IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1950

JANE ROGERS, Petitioner, vs. UNITED STATES OF AMERICA	No. 20
IRVING BLAU, Petitioner, vs. UNITED STATES OF AMERICA	No. 21
PATRICIA BLAU, Petitioner, vs. UNITED STATES OF AMERICA	No. 22

Washington, D. C.

Tuesday, November 7, 1950

WARD & PAUL

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WASHINGTON, D. C.

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JANE ROGERS,

Petitioner,

vs. No. 20

UNITED STATES OF AMERICA

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IRVING BLAU,

Petitioner,

vs. No. 21

UNITED STATES OF AMERICA

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PATRICIA BLAU,

Petitioner,

vs. No. 22

UNITED STATES OF AMERICA

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Washington, D. C.

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The above-entitled causes came on for oral argument at 1:00 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Reed, Frankfurter, Douglas,

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Jackson, Burton and Minton.

APPEARANCES:

On behalf of the Petitioners:

SAMUEL D. MENIN,
614 E. and C. Building
930 17th Street
Denver, Colorado

On behalf of The United States of America:

PHILIP B. PERLMAN,
Solicitor General.

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PROCEEDINGS

The Chief Justice: No. 20, Jane Rogers versus United States of America, No. 21, Irving Blau versus United States of America, No. 22, Patricia Blau versus United States of America.

ARGUMENT ON BEHALF OF PETITIONERS

By Mr. Menin

Mr. Menin: May it please the Court, this is a proceeding which arose in Denver, where the petitioners were subpoenaed to appear before a Grand Jury and were questioned relative to their activities, associations, and membership in the Communist Party.

These proceedings concern three of the petitioners. Originally there were seven petitioners. In regard to one of the petitioners, or one of the witnesses, the case was reversed in the Court of Appeals, and three other petitioners' cases were moot, and for that reason the court denied certiorari as to those cases.

The cases now before the Court concern Jane Rogers, Irving Blau, and Patricia Blau. At the time of the investigation the purpose of the investigation was never revealed to the petitioner when they were witnesses before the Grand Jury or to anyone else who was connected with the proceeding.

In its decision in the Court of Appeals, however, the court referred to certain presentments which were filed only in the cases of the petitioners whose cases were moot where certiorari

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was denied. Nevertheless, the Court of Appeals in its decision apparently found the petitioners who are now before the Court with knowledge of the contents of the presentments, the fact being, however, that the presentments were not filed until some three weeks after these petitioners were already found guilty of contempt.

The petitioner, Irving Blau, refused to answer any questions concerning membership or activity in the Communist Party, and likewise did the petitioner, Patricia Blau, basing their refusal to answer on the ground that the answers might tend to incriminate them.

They at that time made a showing to the court that there was pending in New York 12 indictments against the leaders of the Communist Party. There was also pending at that time in New York the conspiracy indictment against all of the leaders of the Communist Party.

The court rejected the contention of the defendants or the petitioners at that time, stating that to be a member of the Communist Party was not a crime and, therefore, it was necessary that the petitioners answer the questions before the Grand Jury; that notwithstanding the fact that the showing was made that the petitioners, that members of the Communist Party were indicted, and that the court itself had recognized that such indictments existed -- in the record the court made this statement at the time of sentencing some of the petitioners:

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"This indictment, Mr. Menin, is for violation of Sections 10 and 13 of Title 18 of the United States Code, and the charge simply is that the defendant is a member of the Communist Party."

Now we contend that when we made the showing that the Communist Party or members of the Communist Party were being indicted and charged with an offense under the Smith Act, that to ask these petitioners whether or not they were members of the Communist Party was to seek from them testimony which would make them the potential victims of indictments which could follow in Colorado.

Justice Reed: What indictment was the Judge talking about?

Mr. Menin: Well, at that time we showed to the court the indictment on conspiracy in New York, and the court had that. Your Honor will note on page 13 of our brief and on page 80 of the record the indictment was referred to the court and the court recognized the import of that indictment. Do you have the record, Your Honor?

Justice Reed: I have the record, yes.

Mr. Menin: On page 80 of the record, about half-way down the page.

Justice Reed: I see that. Now, is he referring to the New York indictment?

Mr. Menin: He is referring to the New York indictments and he had that indictment before him at that time.

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Justice Reed: And it is here in this record?

Mr. Menin: The indictment itself appears in the record in Case No. 22 and it also appears in this record in the cases of Bary and Kleinbord, which are the two cases which became moot.

In those cases the Government filed presentments and an answer was filed to the presentments and copies of the indictments were attached to those answers.

Justice Reed: Does it make any difference whether he was correct about that or not?

Mr. Menin: Who was correct, the court?

Justice Reed: Yes, the Judge.

Mr. Menin: It makes this difference, Your Honor. I think that if we made a showing that there was a possibility that by answering the questions the witness might be confronted with an indictment in Colorado, based on the same type of charge that the indictments were filed in New York, that we then showed a possibility of incrimination and that the witness then had the right to claim the immunity under the Constitution to refuse to answer the question on the ground that it would tend to incriminate him.

Justice Reed: That any State or the State in which the witness was or had been, if it had a law qhich said it was a crime to be a Communist -- that would be sufficient to justify the refusal?

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Mr. Menin: No, Your Honor, I would say this: That in a Federal court when we show a possibility of indictment under Federal law, the court was then bound to permit the witness to claim the immunity. I do not believe that goes so far as to make a showing that under State law if a matter was an offense --

Justice Reed: Then under Federal law you would have to show there was a Federal law that made communism a crime?

Mr. Menin: I don't think we have to go that far, Your Honor.

The Chief Justice: Mr. Menin, in regard to the Rogers case -- I assume that is the case you are arguing.

Mr. Menin: We are arguing all three cases. In regard to the Rogers case --

The Chief Justice: The question I want to get some facts on, the factual situation -- she didn't deny being a Communist. She admitted it.

Mr. Menin: That is right.

The Chief Justice: And the time when she stopped answering questions was in regard to what she had done with the books. She admitted she was secretary or secretary-treasurer.

Mr. Menin: That is right.

The Chief Justice: And she said she wouldn't say to whom she had passed the books?

Mr. Menin: Turned the books over.

The Chief Justice: Now when it comes to Irving Blau, the

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question involved there was the whereabouts of his wife.

Mr. Menin: That is one of the questions involved, and I intended to come to it.

The Chief Justice: Is there any issue there that he denied or refused to answer that he was a Communist?

Mr. Menin: Yes. In that case the court found him guilty of contempt on all of the evidence, which apparently was before the court at that time.

