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Right to and Nature of Representation Before Congressional Committees

Joseph L. Rauh, Jr.*

Daniel H. Pollitt**

INTRODUCTION

A few years ago an attorney who appeared before a congressional committee with his client asked for a continuance. His reason for requesting a postponement was that his client had advised him that the appearance before the committee was scheduled for Saturday and that he, the attorney, had agreed to meet with the client on Thursday evening "to go over his problems." At 7:15 a.m. Thursday morning, however, the attorney received a call from the client stating that the client had been subpoenaed the previous evening to testify that morning. Thus, after a hurried ten minute consultation with his client, the attorney requested a continuance because "I am now in the position of either walking out on the ground of inadequate preparation to advise him, or sitting here next to him, giving what may appear to be the benefit of counsel, but what would really be inadequate counseling." The committee chairman denied the requested postponement with the statement that "We can't exactly operate as a court of law, and our time is limited on these hearings." Whereupon the attorney replied that "rather than leave this man without counsel, I will take my seat next to him . . . but I'm not particularly delighted at the prospect of advising a man on the basis of ten minutes of conference this morning."

The problems of the attorney who represents a client subpoenaed to testify before a congressional committee generally arise

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2. Ibid.
3. Ibid.
only if the committee operates through the use of compelled testimony.\textsuperscript{4} Hence this discussion is limited to (1) an analysis of the witness' right to counsel when he is before such a committee, and (2) a description of the attorney's legal and nonlegal functions when he represents such a witness. Most attorneys who represent subpoenaed witnesses feel that they "take a seat" next to their client and give only what appears to be the benefit of counsel. While the committees take great pains to see that the witness (and the public) knows that he is entitled to counsel, the committees also see to it that the attorney is unable to protect adequately his client's interests.\textsuperscript{5}

\section{I. COMMITTEE PROCEDURES AND THE ATTORNEY}

The normal function of an attorney before a court or administrative body is to question the jurisdiction of the trial body if necessary, to make motions to quash, to object to improper or irrelevant questions, to cross-examine adverse witnesses, to make opening and closing statements, and to protect the interest of his client. However, none of these are permitted as a matter of course in the congressional committee hearings. For example, if the attorney questions the committee's jurisdiction he is promptly cut off, sometimes with the statement that the committee has no time to listen to a "Communist stump speech."\textsuperscript{6} Requests to cross-examine adverse witnesses are also universally denied.\textsuperscript{7} The attorney is not

\footnotesize{\textsuperscript{4} Only a few congressional committees operate in this manner; e.g., the House Committee on Un-American Activities, the Senate Internal Security Subcommittee, the McClellan Labor-Management Committee, and the Kefauver Committee on Crime.}

\footnotesize{\textsuperscript{5} Thus, the witness without an attorney is advised of his right to counsel or offered a continuance to obtain one. E.g., \textit{Hearings on Communist Activities in the Pacific Northwest Area Before the House Committee on Un-American Activities,} 83d Cong., 2d Sess., pt. 4, at 6316–18 (1954) [hereinafter cited as \textit{Hearings}]. The committees have even gone as far as to request that local bar associations provide counsel for the indigent witness. \textit{Id.}, pt. 5, at 6336. However, in the latter case the witness was first asked: "have you gone to the Communist Party headquarters and asked to obtain counsel?" See also text accompanying note 1 supra.}

\footnotesize{\textsuperscript{6} However, there are some exceptions. Paul V. McNutt and Eric Johnston, as counsel for the Motion Picture Association, were given permission to read opening statements highly critical of the House Un-American Activities Committee. Carr, \textit{Un-American Activities Committee,} 18 U. CHI. L. Rev. 598, 623–24 (1951).}

\footnotesize{\textsuperscript{7} This is a recent phenomenon. From the very first congressional investigation of the causes of General St. Clair's defeat by the Indians until as late as the 1924 investigations into the Harding administration Teapot Dome scandal, the witnesses were generally given the right to call and cross-examine witnesses. Taylor, \textit{Judicial Review of Legislative Investigations,} 29 \textit{Notre Dame Law.} 242, 275 (1953). In 1924 Felix Frankfurter, defending the congressional investigations of that time, commented that "of course, the essential decencies must be observed, namely opportunity for}
permitted to question his own client to round out the story,\(^8\) nor may he produce favorable witnesses to support his client's position.\(^9\) Furthermore, attorneys have been told that they cannot object to the distracting activities of news photographers\(^10\) and they are almost never permitted to object to the relevance of committee questions.\(^11\)

The committee's refusal to permit the attorney to object on grounds of relevance can have tragic consequences. The layman's difficulty in making a legal objection after a whispered conversation with his attorney is obvious. An interesting case study of just what can happen in this situation is provided by the contempt hearing of Arthur Miller. Mr. Miller's testimony in the passport investigation hearings of the Un-American Activities Committee was an eloquent presentation of his personal beliefs which even won him the praise of some of the Committee members. He answered all the questions put to him except two which sought to elicit the names of certain Communist Party writers with whom he had attended meetings in 1947 to discuss the relationship of Marxism to art and literature. Mr. Miller told the Committee that his conscience would not permit him "to use the name of another person" and then he went on to say, following a whispered conversation with counsel, that "my counsel advises me that there

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The rules of the McClellan (Labor-Management) Committee expressly permitted counsel to suggest to the Chairman that certain questions be asked of adverse witnesses, but this is hardly a substitute for cross-examination. Even with the Chairman's best intentions, a question loses its impact when read haltingly by a third party, and the follow-up which counsel had in mind will seldom, if ever, be made. On the other hand, there have been a number of proposed bills which would require committees to permit aggrieved persons to cross-examine hostile witnesses for limited periods. Galloway, *Congressional Investigations: Proposed Reforms*, 18 U. Chi. L. Rev. 478, 495 (1951).

