ROGERS V. UNITED STATES

Jane Rogers vs. The United States of America
Nancy Wertheimer vs. The United States of America
Irving Blau vs. The United States of America

APPLICATION FOR BAIL PENDING APPEAL

This is an application for bail pending appeal by the three persons named in the caption made upon a single record of proceedings in the District Court. Each of the three was called before a federal grand jury sitting in Denver, was required to answer certain questions, refused to do so, and thereafter was cited to the United States District Court for the District of Colorado for contempt on account of such refusal. After hearing, the District Court committed each for contempt, imposing sentences upon Mrs. Rogers and Miss Wertheimer of imprisonment for four months and upon Mr. Blau for six months. At the same time the court denied bail in each case.

Thereupon an appeal was noted in each case to the United States Court of Appeals for the Tenth Circuit. Thereafter application for bail and for habeas corpus was made in succession to Chief Judge Orie Phillips, sitting as a district judge; to Circuit Judge Bratton; to myself; and finally to the United States Court of Appeals for the Tenth Circuit. In succession each of these applications was denied. The application to myself was made prior to application to the Court of Appeals, on October 8th. It was denied on October 12th, without prejudice to a further application to the United States Court of Appeals for the Tenth Circuit and without prejudice to a further application to myself. Then followed the application to the Court of Appeals, followed by hearing and denial of the application on October 21st. The appeals have been set for argument on the merits and as I understand, on application for habeas corpus on November 29, 1948.

In my opinion Rule 46 (a) (2) of the Federal Rules of Criminal Procedure is still controlling to authorize the application which is now submitted to myself as Circuit Justice of the Tenth Circuit. Ordinarily the greatest weight would be given on such an application to the decisions of the various judges and the Court of Appeals which have preceded this application. However, under Rule 46 (a) (2), in my opinion, I am required to exercise

my own independent judgment, particularly concerning the question whether the case which is pending on appeal "involves a substantial question which should be determined by the appellate court." In this case, notwithstanding the weight properly to be given to the previous determinations, I have concluded that such a question is presented by the appeal and therefore that bail should be allowed.

I have had the benefit of reading in full the record upon which the judgment of the Court of Appeals denying bail was entered. I have not had an opportunity of examining a copy of the formal judgment or order of that court denying bail. I am informed, however, that the action was taken without the filing of an opinion and merely upon the formal finding that no cause had been shown for relief in the opinion of that court.

The record does not disclose the nature of the grand jury's inquiry except in the following statement made by Mr. Goldschein, Assistant Attorney General aiding the Grand Jury in its investigation, to the District Court in presenting the case to that court at the time of the citation:

"This grand jury is not interested in what the political beliefs of these witnesses who came before the grand jury are; they are not interested in who they believe in or what their political philosophy is; they are interested in whether or not these particular witnesses hold an office in the Communist Part [Publisher's Note: the word "Part" should be "Party"] and whether or not they have in their possession any books or records which show a matter of interest to this grand jury, a matter of inquiry for violation of a federal statute – not a theory, a belief or a politicalism." (R. 17.)

The record is not identical in its disclosures concerning the facts relating to the three applicants. Nor is it entirely clear cut concerning the particular questions for refusal to answer which each petitioner was cited and sentenced. However, it does show that Miss Wertheimer declined to answer an inquiry whether she was a member of the Communist Party and other questions relating to possible affiliation with and activity in connection with or on behalf of that party. Mrs. Rogers admitted that she had been a member of the Communist Party in Denver and had been treasurer of the Denver Communist organization until the beginning of the year 1948. She also admitted that until that time she had had possession as treasurer of books and records of the party. She declined, however, to answer the question asked her concerning the identity of the person in possession of those books at the time of the grand jury hearing. Mr. Blau de-

clined to answer whether he was a member of or affiliated with the Communist Party, together with other questions relating to his possible connection with it, and also declined to answer the question asked of him concerning the whereabouts of his wife.

In refusing to answer, Mrs. Rogers and Miss Wertheimer declined on the ground that their answers would tend to incriminate them, contrary to the provision of the Fifth Amendment. Mr. Blau declined to disclose the whereabouts of his wife on the ground that his knowledge of his wife's whereabouts had been obtained as the result of a confidential communication between husband and wife under Colorado law, to which it was added that a disclosure of this fact by him might tend to incriminate Mrs. Blau. (The record is somewhat dubious upon his connection of the two bases, but the District Court apparently considered them both as having been joined in his objection and for present purposes I so consider the fact.)

