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## Immunity for Witnesses Before Congressional Committees: The Scope of Section 3486

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## LEGISLATION

### IMMUNITY FOR WITNESSES BEFORE CONGRESSIONAL COMMITTEES: THE SCOPE OF SECTION 3486

#### *The Historical Perspective*

In 1857 Congress passed its first immunity statute as an aid to a House committee investigating charges of parliamentary corruption.<sup>1</sup> The statute, designed to overcome the difficulties Congress experienced in compelling witnesses to make disclosures,<sup>2</sup> exonerated witnesses from prosecution “. . . for any fact or act touching which he shall be required to testify. . . .”<sup>3</sup> This experiment in immunity was short-lived when it developed that a host of wrongdoers flocked to congressional committees to absolve themselves in this new “immunity bath.”<sup>4</sup> In fact, an Interior Department official escaped prosecution by relating to a congressional committee how he embezzled two million dollars of public funds in federal bonds.<sup>5</sup> These abuses moved Congress to amend the immunity statute in 1862 so that witnesses who testified would not be shielded from prosecution; this amendment merely provided that their testimony given before the committee should not be used against them in any subsequent criminal proceeding.<sup>6</sup>

However, because of the decision in *Counselman v. Hitchcock*,<sup>7</sup> the 1862 amendment proved to be an ineffectual means of compelling incriminatory disclosures. The *Counselman* case held that a witness may still assert his privilege against self-incrimination in the face of a statute which merely forbids the subsequent use of his testimony since such a statute is not coextensive with the privilege which it seeks to supplant. If the witness were compelled to answer, reasoned the Court, although his testimony could not subsequently be used against him, he would still be incriminating himself, for the statute “. . . could not, and would not, prevent the use of his testimony to

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<sup>1</sup> See Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government I*, 9 TEMP. L.Q. 57, 62 (1934).

<sup>2</sup> See *United States v. Bryan*, 339 U.S. 323, 338 (1950); Comment, 18 ALBANY L. REV. 173, 177 (1954).

<sup>3</sup> 11 STAT. 156 (1857).

<sup>4</sup> 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).

<sup>5</sup> See King, *supra* note 4.

<sup>6</sup> 12 STAT. 333 (1862).

<sup>7</sup> 142 U.S. 547 (1892).

search out other testimony to be used in evidence against him . . . in a criminal proceeding. . . ."<sup>8</sup>

The Supreme Court, however, suggested in the *Counselman* case that a statute which afforded ". . . immunity against future prosecution for the offence to which the question relates" would be effectual to prohibit the witness from claiming his privilege.<sup>9</sup> Accordingly, Congress enacted, as part of the Interstate Commerce Act of 1893, an immunity provision which required a witness to testify before the Interstate Commerce Commission but exempted him from prosecution ". . . for or on account of any transaction, matter or thing, concerning which he may testify. . . ."<sup>10</sup> This statute was declared by the Supreme Court in *Brown v. Walker*<sup>11</sup> as extending protection equal to that of the privilege so that the witness could be compelled to answer. Thereafter, Congress has, from time to time, incorporated this statute into more than twenty regulatory statutes, available to witnesses who appear before various governmental commissions and agencies.<sup>12</sup>

Nevertheless, from 1862 until August, 1954, congressional committees were equipped with no such immunity weapon to ferret out information. Instead, during that span of time, there remained on the books the abortive statute—found in Title 18, Section 3486 of the United States Code<sup>13</sup>—which merely granted testimony immunity to congressional witnesses, an immunity held insufficient to prevent witnesses from raising their privilege.<sup>14</sup> However, in the years preceding 1954, congressional committees investigating subversive activities were confronted with numerous witnesses who abused and prostituted the privilege against self-incrimination to the extent ". . . that it is fast becoming looked upon by many law-abiding persons with doubt and suspicion."<sup>15</sup> In order to restore the diminishing faith in the privilege, and to enable itself to obtain adequate information upon which to legislate,<sup>16</sup> Congress amended Section 3486 so that in any congressional investigation relating to subversive activities,

. . . no witness shall be excused from testifying or from producing books, papers, or other evidence before . . . any committee of either House . . . on

<sup>8</sup> *Id.* at 564.

<sup>9</sup> *Id.* at 586.

<sup>10</sup> 27 STAT. 443 (1893), 49 U.S.C. § 46 (1952).

<sup>11</sup> 161 U.S. 591 (1896).

<sup>12</sup> For a collection of these statutes see *Shapiro v. United States*, 335 U.S. 1, 6 n.4 (1948).

<sup>13</sup> "No testimony given by a witness before either House, or before any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court. . . ." This section was replaced by the recent enactment of Section 3486, effective August 20, 1954.

<sup>14</sup> See note 7 *supra*.

<sup>15</sup> H.R. Rep. No. 2606, 83d Cong., 2d Sess. (1954) in 16 U.S. CODE CONG. & ADMIN. NEWS at 5247 (Sept. 5, 1954).

<sup>16</sup> *Id.* at 5247-5249.

the ground that the testimony or evidence required of him may tend to incriminate him. . . . 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 so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence. . . .<sup>17</sup>

This language is essentially similar to that of the immunity statute upheld by the Supreme Court in *Brown v. Walker*,<sup>18</sup> wherein the Court exhaustively discussed its constitutionality and concluded that it afforded protection coextensive with the privilege.

