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Immunity From Self-Incrimination Under the Federal Compulsory Testimony Act

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John A. Chernak, *Editor*

IMMUNITY FROM SELF-INCRIMINATION UNDER THE FEDERAL COMPULSORY TESTIMONY ACT*

The privilege against self-incrimination has been regarded, since early in English history, as an essential safeguard against unfounded and tyrannical prosecution.[1] During its development in England and America, there was much experimentation with granting immunity instead of permitting an unbridled exercise of a claim asserting the privilege.[2] In 1857 Congress passed the first federal immunity act.[3] However, the 1857 Act was phrased so loosely that the witness could voluntarily disclose unresponsive self-incriminating testimony and thus gain an "immunity bath," that is, immunity from prosecution for all offenses dis-

*"§ 3486. Compelled testimony tending to incriminate witnesses; immunity

(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, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when 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; and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. 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, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

closed in this testimony.[4] Congress then rewrote this statute in 1868 and provided that the compelled testimony itself could not later be used in any criminal proceeding against the witness, but that immunity would not be granted for evidence acquired by testimony not responsive to the question asked.[5] In *Counselman v. Hitchcock*,[6] section 860, which was the court and grand jury section of this revised Act, was held invalid because the immunity provided by it was not coextensive with the privilege against self-incrimination which the witness was required to surrender.[7] The defects of the 1868 Act were avoided in

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving 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, 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, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such 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 (except prosecution described in subsection (d) hereof) against him in any court.

(d) 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 as provided in this section. As amended Aug. 20, 1954, c. 769, S 1, 68 Stat. 745." 18 U. S. C. § 3486 (Supp. 1954).

[1] The English Parliament never thought it necessary to pass an act providing for the privilege against self-incrimination since it was so well established. The privilege concept was carried to America by early settlers and placed in the group of ten amendments recommended to the states by the first Congress. See Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 770–773 (1935); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 12 (1930); INBAU, SELF-INCRIMINATION (1950).

[2] 8 WIGMORE, EVIDENCE § 2281 (3d ed. 1940). Immunity was granted to secure information otherwise unobtainable since all who could give useful testimony were incriminated in the offense.

[3] 11 STAT. 155 (1857)

[4] During congressional investigations a clerk who had stolen two million dollars in bonds from the Interior Department was discharged and the indictment against him was quashed, and several indictments against a former Secretary of War were dismissed, since both men had gained unintended immunity for statements not responsive to the questions asked. CONG. GLOBE, 37th Cong., 2d Sess. 387 (1862).

[5] REV. STAT. §§ 859, 860 (1875).

[6] 142 U. S. 546 (1892).

[7] "No person . . . shall be compelled in any criminal proceeding to be a witness against himself." U. S. CONST. amend. V. The constitutional privilege is applicable only to Congress and the federal courts and not to the several states. Brown v. Walker, 161 U. S. 591,606 (1896). The test enunciated in the *Counselman* case is that the immunity granted must be coextensive with the privilege it replaces so that there is a full and complete substitution for the constitutional privilege against self-incrimination which the witness is required to surrender. Counselman v. Hitchcock, 142 U. S. 547, 585–86 (1892). The court construed the statute involved to prohibit direct use of the testimony compelled but not to prohibit the derivative use of evidence so obtained. Section 860 was not repealed until 1910. 36 STAT. 352 (1910). Congress must have felt that § 859, applying the grant of immunity to congesssional committees, was still of some value since it left this section in force until repealed by the present Federal Compulsory Testimony Act. 62 STAT. 833, 11 U.S.C. § 3486 (Supp. 1954), amending REV. STAT. § 859 (1875).

an immunity provision incorporated into the Interstate Commerce Commission legislation in 1893.[8] This provision granted absolute immunity from prosecution in the federal courts. Subsequently, immunity clauses were incorporated in many temporary wartime measures and in virtually all of the major regulatory enactments of the federal government.[9] Furthermore, a majority of the states have enacted immunity legislation.[10]

