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COMMENTS

IMMUNITY STATUTE: EFFECT OF SELF-INCRIMINATION CLAUSE OF FIFTH AMENDMENT

By MARVIN J. CHRISTIANSEN

In 1954, Public Law 600 was passed by Congress amending Title 18, United States Code, section 3486. This comment is concerned with subsection 3486(c) of the amending statute in respect to grand jury proceedings.¹ The case of *In re Ullman*,² the first decision based on that subsection, has raised controversial questions as to the extent of a citizen's rights under the fifth amendment. In that case, the witness refused to testify under the immunity statute because (1) the statute is unconstitutional and in contravention of his rights under the fifth amendment by requiring him to be a witness against himself and (2) the statute is invalid in that the grant of immunity is not sufficiently protective to compensate for his privilege against self-incrimination. The purpose of this comment is to present an analysis of the pertinent law and policies raised by the witness' contentions.

Privilege Against Self-incrimination: Its Origin, Evolution and Ramifications

"No person . . . shall be compelled in any criminal case to be a witness against himself"³ is the Constitution's limitation on the Federal Government's judicial and quasi-judicial proceedings. This is the privilege against self-incrimination which protects an individual from prosecution and punishment as a consequence of his own compelled testimony. Probably to the average layman this clause was vague and obscure, if not unknown, until recent years. Of course, those threatened with prosecution have learned

¹ 18 U.S.C. § 3486(c). Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212(a) (27), (28), (29) or 241(a) (6), (7) or 313(a) of the Immigration and Nationality Act (66 Stat. 182-186; 204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

² 128 F. Supp. 617 (S.D. N.Y. 1955).

³ U. S. CONST. amend. V.

to some extent the meaning of the self-incrimination clause, but to many it has become important only with recent congressional hearings regarding communist conspiracy. The use of the privilege by witnesses at these hearings has undoubtedly brought much disrepute upon a privilege that has roots extending hundreds of years into the past.

As early as 1591, the King's Bench refused to sustain an indictment for administering the oath on a charge of incontinency, since "the oath cannot be ministered to the party but where the offence is presented first by two men."⁴ We owe much to John Lilburn for his stand on the privilege in 1637.⁵ He was brought before the Council of The Star Chamber in England for one of their inquisitorial proceedings. Such proceedings were used to examine one's past to see if he had committed any crime, there being no real evidence of his guilt. When asked an incriminating question, Lilburn refused to testify, claiming that the court had no right to force one to testify against himself. He further demanded that his accusers be presented and that he would only answer after a formal accusation had been made against him. The court refused Lilburn's plea and imprisoned him for refusing to answer. Several years later the holding was reversed by the House of Lords and Lilburn was freed and granted £3,000 in reparation. Thus, it was recognized that the Star Chamber had no right to force one to testify against himself. Thereafter, a statute⁶ was enacted in 1641 declaring that no man be questioned *ex officio* by any court exercising spiritual or ecclesiastical power, authority, or jurisdiction as to any crime. But the common law courts continued to ask witnesses incriminating questions, feeling the privilege was restricted to ecclesiastical courts. It was some time before the privilege was upheld in common law courts.

The privilege at its early stages was considered to be only applicable to the ordinary witness and not to an accused in as much as the accused was incompetent to testify.⁷ Thus, no such privilege was necessary to supplement the rules of evidence. Today an accused is competent to testify, but the privilege has been extended to cover the accused as well as an ordinary witness.⁸ The accused has also been given the additional privilege of refusing to take the stand.⁹

The framers of our Federal Constitution wanted to be emphatic about the privilege. Rather than leaving its vindication to judicial stare decisis they made it a part of the fifth amendment.¹⁰ Forty-six states have similar

⁴ 8 WIGMORE, EVIDENCE, § 2250 (3d ed. 1940).

⁵ *Id.* § 2250.

⁶ St. 16 Car. I, c. 11, § 4 (1641).

⁷ WIGMORE, *op. cit. supra* note 4, § 2250.

⁸ *Town Council v. Owens*, 61 S.C. 22, 39 S.E. 184 (1901).

⁹ WIGMORE, *op. cit. supra* note 4, § 2250.

