

## Compulsory Self-Incrimination and Statutory Immunity

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## COMPULSORY SELF-INCRIMINATION AND STATUTORY IMMUNITY

It has been said that a peculiar excellence of our common-law system over that which has prevailed in other civilized countries is that an individual may *never* be compelled to give evidence that would incriminate himself.<sup>1</sup> This view, expressed nearly one hundred years ago,<sup>2</sup> stands today in "uneasy opposition"<sup>3</sup> to the principle that the state is entitled to the testimony of her citizens.<sup>4</sup>

The development of the United States Constitution, especially since the adoption of the Bill of Rights, has led to a marked tendency on the part of certain observers to view the privilege against self-incrimination as an all-embracing, singular *right* enjoyed by every citizen in any and all types of situations.<sup>5</sup> This tendency can best be explained by the history of the privilege and its development in the United States.

The settlement of the British colonies in the New World coincided with the opposition, in England, to the ex officio oath of the ecclesiastical courts.<sup>6</sup> It was at this time that the privilege against self-incrimination in the courts of common law began to have a decided effect.<sup>7</sup> Since the colonies were to be governed, to a great extent, by the common law of England,<sup>8</sup> the privilege was introduced into this country. While it never formed a part of English fundamental laws such as the Magna Carta, Petition of Right and English Bills of Right,<sup>9</sup> seven American colonies inserted it in their constitutions or bills of rights before 1789.<sup>10</sup> It became, therefore, a landmark in America and assumed greater importance than it ever had in England.<sup>11</sup> It was almost inevitable that such a provision would be enacted as a part of the federal Bill of Rights.<sup>12</sup> Early

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<sup>1</sup> 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647-48 n.1 (1927 ed.).

<sup>2</sup> Grant, *Immunity From Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMP. L.Q. 57 n.4 (1934).

<sup>3</sup> Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 448 (1954).

<sup>4</sup> Note, 70 HARV. L. REV. 1454 (1957). See, e.g., *United States v. Burr*, 25 Fed. Cas. 38 (No. 14692e) (C.C.D. Va. 1807).

<sup>5</sup> See, e.g., GRISWOLD, *THE FIFTH AMENDMENT TODAY* 1-30 (1955); Straight, *Congressional Encroachment*, 5 VA. L. WEEKLY DICTA COMP. 37 (1954); Redlich, *Reasons For Invoking*, 5 *id.* at 42; Sheppard, *Texas Attorney General*, 5 *id.* at 76.

<sup>6</sup> Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 769 (1935).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* at 766.

<sup>9</sup> *Id.* at 764.

<sup>10</sup> *Id.* at 764-65. The states which so adopted it were Virginia (June 1776), Pennsylvania (September 1776), Maryland (November 1776), North Carolina (December 1776), Vermont (July 1777), Massachusetts (March 1780), and New Hampshire (1784).

<sup>11</sup> 8 WIGMORE, EVIDENCE § 2250, at 301 (3d ed. 1940).

<sup>12</sup> U. S. CONST. amend. V.

lawmakers did not define the scope of the privilege against self-incrimination.<sup>13</sup> In this absence of definition the courts have extended the privilege not only to an accused but also to a witness,<sup>14</sup> in almost every type of legal proceeding where a criminal prosecution may result.<sup>15</sup> A close analysis of the origin and development of the privilege reveals that its meaning and utilization is twofold.<sup>16</sup> There is the privilege of an accused not to take the witness stand at all.<sup>17</sup> Because of our accusatorial method wherein the prosecution sustains the burden of proof, this protection is designed for those who must be assumed innocent.<sup>18</sup> This is the fundamental bulwark of the entire area of freedom from self-incrimination.<sup>19</sup>

The second aspect of the privilege is the choice which a witness has in a proceeding in which he is *not* the accused, to either answer or refuse to answer a question or line of questioning that might incriminate him.<sup>20</sup> This privilege is only available for those witnesses who may very well be guilty,<sup>21</sup> for a man only has the right to invoke it when his truthful answer to the question might tend to incriminate him.<sup>22</sup> While it is for the court to pass upon the question whether a truthful answer might reasonably be incriminating,<sup>23</sup> its

<sup>13</sup> 8 WIGMORE, EVIDENCE § 2251 (3d. ed. 1940). See, *e.g.*, *Boyd v. United States*, 116 U.S. 616 (1886). This case intertwines the fourth and fifth amendments by stating that compulsory self-incrimination is contrary to the principles of a free government and is abhorrent to the instincts of an American. *Id.* at 631-32; *United States v. Burr*, 25 Fed. Cas. 38, 39 (No. 14692e) (C.C.D. Va. 1807). This case laid down the rule that the judge decides whether a correct answer would incriminate, yet it allows the privilege to extend to a witness.