In addition, Section 3486 contains features which should forestall the abuses and "immunity baths" brought about by the 1857 statute which also forbade prosecution of witnesses who testified before congressional committees. Under the new statute, witnesses must claim their privilege before they are granted immunity.<sup>19</sup> This then puts the committee on ". . . notice that a serious and important decision has been placed upon them."<sup>20</sup> The committee will then have the opportunity to deliberate and investigate the feasibility of granting immunity. The statute also requires the committee to obtain the approval of the district court for the district wherein the inquiry is being carried on before any immunity can be granted to the witness.<sup>21</sup> In the proceeding before the district court, the Attorney General is given an opportunity to raise objections to a congressional grant of immunity.<sup>22</sup> Thus, if the district court judge decides that a grant of immunity would serve to embarrass an investigation being conducted by the Justice Department, or that the need to punish the witness outweighs the value of obtaining his testimony, he could refuse to issue the required order of immunity. In such a case, the witness could not be compelled to testify. The 1857 immunity statute contained no such safeguards.

Moreover, it should not be overlooked that the new Section 3486 provides for a grant of immunity to witnesses only before committees investigating subversive activities.<sup>23</sup> Congress has, in effect, by so

<sup>17</sup> 18 U.S.C. § 3486(a) (Supp. 1954). The new statute also contains similar immunity provisions available to the Attorney General in grand jury or trial proceedings concerning subversive activities. 18 U.S.C. § 3486(c) (Supp. 1954).

<sup>18</sup> 161 U.S. 591 (1896). The Court also considered the argument that only the President has the power to pardon, but decided an immunity statute is "virtually an act of general amnesty" which is within the power of Congress. *Id.* at 601.

<sup>19</sup> 18 U.S.C. § 3486(a) (Supp. 1954).

<sup>20</sup> H.R. Rep. No. 2606, 83d Cong., 2d Sess. (1954) in 16 U.S. CODE CONG. & ADMIN. NEWS at 5250 (Sept. 5, 1954).

<sup>21</sup> 18 U.S.C. § 3486(a) (Supp. 1954).

<sup>22</sup> *Id.* § 3486(b).

<sup>23</sup> *Id.* § 3486(a) ("In the course of any investigation relating to 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, seditious conspiracy or the overthrow of its Government by force or violence. . . .").

limiting Section 3486, repealed the old section<sup>24</sup> which only prohibited the subsequent use of testimony given before any congressional committee. Henceforth witnesses before congressional committees, other than those investigating subversive activities, are afforded no protection whatever against the subsequent use of their testimony in criminal proceedings. This repeal, however, could not work retroactively, so as to allow the Government to now use, in criminal prosecutions against witnesses who had previously testified before congressional committees, the testimony they gave when the old Section 3486 was in force.<sup>25</sup>

### *Privilege and Immunity: Their Scope*

An immunity statute which effectively prevents the assertion of the privilege against self-incrimination represents a solution of a conflict of two principles: the need of Congress to investigate, which is perhaps "more critical now than at any time in the history of the world";<sup>26</sup> and second, the privilege of witnesses to withhold incriminating information—a privilege which ". . . grows out of the high sentiment and regard of our jurisprudence for conducting . . . investigatory proceedings upon a plane of dignity, humanity and impartiality."<sup>27</sup> No evaluation of an immunity statute would be complete, therefore, without comparing it to the judicially declared scope of the privilege against self-incrimination. For unless *in practice* immunity is coextensive with the privilege, there has really been no solution of the conflict.

### *Disclosures Protected*

The privilege against self-incrimination protects the witness from giving any answer which may tend to incriminate him by furnishing a link in the chain of evidence needed to prosecute him.<sup>28</sup> As to what answers would "tend" to incriminate, Wigmore states that only those which would establish an element of the crime tend to incriminate.<sup>29</sup> There is language by Chief Justice Marshall<sup>30</sup> and in the

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<sup>24</sup> See note 13 *supra*.

<sup>25</sup> *Cf.* Cameron v. United States, 231 U.S. 710 (1914).

<sup>26</sup> United States v. Emspak, 95 F. Supp. 1012, 1017 (D.D.C. 1951), *aff'd*, 203 F.2d 54 (D.C. Cir. 1952).

<sup>27</sup> United States v. White, 322 U.S. 694, 698 (1944).

<sup>28</sup> Hoffman v. United States, 341 U.S. 479 (1951); *see* Blau v. United States, 340 U.S. 159, 161 (1950).

<sup>29</sup> See 8 WIGMORE, EVIDENCE § 2260 (3d ed. 1940).

<sup>30</sup> *See* United States v. Burr, 25 Fed. Cas. No. 14,692e, at 40 (C.C.D. Va. 1807) ("It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.").

case of *Mason v. United States*<sup>31</sup> which seems to express this view. Nevertheless, the authorities are abundant to the effect that "tend to incriminate" includes any answer which may furnish a clue to the finding of *other* evidence which is incriminating.<sup>32</sup> Indeed, implicit in those cases<sup>33</sup> which hold a testimony-immunity statute not co-extensive with the privilege is the rationale that the privilege encompasses disclosure of leads which these statutes could not prevent. However, the privilege is confined to those answers which may in some real and substantial way tend to incriminate—remote possibilities of incrimination do not justify the assertion of the privilege.<sup>34</sup>

Section 3486 provides immunity to the witness ". . . for or on account of any transaction, matter, or thing concerning which he is so compelled . . . to testify. . . ." It says nothing about immunity from those leads or clues gleaned from the testimony which may also furnish links in the chain of evidence against the witness. Yet the courts have construed similar immunity statutes to so apply. Thus, if what the witness has related to a congressional committee has a substantial connection<sup>35</sup>—even by way of leads or clues<sup>36</sup>—to the subject matter of a subsequent prosecution against him, the indictment will be dismissed. Moreover, the protection afforded would not be limited to a subversive activity type crime which the committee is investigating, but would also include incidental crimes which

<sup>31</sup> 244 U.S. 362 (1917).

