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Self-Incrimination--United States v. Kordel, 397 U.S. 1 (1970)

The functional approach the Court utilizes to affirm the six-man jury is less cogent than the historical.[51] The avowed purpose of the jury in the criminal setting is to prevent oppression by the government.[52] The Court found that this purpose, the essential feature of a jury lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[53] The Court then concluded that the number of persons comprising a jury does not affect its function as a buffer between the state and the individual.

There are two difficulties with this conclusion. For the defendant there is safety in numbers, especially when the accused is a member of a minority ethnic group. Moreover, when a unanimous verdict is necessary, a twelve-man jury would seem far more advantageous to the defendant than a six-man jury, inasmuch as a twelve-man jury effectively doubles the accused's chances of finding one sympathetic juror to "hang" the jury.[54]

Secondly, although the ideal that a man is to be judged by a jury of his peers seldom corresponds with reality,[55] the *Williams* decision hardly brings us closer to that goal. By permitting Williams to be imprisoned for life by a jury of six, the chance of his being judged by a representative cross-section of his community is reduced by one-half. The Court responded to this contention by saying that, so long as the peremptory challenge exists, fair representation can never really exist, even on a twelve-man jury.[56] Assuming that to be true, the Court still fails to recognize the fact that its decision in *Williams* still further exacerbates the shortcomings of American juries.

Both issues in *Williams* presented the Court with the inevitable conflict of interest between the individual's rights and the state's interest in efficient and expeditious justice.[57] The affirmation of Johnny Williams' conviction indicates the Court's deference for the latter.

[51] *Id.* at 100–03.
[52] *Id.* at 100. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
[53] 399 U.S. at 100.
[54] *Id.* at 101 nn. 47–48.
[55] H. Jacob, JUSTICE IN AMERICA 110–112 (1965).
[56] 399 U.S. at 102.
[57] *See* notes 11 and 46 *supra*, and accompanying text.

SELF-INCRIMINATION

United States v. Kordel, 397 U.S. 1 (1970)

In recent years, the Supreme Court has expanded the scope of the fifth amendment[1] privilege against self-incrimination.[2] This trend, however, stalled during October Term, 1969.[3] Illustrative of the refusal by the Supreme Court to expand the boundaries of the fifth amendment is *United States v. Kordel.*[4] This unanimous decision[5] did little more than restate established law, indicating no future or potential areas of alteration in judicial thought.

In *Kordel*, the Food and Drug Administration[6] initiated an in rem action to seize two products produced and distributed by Detroit Vital Foods, Inc.[7] Pursuant to Rule 33 of the Federal Rules of Civil Procedure,[8] the FDA served extensive

[1] The fifth amendment to the United States Constitution provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."
[2] *See, e.g.*, Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1969); Haynes v. United States, 390 U.S. 85 (1968); Miranda v. Arizona, 384 U.S. 436 (1966).
[3] *See, e.g.*, Turner v. United States, 396 U.S. 398 (1970); Minor v. United States, 396 U.S. 87 (1969); United States v. Knox, 396 U.S. 77 (1969); Bryson v. United States, 396 U.S. 64 (1969).
[4] 397 U.S. 1 (1970).
[5] Mr. Justice Black did not take part in the decision.
[6] Hereinafter cited as FDA.
[7] The indictment charged the corporation "with introduction into interstate commerce of misbranded drugs and with causing a drug to be misbranded after it had been shipped in interstate commerce. 21 U.S.C. § 331(a) and (k) (1964)." United States v. Detroit Vital Foods, Inc., 407 F.2d 570, 571 (6th Cir. 1969).
[8] At that time, Rule 33 provided in part:
> Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party.

Rule 33 was amended on March 30, 1970, to be effective on July 1, 1970. The changes, however, do not affect the use of Rule 33 in *Kordel.*

interrogatories on the corporation in this civil action. Before the interrogatories were answered, the FDA served further notice on the corporation that the FDA was contemplating the commencement of criminal proceedings against the corporation and its officers.[9] The criminal action was to be grounded upon the same transactions that that were at issue in the civil action.