<sup>14</sup> *United States v. Burr*, *supra* note 13, at 39.

<sup>15</sup> *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *People ex rel. Lewisohn v. O'Brien*, 176 N.Y. 253, 261, 68 N.E. 353, 355 (1903). See Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 449 (1954).

<sup>16</sup> See 8 WIGMORE, EVIDENCE § 2276, at 438-41 (3d ed. 1940). *But cf.* *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Connors v. People*, 50 N.Y. 240 (1872).

<sup>17</sup> 8 WIGMORE, *op. cit. supra* note 16, § 2276, at 441; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 27 MICH. L. REV. 1, 9 (1930).

<sup>18</sup> *Bartlett v. Lewis*, 12 C.B. (n.s.) 249, 265, 142 Eng. Rep. 1139, 1145 (C.P. 1862) (concurring opinion). 8 WIGMORE, *op. cit. supra* note 16, § 2251, at 308. See Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 Ky. L.J. 267 (1956).

<sup>19</sup> See generally, Corwin, *Legal Status*, 5 VA. L. WEEKLY DICTA COMP. 19 (1954); INBAU, SELF-INCRIMINATION 5 (1950).

<sup>20</sup> *Counselman v. Hitchcock*, *supra* note 16, at 562; 8 WIGMORE, EVIDENCE § 2266, at 388 (3d ed. 1940).

<sup>21</sup> 8 WIGMORE, EVIDENCE § 2251, at 307-08 (3d ed. 1940). *Contra*, GRISWOLD, THE FIFTH AMENDMENT TODAY 56-57 (1955).

<sup>22</sup> Note, 70 HARV. L. REV. 1454, 1455 (1957).

<sup>23</sup> *Rogers v. United States*, 340 U.S. 367, 374 (1951); *United States v. Burr*, 25 Fed. Cas. 38, 40 (No. 14692e) (C.C.D. Va. 1807); 8 WIGMORE, EVIDENCE § 2271, at 403-09 (3d ed. 1940); Note, 70 HARV. L. REV. 1454, 1455 (1957).

tendency to be so is ultimately determined by the witness himself.<sup>24</sup> If he chooses not to answer, it is perhaps logical that the inference drawn from this refusal is that he is confessing the fact.<sup>25</sup>

This should not be taken as an indictment of all the witnesses in trials, grand jury proceedings and congressional investigations who have ever pleaded the privilege. At times, an over-zealous prosecutor or a committee chairman more interested in publicity than in information may transform the proceeding into one which, in effect, treats the witness as if he were an accused.<sup>26</sup> In such a case the "witness" should be allowed all the privileges attending an accused.<sup>27</sup>

Nevertheless, this basic confusion and intermingling of the privilege of an accused and that of a witness has presented a dilemma for federal and state law enforcement agencies. For while we might agree that it be vital that a man have such a privilege we must also agree that the government is entitled to the testimony of her citizens.<sup>28</sup> With the privilege now extended to almost every type of legal proceeding,<sup>29</sup> the administration of justice has been "hampered."<sup>30</sup> This problem, recognized by both federal and state legislatures, has led to the enactment of devices to curtail the privilege while still effectuating its purpose.<sup>31</sup>

### *The Immunity Statutes*

Perhaps the most extensively used method of circumventing the privilege afforded witnesses has been the use of "immunity" statutes.<sup>32</sup> Such a statute, when invoked, removes the witness' privilege against self-incrimination, thereby compelling him to testify, in exchange for an immunity from prosecution by the particular jurisdiction so compelling.<sup>33</sup> The theory of the law is that if the threat of prosecution is

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<sup>24</sup> *Mason v. United States*, 244 U.S. 362, 363-364 (1917); *United States v. Burr*, *supra* note 23, at 39-40.

<sup>25</sup> 8 WIGMORE, *op. cit. supra* note 21, § 2272, at 409-10. For a contrary approach, see GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955).

<sup>26</sup> See Stokes, *An Expanding Issue*, 5 VA. L. WEEKLY DICTA COMP. 27, 30 (1954); Note, 70 HARV. L. REV. 1454, 1456-57 (1957).