At the hearing in the District Court counsel for the present applicants disclosed to the court the pendency of an indictment in a federal court in New York City against eleven persons pursuant to § 2 of the Act of June 28, 1940, 18 U. S. C. § 10, commonly known as the Smith Act. This charge was a charge of conspiracy to violate that Act. Counsel for the applicants also disclosed at that time the pendency of eleven indictments against the same persons named in the conspiracy indictment for violation of §§ 10 and 13 of Title 18, U. S. Code. None of the persons under either of these indictments included any of the present applicants. The conspiracy indictment shortly charged the defendants with unlawfully conspiring to organize the Communist Party of the United States, describing it as "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence." The substantive indictments charge in effect that the Communist Party has been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

In view of the pendency of these indictments and of the terms of the statute pursuant to which they were drawn, statutes which in essential substance now constitute 18 U. S. Code § 2385 (approved June 25, 1948, and effective September 1, 1948), the question is with reference to Miss Wertheimer and Mr. Blau whether their refusal to answer flat inquiries whether they are members of the Communist Party or have been gives

basis for reasonable belief that answering those questions affirmatively might incriminate them. In view of the same considerations the same question arises concerning Mrs. Rogers' refusal to identify the person or persons in possession of the books of the Communist Party to which she referred in her testimony. In view of the pendency or the indictments in New York and of the terms of the statutes pursuant to which they have been returned, I cannot honestly conclude that no substantial question would be presented in case an indictment or indictments or similar character should be returned either now or later and whether in Denver or elsewhere against Miss Wertheimer and Mr. Blau for alleged violation of the statutes. Nor can I conclude that they could have no possible or reasonable ground for fearing that such indictments might be returned in the event of their answering affirmatively the questions relating to their membership in the Communist Party and possible affiliation or other activities in connection with it. In consequence I cannot conclude that these applicants had no reasonable basis for fearing that their responses to the questions might incriminate them.

Upon the authorities the applicants are not the sole and final judges of whether their responses may have a tendency to incriminate them. That function is the courts' in the final analysis. On the other hand, the boundaries between the scope of the privilege against self-incrimination and that of the right of the Government to secure evidence from citizens are not sharply defined or precise. The test in my view is whether, on the particular circumstances presented, responding to the question may be regarded as reasonably having a tendency to incriminate the witness. It is not necessary that criminal or penal proceedings be presently pending against him. Nor is it necessary that upon the facts and disclosures available the answer be shown to be one which certainly would have a tendency to incriminate. It is enough, as I construe the authorities, that upon the total showing the answer might or might not incriminate. If the showing is not made in good faith and so found on sufficient evidence, the witness may be required to answer. There is no contention in this case that the claim of privilege is not advanced in good faith. Nor in my opinion is it frivolous. My conclusion in respect to the responses of these two applicants is the same as that reached by Judge David Pine, of the United States District Court for the District of Columbia, in the case of *In re Emil Costello* decided by him June 27, 1948. There is therefore conflict between Judge Pine's opinion in a substantial

sense and that of the judges who have preceded me in hearing applications for bail in this case. This furnishes an added ground for believing that a substantial question is presented by the appeal in this case.

It is true that Mr. Blau was committed in the face of a dual claim of privilege for refusing to answer questions, some which in my opinion he reasonably regarded as tending to incriminate him, and others on the ground of confidential communication between husband and wife, coupled with the suggestion that his disclosure of her whereabouts would tend to incriminate her. It is not necessary in this application for me to decide whether the latter ground alone would be sufficient. As I understand the record, the single sentence of six months was imposed upon Mr. Blau for refusing to answer both types of question and as against the claim of both types of privilege. In short, the sentence is indivisible and in my judgment the claim of privilege against self-incrimination was sufficient in the circumstances of the case to raise a substantial question requiring his release on bail pending outcome of the appeal.

The case of Mrs. Rogers is somewhat more doubtful. It is not claimed that she is now in possession of the books. Even if she were, it would seem that her privilege against self-incrimination would not be good. *United States* v. *White*, 322 U. S. 694. On the other hand, she does not refuse to surrender books of the organization in her possession. She merely declines to disclose who presently has possession of them. The White case does not squarely rule such a situation. It is entirely possible that, although she is willing to admit affiliation with or membership in the Communist Party, she may also know that the books will contain further evidence of activities by her of an illegal sort which, if produced, would incriminate her. Although I regard the ground she asserts for her privilege under the facts as weaker than that claimed by the other two applicants, I feel also that her claim as made presents more than a merely frivolous contention and there is no finding that it is not put forward in good faith. Accordingly, I have concluded that in all three applications bail should be granted pending determination of the appeals by the United States Court of Appeals for the Tenth Circuit.

[October 20, 1948]