

Compulsory Testimony and Constitutional Limitations

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NOTES

COMPULSORY TESTIMONY AND CONSTITUTIONAL LIMITATIONS

An awakening to the threat of the communist conspiracy has effected extensive programs of investigation and prosecution in the past decade.¹ Law enforcement authorities, thwarted in their efforts to obtain information vital to prosecution for subversive activities, sought statutory aid to compel essential testimony.² Frustrated by the repetitious invocation of the fifth amendment privilege against self-incrimination—which saw in two years almost six hundred of its witnesses seek refuge through its exercise,³ Congress was ready to supply the needed reform.⁴ A federal compulsory testimony act resulted.⁵ This immunity act, expressly directed at seditious conspiracy endangering national security,⁶ seeks to obtain needed testimony by affording protection from prosecution to selected witnesses. Upon implementation of the statute, a witness can no longer rely upon his privilege against self-incrimination.

¹ For discussion of the problems relating to legislative investigations, see Gilligan, *Congressional Investigations*, 41 J. CRIM. L., C. & P.S. 618 (1951); Levi, *Congressional Investigations*, 18 U. CHI. L. REV. 421 (1951); Williams, *Problems of the Fifth Amendment*, 24 FORDHAM L. REV. 19 (1955); Note, 45 ILL. L. REV. 633 (1950).

² *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 83d Cong., 1st Sess., pt. 16, at 1130-31 (1954); see Brownell, *Immunity From Prosecution Versus Privilege Against Self-Incrimination*, 28 TUL. L. REV. 1, 13 (1953).

³ In 1953, 317 witnesses invoked the privilege. See HOFSTADTER, *THE FIFTH AMENDMENT AND THE IMMUNITY ACT OF 1954* 20 (1956). In 1954, 266 witnesses sought refuge in the privilege. 101 CONG. REC. 11316 (daily ed. Aug. 3, 1955).

⁴ See Finkelhor and Stockdale, *The Professor and the Fifth Amendment*, 16 U. PITT. L. REV. 344, 356-57 (1955).

⁵ 18 U.S.C. § 3486 (Supp. II, 1954).

⁶ Subsections *a* and *c* recite as the subjects of the act “. . . 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 . . .” In addition, *a*, which deals with congressional investigations, adds “the overthrow of its Government by force or violence.” And *c*, which concerns grand jury or court proceedings, adds in detail “. . . 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 . . .” *Ibid*.

. . . [S]uch 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 . . . against him in any court.⁷

The exemption thus granted, however, is not unrestricted; for there is no immunization against prosecution for perjury committed during the compelled proceedings.⁸ The statute is designed to satisfy the demands of both the investigative and enforcement bodies, since evidence may be compelled both before congressional committees and in grand jury and court proceedings.

The problem of requiring recalcitrant witnesses to supply information important to the unimpeded exercise of governmental function is not new.⁹ Nor is the solution—the exchange of immunity for that information. In England, the device has been employed for more than two hundred years, beginning with special legislation enacted to obtain the statements of specified individuals.¹⁰ Later, much immunity legislation was introduced into criminal and regulatory law.¹¹ A great majority of the states of the United States, realizing the practical efficacy of statutory immunity, have enacted like provisions.¹²

Compulsory Testimony and Immunity

1957 will mark the centennial of the first federal immunity provision.¹³ Designed to facilitate a congressional investigation into corruption, the statute was nevertheless phrased so loosely as to pervert a general policy of law enforcement. A witness could volunteer unresponsive answers, disclosing personal malefaction, and insure his freedom from prosecution.¹⁴ Wrongdoers eagerly sought the chance

⁷ 18 U.S.C. § 3486(c) (Supp. II, 1954).

⁸ Subsection *d* provides that "no witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion. . . ." *Id.* § 3486(d).

⁹ See *Smith v. United States*, 337 U.S. 137, 146-47 (1949); *United States v. Monia*, 317 U.S. 424 (1943).

¹⁰ See, *e.g.*, *Trial of Lord Chancellor Macclesfield*, 16 How. St. Tr. 767, 921, 1147 (1725).