The corporation moved to stay further proceedings in the civil action or to allow the interrogatories to go unanswered until any future criminal action was taken.

The corporation claimed that:

> [p]ermitting the Government to obtain proof of violations of the Act by resort to civil discovery procedures . . . would be 'improper' and would 'work a grave injustice against the claimant'; it would also enable the Government to have pretrial discovery of the . . . defense to future criminal charges.[10]

The officers, moreover, never expressly claimed that their privilege against self-incrimination was being denied.

The corporation's motion was denied by the district court, and the interrogatories were ordered to be answered. Before the corporation's vice president answered the interrogatories, the FDA decided to proceed with the previously contemplated criminal prosecution. With the aid of the interrogatories, the corporation and its president and vice president were convicted on the criminal charges.

The Court of Appeals for the Sixth Circuit reversed the convictions of the president and vice president on the ground that the Government's use of interrogatories to obtain evidence from the officers in a nearly contemporaneous civil proceeding violated their fifth amendment privilege against compulsory self-incrimination.[11] It was felt that the officers' actions were not voluntary in light of the three alternatives available to them. If they had refused to answer the interrogatories despite the district court order, their seized property would have been forfeited. If they had falsified their answers, they would have run the risk of a prosecution for perjury. If they supplied the required information, as they did, they would incriminate themselves in the potential criminal action.

In an opinion delivered by Mr. Justice Stewart, the Supreme Court reversed the court of appeals and upheld the convictions. The Court reasoned that the vice president need not have answered the interrogatories if he had *actually invoked* his fifth amendment privilege against compulsory self-incrimination. Stewart said that "[the vice president's] failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself."[12] There is ample precedent for the principle that the privilege is deemed waived unless invoked.[13] Describing the element of compulsion which is prohibited by the fifth amendment, the Sixth Circuit had stated that "[a] person may not be required to supply information which may possibly incriminate him upon penalty of suffering a forfeiture of his property."[14] While this is good law, the vice president was never required to answer the interrogatories; all he had to do was assert his privilege.[15]

The facts in *Kordel,* however, raise the question of whether the Court should have inferred that the witness was attempting to invoke the privilege, even though he did not affirmatively request that his fifth amendment rights be protected. The decision itself does not allude to this matter. The Supreme Court has stated that the waiver of constitutional rights, which includes the privilege against self-incrimination, is "not lightly to be inferred."[16] It has also been stated that "[t]he privilege may not be relied on and must be deemed waived if not *in some manner fairly brought to the attention of the tribunal* which must pass on it."[17]

[9] The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 335 (1964), provides:

> Before any violation of [the Act] . . . is reported by the Secretary [of the Department of Health, Education, and Welfare] to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

[10] 397 U.S. at 5.

[11] 407 F.2d 570 (6th Cir. 1969).

[12] 397 U.S. at 10.

[13] Rogers v. United States, 340 U.S. 367, 370 (1951); United States v. Monia, 317 U.S. 424, 427 (1943); Gollaher v. United States, 419 F.2d 520, 525–26 (9th Cir. 1969).

[14] 407 F.2d at 573.

[15] The Court also noted that the president of the corporation had a very tenuous self-incrimination argument. He had neither asserted the privilege nor answered any of the interrogatories. The president had "attempted to fashion a self-incrimination claim by combining testimony that he never gave and an assertion of the privilege that he never made. . . ." 397 U.S. at 10.

[16] Smith v. United States, 337 U.S. 137, 150 (1949).

No special combination of words is required to invoke the privilege; all that is necessary is an objection stated in language that the tribunal may reasonably be expected to understand as an attempt to claim the privilege.[18] While the tribunal is not obligated to either accept or reject the ambiguous constitutional claim the very moment it is first presented, there is an obligation to inquire into the nature of the claim or to ask whether the witness is in fact invoking the privilege.[19]

In *Kordel*, there was a motion to either stay further civil proceedings or extend the date when the answers were due, and it was claimed that the use of the interrogatories would serve injustice and inform the Government of the defenses to future criminal charges. The Supreme Court apparently felt that the waiver of the privilege against self-incrimination could be justifiably inferred since the privilege was neither asserted nor "in some manner fairly brought" to the trial court's attention.[20] Strictly interpreted, the respondent's motions to stay or extend the answer date or his other claims did not reasonably indicate to the court the desire to invoke the privilege. Moreover, they did not allude to the prospect that his answering the interrogatories might actually lead to his future criminal conviction. They did, however, manifest a fear of divulging criminal defenses.

