

## THE PRIVILEGE AGAINST SELF- INCRIMINATION FROM JOHN LILBURNE TO OLLIE NORTH

*Joseph L. Rauh, Jr.\**

In the 200th anniversary year of the Constitution, inadequate attention was paid to the turbulent history and current application of the fifth amendment privilege that no person "shall be compelled in any criminal case to be a witness against himself . . ." This ecumenical provision has been invoked over the years by such differing groups as the Communists and their fellow travellers and dupes, Iran-Contra superpatriots, crooked business and government leaders, and almost anyone else caught up in the tolls of the law. Yet, even the diversity of those benefitting from the privilege and its ancient and honorable roots have too often failed, in periods of domestic stress, to persuade judges of its importance. A little history of this much maligned and often ignored constitutional provision might be both timely and useful.

Some historians trace the prohibition against self-incrimination all the way back to Magna Carta. Although largely a struggle between King John and the English barons, Magna Carta contained this lofty if somewhat vague provision: "No free man shall be taken or imprisoned or dispossessed . . . except by the legal judgment of his peers or by the law of the land." But more commonly the privilege against self-incrimination is traced back to the seventeenth-century Leveller Movement and its hero Freeborn John Lilburne.

Following a trip to Holland in 1637, Lilburne was arrested on suspicion of importing "factious and scandalous books" into England. When the authorities and the Star Chamber tried to interrogate him, he asserted what he claimed with more certainty than precedent was the right of a freeborn Englishman not to accuse himself. Whippings, the pillory, imprisonment, massive fines could neither force answers from his lips nor silence his eloquence against "crimination." He finally was vindicated and released from prison at the direction of the Long Parliament; his role as national hero was confirmed by a substantial indemnity ordered by the House of

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\* Member of the Supreme Court and D.C. Bar; civil liberties and labor lawyer.

Lords. As Dean Erwin N. Griswold made clear in his bold and brilliant tract in the 1950s, “[T]his event seems to have been enough to establish the privilege against self-incrimination as a part of the common law . . . and [it] came to this continent as a part of the legal heritage of our early settlers.” When the demand for a Bill of Rights arose with the drafting and ratification of the Constitution two centuries ago, the privilege against self-incrimination was included in the fifth amendment, thus buttressing the presumption of innocence and placing the burden of proving guilt upon the government. But the privilege’s inclusion in the Constitution was more tranquil than its life since.

The fifth amendment privilege against self-incrimination, like the other provisions of the Bill of Rights, was of course only applicable against the new federal government. Even after the Supreme Court began interpreting the fourteenth amendment’s “due process” clause as incorporating substantial segments of the Bill of Rights like the first amendment, the privilege against self-incrimination was not given that lofty status. As late as 1937, Justice Benjamin N. Cardozo, certainly one of the greatest and most liberal judges in our entire legal history, found the privilege not “so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief . . . and who would limit its scope, or destroy it altogether.” I was Justice Cardozo’s law clerk at the time; the only defense I can make fifty years later is a combination of hero worship and my own plea of self-incrimination. It was not until 1964 that the privilege became binding upon the states.

Likely the worst storm to engulf the fifth amendment came in the wake of World War II with the anti-Communist hysteria that followed the nation’s disillusionment with its Soviet wartime ally. The House un-American Activities Committee (“HUAC”) set its sights on exposing to public view Communists and their fellow travellers in all walks of life. One of HUAC’s first targets was the motion picture industry. The Committee subpoenaed ten screenwriters, promptly dubbed the Hollywood 10, who balked at answering questions about Communist affiliations. Recognizing the public hostility to a plea of self-incrimination, the Hollywood 10 based their refusal upon the rights of silence and privacy of thought which they extrapolated from the first amendment. The lower courts, however, rejected these contentions and the Vinson Supreme Court refused to review the case.

