Washington University Law Review

Volume 1953 | Issue 3

January 1953

Proposed Federal Immunity Legislation

George A. Jensen

NOTES

PROPOSED FEDERAL IMMUNITY LEGISLATION

Two bills are pending in Congress which will have a considerable effect on the privilege against self-incrimination if they become law. One of these bills would authorize the Attorney General to compel self-incriminating testimony or documents from any witness in any case or proceeding before any grand jury or court of the United States whenever, in the judgment of the Attorney General, such testimony is necessary to the public interest. The witness, on the other hand, would not be subject to any penalty or forfeiture for any testimony compelled of him after having claimed his privilege against self-incrimination.[1] The other bill would give essentially the same power to either House of Congress or committees of either or both Houses, with respect to any witness appearing before either House or a committee of either or both Houses.[2]

The constitutional provision against self-incrimination as embodied in the Fifth Amendment is no broader than the common law privilege against self-incrimination, but this Amendment insures the privilege against legislative abridgement.[3] The constitutionality of such legislation as that now proposed, however, is well settled.[4] The only real question presented is the desirability of such immunity legislation. This question should be considered in view of the history of federal immunity legislation in the United States.

In 1857 Congress passed an act which provided in part as follows:

> . . . [N]o person examined and testifying before either House of Congress, or any committee of either House, *shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify* before either House of Congress or any committee of either House . . . and that no statement made or paper produced by any witness before

1. S. 565, 83d Cong., 1st Sess. (1953).
2. S. 16, 83d Cong., 1st Sess. (1953).
3. 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940).
4. Hale v. Henkel, 201 U.S. 43 (1906); Interstate Commerce Commission v. Baird, 194 U.S. 25 (1904); Brown v. Walker, 161 U.S. 591 (1896).

> either House of Congress or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness. . . .[5] [Emphasis added.]

This legislation was proposed by a select committee appointed by the House of Representatives to investigate newspaper charges of corruption among members of the House. The committee had been obstructed in its investigation by a newspaper reporter's refusal to disclose the source of his information for his charges of corruption. The committee cited the reporter for contempt and proposed the above act to compel more effectively the attendance of witnesses and require their answers.[6]

The senatorial debate in 1862 on a proposed amendment to this act of 1857 reveals the abuse which followed its passage and which led to its change. Apparently a great many persons, including the Secretary of War, immediately testified before congressional committees to secure immunity for their wrongdoings.[7] Because of this, in 1862 the above quoted provision of

---

5. 11 STAT. 155 (1857).

6. CONG. GLOBE, 34th Cong., 3d Sess. 403 (1857).

7. Senator Trumbull, arguing in favor of amendment, said:

> . . . The Senate is aware that one or two investigating committees are in session; and that, under the law as it now stands, any person who testifies before those committees in reference to any matter whatever is discharged from criminal prosecution for any offense that he may have been guilty of, connected in any way with those transactions. It was under this law that Floyd was discharged after he had been indicted, and also the clerk in the Interior Department who purloined the Indian bonds. . . .
>
> . . . In fact this [the statute of 1857] holds out an inducement for the worst criminals to appear before our investigating committees. Here is a man who stole two millions in bonds, if you please, out of the Interior Department. What does he do? He gets himself called as witness before one of the investigating committees and testifies something in relation to that matter, and then he cannot be indicted. . . . So it was with the former Secretary of War; there were two or three indictments against him in this District, but my information is that they were all quashed, upon the ground that he also had testified before a Congressional committee.

CONG. GLOBE, 37th Cong., 2d Sess., 428 (1862).

Senator Wade, also arguing in favor of amendment, said:

> . . . I have not dared to enter upon certain investigations before a committee of which I am a member, for the reason that the law as it now stands exculpates great rascals from the responsibility they owe to the Government, and gives entire immunity to any man touching any matter that you see fit to inquire of him about. I wonder how such a law was ever passed. I never should have believed that such a law was on your statute-book if it had not been suggested to me and I had found it. . . .

