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Criminal Procedure: Federal Immunity Statutes and the Fifth Amendment--Fresh Beginning or False Start

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CRIMINAL PROCEDURE: FEDERAL IMMUNITY STATUTES AND THE FIFTH AMENDMENT – FRESH BEGINNING OR FALSE START?

Kastigar v. United States, 406 U.S. 444 (1972)

Petitioners were summoned before a United States grand jury. The Government, believing they might invoke the fifth amendment, obtained an order compelling answers and granting immunity pursuant to the Organized Crime Control Act of 1970.[1] Petitioners appeared, but refused to answer, whereupon the district court found them in contempt. Rejecting the petitioners' contention that the immunity grant was not broad enough to supplant the fifth amendment privilege, the Court of Appeals for the Ninth Circuit affirmed.[2] On certiorari[3] the Supreme Court affirmed and HELD, immunity from use of compelled testimony and evidence derived therefrom is coextensive with the privilege against self-incrimination and sufficient to compel testimony over a claim of privilege.[4]

The privilege against self-incrimination was established in Anglo-American law[5] long before its incorporation into the United States Constitution.[6] Although courts have guarded the privilege zealously, there has never been complete agreement on the ultimate interests it protects.[7] Some commentators have viewed it as a manifestation of the right to privacy, others as a legalized form of civil disobedience.[8] Even among members of the Supreme Court there has been contention that the privilege should shield witnesses not only from threat of criminal prosecution but also from extra-judicial effects of incriminating testimony.[9] However, these interests must be counterbalanced by the paramount necessity for public disclosure of information relating to criminal activity.[10] Consequently, the area of individual protection

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1. 18 U.S.C. §6002 (1970).
2. Stewart v. United States, 440 F.2d 954 (9th Cir. 1971).
3. 402 U.S. 971 (1971).
4. 406 U.S. 441 (1972). Powell, J., announced the opinion of the Court, in which Burger, C.J., and Stewart, White, Blackmun, JJ., concurred. Douglas and Marshall, (JJ., dissented with opinions. Brennan and Rehnquist, JJ., took no part in the decision.
5. The privilege against self-incrimination developed from popular opposition to the oath ex officio and its use to compel testimony in the Star Chamber. Both were abolished in 1641. By the late 17th century the privilege had been established in the common law courts. 8 J. WIGMORE, EVIDENCE §2250, at 269-92 (McNaughton rev. 1961).
6. U.S. CONST. amend. V.
7. 8 J. WIGMORE, *supra* note 5, §2251, at 296.
8. Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 BOSTON U.L. REV. 616, 618 (1971).
9. *Compare* Ullman v. United States, 350 U.S. 422, 459-60 (1956) (Douglas, J., dissenting) *and* Brown v. Walker, 161 U.S. 591, 628 (1896) (Field, J., dissenting), *with Ullman v.* United States, 350 U.S. 422, 430 (1956) (majority opinion).
10. *See* 8 J. WIGMORE, *supra* note 5, §2192, at 70. Crimes such as bribery and conspiracy are likely to go unpunished unless one of the parties furnishes evidence against the others. The likelihood of criminal prosecution, absent an immunity grant, obviously

is narrow: the witness may claim the privilege for himself alone[11] and only when testimony will subject him to a possible criminal penalty.[12]

Immunity statutes have been devised as a means of resolving the conflict between the public's need to know and the individual's right to remain silent.[13] By withdrawing the witness' constitutionally guaranteed privilege against self-incrimination and substituting protection commensurate therewith,[14] a balance is maintained between these competing interests. The first federal immunity statute,[15] passed to aid congressional investigating committees, was broadly drawn and amenable to flagrant abuse by witnesses eager to testify in order to gain immunity for undiscovered misdeeds.[16] Attempting to rectify this situation, the succeeding statute only immunized witnesses from actual use of compelled testimony but not from use of evidence indirectly derived therefrom.[17] The immunity Act of 1868[18] embodied these provisions and extended the use of witness immunity provisions to judicial proceedings.