The jail terms served by John Howard Lawson, Dalton

Trumbo and their associates would almost certainly have been avoided by a timely plea of self-incrimination. The same year that the Supreme Court refused to review the Hollywood 10's unsuccessful reliance upon the first amendment (1950), the Court upheld the plea of self-incrimination against questioning concerning Communist activities or affiliations when the witness's answers "would have furnished a link in the chain of evidence needed in a prosecution . . . for violation of (or conspiracy to violate) the Smith Act."

These actions of the Supreme Court forced reliance upon the fifth rather than the first amendment where a congressional committee witness was unwilling to reveal Communist ideology or affiliations. The consequences extended far beyond the imprisonment of the Hollywood 10. Communist-hunters, with the late recruit Senator Joseph McCarthy leading the charge (he joined the pack in 1950), labelled those who invoked the privilege "Fifth Amendment Communists." For at least a large segment of the public, the plea of self-incrimination turned into an admission of Communist ideology or even subversion. The congressional investigating committees wanted little more from the witnesses before them than pleas of the fifth amendment; even when a witness made clear in executive session or otherwise that he would plead the privilege rather than furnish information, the committee would hold a public session to expose him as a "Fifth Amendment Communist."

There were, of course, reasons why a witness might plead the fifth amendment that were both nonincriminating and honorable. Playwright Lillian Hellman asked me to represent her when she received a subpoena from HUAC in 1952. She told me that she was quite willing to tell all about her own political affiliations and activities. She hated the idea of pleading the fifth amendment. But she also said she was unwilling to testify concerning the affiliations and activities of others, and she did not think she was the kind of person who could serve a prison sentence. This created a considerable legal dilemma not only for Miss Hellman, but for many like her who were willing to testify about themselves but unwilling to "name names" or invite a jail term.

The reason for her dilemma was a Supreme Court ruling that a person who tells about, and thus incriminates, herself "waives" the privilege in various ways, including testifying about others. Thus, if Miss Hellman testified about herself, she could not invoke the privilege as to others and would be faced with the unacceptable alternatives of naming names or a prison sentence. In this situation, Miss Hellman wrote HUAC that she had "nothing to hide from your Committee" and was willing to testify before the Committee "as to

my own opinions and my own actions . . . .” Since this would waive her privilege against self-incrimination (a privilege she legally had), she asked HUAC to agree not to force her to answer questions about others. “I cannot and will not,” she wrote, “cut my conscience to fit this year’s fashions . . . .” The Committee haughtily rejected the proposal. While Miss Hellman was pleading the fifth amendment, the press was reading the letter we distributed in the Committee room. Miss Hellman and I had agreed that victory or defeat would be measured by whether the headlines the next day pitched the story on her refusal to name names or her plea of the fifth amendment. We won!

A much easier client was playwright Arthur Miller, who received his HUAC subpoena four years later, apparently because the Committee thought a little Marilyn Monroe publicity would not hurt. (Miller and Monroe were engaged at the time.) Rejecting any fifth amendment plea, Mr. Miller testified all about his own activities and then bluntly refused to name names, thus inviting the indictment for contempt of Congress which followed in due course.

Arthur Miller had a perfect first amendment case; the Committee asked him all about his past beliefs, expressions, and associations; interrogated him in detail about his plays; and went so far as to question him repeatedly about his criticisms of HUAC. But the court of appeals, ducking the first amendment issue, found a technical defect in the Committee’s procedures as a reason for acquitting Mr. Miller. So his truly noble effort to vindicate first amendment rights in the face of the Hollywood 10 defeat went by the boards.

I participated in one more “fifth amendment” case from the McCarthy-HUAC period that may be worthy of mention—that of United Auto Workers organizer John Watkins. Charges of “Fifth Amendment Communist” were blackening not only the individuals that they were made against but the organizations in which they were involved. Walter Reuther, President of the UAW and himself a champion of civil liberties, felt duty-bound to inform the entire UAW staff that they could not plead the fifth amendment and retain their jobs. He promised UAW legal assistance to any staff member resisting an investigating committee in other ways. Watkins told me he had “wanted to take the Fifth” but needed his job. Accepting the UAW directive, he told HUAC all about his own Communist activities, but refused to name others without a court order directing him to do so. In a landmark opinion by Chief Justice Earl Warren, the Supreme Court put strict limits on the activities of congressional investigating committees. It is not unlikely that the *Wat-*

*kins* decision saved many a potential witness from subpoena and the obloquy of "Fifth Amendment Communism."