<sup>32</sup> See, e.g., *Estes v. Potter*, 183 F.2d 865, 867 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951); *Kasinowitz v. United States*, 181 F.2d 632, 637 (9th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951); *United States v. St. Pierre*, 132 F.2d 837, 838 (2d Cir. 1942); *Edelstein v. United States*, 149 Fed. 636, 642 (8th Cir. 1906), *cert. denied*, 205 U.S. 543 (1907). But see Falknor, *Self-Crimination Privilege: "Links in the Chain,"* 5 VAND. L. REV. 479 (1952) (wherein the author traces the trend of the courts from the *Burr* and *Mason* cases and concludes that the "clue" theory has led courts to allow the privilege to be asserted where danger of incrimination is remote and speculative).

<sup>33</sup> See *Counselman v. Hitchcock*, 142 U.S. 547 (1892), and similar cases collected in Note, 118 A.L.R. 602 (1939).

<sup>34</sup> See *Rogers v. United States*, 340 U.S. 367, 374 (1951); *Brown v. Walker*, 161 U.S. 591, 608 (1896); *Camarota v. United States*, 111 F.2d 243, 245 (3d Cir.), *cert. denied*, 311 U.S. 651 (1940); *United States v. Weinberg*, 65 F.2d 394, 395 (2d Cir.), *cert. denied*, 290 U.S. 675 (1933).

<sup>35</sup> *Accord*, *United States v. Eisele*, 52 F. Supp. 105 (D.D.C. 1943); see *Heike v. United States*, 227 U.S. 131, 144 (1913) ("When the [immunity] statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law."); *Lumber Products Ass'n, Inc. v. United States*, 144 F.2d 546, 553 (9th Cir. 1944), *rev'd on other grounds sub nom.* *United Brotherhood of Carpenters & Joiners of America v. United States*, 330 U.S. 395 (1947); *United States v. Greater Kansas City Retail Coal Merchants' Ass'n*, 85 F. Supp. 503, 514 (W.D. Mo. 1949).

<sup>36</sup> *Smith v. United States*, 337 U.S. 137, 153 (1949); *Edwards v. United States*, 312 U.S. 473 (1941); *United States v. Moore*, 15 F.2d 593, 594 (D. Ore. 1926).

happened to be disclosed by the testimony of the witness.<sup>37</sup> This is only a necessary corollary to the principle that immunity, in order to replace the privilege, must give the same protection that could have been achieved by it.

Some courts have even extended the scope of immunity statutes to afford protection to a witness who does not reveal any incriminating facts<sup>38</sup> or who categorically denies the commission of crimes.<sup>39</sup> Other courts, however, disagree, reasoning that the immunity statute was not enacted to confer a gratuity to criminals, but to seek information otherwise not obtainable because of the privilege against self-incrimination.<sup>40</sup> Hence, the mere fact of testifying, without disclosing incriminatory facts, should not entitle the witness to immunity. The latter rule seems more in keeping with the purpose of granting immunity, but it should be applied with caution in the case of a witness who, in making denials of his involvement in a crime, incidentally reveals leads which could be incriminating.

### *Books, Papers and Records*

By virtue of the privilege, a witness can refuse to obey a subpoena *duces tecum* directed at obtaining his documents or papers,<sup>41</sup> unless they are public documents<sup>42</sup> or records required to be kept by law.<sup>43</sup> However, the witness cannot claim his privilege with respect to documents he holds as a custodian or officer of a corporation<sup>44</sup> or unincorporated association,<sup>45</sup> even though these documents may tend to incriminate him personally.<sup>46</sup> In fact the witness may be required to authenticate or identify these documents by oral testimony.<sup>47</sup>

The immunity afforded oral testimony by Section 3486 also applies to books and records the witness may be compelled to produce.<sup>48</sup>

<sup>37</sup> Cf. *United States v. Weinberg*, *supra* note 34.

<sup>38</sup> See *United States v. Armour & Co.*, 142 Fed. 808, 822 (N.D. Ill. 1906).

<sup>39</sup> See *State v. Sacks*, 116 Kan. 148, 225 Pac. 738 (1924).

<sup>40</sup> *Stone v. State*, 96 Tex. Crim. App. 211, 256 S.W. 930 (1923); *State v. Carchidi*, 187 Wis. 438, 204 N.W. 473 (1925); see *State v. Grosnickle*, 189 Wis. 17, 206 N.W. 895, 896-897 (1926).

<sup>41</sup> Cf. *Boyd v. United States*, 116 U.S. 616 (1886); see *Wilson v. United States*, 221 U.S. 361, 383 (1911).

<sup>42</sup> See *Davis v. United States*, 328 U.S. 582, 593 (1946); *Wilson v. United States*, *supra* note 41 at 380.

<sup>43</sup> *Shapiro v. United States*, 335 U.S. 1 (1948) (records required to be kept by OPA regulations).