<sup>27</sup> See Straight, *Congressional Encroachment*, 5 VA. L. WEEKLY DICTA COMP. 37 (1954).

<sup>28</sup> Note, 70 HARV. L. REV. 1454 (1957).

<sup>29</sup> See, *e.g.*, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *People v. O'Brien*, 176 N.Y. 253, 261 (1903).

<sup>30</sup> Note, 10 OKLA. L. REV. 334, 335 (1957).

<sup>31</sup> See *Ullmann v. United States*, 350 U.S. 422 (1956); *Scribner v. State*, 9 Okla. Cr. 465, 132 Pac. 933 (1913); Note, 31 ST. JOHN'S L. REV. 78, 79-80 (1956).

<sup>32</sup> Note, 31 ST. JOHN'S L. REV. *supra* note 31. Another device employed is the requiring of a waiver of immunity as a condition to continuing employment. *Ibid.*

<sup>33</sup> See *Knapp v. Schweitzer*, 357 U.S. 371, 379 (1958); Note, 31 ST. JOHN'S L. REV. 66, 67 (1956).

removed the justification for the exercise of the privilege ceases, and thus the witness must answer.<sup>34</sup> It is, in effect, an anticipatory exercise of the pardoning power.<sup>35</sup> The first such act, enacted in 1857,<sup>36</sup> was passed as an emergency measure to aid a House committee investigating charges of parliamentary corruption, and received little discussion on the floor of either house.<sup>37</sup> A decade later the first national immunity act of general application was passed.<sup>38</sup> It provided

that no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness. . . .<sup>39</sup>

During five years of experience with the 1857 law, there was criticism of the breadth of the act in disallowing "any fact or act touching which he shall be required to testify" from being used in subsequent proceedings.<sup>40</sup> It was therefore amended to read simply, "the testimony of a witness . . . shall not be used as evidence in any criminal proceeding against such witness in any court of justice. . . ." <sup>41</sup> Congress was now of the opinion that this was all that the Constitution required, a view which was not entirely unjustified, having the support of various state court decisions construing similar guaranties in state enactments.<sup>42</sup> Possibly as a result, succeeding immunity statutes were similarly restricted in scope.<sup>43</sup> It was not until the Supreme Court held, in *Counselman v. Hitchcock*,<sup>44</sup> that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates," <sup>45</sup> that Congress returned to

<sup>34</sup> 8 WIGMORE, EVIDENCE § 2281, at 467 (3d ed. 1940); Note, 31 ST. JOHN'S L. REV. 78, 79-80 (1956).

<sup>35</sup> 1953 LEG. DOC. NO. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 14, 15 (1953).

<sup>36</sup> Act of Jan. 26, 1857, ch. 19, § 2, 11 Stat. 156. See Grant, *Immunity From Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMP. L.Q. 57, 62 (1935).

<sup>37</sup> Grant, *supra* note 36, at 62.

<sup>38</sup> *Id.* at 63.

<sup>39</sup> Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

<sup>40</sup> Act of Jan. 26, 1857, ch. 19, § 2, 11 Stat. 156. See Grant, *supra* note 36, at 64.

<sup>41</sup> Act of Jan. 24, 1862, ch. 11, 12 Stat. 333; Grant, *Immunity From Self-Incrimination in a Federal System of Government*, 9 TEMP. L.Q. 57, 64 (1935).

<sup>42</sup> Grant, *supra* note 41. See *State v. Quarles*, 13 Ark. 307 (1853); *Higdon v. Heard*, 14 Ga. 255 (1853); *Wilkins v. Malone*, 14 Ind. 153 (1860).

<sup>43</sup> Act of Mar. 2, 1889, ch. 382, § 3, 25 Stat. 858; Act of Mar. 3, 1887, ch. 345, § 2, 24 Stat. 491; Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

<sup>44</sup> 142 U.S. 547 (1892).