The Chief Justice: In the case of Patricia Blau then, you have the question right straight out and they refused?

Mr. Menin: That is right. I think we have exactly the same question in the Irving Blau case as we have in the Patricia Blau case, because in those cases Irving Blau refused to answer questions regarding activity or membership in the Communist Party. He was then asked the whereabouts of his wife. Then he stated that the whereabouts -- said, "The whereabouts of my wife is a matter that came to me by reason of a confidential communication," and refused to answer that question.

Now we think that the law is clear on that point, that all communications between husband and wife are confidential, and that the party seeking to overthrow that confidence has the burden of establishing that it was not a confidential communication. That issue only appies to the Irving Blau case and not to the other two.

Now to get back to Your Honor on the question of the answer

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made by --

Justice Black: Did the Judge say he was sending this husband to jail for refusing to tell where his wife was?

Mr. Menin: That is exactly what the Judge said.

Justice Black: Is that what he said?

Mr. Menin: Yes, that is exactly what the Judge said.

Justice Black: He had to swear where his wife was so the officers could go get her?

Mr. Menin: That is exactly what the court wanted the petitioner, Irving Blau, to do in this case. He wanted this petitioner to violate his marriage vow and disclose the whereabouts of his wife in controvention of the common law and the statutory law of the State of Colorado.

Justice Black: That wasn't the sole ground, was it?

Mr. Menin: The other ground was his refusal to answer questions regarding membership and activity in the Communist Party on the ground that the answer would tend to incriminate him.

Justice Black: You say it might have been on those grounds?

Mr. Menin: Those are the two grounds.

Justice Black: For the same reason as the others and not because he refused to tell the whereabouts of his wife?

Mr. Menin: The remarks of the court to the effect that "You have no right to refuse to tell us where your wife is," and remarks of that nature, and very definitely indicated that

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the court considered both of those grounds in finding the petitioner, Irving Blau, guilty of contempt.

Justice Black: I haven't seen yet anywhere in the record why you can say the Judge would have sent him to jail for insisting that he tell a confidential communication so that the officers could go get the wife. I know it is mixed up in it but I don't see any indication that that is the only reason he did it. It seems to me like it can be attributed to the other, and should.

Mr. Menin: I think the record very clearly, Your Honor, indicates that.

Justice Minton: If he sentenced him on two grounds, one of which was good, that would be sufficient to uphold it,

Mr. Menin: I think, Your Honor, that both grounds were bad.

Justice Minton: Sure, but suppose the Court should be of the opinion that one of them was good.

Mr. Menin: If the Court is of the opinion that one is good, I think the contempt will stand, but I think very definitely -- and Mr. Justice Jackson pointed out before that it is necessary that counsel convince himself he is correct -- and I feel very definitely that I am correct.

Justice Black: How can we reach the conclusion? How long did he give this woman, how long a sentence?

Mr. Menin: Which one?

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Justice Black: The man.

Mr. Menin: He gave him a six-months sentence.

Justice Black: How can we say that the Judge thought he was sentencing him for two reasons, one being that he wouldn't tell on his wife, and the other one that he wouldn't communicate being a Communist, and he gave him six months, how can we say any Judge in the United States would have give a man six months in jail for failing to expose his wife? Is there any indication here that this Judge would have done that?

Mr. Menin: Here is what the record says, Your Honor:

"Question. What do you mean by privileged communication?

"Answer. Well, a privileged communication to my understanding is a communication between husband and wife.

"Question. Mr. Blau, this Grand Jury requests the presence of your wife as a witness here and up until now you have been concealing her whereabouts and obstructing this Grand Jury from serving a subpoena, having a subpoena served on her. Are you going to persist in that?

"Answer. My answer as to her whereabouts, my knowledge of her whereabouts is based on a communication which I understand is privileged under the laws of the State of Colorado, and I also understand under the Federal law."

Then the court:

"The Court: Do you still persist in that?

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"Mr. Blau: Under my understanding of the privileged communication, my privilege against self-incrimination under the appropriate amendments of the Constitution, which I think are the First and Fourth Amendments, I feel I must continue to persist in my answer.

"The Court: Do you understand this examination of the Grand Jury is not necessarily an investigation of whether or not you violated the law. This is an investigation that someone else may have violated the law."

Then the court said this:

"Mr. Blau: Well, my answers regarding the whereabouts of my wife are to the effect that I need not bring testimony against her where she might possibly be incriminated.

"The Court: You think it is testimony against her and you won't tell where she is?

"Answer. No.

"The Court: What has that got to do with it? She isn't charged with the violation of any law.

"Mr. Blau: She might possibly be. She might possibly be. I assume that it is one of the purposes of the Grand Jury.

"The Court: And you don't care to answer the question?

"Mr. Blau: Not if my understanding of the law is correct.

"The Court: I mean I will give you an opportunity, if

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you want to go back before the Grand Jury and answer these questions. Do you want to avail yourself of that privilege?

"Mr. Blau: Well, then, may I ask this question? Is my understanding of my rights regarding privileged communications correct? If my understanding is correct, I certainly wish to take advantage of the law.

"The Court: I don't think it is a privileged communication myself."

Now it was based on that statement that the court later found the defendant guilty of contempt, both as to the privilege claimed under the Fifth Amendment and under the right to refrain from disclosing the privileged communication between himself and his wife.

However, I do want to get back to Mr. Chief Justice Vinson's question regarding Jane Rogers. In her case she did answer that she was a member of the Communist Party. However, the record shows that at the time she was sentenced, she was brought before the court and counsel for the Government announced that "The witness still persists in refusing to answer questions before the Grand Jury."

At that time the court did not bother to determine what questions she refused to answer and summarily sentenced her to four months in the custody of the Attorney General.

The Chief Justice: Was that to her prejudice? If he had inquired about that, he might have found her guilty of something

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and added punishment.

Mr. Minen: What I want to point out here is this: If she answered a single question as to being a member of the Communist Party, she might have incriminated herself to the point where she might be subjected to an indictment under the Smith Act as an individual.

The Chief Justice: There is no question, Mr. Counsel, that she did admit her membership in the Party. She admitted she was an officer.

Mr. Minen: That is right.

The Chief Justice: What she was sentenced for was failing to say to whom she had turned over the papers. That was her contempt, wasn't it?

Mr. Minen: That is right.

Justice Black: She was found guilty of contempt for refusing to give more evidence to tie her closer to the Party?

Mr. Minen: She was found guilty of contempt for refusing to answer other questions relative to her association and to whom she gave the books, which would, of course, have indicated with whom she was associated in the Party.