¹¹ *E.g.*, *Larceny Act*, 1916, 6 & 7 GEO. 5, c. 50; *Bankruptcy Act*, 1914, 4 & 5 GEO. 5, c. 59; *Corrupt & Illegal Practice Prevention Act*, 1883, 46 & 47 VICT., c. 51.

¹² See 8 WIGMORE, *EVIDENCE* § 2281 n.11 (3d ed. 1940).

¹³ 11 STAT. 156 (1857).

¹⁴ See King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377, 380 (1954); Smelser, *The Grand Inquest of the Nation*, 29 NOTRE DAME LAW. 163, 171 (1954).

to testify and to take the "immunity bath."¹⁵ In reaction, Congress withdrew the quarantine against prosecution for compelled testimony, amending the law so that the remaining shield protected only against the use of the compelled testimony in a later criminal action.¹⁶ Some thirty years after the passage of this amendment, the Supreme Court pointed out in *Counselman v. Hitchcock*,¹⁷ the ineffectiveness of the statute as a method of coercing important disclosures. In that case, a witness, ordered to testify, was held to have validly refused to do so, properly remaining silent because of the constitutional prohibition against self-incrimination. Since the statute did not inhibit the use of other evidence obtained as a result of the lead supplied by the original testimony, the immunity was found not to be as broad as the constitutional privilege. Thus, the privilege remained. This emasculated law remained in effect with but minor change until the adoption of the present federal compulsory testimony act.¹⁸

Nonetheless, in other fields of public law, the immunity theory found frequent and efficient use. The first successful provision was incorporated into the Interstate Commerce Act.¹⁹ Congress, adhering to standards outlined by the Supreme Court,²⁰ provided that there could be no prosecution resulting from any evidence supplied by the immunized witness. This statute finally found approval by the Supreme Court,²¹ which held that the protection afforded by the law was extensive enough to encompass the fullest freedom from self-incrimination allowed by the Constitution. The enactment, coextensive with the constitutional protection, was therefore not repugnant to the Constitution. The success of this law led to similar provisions in other federal administrative fields including agriculture,²² regulation of business,²³ power,²⁴ labor,²⁵ communications,²⁶ welfare,²⁷ and national defense.²⁸

¹⁵ See Senate Committee on the Judiciary, *Congressional Power of Investigation*, S. Doc. No. 99, 83d Cong., 2d Sess. 11-12 (1954).

¹⁶ 12 STAT. 333 (1862).

¹⁷ 142 U.S. 547 (1892).

¹⁸ See Legis. Note, 29 ST. JOHN'S L. REV. 153, 154 (1954).

¹⁹ 27 STAT. 443 (1893), 49 U.S.C. § 46 (1952).

²⁰ See *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892).

²¹ *Brown v. Walker*, 161 U.S. 591 (1896).

²² Perishable Agricultural Commodities Act, 46 STAT. 536 (1930), 7 U.S.C. § 499m (1952).

²³ Securities Exchange Act of 1934, 48 STAT. 899 (1934), 15 U.S.C. § 78u (1952).

²⁴ Federal Power Act, 49 STAT. 856 (1935), 16 U.S.C. § 825 (1952).

²⁵ Labor Management Relations Act, 1947 (Taft-Hartley), 61 STAT. 136, 29 U.S.C. § 161 (1952).

²⁶ Communications Act of 1934, 48 STAT. 1097 (1934), 47 U.S.C. § 409(1) (1952).

²⁷ Social Security Act, 53 STAT. 1370 (1939), 42 U.S.C. § 405(f) (1956).

²⁸ Atomic Energy Act of 1946, 60 STAT. 771 (1946), 42 U.S.C. § 1812(a) (3) (1952).

The present federal compulsory testimony act was carefully drafted to obviate defects of prior legislation.²⁹ There are ample checks against a hasty or possibly unjustified grant of freedom from prosecution. The sections applicable to congressional inquiry require at least a majority vote,³⁰ notification of the Attorney General, and an order by a federal district court compelling testimony. The section pertaining to grand jury and court testimony is equally restricted. The district court will order the witness to testify only after the United States Attorney conducting the inquiry determines the testimony to be important and the Attorney General concurs. The new act further provides protection coextensive with the privilege in that it forbids prosecution in a criminal proceeding "for or on account of any" of the coerced evidence.³¹ The danger of "immunity baths" is effectively precluded. The problem of voluntary and unresponsive answers given by a witness to secure the shelter of the statute is avoided by the requirement that the constitutional privilege be first invoked and by the procedural necessity that the immunity process can be initiated only by the questioners. In addition, the complexity of the process effectively eliminates threats of conspiracy between investigator and witness to obtain amnesty.³² Faced with no possibility of evasion, the witness, willing or not,³³ must answer or face contempt charges.