Although the *Counselman* decision had held the grand jury and court section of the 1868 Act invalid, there remained in force its companion provision, which permitted congressional committees to extend a grant of immunity to witnesses appearing before them.[11] However, Congress became increasingly disturbed as suspected subversives and criminals refused to testify before congressional committees.[12] In addition, witnesses appearing before federal grand juries and courts in proceedings involving the national defense and security were free to invoke the privilege since Congress had failed to replace the grand jury and court immunity provision invalidated in the *Counselman* case. Accordingly, in 1954, Congress passed the Federal Compulsory Testimony Act,[13] the purpose of which was to secure evidence of federal crimes affecting national defense and security by means of an effective grant of immunity.[14] This Act provides that a witness shall neither be prosecuted nor subjected to penalty concerning activities about which he has been compelled to testify, and his testimony may not be used against him as evidence in any criminal proceeding. Sections (a) and (b) of the Act deal with congressional investigations. Section (a) provides that if a witness claims his privilege[15]

[8] This statute, the Act of Feb. 11, 1893, c. 83, 27 STAT. 443 (1893), 49 U.S.C. § 46 (1953), was held constitutional in Brown v. Walker, 161 U.S. 591 (1896) since it provided the equivalent of the constitutional privilege. The procedure followed under the Interstate Commerce Commission Act involved in the *Brown* case was more strict than that followed under the 1857 Act which allowed immunity baths. In the proceedings leading up to the *Brown* case the witness was required to claim his privilege before a court order was issued granting him immunity for matters disclosed in answers to specific questions. Immunity was then to be granted only for matters specified in the court order so that if the witness volunteered incriminating testimony he thereby waived his privilege for such voluntary information. The constitutionality of immunity statutes has been sustained in seven other cases before the Supreme Court. Jack v. Kansas, 199 U.S. 372 (1905); Heike v. United States, 227 U.S. 131 (1913); United States v. Monia, 317 U.S. 424 (1943); Feldman v. United States, 322 U.S. 487 (1944); Shapiro v. United States, 335 U.S. 1 (1948); Smith v. United States, 337 U.S. 137 (1949); Adams v. Maryland, 347 U.S. 179 (1954).

[9] For a collection of these statutes see Shapiro v. United States, 335 U.S. 1, n. 4 (1948).

[10] State statutes, including those which prohibit prosecution for matters described in the testimony and those which merely prohibit the use of such compelled testimony, are collected in 8 WIGMORE EVIDENCE, § 2281, n. 11 (3d ed. 1940).

[11] See note 7 *supra*.

[12] See H.R. REP. No. 2606, 83d Cong., 2d Sess. 2 (1954). *Hearings before Subcommittee No. 1 of the House Committee on the Judiciary*, 83d Cong., 2d Sess., 133-167 (1954). Many witnesses preferred to risk the contempt sanction rather than risk conviction for a crime involving a much more serious penalty. Only one of the hoodlums before the Kefauver Committee was jailed for contempt but he could have escaped this by claiming his privilege instead of defiantly walking out on the committee. See, Inbau, *Should We Abolish the Privilege Against Self-Incrimination*, 45 J. CRIM. L., C. & P.S., 180, 183 (1954).

[13] 62 STAT. 833, 18 U.S.C. § 3486 (Supp. 1954).

[14] See note 12 *supra*.

[15] What language must a witness employ in claiming the privilege? In Quinn v. United States, 347 U.S. 1008 (1955); Emspack v. United States, 346 U.S. 809 (1955); Bart v. United States, 347 U.S. 1011 (1955), recent Supreme Court decisions, vague language was sustained. Will this type of vacillation by witnesses be sufficient under a congressional proceeding [§§ (a) and (b)] in which the statutory language for the first time specifically requires a claim? Will a different standard apply before grand juries and courts when a witness seeks to invoke his privilege?