The constitutionality of immunity legislation was first considered in *Counselman v. Hitchcock*[19] in 1892. A witness had been granted immunity pursuant to the Act of 1868 but refused under court order to answer grand jury questions and was sentenced for contempt. The Supreme Court approved the concept of the immunity device, but held that a statute must offer protection coextensive with the fifth amendment privilege it purports to supplant.[20] Since the Act of 1868 prohibited neither use of compelled testimony to obtain new evidence nor introduction of evidence thus obtained in a subsequent prosecution, the Court held its protection was not sufficiently broad and

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provides little incentive for a party to furnish such evidence.

11. *E.g.*, Hale v. Henkel, 201 U.S. 43 (1906) (corporate officer may not assert privilege on behalf of corporation).

12. The testimony sought need not be sufficient to support a criminal conviction independently in order to invoke the privilege properly; it is sufficient if it supplies a connecting link in a chain of evidence that would lead to the witness' prosecution. *E.g.*, Blau v. United States, 340 U.S. 159, 161 (1950). However, there must be a reasonable ground as distinguished from a speculative possibility that the testimony will furnish such a link. Mason v. United States, 244 U.S. 362, 365-66 (1917).

13. The immunity principle by which a witness is compelled to give testimony but granted some degree of protection from its consequences was used as a means of eliciting evidence in England as early as 1725 and made its appearance in American jurisprudence in 1807. The first immunity statute, however, was not enacted until fifty years later. 8 J. WIGMORE, *supra* note 5, §2281, at 492; Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 330-33 (1966).

14. Counselman v. Hitchcock, 142 U.S. 547 (1892).

15. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

16. The impetus for reform was provided by two clerks of the Department of the Interior, who embezzled $2 million and later obtained immunity from prosecution by relating their exploit to a congressional committee. Wendel, *supra* note 13, at 334 .

17. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

18. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

19. 142 U.S. 547 (1892).

20. *Id.* at 585.

declared it unconstitutional.[21] Furthermore, the Court stated in dictum that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."[22]

Reacting swiftly to the *Counselman* decision[23] Congress enacted a new immunity statute[24] that afforded witnesses complete protection from criminal proceedings growing out of any "transaction, matter, or thing"[25] that was the subject of their testimony. The statute was sustained in *Brown v. Walker*[26] as meeting the requirement of coextensiveness, despite objections that it offered no protection against state prosecution. Although the Supreme Court noted that such protection was not constitutionally necessary, it construed the statute to prohibit state prosecution of federal witnesses under an immunity grant.[27] This judicially sanctioned transactional immunity[28] became the basis for subsequent federal immunity legislation.[29]

After *Brown* a witness who testified under a federal immunity grant to crimes committed in state *A* could not be prosecuted by state authorities. However, the same witness testifying in state *A* under a state immunity grant could be prosecuted for crimes committed under federal law[30] or the laws of state *B*. Although some authority existed to the contrary,[31] federal precedent[32] supported this "two sovereignties" rule that required only the jurisdiction compelling the testimony to grant the witness immunity.

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21. *Id.* at 586.

22. *Id.*

23. Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 457-58 (1955).

24. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

25. *Id.*

26. 161 U.S. 591 (1896).

27. *Id.* at 606-08. The power of Congress to prohibit subsequent state prosecutions was upheld under the supremacy clause (U.S. CONST. art. VI, §2). The holding was thoroughly reconsidered and reaffirmed in Ullman v. United States, 350 U.S. 422 (1956). Even lacking that construction the statute would have been sustained, since the Court regarded state prosecution as an unsubstantial and remote possibility from which the fifth amendment offered no protection. Brown v. Walker, 161 U.S. 591, 608-09 (1896).

28. The concept embodied in the Act of 1893 and derived from the "absolute immunity" dictum of *Counselman* is referred to as "transactional immunity." Under a grant of transactional immunity a witness is absolutely protected from future prosecution for criminal acts revealed by his testimony. *See* Petition of Specter, 439 Pa. 404, 411-12, 268 A.2d 104, 109 (1970). In the present case the Court stated that transactional immunity is broader than required by the fifth amendment. Consequently, it held that a witness may be compelled to answer after being granted immunity from direct use of compelled testimony and evidence directly or indirectly derived therefrom. Thus, under "use immunity" a witness may be prosecuted for a crime revealed in compelled testimony, provided the prosecution is based on independently obtained evidence. *See text* accompanying notes 55-61 *infra.*

29. *See* Wendel, *supra* note 13, at 348.