The Ullmann Case

William L. Ullmann was the first witness to be placed in this dilemma.³⁴ Appearing before a grand jury investigating espionage

²⁹ See H.R. REP. No. 2606, 83d Cong., 2d Sess. (1954).

³⁰ "[W]hen the record shows that—

"(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 shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer . . ." 18 U.S.C. § 3486(a) (Supp. II, 1954).

³¹ Thus, the defect of a law which was merely directed at *testimony* and allowed the privilege to survive [see *Counselman v. Hitchcock*, 142 U.S. 547 (1892)] is avoided.

³² There would have to be a widespread conspiracy indeed to force an unmeritorious claim for immunity past the checks of the initial stage—the vote of Congressmen or request by the United States Attorney; the intermediate stage of notification, or approval by, the Attorney General; and the final check—the order of the federal district court.

³³ See *United States v. Fitzgerald*, 235 F.2d 453 (2d Cir. 1956). In this case, defendant was convicted of contempt of court for refusal to testify before a grand jury after the process of the compulsory testimony statute was utilized. In affirming the conviction, the court rejected defendant's contention that he was relieved of compulsion because of his express rejection of the immunity tendered.

³⁴ See Note, 31 *IND. L.J.* 208, 210 (1956); 1 *N.Y.L. FORUM* 254 (1955).

activity directed at national security, Ullmann refused to answer incriminating questions on the basis of his constitutional privilege. One week after this refusal, the United States Attorney, regarding the testimony as vital to public interest,³⁵ and after obtaining the approval of the Attorney General, applied to the federal district court for an order compelling answers. Three months later the district court so ordered. Ullmann, again before the grand jury, refused to answer³⁶ and was subsequently convicted of contempt.³⁷ On appeal, the Supreme Court affirmed the conviction, sustaining the constitutionality of the immunity act.

A major contention presented by Ullmann was that the statute was not a sufficient substitute for the constitutional privilege since it did not afford protection against state prosecution. In the alternative, it was contended that Congress could not constitutionally so extend protection. Justice Frankfurter, author of the Court's majority opinion, refuted both arguments.

The Immunity Act is concerned with the national security. It reflects a congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution. We cannot say that Congress' paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of state power for the more effective exercise of conceded federal power.³⁸

The additional question of whether immunity from state prosecution need be granted³⁹ had been considered by the Court before.⁴⁰ In *United States v. Murdock*⁴¹ a taxpayer was indicted for failure to supply information necessary in the computation of his federal income tax. The taxpayer refused to give information, contending that to do

³⁵ Possibly indicative of the considered application of the immunity act and the nature of the desired testimony is the fact that Ullmann had been identified as a member of a communist espionage group in testimony before a congressional investigating committee. See, e.g., *Hearings Before the House Un-American Activities Committee*, 80th Cong., 2d Sess., at 525 (1948); Senate Committee on the Judiciary, *Interlocking Subversion in Government Departments*, 83d Cong., 1st Sess. 29 (1953).

³⁶ Ullmann had appeared before congressional committees on previous occasions each time refusing to affirm or deny the allegations of his complicity in the communist conspiracy. See House Committee on Un-American Activities, *The Shameful Years* 61 (1951); *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 83d Cong., 1st Sess., pt. 16, at 1191-1214 (1954).

³⁷ Ullmann was convicted of contempt and sentenced to six months imprisonment "unless he should purge himself of the contempt." *Ullmann v. United States*, 350 U.S. 422, 425 (1956).

³⁸ *Id.* at 436.

³⁹ This question is implicit in the first-mentioned Ullmann contention that Congress did not protect against state prosecution.

⁴⁰ See *Jack v. Kansas*, 199 U.S. 372, 381 (1905); *Brown v. Walker*, 161 U.S. 591, 606 (1896); cf. *Hale v. Henkel*, 201 U.S. 43 (1906).

