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Joseph L. Jr. Rauh

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REPRESENTATION BEFORE CONGRESSIONAL COMMITTEE HEARINGS

JOSEPH L. RAUH, JR.

The author was Law Secretary to Mr. Justice Benjamin N. Cardozo and Mr. Justice Felix Frankfurter during the years 1936 to 1939. Prior to our entrance into World War II he was counsel to a number of Government agencies. More recently he has been in the general practice of law in Washington. He is Washington Counsel for the United Automobile Workers and the Brotherhood of Sleeping Car Porters, and does a good deal of professional work related to civil liberties and civil rights.

This article was originally given as a lecture in the 1958 course for defense lawyers at Northwestern University.—EDITOR.

A paper on the subject of Congressional committee hearings may appear to some as outside the scope of a journal concerned with criminal law. It will undoubtedly seem so at least to Congressional investigators, for if there is one thing that these individuals are agreed upon—and there is probably just about one thing—it is that their investigations are objective fact-finding operations, as far from the criminal law as the Rule in Shelley's Case. Including this subject in a journal such as this, however, contradicts investigating committee lore and suggests that these hearings may have something in common with criminal trials. The "heresy" of such a position has, in fact, all the unorthodoxy of calling a spade a spade. Congressional committee hearings do have many of the elements of a criminal case, and treating them as such is simply to prefer substance to form and common sense to well-cultivated myth.

The Committee often opens its hearing by having its staff put on the "prosecution case"—i.e., by having the "friendly" witnesses publicly tell the Committee under well-rehearsed questioning exactly what the Committee wants to hear and what it has set out to prove. After the "prosecution case" is put on, the "hostile" witness 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 will issue an official "clearance" to an individual or an organization. Sometimes the verdict will be a split one, with a minority seeing the facts and the politics differently from the majority, but seldom is a verdict wholly absent.

SIMILARITY TO CRIMINAL CASES

But this does not end the similarity to criminal cases, for punishment regularly ensues from committee hearings. Persons who are "hostile" to the Committee often lose their jobs; indeed, only too often this appears to be the purpose of the Committee. 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 communities 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, which requires informing on one's past associates in public, those in the entertainment industry will find themselves blacklisted and unable to work in radio, television and the movies. Even deportation proceedings have had their inception at committee hearings; the Immigration Service follows the hearings of "sub-

versive-activities" investigating committees for likely deportees. Certainly many have suffered consequences from a committee hearing as painful and permanent as criminal punishment.

Sadly, however, no matter how clearly criminal in nature these committee hearings appear to be, they are proceedings in which the defendants' rights go largely unprotected. The Committee is investigator, prosecutor, judge and jury, all rolled into one. The impartiality of the judge, the jury of twelve peers deciding on the evidence before it without regard to political or other extraneous considerations, the right of the defendant to cross-examine his accusers and to present his own case in his own way—all this, and much more, is absent from a committee hearing. Last but by no means least, there are no statutes of limitation to protect those who fall within the clutches of a Congressional investigation.

Taking note of the important similarities between committee hearings and criminal cases, I find that my paper, is in the right "church" in appearing in this JOURNAL. The next question is whether it may not yet be in the wrong "pew." My subject—"Representation before Congressional Committee Hearings"—rather assumes that witnesses at these hearings do have legal representation akin to that of the courtroom. But, despite the fact that the rules of the various investigating committees almost invariably provide for counsel, his role before most committees is far too anemic to warrant the description "representation." Most committees take great pains to see that the witness knows he may have a lawyer with him and equal pains to see that the lawyer is unable adequately to protect his client's interests.

Before the House Un-American Activities Committee and Senate Internal Security Subcommittee—the two permanent investigating committees which have probably subpoenaed as many witnesses in the past decade as all the other Congressional investigating committees put together—counsel is not even allowed to address the Committee. Thus, the Rules of the former provide, in a show of concern for the Bill of Rights, that "at every hearing . . . every witness shall be accorded the privilege of having counsel of his own choosing"; but then the Committee turns around in its Rules and takes away most of the benefit of having counsel by providing as follows: "The participation of counsel during the course of any hearing and while the witness is testifying

shall be limited to advising said witness as to his legal rights. Counsel . . . shall confine his activity to the area of legal advice to his client." Thus, before these committees, counsel is not even permitted to seek clarification of a question put to his client or to make objection to a question on grounds of lack of pertinence. All he can do is try and catch his client's attention and whisper an objection to him so that he can repeat it to the committee as nearly verbatim as possible.