One final assault on the privilege against self-incrimination—compelling testimony by grant of immunity from prosecution—has current relevance in the Iran-Contra scandal. As Dean Griswold pointed out, the Latin maxim for the privilege was, from its inception, "*Nemo tenetur prodere se ipsum*"—or, in English, "No one should be required to accuse himself." This lends support to those, like Justice William O. Douglas, who argued that the fifth amendment grants a "federally protected right of silence." But that is not the law. The Supreme Court has in effect reduced the privilege from not having to *accuse* oneself in a criminal matter to not having to give evidence that will help *convict* oneself.

One would have thought that, at a minimum, if witnesses are to be compelled to testify and accuse themselves under a grant of immunity, they would at least receive full immunity from the entire matter about which they were compelled to testify ("transactional immunity"). Indeed for a long time nothing less than transactional immunity was deemed to satisfy the requirements of the fifth amendment. But in 1970, as part of the Richard Nixon-John Mitchell war on crime, Congress limited immunity to a bar on the use of that testimony or evidence derived from it ("use immunity"). No matter that the question whether the prosecutor used tainted evidence will always be peculiarly within his own knowledge or that of some staffer. No matter that the potential defendant will almost certainly disclose his defenses during his compelled testimony, which will advantage the prosecution in various ways at trial. The Supreme Court still could find nothing wrong with compelling testimony from a potential defendant with only a limited grant of immunity to protect his fifth amendment privilege.

Some of the pro-fifth amendment civil libertarians of the McCarthy era, rather surprisingly, demanded the compelled testimony of John Poindexter and Oliver North. One such civil libertarian, himself a liberal former Supreme Court Justice, proposed that President Reagan order the Secretary of the Navy to bring general court-martial proceedings against active-duty officers Poindexter and North, so that compelled testimony under limited use immunity could be expedited. A leading advocate against McCarthyism argued that "the national interest prevails over a soldier's personal considerations" so Poindexter and North "have no valid basis other than personal advantage for invoking their constitutional privilege." Equally surprising, one of the nation's most respected, long-time columnists went so far as to suggest a non-immunity "simpler

way”: Just have the President call in Poindexter and North and “ask them for the facts of what they did and who authorized it.”

Independent counsel Lawrence Walsh may have seen the situation most clearly. His earlier requests for delay in the grant of use immunity to North and Poindexter are easily understood; he wanted to have his criminal cases buttoned up before immunity became effective. But he went further and argued against the committees giving the leading figures in the investigation any immunity at all and even directed his staff not to watch the hearings. Quite likely Walsh sensed the danger that making North and Poindexter disclose the facts as they know them, including their defenses, may finally be too much for the courts to swallow. After all, no one would suggest Walsh could put his case together as he did, and then haul North and Poindexter before a grand jury under use immunity. Is it really any different if the committees do it for him? Could the testimony of North and Poindexter really be totally unknown to Walsh and his staff today? Will it remain unknown to them during the trials to come? If the national interest supported requiring North and Poindexter to testify before the committees, as I believe it did, then there is a serious question whether the fifth amendment permits them to be tried thereafter.

The fifth amendment has been the cutting edge of the Bill of Rights for two centuries. It is our recognition of the dignity of every human being that he need not accuse or incriminate himself but rather that the government must prove its case against any accused, high or low. Though it measures the degree of our civilization, the privilege has not always received the support of those who purport to hold high the banners of freedom. “It seems to me,” as it did to Joseph Welch, that bold spirit of the McCarthy era, “in this lovely land of ours there is no problem we cannot solve, no menace we cannot meet, nor is it in any sense necessary that we either surrender or impair any of our ancient, beautiful freedoms.”