⁴¹ 284 U.S. 141 (1931).

so would put him in jeopardy of state prosecution. The Supreme Court dismissed this argument, stating that "this court has held that immunity against state prosecution is not essential to the validity of federal [immunity] statutes The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."⁴² The view that protection against self-incrimination need be provided only by the government which seeks the information⁴³ was endorsed in *Feldman v. United States*.⁴⁴ A judgment debtor, called as a witness in state proceedings, was forced to testify under a state immunity statute. In a subsequent federal criminal prosecution for using the mails to defraud, brought against this witness, the prior "immune" testimony was introduced into evidence resulting in his conviction. The Supreme Court recognized that a state could not prevent subsequent derivative criminal action by the federal government⁴⁵ and held that "immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction."⁴⁶

Legislative history surrounding the enactment of the new compulsory testimony statute demonstrates considerable doubt among the drafters whether they would be empowered to proscribe state prosecution.⁴⁷ In order to insure the constitutionality and the efficacy of the proposed statute, the alternate method of outlawing only the coerced testimony was incorporated. That this latter provision was valid was not in question, since a recent Supreme Court opinion⁴⁸ had sustained a similar statute which barred the subsequent use of coerced testimony in both federal and state proceedings. Congress left resolution of the problem of prohibiting state prosecution to the Supreme Court,⁴⁹ merely stating that no "witness shall be prosecuted" in any subsequent proceedings.⁵⁰ Thus, it did not explicitly preclude state prosecution. On the other hand, the legislature had already clearly

⁴² *United States v. Murdock*, 284 U.S. 141, 149 (1931).

⁴³ *But see United States v. Di Carlo*, 102 F. Supp. 597 (N.D. Ohio 1952). In that case, a witness was held to have validly invoked the privilege because of fear of incrimination involving state crimes. The witness was testifying before a congressional committee investigating state crimes.

⁴⁴ 322 U.S. 487 (1944).

⁴⁵ See *Jack v. Kansas*, 199 U.S. 372 (1905).

⁴⁶ *Feldman v. United States*, 322 U.S. 487, 493 (1944). It is interesting to note that Justice Frankfurter, writing the majority decision in this case, relied in part on *Brown v. Walker*, 161 U.S. 591 (1896). Twelve years later in the *Ullmann* case, Justice Frankfurter relied on *Brown v. Walker* as supporting his decision that immunity be extended to both jurisdictions. *Ullmann v. United States*, 350 U.S. 422 (1956).

⁴⁷ See H.R. REP. No. 2606, 83d Cong., 2d Sess. 7 (1954).

⁴⁸ *Adams v. Maryland*, 347 U.S. 179 (1954).

⁴⁹ "The answer to the precise question is not too clear. . . . In any event, the question can only be resolved by a decision of the Supreme Court." H.R. REP. No. 2606, 83d Cong., 2d Sess. 7 (1954).

⁵⁰ 18 U.S.C. § 3486(c) (Supp. II, 1954).

expressed its desire that state prosecution not be inhibited. This is evidenced by another section⁵¹ in the federal criminal code, which encompasses the immunity act, providing that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."⁵² The Supreme Court more than half a century before in construing this section had said that "it was intended to leave with the state court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject."⁵³

The broad question, asked by the Congress and answered by the Court, is whether Congress had the constitutional power to eliminate state prosecutions.⁵⁴ In responding affirmatively, the Court relied on the power to provide for national defense and the complementary necessary and proper clause.⁵⁵ It may be contended that the assumption of exclusive power by the federal government runs afoul of the tenth amendment concept of delegated federal powers and residuary states' rights.⁵⁶ Alexander Hamilton, discussing this concept, considered alienation of state sovereignty valid, where a federal authority is granted, only when ". . . a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."⁵⁷ Chief Justice Marshall also turned his attention to the seriousness of interference with a state's penal provisions, establishing that the intention to interfere be "clearly and unequivocally expressed."⁵⁸

In the absence of unequivocal language and totally repugnant state action, the Supreme Court has sustained the exercise of the state police power on several occasions.⁵⁹ The case of *Gilbert v. Minnesota*⁶⁰ involved a conviction under a Minnesota statute that forbade discouraging the enlistment of citizens in the armed forces of the United States.⁶¹ The majority, despite the constitutional delega-

⁵¹ 18 U.S.C. § 3231 (1952).