<sup>44</sup> *Wilson v. United States*, *supra* note 41. The Court stated that if corporate documents are interspersed with private ones, the witness may withdraw the latter under supervision of the court. *Id.* at 378, 386.

<sup>45</sup> *United States v. White*, 322 U.S. 694 (1944).

<sup>46</sup> See *Rogers v. United States*, 340 U.S. 367, 372-373 (1951).

<sup>47</sup> See *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 234 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929).

<sup>48</sup> As to the extent of the protection see notes 35 and 36 *supra*.

Yet the law is now clear that he will receive no immunity with respect to books and papers which were not subject to the privilege, such as records required to be kept by law<sup>49</sup> or books of a corporation<sup>50</sup> or unincorporated association. Again, the theory is that immunity should be construed only as coterminous with what otherwise would have been the privilege of the person concerned.

The Supreme Court has already declared that there is no privilege attaching to the books and records of a state-wide Communist Party, whether it be a corporation or unincorporated association.<sup>51</sup> The same would probably be true of front-organizations or local cells of subversives. According to *United States v. White*,<sup>52</sup> if an organization has an impersonal character so that ". . . it cannot be said to embody or represent the purely private or personal interests of its constituents . . .,"<sup>53</sup> the privilege cannot be invoked to prevent disclosure of its books and records. Any group or organization which participates in the world-wide communist conspiracy would certainly not be representing "purely private or personal interests."

Added complications arise under the provisions of the Subversive Activities Control Act of 1950.<sup>54</sup> "Communist-action"<sup>55</sup> and "Communist-front"<sup>56</sup> organizations are required to register information with the Attorney General;<sup>57</sup> they are also required to keep books indicating how monies are received and how they are expended.<sup>58</sup> In addition, members of "Communist-action" organizations must fill out registration statements containing ". . . such information as the

<sup>49</sup> *Shapiro v. United States*, 335 U.S. 1 (1948), criticized in 47 MICH. L. REV. 271 (1948) and 24 N.Y.U.L.Q. REV. 235 (1949).

<sup>50</sup> *Heike v. United States*, 227 U.S. 131 (1913), which in effect overrules the language to the contrary in *Hale v. Henkel*, 201 U.S. 43, 73 (1906); *United States v. Greater Kansas City Retail Coal Merchants' Ass'n*, 85 F. Supp. 503 (W.D. Mo. 1949); see *United States v. Frontier Asthma Co.*, 69 F. Supp. 994, 996-997 (W.D.N.Y. 1947).

<sup>51</sup> See *Rogers v. United States*, 340 U.S. 367, 371-372 (1951).

<sup>52</sup> 322 U.S. 694 (1944).

<sup>53</sup> *Id.* at 701.

<sup>54</sup> 64 STAT. 987 (1950), 50 U.S.C. § 781 *et seq.* (1952).

<sup>55</sup> A Communist-action organization is ". . . any organization in the United States . . . which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operates primarily to advance the objectives of such world Communist movement . . . and . . . any section, branch, fraction, or cell of [such Communist-action organization] . . ." 64 STAT. 989 (1950), 50 U.S.C. § 782(3) (1952).

<sup>56</sup> A Communist-front organization is ". . . any organization . . . (other than a Communist-action organization . . .) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement . . ." 64 STAT. 989 (1950), 50 U.S.C. § 782(4) (1952).

<sup>57</sup> 64 STAT. 993 (1950), 50 U.S.C. § 786(a), (b), (d) (1952).

<sup>58</sup> 64 STAT. 994 (1950), 50 U.S.C. § 786(f)(1) (1952).

Attorney General shall by regulations prescribe." <sup>59</sup> These registration statements are to be made available for public inspection.<sup>60</sup>

If the Act is enforced—and there are serious doubts as to its constitutionality <sup>61</sup>—the rule which denies the privilege to records required to be kept by law thus looms in importance. Moreover, as to members of "Communist-action" organizations, their registration statements, becoming in effect public records,<sup>62</sup> would also not be protected by the privilege. The member of the "Communist-action" organization who testifies before a congressional committee may already have been forced to disclose incriminatory information in his registration statement without having been afforded immunity from prosecution.<sup>63</sup> Will his testimony before the committee grant him such immunity?

The answer to this question poses a further problem. A witness may be compelled to produce incriminating documents which, because of their nature (*e.g.*, required to be kept by law, documents of a corporation or unincorporated association), are not protected by the privilege. At the same time he is also compelled by the committee to give testimony. Does the testimony he gives work to grant him immunity? The answer may be found in the rationale of *Shapiro v. United States* <sup>64</sup> and *Heike v. United States*.<sup>65</sup> Those cases reasoned that the purpose of immunity statutes is to ". . . make evidence available and compulsory that otherwise could not be got."<sup>66</sup> Hence, if the witness, in his oral testimony, discloses no more than what

<sup>59</sup> 64 STAT. 995 (1950), 50 U.S.C. § 787 (1952). The Attorney General has already prescribed the following information: aliases of the registrant; description of registrant's duties; names of clubs, societies and organizations of which the registrant is a member; connection with foreign governments or political parties; and accounts of the registrant's trips abroad. See 28 CODE FED. REGS. § 11.207 (Cum. Supp. 1954).

<sup>60</sup> 64 STAT. 995 (1950), 50 U.S.C. § 788(2)(b) (1952). See also 28 CODE FED. REGS. § 11.300 (Cum. Supp. 1954).