Id. at 429. Senator Harris argued against the proposed amendment, and although he mistakenly assumed that the proposed amendment would be a

the 1857 act was abolished, and it was provided in lieu thereof as follows:

> . . . [T]he testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, *shall not be used as evidence in any criminal proceeding against such witness* in any court of justice. . . .[8] [Emphasis added.]

The validity of this type of legislation was tested in *Counselman v. Hitchcock*,[9] where the statute involved was in substance almost identical to the above quoted 1862 amendment except that it dealt with evidence obtained in a judicial proceeding instead of a congressional hearing.[10] The Court, holding that statute invalid as a means of compelling self-incriminating testimony, said:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates. . . . Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.[11]

---

constitutionally effective immunity statute to compel testimony, he spoke prophetically when he said:

> . . . It is not enough to say that the testimony of a witness shall not afterwards be used against him on a criminal prosecution. . . . Now, the effect of passing the bill in its present shape will be this: a witness may be put upon the stand; he may be compelled to answer questions, and the answer to those questions may be such as to furnish the means by which he can afterwards be convicted of a crime. I am not willing to make this great innovation upon the common-law doctrine of evidence. . . .

Id. at 428.

8. 12 STAT. 333 (1862).

9. 142 U.S. 547 (1892).

10. REV. STAT. § 860 (1875):

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . .

11. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

This case thus set forth the pattern for future immunity statutes, the test being whether the immunity granted is as broad as the privilege being abrogated. If the immunity is coextensive with the privilege against self-incrimination, then the statute is valid, and if it is not coextensive with the privilege the statute is ineffective to compel otherwise privileged testimony.

It should be noted that the decision in the *Counselman* case did not render the provision there involved or the similar 1862 amendment invalid *per se,* but rather it rendered these statutes ineffective to compel privileged testimony. These statutes were still effective to prevent testimony given in a congressional hearing or judicial proceeding from being used as evidence in a later prosecution even though the testimony or evidence was never privileged. Thus as a practical matter, these statutes remained on the books and gave unwarranted protection to witnesses later prosecuted although they were of no use to compel testimony or evidence. It was for this very reason that the statute involved in the *Counselman* case was repealed in 1910,[12] but the 1862 amendment has never been repealed and is still law today.[13]

Shortly after the *Counselman* case an immunity statute[14] dealing with witnesses appearing before the Interstate Commerce Commission was upheld in *Brown v. Walker.*[15] This statute, which provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . . ,"[16] met the requirements of the *Counselman* case. In the *Brown* case the Court said that there are two possible interpretations of the Fifth Amendment: first, a literal interpretation that no one could be compelled to testify as to anything against his will unless it was obviously not incriminating or degrading, or second, that the object of the Fifth Amendment is to secure a witness against criminal prosecution. The Court adopted the second interpretation, from

12. 36 STAT. 352 (1910).
Since the decision above referred to [Counselman v. Hitchcock] section 860 has possessed no usefulness whatever, but has remained in the law as an impediment to the course of justice. . . . The statute has become a shield to the criminal and an obstruction to justice.
H. R. REP. No. 266, 61st Cong., 2d Sess. (1910).
13. 12 STAT. 333 (1862), as amended, 18 U.S.C. § 3486 (Supp. 1952).
14. 27 STAT. 443 (1893).
15. 161 U.S. 591 (1896).
16. 27 STAT. 443 (1893).

which it follows that if the statute prevents future prosecution, then the privileged testimony can be compelled.

With this history in the background the basic question of the desirability of the proposed immunity legislation can be considered. The Special Committee to Investigate Organized Crime in Interstate Commerce reported that "[t]he most glaring weakness, which proved highly embarrassing to the committee and continuously frustrated its investigations, was the defect in the immunity statute governing Congressional investigations. . . ."[17] The committee strongly endorsed the passage of the proposed bill which compels testimony at congressional hearings.[18] This bill has also been reported on favorably by the Senate Committee on the Judiciary.[19] The other bill,[20] which gives power to the Attorney General to compel testimony at his discretion in judicial proceedings, was proposed by Senator Kefauver and has been strongly endorsed by Judge Morris Ploscowe.[21]

What will be the effect of the passage of the proposed legislation? Will there again be such abuse of the powers created as there was following the first immunity statute in 1857?