The rules of the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments permit persons being investigated to cross-examine any other witness whom the Committee calls. Id. at 491.

8. The Supreme Court recently held that a Georgia statute unconstitutionally denied a criminal defendant his fundamental rights because the statute, while permitting the defendant to make an unsworn statement, denied him the right to develop this statement by questions from his counsel. Ferguson v. Georgia, 365 U.S. 570 (1961). However, this rule has not been applied to witnesses who appear before congressional committees.

9. Pending legislation would permit congressional committee witnesses to secure and examine not more than four favorable witnesses. Galloway, *supra* note 7, at 496.

10. *Hearings, supra* note 5, at 6311. There the attorney was told to advise his client who "may make the request to the chair."

11. See text accompanying notes 44 & 56 *infra*. 
is no relevance between this question and the question of whether I should have a passport or whether there should be passport legislation in 1956." Since there were actually two questions before the Committee at that moment, a more precise objection would have been that there was no relevance between these questions and the subject of passports. But it still seems that Mr. Miller did remarkably well in getting out as much of the whispered conversation as he did. Yet the Committee cited him for contempt, and the government argued at the trial that Mr. Miller had not objected to the relevance of the first of the two questions because he said "this question" rather than "these questions." Difficult as it is to believe, the prosecution's argument persuaded the district court, and Mr. Miller lived under the cloud of a criminal conviction for over a year until the court of appeals unanimously voted for his acquittal on another ground—the failure of the Committee properly to direct an answer.

Attorneys are even admonished by committees to refrain from advising their clients that the question may be irrelevant. Hence, the attorney must sit and wait for his client to ask his advice, even when it is apparent to him that his client does not know when he needs advice and when he does not. The way out of this dilemma is to advise the client prior to the hearing, that he must consult with his attorney before answering each question, regardless of how innocent the question appears to be. This practice, of course, upsets the committee.12 The chairman will often comment that "the duty of counsel in this case is to advise a client as to his legal right—not to tell him what to testify to."13 Furthermore the attorney who disobeys the rules and objects to questions or who advises his client not to answer without first consulting him may find himself threatened with ejection from the committee room.14 These practices discourage many attorneys from taking a case for a subpoenaed witness: the effect is to deny the witness any legal assistance.

II. LEGAL COUNSEL AS A RIGHT

The client of one attorney was asked in a committee hearing: "If you hadn't had counsel present, would you have answered the

12. "Friendly" witnesses who appear without counsel are often congratulated. A typical comment after a witness appears without counsel is: "I would like to have the record show that... [the witness] came here without benefit of counsel to whisper in his ear the answers he should give to the committee. I think that is very commendable." Carr, supra note 6, at 616.
13. E.g., Hearings, supra note 5, at 6270.
14. Id. at 6271.
questions that were put to you by our counsel?" Attorney's even have been called to the stand as witnesses. One such attorney protested: "I am not here as a witness. I am here as counsel." The chairman replied that "from now on you are here as a witness"; and when the attorney asserted his rights not to be called in this manner the chairman replied: "The rights you have are the rights given you by this Committee." Another such unwilling attorney-turned-witness had the Federal Conspiracy Act read to him, implying that the attorney and his clients might have committed a criminal offense if they had deliberately agreed that the witness should refuse to answer committee questions. In a third situation, when the attorney was called to the stand, the following occurred:

[Attorney]: I would like to have counsel before I am sworn, please.
Mr. Velde: [Committee Chairman] You are an attorney yourself, are you not?
[Attorney]: That is true.
Mr. Velde: You should know the law, being a member of the bar.
[Attorney]: Sir, it is very evident . . . .
Mr. Velde: Have you had an opportunity to obtain counsel?
[Attorney]: No, I have not, sir . . . .
Mr. Velde: How soon can you obtain counsel?
[Attorney]: I was served, sir, with a subpoena by this committee at about 10 o'clock this morning. I have witnesses who have been called before this committee who have relied on me to act as their counsel. I have obligations to them, which are prior to any other obligations, as a member of the bar, and I respectfully suggest, sir, that your subpoenaing me represents an attempt on your part to deprive not only my witnesses, whom I represent, but myself of the right to counsel

. . . .

Now, will that opportunity be accorded me, or will you deny me that opportunity?
Mr. Velde: How soon will you be able to obtain counsel?
[Attorney]: Sir, I have found during this noon hour that attorneys in this city have other obligations besides being here at this committee, and I cannot tell you just how soon I will be able to obtain counsel. I assure you that I will make an effort to obtain counsel . . . .
Mr. Velde: I believe you certainly should be able to obtain counsel by at least 2 o'clock tomorrow afternoon.
Is that a reasonable time for you to obtain counsel?
[Attorney]: I can't say, sir . . . .

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15. The witness replied that "I would have answered them in the same way," whereupon his counsel remarked, "I guess that shows I'm not much good around here." *Hearings on Communist Methods of Infiltration (Education) Before the House Committee on Un-American Activities, 83d Cong., 1st Sess.*, pt. 3, at 987 (1953).


Mr. Velde: You can be of great help to this committee if you are sworn in and testify.

[Attorney]: I expect to be of help to the people I represent and also to the American people.

