JUDICIARY

Comm.

misc.

69 House Bills
40 Senate bills

PASSED BY JUDICIARY 1975

HB 27 School bus permits

HB 31 Abandoned vessels

HB 45 Ombudsman

HB 48 Realty interest

HB 52 Public Adjustor

HB 59 Teacher Tenure

HB 62 Transportation of hunters

HB 81 Supplemental

HB 90 Adultery

HB 94 Conflict of Interest

HB 96 Corporators

HB 99 Guide board

HB 105 Hold harmless

HB 114 Violent Crimes

HB 118 Transporters

HB 129 Smoking

HB 138 Income tax

HB 139 Rental adjustment

HB 140 Official maps

HB 151 Log Brands

HB 154 Assault

HB 156 Obstruction of officer

HB 157 Unauthorized entry

HB 159 Edible meat

HB 170 Subdivision judicial payments

HB 175 Department of Labor

HB 176 Comparative negligency

HB 177 Prepaid rent

HB 178 Third party beneficiaries

HB 191 Transportation tariff

HB 192 Utility tariff

HB 197 Military residency

HB 202 Regents terms

HB 209 Income tax

HB 211 Tax and revenue

HB 213 U of A

HB 237 Divorce

HB 238 Child's rights

HB 241 Fishing gear

HB 242 Rights/state employees

HB 246 Liquor license

HB 248 Public Administrators

HB 256 Dentistry

HB 265 Legal Assistance

HB 266 Legal Assistance $

HB 282 Public Administrators

HB 283 Judicial qualifications

HB 295 Teacher retirement

HB 298 Security

HB 312 Crab marketing

HB 314 Outdoor advertising

HB 318 Imposed sex

HB 321 Rent control

HB 356 Pari mutuel

HB 370 Fish and Game prosecutor

HB 371 Fish and Game $

HB 384 Evaluate judges

HB 385 Judicial appointments

HB 390 Conflict of interest

HB 391 Contractor names

HB 401 Public funds

HB 402 Disabilities of minor

HB 416 Abuse of power

HB 417 Intelligence information

HB 418 Conflict of interest

HB 422 Public assistance

HB 432 Child protection

HB 459 Fathers leave

HB 488 Campaign disclosure

HJR 1 Unicameral

HJR 4 Governor's term

HJR 10 Inherent rights

HJR 11 vetoed bills

HJR 15 U of A

HJR 35 Child support

HCR 2 Election districts

HCR 5 Drivers regulations

HCR 28 Fishing rights

HCR 39 Criminal code

HCR 53 Retention elections

HCR 57 Uncontested divorce

HR 3 Department of Justice

SB 5 Anti trust

SB 11 Artificial insemination

SB 28 Marriage

SB 44 Smoking

SB 53 Bond/suit

SB 59 Juveniles

SB 60 Discrimination

SB 62 Conflict of interest

SB 80 Case against state

SB 89 Conflict of interest

SB 96 Salmon roe

SB 99 Public records

SB 113 Health care information

SB 132 Nursing home administrators

SB 138 Zoning state parks

SB 140 Administration of Justice

SB 153 Sound recordings

SB 167 False reports
SB 168 Larceny
SB 180 Hatcheries

SB 182 Arrest/no warrant

SB 202 Malicious mischief

SB 230 Antlerless moose

SB 257 Fire departments

SB 261 Rape

SB 266 Motor vehicles

SB 269 Punch card voting

SB 290 Rent control

SB 300 Stolen property

SB 301 Insufficient funds

SB 302 Convicts/weapons

SB 350 Pot

SB 357 Minor on premises

SB 358 Trust lands

SB 384 Revise statutes

SB 399 Imitation gold

SB 407 Motor vehicle safety

SB 411 Dr. guide

SCR 5 Criminal code

SCR 15 Rape

SCR 17 "

SCR 19 "