¹⁰ See note 3 *supra*.

constitutional provisions.¹¹ New Jersey has no constitutional provision against self-incrimination but has a statute which has been construed to declare the privilege as part of the common law.¹² Iowa has no constitutional provision but the due process provision of the Iowa Constitution has been construed to include the privilege against self-incrimination.¹³ Therefore, every jurisdiction within the United States protects its citizens against compelled testimony.

Various arguments have been advanced to justify the privilege. It is considered uncivilized to force one to testify against oneself. Law enforcement agencies should convict by the use of real evidence. Without the protection of the fifth amendment, law enforcement officers might resort to the rack and screw instead of obtaining real evidence. Although a voluntary confession has been always considered a valid aid to law enforcement, it is obtained without compulsion and duress.

Many courts interpreted the constitutional provision to clearly limit the privilege to an accused in a criminal proceeding. An early New York case held that such a constitutional clause meant an actual trial of the accused.¹⁴ But, this holding not only left the clause meaningless; it was historically wrong. The constitutional privilege was not necessary for an accused because he was either incompetent to testify or had the privilege to refuse to testify by rules of evidence. Historically, the protection was meant to prevent general questioning of one not accused of a crime in an attempt to find some unlawful act in his past. Later, courts realized this error and construed the provision to be a restatement of the common law. A leading case, *Counselman v. Hitchcock*,¹⁵ held the privilege to be applicable to a grand jury proceeding.

"If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act. The case before the grand jury was therefore a criminal case."¹⁶

The privilege has been extended to civil cases and is now recognized where a witness is before any official hearing.¹⁷

The constitutional provision has been construed as allowing a witness to claim the privilege when an answer to a question would tend to incriminate him of a crime. A recent Supreme Court decision¹⁸ has gone further in holding that as long as the answer would be a link in the chain of convicting

¹¹ 118 A.L.R. 602.

¹² *In re Vince*, 2 N.J. 443, 67 A.2d 141 (1949).

¹³ *Koonck v. Cooney*, 244 Iowa 153, 55 N.W.2d 269 (1952).

¹⁴ *People v. Kelly*, 24 N.Y. 74, 21 How. Pr. 54 (1861).

¹⁵ 142 U.S. 547 (1891).

¹⁶ *Id.* at 562.

¹⁷ *Wicmore*, *op. cit. supra* note 4, § 2250.

¹⁸ *Blau v. United States*, 340 U.S. 159 (1950).

evidence, the witness may claim the privilege. Although some courts allow the witness to decide if the answer will tend to incriminate him, the prevailing view and especially the federal view is that the court decides whether the witness has the right to claim the privilege at that time. In absence of immunity statutes, there is a tendency for the courts not to charge a witness with contempt for claiming the privilege.¹⁹

*Emspak v. United States*²⁰ illustrates the extensive protection of the privilege. In that case, the court's opinion, stated by Chief Justice Warren, was that, under the circumstances, questions as to communist affiliations were incriminatory. The court so held despite the absence of any law against being a communist, although there is a law against subversion. This holding has made it possible for recent witnesses before congressional committees to claim the privilege without fear of being in contempt of Congress, if they are in a similar situation to the witness in the above holding.

The rights of individuals have been protected under the privilege to the extent of disallowing comment as to the accused's refusal to testify.²¹ It is felt that to allow comment would prejudice the accused's position in the eyes of the jury. California allows comment on a refusal to testify, but it was deemed necessary to pass a constitutional amendment²² in order to reach that result.

Immunity Grants: Prosecution's Circumvention of Fifth Amendment

The privilege was originally instituted for the protection of the innocent; it has also been a shield of the guilty. Prosecutors, feeling that it was better to give immunity to one person in order to get sufficient evidence against others, started promising immunity against prosecution if the witness would testify. This was the inception of immunity grants which in turn gave way to immunity legislation. Under modern practices, immunity without legislation has not gained much approval. Even in Texas, where non-legislative immunity is recognized, there is a requirement of court approval before there is an effective immunity.²³ The prevailing view in the United States is that a court cannot grant a valid immunity without a statute giving them such authority. The Supreme Court held in *United States v. Ford*²⁴ that the district attorney had no authority to contract so that one accused of an offence would not be prosecuted if he discloses his guilt while testifying against accomplices; the most the accused could expect is an equitable title

¹⁹ See note 15 *supra*.

²⁰ 349 U.S. 190 (1955).

²¹ 2 Mo. L. REV. 78, 85 (1937).