Mr. Velde: Your subpoena is continued until tomorrow at 2 o'clock, and we will expect you to have counsel by your side at that time.

[Attorney]: Thank you, sir.

Mr. Clardy: [Committee Member] Mr. Chairman, I would like to make a comment on the scene that was just created, because I think it should show in the record at this point.

Mr. Velde: Mr. Clardy.

Mr. Clardy: Under the rules we accord the privilege, not the right—the privilege to witnesses to be accompanied by counsel, if they so desire. That is solely for the purpose of enabling the witness to be counseled and guided on questions of constitutional rights at law and nothing else.

I submit that in delaying the appearance of that witness until tomorrow, we have more than bent over backward, because the man is a lawyer himself and, if he has any competence at all as an attorney, he has no need for an attorney to accompany him.

It is not a matter of right; it is purely a matter of privilege, and I think that it should so show at this time. [Applause].

The above exchange raises an important issue: is the assistance of counsel in a legislative investigation a matter of constitutional right or is it a privilege awarded as a matter of grace?

A. CONSTITUTIONAL AND LEGISLATIVE REQUIREMENTS

The sixth amendment expressly guarantees that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty, and a denial of this right in a federal court vitiates the entire proceeding.20 The necessity of counsel is often considered so vital and imperative that the due process clause of the fourteenth amendment necessitates the appointment of attorneys to represent indigent defendants charged with state crimes in state courts.21 Furthermore, the consequences of federal noncriminal action may be so severe that it will bring the due process clause of the fifth amendment into play. The federal courts also have required, as a constitutional necessity, the right to counsel in situations where the sixth amendment is not applicable.22 In addition, Congress required that federal agencies observe these standards.

The 1946 Administrative Procedure Act requires that any person compelled to appear before any federal agency "shall be accorded the right to be accompanied, represented, and advised by counsel . . ."23 A report of the House Judiciary Committee, headed by Congressman Walter, recited that the bill "is an outline of minimum essential rights and procedures."24 Prior to the enactment of this statute at least one federal agency had obtained judicial acquiescence of its practice of denying counsel to persons interviewed during preliminary investigations.25 Similarly, the local draft boards have been permitted to deny counsel to those seeking change in draft classification.26

B. RELATED JUDICIAL DECISIONS

Two recent Supreme Court decisions shed some light on the right to counsel in state administrative investigatory proceedings. The first case, In re Groban,27 concerned a situation in Ohio where the fire marshal was authorized to subpoena and question witnesses to ascertain the causes of fires. Groban was subpoenaed, but refused to testify without the aid of counsel. For this refusal, he was convicted and jailed. The Supreme Court, in an opinion by Mr. Justice Reed, sustained the contempt conviction with the statement:

The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. . . . Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination.28

Mr. Justice Frankfurter, in a concurring opinion, noted that the "due process" requirement recognized differences of degree.

If the Ohio legislation were directed explicitly or by obvious design toward secret inquisition of those suspected of arson, we would have

25. Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944).
26. United States v. Pitt, 144 F.2d 169 (3d Cir. 1944); Niznik v. United States, 173 F.2d 328 (6th Cir.), cert. denied, 337 U.S. 925 (1949). In the former case, without discussion or explanation, the court said by way of dictum that "while a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before the selective service agencies are not within that category." 144 F.2d at 172. In the Niznik case, when the issue was raised by the record, the court merely cited the dictum in Pitt as authority that the appellant was not denied due process because he was denied the right to be represented by counsel in the hearing before the draft board.
28. Id. at 332–33.
a wholly different situation from the one before us. This is not a statute directed to the examination of suspects. . . . What has been said dispenses with the suggestion that, because this statute relating to a general administrative, non-prosecutorial inquiry into the causes of fire is sustained, it would follow that secret inquisitorial powers given to a District Attorney would also have to be sustained. The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process.29

Anonymous v. Baker30 was the other five to four decision against the witness' right to counsel in a state investigatory proceeding. A New York judge was investigating alleged "ambulance chasing" by lawyers, and the appellant, a private detective, was subpoenaed as a witness. The appellant was not permitted to take counsel into the hearing room, but he was given the right to leave the hearing room intermittently in order to consult with his counsel who waited outside. The appellant refused to testify under these conditions, and was convicted for contempt. His conviction was affirmed on the authority of Groban, the Court pointed out that:

the circumstance that this investigation was conducted by an experienced judge, rather than an administrative official, and the fact that appellants throughout their interrogation were freely given the right to consult counsel, notwithstanding his exclusion from the hearing room, make the constitutional claim here far less tenable than that found wanting in Groban.31

The Court further rejected the appellants' contention that the record supported their assertion that they "were summoned before the Special Term not as mere witnesses but with an eye to their future prosecution."32

From the above decisions it is apparent that the question whether a witness has a right to counsel depends upon the circumstances surrounding each case. Is the proceeding seeking to ascertain facts in general, or is it seeking to adjudicate the witness' responsibilities? Is the inquiry directed to the examination of suspects, or is it a non-prosecutorial inquiry into a general problem? Is the investigation conducted by impartial fact-finders, or is it in the hands of interested parties who have a predetermined end to achieve? A related question concerns the complexity of the subject matter and the witness' need for professional assistance. Whether or not the witness must contend with rebutting evidence or other

29. Id. at 336-37. This was a 5 to 4 decision with the Chief Justice and Justices Black, Brennan and Douglas dissenting.
31. Id. at 296.
32. Ibid.
witnesses may also be relevant. There are no mechanical tests. The "naked, stark issue" is whether the person demanding counsel is threatened with so great a harm that to deny him counsel cannot be fairly justified.33