We point out that at that stage she may have committed herself on a charge under the Smith Act, but it must be remembered that there were two charges under the Smith Act that were filed against members of the Communist Party. One was the individual charge and the other was the charge for conspiracy.

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Now I think it is well recognized that one cannot individually be guilty of a conspiracy and, thus, when she refused to answer other questions which would show her association with other members of the Communist Party, she then stood on her rights to refuse to give testimony which would indicate that she could be guilty of a conspiracy and, therefore, even though she might have incriminated herself on one charge, there is nothing in the law which says that she must go ahead and provide the Government with sufficient evidence to charge her under a different charge entirely.

That is the reason she refused and that is the reason, we contend, she had a right to refuse to answer regarding her associations and connections with other members in the Communist Party. I think that answers, I trust, the inquiry of Mr. Chief Justice Vinson.

Now in this case there was, in addition to these refusals on the part of the court to permit the witnesses to claim the privilege, there was in our judgment a gross violation of due process of law. In the Jane Rogers case -- and this was pointed out rather violently the other day to me as I read the brief of the Government -- we have in our specification of error indicated a denial of due process. In the Jane Rogers case, when Jane Rogers was brought before the court, just before she was sentenced, the following took place, and this is reading from the Government's brief on page 11:

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"Mr. Goldschein" --

That was Government counsel at that time --

"Mrs. Rogers refuses to answer the questions propounded to her in the Grand Jury room. She was brought back on yesterday, but says that she will answer one question but will not answer any others, and was advised that it would be necessary for her to answer all questions propounded except those which would incriminate her for the violation of a Federal offense, and she says she won't answer any.

"The Court: Is that your position, madam?

"Mr. Menin:" --

Now, that was the first time counsel -- or at that time counsel -- attempted to make a statement on behalf of the witness. (Continuing)

"Mr. Menin: I think there has been a misunderstanding.

"The Court: Just a minute. Will you please be seated, Mr. Menin? Please be seated.

"Mr. Menin: Well, I represent this lady.

"The Court: Just a moment. Please be seated.

"Mr. Menin: Very well.

"The Court: I'll hear you in due course. Madam, do you still persist in not answering these questions?

"Mrs. Rogers: Well, on the basis of Mr. Menin's statements this morning --

"The Court: Will you please answer the question 'yes'

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or 'no'?

"Mrs. Rogers: Well, I think that's rather undemocratic. I'm a very honest person. Would you mind letting me consider --

"The Court: Make any statement you wish.

"Mrs. Rogers: Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am -- and I do have a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and you read it yourself, that I have a right to decide that.

"The Court: You have not the right to say.

"Mrs. Rogers: According to what you read, I do. I stand on that.

"The Court: All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case."

Now we submit that when this lady was in court --

Justice Black: Who was it he told to sit down?

Mr. Menin: Counsel for the petitioner here when this lady was in court and her counsel attempted to indicate to the court that there had been a misunderstanding, the court refused to hear him, the court ordered him to sit down and said, "I will

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hear you later," but instead of hearing counsel later, the court summarily sentenced her to jail for contempt and called for the next case, and that was the end of it.

Now we submit that if ever there was a denial of counsel, certainly there are two ways to deny a person the right of counsel: One is not to permit counsel to appear in court entirely and the other one would be by permitting counsel to sit in court and not permit him to utter anything on behalf of his client. That is what took place in this case.

But there are other instances of denial of due process. In the case of Irving Blau, the record at page 51 to page 53, the following appears:

"Mr. Goldschein: I have the original copy --

"The Court: Read the transcript.

"Mr. Goldschein: The court may have it to refer to.

"The Court: What page?

"Mr. Goldschein: Beginning, may it please Your Honor, on page 35.

"Mr. Menin: If the court please, it seems to me that the witness is put at a disadvantage. I don't have a copy and they refused to let me see the testimony of what the complaint is about.

"The Court: Listen to this testimony and if it isn't correct you can take it up. You don't need a copy.

"Mr. Menin: Before I argue this matter I should have

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a copy of it.

"The Court: You are not entitled to counsel. Please proceed.

"Mr. Menin: Let the record show the court indicates that the witness is not entitled to counsel at this stage of the proceeding.

"The Court: What?

"Mr. Menin: As I understand you --

"The Court: I said I didn't think he was, but I said I would allow you to appear for them if you want to.

"Mr. Menin: I am appearing for him, and as his counsel I demand the right to see what testimony is being complained of so that I may intelligently be able to defend him in this proceeding this morning.

"The Court: You can listen to the record as it is read. That's the reason I'm having it read, so you can tell what it's about.

"Mr. Blau: I'd like to have a copy of this transcript so that I may follow it.

"The Court: You're not entitled to it. Just be seated."

The Chief Justice: Mr. Menin, in your petition for writ of certiorari, you have a statement of matters involved. I take it that is the point that you wanted to rely upon.

Mr. Menin: That is correct.

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The Chief Justice: In that statement is there anything about the counsel issue?

Mr. Menin: We have set up that there was a denial of due process and in our brief we point out that the denial of counsel and the conduct of the court relative to these proceedings was a denial of due process of law.

The Chief Justice: I read the statement of matters involved and I saw nothing that related to denial of counsel.

Mr. Menin: I think in our statement of matters involved we do state that there was a denial of due process of law.

The Chief Justice: Well, you state certain grounds upon which you rely, but you don't rely upon counsel?

Mr. Menin: We do rely upon the denial of due process of law, and in making our showing of the denial of due process of law we set up these matters which have occurred in court. I don't think we must specifically point out in each instance. We have set out in our brief that this is what amounts to the denial of due process of law.

Justice Minton: Was that document read to you?

Mr. Menin: What document?

Justice Minton: That you asked for a copy of.

Mr. Menin: It was read, but it was not presented to counsel. In other words, the court and the prosecution had before them the Grand Jury proceedings and we just sat in the courtroom and listened to its reading, and that is all we were able to do at

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that time.

I might suggest further on the question of due process the following occurred. The defendant was allowed, or the petitioner was allowed, five minutes to consult with his counsel. Then upon entering the court the following occurred:

"The Court: Will you step up to the bar of the court.

"Mr. Menin: May I for the purpose of the record --

"The Court: No. Just a minute until the court finishes."

And then the court addressing himself to the defendant says:

"What is your name?

"Mr. Blau: Irving S. Blau.

"The Court: Where were you born?

