PROTECTION OF IMMUNITY STATUTE IN CONGRESSIONAL COMMITTEE HEARINGS

Contempt proceedings were instituted against the defendants, members of the Joint Anti-Fascist Refugee Committee, on two charges: 1) that they conspired to defraud the United States[1] by encouraging one Helen R. Bryan, defendant in a separate proceeding,[2] to refuse to produce records before the House Un-American Activities Committee; and further with a conspiracy to violate a statute making it a misdemeanor to refuse to give testimony or produc documents before a congressional committee;[3] and 2) that they failed to produce books and records in response to a subpoena duces tecum as required by the same statute.[4] After motions for a bill of particulars[5] and to dismiss the indictment[6] were denied, the case proceeded to trial.[7] During the trial the Government offered in evidence the record of the defendants' testimony before the House Committee as to the fact that the books and records were not produced, as to why they were not produced, as to what steps the witnesses had taken in response to the subpoena duces tecum, and as to other matters not necessary to prove the fact of the non-production of the books and records.[8] Counsel for the defense objected to the admission of this evidence on the basis of a statutory immunity.[9] The court stated that to construe the immunity clause to include

[1] 35 Stat. 1096 (1909), 18 U.S.C.A. § 88 (1927): "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[2] United States v. Bryan, 72 F. Supp. 58 (D.C., 1947).

[3] 52 Stat. 942 (1938), 2 U.S.C.A. § 192 (Supp., 1946): "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor. . . ."

[4] Ibid. [5] United States v. Barsky, 7 F.R.D. 38 (D.C., 1947).

[6] United States v. Bryan, 72 F. Supp. 58 (D.C., 1947) where the court found the House Resolution creating the Committee on Un-American Activities constitutional.

[7] Judge Holtzoff, who had been presiding up to this time, was removed by writ of mandamus granted by the Court of Appeals for the District of Columbia on grounds of bias and prejudice on June 11, 1947. Barsky v. Holtzoff, No. 126 Misc. (App. D.C., 1947). The trial began on June 13, 1947, with Judge Keech presiding.

[8] See Appellant's Brief on appeal to the United States Court of Appeals for the District of Columbia, at page 75.

[9] 52 Stat. 943 (1938), 28 U.S.C.A. § 634 (Supp., 1946). "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used in evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

contempt proceedings would be effectively to frustrate the purpose of Section 192. To give effect to the legislative intent and to avoid any "absurd consequences" the court held that Section 634 was not intended to, and did not, bar the use of all testimony taken at a congressional hearing in a prosecution for contempt or conspiracy leading to a contempt. *United States v. Barsky.*[10]

This decision amends the immunity statute by judicial construction so that for all practical purposes it now reads: "No testimony .... shall be used in evidence in any criminal proceeding against a witness before either House or committee thereof in any court, except in a prosecution for perjury committed in giving such testimony," *or for contempt, or for conspiracy leading to contempt.* It is questionable whether this construction can be justified in light of the facts.

The court relied heavily on the reasoning in *Glickstein v. United States.*[11] There a broad immunity statute[12] (containing no exceptions) was construed not to apply to a witness being prosecuted for perjury committed in a bankruptcy proceeding before a referee. The court reasoned that to interpret the statute otherwise would license perjury and thus frustrate the statutory requirement of truthful testimony. Previously it had been held that the immunity clause related only to testimony concerning subjects under inquiry.[13] The court in the instant case followed the principle stated by Justice Brandeis that "if Congress should .... conclude that a full disclosure .... by the witness is of greater importance than the possibility of punishing him for *some crime in the past,* it can, as in other cases, confer the power of unrestricted examination by providing .... immunity."[14] (Italics added.)

Although the analogy of *contempt* in the giving of testimony to *perjury* in the giving of testimony may aid in determining whether or not the immunity statute should apply, in following the past action doctrine the court missed an essential distinction which, if recognized, would have required a decision holding the evidence inadmissible. The crucial question, it seems, is whether the act which constitutes the offense is one disclosed by the testimony or whether it is the testimony itself.

If the act complained of is disclosed by the testimony, the testimony must of necessity be relevant to the subject matter under inquiry, have been given in response to direct questioning, and have been obtained from the witness under compulsion. Testimony given under such circumstances is protected by the immunity clause.