²² CAL. CONST. Art. I, § 13.

²³ *Reagan v. State*, 49 Tex. Crim. 443, 93 S.W. 733 (1906).

²⁴ 99 U.S. 594 (1879).

to executive mercy. Cardozo, whose opinions have been the foundation of much of our present law, stated, "The grant of immunity is in every truth the assumption of a legislative power."²⁵

As a result of similar holdings requiring legislative immunity, the federal and state legislatures accelerated the passage of immunity statutes covering specific crimes. Some of the more important immunity statutes have involved testimony regarding violations of the laws of bribery, gambling, prohibition, interstate commerce and monopoly. Recently there has been increased legislation to alleviate the burden on Congressional investigating bodies in obtaining testimony from witnesses before them.

Many of these immunity statutes merely prevented the testimony from being used against the witness in the same jurisdiction. A statute cannot amend the Constitution, but, if a statute gives the witness as much protection as the Constitution it is felt that it is valid because a witness would lose nothing by testifying.

To be commensurate with the Constitution, the immunity must give protection against future prosecution in the same jurisdiction in regards to that material disclosed by the compelled testimony. The trend towards this holding was a result of the *Counselman v. Hitchcock* decision.²⁶ In that case, the Supreme Court held section 860 of the revised statutes to be insufficient because it only protected against future use of the testimony to gain a conviction. Many persons have argued that the constitutional provision that one shall not be a witness against himself is satisfied by preventing the testimony being used. They reasoned that the prosecution is not using coerced evidence to convict the accused. But the better opinion would seem to be that set forth in the *Counselman* case to the effect that although the testimony could not be used the prosecution could still get leads from it to get other evidence with which to prosecute. Thus, the witness would indirectly convict himself.

Prior to the famous decision of *Counselman v. Hitchcock*, many courts²⁷ held that an immunity statute granting protection against the use of testimony was commensurate with the self-incrimination clause of the Constitution and therefore valid. But this viewpoint would appear to have been abrogated by the *Counselman* decision.

Another issue that arose over these immunity statutes was whether or not the witness had to claim immunity if the statute did not specifically require such a request. A few of the lower federal courts²⁸ held that the

²⁵ *Doyle v. Hofstader*, 257 N.Y. 244, 261; 177 N.E. 489 (1931).

²⁶ See note 15 *supra*.

²⁷ *United States v. McCarthy*, 18 F. 87 (S.D. N.Y. 1883); *Ex Parte Rowe*, 7 Cal. 184 (1857).

²⁸ *United States v. Daisart*, 169 F.2d 856 (2d Cir. 1948); *United States v. Elton*, 222 F. 428 (S.D. N.Y. 1915); *United States v. Skinner*, 218 F. 870 (S.D. N.Y. 1914).

witness did not get the benefit of the immunity statute where he had not requested immunity even though he appeared by virtue of a subpoena. Their argument was that the immunity statute should be no broader than the self-incrimination clause. To get the benefit of the self-incrimination clause one must claim the privilege. But the prevailing view in the state courts seemed to be that appearing by subpoena was an involuntary appearance; therefore, the immunity should apply even though the witness does not specifically request it. *United States v. Pardue*²⁹ represented the view of most lower federal courts. That case dealt with the Federal Trade Commission Act, which made it a criminal offense to refuse to attend and testify before the commission. It held the provision of section 9 that "no natural person shall be prosecuted . . . for or on account of any transaction, matter or thing concerning which he may testify or produce evidence . . . before the commission in obedience to a subpoena issued by it"³⁰ must be construed in accordance with its plain language; if a witness appear in obedience to a subpoena and is placed on the stand by the government, the fact of compulsion is prima facie established. Thus, to entitle him to the immunity expressly given, it is not necessary that he should claim it before the commission. The Supreme Court³¹ followed the *Pardue* view by holding that a person gets immunity without requesting it, since the statute did not require requesting of immunity if the appearance was in obedience to a subpoena. But it would appear that to get the immunity the witness must abide by the statute. Consequently, *Sherwin v. United States*³² held that the statute giving immunity to a person subpoenaed and forced to testify did not apply when the person who gave the testimony was not subpoenaed and did not request immunity.

It would have been best to follow the view that the witness must claim the immunity, because the immunity statutes were intended to force persons to testify who relied on the self-incrimination privilege. Their intention was not to give free immunity to everyone but only to circumvent the self-incrimination clause.