30. Knapp v. Schweitzer, 357 U.S. 371, 378-79 (1958). *See* Jack v. Kansas, 199 U.S. 372, 380 (1905).

31. United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828).

32. *See, e.g.*, Murdock v. United States, 284 U.S. 141 (1931).

This situation of interjurisdictional immunity[33] was undesirable in the eyes of state officials and witnesses, but posed no problem for federal officials until the fifth amendment was made applicable to state proceedings in 1964.[34] This necessitated precise definition of the effect of immunity granted by one sovereign on the prosecutorial powers of another. Sweeping aside the two sovereignties rule as outmoded and historically ill-founded, the Supreme Court held in *Murphy v. Waterfront Commission of New York Harbor*[35] that a state witness could not be compelled to testify unless the testimony and its fruits could not be used against him in a federal prosecution.[36] Moreover, to implement this decision the federal government was prohibited from using compelled testimony or any evidence derived therefrom in prosecuting a witness for a crime revealed under a state immunity grant.[37] Consequently, a witness under a grant of "use immunity"[38] could be prosecuted by a different jurisdiction for criminal acts revealed in his testimony only if an independent, legitimate source exists for the evidence challenged as being the fruit of compelled testimony. The Court observed, however, that this placed the witness in substantially the same position as if, absent state immunity, he had properly invoked his fifth amendment privilege.[39]

The Court's decision in *Murphy* caused serious doubt as to the vitality of transactional immunity,[40] which had been the basis of federal immunity statutes since 1893 and repeatedly upheld by the courts.[41] Some commentators viewed the decision as settling only the interjurisdictional immunity problem and leaving the transactional requirement unchanged where intra-

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33. "Interjurisdictional immunity" as used herein describes the situation in which a witness is granted immunity by state *A*, then state *B* wishes to prosecute him for matters revealed in his testimony. "Intrajurisdictional immunity" describes the situation in which state *A* grants immunity to a witness and later wishes to prosecute him for matters revealed in his testimony. *See* Note, *supra* note 8, at 618.

34. Malloy v. Hogan, 378 U.S. 1 (1964).

35. 378 U.S. 52 (1964).

36. *Id.* at 79.

37. Murphy v. Waterfront Comm'n, 378 U. S. 52, 79 (1964). It is unclear whether this exclusionary rule was based on constitutional grounds or the Courts supervisory powers. A footnote suggested exclusion of compelled testimony and tainted evidence was constitutionally required. *Id.* at 79 n.18. The opinion of the Court in the instant case seems to confirm this view. 406 U.S. at 457 n.43.

38. *See* note 28 *supra.*

39. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

40. *E.g.*, Byers v. People, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *vacated on other grounds*, 402 U.S. 424 (1971). *But see In re* Korman, 449 F.2d 32, 35-37 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972). In his concurring opinion in *Murphy* Justice White specifically rejected transactional immunity as being broader than that required by the fifth amendment. *Id.* at 102-03. One commentator noted, however, that the cases cited to support this position are factually distinguishable. Wendel, *supra* note 13, at 372. The Court in the instant case relied instead on *Murphy* to reach the same conclusion. 406 U.S. at 455-59.

41. *In re* Korman, 449 F.2d 32, 35-37 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972).

jurisdictional immunity[42] was concerned.[43] Others contended it meant transactional immunity was not constitutionally required in any circumstance, since the Court made no reference to the "absolute immunity" dictum in its citations of *Counselman*.[44] Therefore, while the requirement that immunity statutes provide protection co-extensive with the privilege against self-incrimination remained unchanged,[45] the quantum of protection required was in doubt.

The Organized Crime Control Act of 1970[46] attempted to inject order into the undisciplined proliferation of federal witness immunity statutes.[47] The drafters of the immunity provision, influenced by *Murphy*[48] and later cases,[49] wished not only to provide protection for the witness commensurate with the fifth amendment privilege, but also to make the scope of the immunity as narrow as possible to avoid hampering state and federal law enforcement.[50] The statute provided that "no testimony or other information compelled . . . or any information directly or indirectly derived from such testimony or other information . . . [could] be used against [a witness] in any criminal case."[51] Transactional immunity was abandoned altogether in favor of use immunity.[52] *Murphy* already permitted the federal government to prosecute a witness for acts revealed in testimony compelled by a state, as long as no tainted evidence was used. The Act went further by allowing the federal government to compel testimony and later prosecute the witness itself for acts revealed thereby. Judicial reaction to the new statute was mixed. The Ninth Circuit upheld it, following the reasoning of *Murphy*;[53] the Fifth and Seventh Circuits, however, found that the case did not narrow *Counselman*'s transactional standard for interjurisdictional immunity and held the Act unconstitutional.[54]

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42. *See* note 33 *supra*.