The difficulty of a layman making legal objection on grounds of irrelevance after a whispered conversation with his lawyer will be obvious to anyone. An interesting case study of just what can happen in this situation is provided by Arthur Miller's contempt hearing. Mr. Miller's testimony before the passport investigation of the Un-American Activities Committee was an eloquent presentation of his personal beliefs which won him the praise of even 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 back 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 went on to say, following a whispered conversation with counsel, that "my counsel advises me that there 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 and the witness 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 to me that Mr. Miller did pretty 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 hadn't objected to the relevance of the first of the two questions because he said "this question" rather than "these questions." Believe it or not, the prosecution persuaded the District Judge to so hold, 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 for want of a proper direction to answer by the Committee, without reaching the point at issue here.

LAWYER HAMSTRUNG BY COMMITTEE

Lawyers not familiar with, and reconciled to, their feeble role at Committee hearings sometimes run into trouble. A subcommittee of the Senate Internal Security Subcommittee, in the person of Senator Eastland, was holding a hearing in New Orleans. John P. Kohn, a distinguished attorney from Montgomery, Alabama, appeared as counsel for a witness from Montgomery. Early in the course of the hearing, Mr. Kohn arose and asked the chairman if he would be allowed to cross-examine a witness who had accused his client. Then, according to the reporter from the *Montgomery Advertiser* who was covering the hearing, the chairman "frowned and growled that he had 'no intention of standing still for heckling during this hearing; it is unheard of for a witness before a congressional committee to be cross-examined. It will not be done here.' When Kohn pressed for an idea of the 'ground rules' for the investigation, Eastland snapped: 'I will decide those as we go along and announce them when I desire. Sit down, sir. You are out of order'."

Before the McClellan (Labor-Management) and Harris (Legislative Oversight) Committees, which are the other two investigative committees most in the public eye today and which have allowed counsel wider scope of representation than the committees just mentioned, a lawyer is still not permitted to make opening or closing arguments, to put on his case as he deems best, to object to questions, or to cross-examine witnesses. The rules of the McClellan Committee expressly permit, and the Harris Committee would also undoubtedly permit, counsel to suggest to the Chairman that he put certain questions to the witness, but this is hardly a substitute for cross-examination. Even with the best of intentions on the part of the chairman—which is hardly to be expected towards a person under investigation by him—a question loses its impact when read haltingly by the chairman, and the follow-up counsel had in mind will seldom if ever be made.

LAWYER PLAYS MANY ROLES

Though a lawyer cannot give full representation before a congressional committee, he is not without value to his client. Actually a lawyer before a Congressional committee plays many roles—he might be described as part lawyer, 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. The Washington lawyer, apparently thinking of the bad public relations involved in Mr. Goldfine's refusal to answer questions and particularly the bad public relations effect which a contempt citation would have on his client and the Administration, urged Mr. Goldfine to answer all questions of conceivable relevance. 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 the client to refuse to answer in cases where the relevance was not abundantly clear. Telling the Committee about his activities with the East Boston Company might very well have interfered with Goldfine's business affairs, increased his SEC troubles and weakened his defense in one or more lawsuits. Because of this and to the dismay of his Washington counsel, Mr. Goldfine settled the conflict by refusing to answer a number of questions and getting himself cited for contempt, with all the public obloquy that goes with both of those things. Ordinarily witnesses before an investigating committee cannot afford two sets of lawyers—one with an eye towards public relations, the other looking out for business affairs. Most witnesses have just one lawyer; the conflict goes on inside, which may explain the high ulcer rate of Washington attorneys.

The role of the lawyer, the friend and the public relations counsellor may all be present right at the outset of the hearing. Walking into the hearing room of the Senate Internal Security Subcommittee with a United Automobile Workers organizer, I saw my client blanch at the sight of the television and movie cameras. In a halting voice he told me 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. I knew that if he ever came forward and sat down in the witness chair, plenty of feet of film would be taken before we could get the cameras shut off. When my client's name was called by the Committee Chairman, I 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 we were simply

exercising rights which we believed to be ours.¹ Yet the Chairman and his counsel were not easily so persuaded, and an unpleasant colloquy resulted. We held our 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 he bring his client to the witness stand. They probably don't care, but I understand that the girl had a lovely time at her graduation dance.