"Mr. Blau: Younkers,New York

"The Court: The court having found you guilty of contempt and in violation of the laws of the United States, it is the sentence and judgment of the court that you serve a term of six months in jail and be committed to the custody of the Attorney General. What is the next case?"

Now here counsel was permitted five minutes with his client to consult about this case. When they entered the courtroom, counsel started to make a statement to the court. The court summarily cut counsel off, wouldn't listen to counsel, called the petitioner before the bar of the court, and summarily

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sentenced him.

Now I say to this Court: What was the use of giving counsel and his client this period of five minutes' time to consult if not to come back into court and to explain to the court what the situation was or whatever the defendant might have had in mitigation of his situation? But that was summarily cut off and the court then proceeded to sentence the petitioner at that time.

May I inquire, Your Honor, how much time I have?

The Chief Justice: You have about a minute and a half. I think you have been asked questions, and you ought to deal with Patricia Blau.

Mr. Menin: In the Patricia Blau case --

The Chief Justice: I will allow you ten additional minutes.

Mr. Menin: Thank you. In the Patricia Blau case the situation was simply this: Patricia Blau was served with a subpoena and she appeared before the Grand Jury pursuant to that subpoena. She was asked various questions regarding her membership and activities in the Communist Party, all of which she refused to answer on the basis of the fact that indictments were returned under the Smith Act in New York. The Court of Appeals found in her case, to quote just a portion of her testimony -- she was asked a question, and she stated:

"While I agree it is not a crime to be a member of the Communist Party, nevertheless people are being prosecuted

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for such, and the outcome of this case may have a bearing on the testimony that I might give before the court."

In response to other questions she said:

"My answer in substance was that since there are 12 national leaders of the Communist Party under indictment at this moment by the Department of Justice in the Southern District of New York, I believe that my expressing knowledge, intimate knowledge of the Communist Party in this State would tend to incriminate me under the Smith Act, and because the Smith Act specifically says that they wilfully and knowingly did conspire with each other and with divers other persons to the Grand Jurors unknown, and that my answering a question which would associate myself with the leadership of the Communist Party would tend to incriminate me under the Smith Act."

Now throughout all of her testimony a similar strain followed and we submit that in her case we have the clean-cut issue, we don't have the question of privileged communication, but the clean-cut issue as to whether or not a person at this stage in our civilization, where the Communist Party is being considered subversive and people are being indicted for being members of the Communist Party, whether a person can be called before the Grand Jury and asked questions regarding their membership and their activities.

We think that the Government in this case presents a rather

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unusual defense to these matters, and that is this: As I read the Government's brief, the Government indicates that since the matter of the conspiracy charge is now before this Court on certiorari, that the Court would perhaps have to wait to determine whether or not the Smith Act is constitutional as to whether or not these petitioners had a right to refuse to answer the questions. We think that is a rather novel defense.

We say this, Your Honor, and we think this position is justified under the case of the United States against Alexander, which was the decision in the Ninth Circuit which is in direct conflict with the decision in this case, and the case of Estes versus Potter, a case which was decided on August 5 in the Court of Appeals of the Fifth Circuit.

In those cases the court holds in substance, especially the language of the Potter case is appropriate.

Justice Jackson: Do you construe the New York indictment as being based merely on membership in the Communist Party?

Mr. Menin: The New York indictment charges that the defendants, members of the Communist Party, who believe in the Marxist, Leninist doctrine, which doctrine has as its basis the forcible overthrow of governments, it is those charges that are embodied within the indictment and, therefore, if a member of the Communist Party, who necessarily must be a believer in the Marxist-Lenin doctrine, if a member of the Communist Party discloses that factor, discloses his membership in the Communist

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Party, because the indictment itself charges solely by reason of being members of the Communist Party, they believe in that doctrine; we, therefore, feel that they had a reasonable right to apprehend the danger to which they might have been subjected and, therefore, they had a right to refuse to answer any questions.

Justice Jackson: I thought the New York indictment charged that or meant that the Communist Party was organized and managed for particular ends.

Mr. Menin: As members of the Communist Party. As I understood it, and I think Judge Symes in his summary of it, when he said it merely charges membership in the Communist Party, Judge Symes came to that conclusion after reading the indictment.

I should, however, like to point this out. In the Estes against Potter case the Court of Appeals in the Fifth Circuit said this:

> "If the appellant denies that he is a Communist, he may prosecuted for perjury; if he admits it he may be prosecuted for belonging to a group that encourages the overthrow of governments by force; if he declines to do either, he is 'liable to spend a long time in jail, when he ought to be a free man.' This is a perilous position for a citizen, who is presumed to be innocent. . ."

We submit, Your Honors, that it was never intended that the Government should have a two-edged sword which would put a

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witness in a position where he is charged with an offense if he answers the question, because if he is in fact a Communist, he would certainly be subjected to a perjury charge; if he admits he is a Communist, then he gives the Government the evidence it needs to charge him for conspiracy, as was done in New York; and if he denies it, he is held guilty of contempt.

We don't think that any situation should ever occur where a witness who comes before the court finds himself in a dilemma where whatever answer he gives or his refusal to answer results in his imprisonment, and that is precisely what has occurred in this case.

Justice Burton: Mr. Minen, under our rules a similar proceeding for contempt is governed by, I think, Rule 42(a) and you have notice in hearing if it is under 42(b), and 42(a) applies when it occurs in the presence of the court.

Have you made any point of whether these contempts occurred in the Grand Jury room rather than in the presence of the court or do you recognize they all were in the presence of the court?

Mr. Menin: The court has found the defendants guilty under USCA Section 401 and 402. 401 is the summary proceeding. The court didn't indicate which it was finding the defendant guilty under. We did in our brief point out that under Section 401 if the court considers that this was a contempt in its presence, then the court should have made a certified finding. The Code, Section 42(a), specifically states that he must certify that the

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contempt was in his presence and the acts which constitute the contempt. That was not done in this case, although counsel for the Government controverts it by pointing to the judgment itself. The judgment merely recites that, having found the defendant guilty of contempt, he is now sentenced to four months in jail or six months, as the case may be. We, therefore, say even under Section 42(a) there was a failure to comply with the law, and therefore a failure to grant due process.

After this notice of appeal was filed, it appears that a certificate was signed some five days later on the 28th -- the judgment took place on the 23rd. There is a certificate setting out certain acts of the petitioners, and we think that the Government is wrong in making the assertion that they did comply with Section 42(a).

If under Section 42(b), then, there should have been charges filed, which was not done in this case, we think whichever method the Government chose to pursue -- and they say they chose both of them -- and neither one of them was complied with in this case.

Do I have about two minutes?