⁵² *Ibid.*

⁵³ *Sexton v. California*, 189 U.S. 319, 324-25 (1903).

⁵⁴ The *Ullmann* case decided one week before *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), may have forecast the latter decision. In the *Nelson* case, the Supreme Court held that federal legislation could, and did, preclude state sedition laws.

⁵⁵ *Ullmann v. United States*, 350 U.S. 422, 436 (1956); see U.S. CONST. art. I, § 8, cl. 18.

⁵⁶ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

⁵⁷ THE FEDERALIST No. 32, at 186 (Lodge ed. 1888) (Hamilton).

⁵⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 443 (1821).

⁵⁹ See, e.g., *Whitney v. California*, 274 U.S. 357 (1927); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1846).

⁶⁰ 254 U.S. 325 (1920).

⁶¹ The statute made it a misdemeanor ". . . to advocate or teach . . . that men should not enlist in the military . . . or . . . aid or assist the United States in prosecuting or carrying on war. . . ." *Gilbert v. Minnesota*, 254 U.S. 325, 326-27 (1920).

tion of the war-making power to Congress, held that the police power of the state to legislate within this field was not invalidly exercised. In a dissenting opinion Justice Brandeis vainly pointed out that the state statute was inconsistent with federal legislation⁶² and that the latter was exclusive. In comparing the decision in the *Gilbert* case with what was said in *Ullmann*,⁶³ it becomes difficult to determine why state prosecution would be totally inconsistent and repugnant to a federal law manifesting an exercise of authority under the national defense clause in the latter case, and not in the former.

The reasoning of the *Ullmann* decision seems to present an aberration from settled law.⁶⁴ Not only had it been established that the federal constitutional privilege may not be invoked by a witness in state proceedings,⁶⁵ but it had been made clear that the privilege against self-incrimination could not be invoked in federal proceedings because of fear of state prosecution.⁶⁶ The *Ullmann* case allows a federal statute, however, to extend immunity from prosecution to state actions. The result is that if a witness before a federal tribunal, relies on his constitutional privilege, he is not protected from subsequent state prosecution; but, if he is fortunate enough to be extended the benefit of the statute, his protection is assured. Thus, the statutory immunity granted is greater than the constitutional privilege it replaces. In this respect, the *Constitution* is powerless while a *statute* grants amnesty.

It would, of course, seem undeniable that unless all prosecution—federal and state—is eliminated, there is no true immunity. To say that a witness, though safe from federal prosecution but subject to state process, is really “immune” is to be blind to reality. The *Ullmann* decision, then, may be attacked not because it extended immunity but because it extended immunity at the expense of the constitutional concept of delimited federal and residual state power. In addition, the question of full immunity from prosecution is not the sole defect in the compulsory testimony statute. A witness making a full and truthful disclosure under the immunity process is still not protected from a vindictive prosecution for perjury.⁶⁷ Wrongful criminal prosecution based on false information has not been unknown in the past, and the statute presents nothing to prevent a repetition of such injustice. Finally, it is clear that the statute grants no amnesty

⁶² The federal espionage act of 1917, 40 STAT. 217 (1917).

⁶³ See Text at note 38 *supra*.

⁶⁴ But see 58 W. VA. L. REV. 420 (1956) which considers the *Ullmann* case as merely “. . . reaffirming the proposition that Congress has the authority to deny a witness the privilege against self-incrimination and thereby, can compel him to testify where the statute grants complete immunity to the witness from prosecution concerning such matters.” *Id.* at 421-22.

⁶⁵ See *Twining v. New Jersey*, 211 U.S. 78 (1908).

⁶⁶ *United States v. Murdock*, 284 U.S. 141 (1931). See Text at note 34 *supra*.