43. *See* Sobel, *The Privilege Against Self-Incrimination "Federalized,"* 31 BROOKLYN L. REV. 1, 44-47 (1964).

44. Wendel, *supra* note 13, at 370.

45. Murphy v. Waterfront Comm'n, 378 U.S. 52, 54 (1964).

46. 18 U.S.C. §§6001-05 (1970).

47. The Organized Crime Control Act of 1970 replaced fifty-three existing immunity statutes that had been passed in connection with various pieces of regulatory legislation. *See* 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1411, app. A at 1444-45 (1970) [hereinafter cited as WORKING PAPERS].

48. *Id.* at 1422-32; McClellan, *The Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 82-86 (1970).

49. *E.g.*, Gardner v. Broderick, 392 U.S. 273 (1968); *see* WORKING PAPERS, *supra* note 46, at 1427-28.

50. WORKING PAPERS, *supra* note 46, at 1412.

51. 18 U.S.C. §6002 (1970).

52. New Jersey had adopted a new immunity statute prior to enactment of the Organized Crime Control Act, which was upheld in Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), decided the same day as the instant case.

53. Stewart v. United States, 440 F.2d 954 (9th Cir. 1971); Bacon v. United States, 446 F.2d 667 (9th Cir. 1971); Charleston v. United States, 444 F.2d 504 (9th Cir.), *cert. dismissed*, 404 U.S. 916 (1971).

54. United States v. Cropper, 454 F.2d 215 (5th Cir. 1971), *rev'd*, 406 U.S. 952 (1972);

In the instant case the Supreme Court relied heavily on *Murphy*, although conceding that it dealt with a different aspect of the immunity problem.[55] Since the scope of the fifth amendment privilege is identical in all jurisdictions, the majority reasoned that if use immunity secures a state witness' privilege against the federal government then use immunity must be coextensive with the scope of the privilege.[56]In his dissent Justice Douglas maintained *Murphy* should be distinguished, since the consideration for the right of the several states to prosecute violations of their laws, which influenced the Court in *Murphy*, was absent in the instant case.[57]

Although subsequent to *Murphy*[58] the Court continued to cite the *Counselman* dictum from which transactional immunity was derived,[59] the Court specifically rejected it in the instant case.[60] However, the majority concluded that its decision was consistent with the narrow ground on which *Counselman* was decided,[61] since the statute under consideration protected against indirect use of compelled testimony to adduce new evidence. The prosecution was held to an affirmative burden "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[62] Justice Marshall, dissenting, objected that this left the witness dependent on the good faith of the prosecutor who alone possesses information relative to the question of taint. Moreover, good faith is insufficient, since it would be virtually impossible for a prosecutor who relies on scores of investigative personnel to be certain that some use of compelled testimony has not been made.[63]

The instant case although predictable,[64] drastically reduces the amount of protection enjoyed by a witness under a federal immunity grant. The Court's failure to deal more specifically with the burden of establishing an independent basis for evidence introduced at a witness' subsequent trial means standards will be developed only by future litigation. Furthermore, use immunity may be counterproductive of the goal it seeks to achieve. A witness under subpoena faced with either a contempt sentence if he refuses to answer or a possible prosecution if he does answer will have no reason to be more than minimally cooperative. A witness who might otherwise remain unknown will have little incentive to come forward voluntarily. As Justice Brennan

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In re Korman, 449 F.2d 32 (7th Cir. 1971), *rev'd* 406 U.S. 952 (1972).

55. 406 U.S. at 457-58.
56. *Id.* at 458.
57. *Id.* at 464 (Douglas, J., dissenting).
58. Shapiro v. United States, 335 U.S. 1, 28-29 n.36 (1948).
59. Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).
60. 406 U.S. at 454-55.
61. *See* text accompanying note 21 *supra*.
62. 406 U.S. at 460.
63. *Id.* at 469 (Marshall, J., dissenting).
64. Note, *supra* note 8, at 648-49.