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CONSTITUTIONAL LAW: FEDERAL IMMUNITY STATUTE-POWER OF FEDERAL COURT TO COMPEL TESTIMONY DESPITE POSSIBLE SELF-INCRIMINATION

COMMENT

CONSTITUTIONAL LAW.—FEDERAL IMMUNITY STATUTE—POWER OF FEDERAL COURT TO COMPEL TESTIMONY DESPITE POSSIBLE SELF-INCRIMINATION.—By a 7-2 decision, the United States Supreme Court has upheld the constitutionality of sub-section (c) of the Immunity Act of 1954.[1] This law empowers a United States Attorney with the approval of the Attorney-General to compel, by a District Court order, a witness before a federal grand jury or court to testify or to produce evidence as to matters of national security or defense in exchange for immunity from criminal prosecution, except for perjury.[2]

Petitioner was William Ludwig Ullmann, a former Treasury Department official who had been named by Elizabeth Bentley, a former Communist courier, as a member of a wartime espionage ring. Pursuant to a subpoena, petitioner appeared before a federal grand jury in the Southern District of New York which was investigating attempts to endanger the national security by espionage and conspiracy to commit espionage. Invoking the privilege against self-incrimination,[3] petitioner refused to answer questions concerning alleged participation in espionage activities and membership in the Communist Party by himself and others.

Thereupon, the United States Attorney duly applied for a District Court order directing petitioner to testify and to produce evidence pursuant to sub-section (c) of the Immunity Act of 1954.[4] In an opposing affidavit, petitioner attacked the constitutionality of the Act. However, after a hearing, District Judge Weinfeld sustained the constitutionality of the Act and granted the application.[5] When petitioner again declined to answer the questions, he was adjudged in contempt and sentenced to six months imprisonment with the right to purge himself.

Subsequently, the United States Court of Appeals for the Second Circuit unanimously affirmed the conviction[6] and the United States Supreme Court granted a petition for a writ of certiorari.[7]

On appeal the Supreme Court was presented with three basic questions. One, whether any "immunity act" which exchanges compulsory testimony for security against criminal prosecution is repugnant to the self-incrimination clause of the Fifth Amendment? Two, if not, whether subsection (c) of the Immunity Act of 1954 violates the Fifth Amendment for failure to afford as complete immunity as is co-extensive with the scope of the privilege against self-incrimination? Three, whether sub-section (c) of the Immunity Act of 1954 empowers a District Court with the non-judicial

1 Ullmann v. United States, 350 U. S. 422, 76 S. Ct. 497, 100 L. Ed. 361 (1956), *rehearing den.* 351 U. S. 928, 76 S. Ct. 777, 100 L. Ed. 602 (1956).
2 Immunity Act of 1954, 68 STAT. 745, 18 U. S. C. (Supp. II) § 3486 (c) (1954).
3 U. S. CONST. amend. V.
4 See note 2, *supra.*
5 128 F. Supp. 617 (S. D. N. Y. 1955).
6 221 F. 2d 760 (2d Cir. 1955); See Decisions, 1. N. Y. L. F. 254 (1955).
7 349 U. S. 951, 75 S. Ct. 882, 99 L. Ed. 1276 (1955).

function of reviewing a grant of immunity under the above Act and so contravenes the "separation of powers" principle of the Federal Constitution?

The first issue involved the celebrated case of *Brown* v. *Walker*.[8] There, defendant, a railroad company auditor, was subpoenaed to testify before a federal grand jury investigating charges that company officers and agents violated the Interstate Commerce Act.[9] Despite the immunity proffered by the Compulsory-Testimony Act of 1893,[10] Brown persisted in invoking his privilege against self-incrimination in response to questions concerning the operation and rebate policy of the railroad. He was thereupon adjudged in contempt by the District Court for the Western District of Pennsylvania and the Circuit Court dismissed his petition for a writ of habeas corpus.[11] On appeal, the United States Supreme Court, in a 5-to-4 decision, upheld the constitutionality of immunity statutes in general and the 1893 Act in particular as being within the self-incrimination clause.[12] It deemed the sole object of this clause to be non-self-incrimination, not preventing personal odium and disgrace. On the other hand, the dissenters in the *Brown* case reasoned that the self-incrimination clause granted a right of silence that "should not be divested or impaired by any act of Congress."[13]