<sup>61</sup> In *Blau v. United States*, 340 U.S. 159 (1950), the Court held that petitioner was justified in refusing to answer questions relating to her connection with the Colorado Communist Party. The Court said her answers might tend to incriminate her of violation of the Smith Act. It would seem, then, that the Subversive Activities Control Act requires the witness to disclose incriminating testimony in violation of the Fifth Amendment. See Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimination*, 18 U. OF CHI. L. REV. 687, 724 (1951).

<sup>62</sup> See note 60 *supra*.

<sup>63</sup> The Subversive Activities Control Act [64 STAT. 992 (1950), 50 U.S.C. § 783(f) (1952)] provides that the fact of registration of any person under the Act as a member of a Communist organization shall not be used as evidence against him for any violation of a criminal statute. However, this immunity is not coextensive with the privilege and thus does not give full protection from prosecution. See note 7 *supra*.

<sup>64</sup> 335 U.S. 1 (1948).

<sup>65</sup> 227 U.S. 131 (1913).

<sup>66</sup> *Id.* at 142.

was contained in these non-privileged documents, he would not receive immunity because he has given the committee nothing which it did not already have. However, if the witness is compelled to give new incriminating information, the rule might be otherwise. The member of the "Communist-action" group who has been required by law to file a registration statement which becomes open to public inspection may have signed away his privilege with respect to information contained therein. In any event, if the witness is deprived of immunity, he has lost nothing he had under the privilege. If this be considered unjust, it is the fault of the courts which have deemed certain incriminating documents non-privileged, rather than the immunity statute, which grants immunity coextensive with the privilege.

### *Danger of Incrimination for State Crimes*

A witness who appears before a congressional committee investigating subversive activities may incidentally reveal, either directly or by way of leads, violations of state crimes. Whether he would receive immunity from state prosecution of those crimes has not conclusively been decided, nor has this possibility been a ground for invalidating federal immunity statutes.<sup>67</sup> There is, however, *dicta* to the effect that where the immunity statute broadly confers immunity for "any" crime disclosed, it means state as well as federal crimes, and that the federal statute, being the supreme law of the land, must be obeyed by the states.<sup>68</sup> Recently, in *Adams v. Maryland*,<sup>69</sup> the Supreme Court construed former Section 3486 so as to prohibit the use in state courts of testimony given before a congressional committee. The Court said Section 3486 was a legitimate exercise of congressional power, necessary and proper to carry out its legislative functions and binding on the state courts as the "Supreme Law of the Land." It should be noted, however, that former Section 3486 restricted use of *testimony*; whether the reasoning of the *Adams* case would extend to prohibition of state *prosecutions* remains unanswered.<sup>70</sup>

Even assuming that Section 3486 does not bind the states, it would not theoretically be an infringement of the privilege since the courts have ruled that the privilege cannot be raised by the witness before a federal tribunal on the grounds that his answer may incriminate him of a state crime.<sup>71</sup> Yet this rule, resting on a dual-

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<sup>67</sup> See *Brown v. Walker*, 161 U.S. 591, 606 (1896); *Hale v. Henkel*, 201 U.S. 43, 68 (1906).

<sup>68</sup> See *Brown v. Walker*, *supra* note 67 at 606-608.

<sup>69</sup> 347 U.S. 179 (1954).

<sup>70</sup> As to the power of Congress to immunize against state prosecution, see Comment, 18 ALBANY L. REV. 173, 194-202 (1954).

<sup>71</sup> *United States v. Murdock*, 284 U.S. 141 (1931); *Camarota v. United States*, 111 F.2d 243 (3d Cir.), *cert. denied*, 311 U.S. 651 (1940); *Graham v. United States*, 99 F.2d 746 (9th Cir. 1938). "Not until this court pronounced

sovereignty concept,<sup>72</sup> should not be aggravated by an immunity statute that compels testimony which might disclose state commission of crimes.

However, the witness fearing state prosecution is not without protection. The Supreme Court may affirm the ruling of *Commonwealth v. Nelson*,<sup>73</sup> which held that the Smith Act superseded a similar state statute. If so, the danger of state prosecution will be limited to crimes not involving subversive activities. Even in this field, Section 3486, by virtue of the *Adams* case, forbids the use of his testimony in state courts.<sup>74</sup> This would not only protect the witness from the direct introduction of his testimony against him in a state prosecution, but would also prevent its use on cross-examination for impeachment purposes.<sup>75</sup> Furthermore, Section 3486 states that the witness cannot refuse to answer on the grounds of *self-incrimination*. It would not be contempt of Congress to refuse to answer questions that are not *pertinent* to the investigation.<sup>76</sup> The whole tenor of *United States v. DiCarlo*<sup>77</sup> indicates that it would not be pertinent for a congressional committee to ask the witness questions that pry into the commission of state crimes. Finally, only one case has been found where a state has convicted a witness who received *prosecution*

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judgment in *United States v. Murdock*, 284 U.S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." *United States v. Murdock*, 290 U.S. 389, 396 (1933). See 45 HARV. L. REV. 595 (1932), for a collection of cases prior to the *Murdock* decision.

<sup>72</sup> For a comprehensive treatment of the dual sovereignty concept and the privilege against self-incrimination, see Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government II*, 9 TEMP. L.Q. 194 (1935).