C. THE NEED FOR LEGAL COUNSEL

Applying these standards to the investigations conducted by committees such as the Committee on Un-American Activities, the need for counsel seems obvious. These investigations are not objective fact-finding operations designed only to produce information necessary for sensible legislation. To challenge the legitimacy of such committees has all the unorthodoxy of calling a spade a spade, preferring substance to form, and favoring common sense over a well-cultivated myth. Congressional committee hearings are often designed to "get" the witness34—how else can one explain the annual reports of the Committee on Un-American Activities which in the main contain a list of the names of persons the Committee has identified as Communists. The Committee treats the witnesses as accused defendants, or even as convicted felons. The chairman announced at the beginning of one series of hearings that no innocent people would be put on the stand.35 During another series of hearings when a witness testified that he had given a number of loyalty oaths, a committee member interrupted to say: "Some of our investigators in California are former FBI men, and we don't waste your time nor the committee's time when we ask you to come before us."36

It is significant that a federal court close to the scene of congressional investigations commented that:

If there is anything to suggest that a congressional committee hearing is less awesome than a police station or a district attorney's office, and should therefore be viewed differently, it has escaped our notice. The similarity has become more apparent as the "investigative" activi-

33. Id. at 299 (Black, J., dissenting).
34. In one series of hearings, a committee gave the list of subpoenaed witnesses to the press, called all such witnesses into executive session, and then refused the witnesses who denied any association with the Communist Party the right to a public hearing where they could clear themselves. Counsel for the witnesses called into public session asked the committee: "Doesn't the holding of a public hearing and the selection of these 4 men out of the 10 who testified this morning impair their privilege under the fifth amendment?" Hearings on the Subversive Influence in the Educational Process Before a Subcommittee of the Senate Committee on the Judiciary, 83d Cong., 1st Sess., pt. 12, at 1077 (1953).
ties of Congress have become less distinguishable from the law enforce-
ment activities of the Executive.\(^37\)

A congressional investigation, indeed, is similar to a criminal case. The committee often opens its hearing by having its staff present the “prosecution case”—that is, by having the “friendly” witnesses publicly tell the committee under well-rehearsed questioning exactly what the committee wants to hear and what it intends to prove. After the “prosecution case” is presented, the “hostile” wit-
ness or witnesses under investigation are called to the stand for vigorous cross-examination. The committee members, by their statements during and after (and sometimes even before) the hearing, pronounce a sort of running verdict, usually of guilt but on occasion of innocence. Often the investigating committee issues a report pronouncing a judgment of guilt; on rare instances it issues an official “clearance” to an individual or an organization. Sometimes the verdict will be a split one, with a minority interpret-
ing the facts and the politics differently from the majority, but seldom is a verdict wholly absent.

This does not, however, end the similarity with criminal cases, for punishment regularly ensues from committee hearings. Persons who are “hostile” to the committee often lose their jobs; indeed, this economic punishment often appears to be the commit-
tee’s purpose. Representative Francis Walter, with commendable candor, announced at the time he assumed the chairmanship of the House Un-American Activities Committee a few years ago that he would “hold large public hearings in industrial commu-
nities where subversives are known to be operating” and “by this means active communists will be exposed before their neighbors and fellow workers, and I have every confidence that the loyal Americans who work with them will do the rest of the job.” For failure to “cooperate” with this Committee, those in the entertain-
ment industry are blacklisted and unable to work in radio, tele-
vision and motion pictures. Even deportation proceedings have had their inception at committee hearings. At the close of one session in which a naturalized citizen had invoked the fifth amend-
ment, a Committee member commented that “I think this is an-
other one of those cases that should be referred to the Department of Justice to determine whether or not proceedings for denatural-
ization should be commenced.”\(^38\) Certainly many witnesses have

\(^37\) Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953). The court, in reliance on those cases holding that consent to search is involun-
tary when obtained from a suspect detained at a police station, held that permission to search given by a congressional committee witness while testi-
fying under subpoena was likewise not given “freely and intelligently” without “physical and moral compulsion.”

\(^38\) \textit{Hearings on Communism in the District of Columbia Before the}
suffered consequences as painful and permanent as criminal punish-
ment.\footnote{Refusal to answer Congressional Committee questions causes severe economic and social hardships. Seventy-five witnesses were employed by others at the time of their testimony. There is information concerning sixty-four of them. Fifty were fired, fourteen were retained on the job. Of the thirty-six witnesses who returned questionnaires, twenty-three reported threatening letters and/or phone calls. See Politt, \textit{Survey of Fifth Amendment Pleaders}, 106 \textit{U. Pa. L. Rev.} 1117, 1118 n.7 (1958).} \footnote{A survey of one-third of the witnesses who invoked the fifth amendment during a two-year period in the mid-1950's reveals that almost half of them were asked questions about activities prior to 1940. \textit{Id.} at 1123.} \footnote{Watkins v. United States, 354 U.S. 178, 188 (1957). See also Scull v. Commonwealth of Virginia, 339 U.S. 344 (1959); Sacher v. United States, 356 U.S. 576 (1958).} \footnote{In 1856, the Wisconsin legislature appointed a committee to investigate the alleged bribery of some of its members. This committee subpoenaed one Falvey, a legislator, and others to testify on the matter, and they refused to answer the committee questions. Thereupon, the committee referred the “contempt” to the parent body for trial. At the contempt trial held by the Wisconsin assembly the accused were denied the assistance of counsel. After conviction by the Wisconsin assembly, Falvey sought a writ of habeas corpus. In its decision the Wisconsin Supreme Court conceded that “the assembly, in refusing to hear the petitioner by counsel before adjudging him in contempt, might have acted arbitrarily and improper [sic].” The court held, however, that: as the jurisdiction of the assembly acting in this matter was final, the...
tractable witness refused to testify without the assistance of counsel, the committee backed away from the issue. Or if the witness who was denied counsel was not obdurate in his refusal to take the stand, he generally coupled self-incrimination with his denial-of-counsel reason for refusal to answer certain questions, thereby the contempt citation was avoided and the issue of legal counsel as a right was avoided.