Because the courts began holding that an immunity statute that merely prevented the testimony from being used in a future trial was not sufficient immunity to compel the witnesses to testify, legislatures started passing immunity statutes which prevented prosecution in respect to matters disclosed by the compelled testimony. Some of the state courts held that even this was no sufficient if there was *possible* federal prosecution as a result of the testimony. Michigan appears to have approved the idea that the immunity

²⁹ 294 F. 543 (S.D. Tex. 1923).

³⁰ *Ibid.*

³¹ *United States v. Monia*, 317 U.S. 424 (1943).

³² 268 U.S. 369 (1924).

statute must give protection against *possible* federal prosecution.³³ The court stated in *In re Watson*³⁴ that after a review of the authorities and a consideration of the constitutional provisions and the principles involved, they were of the opinion that the privilege against self-incrimination exonerates one from testifying whenever there is a probability of prosecution in state or federal jurisdictions. In an early federal action³⁵ Chief Justice Marshall commented that the rule clearly is that a party is not bound to make any disclosures which would expose him to state penalties. The court in *Smith v. United States*³⁶ stated that undoubtedly it is true that the immunity granted by the National Prohibition Act must, in order to comply with the fifth amendment, afford protection from prosecution in the state courts and cited *Brown v. Walker*.³⁷ Although *Brown v. Walker* declared that federal law is supreme, and that the words of the immunity statute were general and therefore should cover state prosecution, it did not declare that it had to cover state prosecution and in fact stated that such immunity was not required. A recent lower federal court decision,³⁸ which involved testimony from the Kefauver hearings concerning nationwide crime, held that the privilege against self-incrimination exists in federal courts where there is question of liability under state law.

The prevailing federal and state view is that an immunity statute merely preventing prosecution in the immediate jurisdiction is sufficient immunity to compel the witness to testify. "It should also be noted that the fifth amendment does not give immunity against a state prosecution as it does against a federal prosecution."³⁹ *Brown v. Walker*,⁴⁰ the leading case supporting this view, held that if there is no chance of prosecution in the state courts, there is no privilege in federal courts against testifying.

Brown v. Walker also decided that an immunity not covering disgrace is valid. *Smith v. United States* appears to be in accord with the *Walker* decision and the prevailing view, stating that:

"If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself. He might suffer disgrace and humiliation but such unfortunate results to him are outside of constitutional protection."⁴¹

However, a strong dissent by Justice Field in *Brown v. Walker* stated

³³ *People v. DenUyl*, 318 Mich. 645, 29 N.W.2d 284 (1947).

³⁴ 293 Mich. 263, 291 N.W. 652 (1940).

³⁵ *United States v. Saline Bank of Virginia*, 26 U.S. (1 Pet.) 100 (1828).

³⁶ 58 F.2d 735 (5th Cir. 1932).

³⁷ 161 U.S. 591 (1896).

³⁸ *United States v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952).

³⁹ *United States v. Emspak*, 95 F. Supp. 1012, 1018 (D.C. 1951).

⁴⁰ See note 37 *supra*.

⁴¹ 337 U.S. 137, 147 (1949).

that the only absolute immunity was absolute silence. "What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant."⁴² There was an old decision to this effect,⁴³ although it would seem that in the historical background that it was not in the purview of the self-incrimination clause. The privilege was aimed at preventing one from convicting oneself by his own compelled testimony. Its purpose was not to protect one's reputation.

The courts have placed some limitations on witnesses acquiring immunity. One judicial check is that there is no privilege to commit perjury. The Supreme Court held that for a statute to be valid it was not necessary to grant immunity against a possible perjury conviction based upon the compelled testimony.⁴⁴ Also, immunity will not be granted a witness who gives self-incriminating evidence unless he acts in good faith with the state, and testifies truthfully and fully.⁴⁵ Another limitation is that a witness is not entitled to immunity if no incriminating testimony was given.⁴⁶ An important rule is that one who is required to keep records by law cannot take advantage of immunity in as much as he had a duty to present the records irrespective of immunity.⁴⁷