SJR 30 ammunition

SJR 37 Outboard motors

PASSED BY JUDICIARY 1976

HB 199	Open/close polls
HB 214	Absentee voting
HB 243	Public Utility Rates
HB 261	Property Tax exemption
HB 366	Deed of trust sales
HB 442	Game Refuges and Sanctuaries
HB 510	ASHA land sales
HB 522	Lobbying
CSSSHB 531	Freedom of Information
HB 541	Visitation of Prisoners
HB 546	Surcharges
HB 554	Insurance holding companies
HB 558	Insurance practices
HB 559	Insurance filing review periods
HB 574	Medical Malpractice
HB 581	Watercraft
HB 584	Substitution of generic drugs
HB 588	OSHA
HB 600	Determinate Sentencing
HB 604	Uniform Land Sales
HB 606	Vacancies U.S. Senators
HB 631	Public utilities
HB 632	Exempt small telephone companies
HB 633	Public utilities
HB 634	Employment of minors
HB 639	Collection of wages
HB 655	Foreclosure
HB 677	Anti-Trust
HB 679	Public Utility Indebtedness
HB 694	Criminal Code Revision Commission
HB 705	Alaska Pipeline Commission
HB 713	Student Regent
HB 722	Consumer Pretection
HB 723	Residential Homestead exemption

HB 735	Defrauding Hotels
HB 738	Misc. Court Awards
HB 756	Survivor Benefits
HB 774	COLA Magistrates
HB 775	Criminal escapes
HB 784	Cook Inlet Land Trade
HB 785	Electric Dart guns
HB 786	Faculty smoking
HB 795	Women in Alaska
HB 801	Capital Site Sel. Commission
HB 808	Hippie Homestead
HB 809	Money game proceeds
HB 823	Credit Unions
HB 831	Public meetings
HB 833	Abatement of nuisances
HB 839	Fish and Game Data
HB 851	Quasi Judicial Regulatory Agnecies
HB 856	Security Guards
HB 857	Campaign Disclosure
HB 861	Educational incentive grant
HB 871	Number of judges
HB 873	Dissolution of marriage
HB 881	Laetrile
HB 885	Student collective bargaining
HB 890	Coop res. management
HB 898	Toilet Facilities
HB 908	Religious property exemption

SB 157	Consciencious clause
HCS 2dCSSB 215	Navigable Waters
SB 296 am	Integrated Bar Act
SB 336	Treatment of Drunks
SB 345	Drunks on Highway
SB 346	Uniform Alcoholism Act
SB 354	Limited Liability Companies
SB 365	Hairdressers
SB 371	Child Protection
SB 406	Tankers
SB 438	Dealer's day in court
CSSB 440	Security interests
CSSB 443	Takeover Bids
SB 484	Abandoned Vehicles
SB 489	Physical exams non-residents
SB 490	Corporate statute amendments
SB 494	Civil liabilities National Guard
SB 499	Salary Commission
SB 509	Notaries
SB 511	Revenue Laws
SB 515	Referendum Procedures
SB 544	Municipal parking
SB 546	Eminent Domain
S. 570	Municipal officers
SB 575	Injunctive relief
SB 588	Minor purchase motor vehicle
SB 592	Theft of telecommunications services
SB 594	Unavailable Insurance
SB 596	Larceny and embezzlement
SB 597	Bingo, Raffles
SB 611	Adoption
SB 627	Larceny by trick
SB 628	Implied Consent
SB 629	Interstate compact: children

SB 630 Apprenticeship

SB 641 Wage rates

SB 653 Philosophy of child treatment

SB 659 Child support agency

SB 661 Gaming Activities

SB 666 Motorcycle helmets

SB 670 Superior judges

SB 673 Judicial appointments

SB 677 Capital Site

SB 691 Public broadcasting

SB 696 Appropriation for telecommunications

SB 717 Probate Code

SB 718 Statehood Act

SB 720 Kachemak Bay

SB 724 Revisor

SB 740 Real Estate Conveyance

SB 741 Teachers certificates

SS HJR 39 Permanent Fund

HJR 43 Traps

HJR 44 Kantishna mining

HJR 45 Gun Control

HJR 73 State aid to private education

HCR 88 Capital Site

HCR 109 Atty, Fee Review

SJR 45 Disposal Stateland

SCR 48 Glacier Bay Monument

SCR 62 Motor vehicle inspection

LEAGUE OF WOMEN VOTERS
OF THE FAIRBANKS NORTH STAR BOROUGH
P.O. BOX 1974
FAIRBANKS, AK 99707

Superior Court
State of Alaska
FIRST JUDICIAL DISTRICT
STATE CAPITOL BUILDING
POUCH U
JUNEAU, ALASKA
99801

THOMAS B. STEWART
PRESIDING JUDGE

February 14, 1975

Honorable Charles Parr
Alaska House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Parr:

In 1973 the Alaska Supreme Court established a standing committee composed of the four presiding judges of the Superior Court and the Administrative Director of Courts to advise and assist in improving the administration of all courts. A recent function of the committee has been to consider and report on a Judicial Council proposal for a change in the judicial districting plan for the state.