<sup>73</sup> 377 Pa. 58, 104 A.2d 133 (1954). The court reasoned that a federal statute supersedes a state statute in a field—such as sedition against the United States—which is of paramount importance to the Federal Government. The case is being appealed to the Supreme Court. N.Y. Times, Oct. 3, 1954, p. 52, col. 2. See 29 N.Y.U. L. REV. 1293 (1954) which comments with approval on the *Nelson* case. But see 67 HARV. L. REV. 1419 (1954) which concludes that the case was an unwarranted invasion of states rights.

<sup>74</sup> Section 3486(a) (Supp. 1954) provides: ". . . nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court." This is the same language of former Section 3486 which was construed in the *Adams* case to apply to state courts. See note 69 *supra*.

<sup>75</sup> See, e.g., *Jacobs v. United States*, 161 Fed. 694 (1st Cir. 1908); *Alkon v. United States*, 163 Fed. 810 (1st Cir. 1908); *People v. Carlson*, 222 App. Div. 54, 225 N.Y. Supp. 149 (4th Dep't 1927). However, if the prosecutor does use the prior immune testimony at the trial in this manner, and the defendant does not object, it would not be reversible error. See *Bain v. United States*, 262 Fed. 664, 669 (6th Cir.), *cert. denied*, 252 U.S. 586 (1920).

<sup>76</sup> See *Sinclair v. United States*, 279 U.S. 263, 296-299 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927); see *United States v. Orman*, 207 F.2d 148 (3d Cir. 1953) (which is an exhaustive treatment of the subject, laying down the criteria for judging the pertinency of a question).

<sup>77</sup> 102 F. Supp. 597, 601-602 (N.D. Ohio 1952).

immunity from a federal tribunal.<sup>78</sup> Even there, the state court said it would have respected the federal immunity statute had the defendant not admitted his crime during the course of the trial. The general pattern has been for state courts to give effect to federal immunity statutes.<sup>79</sup>

### *Crime, Penalty or Forfeiture*

The privilege protects the witness from disclosures which will expose him to "criminal prosecution or imposition of a penalty under federal law"; it does not permit him to withhold facts that would subject him to civil liabilities.<sup>80</sup> Section 3486 provides that the witness who is compelled to testify shall not "be prosecuted or subjected to any penalty or forfeiture." To illustrate that immunity statutes would not protect the witness against civil punishments, Judge Cardozo has stated:

Their purpose [referring to immunity statutes] was to make the Constitution and the statute coextensive and consistent. Penalties and forfeitures, as the words are used in this exemption, are penalties and forfeitures imposed upon an offender as part of the punishment of his *crime*. . . .<sup>81</sup>

Thus, various non-criminal penalties could result after a witness is compelled to testify before a congressional committee investigating subversive activities. If he is an alien he may be deported since deportation proceedings are considered civil in nature;<sup>82</sup> if he is a lawyer he may be disbarred.<sup>83</sup> The disqualification of a person from being a political candidate and from being placed on a voting list is

<sup>78</sup> See *State v. Verecker*, 124 Me. 178, 126 Atl. 827 (1924).

<sup>79</sup> See *People v. Donnenfeld*, 198 App. Div. 918, 189 N.Y. Supp. 951 (2d Dep't 1921), *aff'd mem.*, 233 N.Y. 526, 135 N.E. 903 (1922); *People v. Elliot*, 123 Misc. 602, 206 N.Y. Supp. 54 (Gen. Sess. 1924); *Clark v. State*, 68 Fla. 433, 67 So. 135 (1914); see *People v. Lay*, 193 Mich. 17, 159 N.W. 299, 303 (1916).

<sup>80</sup> See *Pfzinger v. U.S. Civil Serv. Comm'n*, 96 F. Supp. 1, 2 (D.N.J.), *aff'd mem.*, 192 F.2d 934 (3d Cir. 1951); see 8 WIGMORE, EVIDENCE 327 (3d ed. 1940).

<sup>81</sup> *Matter of Rouss*, 221 N.Y. 81, 87, 116 N.E. 782, 784 (1917), *cert. denied*, 246 U.S. 661 (1918) (emphasis added).

<sup>82</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Carlson v. Landon*, 342 U.S. 524, 537 (1952). *But see* *Estes v. Potter*, 183 F.2d 865, 867 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951). Subversive aliens and aliens who are members of the Communist party may be deported. 66 STAT. 204, 8 U.S.C. § 1251(a) (6) (B) and (C) (1952).

<sup>83</sup> *Matter of Rouss*, *supra* note 81 (disbarment not a "penalty or forfeiture" within the immunity statute); see *Matter of Solovei*, 250 App. Div. 117, 121, 293 N.Y. Supp. 640, 644 (2d Dep't 1937), *aff'd mem.*, 276 N.Y. 647, 12 N.E.2d 802 (1938); see 11 CALIF. L. REV. 137 (1923) (disbarment proceedings are not criminal in nature). *But cf.* *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952) (proceeding to revoke an architect's certificate imposes a "penalty or forfeiture" within the meaning of the immunity statute).

not a forfeiture or penalty in the criminal sense.<sup>84</sup> In addition, the loss of federal employment would not be a criminal punishment.<sup>85</sup> Moreover, awaiting the witness would be numerous state statutes which exclude subversives from teaching, public office, and state employment.<sup>86</sup> In fact, if the foregoing civil penalties are enforced by a civil proceeding, the testimony of the witness would be admissible, since Section 3486 only prohibits subsequent use of compelled testimony in criminal proceedings.