⁶⁷ See note 8 *supra*.

from the social and economic opprobrium that would follow testimony under the statute.⁶⁸ It can be contended that the constitutional privilege itself does not protect reputation,⁶⁹ or avoid disgrace and humiliation.⁷⁰ Likewise, the privilege contains no protection against economic loss through discharge from private employment.⁷¹ This absence of constitutional protection, however, does not supply a conclusive answer to the statutory absence. Is protection which gives but partial immunity really coextensive? Had the Supreme Court held the statute invalid, this conflict would have been avoided. Were the statute found to be unconstitutional, the federal theory of government would not have suffered attack, nor would the concept of full, co-extensive immunity been defeated.

Physical Coercion

Perhaps the most interesting aspect of the *Ullmann* decision is its approval of the governmental compulsion inherent in the immunity statute. The history of the constitutional privilege against self-incrimination reveals a continuing struggle against coercion.⁷² As early as the thirteenth century, England saw the utilization of the ecclesiastical *ex officio* oath.⁷³ With this device, church authorities were able to force the disclosure of heresy, the witnesses being required to answer truthfully to avoid the pain of excommunication. This method of extortion of testimony was later adopted by secular courts considering charges of crimes against the sovereign.⁷⁴ The application of the oath was regarded as little more than a variation of the forms of physical torture.⁷⁵ The revolution against the oath, in response to the opposition of Leveller leader Lilburn,⁷⁶ culminated in the abolition of the use of the oath in governmental or ecclesiastical tribunals.⁷⁷ The use of torture, however, did not end. Torture had proved most efficient in the English criminal process, since it was necessary that those accused of felonies plead to the charges.⁷⁸ Physical pressure caused a plea or death.⁷⁹ Similarly, torture, or fear of the rack, forced a defendant to confess self-incriminatory evidence late

⁶⁸ See *Ullmann v. United States*, 350 U.S. 422, 440 (1956) (dissenting opinion).

⁶⁹ See *Hale v. Henkel*, 201 U.S. 43, 66 (1906).

⁷⁰ See *Smith v. United States*, 337 U.S. 137, 147 (1949).

⁷¹ See Claffin, *The Self-Incrimination Clause*, 42 A.B.A.J. 935, 937 (1956).

⁷² See Note, 41 CORNELL L.Q. 294, 295 (1956).

⁷³ See MORGAN & MAGUIRE, EVIDENCE 411 (3d ed. 1951).

⁷⁴ See Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY. L.J. 267, 269 (1956).

⁷⁵ See McCORMICK, EVIDENCE 253 (1954).

⁷⁶ See Trial of Lilburn and Wharton, 3 How. St. Tr. 1315 (1637).

⁷⁷ See Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 9 (1949).

⁷⁸ See I STEPHEN, HISTORY OF THE CRIMINAL LAW 297-301 (1883).

⁷⁹ See Trial of Weston, 2 How. St. Tr. 911, 914 (1615).

in the seventeenth century.⁸⁰ There is some evidence that such extortive methods were transplanted to the American colonies.⁸¹ Certainly, the knowledge and fear of the technique of torture was before the drafters of early American organic law.⁸² Some of them equated the privilege against self-incrimination with the prohibition of torture.⁸³ In debates before the state conventions, called to ratify the Federal Constitution, scattered references to the privilege demonstrate that it was regarded merely as a privilege against physical compulsion.⁸⁴

The threat of coercion today is not so remote as might appear on superficial examination. Occasional, but real, occurrences of American police methods employing physical compulsion⁸⁵ may be contrasted with systematic tortures prevalent in contemporary totalitarian countries.⁸⁶ The immunity statute, embodying mental coercion, may now be contrasted with the "brain-washing" technique currently employed in the authoritarian nations.⁸⁷ That the method approved by the Court in the *Ullmann* case pales in comparison does not necessarily refute objection to the statute as inconsistent with the intent of the constitutional provision. In any event, the full circle has apparently been turned. The mental compulsion of the ecclesiastical oath, replaced by the privilege against self-incrimination, has now been replaced by the mental coercion of the statute. It would follow that the criticism directed against the immunity statute involved in the *Ullmann* case is equally applicable to all federal immunity statutes. The effect of these compulsory testimony statutes runs contrary to the historical background of the privilege. It may be argued further that all such statutes are unconstitutional since they do compel—and the Constitution provides that no person "shall be compelled."⁸⁸ However, it would not be realistic to optimistically urge the Supreme

⁸⁰ See *Trial of Tonge*, 6 How. St. Tr. 225, 359 (1662).