LAWYER 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, Mr. 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 FCC on his behalf. The leader of the attack on 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 pretty black for Mr. Katzentine until his resourceful counsel, Paul A. Porter, himself a former FCC Chairman, turned up with a copy of a letter from Congressman Wolverton to the Commission in another case doing exactly what he had condemned in Mr. Katzentine. While most lawyers cannot hope to emulate Mr. Porter's feat in producing the clincher, there is always much preparation to be undertaken in reviewing earlier hearings and in outside investigation.

LAWYER AS POLITICIAN

What the lawyer does as politician is, of course, quite obvious. He tries to persuade friendly members of the Committee, if any, to attend the hearing and give his client a little protection by timely interruption with a kind word or question; he tries to explain his client's case in advance to any member who may not yet have committed himself and to persuade him to take his client's side at the hearing. 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 came out best on a given hearing day often turned 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 backed him up in no uncertain terms. Senator Curtis clearly came off second best 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 then testifying came off second best when he engaged in a heated colloquy with the Senator on this matter. When the judges sit in panel with political and economic representation, it is a good idea to have your side present.

I recall, too, the case of a Quaker lady I escorted to an Executive Session of the old McCarthy Committee. She assured me 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 real force and violence. We 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, we were able to persuade two of the fairest members of the committee to attend the hearing and make sure she was not browbeaten. As soon as the hearing opened, Mr. Cohn asked my client if 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

¹United States v. Kleinman, 107 F. Supp. 407 (D.D.C. 1952).

the Chairman and his counsel. Chairman McCarthy took over; he repeated the question whether she had ever resided at the designated address and, upon receiving another negative response, he asked her the old standby 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 he thought 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. The presence of a friendly Senator ended the hearing without her being forced to reveal this unpleasant and long-abandoned association.

Incidentally, cases of mistaken identity like the one of the Quaker lady are not so 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 First Amendment. After this, the Committee not only questioned the unintended victim at some length but went on to cite him for contempt. The trial judge convicted Shelton and sentenced him to six months in jail, accepting the Government's contention that a Congressional committee can even call a man off the street without any probable cause whatever and ask him questions of the type Shelton refused to answer. Shelton's appeal is pending and meanwhile he worries about a prison sentence based on an accident.² The only thing for a lawyer to do with a case of mistaken identity is get to the committee ahead of time and urge them to kill the subpoena; once the

witness is in the committee room anything may happen.

PUBLIC RELATIONS COUNSELLOR

I don't suppose one need say too much about the role of the lawyer as public relations counsellor. Ordinarily one's client isn't Mr. Goldfine and doesn't have the money to hire a model as a receptionist, Tex McCrary for prestige, and a raft of others for diversion, so the lawyer must take on this function, 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; so the method of presentation of a given point may be determinative.

Take the case of distinguished playwright Lillian Hellman. She was perfectly willing to tell the Committee everything she had ever done, but she was unwilling to inform on others with whom she had associated many years before. 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 contempt. What she wanted to do was to let the public know that she had nothing to hide personally but was unwilling to turn informer on people she did not believe had ever been disloyal to our country. So Miss Hellman wrote the Un-American Activities Committee a respectful letter offering to waive her privilege against self-incrimination and tell all about herself, if only the Committee would refrain from demanding the names. The Committee responded with a curt rejection. When Miss Hellman appeared before the Committee and they began asking questions about her past, she promptly referred to her letter. The Chairman of the Committee 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 Hellman was exercising her privilege against self-incrimination, the press was reading the exchange of letters which we handed out while she talked. For once the charging party, the Committee, did not get the headlines. The eloquence of Miss Hellman's explanation of her inability to bring bad trouble to others outranked her plea of the Fifth Amendment in the minds of the reporters present.

Sometimes committee hearings become multiple public relations contests. The McClellan Com-

² *United States v. Shelton*, 148 F. Supp. 926 (D.D.C. 1957). An appeal is pending.

mittee 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 violence on the UAW, and the efforts of Senators Goldwater, Mundt and Curtis to utilize the hearing as a springboard for partisan 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, and then the Committee put on ten Kohler witnesses who testified to individual acts of vandalism. A union official was then called to testify as to the steps taken by the UAW to prevent vandalism. Just when he seemed to be getting through to the press on this point, Senator Mundt interrupted to read an editorial from the Detroit Free Press charging 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 me the floor; I stated categorically that the article was false and that if the Senator would waive his privilege and repeat the newspaper's charge, we would most assuredly sue him. Senator Mundt seemed nonplused, 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, the third Republican Committee member, brought out in blunt terms the fact that the union witness had lived as man and wife with his then present wife prior to their marriage. And so on into the next edition's headline.