A good last word on the subject is the summary made by Senator George Wharton Pepper thirty years ago in discussing the committee abuses of that period:

Congressional investigations in general and senatorial inquisitions in particular are not going to be controlled by the Supreme Court. Nor are they going to be regulated by statutes or procedural devices. Let it once for all be understood that the power of inquiry exists, that its possession is a great public trust, and that the American people are going to pour out the vials of their wrath upon those who prove themselves unworthy of the trust. We have evolved worthy standards of conduct for professional baseball players. We are hopeful of a similar evolution in the case of prize fighters. It would be lamentable if only Senators were to be classed as invincibly barbarous.43

III. THE ATTORNEY’S ROLE BEFORE A CONGRESSIONAL COMMITTEE

Though an attorney cannot give his client full representation before a congressional committee, he is not without value. Actually an attorney before a congressional committee plays many roles—
he might be described as part attorney, part friend, part politician, part investigator and part public relations counsellor. These roles, of course, are often overlapping and may sometimes even conflict, as they did at the Goldfine hearing before the Harris Committee. Mr. Goldfine's Washington lawyer, apparently thinking of the bad public relations involved in his client's refusal to answer questions and particularly the bad public relations effect which a contempt citation would have on his client and the Eisenhower Administration, urged Mr. Goldfine to answer all questions of conceivable relevance. The Boston counsel, less worried about bad public relations and the administration and more worried about the adverse effect which answering all questions might have on Mr. Goldfine's tangled business affairs, advised his client to refuse to answer in cases where the relevance was not abundantly clear. Telling the Harris Committee about his activities with the East Boston Company might have interfered with Goldfine's business affairs, increased his SEC troubles and weakened his defense in one or more lawsuits. Because of these problems and to the dismay of his Washington counsel, Mr. Goldfine settled the conflict by refusing to answer a number of questions. As a result Mr. Goldfine was cited for contempt with all the public obloquy that accompanies this action. Ordinarily, witnesses before an investigating committee cannot afford two sets of lawyers—one with an eye towards public relations, the other protecting business affairs.

The roles of attorney, friend, and public relations counsellor may all exist at the outset of the hearing. Walking into the hearing room of the Senate Internal Security Subcommittee with a United Automobile Workers (UAW) organizer, an attorney saw his client blanch at the sight of the television and movie cameras. In a halting voice he told the attorney that his daughter had graduated from high school the day before and that he could not bear to have her see him on the evening television newscast before going to her graduation dance that night. The lawyer knew that if the client ever came forward and sat down in the witness chair, plenty of feet of film would be taken before the cameras could be shut off. When the client's name was called by the committee chairman, the attorney got up in the back of the room and announced that he would not come forward until the television and movie cameras had been turned off. In so doing he was simply exercising rights which he believed to be his. Yet the chairman and his

44. United States v. Kleinman, 107 F. Supp. 407 (D.D.C. 1952). There, the defendants refused to answer questions on a general claim of violation of constitutional rights if they were compelled to testify in the presence of television, newsreel cameras and other distracting apparatus. They were acquitted of contempt after a trial in which counsel for the committee...
counsel were not so easily persuaded, and an unpleasant colloquy resulted. Attorney and client held their ground, and the television and motion picture lights finally went out. Nothing one learns in law school trains a man to stand in the back of a crowded room and try to look dignified while the chairman and his counsel, acting as prosecutors, judge and jury, demand that the attorney take his client to the witness stand.

A. THE ATTORNEY AS INVESTIGATOR

Counsel's role as investigator may at times prove decisive. The hearings before the Harris Committee, which was investigating the granting of TV Channel 10 in Miami to National Airlines, went off on a tangent and began looking into the activities of the chief rival applicant—A. Frank Katzentine. It developed that Mr. Katzentine had not been without political influence himself and indeed had persuaded a number of Senators to intervene with the Federal Communications Commission (FCC) on his behalf. The leader of the attack on Mr. Katzentine was Congressman Wolverton, the ranking minority member of the Committee, who seemed quite outraged by any such congressional intervention in a quasi-judicial proceeding. Things looked quite black for Mr. Katzentine until his resourceful counsel produced a copy of a letter from Congressman Wolverton to the FCC in another case doing exactly what he had condemned. While most attorneys cannot hope to equal this feat, there is always much preparation to be undertaken in reviewing earlier hearings and in pursuing outside investigation.

Candidly stated that television and extensive publicity was considered proper to educate the public. The court said:

The only reason for having a witness on the stand . . . is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, news-reel cameras, news photographers with the concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. . . . The concentration of all these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again. . . .

Under the circumstances clearly delineated here, the court holds that the refusal of the defendants to testify was justified and it is hereby adjudged that they are not guilty.