⁸¹ See 3 WIGMORE, EVIDENCE 235 n.7 (3d ed. 1940).

⁸² See Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 775-89 (1935).

⁸³ Pittman, *supra* note 82, at 783.

⁸⁴ See, e.g., 2 ELLIOTT'S DEBATES 111 (2d ed. 1937).

⁸⁵ See, e.g., *Rochin v. California*, 342 U.S. 165 (1952); *Watts v. Indiana*, 338 U.S. 49 (1949); *Ward v. Texas*, 316 U.S. 547 (1942); *Brown v. Mississippi*, 297 U.S. 278 (1936). See also Comment, 6 HASTINGS L.J. 71, 74 (1954).

⁸⁶ The brutality of the Nazi organization was highlighted at post-war trials. See, e.g., OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 63 (1947).

⁸⁷ A classic example of the use of "brain washing" may be observed through a consideration of the great purge of communist leaders two decades ago. The numerous convictions followed open self-accusation. A writer asks: "How then explain the confessions of guilt in open court?" FAINSON, *HOW RUSSIA IS RULED* 370 (1953). The highly probable answer—psychological duress—had already been recorded by a noted authority. See KOESTLER, *DARKNESS AT NOON*. The utilization of psychological duress by the communists in Korea is, of course, notorious.

⁸⁸ U.S. CONST. amend. V.

Court to find the established, oft-used immunity statutes unconstitutional. Perhaps the future Congress can be prevailed upon to abandon this technique. Certainly, questionable constitutional action should be resolved in favor of those protected by the Constitution. Utility and national security do not justify abuse of constitutional privilege.

Conclusion

"The history of liberty is the history of limitations upon the powers of government."⁸⁹ Likewise, the history of the privilege against self-incrimination has been a history of reaction against authority using the methods of the inquisitor.⁹⁰ Just as the opposition to the ecclesiastical oath was directed against the autocracy of both the church and state,⁹¹ the struggle against self-incrimination was a revolt against the tyranny of the sovereign which "pervaded every nook and corner of the individual."⁹² The Bill of Rights, which encompasses the privilege, had as its main purpose the restriction of a powerful federal, centralized government.⁹³ As James Madison explained in support of the constitutional declaration of rights:

. . . the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.⁹⁴

At the time of the consideration of the Constitution for ratification, the wide-spread fear of federal invasion of the states' jurisdiction prompted virtually all of the states ratifying conventions to decry the absence of a Bill of Rights.⁹⁵ The Bill of Rights was projected to allay these fears.⁹⁶ These amendments, essentially negative in construction and nature, sought to restrict tyranny.⁹⁷

⁸⁹ Observation of Woodrow Wilson quoted in STRONG, *AMERICAN CONSTITUTIONAL LAW* 3 (1950).

⁹⁰ See MCKELVEY, *EVIDENCE* § 300 (5th ed. 1944).

⁹¹ See MORGAN & MAGUIRE, *EVIDENCE* 410, 411 (3d ed. 1951). U.S. CONST. amend. V.

⁹² *United States v. James*, 60 Fed. 257, 263 (N.D. Ill. 1894).

⁹³ See 1 GALES & SEATON, *ANNALS OF CONGRESS* (1834) as quoted in PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 108-09 (1955).

⁹⁴ *Id.* at 113.

⁹⁵ See Brownell, *The Bill of Rights: Liberty and Law Are Inseparable*, 41 A.B.A.J. 517 (1955); Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 629 (1956).

⁹⁶ See CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 61 (10th ed. 1955).

⁹⁷ Chief Justice Marshall has said:

". . . [I]t is universally understood, it is part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively

Exemplifying this negative concept is the fourth amendment, which is closely and historically intertwined with the privilege against self-incrimination.⁹⁸ The fact that, under the fourth, only unreasonable searches by the federal government are outlawed⁹⁹—reasonable searches being perfectly valid¹⁰⁰—indicates that it was merely the exercise of arbitrary or excessive power that was feared. A reading of the concluding amendments¹⁰¹ solidifies the appraisal of the Bill of Rights as a delimiting document intended to reduce and restrict the power of the federal government.¹⁰²

