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CONSTITUTIONAL LAW--FIFTH AMENDMENT--PRIVILEGE AGAINST SELF-INCRIMINATION BY ADMISSION OF OCCUPATION AND OF KNOWLEDGE OF WHEREABOUTS OF A FUGITIVE WITNESS

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CONSTITUTIONAL LAW—FIFTH AMENDMENT—PRIVILEGE AGAINST SELF-INCRIMINATION BY ADMISSION OF OCCUPATION AND OF KNOWLEDGE OF WHEREABOUTS OF A FUGITIVE WITNESS—Petitioner, who was known as an underworld character and racketeer, was subpoenaed before a federal grand jury investigating federal crime and rackets and was asked his occupation and business and whether he had seen, talked to, or knew the whereabouts of a certain person upon whom a subpoena had been issued but not served requiring such fugitive person to appear before a federal grand jury. He refused to answer on the ground of the constitutional privilege against self-incrimination.[1] Petitioner was adjudged in contempt of court for refusal to answer the questions. The court of appeals affirmed the judgment[2] and the Supreme Court granted certiorari.[3] *Held,* judgment reversed. Petitioner could sense the peril of prosecution and therefore had the right to assert his constitutional privilege of refusing to answer. *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814 (1951).

The privilege against self-incrimination includes proceedings before a grand jury.[4] The privilege includes not only evidence showing elements of the crime, but also evidence from which the law-enforcement agencies might be led to investigate and find other evidence of the crime.[5] In our early constitutional history, in the *Burr* case,[6] rules were laid down for determining when a witness could refuse to answer on constitutional grounds. A direct answer was held to be incriminating if the answer was a necessary and essential fact which would

[1] U.S. CONST., Amend. V.: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[2] United States v. Hoffman, (3d Cir. 1950) 185 F. (2d) 617.

[3] Hoffman v. United States, 340 U.S. 946, 71 S.Ct. 532 (1951).

[4] ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 801 (1939); Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195 (1892).

[5] Blau v. United States, 340 U.S. 159, 71 S.Ct. 223 (1950).

[6] United States v. Burr (In re Willie), 25 Fed. Cas., No. 14,692e (1807).

form a link in the chain of testimony which would be sufficient to convict him; but he could not refuse to answer if a direct answer to the questions asked would not tend to incriminate him, even though answers to subsequent questions might do so.[7] In the principal case the questions asked petitioner would, in the opinion of Justice Clark and the majority of the Supreme Court, have disclosed facts likely to forge links in a chain of facts sufficient to convict him of a federal crime. Although the answers to the questions asked Hoffman would not have imperiled him more than the answers to the questions asked in the *Burr* case, the holding is the logical result of the more modern cases on self-incrimination, in which emphasis is placed on the probability of association with others suspected of criminal activity.[8] The Supreme Court has recently remanded a case to the court of appeals for reconsideration in the light of the principal case; although the facts were similar, the witness did not show that he had a past record of criminality, and the likelihood of association with the fugitive witness was even less than that in the principal case.[9] This suggests that the mere possibility of association may be sufficient to sustain the privilege. Justice Reed dissented in the principal case and agreed with the majority holding of the lower appellate court.[10] The court of appeals unanimously felt that answers to the questions as to the fugitive witness's whereabouts would not have differentiated Hoffman from a considerable number of blameless people and that the questions were not sufficiently related to possible punishment for obstructing justice to permit Hoffman to refuse to answer them. But the court of appeals split on the question of Hoffman's occupation, the majority feeling that although a direct answer to the question could have incriminated him, nevertheless, he had not given the trial court any information which would allow it to rule intelligently on the claim of privilege. The writer submits that the test laid down by the Supreme Court may be necessary as applied to cases involving political beliefs, in a period of political tension in which loyalty oaths and investigations of loyalty flourish and in the light of the extension of the doctrine of waiver of the constitutional privilege;[11] nevertheless, since many witnesses brought before grand juries do

[7] Camarato v. United States, (3d Cir. 1940) 111 F. (2d) 243, cert. den. 311 U.S. 651, 61 S.Ct. 16 (1940); In United States v. Burr (In re Willie), supra note 6, Chief Justice Marshall said that the question, "Do you understand the contents of that paper?" was not a question which the witness could refuse to answer, since the answer could only mean that he presently understood the ciphers, and not that he had understood it during the time the alleged crime was taking place. The writer believes that the same might be said of the questions asked Hoffman, other than those relating to his occupation.

[8] Blau v. United States, supra note 5; Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951).

[9] United States v. Greenburg, (3d Cir. 1951) 187 F. (2d) 35, cert. granted 341 U.S. 944, 71 S.Ct. 1013 (1951).

[10] United States v. Hoffman, supra note 2. The court of appeals split on whether or not the trial court should have taken judicial notice of the fact that some of the witnesses summoned before the grand jury live by activity prohibited by federal criminal law and that Hoffman might be in this class of persons. The majority of the court of appeals felt that the trial court was correct in not considering it.

[11] See the dissent of Justice Black in Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951).

have criminal records, and since any witness might be hiding a fugitive witness, the rule established by the Supreme Court tends to hinder the law-enforcement agencies. The interest of the public in the testimony of its citizens in investigations of ordinary crimes is not sufficiently protected when a witness may refuse to answer ordinarily innocuous questions on the ground that he may be implicated in a federal crime by acquaintance with another person merely suspected of a federal crime.

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