Mr. Justice Frankfurter, speaking for the instant majority, accepted the Government's argument that the doctrine of the majority in *Brown* v. *Walker* should be re-affirmed as settled constitutional law saying "Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."[14] He observed that immunity acts are part of our constitutional fabric and included in all major regulatory enactments of the Federal Government.[15] The majority rejected Ullmann's contention that the Fifth Amendment,[16] including the self-incrimination clause, was created to buttress the First Amendment[17] in its protection of freedom of speech.

As to the second question, whether the statutory provision in issue afforded as complete immunity as is co-extensive with the scope of the privilege against self-incrimination, the majority held that it did. Passing over the possibilities, alleged by petitioner of federal criminal prosecution for a continuing crime[18] and perjury,[19] the majority concluded that Congress intended and possessed the constitutional power to grant immunity from state criminal prosecution in the Immunity Act of 1954. That the statute did grant such immunity, Mr. Justice Frankfurter noted, was evidenced by the

[8] Brown v. Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896).
[9] 24 STAT. 379, 49 U. S. C. § 1 (1887).
[10] 27 STAT. 443, 49 U. S. C. § 46 (1893).
[11] 70 Fed. 46 (Cir. Ct. W. D. Pa. 1895).
[12] See note 8, *supra*.
[13] *Id.* at 610, 16 S. Ct. 644, 656, 40 L. Ed. 819, 826 (dissenting opinion).
[14] See note 1, *supra* at 439, 76 S. Ct. 497, 507, 100 L. Ed. 361.
[15] For a list of such statutes, see 8 WIGMORE, EVIDENCE § 2281 n. 11 and Pocket Supp. (3rd ed. Boston 1940).
[16] See note 3, *supra*.
[17] U. S. CONST. amend. I.
[18] United States v. Smith, 206 F. 2d 905 (3rd Cir. 1953).
[19] See note 2, *supra* at 18 U. S. C. (Supp. II) § 3486 (d).

fact that identical language has been construed by the Supreme Court to bar both the use of such compelled testimony in a state criminal proceeding[20] and state prosecution itself;[21] and that it was so interpreted in the final report of the House Committee on the Judiciary.[22] The Court also found that the removal of fear of state prosecution was within the constitutionally delegated powers of Congress to provide for the national defense[23] and its complementary power of execution ("elastic clause")[24] so as to effect a policy of complete and open disclosure. No distinction from *Brown* v. *Walker,* where a similar restriction was upheld in the name of the Commerce Clause,[25] was seen. As for punitive disabilities, the majority rejected petitioner's claim that they must be regarded as sufficient grounds for invoking the privilege against self-incrimination and should, therefore, be within the scope of immunity. The Supreme Court had previously held that private punitive disabilities[26] were excluded from such protection.[27] For the more recent federal and state punitive disabilities[28] to be within the self-incrimination clause, they must first be deemed criminal in nature. As to whether they are such, the Court left that question open until the time when a particular sanction is sought to be imposed. In so doing, the majority also declined to accept, for the present, the Government's argument that all such punitive sanctions are non-criminal in nature and thus provide no ground for invoking the privilege, or even if deemed criminal in nature they are necessarily under the aegis of the Immunity Act which covers "any penalty or forfeiture"[29] arising from the compulsory testimony or production of evidence.

On the final main issue presented, whether the statutory provision which empowers a District Court with the non-judicial function of reviewing a grant of immunity under the Act contravened the "separation of powers" principle of the federal Constitution, the majority held that it did not. If adopted the Government's contentions that the statute clearly

20 Adams v. Maryland, 347 U. S. 179, 74 S. Ct. 442, 98 L. Ed. 609 (1954).

21 See note 8, *supra* at 607-8, 16 S. Ct. 644, 651, 40 L. Ed. 819, 824-5.

22 H. R. Rep. No. 2606, 83rd Cong., 2d Sess. 7 (1954).

23 U. S. CONST. art. I. § 8, cl. 1.

24 *Id.* at cl. 18.