In the *Emspack* case Justice Harlan decried the Supreme Court's apparent retreat from Learned Hand's test of when the privilege can be properly invoked. According to this test, the witness to have a proper basis for his claim must face the risk of exposing himself to a real and appreciable danger as

while testifying before either Congress or a congressional committee there may be a grant of immunity authorized upon a majority vote of the entire legislative body or by a two-thirds vote of the committee respectively. Then, a duly authorized representative of the body concerned applies to the district court for an order compelling the desired testimony or papers. Such order compelling testimony *may be issued* by a United States district court judge. Section (b) provides that the Attorney General of the United States must first be notified and given an opportunity to be heard by the court before *approval* by the district court. Section (c), which pertains to grand jury investigations and court trials, also requires a witness to claim his privilege against self-incrimination.[15a] If the United States Attorney who is handling the case, believes it necessary to the public interest that a witness be compelled to testify, he must seek the approval of the Attorney General. If the latter approves, application is then made to the district court to issue an order instructing the witness to testify or produce the required evidence.[16]

Proceedings under the Compulsory Testimony Act may raise many problems such as whether the adverse party requirement of a case or controversy is fulfilled; whether there is a violation of the doctrine of separation of powers; and whether Congress has the power to prevent any prosecution by the states for crimes disclosed in federally compelled testimony.

These problems were considered in the first case to be decided under the 1954 Act, *In re Ullman*.[17] The case arose when Ullman refused to testify before a grand jury, claiming his Fifth Amendment privilege. The United States Attorney requested an order granting him immunity which was issued by the federal district court; but upon Ullman's continued refusal to testify he was sentenced to six months for contempt of court.

In the district court, Ullman alleged a lack of adverse parties. This problem may arise if the witness wishes immunity and thus has interests which coincide with those of the interrogator.[18] However, since a witness must first claim his privilege of refusing to testify before immunity can be granted, it seems apparent that the court which issues the order compelling testimony is confronted with at least two adverse parties, the witness and the Attorney General.[19] In construing the grand

opposed to a remote and unlikely possibility of self-incrimination. Weisman v. United States, 111 F.2d 260 (2d Cir. 1940). Will, as the majority decision in the *Emspack* case seems to indicate, a different standard be applied under §§ (a) and (b) proceedings than under (c)?

[15a] See note 15 *supra*.

[16] Section (d) provides that under this statute the witness is still subject to prosecution for perjury or contempt committed while giving compelled testimony.

[17] 128 F. Supp. 617 (S.D.N.Y.), *aff'd* 221 F.2d 760 (2d Cir. 1955), *cert. granted* 349 U.S. 951 (1955). The court held, *inter alia*, that the immunity provided by the statute is coextensive with the privilege against self-incrimination and is, therefore an adequate substitute for it. In answer to Ullman's objection that the request of such information violated his First Amendment rights, the court held that the investigation did not relate to his political belief and affiliation. In addition, the court also held that the questions appeared to come within the framework of an inquiry into national defense or security, hence the witness had no basis for urging that the questions were incompetent and immaterial. As to the latter proposition, see Blair v. United States, 250 U.S. 273,282 (1918); Nelson v. United States, 201 U.S. 91, 115 (1905); United States v. McGovern, 60 F.2d 880,888–889 (2d Cir. 1932).

[18] Muskrat v. United States, 219 U.S. 346 (1911) held that a court created under Article III of the Constitution may only adjudicate a case or controversy involving present or possible adverse parties whose opposing contentions are submitted. The United States is "always a possible adverse party." Tutun v. United States, 270 U.S. 568,577 (1926).