Id. at 408. While the implications in this decision are far-reaching, its practical effect has been that congressional committees generally accede to a witness' request that he not be televised.
B. THE ATTORNEY AS POLITICIAN

What an attorney does as politician is, of course, quite obvious. He is denied the right to suggest that hostile and biased committee members disqualify themselves: instead, he tries to persuade friendly members of the committee, if any, to attend the hearing and see that fair play is accorded his client. The importance of getting every possible friendly committee member to the hearing cannot be overestimated. At the McClellan Committee hearing on the United Automobile Workers' strike at the Kohler Company, Senators Goldwater, Mundt and Curtis, who were trying to turn the hearing into a crusade against the UAW, had an almost perfect rate of attendance. The remaining Senators, some of whom could be termed neutral and some generally friendly to labor, were, with the exception of Chairman McClellan, far less regular in their attendance. Who "won" on a given hearing day often depended upon what committee members were present.

Thus, early in the hearings an attempt was made by Senator Curtis to discredit a UAW witness by showing that he had lived with his present wife before they were married. Senator Kennedy was present and objected to the relevance of this showing, and Chairman McClellan concurred. Thus, Senator Curtis was unsuccessful in his efforts to discredit the witness with this irrelevancy. Later in the hearings Senator Mundt sought to discredit the UAW by reading into the transcript a radical article written 25 years earlier by a UAW official who had long ago repudiated it and who had no connection with the Kohler strike. There were no Senators present to object to its relevance, and the union witness was the "loser" when he engaged in a heated colloquy with the Senator on this matter.

Another situation involved a Quaker lady at an executive session of the old McCarthy Committee. She assured her attorney that she had never had any connections with the Communist Party, but she did recall that a decade or two earlier she had associated with leaders of the Puerto Rican Nationalist Party which subsequently engaged in some force and violence. She presumed that Senator McCarthy and his counsel, Mr. Roy Cohn, would give her a pretty hard time over these old associations. Because of the lady's Quaker connections, her attorney was able to persuade two of the fairer members of the committee to attend the hearing and to make sure she was not browbeaten. As soon as the hearing opened, Mr. Cohn asked the lady whether she had ever resided in a designated mid-western city. She replied in the negative, and a look of consternation passed over the faces of the Chairman and his counsel. Chairman McCarthy took over; he again asked whether she
had ever resided at the designated address and, upon receiving another negative response, he asked her the old standby of whether she had ever been a member of the Communist Party. When she made another negative reply, one of the Senators who had been persuaded to attend the hearing politely suggested that the lady might be dismissed. The usual ferreting of the McCarthy Committee would undoubtedly have elicited the lady’s association with the Puerto Rican Nationalists. However, the presence of a friendly Senator ended the hearing without her being forced to reveal this unpleasant and long-abandoned association.45

C. THE ATTORNEY AS PUBLIC RELATIONS COUNSELLOR

Little needs to be said about the role of the attorney as a public relations counsellor. Ordinarily one’s client is not Mr. Goldfine, and the client will not have the money to hire a model as a receptionist, Tex McCrary for prestige, or a raft of others for diversion; thus, the attorney must take on these functions, too. Since the client’s reputation is generally at stake in the committee room, what the press and radio say before, during and after the hearing becomes all-important; hence, the method of presentation may be determinative.

An example is the case of the distinguished playwright Lillian Hellman. She was willing to tell the Committee on Un-American Activities everything she had ever done, but she was unwilling to inform on others with whom she had associated many years be-

45. Incidentally, cases of mistaken identity such as the one of the Quaker lady are not as rare as one might think. For example, during the course of the Senate Internal Security Subcommittee investigation of the New York Times, a subpoena was issued for one Willard Shelton. Unfortunately for the committee, Mr. Willard Shelton did not work for the New York Times, but was a freelance newspaper man in Washington. The investigator serving the subpoena, however, was a resourceful fellow; he uncovered some other Sheltons, including a Robert Shelton, on the Times and served the subpoena on him, after crossing out the name “Willard” and putting the word “Robert” in its place. When the Committee heard Robert Shelton, they began to realize that it was a case of mistaken identity, but, apparently just for the record, they asked him the usual question about Communist affiliation. Much to their surprise, they received a declination to answer and a plea of the fifth amendment. After this, the Committee not only questioned the unintended victim at some length but went on to cite him for contempt. The trial court convicted Shelton and sentenced him to six months in jail; it accepted the Government’s contention that a congressional committee may subpoena a man without any probable cause and ask him questions of the type Shelton refused to answer. The Court of Appeals for the District of Columbia affirmed the conviction; however, the Supreme Court has recently agreed to hear the case. United States v. Shelton, 148 F. Supp. 926 (D.D.C. 1957), aff’d, 280 F.2d 701 (D.C. Cir. 1960), cert. granted, 365 U.S. 857 (1961). Hence, the only thing an attorney can do in a case of mistaken identity is to contact the committee ahead of time and urge it to kill the subpoena; once the witness is called before the committee anything may happen.
fore. If she told the Committee all about herself, she would waive
the privilege against self-incrimination and would either have to
give the names of her former associates or stand trial for con-
tempt. What she wanted to do was to let the public know that she
had nothing to hide but that she was unwilling to turn informer on
people she did not believe had ever been disloyal to our country.
So Miss Hellman wrote the Committee a respectful letter in which
she offered to waive her privilege against self-incrimination and
tell all about her activities if the Committee would refrain from
demanding the names. The Committee responded with a curt re-
jection. As a result, when Miss Hellman appeared before the Com-
mittee and they began asking questions about her past activities,
she promptly referred to her letter. The chairman of the Com-
mittee brushed the letter aside and demanded that she answer the
questions. But the press covering the hearing was vitally interested
in the letter the chairman was trying to hide and, while Miss Hell-
man was exercising her privilege against self-incrimination, the
press was reading the exchange of letters which counsel handed
out while she talked. For once the charging party, the Committee,
did not get the headlines. In the minds of the reporters present,
the eloquence of Miss Hellman’s explanation of her inability to
bring trouble to others outranked her plea of the fifth amendment.