The Chief Justice: You have a couple of minutes.

Mr. Menin: I should like to use that to reply to counsel. Thank you.

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ARGUMENT ON BEHALF OF THE UNITED STATES OF AMERICA

By Mr. Perlman

Mr. Perlman: If the Court please, these three cases are important to the Government because there are a number of other cases pending throughout the country, some of them resulting from charges of contempt voted by both the House and the Senate of the Congress of the United States, and a number of other cases resulting from contempts being found by some of the District Courts throughout the country. There are pending here, in addition to these cases, cases from the Ninth Circuit and, as has been said, cases also from the Fifth Circuit.

Now these three cases raise the question, the record raises the question, as to whether a person asked questions with respect to association or membership in the Communist Party of the United States has a right to decline to answer on the ground that an answer might incriminate him.

With respect to the first case -- and I would like to deal with the facts in that case by themselves -- the first case involves a woman by the name of Jane Rogers. She was called before the Grand Jury in Denver, Colorado, and she was asked certain questions about the membership and the records, and so forth, of the Communist Party of the State of Colorado. She was among a group of officers of the Communist Party of the State of Colorado who were called before the Grand Jury in Denver.

A number of them testified fairly fully and without objec-

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tion on a great many of the questions that were asked them.

With respect to Jane Rogers, it had already been testified, I think by the chairman or the president of the Communist Party of the State of Colorado, that Jane Rogers, a petitioner here, had been the treasurer of the Communist Party of the State of Colorado and for a time had had charge of their books and records and accounts, and so forth.

It appeared that the Grand Jury wanted to get those books and records relating to the membership of the Communist Party of the State of Colorado. It appears in the record that the purpose of the investigation, and certainly the main purpose of it, was to ascertain whether or not there were any Government employees, any Federal Government employees, in the State of Colorado who had made false oaths with respect to membership in the Communist Party in the State of Colorado.

Now Jane Rogers testified that she had been the treasurer of the Communist Party in the State of Colorado, that she had had possession of these books and records, and that she had turned them over to somebody else.

She didn't then, she testified, have possession of them or custody of them. She was asked who she had turned those records over to, and she refused to answer. The position of the Government is with respect to Jane Rogers that it was too late for her to make a claim that she was entitled to the privilege given under the Constitution of the United States to refuse to

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incriminate herself in a criminal case.

She had already testified as to membership in, association with, and holding an office in the Communist Party of the State of Colorado; and on the cases that we have in the brief the courts have already held that so far as this privilege is concerned, a witness must assert that privilege at the first opportunity and stand on it, if he has a right to assert it at all.

In this case the witness did not assert that privilege. The record is very interesting in view of the kind of argument that has been made here about due process.

When the question was asked her before the Grand Jury, having testified at length on her relationship with the Communist Party, she refused to tell who had the records or who she had turned the records over to, and she did that before the Grand Jury.

She was brought in court,not once but three times, on three separate days. The Judge before whom she was brought asked her on one day whether it was true that she had refused to disclose this information to the Grand Jury, and she said that was true, that she had declined to do it.

She was asked by counsel why she didn't want to tell who she had turned the records over to, and the only reason she gave was that she didn't want any other person to go through the questioning she was going through.

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So she herself testified it wasn't fear of incrimination certainly on the first day but that she was trying to protect somebody else from being subjected to an examination. It was her interest in some third party and not the privilege that the Constitution gives to the witness himself that interested her.

Justice Black: I thought she claimed protection for herself under this.

Mr. Perlman: She did not do that until the third time.

Justice Black: That is before she was sentenced?

Mr. Perlman: That is right.

Justice Black: When they were trying to make her testify?

Mr. Perlman: I beg your pardon?

Justice Black: When they tried to make her tell where they were?

Mr. Perlman: Yes, sir. She was asked first before the Grand Jury. She didn't do it. She was brought before the court three times. The first time she did not claim, if my recollection is correct, any special privilege. She said she didn't want to involve somebody else.

Justice Black: But before she was sentenced she did claim it?

Mr. Perlman: Yes, that is right. I am just trying to tell you the sequence of this situation.

The Chief Justice: It was at the time she was brought in for sentencing that she said that she refused to answer on the

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basis of self-incrimination?

Mr. Perlman: The interesting thing is that the first time she said she was doing this, she was refusing to answer because she wanted to protect somebody else.

On the second day, when she came before the court, the court postponed the matter until the next day, counsel, the same counsel here as there, told the court that he had had a conversation with her and that she would tell.

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So it was on the basis of counsel's promise that his client was going to answer the question that the case was again postponed and she was sent to the Grand Jury, where she again refused to tell and did not carry out the suggestion that counsel had made that she would tell.

He said he had had a conference with her and that she would disclose the information, and then she was brought back to court again. That was the third time she was brought back to court, and she was asked whether or not she wanted to make any change in her statement, and it was then that she claimed her privilege, asserted the privilege under the Constitution.

Now, the Government's position is with respect to her that it was too late, that she had waived the privilege by testifying freely that she was a member of the Communist Party and that actually there was no privilege involved as to who she had turned the records over to.

Justice Black: Your claim gets down to this, doesn't it, when a person admits being a Communist, assuming that self-incrimination could be pleaded --

Mr. Perlman: Assuming what, sir?

Justice Black: Assuming now that self-incrimination could be pleaded and the person failed to do it, but admitted being a member of the Communist Party, and then later came in and refused to give the names of a lot of people who could give evidence against her, she couldn't claim self-incrimination but would be

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compelled to give names of witnesses who could testify against her and show what she had done. I assume you would admit, wouldn't you, that the Government can't compel people to give the names of witnesses who could give evidence against them in crime.

Mr. Perlman: I do admit that.

Justice Black: It gets down to whether when she said, "I am a Communist", she could be compelled to give the names of a lot of people who could be summoned as witnesses to show just what she had done in the Communist Party, tending to try to subvert the Government.

Mr. Perlman: Well, I don't think that is the situation here, if Your Honor please, because a number of the members of the Communist Party, the officers certainly, had been summoned and they had testified. There wasn't any mystery apparently about who they were.

Justice Black: You didn't have all you wanted or you wouldn't have asked her for the names.

Mr. Perlman: That had to do with membership.

The Chief Justice: I know, but assume there is something in the books that would have been evidence against her. What she refused to do was to tell you to whom she had turned the books over.

Mr. Perlman: That is right.

The Chief Justice: Now, suppose there is something in the

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books there that would incriminate her.