<sup>45</sup> *Id.* at 586.

its original plan of granting immunity for "any transaction, matter or thing, concerning which he may testify, or produce evidence . . ." <sup>46</sup>

New York State, having a constitutional provision of its own against self-incrimination,<sup>47</sup> enacted various immunity statutes in order to obtain needed testimony.<sup>48</sup> In 1903, in the case of *People ex rel. Lewisohn v. O'Brien*,<sup>49</sup> the Court of Appeals held that the immunity conferred under section 342 of the Penal Code was *not* co-extensive with the constitutional guarantee of freedom from self-incrimination.<sup>50</sup> The court insisted that for a witness to be compelled to testify, his immunity must protect him from prosecution for any crime that he may allude to in the course of his testimony.<sup>51</sup> However, it was not until 1953 that a single, all-embracing immunity statute was enacted<sup>52</sup> granting immunity from prosecution or subjection to any penalty or forfeiture (except perjury) to any witness who was instructed to answer after claiming the privilege.<sup>53</sup> Thus, New York adopted *in toto* the federal position.<sup>54</sup>

The law, section 2447 of the Penal Code, attempts to solve some of the problems and shortcomings of immunity statutes in general.<sup>55</sup> However in so doing it creates problems of its own.

The statute provides that

in any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question . . . such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer . . . then immunity shall be conferred upon him. . . <sup>56</sup>

The statute defines "immunity" to mean

that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which,

<sup>46</sup> Act of Feb. 11, 1893, ch. 83, 27 Stat. 444.

<sup>47</sup> N.Y. CONST. art. I, § 6 (1894).

<sup>48</sup> See, e.g., N.Y. CIV. PRAC. ACT § 789; N.Y. DEBT. & CRED. LAW § 16 (Supp. 1958); N.Y. GEN. BUS. LAW § 345.

<sup>49</sup> 176 N.Y. 253, 68 N.E. 353 (1903).

<sup>50</sup> Following the reasoning in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Section 342 merely excluded the use of testimony given while compelling the witness to answer.

<sup>51</sup> 176 N.Y. 253, 259, 68 N.E. 353, 355 (1903).

<sup>52</sup> N.Y. PENAL LAW § 2447. Up to this time there were forty-six separate immunity statutes. 1953 LEG. DOC. No. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 14, 15 (1953).

<sup>53</sup> *Ibid.*

<sup>54</sup> See *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

<sup>55</sup> See 1953 LEG. DOC. No. 68, *supra* note 52, at 14.

<sup>56</sup> N.Y. PENAL LAW § 2447(1).

in accordance with the order by competent authority, he gave answer . . . and that no such answer . . . shall be received against him upon any criminal proceeding.<sup>57</sup>

It states that such person may, however, be prosecuted for any act of perjury or contempt in answering or failing to answer in accordance with this order, and that the answer given shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.<sup>58</sup>

This complete immunity, not a revolutionary concept,<sup>59</sup> was the cause of much concern as to the possibility of "immunity baths"<sup>60</sup> being given inadvertently to "eager witnesses,"<sup>61</sup> who might thereby "tell all" and emerge absolved from punishment. As a safeguard against this unhappy event a provision that the immunity can only be granted by "order of a competent authority" was adopted.<sup>62</sup> A "competent authority" is defined as either a court or magistrate before whom a person is called upon to answer questions in a criminal proceeding when such court or magistrate is expressly requested by the prosecuting attorney to order such person to answer; a civil court to which the state or subdivision thereof (including agencies and departments) or any officer in official capacity, is a party and is requested by the attorney general to answer; a majority of a grand jury when requested by the prosecuting attorney; and a legislative committee, state commission, head of a state department or agency before whom a witness is appearing, upon twenty-four hours prior written notice to the attorney general and the appropriate district attorney.<sup>63</sup> While certainly this provision lessens the danger of an immunity bath there is still the possibility of an improvident grant of immunity. At best all this provision does is make reasonably certain that the decision to grant immunity will be made at a "high level."<sup>64</sup> The Crime Commission which suggested this law stated that the immunity should only be given where there is an "over-riding public interest"<sup>65</sup> for the compulsion of testimony. Yet, the law itself has no such limitation. *Any* competent authority can give this immunity. Other recommendations of the committee were

<sup>57</sup> N.Y. PENAL LAW § 2447(2).

<sup>58</sup> *Ibid.*

<sup>59</sup> See, e.g., N.Y. DEBT. & CRED. LAW § 16 (Supp. 1958).

<sup>60</sup> Note, 70 HARV. L. REV. 1454, 1462 (1957). An immunity bath is explained as a witness volunteering answers, disclosing personal malefaction and thereby obtaining freedom from prosecution. Note, 31 ST. JOHN'S L. REV. 66, 67-68 (1956).