25 See note 21, *supra.*

26 These include: expulsion from labor unions; loss of employment; discrimination in housing and public opprobrium. See Brief for Petitioner, p. 19, Ullmann v. United States, 350 U. S. 422 (1956).

27 See note 8, *supra.*

28 Federal disabilities include ineligibility for and loss of: a passport, employment in government and defense facilities, and the risk of internment. Internal Security Act of 1950, 64 STAT. 987, 1019, 50 U. S. C. § 781, 811-26 (1950); a broadcasting station license, F. C. C. Docket Nos. 11060-61, 19 F. R. 3588-89 (1954); use of N. L. R. B. facilities, Labor-Management Relations Act, 1947, 61 STAT. 136, 146, 29 U. S. C. § 141, 159 (h) (1947); citizenship, Expatriation Act of 1954, 68 STAT. 1146, 8 U. S. C. § 1481 (1954).

State disabilities include: ineligibility for and loss of employment as a teacher, with the state and mandatory registration. See Brief for Petitioner, p. 18, Ullmann v. United States, 350 U. S. 422 (1956).

29 See note 2, *supra.*

restricted the District Court to the performance of the judicial function of directing a witness to testify if the court determined that his case fell within the framework and requisites of the Act; the pertinent legislative history is, at worst, inconclusive;[30] where ambiguous, that statutory construction which avoids the constitutional question is preferred;[31] and the validity of sub-sections (a) and (b), independently worded and inapplicable here, cannot be questioned by petitioner. The Court did not question the conclusion that *if* the statute did empower the District Court to review a grant of immunity under the Act such would be an unconstitutional non-judicial function whether deemed part of the executive power of pardon[32] or the legislative power of amnesty[33] for crimes committed. It did, however, reject petitioner's premise and supporting evidence thereunder, to wit: his interpretation of the statute's legal history; the fact that sub-sections (a) and (b) expressly delegate that function to the Court without any separability clause; and the words of the Attorney-General[34] and a leading scholar[35] in the immunity field to that effect.

Because they were not raised when petitioner was cited for contempt, the instant majority declined to consider petitioner's other points:[36] namely, that the District Court order was invalid because it directed petitioner to answer questions in violation of the First Amendment, not relevant to a bona fide investigation into espionage; and it did not define the scope of petitioner's area of immunity. The petitioner's conviction was affirmed.

In a vigorous dissent, Mr. Justice Douglas, with whom Mr. Justice Black concurred, disputed the basic premises of the majority. Initially, he believed, *Brown* v. *Walker*,[37] decided by a bare majority sixty years ago and the constitutional foundation of immunity statutes, should be overruled. The minority felt it "beyond the power of Congress to compel anyone to confess his crimes"[38] deeming the purpose of the privilege against self-incrimination to be "not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well[39] . . . the Constitution places the right of silence beyond the reach of government."[40] Great infamy, against which the self-incrimination privilege was purportedly designed to protect,[41] was seen in the in-

[30] See note 5, *supra* at 627.

[31] United States v. Rumely, 345 U. S. 41, 45, 73 S. Ct. 543, 547, 97 L. Ed. 770, 775 (1953).

[32] U. S. CONST. art. II, § 2, cl. 1.

[33] *Ex Parte* Garland, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366 (1866).

[34] Address by Attorney-General Brownell, *Twentieth Century General Congress*, General Society of Mayflower Descendants, Sept. 13, 1954.

[35] Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 502 (1955).

[36] Brief for Petitioner, pp. 55, 58, Ullmann v. United States, 350 U. S. 422 (1956).

[37] See note 8, *supra*.

