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FEDERAL GRAND JURY TESTIMONY AND
THE FIFTH AMENDMENT

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The constantly increasing investigative activities of federal grand juries have complicated the problem of the prospective witness, whether or not he be legally and morally free from guilt. His most effective shield is unquestionably the self-incrimination prohibition embodied in the fifth amendment, the use and abuse of which will be the primary concern of this article.

While widespread public attention has only recently been focused on the privilege against self-incrimination, the concept itself is certainly not a modern innovation, but actually antedates the Bill of Rights by more than a hundred years. In the middle seventeenth century, the English common law first began to recognize the principle that no man should be compelled to give testimony incriminating himself,¹ although the idea had been propounded in vain a hundred years previously.² It was therefore a natural consequence that our founding fathers, still painfully cognizant of the potential aggressions of a government where individual rights were ignored, should include in the Bill of Rights the provision that no person "shall be compelled in any criminal case to be a witness against himself."³

In recent years, however, the extensive employment of the privilege by various individuals associated with unpopular causes, resulting in the frustration of many important government inquiries, has encouraged bitter criticism of the fifth amendment from various legal and lay sources. Nevertheless, it is safe to assume that "our old friend"⁴ is here to stay, and has become an integrated and essential part of our

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1. 8 Wigmore, Evidence § 2250 (3d ed. 1940).

2. Griswold, *The Fifth Amendment Today* 2 (1955).

3. U.S. Const. amend. V.

4. Griswold, *op. cit. supra* note 2, at 1.

democratic way of life. The castigations of the critics and newspaper editorials to the contrary notwithstanding, the proper invocation of the self-incrimination privilege is not to be deemed inconsistent with good citizenship. The prospective grand jury witness and his attorney should therefore become closely familiar with the duties and obligations of such a witness, and the instances in which they may be legally superseded by privilege. This article is concerned with increasing such familiarization.

I. SCOPE OF INQUIRY AND COMPULSORY NATURE OF TESTIMONY

The compulsory nature of grand jury testimony cannot be controverted; all duly subpoenaed witnesses *must* appear, be sworn, and testify, subject only to certain privileges to be hereinafter discussed.⁵ The witness, furthermore, is not entitled to counsel while giving testimony,⁶ nor is he permitted to interpose objections to the competency or materiality of information sought to be elicited from him.⁷

The prevalent judicial attitude seems to be to permit the grand jury a wide and unfettered range of examination, and deny the individual witness any standing to protest the nature or scope of his testimony, so long as his privileges are not transgressed. A refusal by the witness to testify, unjustified by any valid claim of privilege, can subject him to the various contempt procedures with which the district court is empowered. Furthermore, it should be noticed that the witness is powerless to contest the jurisdiction of the grand jury,⁸ so long as he has been properly summoned to appear before it. However, should the grand jury exceed its jurisdiction and scope, untruthful answers given by the witness will not constitute perjury.⁹ Thus, while an unlawful or excessive scope of inquiry will not justify a refusal to testify, it will provide a perfect defense to a perjury prosecution for false testimony. It is indeed a strange paradox in the law that while a witness escapes punishment if he falsely testifies, he is subjected to the penalties of contempt for the more courageous action of refusing to testify at all.

In general then, the witness before a grand jury who cannot claim self-incrimination or other privileges has but one legal course of action—to answer each question truthfully to the best of his ability, fore-

5. *Nelson v. United States*, 201 U.S. 92 (1905); *Howard v. United States*, 182 F.2d 908 (8th Cir.), vacated as moot, 340 U.S. 898 (1950); *United States v. McGovern*, 60 F.2d 880 (2d Cir.), cert. denied, 287 U.S. 650 (1932).

6. *In re Black*, 47 F.2d 542 (2d Cir. 1931).

7. *Blair v. United States*, 250 U.S. 273 (1918); *Nelson v. United States*, *supra* note 5; *Howard v. United States*, *supra* note 5.

8. *Blair v. United States*, *supra* note 7.

9. *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957).

going all technical and procedural objections to competency, materiality or jurisdiction. Evasive answers and half-truths provide no escape from this obligation, as they are considered as contemptuous as lies or outright refusals.¹⁰

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. *Scope of the Privilege*

The only ground acceptable to federal courts for a refusal by a grand jury witness to answer certain questions is privilege, particularly that against self-incrimination as established by the fifth amendment of the Constitution.

The basic issue involved in this problem is whether or not the testimony sought to be elicited might subject the witness to a federal prosecution. That such testimony might involve admissions by the witness as to guilt of crimes under state law will not invoke the privilege.¹¹ The case of *Miller v. United States*¹² illustrates this point. Here the witness was not allowed to claim the privilege, although her testimony would have amounted to a virtual confession of prostitution or other unlawful immoral conduct, but fell short of involving her in a White Slave Traffic Act¹³ violation under the federal code.

A second basic consideration, wherein the federal rule is diametrically contrary to that of many states, concerns the methods of determining the presence of incriminating matter in the testimony sought. A question will not be deemed a violation of the privilege merely because the witness claims the answer will incriminate him.¹⁴ The ultimate decision is left to the court after examination of the question, the circumstances under which it was asked, and the position of the witness.¹⁵ It is also significant to note that neither the court nor the examiner (usually the District Attorney or his assistant) need warn or advise the witness of his privilege, even in grand jury pro-

10. *United States v. McGovern*, supra note 5. One final observation should be made regarding the grand jury subpoena. The frequent use of such a subpoena by District Attorneys to order the witness into their office for questioning is improper, and adequate grounds exist to prevent the use of statements thus obtained in a prosecution against the witness. *Durbin v. United States*, 221 F.2d 520 (D.C. Cir. 1954). The United States Attorney's Office is no substitute for the grand jury room, the latter being the only lawful place of appearance to which the witness can be commanded.

11. *United States v. Murdock*, 284 U.S. 141 (1931).

12. 95 F.2d 492 (9th Cir. 1938).

13. 18 U.S.C. § 2421-24 (1958).

14. *Hoffman v. United States*, 341 U.S. 479 (1951); *Mason v. United States*, 244 U.S. 362 (1917).