### *Claiming the Privilege*

The witness must specifically claim his privilege.<sup>87</sup> If he fails to do so, and discloses incriminating facts, he is deemed to have waived it.<sup>88</sup> Accordingly, Section 3486 provides that the witness must claim his privilege before he can receive immunity. Some prior immunity statutes did not contain such a provision, so that a witness could receive immunity merely by virtue of appearing and testifying.<sup>89</sup> Under Section 3486 the usual procedure will probably be for the committee to question the witness to discover what questions he refuses to answer. Thereupon, the witness, who has already raised his privilege, will be excused, to be called back later after the committee notifies the Attorney General and secures the necessary court order.<sup>90</sup> When the witness is recalled he will be compelled to answer. It is doubtful that in order to receive immunity the witness must again assert his privilege before each question since the committee is already aware that he has raised his privilege.<sup>91</sup> Moreover, the courts

<sup>84</sup> See *Ross v. Crane*, 291 Mass. 28, 195 N.E. 884, 887 (1935).

<sup>85</sup> See *Pfzinger v. U.S. Civil Serv. Comm'n*, 96 F. Supp. 1, 3 (D.N.J.), *aff'd mem.*, 192 F.2d 934 (3d Cir. 1951).

<sup>86</sup> For a collection of such statutes, see GELLHORN, *THE STATES AND SUBVERSION* 393-440 (1952).

<sup>87</sup> See *United States v. Emspak*, 95 F. Supp. 1012, 1019 (D.D.C. 1951), *aff'd*, 203 F.2d 54 (D.C. Cir. 1952).

<sup>88</sup> *Rogers v. United States*, 340 U.S. 367 (1951); *Foster v. People*, 18 Mich. 265 (1869).

<sup>89</sup> See, e.g., *United States v. Monia*, 317 U.S. 424 (1943); *United States v. Armour & Co.*, 142 Fed. 808 (N.D. Ill. 1906).

<sup>90</sup> However, Section 3486 does not explicitly require that there be a prior questioning of the witness before immunity will be granted; it might thus be possible to grant immunity the very first time the witness appears before the committee if the necessary court order had been obtained and the Attorney General had been notified. Nevertheless, the committee report on Section 3486 indicates that the usual procedure will be to conduct a prior hearing to question the witness and then to recall him after the committee has investigated and deliberated on the feasibility of granting him immunity. See H.R. REP. NO. 2606, 83d Cong., 2d Sess. (1954) in 16 U.S. CODE CONG. & ADMIN. NEWS at 5250 (Sept. 5, 1954).

<sup>91</sup> See *United States v. Goodner*, 35 F. Supp. 286 (D. Colo. 1940) (Where, after the examining officials of the SEC were notified of the claim of immunity under a statute similar to Section 3486, it was deemed unnecessary that the witness assert his privilege before each question.).

are reluctant to refuse immunity when the witness is led to believe he has obtained it.<sup>92</sup> If, however, the witness does not confine himself to directly answering the questions, but volunteers a "spontaneous outpouring of testimony," he may not receive immunity for information so disclosed.<sup>93</sup>

#### *Privilege Applies to Testimony Before Congressional Committees*

Although the Fifth Amendment states that no person shall be compelled in any *criminal case* to be a witness against himself, the privilege is available to witnesses who appear before congressional committees.<sup>94</sup> Section 3486 states that no person shall be excused from testifying "before any committee of either House."<sup>95</sup> However, the court, in *United States v. Brennan*,<sup>96</sup> dealing with former Section 3486, held that no immunity attaches to voluntary statements to committee counsel acting within the scope of his authority. But the court implied that a different rule would apply if the testimony were given under compulsion.<sup>97</sup>

Under certain immunity statutes, no immunity attaches to a witness unless he appears in obedience to a subpoena and testifies under oath.<sup>98</sup> Section 3486 contains no such requirements and hence immunity would not be dependent upon the serving of a subpoena or the administering of an oath.<sup>99</sup>

#### *Enforcing Immunity Against Subsequent Prosecution*

A witness who testifies before a congressional committee investigating subversive activities obtains immunity from a subsequent prosecution even though the Government does not use his testimony; "[t]he application of the immunity provision is dependent upon how the information is obtained rather than the use to be made of it thereafter."<sup>100</sup> However, whether immunity attaches to a particular

<sup>92</sup> See, e.g., *United States v. Monia*, *supra* note 89 at 430 (where the Court fears the possibility of trapping the witness into believing he has immunity); *United States v. Elton*, 222 Fed. 428, 437 (S.D.N.Y. 1915).

<sup>93</sup> Cf. *Adams v. Maryland*, 347 U.S. 179, 180-181 (1954).

<sup>94</sup> See *United States v. Emspak*, 95 F. Supp. 1012, 1018 (D.D.C. 1951), *aff'd*, 203 F.2d 54 (D.C. Cir. 1952) (for a full discussion); cf. *Ex parte Johnson*, 187 S.C. 1, 196 S.E. 164, 167 (1938).

<sup>95</sup> 18 U.S.C. § 3486(a) (Supp. 1954) (emphasis added). In proceedings before a committee, two-thirds of the members of the committee must affirmatively vote for a grant of immunity by the committee. *Ibid.*

<sup>96</sup> 214 F.2d 268 (D.C. Cir. 1954).

<sup>97</sup> *Id.* at 272.

<sup>98</sup> See, e.g., *Sherwin v. United States*, 268 U.S. 369 (1925); *Phelps v. United States*, 160 F.2d 858 (8th Cir. 1947); *Bowles v. Chu Mang Poo*, 58 F. Supp. 841 (N.D. Cal. 1945).