The committee is pleased to transmit for your review a copy of its report issued in November 1974 which details its recommendations for modification of judicial district boundaries. With the exception of the Honorable William H. Sanders, Presiding Judge of the Second Judicial District, all members of the committee recommended that there be three judicial districts, or in the alternative, the existing four districts with boundary changes. The justification for these alternatives and the proposed boundaries are stated in the report. The minority view of Judge Sanders is also included.

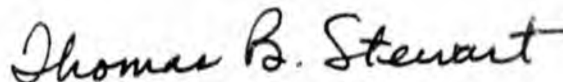
The report of the committee and that of the Judicial Council were distributed to all judges in the state. Summaries of these proposals were presented orally to the Conference of Alaska Judges at Anchorage on January 17, 1975, and the subject was then discussed by the assembled judges. Subsequently the members of the Conference (excepting the Justices of the Supreme Court) were polled as to their views, and the results are stated in the attached communication dated February 6, 1975, from Judge Victor D. Carlson, Secretary-Treasurer of the Conference, to Chief Justice Jay A. Rabinowitz. In summary, the 28 members voting

Honorable Charles Par[illegible]
February 14, 1975
Page Two

favored a modification of the existing four districts or the alternative of three districts by better than five to one over the seven district plan. The Supreme Court acted independently on the proposals and has unanimously recommended retention of the existing four districts, but with modification of boundaries to adjust to existing transportation and communication patterns.

In a dual capacity as chairman of the Presiding Judges' Committee and as President of the Conference of Alaska Judges, it is a privilege to provide you with these informational materials on judicial districting. If any legislator or legislative committee desires further comment on the subject, we would be pleased to provide it upon request.

Very truly yours,



Thomas B. Stewart
Chairman, Presiding Judges' Committee and
President, Alaska Conference of Judges

:lw

Members of the Committee:

Presiding Judge Thomas B. Stewart, First District
Presiding Judge William H. Sanders, Second District
Presiding Judge C. J. Occhipinti, Third District
Presiding Judge Gerald J. Van Hoomissen, Fourth District
Arthur H. Snowden, II, Administrative Director

Supreme Court
State of Alaska
941 Fourth Avenue
Anchorage, Alaska 99501

JAY A. RABINOWITZ, Chief Justice

907-279-0664

February 13, 1975

Honorable Mike Bradner
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Bradner:

The Supreme Court of Alaska met last week to consider the matter of judicial district reform. Because the design of judicial districts will affect the administration of the Alaska Court System for which the Supreme Court has constitutional responsibility, we would like to take this opportunity to express our views concerning judicial district reform and to present our recommendations for modification of the existing judicial districts.

The Supreme Court unanimously recommends retention of four judicial districts, but with the district boundaries realigned to conform to existing transportation and communication patterns. It is our belief that this proposal will enable the Alaska Court System to continue to provide more readily available and quality judicial services to all areas of the state. Enclosed is a draft bill that defined the judicial district boundaries as proposed by the Supreme Court. In this bill, the First Judicial District is unchanged; the Second District is redrawn to encompass those communities having direct transportation and communication links with Nome; the Third District is extended westward to include the Kuskokwim and Lower Yukon regions; and the Fourth District is extended to include the North Slope. Also enclosed is a map illustrating these proposed districts.

In reaching its decision, the Supreme Court considered the recommendations of the Judicial Council for seven judicial districts as well as the Presiding Judges' Committee proposal for three districts together with Judge Sanders' dissent. The

reports prepared by the Judicial Council and the Presiding Judges' Committee in support of their recommendations agreed that the two primary functions served by judicial districts are (1) their operation as election units for retention elections of superior and district court judges and (2) their function as regional units for judicial administration. Where the Judicial Council's report emphasized the retention election unit function, the Presiding Judges' Committee stressed the administrative function. Seven districts have been recommended by the Council for the sole purpose of providing certain regions of the state with concentrated voting power in judicial retention elections. No claim has been made that increased judicial services will result from an increase in the number of districts. The Presiding Judges' Committee recommends three districts on the assumption that a decrease in the number of districts will simplify the administration of the court system and will result in improved administrative and judicial services throughout the state. By tending to stress one function over the other, however, each recommendation falls short of reaching accomodation between two equally important functions of judicial districts.