15. *Hoffman v. United States*, supra note 14.

ceedings where he is not entitled to the representation and advice of counsel while testifying.¹⁶

The most difficult problem, of course, is determining just when a question departs from the realm of propriety and tears at the mantle of protection cast about the witness by this privilege. The classic conservative point of view was clearly reiterated by the United States Supreme Court in *Mason v. United States*,¹⁷ a 1917 decision arising out of the federal territorial jurisdiction over Alaska. Gambling, outlawed in that territory, was the subject of investigation of the grand jury before which defendant was called to testify. He refused, on grounds of self-incrimination, to testify whether or not he had indulged in a game of cards in a certain establishment. The Supreme Court, in sustaining the contempt conviction, narrowly observed that playing cards alone was not criminal, unless there were pecuniary stakes involved. The Court then announced that invocation of the self-incrimination privilege could be allowed only where the danger was real and substantial, not where a witness's fear of prosecution was remote or speculative. However, even under this stringent test, the defendant in the *Mason* case seemed justified in his refusal. It is believed that the real basis of the *Mason* decision lies in the refusal of the Supreme Court to reverse a decision which it felt was primarily discretionary with the trial court. The "test" of the incriminatory nature of a question, announced by the Court, appears to be little more than broad general language propounded to support its decision, language which was unfortunately seized upon by lower appellate courts in restricting the privilege against self-incrimination.¹⁸ Furthermore, the disposition to recognize a considerable discretion in the trial judge, as evidenced in the *Mason* case, has not been manifest in more recent decisions, as will be hereafter set forth.

It will be readily observed that the most vexing problem in this type of case occurs when the question is innocuous on its face, apparently importing no scent of criminality. No difficulty arises when a question bluntly and manifestly seeks incriminating information ("Did you sell opium to John Doe?", or "Was your 1956 income understated in this tax return?"). The *Mason* case represents the antiquated method of treating the innocent type of question, vesting the trial court with those vast discretionary powers which are peculiar to federal judicial procedure, and setting forth a very narrow construction of the protection intended by the fifth amendment.

16. *United States v. Block*, 88 F.2d 618 (2d Cir. 1937); *Thompson v. United States*, 10 F.2d 781 (7th Cir.), cert. denied, 270 U.S. 654 (1926).

17. Note 14 supra.

18. See, e.g., *O'Connell v. United States*, 40 F.2d 201 (2d Cir.); cert. dismissed, 51 Sup. Ct. 658 (1930).

The *Mason* case apparently represented the unchallenged authority on this issue until the decision of *Blau v. United States*,¹⁹ involving the questioning by a federal grand jury which was investigating Communist activities in Colorado. Upon examination, defendant refused to answer questions touching her knowledge of the officers and activities of the Denver Communist Party, on the grounds that such answers would incriminate her. She was found in contempt, sentenced to one year imprisonment and eventually appealed to the Supreme Court which reversed the conviction. It was here that the Court announced the well-known "link in the chain" rule, holding that it is immaterial in invoking the privilege whether a specific answer requested would support a conviction of the witness; it is only necessary that such answers would have provided some "link in the chain of evidence needed in a prosecution against defendant."²⁰ The Court then observed that, in view of the Smith Act,²¹ defendant was clearly justified in her refusals. The *Mason* case was thus effectively, if not in fact, overruled, although it is still frequently cited for the broad general clichés announced therein.

Shortly after the *Blau*²² decision, the Supreme Court, in *Hoffman v. United States*,²³ completely reviewed the judicial interpretation of the fifth amendment, and set forth a policy of liberality which has become the guiding light in this particular field. The *Hoffman* case involved a grand jury investigation of racketeering in New York, in which defendant appeared as a subpoenaed witness. He refused to answer an interrogation as to what his present employment was, and whether he had recently seen one "William Weisberg." The district court promptly convicted him of contempt, but was eventually overruled by the United States Supreme Court, which, in reaching a decision, carefully scrutinized the external extra-judicial circumstances showing that defendant had long been known as a racketeer, had been convicted previously on a narcotics charge, and had been characterized in the local press as one of the type of individuals that the government was investigating. In advocating a policy of liberal construction of the fifth amendment, the Court expressed serious concern over the extent to which a witness claiming the privilege should be required to justify his refusal:

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for

19. 340 U.S. 159 (1950).

20. *Id.* at 161.

21. 18 U.S.C. § 2385 (1958).

22. *Blau v. United States*, *supra* note 19.

23. 341 U.S. 479 (1950).

the court to say whether his silence is justified, *Rogers v. United States*, 1951, 340 U.S. 367, . . . , and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple v. Commonwealth*, 1880, 75 Va. 892, 899. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implication of the question, in 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. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." See Taft, J., in *Ex parte Irvine*, C.C.S.D. Ohio, 1896, 74 F. 954, 960.²⁴

The *Hoffman* case establishes the following principles in determining the self-incriminating quality of innocuous questions: (1) The "link in the chain" of evidence rule, as first announced in the *Blau*²⁵ case, was reiterated and followed. (2) The witness's own declaration that the question is incriminating is insufficient to invoke the privilege. (3) The witness claiming the privilege should not be compelled to prove the incrimination to such an extent that it would destroy his protection. (4) The Court, in deciding applicability of the privilege, should consider external circumstances (such as newspaper publicity, setting, etc.) as well as the mere grammatical implications of the question itself. (5) The privilege should be sustained on the mere *possibility* of the disclosure being dangerous to the witness.

The *Hoffman* case, of course, had a resounding impact on the law of self-incrimination. Shortly after the decision, the Supreme Court began issuing per curiam reversals of cases in which the privilege was denied, citing only the *Hoffman* case as authority.²⁶ Contempt citations arising out of the Kefauver Committee investigations met quick reversals in the courts of appeals as the full impact of the *Hoffman* case was beginning to take effect. Thus, in *United States v. Doto*,²⁷ the conviction of Joe Adonis for refusal to answer was reversed on the specific authority of the *Hoffman* decision by taking notice of the setting in which the questions were asked—the Kefauver Committee's wide advance publicity in investigating organized crime, and its promise to become the scourge of the underworld.²⁸

24. *Id.* at 486-87.

25. Note 19 *supra*.

26. See, e.g., *Singleton v. United States*, 343 U.S. 944 (1952); *Greenberg v. United States*, 343 U.S. 918 (1952).

27. 205 F.2d 416 (2d Cir. 1953).