[19] Even though the witness may want immunity from prosecution for a crime about which he may be "compelled" to testify, it is evident in a claim of the privilege that the witness would prefer to remain silent instead of being granted immunity in exchange for his testimony. The opposing argument is that the witness, although desirous of immunity, is *forced* to

jury section [§c] of the Act, the court in the *Ullman* case held that the witness could raise all legal or constitutional objections against immunity—thus providing the necessary adverse parties.[20]

Discounting the witness as a possible adverse party under a section (a) and (b) proceeding there is still the possibility of finding two adverse parties. These sections are designed to allow Congress and the courts to weigh the effect of information relating to prospective witnesses which is ordinarily available only to the Attorney General.[21] The Attorney General would serve as a check on Congress which might, in ignorance of other investigations and pending prosecutions, unwisely wish to grant immunity.[22] It is also possible that during investigations of the executive department Congress may point up activities, a disclosure of which the Attorney General might improperly wish to suppress.[23] Thus, in the congressional section as well as in the court and grand jury section there is the possibility of finding two adverse parties.

Another problem arising is whether Congress has conferred upon the courts a non-judicial power, thereby violating the doctrine of separation of powers. According to a statement in the *Ullman* case, the court may be required to exercise a non-judicial discretion under sections (a) and (b) of the Act, distinguishing it from the judicial function performed under section (c).[24] In that case the court deemed significant the language in sections (a) and (b) which requires the Congress to notify the Attorney General and secure the *approval* of the district court before granting immunity and which provides that the order *may be issued* by the district court judge.[25] According to the court, the district judge would participate in balancing the possibility and advisability of prosecuting the individual against the need for particular information to see whether the public interest may best be served by granting immunity.[26] If the district court does have the final decision of what is in the public interest

go through the formality of claiming his privilege, thereby precluding classifying him as an adverse party.

[20] This of course is a different means of arriving at an adverse party situation, and by this the technical problems considered in note 19 *supra* are avoided.

[21] As chief legal officer of the United States Government the Attorney General would know of pending prosecutions that might be disrupted by a judicially sanctioned Congressional grant of immunity.

[22] See remarks of Senator Kefauver, S. REP. No. 153, 83d Cong., 1st Sess. (1953), Brownell, *Immunity from Prosecution Versus Privilege Against Self-Incrimination*, 28 TUL. L. REV. 1 (1953). It should be noted that certain legislators wanted to go so far as to give the Attorney General the power to veto congressional grants of immunity. See *Minority Views*, H. R. REP. 2606, 83d Cong., 2d Sess. 11 (1954); 99 CONG. REC. 8342 (1953); 99 CONG. REC. 8346 (1953).

[23] Some legislators felt that the granting of immunity should be left exclusively to the legislature since the Attorney General could frustrate legislative investigations of the executive branch. 99 CONG. REC. 8342 (1953). For examples of disputes between two branches of the government see United States v. ICC., 337 U.S. 426 (1949); In the Matter of the NLRB, 304 U.S. 486 (1938); *But cf.* Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945).

[24] 128 F.Supp. at 625. The district court opinion set up the following prerequisite conditions to be checked by the court before ordering the witness to testify under a section (c) proceeding: (1) the proceeding must relate to national security and defense; (2) the United States Attorney and the Attorney General must have approved the application; (3) no other legal objection exists to the compulsion of the witness's testimony. A legal objection would be that the witness had not properly claimed his privilege. See note 15 *supra*.

[25] 128 F. Supp. at 625.

[26] A test suggested by the A.B.A. to determine whether immunity should be granted is as follows: "Is the evidence expectable from this witness so important to this proceeding, and is this proceeding so important, that the witness should now be compelled to give his evidence and so be immunized, in spite of the offense for which he may go unpunished and in spite of the damage his immunity may do to present or future efforts to enforce the criminal laws of this state or to the public interest in a just, orderly society?" A.B.A. COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT, VOL. II, *Appendix* 4, p. 157 (1953).

under sections (a) and (b) then there is the possibility of an improper merger of judicial, executive, and legislative functions.[27]