Mr. Perlman: Well, if you make that supposition, at the time she asserted her privilege our position is it was too late; that she couldn't assert it after testifying as she had testified, as her membership in the Communist Party, her holding an office in the Communist Party, her knowledge of all of its affairs.

She testified to that and I think the most interesting case on that point is the St. Pierre case in New York, which we cite at length in our brief.

Justice Reed: Is membership in the Communist Party a Federal crime?

Mr. Perlman: No, sir. That is not a Federal crime.

Justice Reed: Why shouldn't she testify as to membership in the Communist Party?

Mr. Perlman: The Court below took the attitude, I think, as to all these defendants, that membership in the Communist Party, not being a crime, that they had no privilege that they could assert.

Justice Reed: You said she didn't claim her privilege and said she was a member of the Communist Party, the Treasurer of it. That was not admission of a crime.

Mr. Perlman: That is right.

Justice Reed: Next she was asked and refused to tell the name of the person to whom she had given the books.

Mr. Perlman: That is right.

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Justice Reed: And claim a privilege. Where was the waiver?

Mr. Perlman: Well, if there was --

Justice Reed: Assume that membership in the Communist Party is not a crime.

Mr. Perlman: Well, we assume that membership in the Communist Party is not a crime, but it is necessary, I think, for the Court to consider the effect of the Smith Act, passed in 1940, and we don't wish to dodge that and we don't wish to avoid it. We don't think we have any right to. That makes it an offense to teach and advocate or to belong to an association or party which teaches or advocates the overthrow of the Government by force or violence.

Justice Reed: Knowingly.

Mr. Perlman: We do claim and we had claimed in New York under the indictment that has been put in the record in this case that the Communist Party is such an association. On the basis of our proof in that case, as the Court knows because that case is here, there were eleven Communists who were convicted.

Now, it is true -- I think Mr. Justice Jackson asked the question about the conspiracy indictment in that case -- that something more was required than just being a member of the Communist Party. Membership alone would not have been sufficient to support the indictment nor the conviction. It was necessary to prove the conduct of each defendant and the extent of their participation in the conspiracy that was charged.

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Now here under the principles that this Court has followed we think -- and we think it is our duty to say to the Court that we think -- it is extremely doubtful whether in one of these cases the lower Court was correct, because in that case there was no waiver of the privilege given under the Constitution.

The Chief Justice: That is the Patricia Blau case?

Mr. Perlman: That is the Patricia Blau case. In this case, we think this case falls squarely within the rules that were expressed by Judge Learned Hand in the St. Pierre case and in other cases that we have cited in our brief, that when a witness undertakes to answer questions, give information of a character that may be used to incriminate him, as they claim, that there is a possibility of incrimination through their relationship with the Communist Party, that where a witness testifies freely under oath, that under the rules this Court has approved and the other Courts have approved, they cannot stop, they must go on and complete the story that they have begun to tell.

Justice Black: But she hadn't told enough to admit guilt of anything at all under what you say there.

Mr. Perlman: That also was pointed out.

(RECESS.)

Mr. Perlman: If Your Honors please, we were still discussing, I think, the Jane Rogers case, the first of the three cases, and I did want to go back for a moment to call the Court's attention to the fact that the question that Mr. Justice Black

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asked me as to whether or not the jury could ask Jane Rogers who were the members in order to use those members maybe to testify against her, I wanted to call the Court's attention to the situation in the St. Pierre case where St. Pierre admitted that he had embezzled money, he admitted he had carried this money across a state line. It had become a Federal offense, although that wasn't clear.

That case was tried twice. The first time it didn't appear it was a Federal offense. It was sent back, and he made other admissions, and then he was found guilty of contempt because he refused to disclose the name of the person from whom he had embezzled the money. The Circuit Court, the Second Circuit, held he had to give that name, although the name of that single person was the thing that the Government did not have and was the thing that was absolutely necessary in order to convict him.

Justice Black: Has this Court ever held that?

Mr. Perlman: No, that case didn't come here.

Justice Frankfurter: It came here and became moot. Is that the St. Pierre case?

Mr. Perlman: Yes; it wasn't decided here, but that is right, it did become mmot. There is quite a discussion in that case by His Honor, Judge Hand, as to reasons why this person who had testified to every element of the crime except the one element that the Government needed to convict him, they didn't know who he had robbed.

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Justice Frankfurter: This case is a little different.

Mr. Perlman: This is much different.

Justice Frankfurter: Because here the admission is not to crime.

Mr. Perlman: That is right.

Justice Frankfurter: But it is on the way to being a crime.

Mr. Perlman: Yes. There wasn't any question but he admitted it was a crime and admitted everything except who he had stolen the money from, and the Court held he had to tell that or was in contempt. There isn't any real question in this case, Your Honor. Your Honor asked the question about where the contempts were committed. They were committed first before the Grand Jury and then they were brought in open court.

Justice Burton: You treat all of them in the presence of the Court?

Mr. Perlman: All of them in the presence of the Court, and all of them were under Section 42(a), and we think the record discloses that all of the requirements were complied with.

We think it is clear from the authorities that Jane Rogers, having testified as she did, could not be permitted to stop when she chose to stop and to refuse to tell to whom she had turned over the records, since it appears what she was trying to do, from her own testimony, was to protect somebody else and not herself.

Whether that was so or not we contend -- and we cite cases

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the brief -- that having gone as far as she did, that she could not stop, and the authorities sustain that.

As to Irving Blau, Irving Blau, the second defendant here, the contempt on which the Government relies is his refusal to tell where his wife was. We differ with the idea that has been expressed from the bench that a husband is not required to disclose that information. Under the circumstances here, we think he was compelled to disclose it. His own testimony shows he was not attempting to protect his wife from anything. He testified to that, not only once, but he testified three times, that he knew she had no objection to testifying as a witness.

He was asked whether he thought he was protecting her from any charge, and he testified that he didn't think he was, that she was perfectly satisfied to come there and testify. He admitted he knew where she was. When they asked him to tell where she was, he said, "Well, that is your problem. That isn't mine."

Now, we think under the leading case on the subject, the Wolfle case, that was decided by this Court -- that is the leading case on the right of the husband to claim a privileged communication from his wife -- this Court said this, and I just call Your Honors' attention to just one sentence:

"Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances

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under which it was made, was obviously not intended to be confidential it is not a privileged communication."

He testified that there was no real reason that she had for having her whereabouts kept a secret. He testified he didn't have any himself. He knew that she would be glad to come there and testify, and the one thing that he didn't do -- and this Court said it is necessary, communications between spouses privately made -- he never told how he got that information, whether it was privately made or publicly made. He wouldn't say anything about it.