28. In *United States v. Costello*, 198 F.2d 200 (2d Cir.), cert. denied, 344 U.S. 874 (1952), the propriety of the privilege was more obvious. Here the Kefauver

The Eighth Circuit, for example, immediately established a policy in direct accordance with the *Hoffman* case principle. In *Kiewel v. United States*,²⁹ the defendant was convicted of contempt for refusal to testify before a grand jury, concerning the books and records of the corporation of which he was president. The entire investigation concerned the tax return of the corporation. The court of appeals, while noting that no privilege is available to avoid embarrassment or protect others (including one's own corporation), also observed that it would be improper to require a witness to go into detail in explaining his fear of incrimination, the implication alone sufficing:

When the inquiry is found to be pregnant with danger, great latitude must be afforded the witness in determining what question it may be dangerous for him to answer.³⁰

However, the most interesting metamorphosis of the law has occurred in the Third Circuit, the one from which the *Hoffman* case was originally appealed. Immediately after the Supreme Court granted certiorari, but before the decision of reversal was announced, the court of appeals decided *United States v. Greenberg*,³¹ in which (consistent with their own decision in the *Hoffman case*³²) they upheld the contempt conviction of witness Greenberg for refusing to tell the grand jury the business he conducted in which a particular telephone was used. This matter was also appealed, but before the Supreme Court had an opportunity to consider its merits, the *Hoffman* decision was announced. Believing this adequately disposed of any question as to the invalidity of Greenberg's conviction, that Court graciously remanded the *Greenberg* case for reconsideration in the Third Circuit in the light of the newly proclaimed *Hoffman* rulings.³³ However, the court of appeals stood firm in its convictions. In a scholarly, well-written opinion, Judge Maris carefully distinguished the *Hoffman* opinion, and again upheld the contempt citation of Greenberg,³⁴ re-

Committee had asked witness Costello what his net worth was, and to whom he owed money. Although the court of appeals, reversing the contempt conviction, relied essentially on the *Hoffman* opinion, it seems that the question here could hardly be termed innocuous. The implication of criminality was obvious; the admission of one's net worth provides the government with exactly one-half of what it usually needs to prove an income tax evasion case. Hence, while the *Blau* and *Hoffman* cases required only a "link," the *Costello* case involved fifty per cent of the entire chain.

29. 204 F.2d 1 (8th Cir. 1953).

30. *Id.* at 4.

31. 187 F.2d 35 (3d Cir. 1951).

32. *United States v. Hoffman*, 185 F.2d 617 (3d Cir. 1950), rev'd, 341 U.S. 479 (1951).

33. *Greenberg v. United States*, 341 U.S. 944 (1951).

34. *United States v. Greenberg*, 192 F.2d 201 (3d Cir. 1951), rev'd, 343 U.S. 918 (1952).

lying mainly on *Mason v. United States*,³⁵ which had been cited with apparent approval by the Supreme Court in the *Hoffman* case. Certiorari was again granted, but this time the Supreme Court was not so kind in its treatment of the Third Circuit. In a brief, brusque per curiam opinion, they reversed outright the decision below, citing only the *Hoffman* case.³⁶ Furthermore, a similar per curiam reversal was adjudged at the same term in *Singleton v. United States*,³⁷ which had also been appealed from a Third Circuit decision upholding a similar contempt conviction. Finally, that court of appeals was confronted with *United States v. Coffey*,³⁸ in which the witness before a grand jury had refused to testify whether certain acquaintances were engaged in the numbers racket, and was convicted of contempt. By this time, the Third Circuit had become well aware of the *Hoffman* decision, and apparently realized the futility of affirming these contempt convictions any further. Hence, the *Coffey* conviction was reversed by that court of appeals, with Judge Hastie, speaking for the court, framing a rather cynical appraisal of the *Hoffman* case's full import:

The decision in the *Mason* case would not be followed today. It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. . . .

Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached and achieved by obscure and unlikely lines of inquiry.³⁹

It is felt that the analysis is essentially correct, although the court's usage of the term "incredible" was probably more the product of sarcasm than of judicial logic. The most important observation, however, is the recognition by the court that the *Mason*⁴⁰ case would not be followed today, an opinion that is apparently shared by contemporary legal scholars in this field.⁴¹

Within a few short years after the *Hoffman* decision, most federal circuits had adopted the broad, liberal interpretation of the self-incrimination privilege, though with considerable reluctance in some

35. Note 14 supra.

36. *Greenberg v. United States*, 343 U.S. 918 (1952).

37. Note 26 supra.

38. 198 F.2d 438 (3d Cir. 1952).

39. *Id.* at 440-41. (Footnote omitted.)

40. *Mason v. United States*, 244 U.S. 362 (1917).

41. See, e.g., Falknor, *Self-Crimination Privilege: "Links in the Chain,"* 5 *Vand. L. Rev.* 479 (1952).

instances. Thus, the Seventh Circuit reversed a contempt conviction in *In re Portell*,⁴² in which the defendant had refused to give testimony concerning her previous address when the grand jury investigation centered around an alleged close acquaintance (of questionable reputation) of the witness. The court, with some hesitation, noted that it was obliged to invoke the spirit of the *Hoffman* decision and uphold the privilege whenever there is even slight possibility of the witness giving evidence against herself.

In the Eighth Circuit, the same policy of liberality has appeared. In *Isaacs v. United States*,⁴³ the witness, as president of a corporation, refused to give testimony regarding payments by the corporation to certain individuals. A contempt conviction was reversed, the *Hoffman* case followed, and the government's argument that the witness was shielding others and not himself was refused by the court. It was observed that it was not inconceivable that defendant could possibly be an accessory to internal revenue violations committed by his corporation's payees, and therefore could invoke his privilege. While this is undoubtedly consistent with *Hoffman*, it certainly represents a direct retreat from the Eighth Circuit's position in *Saffo v. United States*,⁴⁴ in which this same court sustained a contempt conviction regarding a refusal to answer questions which the court categorized as tending to incriminate others, but not the witness Saffo. Obviously, if a witness has knowledge of incriminating facts concerning his associates, his own criminal liability as a potential accessory would always seem to justify a fifth amendment refusal to testify, as in the *Isaacs* situation.⁴⁵ This possibility was ignored in the *Saffo* case, as was the *Hoffman* holding, with an unexplainable decision as the result. Incidentally, a remarkably terse analysis of the *Hoffman* decision is contained in the *Isaacs* case:

To warrant a denial of the privilege it must appear in the setting in which the question is asked that the answer cannot possibly have a tendency to incriminate.⁴⁶

Most important, of course, is the interjection of the word "possibly," which expresses the real innovation of the *Hoffman* decision; prior to that, "substantial" or "reasonable" chance of incrimination was the criterion employed.

Consistent with the *Isaacs* holding is *United States v. Trigilio*,⁴⁷ where the court upheld witness's refusal to tell about conversation

42. 245 F.2d 183 (7th Cir. 1957).

43. 256 F.2d 654 (8th Cir. 1958).

44. 213 F.2d 131 (8th Cir. 1954).

45. *Isaacs v. United States*, supra note 43.

46. *Id.* at 658.