However, the process of balancing the need for testimony against the desirability of prosecution seems not altogether different from the judicial balancing of competing considerations in other areas of judicial activity. Throughout many of the states it is found that analogous duties are performed by judges.[28] For instance the courts may consider applications for the recount of votes following an election.[29] In addition, Congress delegates the power to federal courts to exercise their discretion in imposing prison terms within specified limits,[30] and to suspend sentences and place convicted persons on probation.[31] In probation matters the judicial discretion is necessarily broad since the punishment must be tailored to the individual defendant. Likewise, in the present situation the order must be tailored to the individual witness being interrogated. In both, the public interest and the interest of the individual are under consideration by the judge.[32] The preceding examples illustrate that in many situations there may be a very broad interpretation as to what constitutes a proper judicial function. In this instance the delegation of a certain amount of discretion recognizes that additional security may be afforded a witness by vesting the final determination, as to whether or not immunity should be granted, in the hands of the judiciary. Furthermore, the public interest would best be served by allowing the three branches of government to serve as checks on one another in this area. However, if it is determined that non-judicial discretion does lie with the court under sections (a) and (b), then the Supreme Court may declare these sections unconstitutional while permitting the court and grand jury section [§c] to stand.[33]

Seemingly the most important problem of practical significance raised by the Act is whether Congress has the power to prevent subsequent state prosecutions for crimes disclosed in federally compelled testimony.[34] An understanding of some basic principles is necessary to properly focus this issue. In *United*

[27] Traditionally policy decisions rest either with the executive or legislative branches of government since they, unlike the judiciary, are directly responsible to the electorate. See BALDWIN, THE AMERICAN JUDICIARY (1905).

[28] These include the appointment of city park commissioners, water commissioner, morgue keepers, commissioners to survey the boundary between municipalities, and persons to examine sick, maimed, or disabled animals. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE, 114 (1953).

[29] Massett Building Co. v. Bennett, 4 N.J. 53, 59–60, 71 A.2d 327, 330–331 (1950).

[30] 45 STAT. 1146 (1929), 18 U.S.C. § 3653 (1952); Ross v. United States, 37 F.2d 557 (4th Cir. 1930), *cert. denied*, 281 U.S. 767 (1930); McElvogue v. United States, 40 F.2d 889 (8th Cir. 1930), *cert. denied*, 282 U.S. 845 (1930).

[31] Probation Act, 43 STAT. 1259 (1925), 18 U.S.C. § 3651 (1952). Riggs v. United States, 14 F.2d 5 (4th Cir. 1926); Nix v. James, 7 F.2d 590 (9th Cir. 1925).

[32] Courts also balance competing considerations in other areas. Courts will decide if a strike would imperil the national health or safety when required to do so by the emergency strike provisions of the Labor Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C. § 178 (1952); United States v. United Steel Workers, CIO, 202 F.2d 132 (2d Cir. 1952), *cert. denied*, 344 U.S. 915 (1953). For an example of a court exercising a broad discretion in bankruptcy matters, see *In re* New York, N.H. & H.R., 16 F. Supp. 504 (D.Conn. 1936); *In re* Burgh, 7 F. Supp. 184 (N.D.Ill. 1933); and in divorce proceedings, see Allen v. Allen, 73 Conn. 54, 46 Atl. 242 (1900).

[33] Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895); Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico, 142 F.2d 11, 19 (1st. Cir. 1944).

[34] There was some doubt evidenced in debate as to whether the language of the statute did prevent state prosecution. See comments by Representatives Celler and Dodd. 100 CONG. REC. 12603-7 (1954). This seems to have been resolved by the Report of the House Committee of the Judiciary which stated that it intended to ban subsequent state prosecutions even though it doubted the congressional power to do so. H.R. REP. No. 2606, 83d Cong., 2d Sess., 3059, 3064 (1954). The court, in the *Ullman* case, concluded that this was the congressional intention.