Sometimes committee hearings become multiple public rela-
tions contests. The McClellan Committee hearings on the UAW
strike at the Kohler plant became a three-sided battle—the UAW’s
efforts to make the public aware of its repeated efforts to settle
the strike, the Kohler Company’s efforts to pin the label of vio-
ence on the UAW, and the efforts of Senators Goldwater, Mundt
and Curtis to utilize the hearing as a springboard for political
charges against the union. At times the hearing was like a bridge
game with everyone trying to trump the other fellow’s ace.

The hearings opened with an introductory background story by
the president of the local union; then the Committee put on ten
Kohler witnesses who testified to individual acts of vandalism.
Subsequently, a union official was called to testify to the steps
taken by the UAW to prevent vandalism. Just when he seemed to
have impressed the press on this point, Senator Mundt interrupted
to read an editorial from the Detroit Free Press which charged a
different union man with murder. Senator Mundt tried to give
support to this editorial by inviting the UAW to sue the newspaper
if the editorial was false. This invitation gave UAW counsel the
floor; he stated categorically that the article was false and that if
the Senator would waive his privilege and repeat the newspaper’s
charge, the Union would most assuredly sue him. Senator Mundt
seemed nonplussed, so Senator Goldwater came forward with the
statement that the Committee was beginning to develop a pattern of UAW strike violence and that by a strange coincidence, the same tactics could be found in Communist-dominated strikes. Senator Kennedy interrupted at that moment to remark: "My brother's name is Joe and Stalin's name is Joe. The coincidence may be strange but I don't draw any inference from it." This, of course, completely took the wind out of Senator Goldwater's sails, whereupon Senator Curtis stated that the union witness had lived with his present wife prior to their marriage. And "the trumping" continued on into the next edition's headline.

Mr. Lyman Conger, the attorney and chief spokesman for Kohler, was not to be outdone in this torrid public relations battle. Unwilling to rely entirely upon committee members for support, he became quite an artist in diversionary tactics. When the newspapers were full of testimony about Kohler's widespread use of private detectives, Mr. Conger arose to announce to the Committee that Mr. Emil Mazey, the Union's Secretary-Treasurer, had sought to intimidate him in the committee room by the use of vile and vituperative language. However, Mr. Conger did not tell the Committee that Mr. Mazey had first asked him whether he, too, had been shadowed; Mr. Conger's admission that Kohler had had Mr. Mazey shadowed would seem to have been adequate provocation for whatever language was used.

D. The Attorney as Legal Advisor

What has been said concerning the role of counsel as friend, politician, investigator and public relations counsellor was not intended to convey the impression that there is not a strictly legal role for counsel before a congressional committee. A brief look at this role may be of interest.

Counsel can "horseshed" his witness much as he would for a criminal trial. If the witness is to be a "friendly" one, an attorney or an investigator for the committee has probably already done this work, and all counsel has to do is sit quietly beside his client and hope to get paid. If, as is the usual case, the client is a witness under investigation, there is much to be done before hand in refreshing his recollection, in helping him clear up in his mind things that he is psychologically anxious to forget, and in indicating the phrasing of answers which will do the least damage to his reputation.

Once at the hearing, the plea of the fifth amendment will raise the most difficult legal questions. The fifth amendment can only be pleaded to those questions which, if answered, would serve as a link in the chain of evidence tending to incriminate the witness. If the answer would not tend to incriminate, and this decision is
made by the court at the contempt trial a year or two later, a plea of the fifth amendment is of no avail. Consequently, the attorney must be certain that the plea is not invoked until the questions reach the incriminating level. This determination has been made somewhat easier by the recent tendency of the courts to stretch the fifth amendment to include questions which appear on their face to have little tendency to incriminate. Thus, a court of appeals' holding that a witness could not plead the fifth amendment when asked to state his residence was summarily reversed upon confession of error by the Solicitor General.46

But, just as counsel must be careful that his client does not plead the fifth amendment too early, he must be equally careful that it is not pleaded too late.47 The right to claim the fifth amendment is "waived" by the admission of guilt or incriminating facts. As the Supreme Court said in Rogers v. United States,48 a witness is not permitted "to select any stopping place in the testimony . . . . Disclosure of a fact waives the privilege as to details."49 The Court there held that a witness who admitted she had been an office-holder in the Communist Party could not invoke the fifth amendment when asked to indentify her successor in office. The Court's rationale was that the answer to that question would not subject her to any real danger of further incrimination. Following this decision, the Court of Appeals for the District of Columbia

46. Simpson v. United States, 241 F.2d 222 (9th Cir.), rev'd, 355 U.S. 7 (1957). When an answer becomes a "link in the chain of evidence tending to incriminate" is difficult to ascertain. Chief Justice Marshall was the first to tackle this problem and his phrasing of the solution was that a witness may refuse to testify if the answer "may disclose a fact which forms a necessary and essential link in the chain of evidence, which would be sufficient to convict him of any crime." United States v. Burr, 25 Fed. Cas. 38 (No. 14692(e)) (C.C.D. Va. 1807). The rule has since been relaxed. The Supreme Court recently announced that:

If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness, if subsequently prosecuted, could perhaps refute any inference of guilt arising from the answer.