47. 255 F.2d 385 (2d Cir. 1958).

with his brother-in-law who was suspected of a bank robbery. As in *Issacs*, the court here noted that an accessory prosecution was possible, and such conversations could be a link in the chain needed to incriminate the witness. Undoubtedly, the Second Circuit was influenced by the outright per curiam reversal of its previous decision in *United States v. Trock*.⁴⁸ In that case, where witness refused to answer questions about whether he knew various people (who were all apparently under investigation), the court of appeals apparently felt that the *Hoffman* case did not support the assertion of the privilege where the questions were completely innocuous in themselves, even though they might have developed into a chain of evidence later; the time for asserting the privilege, held the court, was when such a chain did begin to develop. The per curiam reversal by the Supreme Court cited only the *Hoffman* opinion, without further comment.

The Ninth Circuit, too, received its fifth amendment education from the Supreme Court in a summary manner. In three cases,⁴⁹ the defendants were convicted of contempt for refusing to give their present address to a congressional committee (House Un-American Activities) investigating Communism. The three convictions, affirmed in the court of appeals, were reversed in the Supreme Court in one brief per curiam opinion,⁵⁰ citing only the *Hoffman* case. This particular reversal is significant because in neither of the three cases had there been any sort of record made in the district court to establish a setting which might justify the witnesses' fears. Apparently, the Supreme Court followed defense arguments that in this type of investigation, seeking out an entire subversive movement, even one's address might be a vital link connecting him to the party or its activities.

Other instances of the expanded scope of the self-incrimination privilege are numerous, throughout the circuits. A scholarly résumé of case-by-case development of the present status of the law is presented in *Aiuppa v. United States*,⁵¹ where the Sixth Circuit reversed a contempt conviction based on defendant's refusal to tell the Senate Crime Committee whether he knew "R. H. O'Donnell," when R. H. O'Donnell had already given much derogatory information to the government concerning the witness. Again, in the investigation of the famous Brink's robbery, contempt convictions were stricken down in the Third Circuit, where the setting showed that the grand jury was trying to elicit information from witnesses who were actually suspects. In such

48. 232 F.2d 839 (2d Cir.), rev'd, 351 U.S. 976 (1956).

49. *Simpson v. United States*, 241 F.2d 222 (9th Cir.), rev'd, 355 U.S. 7 (1957); *Wollam v. United States*, 244 F.2d 212 (9th Cir.), rev'd, 355 U.S. 7 (1957); *MacKenzie v. United States*, 244 F.2d 712 (9th Cir.), rev'd, 355 U.S. 7 (1957).

50. *Simpson v. United States*, 355 U.S. 7 (1957).

51. 201 F.2d 287 (6th Cir. 1952).

a case, it was held that the privilege could be claimed for all but the most routine questions.⁵² And, the Second Circuit, still smarting from the reversal of the *Trock* case,⁵³ reversed a contempt conviction of a union leader who refused, on grounds of self-incrimination, to give the grand jury various answers concerning the operation of his union.⁵⁴ The reluctance of the court to so hold was metaphorically illustrated by the opening passage of the opinion by Judge Frank:

As we have several times noted previously, our function (as an inferior court) is often to serve as a judicial moon, reflecting, as best we can, light from the sun of our system. The latest shaft of light from that source, in the direction of a case like this, is *Trock v. United States*⁵⁵

Such language is significant because it illustrates the tremendous impact of the *Hoffman* case, and its compelling effect on lower tribunals not apparently in sympathy with the spirit of the Supreme Court in that decision. That effect has been achieved not so much by the *Hoffman* decision itself, but more by the numerous per curiam reversals that cite it. It has indeed become one of the strongest precedents in our federal judicial history.

Little more can thus be said concerning the scope of the self-incrimination privilege. While the court still retains the power to determine the applicability of the privilege (as per *Hoffman*), it must indeed be an unusual situation, completely devoid of even the most remote possibility of incriminating tendencies, when the claim of privilege will be denied as to any particular question. What the future holds in prospect on this matter is purely speculative, as this will depend entirely on the personality and philosophy of the nine individuals comprising our highest tribunal. Just as *Mason v. United States*⁵⁶ became a useless antiquity as judicial precedent, although never overruled, so may the same fate befall the *Hoffman* decision at a time when a narrow, strict interpretation of the privilege will be in vogue. But for the present, the constitutional guarantees of the fifth amendment enjoy the most liberal interpretation that the very language of that provision will admit.

A particular caution should be noted at this point with respect to so-called "blanket" refusals to testify. Even though the liberal application of the fifth amendment could conceivably justify refusal to answer any but the most routine questions, the courts still retain, and

52. *Maffie v. United States*, 209 F.2d 225 (1st Cir. 1954); *Carlson v. United States*, 209 F.2d 209 (1st Cir. 1954); *Hooley v. United States*, 209 F.2d 219 (1st Cir. 1954).

53. Note 48 *supra*.

54. *United States v. Gordon*, 236 F.2d 916 (2d Cir. 1956).

55. *Id.* at 918.

56. Note 40 *supra*.

jealously guard, the power to make the final determination of the propriety of the privilege. The witness should therefore claim the privilege as to each individual question, but never, under any circumstances, proclaim in advance his intention to refuse to answer all questions on self-incrimination grounds. Such was the fatal error of the witness in *Enrichi v. United States*,⁵⁷ whose contempt conviction was upheld on appeal. This is one of the very few such convictions since the *Hoffman* case which has not been reversed. The lesson of the *Enrichi* holding is strong and simple: "blanket" refusals, or assertions of the privilege in advance of the questioning, will *not* be sustained by the court, even though many or all of the intended questions could have been properly answered individually by a fifth amendment refusal.⁵⁸

One further pertinent limitation on the scope of the privilege is suggested by *Knapp v. Schweitzer*,⁵⁹ which involved a New York State grand jury investigation of labor union activities. After being granted immunity from state prosecution, defendant still refused to testify on fifth amendment grounds and fear of federal prosecution, and buttressed his claim by proof that the United States Attorney had made a public statement that he was carefully observing and cooperating in the state proceedings. Although recognizing that a real danger of federal prosecution did exist, the United States Supreme Court refused to set aside the state contempt conviction, noting that the fifth amendment in no way limits state action or proceedings. While it was difficult to quarrel with the logic of this opinion, it certainly made available a potent device to circumvent the fifth amendment, wherever local state authorities would cooperate. However, such evidence has now been held to be inadmissible in federal prosecutions and the "silver platter" doctrine abolished.^{59a}

B. Books and Records

The application of the privilege against self-incrimination to instances regarding production of books and documents has been rather clearly defined. The basic premise in this situation is that the privilege is a personal one, available only to an individual for his personal protection. On this theory, the Supreme Court has ruled that the production of papers and documents of a corporation, labor union or other

57. 212 F.2d 702 (10th Cir. 1954).