States v. Murdock,[35] the Supreme Court held that the privilege against self-incrimination could not be invoked before a federal tribunal where incrimination under state law was feared.[36] According to this rule there can be no valid objection to a federal immunity statute if a witness is not protected from possible state prosecution, since the immunity need only be as broad as the privilege it replaces. A federal grant of immunity, where state law violations are involved, would seem to be a matter of legislative discretion and not a benefit to which the witness is entitled as a matter of right. Such an exercise of discretion was read into the former act and held valid by the Supreme Court in *Adams v. Maryland*.[37] The immunity statute then in use[38] purported to extend the scope of immunity beyond that of the Fifth Amendment Privilege by proscribing the use of testimony, given by a federal witness in congressional inquiries, before state as well as federal courts. However, the *Adams* decision did not preclude prosecution by state authorities, since the immunity was held to extend only to the actual testimony given and not to derivatively obtained evidence.[39] The rationale underlying the *Adams* decision is that a statute barring use of testimony elicited by the federal government is a legitimate exercise of the congressional power "necessary and proper" to carry out its legislative function and is binding upon the states as "the supreme law of the land."[40] Supported by the above proposition, the apparent purpose of Congress in passing this statute is to advance beyond the *Adams* decision and ban subsequent state prosecution.[41] Since Congress has the power to prohibit the use in state courts of evidence elicited before congressional committees, there appears to be no valid reason why it should not have the power to bar any subsequent prosecution concerning matters disclosed in testimony elicited before a federal grand jury or other federal body.[42]

In matters of national concern, such as national defense and security, to which the present Act relates, Congress may pass laws superseding state legislation on the same subject.[43] An example of this is the supersedure

[35] 284 U.S. 141 (1931). Also see Counselman v. Hitchcock, 142 U.S. 546 (1892); Brown v. Walker 161 U.S. 591, 606 (1896); Jack v. Kansas, 199 U.S. 372, 381 (1905); Hale v. Henkel, 201 U.S. 43, 68 (1906).

[36] *But cf.* United States v. DiCarlo, 102 F. Supp. 697, (N.D.Ohio 1952) which held that a witness before a government committee conducting an investigation of organized crime is entitled to remain silent if he would incriminate himself under state laws. This was distinguished from the *Murdock* case since state crime investigations were involved and there was the imminent possibility of state prosecution as compared to a remote possibility in the *Murdock* case.

[37] 347 U.S. 179 (1949) Adams, testifying under a grant of immunity before a congressional committee investigating crime, confessed to having run a gambling business in Maryland. In the Criminal Court of Baltimore, he was convicted, through the use of this testimony, of conspiring to violate the state's anti-lottery laws. His conviction was reversed by the Supreme Court. See Notes, 29 N.Y. U.L. REV. 1483 (1954); 52 MICH. L. REV. 1240 (1954).

[38] 62 STAT. 833, 18 U.S.C. § 3486 (1948).

[39] 347 U.S. at 181.

[40] Congress may pass laws "necessary and proper" to carry out legislative functions vested in it by Article I. U.S. CONST. art. I, § 8, cl. 18. The power to investigate is a necessary concomitant of its legislative function. McGrain v. Daugherty, 273 U.S. 135 (1927). When Congress in the legitimate exercise of its powers enacts "the supreme law of the land," state courts are bound by such law even though it affects their rules of practice. U. S. CONST. art. VI, cl. 2, as construed in Adams v. Maryland, 347 U.S. 179 (1949)

[41] See note 34 *supra*.

[42] See note 40 *supra*.

[43] In many areas, where there is an overlapping of federal and state legislation, the trend has been to recognize a "federal supremacy." A federal court on habeas corpus proceedings, may release a party who is in the custody of a state officer, In re Neagle, 135 U.S. 1 (1890); but a state court may not interfere with the work of federal officers or judicial tribunals. Riggs v. Johnson County, 6 Wall. 166 (U.S. 1867); In re Tarble, 13 Wall. 397 (U.S. 1872). See United States v. Candelaria, 131 F.Supp. 797 (S.D. Cal. 1955) for attempted but unsuccessful interference by state executive authorities with federal judicial functions in a situation involving parole of a federal

of a state law requiring alien registration[44] by a federal law on the same subject[45] intended to meet seditious and like activities. In *Hines v. Davidowitz*[46] the Supreme Court held that Congress has the power to pre-empt the field of alien registration. In the recent case of *Commonwealth v. Nelson*[47] it was held that in view of the pre-eminence of the national government's interest in defending itself against sedition, its control of the field must be exclusive. There is no doubt that Congress has the power to provide for a grant of immunity in the interests of national defense and security; there is little doubt that Congress has the power to grant immunity that will bar state prosecutions.