It is difficult for a judge to always sense when the threshold of self-incrimination is approaching. This, in turn, makes it difficult for a judge to inform the witness of his privilege to remain silent before the incrimination occurs.[21] In *Kordel*, however, the trial court could reasonably have apprehended the possibility for self-incrimination which later occurred. The motions and claims did, at the least, indicate a desire not to answer the interrogatories. The court, having had contact with the interrogatories, must have recognized their self-incriminating tendency.[22] The court perhaps should have realized that what the vice president had in mind, but failed to properly place into words, *might* be fear of self-incrimination. This being the case, the court could reasonably have inquired into the nature of the vice president's claim to determine exactly what the motivation behind it was.

It is possible, however, that when the witness is represented by counsel notice of the privilege against self-incrimination need not be communicated by the court.[23] The opinion in *Kordel* stated that the vice president was neither unrepresented by counsel nor without an appreciation of the possible consequences when he answered the

[17] United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113 (1927) (emphasis added).

[18] Quinn v. United States, 349 U.S. 155, 162–63 (1955); 8 J. WIGMORE, EVIDENCE § 2268, at 402 (McNaughton ed. 1961).

[19] 349 U.S. at 164; Emspak v. United States, 349 U.S. 190, 194–95 (1955).

[20] *Compare* Kordel v. United States, 397 U.S. 1 (1970), *with* Smith v. United States, 337 U.S. 137 (1949). In *Smith*, the Supreme Court characterized a witness' statement "I want to claim privilege as to anything I say" as a "definite claim of general privilege against self-incrimination." *Id.* at 151. *See also* Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955).

[21] Perhaps the best solution is to inform the witness of the privilege before any testimony is given or interrogatories are answered.

[22] 407 F.2d at 575:

> [T]he interrogatories submitted by the Government were broader than would ordinarily be needed in a civil case. Some of the interrogatories were directed specifically toward the activities of [the president].

[23] 8 J. WIGMORE, EVIDENCE § 2269, at 412–13 (McNaughton ed. 1961) states:

> Should the judge, or other presiding official, warn the witness, when an incriminating fact is inquired about, that he has by law an option to refuse an answer? At one time, such a course was often insisted upon by the leaders at the bar; and it is plain that the old practice was to give such a warning when it appeared to be needed. But, as general knowledge spread among the masses and the preparation for testimony became more thorough, this practice seems to have disappeared in England, so far at least as any general rule was concerned.
>
> In the United States both the rule and the trial custom vary in the different jurisdictions. No doubt a capable and painstaking judge will give the warning where need appears, but there is no reason for letting a wholesome custom generate into a technical rule. (footnotes omitted).

An earlier edition contained the following in regard to the witness being warned when an incriminating fact is inquired about:

> In the first place, such a warning would be an anomaly; it is not given for any other privilege; witnesses are in other respects supposed to know their rights; and why not here? . . . Finally, in practical convenience, there is no demand for such a rule; witnesses are usually well enough advised beforehand by counsel as to their rights when such issues impend, and judges are too much concerned with other responsibilities to be burdened with the prevision of individual witnesses' knowledge; the risk of their being in ignorance should fall rather upon the party summoning than the party opposing.