58. The infirmity of the blanket refusal is that it deprives the court of the opportunity to consider each question, and rule on the propriety of a refusal to answer some on the grounds of the privilege.

59. 357 U.S. 371 (1958).

59a. *Elkins v. United States*, 80 Sup. Ct. 1437 (1960); *Rios v. United States*, 80 Sup. Ct. 1431 (1960).

such association cannot be refused on fifth amendment grounds.⁶⁰ Even though the individual who is served with the subpoena duces tecum fears *personal* incrimination, he cannot refuse to produce, since the books and records do not belong to him and are in his custody only because of his representative capacity as an officer of the organization. The decision in *United States v. White*⁶¹ is one of the rare Supreme Court holdings in the field of self-incrimination which was handed down without dissent, and is regarded as such compelling authority that few (if any) witnesses or defendants have ever bothered to raise the particular issue in recent years.

Papers and documents which are subject to the privilege, however, and which the witness may refuse to produce, include those which are his private property, or which he possesses in a *personal* rather than a representative capacity.⁶²

Moreover, this exception to the self-incrimination privilege has been extended to include not only books and records held in a representative capacity, but also all papers and records (even possessed in a private and personal capacity) which the law requires to be maintained as the appropriate part of some government regulation.⁶³ For example, in *Shapiro v. United States*,⁶⁴ defendant was compelled to produce his *personal* records of sales invoices, ledgers, inventory sheets and sales contracts which he was required to maintain under the Emergency Price Control Act.⁶⁵ The court of appeals ruling, affirmed by the Supreme Court, noted that no self-incrimination privilege could be asserted here, since these records required to be kept by law were, in effect, public documents to which no personal privilege attaches.

But even though production of records may be mandatory, the Supreme Court has also declared that the individual custodian nevertheless can refuse, on self-incrimination grounds, to answer any question relative thereto. In *Curcio v. United States*,⁶⁶ defendant Curcio, as secretary-treasurer of a local union, was ordered by subpoena to produce the books and records. He failed to produce them, and testified that they were not in his possession. When the grand jury asked about the location of the records, defendant invoked his privilege against self-incrimination. His contempt conviction for this refusal was eventually reversed by the Supreme Court in a unanimous opinion declaring that while the custodian of corporate or association books has no

60. *United States v. White*, 322 U.S. 694 (1944).

61. *Ibid.*

62. *Ibid.*

63. *Shapiro v. United States*, 335 U.S. 1 (1948); *Wilson v. United States*, 221 U.S. 361 (1911).

64. Note 63 *supra*.

65. Ch. 26, § 202(g), 56 Stat. 30 (1942).

66. 354 U.S. 118 (1957).

privilege to refuse to produce them, such person nevertheless retains his full constitutional privilege as to oral testimony pertaining to the books. Squarely rejected was the government's contention that the *United States v. White* holding,⁶⁷ which negated any privilege with respect to the records themselves, likewise ruled out any privilege regarding questions seeking to ascertain the location of such records:

In other words, when the custodian fails to produce the books, he must, according to the Government, explain or account under oath for their nonproduction, even though to do so may tend to incriminate him.

The Fifth Amendment suggests no such exception. . . . A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.⁶⁸

The *Curcio* decision thus casts important light on the requirements of *United States v. White*, so that the only activity not subject to the fifth amendment protection is the bare production of the subpoenaed records. Even the most routine inquiry, such as "Mr. Jones, are these the records specified in the subpoena?" might under certain circumstances, be refused on grounds of the privilege.⁶⁹ The same *United States v. Hoffman* tests would apply as in any other oral examination, and the mere fact that the inquiry concerns non-privileged records does not, in any respect, diminish the protection of the Constitution.

C. Waiver of Privilege Against Self-incrimination

The self-incrimination privilege, however, may be of no avail to the witness unless he asserts it immediately upon being asked the transgressive question. A failure to claim the privilege instantly can result in a waiver, the witness thereafter being compelled to answer any and all interrogation on the particular subject.

Preliminary to a discussion of the principle of waiver, the importance of the application of that doctrine should be pointed up by a consideration of the plight confronting a witness before the grand jury. He is present, of course, without counsel, and frequently without definite knowledge of the subject of investigation. Furthermore, neither the government (nor the trial judge, if interrogation is in the

67. Note 60 supra.

68. *Curcio v. United States*, supra note 66, at 123-24.

69. Of course, as the *Curcio* opinion observes, there is nothing to prevent the grand jury from utilizing other, independent evidence to show that the subpoena duces tecum had not been fully complied with and hence the custodian is in contempt.

court) nor any of the examiners need warn or advise the witness of the privilege against self-incrimination and the possibilities of waiver thereof.⁷⁰ Thus the broad liberal interpretation of the self-incrimination doctrine will be for naught if the witness is not thoroughly informed as to the proper means of invoking the privilege to his benefit.

The present federal policy as to waiver was established by two landmark decisions, *Rogers v. United States*,⁷¹ and *United States v. St. Pierre*.⁷² The *St. Pierre* case, earlier of the two, involved a witness who, before the grand jury, admitted all the elements of the crime of embezzlement, yet refused to name the victim. His contention was that although he had virtually confessed the crime, the additional information sought would provide the government with the necessary witness to corroborate the confession and procure a conviction. The court of appeals, however, held that the privilege against self-incrimination had been completely waived. Having confessed the crime, the witness may not withhold the details.

The Supreme Court then fully supported the *St. Pierre* theory in *Rogers v. United States*, involving the grand jury examination of defendant in regard to her Communistic affiliation. Witness Rogers had voluntarily testified that she was Treasurer of the Communist Party of Denver, and previously had possession of the membership lists and dues cards. However, she refused to disclose the name of the person to whom she delivered these records, relying, among other things, on the self-incrimination privilege. The Supreme Court, in upholding her contempt conviction, observed that the witness had already implicated herself completely under the Smith Act⁷³ and could not incriminate herself further by answering the additional query. The Court then cited, with approval, the *St. Pierre* and numerous other federal cases holding generally that where incriminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details. Wigmore's treatise on evidence was quoted as an approved summary of the law on this issue:

The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by *answering as to fact X, he waived it for fact Y*. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating fact as a whole.⁷⁴

70. *United States v. Block*, 88 F.2d 618 (2d Cir. 1937); *Thompson v. United States*, 10 F.2d 781 (7th Cir.), cert. denied, 270 U.S. 654 (1926).