However, if the objectionable act is the testimony itself, no protection is offered by the immunity statute. False swearing or contumacious acts in the giving of testimony are certainly not relevant to the subject matter under inquiry.

[10] 72 F. Supp. 165 (D.C., 1947).

[11] 222 U.S. 139 (1911).

[12] 30 Stat. 548 (1898), 11 U.S.C.A. § 25(9) (1927).

[13] Edelstein v. United States, 149 Fed. 636 (C.C.A. 8th, 1906).

[14] McCarthy v. Arndstein, 266 U.S. 34, 42 (1924).

Such testimony is not proper in response to direct questioning; nor can it be argued that any witness committing perjury or contempt was compelled to do so.

Had the court recognized this distinction, the exception to the immunity statute would have been construed to read ". . . . except in a prosectuion for perjury in the giving of testimony" *or contempt in the giving of testimony.* What few cases there are on the point seem to support the above analysis. The same immunity construed in the *Glickstein*[15] case to except perjury proceedings has also been interpreted to except a contempt prosecution resulting from the giving of evasive answers in a hearing before a referee in bankruptcy.[16] The court in that case pointed out that ". . . . if he should be charged with having committed perjury in the course of such examination, the necessities of the case require that his testimony may be proved in order to show in what particulars the false swearing consists, and for a like reason, whenever he is charged with a punishable contempt for refusing to submit to the examination required by the act, the necessities of the case also require that his testimony be examined in order to ascertain whether or not in point of fact he has so refused."[17]

However, where the alleged contempt is not committed in the giving of testimony, but is disclosed by it, it has been held that the accused is entitled to his constitutional privilege against self-incrimination and a record of the testimony at the hearing is not admissible to prove prior acts of alleged contempt.[18]

It must be remembered that in the instant case the alleged contempt was the refusal to produce certain books and records. There was no allegation of any irregularity or contumacious act in the giving of the testimony. The court was of the opinion that "the criminal proceedings which Section 634 contemplates are those for crimes which occurred prior to the action of the committee in subpoenaing the witness. . . . ."[19] A more correct interpretation would seem to be that those crimes which occurred other than in the taking of the testimony are within the scope of Section 634.

It is not evident, as the court contended, that Section 192 would be frustrated if Section 634 were to be given a literal construction, thus excluding contempt proceedings from its protection. Such a result would only be reached if the contemptuous act was the giving of testimony. Without the testimony in such an instance there would be no way to prove the act complained of. However, the failure to produce books and documents does not come within this category, since it can be proven independently of the testimony. The clerk or the sergeant-

[15] 222 U.S. 139 (1911).

[16] In re Kaplan, 213 Fed. 753 (C.C.A. 3d, 1914), cert. den. sub nom. Kaplan v. Leech, 234 U.S. 765 (1914).

[17] Ibid., at 755.

[18] In re Haley, 41 F. 2d 379 (D.C. Cal., 1930); see Wakefield v. Housel, 288 Fed. 712 (C.C.A. 8th, 1923).

[19] United States v. Barsky, 72 F. Supp. 165, 169 (D.C., 1947).

at-arms to whom the books were to be surrendered could have testified as to their non-production. This evidence, uncontradicted, would be sufficient to sustain the charge in any court.

The fact that the testimony would *assist* the government in a prosecution for contempt or for perjury not committed in the giving of the testimony is no basis for depriving the accused of the benefits of the immunity statute or constitutional privilege against self-incrimination. That compelled testimony cannot be introduced to assist in the proof of an alleged contempt committed prior to a hearing has been pointed out.[20] The Supreme Court has also held, in a case where the immunity statute of the Bankruptcy Act[21] was invoked, that "the testimony given in one bankruptcy proceeding, not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other proceeding."[22]

The mandatory language of the statute requiring the giving of truthful testimony is not nullified by including within the protection of the immunity statute testimony of contempts or perjuries other than those committed in giving of the testimony. If the primary purpose of the hearing is the disclosure of information, the best way to promote such information is to provide for an immunity against self-incrimination. The only cases in which the purpose of the statute could be frustrated by applying Section 634 would be those involving contempt or perjury committed in the giving of the testimony. This application is specifically precluded by the recommended construction of the statute.

