COMMENTS

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—IMMUNITY STATUTE

Adams v. Maryland, 347 U.S. 179 (1954)

Before a Senate Committee investigating crime, Adams confessed to having run a gambling business in Maryland. That confession was used by Maryland to convict Adams of conspiring to violate Maryland's anti-lottery laws. Adams appealed, contending that use of the committee testimony against him was forbidden by a federal statute providing that:

> No testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court. . . .[1]

The United States Supreme Court reversed and remanded, holding that the act was within the powers of Congress and that it was applicable to state proceedings.[2] Therefore, the testimony given by Adams before the Senate Committee could not be used by Maryland in its criminal action against him.

The Supreme Court, with notable ease, found the statute in the instant case within the powers of Congress.[3] It is settled that both Congressional investigations[4] and *compulsion* of testimony therefor[5] are necessary and proper incidents to the Congressional power to legislate.[6]

Under early common law rules, it was permissible to question the defendant in criminal trials; however, the abuse of this technique by the Star Chamber led ultimately to the adoption of an evidentiary rule of privilege excusing the defendant both from incriminating himself and from taking the stand.[7] The development of this privilege under common law, and its subsequent integration into the constitutions of the

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1. 18 U.S.C. § 3486 (1948).
2. Adams v. Maryland, 347 U.S. 179 (1954).
3. *Id.* at 183.
4. McGrain v. Daugherty, 273 U.S. 135 (1927).
5. United States v. Bryan, 339 U.S. 323 (1950); Jurney v. McCracken, 294 U.S. 125 (1935).
6. In the principal case the Supreme Court again relied upon Justice Marshall's familiar interpretation of the incidental powers clause. U.S. CONST. Art. I, § 8. McCulloch v. Maryland, 4 Wheat. 316, 421 (U.S. 1819).
7. For an extensive treatment of the history of this privilege under common law, see 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940); Brownell, *Immunity from Prosecution Versus Privilege Against Self-Incrimination*, 28 TULANE L. REV. 1 (1953).

United States[8] and the majority of states[9] has presented a difficult problem to the legislators: it has prevented them in many instances from acquiring information necessary for proper legislation.[10]

While the privilege against self-incrimination in the Fifth Amendment may, in many instances, prevent Congress from acquiring the desired information, Congress can compel testimony without violating this privilege when the testimony is accompanied by a legislative grant of amnesty. A witness may be compelled to testify when he is granted *complete* immunity from prosecution in the federal courts for matters about which he may speak;[11] there is no longer a "real and probable danger" of self-incrimination.[12] In this manner, Congress may obtain the information it desires at the cost of prohibiting prosecution of the witness for any crime which might be uncovered; the serious policy questions influencing the choice of this alternative are apparent.[13]

The statute[14] involved in the instant case merely prevents the use in any criminal proceeding of testimony given by the defendant before a Congressional committee; it does not provide the complete "immunity bath" necessary to compel a witness to testify if he claims the privilege against self-incrimination.[15] The Court's interpretation that the statute applies to state proceedings as well as to those in federal courts indicates that the statute is of more value to legislators than previously supposed. The fact that state courts may not use the testimony directly is a further inducement to the witness to waive his privilege of silence.[16]

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8. U.S. CONST. AMEND. V:
[N]or shall any person . . . be compelled in any criminal case to be a witness against himself. . . .

9. The privilege has been included in all state constitutions except those of Iowa and New Jersey. 8 WIGMORE, EVIDENCE § 2252, notes 1-3 (3d ed. 1940). The latter two states have substantially recognized the privilege as a part of their statutory or common law. IOWA CODE ANN. § 622.14 (1950). State v. Zdanowicz, 69 N.J.L. 619, 55 Atl. 743 (1903). *See* Bednarik v. Bednarik, 18 N.J. Misc. 633, 649, 16 A.2d 80, 89 (Ch. 1940).

10. There has been much recent discussion of this problem. *E.g.*, Imlay, *The Paradoxical Self-Incrimination Rule*, 6 MIAMI L.Q. 147 (1952); Brownell, *Immunity from Prosecution Versus Privilege Against Self-Incrimination*, 28 TULANE L. REV. 1 (1953).

11. Brown v. Walker, 161 U.S. 591 (1896). 8 WIGMORE, EVIDENCE § 2281 (3d ed. 1940).

12. Brown v. Walker, 161 U.S. 591, 608 (1896). A valid immunity statute under which testimony may be compelled need only be coextensive with the privilege it supplants. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892). Since a witness may not claim the privilege on the ground that the testimony will tend to incriminate him under the laws of another jurisdiction, United States v. Murdock, 284 U.S. 141 (1931), a federal immunity statute would not need to afford protection from prosecution under state laws. *See* Camarota v. United States, 111 F.2d 243, 246 (3rd Cir. 1940).

13. See Brownell, *Immunity from Prosecution Versus Privilege Against Self-Incrimination*, 28 TULANE L. REV. 1 (1953); Note, 1953 WASH. U.L.Q. 313.

14. 18 U.S.C. § 3486 (1948).

15. *Accord*, Counselman v. Hitchcock, 142 U.S. 547 (1892).