71. 340 U.S. 367 (1951).

72. 132 F.2d 837 (2d Cir. 1942).

73. 18 U.S.C. § 2385 (1958).

74. 8 Wigmore, *Evidence* § 2276 (3d ed. 1940).

However, bitter dissent in the *Rogers* case was registered by Justice Black, with Justices Frankfurter and Douglas concurring.⁷⁵ After making the preliminary observation that the doctrine of waiver was but an effective device for "whittling away the protection afforded by the privilege,"⁷⁶ the dissent expresses great concern over the dilemma created for witnesses by the majority opinion:

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.⁷⁷

In view of this strong dissent by these men who constitute one-third of our Supreme Court today, it is suggested that the law as to waiver is far from crystallized, and future cases directly involving this issue will probably experience little difficulty in reaching the highest tribunal.

Consistent with the *Rogers* and *St. Pierre*⁷⁸ holdings, but reaching an opposite result, are *Arndstein v. McCarthy*⁷⁹ and *McCarthy v. Arndstein*.⁸⁰ These cases, arising out of the same transaction, concern the refusal of defendant to answer questions propounded by a special commissioner of the bankruptcy court pertaining to his assets. The district judge admitted that answers to many of these interrogations might have incriminated Arndstein of concealment of assets, but felt that the privilege had been waived when defendant voluntarily filed a schedule of assets, which by implication was an assertion that he had no other assets. Upon application for a writ of habeas corpus, the Supreme Court reversed the ruling and ordered defendant released from the confinement he was serving as punishment for contempt. (The second appeal arose as a result of the marshal's return contesting the writ issued by the district court.) Specifically, the Court held that no waiver was established, the bankruptcy schedules themselves being non-incriminating, and the general rule being, "that where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of

75. *Rogers v. United States*, 340 U.S. 367, 375 (1951) (dissenting opinion). This made the decision a narrow 5-3, since Justice Clark took no part in the proceedings.

76. *Id.* at 376.

77. *Id.* at 378. (Footnote omitted.)

78. *Rogers v. United States*, *supra* note 71; *United States v. St. Pierre*, *supra* note 72.

79. 254 U.S. 71 (1920)

80. 262 U.S. 355 (1923).

stopping short in his testimony whenever it may fairly tend to incriminate him."⁸¹

Thus, we have an obvious departure from the doctrine established by the passage from Wigmore followed in the *Rogers* case. While Wigmore claims that disclosure of one of several facts constituting a single transaction will operate as a waiver as to all of the facts, the *McCarthy* cases⁸² hold that disclosure of facts which are not incriminating does not constitute a waiver of privilege against disclosure of other facts of the same transaction which are incriminating. Furthermore, the *McCarthy* cases, old as they are, still represent the existing law on this point, being cited with approval even by the *Rogers* case.

The factual distinctions between the *McCarthy* and *Rogers* cases make them consistent holdings. While witness Rogers testified to definitely incriminating facts before deciding to claim the privilege, witness Arndstein's testimony prior to his privilege claim concerned non-incriminating matter. The test, therefore, is not whether there has been testimony as to some facts involved in a single transaction with others, as Wigmore suggests. Rather, the criterion is whether the previous testimony, concerning the one general transaction, was of an *incriminating* nature.

An excellent example of the application of the *McCarthy* and *Rogers* rules, with a specific rejection of Wigmore's test, is the opinion in *Powell v. United States*.⁸³ The contempt citation of witness Powell was based on his refusal to answer questions concerning certain diaries he allegedly compiled. Since he had earlier *testified* (without invoking any privilege) that he did not keep any diaries, the government contended that he had waived any privilege as to the diary matter, relying on the *Rogers*⁸⁴ decision. This argument, however, was repudiated by the court, which held that the *Rogers* case was not in point: "If he had said that he had the diaries and then refused to testify further about them, the privilege might not lie; this might be the *Rogers* doctrine."⁸⁵ However, since his earlier testimony *denied* knowledge of diaries,⁸⁶ no waiver was effected. This simple distinction by the District of Columbia appellate court is a perfect expression of the waiver doctrine as it exists today—incriminating admissions, but not innocent denials or other innocuous answers, are necessary to constitute a waiver.

81. *Id.* at 359.

82. Notes 79 and 80 *supra*.

83. 226 F.2d 269 (D.C. Cir. 1955).

84. Note 71 *supra*.

85. Note 83 *supra*, at 276.

86. Apparently the diaries themselves were intrinsically incriminating, so that the court felt that a mere admission by defendant that he kept such diaries might be an "incriminating" fact.

Another aspect of the waiver situation was presented in *Emspak v. United States*,⁸⁷ wherein defendant had refused before a congressional committee to answer many questions based on "primarily the first amendment, supplemented by the fifth."⁸⁸ The witness was then asked "Is it your feeling that to reveal your knowledge . . . would subject you to criminal prosecution?"⁸⁹ to which he gave a negative reply. In supporting the contempt conviction, the government eagerly urged the waiver doctrine, but to no avail. The Supreme Court (demonstrating a more liberal attitude than in the *Rogers* case) held that defendant's "no" reply to the question was insufficient to waive the previous definite claim of privilege. Fear of criminal prosecution, Chief Justice Warren observed, is not the only ground upon which the privilege may be asserted, since it also applies to matters which only tend to incriminate or provide some link in an incriminating chain. Thus, when a witness states he does not fear criminal prosecution as a result of his answers, he is not necessarily abandoning his grounds for fifth amendment refusals. The real significance of the *Emspak* decision, however, lies in the apparent change of attitude of the Court on waiver issues; the dissenters in the *Rogers* case, bolstered by recently appointed justices of a liberal inclination, became the majority in the *Emspak* case. One might expect that, with the present complexion of the court, a *United States v. Rogers* situation might well result in a holding exactly opposite to that in 1950 if the *Emspak* spirit prevails.⁹⁰

The importance of a prompt immediate reference to the privilege, when answers are refused, cannot be overemphasized. While generally courts will not require any specific technical language to invoke the constitutional rights,⁹¹ still it must appear from the record that the witness intended to rely on the self-incrimination privilege. At any rate, an unnecessary or unreasonable delay in declaring the reason for refusal may well waive the privilege. In *Brody v. United States*,⁹² defendant was ordered by the district court to submit to an internal revenue examination, and only after numerous delays, citations, and a show cause order, the self-incrimination privilege was asserted. A

87. 349 U.S. 190 (1955).

88. *Id.* at 193.

89. *Id.* at 195.