<sup>99</sup> Cf. *United States v. Armour & Co.*, 142 Fed. 808, 824-825 (N.D. Ill. 1906); *State v. Sacks*, 116 Kan. 148, 225 Pac. 738, 739 (1924).

<sup>100</sup> *United States v. Molasky*, 118 F.2d 128, 134 (7th Cir. 1941), *rev'd on*

disclosure does not depend on the opinion of the dispenser of immunity.<sup>101</sup> "The actual adjudication of immunity can be made only in a subsequent prosecution of the witness for a crime concerning which he had testified."<sup>102</sup> The usual procedure for taking advantage of immunity gained by testifying under compulsion has been to file a plea in bar to a subsequent indictment which could have been derived from the former testimony.<sup>103</sup> Rule 12 of the Federal Rules of Criminal Procedure has abolished this plea, providing in its place the motion to dismiss. This motion may be raised before trial and may be supported by affidavits; the court may grant a hearing on the motion or defer decision until later in the trial. If there is a pending indictment and the witness is later compelled to testify before a congressional committee he would gain immunity from further prosecution and could move to dismiss the indictment.<sup>104</sup> And while it is the general rule that immunity protects from past but not future crimes,<sup>105</sup> one court has held that a conspiracy indictment may be dismissed even where the witness-conspirators committed one overt act after they had testified.<sup>106</sup>

### Conclusion

Section 3486 offers an opportunity to former subversives, who have withheld information because of the fear of prosecution, to assist Congress in its recognized function of investigation.<sup>107</sup> The recalcitrant witness, who had previously abused the privilege, using it as a shield to protect his own reputation or the infamies of his cohorts,<sup>108</sup>

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*other grounds sub nom.* United States v. Ragen, 314 U.S. 513 (1942) (this particular point was not raised on appeal). See cases in note 36 *supra* where the courts consider whether the testimony "could have" or "might have" led to the subsequent prosecution.

<sup>101</sup> United States v. Weinberg, 65 F.2d 394 (2d Cir.), *cert. denied*, 290 U.S. 675 (1933).

<sup>102</sup> *Id.* at 396.

<sup>103</sup> See, *e.g.*, Edwards v. United States, 312 U.S. 473 (1941); Heike v. United States, 227 U.S. 131 (1913). The law does not recognize the burden and expense the witness may undergo to establish his immunity. See Brown v. Walker, 161 U.S. 591, 608 (1896).

<sup>104</sup> *Accord*, *In re Kittle*, 180 Fed. 946 (C.C.S.D.N.Y. 1910).

<sup>105</sup> See United States v. Bryan, 339 U.S. 323, 340-341 (1950). There is no immunity from prosecution for the commission of perjury or contempt during the course of the congressional investigation. 18 U.S.C. § 3486(d) (Supp. 1954).

<sup>106</sup> United States v. Moore, 15 F.2d 593 (D. Ore. 1926).

<sup>107</sup> According to Attorney General Herbert Brownell, Jr., many subversives ". . . wanted to break with the [Communist] conspiracy once they learned its real purposes.

"These persons have wanted desperately to resume their normal place in society, but they have been under the impression that if they . . . told their story they, themselves inevitably would be subject to prosecution for the role they had played in the conspiracy." N.Y. Times, Sept. 14, 1954, p. 16, col. 5.

<sup>108</sup> The witness, however, cannot raise the privilege on the grounds that his

must now choose between fully disclosing information or being cited for contempt.

There are some who say that immunity statutes are morally questionable since they result in the Government making "deals" with "stooges" and "turncoats."<sup>109</sup> If this be true, we should legislate against this "immorality" by placing information gained from "informers" in the same category as that derived from wiretapping or illegal searches and seizures. Such an attitude, however, would thwart legislatures and law enforcement agencies from effectively carrying out their duties of investigation.

Immunity statutes have been construed so as to give protection to the witness coextensive to that afforded by the privilege. As further construction problems arise it may be well for the courts to weigh the advice of Chief Justice John Marshall:

When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded.<sup>110</sup>



#### EMERGENCY CALLS GIVEN PRECEDENCE ON PARTY LINES BY NEW YORK STATUTE

Due to the enterprise of American capital, the telephone has become so commonplace in the United States that most people regard it as a necessity. Although it has been in use for three-quarters of a century, changing social conditions and improved methods of transmission have prevented the law of telephones from ossification and rigidity. Since the telephone is essentially an improvement upon the

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answer would disgrace him. 12 STAT. 333 (1862), as amended, 2 U.S.C. § 193 (1952). See *Brown v. Walker*, 161 U.S. 591, 598 (1896). Moreover, the privilege is personal and cannot be raised to protect others. *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>109</sup> See, e.g., King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377, 378-379 (1954). But Dr. Bella Dodd, a former Communist, told a congressional committee: "I think probably more than anything else the reason why you are not getting many citizens coming forward to testify in this country on the Communist conspiracy is the fear that they have of the smear and the retaliation which the Communists will have upon them.

"One of the things they do, of course, is to use . . . underworld concepts of informer, stool pigeon, a person who sings, and so forth. . . ." *The Tablet*, Sept. 28, 1954, p. 18, col. 6.

<sup>110</sup> *United States v. Burr*, 25 Fed. Cas. No. 14,692e, 38, at 39-40 (C.C.D. Va. 1807).