<sup>61</sup> See Note, 70 HARV. L. REV., *supra* note 60. It is assumed that the witness' answer is in some way responsive to the question asked.

<sup>62</sup> 1953 LEG. DOC. NO. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 14-15 (1953).

<sup>63</sup> See N.Y. PENAL LAW § 2447(3).

<sup>64</sup> Note, 70 HARV. L. REV., *supra* note 60.

<sup>65</sup> 1953 LEG. DOC. NO. 68, *supra* note 62, at 15.

adopted, and are certainly assets: the immunity is not to be used in a civil action in which only private litigants are parties; the witness must first, in good faith, claim his privilege; and the witness must testify pursuant to such direction of the competent authority.<sup>66</sup>

The commission did not recommend, nor does the law include, other provisions to safeguard the public while protecting the witness. It would seem reasonable to limit the application of the statute to witnesses called by the government, thus insuring an authoritative determination whether the anticipated testimony is a worthy trade for the ensuing immunity.<sup>67</sup> Such a provision is not included. Questioned also is the need for the immunity in any type of civil proceeding. Since the purpose of the law is to get valuable information to convict others, should the immunity be "traded" for a civil victory?

### *Effects of Immunity Statutes on Witnesses*

The above problems might detract from successful governmental operation under the statute. Most criticism of the statute, however, is directed toward its effects on the individual witness. For the immunity to be constitutional, as one jurist has put it, it must be as broad as the privilege it replaces.<sup>68</sup> The privilege extends to evidence tending to incriminate the witness in the particular jurisdiction in which the proceeding is being conducted.<sup>69</sup> There is no right to the privilege if the information disclosed will incriminate the witness only in *another* jurisdiction.<sup>70</sup> Therefore the immunity granted only extends to prosecutions in that jurisdiction.<sup>71</sup> Though on the surface of the explanation there seems to be present no problem, there have been doubts raised as to the adequacy<sup>72</sup> and constitutionality<sup>73</sup> of these statutes. Perhaps where the evidence disclosed would incriminate the witness in a sister-state or in a foreign country there is not too much danger of the witness' privilege being violated.<sup>74</sup> But where the proceeding is by a state, and the witness would tend to incriminate himself under a federal statute, the immunity no longer seems "co-extensive" with the privilege.<sup>75</sup> In such a case the federal government could literally wait outside the door of the courtroom and

<sup>66</sup> *Id.* at 15-16.

<sup>67</sup> Note, 70 HARV. L. REV. 1454, 1462 (1957).

<sup>68</sup> See *Glickstein v. United States*, 222 U.S. 139, 141 (1911).

<sup>69</sup> See *Brown v. Walker*, 161 U.S. 591, 608 (1896); 8 WIGMORE, EVIDENCE § 2258, at 337 (3d ed. 1940).

<sup>70</sup> *Ibid.*

<sup>71</sup> See Note, 70 HARV. L. REV. 1454, 1463 (1957).

<sup>72</sup> See GRISWOLD, THE FIFTH AMENDMENT TODAY 80-81 (1955).

<sup>73</sup> See *Knapp v. Schweitzer*, 357 U.S. 371, 382 (1958) (dissenting opinion).

<sup>74</sup> Cf. *Brown v. Walker*, 161 U.S. 591, 608 (1896); Note, 70 HARV. L. REV. 1454, 1463-64 (1957).

<sup>75</sup> See *Knapp v. Schweitzer*, *supra* note 73.

arrest the witness when he emerged, using his own testimony against him.<sup>76</sup>

Since the purpose of the immunity is to obtain needed information,<sup>77</sup> much of its value is lost if the witness, realizing that he will be susceptible to federal prosecution, would rather be held in contempt of court than accept his illusory immunity.<sup>78</sup>

The states, though perhaps realizing this dilemma, are powerless to broaden their immunity statutes even should they wish to do so. It would certainly be unconstitutional for a state to attempt to grant immunity from prosecution in federal courts.<sup>79</sup> Although, conversely, an immunity given in a federal proceeding need not shield the witness from state prosecution to be constitutional,<sup>80</sup> in at least one instance Congress deemed the information desired so important that it did authorize the granting of immunity from both federal and state prosecution.<sup>81</sup>

In assessing whether the state immunity statutes which protect a witness only within the granting jurisdiction are unconstitutional and unfair or constitutional and equitable, one must first decide whether the privilege itself is a "landmark" to our way of life, as some spokesmen insist,<sup>82</sup> or is no more inviolate than any other provision in a state constitution.<sup>83</sup> The Supreme Court has said that the privilege in the fifth amendment applies only to the federal government, and that the "privileges" referred to in the fourteenth amendment do not include this one.<sup>84</sup> This, however, does not obviate the question whether a faulty immunity statute would violate state constitutional enactments.