90. *Emspak v. United States*, supra note 87. Yet this same court adopted a conservative viewpoint on waiver recently, and affirmed a contempt conviction in *Brown v. United States*, 356 U.S. 148 (1958), on grounds of waiver of privilege. The facts of this case are not germane to the present discussion, but the attitude of the court on the waiver problem is less liberal than in *Emspak*, and continues the uncertainty in this field. (Warren, Black, Douglas, and Brennan dissented, consistent with their prior views.)

91. *Emspak v. United States*, supra note 87, at 194.

92. 243 F.2d 378 (1st Cir.), cert. denied, 354 U.S. 923 (1957).

complete waiver, occasioned by the long delay in asserting the privilege, was held to exist, and a contempt citation affirmed. Unquestionably a prompt claim of privilege in the *Brody* case would have been sustained, which only amplifies the necessity for familiarity with the waiver doctrine in this field.

The nature of the proceedings in which a waiver may be established has also been the subject of considerable litigation. While there have been isolated decisions to the contrary,⁹³ the present clear authority holds that a waiver in some trial or proceeding will *not* carry over into any other proceeding, nor is the witness, once having waived his privilege, estopped from asserting that privilege in a new and independent proceeding.⁹⁴ This applies even though the testimony had been given in a previous trial or grand jury session involving exactly the same matter; the waiver, to be effective, must be established in the identical proceeding in which the witness now claims the privilege.⁹⁵

Likewise, responding to interrogations and making admissions to the F.B.I. agents, incriminating and damaging as those statements may be, will not prevent the witness from asserting his privilege on the same subject matter before a grand jury or in the district court.⁹⁶ In *United States v. Miranti*⁹⁷ this doctrine was extended even further to refute a novel government argument. The witness Miranti had testified before a grand jury, without claim of privilege, and was thereafter indicted, convicted and sentenced. A year later, Miranti was called before the same grand jury and again questioned about the same activities, apparently in an effort to indict his cohorts. This time the witness balked, and asserted his self-incrimination privilege. Among other things, the government contended a waiver had been created; conceding the full import of *In re Neff*,⁹⁸ the prosecution nevertheless urged that here the witness was testifying (a year later) in the very *same* proceeding in which he had previously waived the privilege. But the Second Circuit was unconvinced, and, relying on the substance

93. *Nicola v. United States*, 72 F.2d 780 (3d Cir. 1934). Here the defendant voluntarily gave papers and information to the internal revenue agents, which the court found to be a waiver at a subsequent trial. While the facts do not involve a situation of testimony (only personal papers), the language of the opinion clearly conflicts with later and more authoritative decisions.

94. *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); *Ballantyne v. United States*, 237 F.2d 657 (5th Cir. 1956); *In re Neff*, 206 F.2d 149 (3d Cir. 1953).

95. *In re Neff*, supra note 94.

96. *United States v. Miranti*, supra note 94; *Ballantyne v. United States*, supra note 94.

97. Note 94 supra.

98. *Ibid.*

rather than form, held that the lapse of a year during which the witness had been indicted and convicted was a circumstance which destroyed the "sameness" of the proceeding, at least as far as Miranti's waiver was concerned. This opinion, it seems, recognizes the true logic and justice in the *Neff* rule: a witness who once foregoes his privilege should not be bound forever by the waiver, since the lapse of time or intervening circumstances may give him good cause to change his mind. Indeed, his fears of incrimination or prosecution may well have increased, so that he no longer chooses to bear witness against himself.

One cannot help but speculate as to the influence, if any, which the liberalized interpretations of *Hoffman v. United States*⁹⁹ might have on the invocation of a waiver—does the enlarged scope of the self-incrimination privilege simultaneously extend the possibilities of a waiver? If a witness answers an apparently innocuous question which, under the circumstances and setting, he could have refused, has he waived his privilege of self-incrimination as to the whole transaction? At present, the rule is simply that an *incriminating* type of answer is required to establish a waiver, yet it seems only a matter of time before some clever government attorney will urge that an answer which *tends to incriminate* (such as a link in the chain) should likewise waive the privilege since such an answer could properly have been refused. This will immediately be recognized as a reversion to the Wigmore theory approved in *Rogers v. United States*,¹⁰⁰ which advocates a waiver as to any transaction once the witness has testified as to any fact in that transaction—a theory thus far repudiated by the courts.¹⁰¹

The present state of the law, then, countenances a definite hiatus in the concurrent rules concerning the self-incrimination privilege and waiver thereof. While the privilege itself extends to matters which even remotely may tend to incriminate, the waiver of such privilege can occur only when an incriminating fact itself is disclosed.¹⁰² Possibly the logic of this inconsistency might be challenged; but certainly, in view of the position of the grand jury witness who must act without counsel in making fast decisions, any narrow limitation on the waiver doctrine is inconsistent with our spirit of justice and fair play.

99. 341 U.S. 479 (1951).

100. 340 U.S. 367 (1951).

101. *Powell v. United States*, supra note 83; *McCarthy v. Arndstein*, supra note 80.

102. No attempt will be made to define the term "incriminating fact." Somewhere in that gray area between manifestly innocuous answers which might possibly tend to incriminate, and those definite admissions which confess a crime, lies the "incriminating fact" category which will satisfy the waiver requirements.

1. *Legislative Immunity*

Congress has, by specific legislation, eliminated some applications of the fifth amendment by granting immunity from prosecution to witnesses testifying in proceedings (including grand jury) relating to certain subject matters (i.e., matters involving Interstate Commerce Act, Sherman Anti-Trust Act).¹⁰³ The scope and effect of these statutes present some novel and unusual issues, which shall not be considered herein. For the present, suffice it to say that the grand jury witness who might even consider invocation of his self-incrimination privilege should first ascertain that the inquiry is not one covered by an immunity statute which would displace the privilege.¹⁰⁴ Should there be any doubt, the privilege may still be asserted until it is made clear (probably by a district court ruling rejecting the claim of privilege) that legislative immunity is conferred in the particular instance.

III. CONSEQUENCES OF IMPROPER REFUSAL—CONTEMPT

The principal weapon used to enforce obedience to grand jury orders, and to prevent improper refusals by witnesses, is the contempt procedure in the district court. The grand jury itself, of course, is powerless to adjudge contempt, and must refer all matters of irregularity to the district court, which is the only forum (in grand jury matters) having jurisdiction to try and adjudicate contempt proceedings.