It is submitted that probably the greater part of the corruption and misuse following the passage of the 1857 statute was due to the poor draftsmanship of that statute. A comparison of the pertinent part of the 1857 statute with its modern counterpart, which would compel testimony in congressional hearings, shows that the 1857 statute did not require any claim of privilege by the witness, nor did it impose any limitations upon the granting of immunity and its coincident compulsion of testimony.[22] A

17. SEN. REP. No. 725, 82d Cong., 1st Sess. 95 (1951). (Final Report of the Special Committee to Investigate Organized Crime in Interstate Commerce.) The statute criticized by the committee is 18 U.S.C. § 3486 (Supp. 1952) which is essentially the 1862 amendment.

18. S. 16, 83d Cong., 1st Sess. (1953).

19. SEN. REP. No. 153, 83d Cong., 1st Sess. (1953).

20. S. 565, 83d Cong., 1st Sess. (1953). This bill was proposed by Senator Kefauver for himself, Senator Hunt, Senator Tobey, and Senator Wiley.

21. Ploscowe, *How to Make Gangsters Talk*, This Week Magazine, Feb. 1, 1953, p. 7. Judge Ploscowe is Eexcutive Director of the American Bar Association's Commission on Organized Crime. He helped prepare the final report of the Special Committee to Investigate Organized Crime in Interstate Commerce.

22. 11 STAT. 155 (1857):

> . . . [N]o person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House as to which

workable statute of this type needs those two requirements. When a claim of privilege is not required, the examiner never knows when his questions would compel self-incriminating answers. This does not present a problem in the absence of immunity statutes since if a witness does not claim his privilege he is deemed to have waived it by answering the question.[23] Under the 1857 immunity statute, however, the privilege was not waived. Instead the witness gained immunity from further prosecution! Then too, under the 1857 statute there was no requirement that a majority of the House or a certain majority of the committee conducting the hearing vote to grant immunity to compel testimony. Thus even after the examiner became aware that a witness was giving self-incriminating testimony he could continue his questioning and completely immunize the witness unless stopped by the body conducting the hearing.

This type of abuse and misuse is not possible under the pro-

---

he shall have testified whether before or after the date of this act, and that no statement made or paper produced by any witness before either House of Congress or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness in any court of justice; . . . *Provided,* That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.

S. 16, 83d Cong., 1st Sess. (1953):

"No witness shall be excused from testifying or from producing books, papers and other records and documents before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him tend to incriminate him or subject him to a penalty or forfeiture, when the record shows —

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the Members present of that House, or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee, including at least one member of each of the two political parties having the largest representation on such committee.

shall by affirmative vote have authorized that such person be granted immunity under this section with respect to the transactions, matters, or things concerning which, after he has claimed his privilege against self-incrimination, he is nevertheless compelled by direction of the presiding officer or the chair to testify. 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 after he has claimed his privilege against self-incrimination he is nevertheless so compelled to testify, or produce evidence, documentary or otherwise.

"No official paper or record required to be produced hereunder is within the said privilege.

"No person shall be exempt from prosecution or punishment for perjury or contempt committed in so testifying."

23. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113 (1927); 8 WIGMORE, EVIDENCE § 2276 (3d ed. 1940).

posed statute. It is specifically provided that there must be a claim of privilege by the witness.[24] In the absence of such a claim all privilege is waived as to answers given by the witness, and no immunity is gained.[25] When the witness does claim his privilege against self-incrimination, it is then within the discretion of the body conducting the hearing to grant immunity and compel the desired testimony.[26] If a House of Congress is conducting the hearing, a majority of the members of that House present must vote to grant immunity, and if a congressional committee is conducting the hearing, two-thirds of the members of that committee, including at least one member of each of the two major political parties, must vote in favor of granting immunity. To clarify matters and prevent any possible confusion or ambiguity the proposed statute also provides that official papers or records are not within the immunity grant, nor is a person exempt from a prosecution for contempt or perjury committed while so testifying.[27]

One feature not present in the proposed statute is a requirement that the congressional body questioning the witness either receive the approval of the Attorney General prior to granting immunity to a witness or at least consult with the Attorney Genenral. This may or may not be considered a defect in the proposed statute, but such a requirement would appear to have some merit since the Attorney General is the chief law enforcement officer of the Federal Government. As such, he should have a much more complete picture of crime in the United States and of law enforcement in general than the congressional body involved. Requiring such approval or consultation would tend to insure harmony and coordination between the work of the Justice Department and that of Congress.

The other proposed bill authorizes the Attorney General to grant immunity to a witness in any proceeding in any grand jury or court of the United States whenever he thinks that it is necessary to the public interest.[28] The structure of this act is basically

24. See note 22 *supra.*
25. 8 WIGMORE, EVIDENCE § 2276 (3d ed. 1940).
26. See note 22 *supra.*
27. *Ibid.*
28. S. 565, 83d Cong., 1st Sess. (1953):
. . . That section 3486 of chapter 223 of title 18 of the United States Code is amended by striking out the caption thereof and inserting the following: "§ 3486. Compelled testimony tending to incriminate wit-

the same as that of the other proposed measure. The witness must claim his privilege against self-incrimination and then be compelled to testify before he receives any immunity. As in the other bill it is provided that no witness will be exempt from prosecution for perjury or contempt committed while so testifying. It is also provided, as an additional safeguard, that when in the Attorney General's judgment the witness's testimony is necessary to the public interest, this decision shall be in writing, signed by the Attorney General, and become a part of the record of the proceeding or case of which the testimony is a part.

Granted that the apparent defects of the 1857 statute are rectified in both of the proposed bills, the fact still remains that this tremendous power to immunize criminals would be placed in the hands of the Congress and the Attorney General and it may possibly be abused. Although this argument may be made, the answer is, of course, that the Congress and the Attorney General are subject to the will of the people, and there is not apt to be any more abuse of this power than of the many other sweeping powers which Congress and the Attorney General have.

Another and probably more valid argument against this type

---

nesses; immunity," and by inserting "(a)" at the beginning of the text thereof and adding thereafter the following:

"(b) Whenever in the judgment of the Attorney General the testimony of any witness, or the production of books, papers, or other records or documents by any witness, in any case or proceeding before any grand jury or court of the United States is necessary to the public interest, such witness shall not be excused from testifying or from producing books, papers, and other records and documents on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; but such witness shall not be prosecuted or subject 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, documentary or otherwise, except that such witness so testifying shall not be exempt from prosecution and punishment for perjury or contempt committed in so testifying.

"(c) The judgment of the Attorney General that any testimony, or the production of any books, papers, or other records or documents, is necessary to the public interest shall be confirmed in a written communication over the signature of the Attorney General addressed to the grand jury or court of the United States concerned, and shall be made a part of the record of the case or proceeding in which such testimony or evidence is given."

This bill as it now stands would leave still in effect 18 U.S.C. § 3486 (Supp. 1952) which is basically the 1862 act. This section should be repealed because just like REV. STAT. § 860 (1875), which was repealed (36 STAT. 352 (1910)), it is of no use in compelling testimony or evidence and hinders future prosecutions. See note 12 *supra*, and the text supported thereby.

of legislation should be carefully considered, however. The privilege against self-incrimination is constitutionally guaranteed, and although there has been some adverse criticism of that privilege,[29] it has become not only a very important part of our law but also a kind of national concept or creed. It should be pointed out that if this proposed legislation is passed it will impair the privilege. That is because it has been well settled, since *United States v. Murdock*,[30] that a witness in a federal proceeding cannot claim the privilege against self-incrimination on the grounds that his answers will incriminate him under state law.[31] This means that a witness may be compelled to answer questions pertinent to the federal proceeding which may provide information for a subsequent state prosecution. This situation has led one federal judge to say in a recent case:

> . . . The doctrine [of the *Murdock case*] is so strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitutional privilege has been safeguarded because the penitentiary into which his answer may land him is under the supervision of the state instead of the federal government.[32]

Furthermore, it is well settled that for a federal immunity statute to be valid it need not provide immunity from state prosecution but that full immunity from federal prosecution is all that is required.[33]

From a superficial consideration of these rulings, it can be argued that the proposed immunity legislation is not an infringement on the privilege against self-incrimination in the sense of opening the door to subsequent state prosecutions. In theory this may be true, but as a practical matter the argument is doubtful. The rule of the *Murdock* case is a definite abridge-

29. 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 207-283 (1827).

30. 284 U.S. 141 (1931).

31. Camarota v. United States, 111 F.2d 243 (3rd Cir. 1940); Graham v. United States, 99 F.2d 746 (9th Circ. 1938); *In re* Friedman, 104 F. Supp. 419 (S.D.N.Y. 1952); *cf.* United States v. Forrester, 105 F. Supp. 136 (N.D. Ga. 1952); *see* Miller v. United States, 95 F.2d 492, 493 (9th Cir. 1938).

32. Marcello v. United States, 196 F.2d 437, 442 (5th Cir. 1952).

33. Nelson v. United States, 201 U.S. 92 (1906); Hale v. Henkel, 201 U.S. 43 (1906). This is likewise true for a state immunity statute. Feldman v. United States, 322 U.S. 487 (1944); Jack v. Kansas, 199 U.S. 372 (1905). In Brown v. Walker, 161 U.S. 591 (1896), the majority of the Court construed the statute in question as prohibiting subsequent state prosecution, and the decision of the Court may be based on this construction of the statute. Apparently none of the later cases have followed *Brown* v. *Walker* in this respect.

ment of the privilege against self-incrimination and the proposed immunity legislation would further abridge that privilege in the sense that it would increase the area in which a subsequent state prosecution is possible. Then too, and this is a more serious objection, the rule of the *Murdock* case will quite often not apply since in many cases that which is a crime in a state is also a violation of some federal criminal law and the witness can claim his privilege against self-incrimination.[34] Under an immunity statute in this same situation, however, the witness would be compelled to testify and a subsequent state prosecution could follow.

Another phase of this problem is presented with respect to Communism. *Barsky v. United States*[35] held that the First Amendment does not prohibit a congressional inquiry into a witness's Communist affiliations, but the privilege against self-crimination does protect a witness from such an inquiry.[36] If the proposed immunity statutes become law, such information could be compelled and the witness could be subjected to prosecution in the many states which have statutes similar to the Smith Act.[37]

These arguments against the proposed legislation should be considered in light of the evils—organized crime and Communism —which the proposed legislation is designed to combat. Such measures have been deemed an effective tool for combatting these evils. They would enable investigatory bodies to compel testimony from known criminals and Communists in order to learn of their organizations and unknown leaders. Like most policy questions it is not a black or white proposition. It is "balancing" in the truest sense of the word. All that can be asked is that the decision be the result of a thorough consideration of all the facts, probabilities and possibilities involved.

GEORGE A. JENSEN

---

34. See Marcello v. United States, 196 F.2d 437 (5th Cir. 1952).
35. 167 F.2d. 241 (D.C. Cir. 1948).
36. Blau v. United States, 340 U.S. 159 (1950); United States v. Jaffe, 98 F. Supp. 191 (D.D.C. 1951); United States v. Fitzpatrick, 96 F. Supp. 491 (D.D.C. 1951).
37. For a collection of the state acts, see GELLHORN, THE STATES AND SUBVERSION app. A, B (1st ed. 1952).