Mr. Lyman Conger, the lawyer and chief spokesman for Kohler, was not to be outdone in this torrid public relations battle. Unwilling to rely entirely upon his spokesmen on the Committee, he became quite an artist in diversionary tactics himself. 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. Somehow Mr. Conger forgot to tell the Committee that Mr. Mazey had 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.

STRICTLY LEGAL ROLE

What has gone before on 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 hasty look at this role may be of interest.

Counsel can "horseshed" his witness much as he would prepare for a criminal trial. If the witness is to be a "friendly" one, a lawyer 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 beforehand in refreshing his recollection, helping him clear up in his mind things that he is psychologically anxious to forget, and 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 with impunity 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 Judge at the contempt trial a year or two later, a plea of the Fifth Amendment is of no avail. Consequently, the lawyer must make sure that the plea is not invoked until the questions reach the incriminating level. This has been made somewhat easier by the recent tendency of the courts to stretch the Fifth Amendment to 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 Amendment when asked to state his residence,³ was summarily reversed upon confession of error by the Solicitor General.⁴

But, just as counsel has to be careful about not

³ *Simpson v. United States*, 241 F. 2d 222 (9th Cir. 1957).

⁴ *Simpson v. United States*, 355 U.S. 7 (1957).

letting his client plea the Fifth Amendment too early, he has to be equally careful that he not plead it too late. The right to claim the Fifth Amendment is waived by the admission of guilt or incriminating facts. As the Supreme Court put it in *Rogers v. United States*,⁵ "Disclosure of a fact waives the privilege as to details." The Court there held that a witness who admitted to the holding of office in the Communist Party could not invoke the Fifth Amendment when asked to identify her successor in office, as the answer to that question would not subject her to any real danger of further incrimination. Following this decision, the Court of Appeals in the District of Columbia held that a Cornell professor who admitted past participation in a Marxist discussion group waived his right to plead the Fifth Amendment when asked whether persons identified as long-time Communists had attended these meetings.⁶ Dave Beck's lawyers may not have been as 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. Thus, Frank Costello's general denial of wrongdoing did not bar him from pleading the Fifth Amendment when asked about specific criminal acts.⁷ Had some of the lawyers before the McCarthy Committee understood this rule a little better, it might have been harder for the Senator to have pulled off one of his favorite tricks. Very often, once a witness pleaded the Fifth Amendment on his relationship with Communism, Senator McCarthy would ask the witness whether he had ever committed espionage or sabotage. Afraid that a denial might constitute⁸ a waiver, lawyers very often had witnesses plead the Fifth Amendment to this question. Senator McCarthy would then pounce on this plea and lay claim to the catching

of 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.⁸

Another major area of legal assistance is on the issue of pertinence. Questions may be outside the authority of the Committee or not pertinent to the subject under inquiry at the particular moment. The lawyer will have to make a fast judgment on both authority and pertinence; in making this judgment he should recognize that the Committees themselves will seldom accept the answer that a question is unauthorized or irrelevant. As Mr. Goldfine so well knows, the Committee resolves doubtful issues of pertinence against the witness. To stand on a pertinence objection is to invite indictment, and, while the recent record of the committees in the courts is poor indeed, a lawyer who tells his client to plead lack of pertinence is asking for a federal case.

So much for the art, if it can be called one, of representing a witness before Congressional committees. I hope there are a few trade secrets left as this is pleasant work for one who enjoys combat. The odds are all with the investigators, but the tide can be turned, as Walter Reuther so beautifully demonstrated. He successfully defended the obvious public-mindedness of the United Automobile Workers 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 chief investigator of the Committee, was called as a witness by the Committee staff, and he testified as to the complete integrity and excellent condition of the UAW's books and of Mr. Reuther's own affairs. 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 for this once, been totally routed by the investigated.

⁸ *United States v. Hoag*, 142 F. Supp. 667 (D.D.C. 1956).

⁵ 340 U. S. 367, 373 (1951).

⁶ *Singer v. United States*, 244 F. 2d 349 (D.C. Cir. 1957), *rev'd on other grounds on rehearing*, 247 F. 2d 535 (1957).

⁷ *Costello v. United States*, 198 F. 2d 200 (2d Cir. 1952).