Even though there were many checks on the misuse of the immunity statutes, many took advantage of the statutes to cleanse their criminal records by testifying under the statutes and thereby absolving themselves of future punishment for past offenses. Probably as a result of such practices, Congress, in respect to the statute on subversion, decided to grant immunity only against the testimony compelled as to subversive activities. *Adams v. Maryland*⁴⁸ stated that this immunity was not commensurate with the self-incrimination clause. There, the witness had testified in a federal proceeding in accordance with the immunity statute and was now being prosecuted in a state court. His contention was that Congress had power to grant immunity against the testimony being used in state courts and that he was given such immunity. The court's statement that the immunity was not sufficient would appear to be dicta. The issue in the case was not whether the immunity was sufficient, but whether Congress had the power to prevent the testimony from being used in state courts. It was decided that the statute by using the words "in any court" intended to cover state courts as well as federal courts; that the Congress did have such a power under the necessary and

⁴² See note 37 *supra* at 632.

⁴³ *Commonwealth v. Gibbs*, 4 Dall. 241 (Pa. 1802).

⁴⁴ *Glickstein v. United States*, 222 U.S. 139 (1911).

⁴⁵ *Scribner v. State*, 90 Okla. Crim. 465, 132 P. 933 (1913).

⁴⁶ *United States v. Markman*, 193 F.2d 574 (2d Cir. 1952).

⁴⁷ *Shapiro v. United States*, 335 U.S. 1 (1947).

⁴⁸ 347 U.S. 179 (1953).

proper clause of the Federal Constitution. It was held necessary and proper to provide immunity where it was in the public interest for national defense to force the witnesses to testify. Further, where there is a conflict between federal and state law in the field of dual jurisdiction, the federal law will be supreme due to necessity and the supremacy clause of the Federal Constitution.⁴⁹

Today, it would appear that in order to have a valid federal immunity statute it is not necessary to grant immunity against possible state prosecution, nor to protect an individual from disgrace and infamy. However, a person must be protected against prosecution and imprisonment in that jurisdiction which uses compulsion to gain his testimony.

Despite Advocacy to the Contrary, Prior Law, Decisions and Policies Will Be Upheld

We have reviewed the past. What lies in the future for the self-incrimination clause and the immunity statutes? The answer may be in the District Court decision of *In re Ullman*⁵⁰ which was the first case involving the new amendment, subsection 3486(c), respecting grand jury proceedings.

That court affirmed the previous holdings that to be commensurate with the Constitution, the immunity statute need only protect against prosecution in federal courts. Since certiorari has been granted, the Supreme Court, in making their decision, will undoubtedly review the many contentions previously made that the immunity to be commensurate with the fifth amendment must also protect against state prosecution. There has been the view that immunity need not be granted against prosecution in another jurisdiction based on the belief that the privilege applied only to the laws of that jurisdiction. That may have stemmed from the belief that prosecution in another jurisdiction was very unlikely to occur. Most of the old decisions did not involve *possible* state prosecution. But, today, state prosecution is a *possible* consequence of federal compelled testimony. Many states have a law against syndicalism and sabotage, as does Utah.⁵¹ And Iowa has a penal statute stating:

Any person who shall become a member of any organization, society, or order organized or formed, or attend any meeting or council or solicit others so to do, for the purpose of inciting, abetting, promoting or encouraging hostility or opposition to the government of the state of Iowa or to the United States, or who shall in any manner aid, abet, or encourage any such organization, society, order, or meeting in the propagation or advocacy of such a purpose shall be guilty of a misdemeanor.⁵²

⁴⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁵⁰ 128 F. Supp. 617 (S.D. N.Y. 1955).

⁵¹ UTAH PENAL CODE § 76.57.3 (1953).

⁵² IOWA CODE § 689.9 (1954).

Therefore, if there is a threat of *possible* state prosecution it would seem justifiable to require immunity against possible state prosecution.

Does Congress have the power to grant immunity against state prosecution? The *Ullman*⁵³ court held that Congress did have the power from the necessary and proper clause of the Federal Constitution; it was necessary and proper for the national defense to acquire the compelled testimony. Although *Brown v. Walker*⁵⁴ suggested that Congress had the power and the recent *Adams v. Maryland*⁵⁵ case held that Congress had power to prevent testimony from being used in state courts, there has been much dissent on this question. Justice Shiras, dissenting in *Brown v. Walker*, stated:

"It is indeed, claimed that the provisions under consideration would extend to the state courts, and might be relied on therein as an answer to such an indictment. We are unable to accede to such a suggestion. As Congress cannot create state courts, nor establish the ordinary rules of property and of contracts, nor denounce penalties for crimes and offenses against the states, so it cannot prescribe rules of proceeding for the state courts."⁵⁶

"As then, the provision of the constitution of the United States which protects witnesses from self-incrimination cannot be invoked in a state court, so neither can the congressional substitute therefor."⁵⁷

And even in *Adams v. Maryland* Justice Jackson, in concurring, stated:

"It does not say that Maryland cannot prosecute petitioner; it just says she shall not put him to disadvantage on the trial by reason of his cooperation with Congress. It leaves Maryland with complete freedom to prosecute . . . she just has to work up her own evidence and cannot use that worked up by Congress."⁵⁸

Furthermore, is immunity against state prosecution necessary in order to compel a federal witness to testify? *Stare decisis*, as heretofore developed in this comment, is that a valid federal immunity statute does not have to grant immunity against state prosecution. Therefore, the granting of immunity from state prosecution would not seem to be necessary and proper for national defense and therefore appears to be an overextension of legislative power.

As to the intent of the Congress in passing this law, there seems to be much confusion in the legislative history. Senator Kefauver emphasized before the Senate:

"I think it important, in view of the statement of the distinguished Senator from Georgia, that we make clear that this bill, at least, in the

⁵³ See note 50 *supra*.

⁵⁴ See note 37 *supra*.

⁵⁵ See note 48 *supra*.

⁵⁶ See note 37 *supra* at 623.

⁵⁷ *Id.* at 625.

⁵⁸ See note 48 *supra* at 184.

opinion of the Judiciary committee and of its ablest counsel, would not grant to a witness immunity from prosecution in a state court."⁵⁹

On the other hand, the Judicial Committee opinion was:

"The language of the amendment that no such witness shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled to testify after having claimed his privilege against self-incrimination is sufficiently broad to ban a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so."⁶⁰

From a general reading of the Congressional Record, it would appear that, although there was much doubt as to whether Congress had the power, Congress did feel that the statute was broad enough to cover state prosecution.

The *Ullman*⁶¹ case also disregarded the plea that the self-incrimination clause should protect against disgrace and infamy. As previously stated, the prevailing view had been that the privilege does not protect against disgrace and infamy. An interesting fact, though, is that in the Court of Appeals⁶² decision of the *Ullman* case each judge felt there was some merit to the defendant's contention. Judge Frank said:

"We are not prepared to say that this suggestion lacks all merit. But our possible views on the subject have no significance. . . . Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D. C."⁶³

Judge Clark said:

"I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890s."⁶⁴

And last but not least, Judge Galston said:

"If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut legislative statute amending the Fifth Amendment."⁶⁵

From a legal view, immunity from disgrace and infamy is unnecessary as the privilege against self-incrimination was never intended to prevent hurt feelings and disrespect of fellow men. From a practical view, the federal courts will be very hesitant to require immunity against disgrace and infamy. If such immunity were required, the immunity statutes in the

⁵⁹ 99 CONG. REC. 4743 (1953).

⁶⁰ 2 U.S.C. Cong. and Adm. News, 83rd Cong., 2d Sess. 3064 (1954).

⁶¹ See note 50 *supra*.

⁶² *United States v. Ullman*, 221 F.2d 760 (2d Cir. 1955).

⁶³ *Id.* at 761, 762.

⁶⁴ *Id.* at 763.

⁶⁵ *Ibid.*

federal jurisdiction would be destroyed. Immunity statutes could never give total immunity against disgrace and infamy because there would be immediate publication of the compelled testimony in the newspapers.

Congress has taken care of the loophole caused by previous Supreme Court decisions that mere appearance by subpoena was sufficient to take advantage of the immunity statutes. Congress has inserted the provision that the witness must claim the self-incrimination privilege to get the advantage of the statute. This will make the statute more effective since the intent of immunity is not to give immunity to everyone, but, rather to circumvent the privilege by giving immunity to those who refuse to testify. Also, the provision for approval by the attorney general and a subsequent court order places a good restriction on the granting of immunity so that immunity will not be granted freely without supervision.

It does seem that when our national security is at stake that immunity statutes could be valuable in detecting spies and others attempting to overthrow our system of government. They act in such a secrecy that it is hard to get evidence to convict them. Furthermore, immunity statutes have played a big part in getting convictions of other crimes.