To sustain the privilege, it need only be evident from the implications of the question, the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.


47. Today's holding creates this dilemma for witnesses; on the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it.


49. Id. at 371, 373.
held that a professor who admitted past participation in a Marxist discussion group had waived his right to plead the fifth amendment when asked whether persons identified as long-time Communists had attended these meetings. However, the congressional committees have taken a more extreme view of the "waiver" doctrine. Witness the following:

[Senator]: Have you ever met a Communist in your lifetime?
[Witness]: I suppose everybody has, more or less, haven't they?
[Senator]: Well, now, tell me some that you have met.
[Witness]: I invoke the Fifth Amendment.
[Senator]: I insist that you answer since you opened up the subject matter.

Considering this interpretation of the doctrine of "waiver", Dave Beck's attorneys may not have been so silly as they seemed when they recommended that the Becks, father and son, keep their relationship to themselves.

On the other side of this problem, the courts are less willing to find a waiver when the witness denies guilt than when he makes admissions. For example, Frank Costello's general denial of wrongdoing did not bar him from pleading the fifth amendment when asked about specific criminal acts. Had some of the attorneys who represented witnesses before the McCarthy Committee

50. Singer v. United States, 244 F.2d 349, rev'd on other grounds on rehearing, 247 F.2d 535 (D.C. Cir. 1957).
52. The theory for this is that:

The general statements of a person charged with crime in regard to his innocence avail but little against incriminating facts and circumstances. His protestations of innocence, and his broad general denial of any knowledge of or connection with the transaction, might be overcome by facts and circumstances, if the district attorney could be permitted to draw them from the witness. Any one who has had much experience in the conduct of criminal trials is aware of the fact that frequently the most dangerous proof that a person charged with crime has to meet are his own statements made for the purpose of warding off suspicion or of satisfying others with regard to his innocence.

People ex rel. Taylor v. Forbes, 143 N.Y. 219, 230, 38 N.E. 303, 306 (1894). However, the doctrine that a general denial of guilt does not "waive" the right of a subpoenaed witness in a congressional hearing to invoke the fifth amendment as to details is not applicable when a witness voluntarily takes the stand in a civil proceeding.

Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute.

understood this rule a little better, it might have been harder for the Senator to have used one of his favorite tricks. After a witness had pleaded the fifth amendment on his relationship with Communism, Senator McCarthy would often ask the witness whether he had ever committed espionage or sabotage. Afraid that a denial might constitute a waiver, attorneys very often had their clients plead the fifth amendment to this question. Senator McCarthy would then pounce on this plea and lay claim to having caught another spy. In the only reported case on this exact point, the District Court for the District of Columbia acquitted a witness who denied espionage and sabotage and pleaded the privilege on other matters.  

Other major areas where an attorney can provide useful legal assistance are on the issues of jurisdiction and pertinence. Congressional committees are agents of the Congress, and the jurisdiction granted them is limited. When the committee questions probe into areas beyond the delegated jurisdiction, a refusal to answer is not contemptuous. Furthermore, even if the committee is proceeding within its general area of jurisdiction, the question asked may not be pertinent to the subject matter then under inquiry at the particular moment. If the question is not pertinent, a refusal to answer is not punishable as contempt.

The attorney will have to make a fast judgment on both authority and pertinence; in making this judgment he should recog-

55. Thus, committee authority to investigate “all lobbying activities” does not authorize a committee to require disclosure of “the name of a woman from Toledo” who purchased respondent’s books, United States v. Rumely, 345 U.S. 41 (1953); and authority to investigate “the operation of Government activities at all levels” permits neither punishment of a witness for refusal to discuss union finances, Brewster v. United States, 255 F.2d 899 (D.C. Cir. 1958), nor punishment of a witness for refusal to identify “communists” employed by private industry, United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956). Cf. United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956):
While a committee or subcommittee of the Congress has the right to inquire whether there is a likelihood that a crime has been committed touching upon a field within its general jurisdiction . . . this authority cannot be extended to sanction a legislative trial and conviction of the individual toward whom the evidence points the finger of suspicion.

Id. at 388.
57. The question was not pertinent to that inquiry, for we are unable to see how an investigation into the activities of organized crime in interstate commerce which was being conducted in 1951 would be furthered in any way by the subcommittee’s knowledge of what business Bowers engaged in in Chicago some twenty-four years before.

nize that the committees will seldom accept the answer that a question is unauthorized or irrelevant. As Mr. Goldfine well knows, the committee will resolve doubtful issues of pertinence against the witness. To stand on a pertinence objection, therefore, is to invite indictment, and, while the recent record of the committees in the courts is poor, a lawyer who tells his client to plead lack of pertinence is asking for a federal case.

CONCLUSION

So much for the art, if it can be called one, of representing a witness before congressional committees. The odds are all with the investigators, but the tide can be turned, as Walter Reuther demonstrated. He successfully defended the public-mindedness of the UAW hour after hour before the three hostile Senators of the McClellan Committee. While Mr. Reuther was still on the stand and just before he finished, Carmen Bellino, the Committee's chief investigator, was called as a witness by the Committee staff. He testified that the UAW's books were in excellent condition and that Mr. Reuther's affairs illustrated his integrity. He told the story of how a $1.75 valet charge was crossed off Mr. Reuther's hotel bill and paid for out of his own pocket rather than let the union stand the charge. As Senators Goldwater, Curtis and Mundt slumped in their chairs, the reporters and spectators present realized that the investigators had, at least this once, been routed by the investigated.