He just said it was a privileged communication. He didn't say whether she had called him on the phone or whether she had told him where she was going in the presence of one or ten other people; so that it wouldn't intended to be confidential. He never said a single word, and the Court below commented on that to indicate that his information was privately made, and counsel explaining the situation below -- and you will find that in the record -- said that she had communicated with him but he had not told her anything about the subpoena which the Grand Jury had issued.

When she came back, which she did, I believe it was some eleven days later, and found she was wanted, she went to the Post Office and she was served with a subpoena there.

She then said she didn't know anything about it, didn't know the Grand Jury wanted her or she would have been there before.

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we say under those circumstances and under the other cases, the Yoder case is one that we emphasized in our brief -- that didn't come here -- but under the Yoder case there the husband left a note for his wife telling her where he was going, and it became very important in that case to know what he had told his wife because he gave her false information in that note. That note was admitted over his objection and it was held there that that communication between husband and wife was not a privileged communication.

Justice Black: Suppose he had said here, "I refuse to tell because she told me privately in our bedroom." Would you say that was privileged? As I understand it, that is a different thing.

Mr. Perlman: I would say that was privileged, yes, sir. I would say it was privileged to this extent. I would say if he testified to that, then the burden would be on the Government to show that it wasn't intended to be confidential, it wasn't intended to be privileged.

Justice Black: That would be a pretty heavy burden.

Mr. Perlman: It would be a pretty heavy burden, but it does shift the burden to us, and we say so in our brief. But he never said that.

Justice Black: What he said was he claimed the privilege.

Mr. Perlman: That is all.

Justice Black: Because she was his wife and those

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communications are privileged.

Mr. Perlman: That is right. He just said it was a privileged communication. He didn't say how it was made. The Courts have held that it isn't every communication between husband and wife that is privileged, and Your Honors will find in our brief that we have cited cases where conversations between husband and wife were held not to be privileged.

It depends on the circumstances, it depends on the nature of the matter, of the communication, and as the Court below said, nothing is probably less susceptible of confidential treatment ordinary than the whereabouts of one of the spouses.

Justice Black: Do the cases indicate that the Courts have been more likely to hold it privileged when trying to get one of the spouses to tell something on the other to get them in trouble?

Mr. Perlman: Well, I would think that, but, of course, that isn't this case, because he was asked --

Justice Black: She wouldn't have got him into trouble. She got three months when she got there.

Mr. Perlman: No, she got a year.

Justice Black: A year?

Mr. Perlman: Yes, she got a year, but she probably wouldn't have gotten that year if she had --

Justice Black: If she hadn't gotten it.

Mr. Perlman: If she hadn't refused to testify, but he

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testified under oath that she had no objection to her coming there and acting as a witness and becoming a witness.

Justice Black: That is one of those pieces of evidence, is it not, that a reasonable man might expect is not altogether correct?

Mr. Perlman: Well, he testified to it under oath, and she testified to that, or her counsel did, that she had no objection to coming there and that she had no objection to testifying. So we think it is clear from the cases we have cited in the brief, we think that unless he said and unless he testified that that communication was privately made, not made outside of the presence of others, but some kind of communication that was intended to be confidential or was given to him under such circumstances as would make it confidential --

Justice Black: I haven't read all of them, but I presume that maybe some of them said when a wife tells her husband where she is going, that is presumably kind of private.

Mr. Perlman: Well, they didn't hold that in the Yoder case where the husband told the wife where he was going.

The Chief Justice: You may have an additional ten minutes, if you desire.

Mr. Perlman: Thank you. Now, as to that case, we rest on that part of the finding against him.

The Chief Justice: What about the other part with regard to being a member of the Communist Party? What is your attitude

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about that?

Mr. Perlman: Your Honor, he claimed his privilege. He claimed his privilege and he did not answer questions with relation to it. He claimed his privilege there, and the record shows --

The Chief Justice: What did the Judge do? Upon what did the Judge act?

Mr. Perlman: Now, the Judge said this -- and on page 305, I think it is, of the record -- no, 303 -- the lower Court said this:

"A perusal of his entire examination before the Grand Jury" -- that is the Court of Appeals, that is right.

Justice Minton: Page 29, the top of page 29 shows what the District Court said when it sentenced him.

Mr. Perlman: That is right, that is the certificate.

Justice Minton: The second sentence.

Mr. Perlman: That has to do -- the top of the page has to do with his refusal to answer questions about his wife.

Justice Minton: And the other, too.

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Mr. Perlman: Yes, whether or not he held any official connection with the Communist Party and other questions, and then they attached that excerpt to it.

I think I ought to say to the Court that on page 303 -- and this is what has disturbed me about that part of the finding against him -- in the paragraph in the middle of the page, the last sentence says:

"A perusal of his entire examination before the Grand Jury indicates that it was established by his testimony or his answers that he was a member of the Communist Party."

Now we haven't been able to find that he made such answers, and I think I ought to say that to the Court.

Justice Frankfurter: The Grand Jury minutes -- are they in here?

Mr. Perlman: There are the excerpts from them that are attached to the certificate, excerpt A referred to on page 29, Exhibit A and Exhibit B.

Justice Frankfurter: Perusal of his entire examination?

Mr Perlman: Yes, sir. Well, we haven't had access --

Justice Frankfurter: Would the Court of Appeals have had access to it?

Mr. Perlman: I don't know, I suppose so.

Mr. Menin: The Court of Appeals had access to it, and I was amazed when this appeared in the decision, Your Honor, because there wasn't anything in the record, and I have scanned

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the whole record to find where any statement would justify that remark on the part of the court.

Justice Frankfurter: In all events, if the certificate is an indispensible formality, then the certificate is bounded by what is attached to it, the excerpts, and not something outside of it.

Mr. Perlman: That is right. We looked through it to get a basis for that statement, but we have been unable to find it. We do, in any event, rest our case on the other finding, that he had no right to refuse to tell where his wife was.

Both of them negate any idea of any confidential communication between them on that subject. When she got back, she testified that if she had known about it, she would have appeared before. She just didn't know about it. He had never told her.

Justice Black: As I understand your argument on the question of the wife, it has been on the basis that even if it should be held that they could not be compelled to incriminate themselves about the Communist Party, that that was all right, that can be sustained because the Judge also included the failure to answer about the whereabouts of the wife.

Mr. Perlman: That is right.

Justice Black: How could we possibly know, A, that the court would have convicted with that alone if it had known it couldn't constitutionally convict for failure to testify to being a Communist and, B, that he would have given this man six months

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when his only offense was doing that which probably many husbands would do under the circumstances -- say, "I am not going to tell you where my wife is."