Although there have been but few decisions under Section 634, the two most recent decisions cast doubt not only upon its proper construction,[23] but also upon its constitutionality.[24] A statute[25] similar to Section 634 was declared unconstitutional in *Counselman v. Hitchcock*[26] on the ground that it did not protect the witness from prosecution based on the disclosed information, despite the fact that the actual use of the testimony at the trial was prohibited. Section 634 fails to immunize the testimony as a basis for future prosecutions just as the statute which was declared unconstitutional failed. Although Section 634 was upheld in *United States v. De Lorenzo*,[27] the case can be distinguished on the basis that the testimony was not compelled. In a vigorous dissent[28] Judge Clark, by contending that the protection should be judicially read into the statute,

[20] In re Haley, 41 F. 2d 379 (D.C. Cal., 1930).

[21] 30 Stat. 548 (1898), 11 U.S.C.A. § 25(9) (1927).

[22] Cameron v. United States, 231 U.S. 710, 721 (1914).

[23] United States v. Barsky, 72 F. Supp. 165 (D.C., 1947).

[24] United States v. De Lorenzo, 151 F. 2d 122 (C.C.A. 2d, 1945).

[25] 15 Stat. 37 (1868).

[26] 142 U.S. 547 (1892); see Congressional Contempt Power in Investigations into the Area of Civil Liberties, 14 Univ. Chi. L. Rev. 256, 262 (1947).

[27] 151 F. 2d 122 (C.C.A. 2d, 1945).

[28] Ibid., at 126.

tacitly admitted that Section 634 does not protect against future prosecution. Unless the statute can be so construed as to include this protection, it is possible that Section 634 could be held unconstitutional on the ground that the immunity it affords is not as broad as that provided by the Constitution.

In view of the fundamental importance of the privilege against self-incrimination, the existing immunity statute should not be left to the uncertainties of judicial construction. Legislation should be sponsored to clarify the scope of Section 634 with respect to contempt and to provide an immunity as broad as that in the Constitution.

FAILURE TO PLEAD FEDERAL COMPULSORY COUNTERCLAIM AS BAR TO STATE SUIT

The plaintiff administrator sued in a Massachusetts state court to recover for the wrongful death of the decedent, killed when his auto collided with that of the defendant. In a prior suit arising out of the same accident, a federal district court had awarded damages to the defendant (plaintiff there) against the decedent's administrator. The defendant claimed that the district court judgment was res judicata and that the plaintiff's alleged cause of action should have been pleaded in the prior suit in compliance with the compulsory counterclaim provision of the Federal Rules of Civil Procedure.[1] The Massachusetts trial court entered judgment for the defendant notwithstanding a verdict for the plaintiff. On appeal to the Supreme Judicial Court this judgment was reversed. *Campbell v. Ashler.*[2]

The court reasoned that the judgment of the federal district court was not res judicata in the instant action because the administrator was acting in a different capacity in the federal court and was therefore not the same party. There the administrator represented the estate of the deceased for the "benefit of creditors and distributees," while in the present case he represented the heirs or next of kin pursuant to the Massachusetts wrongful death statute.[3] It is conceivable that two distinct causes of action exist,[4] one a common law cause of

[1] Rule 13(a), 28 U.S.C.A. foll. § 723c. See note 11, infra.

[2] 320 Mass. 475, 70 N.E. 2d 302 (1946).

[3] McCarthy v. Wood Lumber Co., 219 Mass. 566, 107 N.E. 439 (1914); Beauvais v. Springfield Institution for Savings, 303 Mass. 136, 20 N.E. 2d 957 (1939); Eaton v. Walker, 244 Mass. 23, 138 N.E. 798 (1923). There is similar authority in other jurisdictions. May Coal Co. v. Robinette, 120 Ohio St. 110, 165 N.E. 576 (1929); Spradlin v. Georgia R. & Electric Co., 139 Ga. 575, 77 S.E. 799 (1913). See Chicago, R.I. & P.R. Co. v. Schendell, 270 U.S. 611 (1926), and Troxell v. Del. Lack. & West. R. Co., 227 U.S. 434 (1913). The leading Massachusetts decision, the McCarthy case supra, may be distinguished from the instant case, however. There the administrator had recovered in an action for personal injuries which had been commenced by the deceased in her lifetime. That judgment was held not to bar a further recovery under the wrongful death statute.

[4] Secrest v. Pacific Electric R. Co., 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); Farrington v. Stoddard, 115 F. 2d 96 (C.C.A. 1st, 1940). 4 Rest., Torts § 925, comment i (1939) states,