But there has been much consternation caused by these immunity statutes. One might wonder how far these immunity statutes can go before they will in effect wipe out the self-incrimination clause. If vague, they will leave the state courts in much doubt as to just who they can prosecute. Also, the state prosecutors may have a very good case destroyed overnight by a federal grant of immunity.

Although the immunity statute has been an aid in convictions, just how far should they influence constitutional rights?

"The power of inquiry . . . must be exerted with due regard for the right of witnesses . . . few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their person and private affairs."⁶⁶

Judge Clark recognized the danger of immunity statutes and declared:

"And realistically viewed there is much in the defendant's contention that at the end of the road is a charge of perjury supported by the oath of a renegade or paid informer. Convictions so obtained and punishment thus decreed cannot satisfy either the need or the ideology of a democratic country committed to respect and toleration for dissident minorities."⁶⁷

The *Rogers v. United States*⁶⁸ decision did not help the evidence situation. It held that once the privilege is considered by the court to be waived by the witness answering questions, subsequent questions must be answered.

⁶⁶ *Sinclair v. United States*, 279 U.S. 263, 291, 292 (1929).

⁶⁷ See note 62 *supra* at 763.

⁶⁸ 340 U.S. 367 (1951).

As pointed out by Dean Griswold of the Harvard Law School,⁶⁹ who looks with disfavor on the present statute, that holding will tempt witnesses to claim the privilege immediately in fear of their privilege being waived.

Maybe the uneasiness caused by communist infiltration can be eased by other means than compelled testimony. For example, it would seem that in regard to questioning government employees to determine if they are a security risk, that the immunity statute would not be needed. Although one has a constitutional right to claim the privilege, he has no constitutional right to remain in the service of our government. If he refuses to answer it would seem that that would be sufficient cause to show that he is not entirely loyal to the government and could be dismissed. After all, the new statute appears to be aimed at subversion, and getting rid of the disloyal from government service would play a big part in carrying out that mission.

I hope the immediate crisis can be met by other methods than by slowly destroying the fifth amendment. Joseph Welch, counsel for the Army in the Army-McCarthy hearings, who was faced with much resentment against the fifth amendment, spoke very aptly when he said:

"Our founding Fathers were familiar enough with the history of the Middle Ages to know that 'Justice' in that time took some peculiar forms. They knew that the formal trial of a citizen often began by placing him to torture, with someone standing by to take down that era's equivalent of a stenographic transcript of the 'confession' he made in his agony. The transcript was then piously and lugubriously produced in court as proof of the poor devil's guilt.

"The framers of the Bill of Rights were determined that this should never happen in this fair country of ours and in this spirit, which I can hardly find blameworthy, they wrote the fifth amendment. Now, to be sure, the fifth amendment has been resorted to in the intervening years by many rascals, by many guilty men and doubtless there are persons invoking it today who will one day be found guilty. But no matter who invokes the amendment, it stands in our Constitution as one of the guardians of our liberties. It is for all men to use. Guilt will have to be proved in other ways, not in a way reminiscent of the medieval dungeons.

"It would be a pity if the net effect of these long and laborious hearings, the confusion and the travail were merely to undermine our Nation's faith in the document that made the Nation possible. If the phrase 'fifth-amendment Communist' has in anyway eroded your faith in the Bill of Rights, read it once again, I pray you."⁷⁰

Conclusion

The law does and will require a valid immunity statute to protect against prosecution in the immediate jurisdiction. The federal courts may even require immunity against state prosecution when there is *possible* state prose-

⁶⁹ GRISWOLD, *THE FIFTH AMENDMENT TODAY* 23 (1955).

⁷⁰ 2 U.S.C. Cong. and Adm. News, 83rd Cong., 2d Sess. 3068 (1954).

cution resulting from the compelled testimony. As to protection against disgrace and infamy, there may be much pity shown by the judges but such protection has never been given in the past and is doubtful whether it will be required in the future.

The *Ullman*⁷¹ case may cause future witnesses to rely on the freedom of speech clause of the first amendment⁷² to protect cherished ones and friends from discredit. At that time, it will have to be decided whether or not the immunity statutes will supersede the first amendment as they have the privilege against self-incrimination.

⁷¹ See note 2 *supra*.

⁷² U.S. CONST. amend. I.