Though there may be some question as to the constitutionality and desirability of the role vested in the district court under the Federal Compulsory Testimony Act, it does contain notable improvements over previous immunity legislation.[48] The possibility of "immunity baths" is minimized since the Act is confined to comparatively narrow limits of investigation, a specific claim of privilege by the witness is required, the order of the district attorney and Attorney General are required, and the witness cannot testify outside the limits of the immunity granted. This immunity Act furnishes a valuable tool which enables the government to secure evidence otherwise unobtainable even though the details of procedure to be followed in granting immunity in many places must be inferred from the avowed purpose of Congress. The delegation to the courts by the legislature of certain procedural duties or even the delegation of a certain amount of discretion reflects an instinctive desire to seek an impartial and independent tribunal as an additional safeguard for the handling of this vital problem. Even though the exact extent of the immunity conferred by the Act is not stated therein, the legislative history

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prisoner. If property subject to tax by both governments is insufficient to pay both claims, Congress may provide that it must be sold for federal taxes first, and only the remainder will be paid to the state. Spokane County v. United States, 279 U.S. 80 (1929). See Field, *States Versus the Nation and the Supreme Court*, 28 AMER. POL. SCI. REV. 233 (1934).

[44] PA. STAT. ANN. tit. 35, §§ 1801–1806 (Purdon, Supp. 1954)

[45] Act of June 28, 1940, c. 439, 54 STAT. 670.

[46] 312 U.S. 52 (1940).

[47] 377 Pa. 58, 104 A.2d 133 (1954), *cert. granted sub. nom.* Pennsylvania v. Nelson, 348 U.S. 814 (1955). It is not necessary to find an affirmatively expressed legislative intent for Congress to pre-empt a particular field. Such purpose can as readily be evidenced objectively by what the circumstances reasonably indicate as being necessary to effectuate the federal objectives. The power to pre-empt certain state legislation is given by the state to the national government in the Constitution and also springs from the federal government's power of self-preservation. *Supra* 104 A.2d at 137, 138.

[48] 221 F.2d 760 (2d Cir. 1955). The United States Court of Appeals indicated that the statute may not, in today's circumstances, give true immunity against "legal detriment" within the meaning of the Constitution. The last word on the subject by the Supreme Court was in Brown v. Walker, 161 U.S. 591 (1896). The legal detriment feared is that confession of serious crimes exposes the witness to such infamy and disgrace that his ability to earn a living is affected. See Rogers v. United States, 340 U.S. 367 (1951) in which the witness was unwilling to cause others to be questioned and accordingly claimed his privilege wrongfully. Furthermore there may be federal disabilities arising from compelled testimony, *e.g.*, the Internal Security Act, which prohibits employment of members of certain organizations from filling government or defense jobs. 64 STAT. 987 (1950), 18 U.S.C. § 741 *passim* (Supp. V. 1952). Also federal executive orders on current loyalty procedures prohibit the employment of so-called radicals in government jobs. Dean Griswold viewed the Federal Compulsory Testimony Act with misgivings, even though he believes the literal requirements of the Constitution are met. GRISWOLD, THE FIFTH AMENDMENT TODAY, 80 (1955). See also Comment, *Federal Anti-Subversive Legislation*, 55 COLUM. L. REV. 631, 654–658 (1955). For a severe criticism of the Act see Dixon, *The Doctrine of Separation of Powers and the Federal Immunity Statute*, 23 GEO. WASH. L. REV. 627 (1955).