In Michigan, the state constitution has been interpreted as preventing compulsion of testimony which might tend to incriminate

<sup>76</sup> However, if there is collusion between state and federal authorities, it appears the courts will consider it a waiver of federal prosecution. *Cf.*, *Jarosuk v. United States*, 201 F.2d 52 (9th Cir. 1953) (per curiam); *Byars v. United States*, 273 U.S. 28, 33 (1927) (dictum); Note, 70 HARV. L. REV. 1454, 1462 (1957). See also *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892).

<sup>77</sup> Grant, *Self-Incrimination In The Modern American Law*, 5 TEMP. L.Q. 368, 393 (1931).

<sup>78</sup> See, e.g., *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Commissioner of Investigation v. Lombardo*, 7 App. Div. 2d 48, 180 N.Y.S.2d 496 (1st Dep't 1958).

<sup>79</sup> *Jack v. Kansas*, 199 U.S. 372, 380 (1905).

<sup>80</sup> See Note, 70 HARV. L. REV. 1454, 1463 (1957). This doctrine, under which courts refuse to consider the consequences which may ensue in other jurisdictions, has been called the "dual sovereignty" doctrine. *Ibid.*

<sup>81</sup> 18 U.S.C. § 3486 (1954); *Ullmann v. United States*, 350 U.S. 422, 434-36 (1956).

<sup>82</sup> See *Boyd v. United States*, 116 U.S. 616, 631-32 (1886) (Bradley, J.); GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955).

<sup>83</sup> See *Knapp v. Schweitzer*, 357 U.S. 371 (1958). *Cf.* *Twining v. New Jersey*, 211 U.S. 78, 98-102 (1908).

<sup>84</sup> *Knapp v. Schweitzer*, *supra* note 83; *Twining v. New Jersey*, *supra* note 83.

the witness under federal law, even though he has been granted full immunity from state prosecution.<sup>85</sup> The same sentiment appears to prevail in Louisiana.<sup>86</sup> Conversely, Mr. Justice Frankfurter, in *Knapp v. Schweitzer*,<sup>87</sup> stresses the division of political and legal powers between two systems of government constituting a single nation.<sup>88</sup> He points out the necessity of immunity statutes by stating that

the States may find it necessary, as did New York, to require full disclosure in exchange for immunity from prosecution. This cannot be denied on the claim that such state law of immunity may expose the potential witness to prosecution under federal law.<sup>89</sup>

Mr. Justice Black claimed that such a result would be a violation of the fifth amendment. He states that

a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of both.<sup>90</sup>

### Conclusion

The immunity statutes, in negating the privilege, must be so worded that their effect is not to penalize the witness while attaining their necessary result. On the other hand, they should not be so loosely phrased that undeserving witnesses receive their benefit.

It is suggested that the courts should be wary of possible collusion between state and federal authorities in the granting of state immunity for the purpose of opening the door to federal prosecution.

Questioned also is the usefulness of the statute where the witness obviously will not comply for fear of federal intervention. Although the purpose of the statute is disclosure, its only effect in these circumstances is to punish an uncooperative witness.

Although the view adopted by the Supreme Court does not extend the federal privilege to the states, it is believed that it has become such an important part of our accusatorial system that the states must give it full effect.

The Michigan view is felt to be more consonant with the spirit of the federal and state constitutions. If the privilege and its attendant immunity statute only become weapons to "get" witnesses, be they guilty or innocent, then our system of jurisprudence is approaching the totalitarian form of government which we so rightly and vigorously condemn.

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<sup>85</sup> *Knapp v. Schweitzer*, *supra* note 83, at 384 n.1; *People v. Den Uyl*, 318 Mich. 645, 29 N.W.2d 284 (1947).

<sup>86</sup> *State v. Dominguez*, 228 La. 284, 82 So. 2d 12 (1955). See 42 VA. L. REV. 84 (1956).

<sup>87</sup> 357 U.S. 371 (1958).

<sup>88</sup> *Id.* at 375.

<sup>89</sup> *Id.* at 379.

<sup>90</sup> *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (dissenting opinion).