Mr. Perlman: Well, I --

Justice Black: Any maybe sometimes when they actually wouldn't know.

Mr. Perlman: Well, he gave the other witness, the first one, Jane Rogers, he gave her four months. He gave Irving Blau six months. In the event that Your Honors should sustain that finding, he has a remedy under the rules. He can apply to the court below for a diminution of sentence on the ground that one of these two grounds was sustained and the other was not.

Justice Black: But if he is convicted for contempt, it was for doing two things. Do you think it is unreasonable to think, do you believe it is unreasonable to think that a Judge trying a person on those two things would not have reached the conclusion of guilt for the only thing he was charged and convicted of was: "I am not going to tell you where my wife was." Is that an unreasonable assumption to think that a Judge might feel differently about finding a man guilty of contempt and might give him a little more because of that, but is it unreasonable to think that a Judge would convict on both of them, and one man might have said, he couldn't convict for the second one, "Well, I am not going to convict you for contempt when the only thing you did was refuse to tell where your wife was."

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Mr. Perlman: I think that is unreasonable under the circumstances of this case. I think he would have gotten the same sentence.

Justice Jackson: If the Judge was wrong about being able to make him answer questions about the Communist Party, if the case falls on that, then he wouldn't want the woman anyway. The whole thing really turns on the other question, doesn't it?

Mr. Perlman: I don't know about that, if Your Honor please. They wanted her to testify. She was an officer of the Communist Party and they had issued a subpoena for her.

Justice Jackson: She doesn't have to answer that line of questions. That was the whole importance of her testimony.

Mr. Perlman: That doesn't excuse him.

Justice Jackson: Well, maybe not, but following up what Justice Black suggests --

Mr. Perlman: It doesn't excuse him. It was his duty to come on the Grand Jury subpoena and it was his duty to tell the Grand Jury and the court that information. Maybe he could have claimed privilege as to other questions, but it certainly was his duty to disclose that, and the cases so hold, and he was in contempt of court for not doing it.

Justice Frankfurter: The remedy that you suggest, diminution of sentence, is a little difficult in this case, if I am right in recalling that Judge Symes left the bench and was no longer serving as a judge. I should think it would be a little

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difficult to guess what Judge Symes would have done. It might have been difficult with any Judge, but it would have been difficult with him.

Mr. Perlman: I don't think that is a matter this Court ought to be concerned with. If he is guilty of contempt, he is guilty of contempt, and the court below has sentenced him.

Justice Douglas: On the case of Blau, is it your contention that that depends upon the ruling of this Court under the Smith Act?

Mr. Perlman: We have called the Court's attention to the fact that the validity of the Smith Act is pending here. It is true that, as has been pointed out, it is not a crime to be a Communist. If that were standing alone, they would not have any right to refuse to answer these questions.

In view, however, of the Smith Act, of the prosecutions which have been taking place under the Smith Act, we think that under the decisions which this Court has made in the past with respect to these kinds of questions, we think that under the decisions which have been made in the Circuits below and where Your Honors have declined certiorari in recent years, we think that Patricia Blau, claiming, as the record shows, privilege from the very start of her inquiry, probably had a right to refuse to answer.

We have conflicting decisions. This Court, the court to which you have issued the writ of certiorari, found them all

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guilty of contempt. There is a conflicting decision before you in the Ninth Circuit, there is another one in the Fifth Circuit. There have been others in the Second Circuit. I am thinking about the Rosen case, in which you denied the certiorari, and we think reading all those decisions the better view may be that she was entitled to decline to disclose any information that would connect her with the Communist Party or with the purposes of the Communist Party.

Justice Frankfurter: Mr. Solicitor, isn't the Smith Act -- and I should think the McCarran Act might be relevant -- whatever that may be or may not be -- the element of time enters the conspiracy.

Justice Douglas: What was the date of the Act, the Smith Act?

Mr. Perlman: The Smith Act?

Justice Douglas: The Smith Act and the date of this.

Mr. Perlman: Yes. The Smith Act was 1940.

Justice Frankfurter: I understand that crimes which the McCarran Act creates, it creates those crimes from the date of the enactment of the statute coming into force, but whatever crime it does create, it is well known, of course, that evidence antedating the date of the crime or even the date of the passage of the Act, which condemns something, is relevant, and this may be very relevant under the edict of the McCarran Act. I don't know what they are, but there appear to be some.

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Mr. Perlman: Well, as pointed out, the privilege here was claimed before the McCarran Act was passed.

Justice Frankfurter: I understand that,but you can have a privilege as to evidence antedating the creation of a crime if the evidence can get in antedating the Act.

Mr. Perlman: Yes, I think so.

The Chief Justice: Your time has expired.

Mr. Perlman: May I say we have this problem, because I stated when I started out there are so many of these contempt citations that have been voted by Congress that we have to decide what we are going to do with them. We don't want to have a lot of foolish prosecutions all over the country.

The Chief Justice: You haven't quite decided yet.

Mr. Perlman: We are waiting for the Court and then we will take action.

The Chief Justice: You haven't quite decided.

Mr. Perlman: Well, we are waiting for the Court.

The Chief Justice: I say in your brief --

Mr. Perlman: As to Patricia Blau, we point out a conflict and we are asking the Court to resolve it so we can take a position and stand upon it.

The Chief Justice: I still say that you haven't decided.

Mr. Perlman: I think I was quite frank, though, in what I did say about it.

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REBUTTAL ARGUMENT ON BEHALF OF THE PETITIONERS

By Mr. Menin

Mr. Menin: I want to concur with my learned adversary in saying that we do think the question as to whether or not a person is a member of the Communist Party, at this stage in our national life, is such as would justify a refusal to answer the questions.

Now there is just one point I desire to make regarding Jane Rogers. It will be noted that she did not have at the time she first appeared before the Grand Jury the benefit of counsel, and counsel did not say to the court that she would answer all questions. Counsel stated she would answer some questions, without indicating that she would waive any privilege that she would have, and it is apparent from the record, when it came to the specific question as to whom she gave the books to, she did claim that privivlege.

There is just one more point I want to make. We do think that the outcome of this case is of vast importance. It involves a very serious privilege under the Constitution, and the Government certainly has at its disposal all of the means by which it can discover criminal elements, and it certainly should not require a person to give evidence which would tend to incriminate him.

Thank you.

(Whereupon, at 3:00 o'clock p.m., oral argument in the above-entitled causes was concluded.)

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