The majority states in the *Ullmann* case that “nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.”¹⁰³ This is inconsistent with the effect of that decision. In *extending* the influence of the federal government by reliance on *restricted* constitutional authority, the Court has circumvented a cardinal canon of construction.¹⁰⁴ The intent of the framers of the constitutional provisions has been ignored. Although the Supreme Court once recognized that the amendments were exclusively restrictions upon federal power, intended to be “limitations upon the powers of the general government”;¹⁰⁵ this concept has apparently been discarded. In spite of the majority’s disclaimer, judicial amendment¹⁰⁶ of the Constitution

entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.” *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

⁹⁸ See *Feldman v. United States*, 322 U.S. 487, 489 (1944); *Weeks v. United States*, 232 U.S. 383, 393 (1914); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

⁹⁹ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation . . . and the persons or things to be seized.” U.S. CONST. amend. IV.

¹⁰⁰ *Carroll v. United States*, 267 U.S. 132 (1925); *Hipp v. United States*, 156 F.2d 58 (5th Cir.) (per curiam), *cert. denied*, 329 U.S. 753 (1946); *United States v. Carter*, 118 F. Supp. 559 (W.D. Pa. 1954).

¹⁰¹ “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX; U.S. CONST. amend. X.

¹⁰² See *Kelsey, The Ninth Amendment of the Federal Constitution*, 11 *IND. L.J.* 309 (1936).

¹⁰³ *Ullmann v. United States*, 350 U.S. 422, 428 (1956).

¹⁰⁴ “The cardinal rule of statutory construction is to ascertain and give effect to the intention of the legislature.” *Melia v. Appeal Board*, 78 N.W.2d 273, 275 (Mich. 1956).

¹⁰⁵ *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 582 (1840).

¹⁰⁶ See *Pittman, The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509 (1956).

has once again been effected.¹⁰⁷ The result is further encroachment upon rights reserved to the states¹⁰⁸—a trend which has characterized recent decisions of the Supreme Court¹⁰⁹—thus driving another “vital blow to the very heart and framework of our constitutional republic.”¹¹⁰



PUBLIC EMPLOYEES AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

Introduction

“. . . [T]he privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized.”¹ The realization of this privilege was the outgrowth of the long conflict between those who championed the spirit of individual liberty on the one hand and the advocates of the “collective power” of the state on the other.² Though, by its terms, the applicability of the constitutional provision was limited to criminal cases,³ it was not long before the courts held that it could be invoked in any federal government proceeding where the evidence thus secured might later be used to convict the witness of a federal crime.⁴ Thus, today, the privilege, if properly invoked, will excuse one from answering questions posed in civil cases,⁵ before grand juries⁶ and in depositions,⁷ and also from

¹⁰⁷ See POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 28-33 (1956); Vaught, *Amending the Constitution by Judicial Decree*, 9 OKLA. L. REV. 249 (1956).

¹⁰⁸ “It will be said that this latest development [the report of the *Ullmann* case at trial level] is a dangerous usurpation of state's rights. The accuracy of this statement will not be disputed, but in view of the past decisions of the Supreme Court it would seem clear that the constitutional validity of this amendment to the statute will also be upheld by that court.” 9 SW. L.J. 474, 476 (1955).

¹⁰⁹ See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

¹¹⁰ Cook and Potter, *The School Segregation Cases: Opposing the Opinion of the Supreme Court*, 42 A.B.A.J. 313, 391 (1956).

¹ GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955).

² See *Brown v. Walker*, 161 U.S. 591, 637 (1896) (dissenting opinion).

³ “. . . nor shall any person . . . be compelled in any *criminal case* to be a witness against himself. . . .” U.S. CONST. amend. V (emphasis added).

⁴ See McCORMICK, *EVIDENCE* 259 (1954); Finkelhor and Stockdale, *The Professor and the Fifth Amendment*, 16 U. PITT. L. REV. 344, 352 (1955); see also cases cited notes 5-9 *infra*.

⁵ See *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

⁶ See *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *United States v. Monia*, 317 U.S. 424, 427 (1943) (dictum).

⁷ See *Phleps v. Phleps*, 133 N.J. Eq. 392, 32 A.2d 81, 83 (Ct. Err. & App. 1943) (dictum).