Id. § 2269, at 398–99 (3d ed. 1940). *See* State v. Lucas, 24 Conn. Supp. 353, 190 A.2d 511 (1963), for the view that where a state's case rests solidly on the testimony of a defendant who is not represented by counsel, and no prima facie case has been made out when the defendant takes the stand, said defendant should be advised of his privilege against self-incrimination.

interrogatories.[24] This being the case, the trial court would ordinarily be under no obligation to notify him of his privilege.[25]

A dilemma is raised while trying to ascertain what the trial court's action should have been. Which factor should take preference, the fact that the court was aware of a possible claim of privilege, or the fact that the witness was represented by counsel? If the former, the court would be obligated to inquire further and perhaps warn the vice president of his right. If the latter, the court would be under no such obligation. The optimum approach would be to disregard the existence of counsel and inquire as to the witness' motives for objection. If self-incrimination was indeed its basis, then the court would correctly interpret the ambiguous or vague language and justice would be served. If self-incrimination had nothing to do with the refusal to testify, no harm would be done, and the witness could be ordered to answer.

Moreover, the fact than an individual is represented by counsel by no means insures that he will be adequately protected. There is the chance that due to incompetence or bad judgment counsel may not appropriately react to inquiries directed to his client. The attorney also may not be adequately familiar with his client, nor understand what testimony might lead to potentially detrimental results. Such is often the plight of the public defender who represents an indigent. There is often a minimum amount of time available for consultation with the multitude of defendants he is assigned to.

In upholding the convictions, the Court stated that an individual is not barred from relying on the privilege against self-incrimination simply because the information is sought in a civil proceeding and not in a criminal proceeding.[26] This reaffirmation of the law is of current importance in light of the increased frequency of concurrent civil and criminal actions arising out of the same activity.[27] In these instances, the civil litigant should not be compelled to submit to incriminating civil discovery which will be used in the concurrent or subsequent criminal action without adequate safeguards.[28]

The decision also dealt with other varied aspects of the privilege against self-incrimination, but its dicta were based on well settled law. A corporation cannot assert the privilege; it is a personal privilege.[29] Being individuals, the officials of a corporation can assert the privilege. However, it must be asserted on their own behalf, and not to protect another party, such as a corporation.[30] Service of the interrogatories pursuant to Rule 33 obligates the corporation to appoint an officer or agent to supply the necessary information. This obligation cannot be satisfied by appointing an individual who would then invoke his own constitutional privilege.[31] If such an officer or agent could be appointed, the ultimate effect would be to "permit the corporation to assert on its own behalf the personal privilege of its individual agents." [32]

[24] 397 U.S. at 9–10.

[25] The Supreme Court recently stated in Gardner v. Broderick, 392 U.S. 273, 276 (1968), that "[t]he privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made." It should be noted that when the witness is represented by counsel, it is often counsel who "knowingly and voluntarily" waives the witness' privilege. Thus, the witness may sometimes suffer due to the bad judgment or incompetence of counsel. It would appear that this is what occurred in *Kordel*.

[26] McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Boyd v. United States, 116 U.S. 616, 634 (1886); C. McCormick, Evidence § 123, at 259 (1954).

[27] In the area of antitrust law, the criminal statutes are addressed to the same kind of illegal activities as are the provisions for private civil actions. *See, e.g.*, Sherman Act, 15 U.S.C. §§ 1, 2 (1964).

[28] Criminal discovery itself is limited and usually a matter of discretion with the trial court rather than a matter of right. The use of civil discovery methods has become of great importance in obtaining information for criminal prosecutions. *See* Norton, *Discovery in the Criminal Process*, 61 J. Crim. L.C. & P.S. 11 (1970).

[29] United States v. White, 322 U.S. 694, 698–99 (1944).

[30] *Id.* at 700:

> The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of the organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

See Hale v. Henkel, 201 U.S. 43, 74–75 (1906). The vice president in *Kordel* could have invoked the privilege since he was not being asked to submit the corporate records and documents, but rather answers to interrogatories. These answers could possibly be more aptly described as either testimony or private papers, either of which may allow him to invoke the privilege. *See generally* Curcio v. United States, 354 U.S. 118, 122 (1957); United States v. White, 322 U.S. 694, 699 (1944); Wilson v. United States, 221 U.S. 361, 384–86 (1911); Boyd v. United States, 116 U.S. 616, 634 (1886).

[31] United States v. 3963 Bottles . . . of . . . Enerjol Double Strength, 265 F.2d 332, 336 (7th Cir. 1959).

[32] 397 U.S. at 8.