[38] See note 1, *supra* at 445, 76 S. Ct. 497, 510, 100 L. Ed. 361 (dissenting opinion).

[39] *Ibid.*

[40] *Id.* at 454, 76 S. Ct. 497, 515, 100 L. Ed. 361.

[41] See U. S. CONST. amend. V, cl. 1.

stant case by the minority because the disclosure of Communist membership or affiliation practically excommunicates one from society. The dissent further reasoned that the Immunity Act of 1954 violated the privilege against self-incrimination for want of protection from the federal and state punitive disabilities[42] that attach to one who is a Communist. Noting that Communist Party membership is a crucial evidentiary link in conviction under the Smith Act,[43] it was reasoned that these disabilities were penalties affixed to a criminal act. Such penalties have been held to be sufficient ground for invoking the privilege against the compulsory production of a private invoice to be used in a proceeding by the United States for the forfeiture of goods allegedly imported without payment of duties.[44] Mr. Justice Douglas also contended there was nothing in the legislative history of this Immunity Act to indicate Congressional intent to include these disabilities within its protection.

It appears that the problem over the use of the self-incrimination clause of the Fifth Amendment by witnesses in cases involving alleged communism is a product of conflicting legal principles. One entitles the United States to the testimony of every citizen, especially in matters of national security, while the other accords every witness the privilege not to accuse himself. Federal immunity acts, which exchange amnesty for information, are an attempted solution. They are not new,[45] though mainly used previously by administrative agencies. Yet their validity and propriety are a matter of debate.[46] Does the privilege against self-incrimination accord one an absolute right of silence or is it "not of the very essence of a scheme of ordered liberty"?[47] Are they justifiable despite moral compulsion and possible abuse by Congressional investigating committees? It was the latter's "immunity baths" that caused repeal of the first immunity statute.[48] In fact, it was not until the present Act that Congressional committees were re-invested with the power to grant immunity from criminal prosecution in national security cases. Its constitutionality remains to be tested. Yet, federal immunity statutes have been repeatedly sustained by the courts and the instant Act has been termed a "fair balance" by an erudite jurist.[49]

The decision at bar only validates that part of the Immunity Act of 1954 relating to the testimony of witnesses and production of evidence before federal grand juries. Its seed was planted in 1892 when the self-incrimi-

[42] See note 28, *supra*.

[43] Alien Registration Act, 1940, 54 STAT. 670, 18 U. S. C. § 2385 (1940), as amended 62 STAT. 808 (1948).

[44] Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[45] See note 15, *supra*.

[46] See GRISWOLD, THE FIFTH AMENDMENT TODAY 80-81 (Cambridge 1955); TAYLOR GRAND INQUEST 217-21, 296-300 (New York 1955); BARTH, GOVERNMENT BY INVESTIGATION 130-34 (New York 1955).

[47] Mr. Justice Cardozo, speaking for the majority, in Palko v. Connecticut, 302 U. S. 319, 325-26, 58 S. Ct. 149, 152, 82 L. Ed. 288, 292 (1937).

[48] Act of January 24, 1862, 12 STAT. 333, 2 U. S. C. § 193 (1862).

[49] HOFSTADTER, THE FIFTH AMENDMENT AND THE IMMUNITY ACT OF 1954, 10 Record 453 (1955).

nation clause was initially extended to grand jury proceedings.[50] Following the instant decision, petitioner exercised his right to purge himself of the adjudged contempt by answering the grand jury's questions.[51] The Immunity Act has since been successfully applied a second time.[52] However, because of its controversial nature and the questions still remaining open, it is likely that sub-section (c) of the Immunity Act of 1954 will again come before the Supreme Court.

[50] Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892); See also Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906); Annot., 38 A. L. R. 2d 225 (1951).

[51] N. Y. Times, July 7, 1956, p. 7, col. 1.

[52] United States v. Fitzgerald, 235 F. 2d 453 (2d Cir. 1956), *cert. den.*, 352 U. S. 842, 77 S. Ct. 66, 1 L. Ed. 2d 58 (1956).