The proper procedures and interpretation of the Federal Rules were carefully expounded by Chief Judge Magruder in *Carlson v. United States*.¹⁰⁵ When the witness refuses to answer the grand jury's questions, he is guilty of no contempt. The matter must then be referred to the district court for a ruling on the witness's objections or reasons for refusal, at which time the witness or his counsel may present any evidence or legal authority to support their position. Of course, if the objections are sustained, the matter is ended; but if the court rules that the refusals are not justified, the witness will be ordered to return to the grand jury room and answer the indicated interrogations. On his return, if the witness again refuses to answer in direct disobedience of the court's order, he has for the first time committed a contempt. Further proceedings will vary, depending on whether a civil or criminal contempt action is pursued. No attempt will be made herein to

103. For typical immunity provisions, see Interstate Commerce Act ch. 83, 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958); Sherman Anti-Trust Act ch. 755, 32 Stat. 904 (1903), 15 U.S.C. § 32 (1958).

104. See *Brown v. United States*, 359 U.S. 41 (1959).

105. 209 F.2d 209 (1st Cir. 1954).

distinguish these proceedings; the primary and most notable difference is simply that a civil contempt action can result in summary confinement of the witness only until he agrees to abide by the court's order or until the grand jury's term expires, whereas a criminal contempt conviction is the basis for a specific sentence, either confinement (for a definite period) or a fine or both.

These explanations of procedure in the *Carlson* case were specifically reviewed and approved recently by the Supreme Court in *Brown v. United States*,¹⁰⁶ but an important alternative method was likewise sanctioned in the close 5-4 decision. Here the defendant Brown, a grand jury witness, declined to answer certain questions on fifth amendment grounds. After a hearing, the district court overruled the claim of privilege (a federal immunity statute was involved) and ordered the witness to answer. Before the grand jury again, the witness violated the court's order by persisting in his refusal. However, instead of instituting contempt proceedings, the government had the witness again brought before the court; on this occasion, the district judge, in the presence of the grand jury, addressed each of the controversial questions to the witness, and ordered him to answer, but again the witness refused and claimed his privilege. The court then summarily held the witness guilty of criminal contempt, and imposed a most substantial sentence (15 months).

The procedural error urged on appeal was that defendant should have been prosecuted for contempt under Rule 42(b),¹⁰⁷ which provides for notice to defendant and a full hearing. Instead, the district court proceeded under Rule 42(a),¹⁰⁸ which authorizes a summary punishment for contempt, without notice or hearing, in instances where the contemptuous conduct was in the actual presence of the court. However, the five-man majority of the Supreme Court approved the proceeding below, noting that the district court judge had every right to put the questions directly to defendant to give him an opportunity to purge himself of the contempt he had already committed in the grand jury room. When defendant again refused, he had directly disobeyed a lawful court order in the presence and hearing of the court, and could therefore be summarily convicted under 42(a) without a hearing or notice.

A most emphatic dissenting opinion,¹⁰⁹ concurred in by Justices Black, Douglas and Brennan, was expressed by Chief Justice Warren. These dissenters objected to the obvious action of the government and district court to convert a clear 42(b) type of contempt into a

106. Note 104 supra.

107. Fed. R. Crim. P. 42(b).

108. Fed. R. Crim. P. 42(a).

109. *Brown v. United States*, 359 U.S. 41, 53 (1959) (dissenting opinion).

42(a) situation with summary punishment—once the contempt was committed in the grand jury room, it should have been prosecuted as such, with a proper notice and hearing as required by law. Furthermore, observed the dissent, Rule 42(a) was intended to apply to “exceptional circumstances,” and not as a vehicle to “ease the difficulties of prosecuting contempts” by forcing persons already guilty of outside contempts to repeat their actions before the court:

Given the purpose of Rule 42(a) with its admittedly precipitous character and extremely harsh consequences, this Court should not countenance a procedure whereby a contempt already completed out of the court’s presence may be reproduced in a command performance before the Court to justify summary disposition.¹¹⁰

It appears that the basic argument between the majority and dissent hinges on the intent of the district court: the majority interprets the “command performance” as merely a generous act of the court in affording defendant yet another chance to purge himself of contempt—a *locus penitentiae*—while the dissent more cynically appraises the procedure as a subterfuge to invoke summary punishment.

At any rate, the *Brown* decision does flash a most important warning to the grand jury witness. Doubtlessly, the novel procedure employed there will be imitated throughout the country since it has the Supreme Court blessing, and provides a neat detour around the due process requirements of Rule 42(b).

The fifth amendment witness can thus anticipate the following step-by-step procedure when he refuses a grand jury question: (1) His first refusal before the grand jury is not contempt, and cannot be punished. (The privilege may thus be freely claimed in all doubtful situations, without fear of punishment.) (2) A hearing before the district court will follow, if the government wishes to challenge the claim of privilege. At this hearing, evidence of setting, background and circumstances should be presented, if necessary, to justify the privilege. (3) The court will rule on the refusal, and, if the privilege claim is found improper, the witness will be ordered to return to the grand jury room and answer the specified questions. (4) Disobedience of the court order by again refusing to answer the specified questions before the grand jury, will constitute contempt. (5) If a civil contempt citation is issued, the witness, without notice or hearing, may be summarily jailed until such time as he agrees to obey the court order by answering. He may not be kept imprisoned beyond the term of the grand jury. (6) If a criminal contempt conviction is sought, a notice and hearing under Rule 42(b) will be provided. (7) A sum-

110. *Id.* at 54.

mary criminal contempt conviction might be obtained if the *Brown*¹¹¹ procedure is followed and Rule 42(a) invoked.

Finally, it should be noted that no limit is placed on possible punishments for criminal contempt,¹¹² so that any fine or sentence might be imposed, subject only to the review of appellate courts as to an abuse of discretion.

One limitation, however, which is placed on the district court in this matter concerns the multi-question refusal. In *Yates v. United States*,¹¹³ it was held that but one criminal contempt is committed when a witness refuses to answer a series of questions in the same general area of inquiry—the government cannot seek a multiplication of convictions by continued questioning once the witness has indicated his refusal to testify on that subject matter. To hold otherwise, noted the Court, would be to reward the most contemptuous type of witness who does not even appear to testify (but subject to only one contempt action) and discourage the partially cooperative witness who refuses to answer only certain classes of questions.

CONCLUSION

One final caveat should be noted regarding the subject matter which has been discussed herein. The law in this field is, at present, extremely dynamic and subject to changes and modifications almost constantly, particularly in regard to the self-incrimination privilege. Some of the cases cited will probably have been distinguished, limited or explained during the publication processes of this review. The practitioner with a problem in this area must therefore constantly renew his research on a month to month basis, so that no innovation in the law is overlooked.

111. Note 104 supra.

112. *Green v. United States*, 356 U.S. 165 (1958).

113. 355 U.S. 66 (1957).