16. This fact was recognized by Justice Jackson in his concurring opinion. Adams v. Maryland, 347 U.S. 179, 183 (1954). It should be noted, however, that

Mr. Justice Jackson indicated in his concurring opinion that the effect of this statute works no deprivation upon Maryland.[17] Clearly this would not be true in the case of a similarly worded full immunity statute, for this would prevent state prosecution.[18] It is not necessary, however, to grant a witness full immunity from state prosecution in order to compel his testimony in federal proceedings.[19]

Although the Fifth Amendment may not be claimed solely on the ground that prosecution under state laws might result,[20] the privilege against self-incrimination may incidentally operate to protect the witness against prosecution under laws of both jurisdictions. This is possible only when the same facts constitute a crime under the laws of both jurisdictions. If the witness may remain silent, he is protected not only against incrimination under federal law, but he has given no testimony which may lead to prosecution by a state. It has been stated that a federal immunity statute compelling testimony would limit the incidental area of protection afforded witnesses by the Fifth Amendment, even though it grants full immunity from federal laws; the testimony forced from the witness could be used later by a state as a source of information leading to the discovery of facts essential to state prosecution.[21]

The enactment of a federal immunity statute which would prevent prosecution under both federal and state laws would avoid this cause for criticism of immunity statutes. This possibility was suggested in

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the principal case does not prevent the indirect use of testimony in acquiring other evidence necessary for prosecution under state law.

17. Adams v. Maryland, 347 U.S. 179, 185 (1954).

18. *E.g.*, 11 STAT. 155 (1857):

> [N]o person examined and testifying before either House of Congress, or any committee . . . *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. . . . [Italics added.]

19. *Cf.* Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892); 8 WIGMORE, EVIDENCE § 2258 (3d ed. 1940). Note the limitation placed on the *Murdock* rule (see note 12 *supra*) by United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952) (testimony demanded in federal investigation of state crimes can be refused under Fifth Amendment privilege).

In at least two states, if a witness in state proceedings fears subsequent prosecution under federal laws, he may claim the state privilege against self-incrimination. State *ex rel.* Mitchell v. Kelly, 71 So.2d 887 (Fla. 1954; People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947). In these states, the privilege is an actual protection against self-incrimination under both domestic and foreign laws. An immunity statute under which testimony could be compelled by these states, in order to be coextensive with the privilege, would have to grant full immunity from both domestic and foreign laws. In view of the inability of a state to grant amnesty to a witness from foreign laws, it would seem impossible for these states to draft such a statute. *See* McCulloch v. Maryland, 4 Wheat. 316, 436 (U.S. 1819). Halpin v. Scotti, 415 Ill. 104, 112 N.E.2d 91 (1953), is illustrative of the situation in the majority of jurisdictions; these courts, holding that the privilege against self-incrimination protects witnesses against prosecution under domestic law only, have no difficulty in allowing compulsory testimony under a statute granting immunity from domestic laws and not from foreign laws.

20. *See* Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

21. Note, 1953 WASH. U.L.Q. 321.

Brown v. Walker in 1896.[22] Such a statute, however, is unnecessary to force testimony from a witness,[23] and it would preclude states from enforcing their own criminal laws upon certain witnesses. While the statute in the principal case was rightly supported as a necessary and proper incident to the legislative powers of Congress,[24] it is questionable whether a complete immunity statute directly affecting the states could be validated on the same basis.

DOMESTIC RELATIONS—DIVORCE—CONDONATION BY A SINGLE ACT OF INTERCOURSE

Daniels v. Daniels, 99 A.2d 717 (Sup. Ct. Del. 1953)

A preliminary decree was entered on a wife's petition for divorce on grounds of her husband's adultery. Before the final decree the husband induced his wife to have sexual intercourse with him in the belief that he could thus defeat the divorce and thereby deprive the wife of a property settlement. The husband then petitioned to vacate the preliminary decree. The appellate court held as a matter of law that, because of the husband's bad faith, this single act of intercourse was not condonation.[1]

Condonation is the voluntary forgiveness by one spouse of a marital offense committed by the other and bars a divorce action for that offense.[2] Condonation requires actual knowledge of the guilty act and may be accomplished by express words or by conduct.[3] Since a finding of condonation may be based on conduct, a subjective lack of forgiveness may be immaterial.[4] By implication of law, the condonation

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22. 161 U.S. 591, 606-608 (1896). But see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191, 197 (1930).

23. See note 19 *supra*.

24. See note 6 *supra*.

1. Daniels v. Daniels, 99 A.2d. 717 (Sup. Ct. Del. 1953). This was a common law determination of the case. The husband contended, as a second ground of appeal, that a statute, DEL. CODE ANN. tit. 13, § 1528 (1953), governed the case. The statute provides in part:

> On a petition for divorce for the cause of adultery, if the defendant . . . proves that the plaintiff . . . has admitted the defendent into conjugal society or *embrace* after knowledge of the adultery . . . the petition shall be dismissed. [Italics added.]

The issue under the statute was basically the same as that under the common law. The court held the husband's act was fraud, which vitiated the wife's consent, and there was no voluntary "embrace" within the meaning of the statute.

2. MADDEN, DOMESTIC RELATIONS §§ 90-91 (1931), gives the elements of condonation. 2 VERNIER, AMERICAN FAMILY LAWS § 77 (1932), treats the statutory coverage of the subject in the several states.

3. MADDEN, *op. cit. supra* note 2.

4. MADDEN, DOMESTIC RELATIONS §§ 90-91, p. 303 (1931). *See* Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922).