

A court of appeals, adopting the above reasoning, established a procedure which requires a committee to propound a question, hear the refusal, rule that the refusal to answer is not satisfactory, and then, in time to allow an opportunity for answering, repeat the question to enable the witness either to purge himself and answer or stand on his original refusal to answer.⁽⁶⁾ A contempt conviction, it has been said, cannot stand if a committee leaves a witness to speculate about the risk of possible prosecution and does not give him a clear choice between standing on his objection or complying with a committee ruling.⁽⁷⁾ However, it has been further indicated that a conclusive presumption of intent to violate the statute might attach to a refusal even where that refusal was made without a statement at the time of the reason therefor.⁽⁸⁾

§ 8. —Procedural Regularity of Hearings

A committee's failure to observe House rules or its own committee

6. *Quinn v United States*, 203 F2d 20, 33 (D.C. Cir. 1952), aff'd., 349 U.S. 155 (1955).
7. *Bart v United States*, 349 U.S. 219, 223 (1955); *Emspak v United States*, 349 U.S. 190, 202 (1955).
8. *Quinn v United States*, 203 F2d 20, 33 (D.C. Cir. 1952), aff'd., 349 U.S. 155 (1955).

rules has been held to constitute a ground to reverse convictions for contempt or perjury. Whether a committee has complied with such rules became easier to ascertain after the House, on Mar. 23, 1955, adopted the Code of Fair Procedures which established certain procedural rights for witnesses and provided that "the Rules of the House are the rules of its committees and subcommittees so far as applicable. . . ." ⁽⁹⁾

As an example of the requirement of compliance with procedural rules, a witness' conviction under a District of Columbia statute ⁽¹⁰⁾ which defined perjury as making false statements before a competent tribunal was reversed by the Supreme Court because the government at trial did not adduce evidence showing that a quorum of a committee was present when the statements alleged to be false were made.⁽¹¹⁾

9. The quotation is taken from Rule XI clause 27(a), *House Rules and Manual* § 735 (1973). See § 13.1, *infra*, for a discussion of adoption of the Code of Fair Procedures. See also § 15, *infra*, dealing with a related topic, the procedure for determining whether information may tend to defame, degrade, or incriminate a person.
10. 22 D.C.C. 2501 (Mar. 3, 1901).
11. *Christoffel v United States*, 338 U.S. 84 (1949).

But presence of a quorum of the committee at the time of the return of the subpoena was held not to be necessary for conviction under the contempt statute, 2 USC §192, for refusal to produce organizational records despite the fact that the witness could have demanded attendance of a quorum and refused to produce documents until a quorum appeared.⁽¹²⁾

A witness' objection or failure to object may affect the validity of an argument at trial. Although the witness' failure to object to the absence of a quorum was considered and did not waive his right to raise that objection at trial in *Christoffel v United States*,⁽¹³⁾ the witness' failure to make the objection at the hearing when the situation could have been remedied was considered a reason to reject this contention at trial in *United States v Bryan*.⁽¹⁴⁾

12. *United States v Bryan*, 339 U. S. 323 (1950).

13. See 338 U.S. 84, 88 (1949), for the statement of the majority that, "In a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one for petitioner to raise the question."

14. See 339 U.S. 323, 333 (1950) in which the majority stated:

"The defect in the composition of the committee, if any, was one which could easily have been remedied. But the committee was not informed until the trial, two years after the

In another contempt case, a court of appeals following *Bryan* held that a defendant who had been convicted of failure to answer questions before a congressional committee could not, on appeal, contend that a one-man subcommittee was not valid, inasmuch as he had failed to make the objection at the congressional hearing.⁽¹⁵⁾

refusal to produce the records, that respondent sought to excuse her non-compliance on the ground that a quorum of the committee had not been present. . . . To deny the committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes."

The different treatment of the same issue, timeliness of the objection, was explained by the majority as a consequence of the fact that the contempt statute considered in *Bryan*, 2 USC §192, did not require a "competent tribunal" but the D.C. perjury statute reviewed in *Christoffel* did. This distinction was criticized by Mr. Justice Jackson who commented in a concurring opinion, ". . . I do not see how we can say that what was timely for *Christoffel* is too late for *Bryan*." (*Bryan*, at 344.)

See also, *United States v Fleischman*, 339 U.S. 349 (1950); reh. denied, 339 U.S. 991 (1950), for another contempt case which held that the witness had waived the objection.

15. *Emspak v United States*, 203 F2d 54 (D.C. Cir. 1952); reversed on other grounds, 349 U.S. 190 (1955).

A subcommittee's initiation of an investigation of Communist Party activities in labor, without obtaining authorization from a majority of the full committee as required by committee rule, was held in another case to constitute a ground to reverse a contempt conviction for refusal to answer questions.⁽¹⁶⁾

§ 9. Rights of Witnesses Under the Constitution—Fifth Amendment

In addition to meeting the requirements imposed by the contempt statute, discussed in preceding sections, congressional investigators must observe limits imposed by the Bill of Rights, particularly the first,⁽¹⁷⁾ fourth,⁽¹⁸⁾ and fifth amendments:

Both the *Bryan* and *Emspak* cases predated Rule XI, clause 28(h), which provides that, "Each committee may fix the number of its members to constitute a quorum for taking testimony and receiving evidence, which shall be not less than two." *House Rules and Manual* §735(h) (1973); this clause, numbered 27(h) at the commencement of the 93d Congress 1st Session, was numbered 28(h) at the end of that session. See §13.3, *infra*, for a discussion of adoption of this rule.

16. *Gojack v United States*, 384 U.S. 702 (1966).

17. See § 10, *infra*.

18. See § 11, *infra*.

The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.⁽¹⁹⁾

The most extensive litigation has involved the fifth amendment. Availability of the privilege against self-incrimination in congressional investigations was established in 1879 when the House adopted a Judiciary Committee report stating that the fifth amendment provision, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." could be invoked by a person in an investigation initiated with a view to impeach him, notwithstanding the fact that a congressional investigation is not a "criminal case."⁽²⁰⁾ Because the government

19. *Watkins v United States*, 354 U.S. 178, 188 (1957). See also Liacos, Rights of Witnesses before Congressional Committees, 33 B.U.L. Rev. 337 (1953).

20. See 3 Hinds' Precedents §§ 1699 and 2514, for discussions of the refusal of George C. Seward, former Counsel General at Shanghai, China, to testify or produce subpoenaed materials. See also, Moreland, Allen B., Congressional Investigations and Private Persons, 40 So. Cal. L. Rev. 189,