The Court is of the view that in fashioning judicial districts for purposes of judicial retention elections there comes a point where the population of a proposed district may become too small and too homogeneous to provide the kind of atmosphere that promotes judicial independence. The judicial retention election is a vital element of Alaska's merit system for judicial selection and tenure, for it is through this device that the judiciary remains responsive to the people it serves. At the same time, however, the judiciary must remain free from partisan political pressures that may affect decisions in particular cases. An election unit having a larger population with diverse political interests is much more likely to strike the proper balance between judicial independence and responsiveness to the public.

The Judicial Council's recommended districts are, for the most part, too small and too homogeneous to provide the kind of diversity that best insures judicial independence. The proposed seven districts were, of course, drawn specifically to recognize distinctive regional interests. However, if the goal of judicial district reform is to give retention election power to recognizable regional interests, then it becomes difficult to distinguish between the regions identified by the Council as requiring judicial district status (that is,

retention election power) and other regions of the state such as the Kenai Peninsula, Kodiak Island, or portions of Southeast Alaska. Certainly there are many points at which the interests of these regions diverge markedly from the interests of the urban areas of Anchorage, Fairbanks, and Juneau. If additional districts are necessary to serve distinctive regional interests in judicial retention elections, then more retention units than proposed by the Council would seem to be required.

Three districts have been urged by the Presiding Judges' Committee to provide a simpler administrative structure. Single judge districts have been recognized as inherently inefficient by experts in the field of judicial administration, and it is on this basis that the merger of the Second and Fourth Districts has been urged. The Court agrees that three judicial districts would be simpler to administer than four, and certainly simpler to administer than seven. Little would seem to be gained, however, by altering the present structure of four judicial districts.

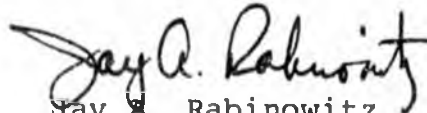
Lack of transportation routes linking the communities contained within existing judicial districts provided the initial impetus for judicial district reform. The Court believes that this continues to be the major flaw in the existing judicial district design. The problems encountered in providing judicial services throughout the state with present district boundaries have been exhaustively catalogued in both the Judicial Council and Presiding Judges' Committee reports. Existing transportation patterns make it impossible to provide judicial services to certain communities in the state by utilizing judges from within the same judicial district. But serving these communities with judges from neighboring judicial districts has an adverse effect both on the administration of courts and on the retention election process. The overlap of administrative responsibilities in the two judicial service areas, as discussed in the Presiding Judges' Committee Report, has caused some administrative confusion. The problems have been far from insurmountable, but they have diverted attention and energy away from more substantial concerns. If judicial services are to be provided to rural communities effectively, they must be provided by judges traveling from other judicial districts. This, in turn, results in a disenfranchisement of voters in the Kuskokwim and North Slope regions who cannot vote on the superior court judges who actually serve their cummunities.

Honorable Mike Bradner
February 13, 1975
Page Four

The four districts proposed by the Supreme Court will solve the major problems with judicial district design with the least disruption in both the judicial retention election process and the administration of the court system. Those communities that are linked by common charter and scheduled transportation routes and that will be served by the same judge or judges have been included within a single judicial district. The Court believes that this proposal will best accommodate the needs of the public that it is charged to serve and the needs of the judiciary in terms of both administrative ease and judicial independence.

The Supreme Court wishes to thank you for this opportunity to express its views to the legislature and to assure you that regardless of the outcome of the various proposals before the legislature, we reaffirm our commitment to bring judicial services to all citizens of Alaska.

Very truly yours,



Jay A. Rabinowitz
Chief Justice

:lw

cc: All Members House of Representatives

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

02-001B (Rev. 10/76)

STATE of ALASKA

MEMORANDUM

Copy opinion SAVE

Kastiger v. US - Sup Court Law Reporter US Reports

TO: Avrum M. Gross
Attorney General

DATE: April 20, 1977

FILE NO: 1974/75

TELEPHONE NO.

FROM: Daniel W. Hickey
Chief Prosecutor

SUBJECT: Federal Prosecution of Witnesses Compelled to Testify Pursuant to a State Grant of Immunity from Prosecution

A question has recently arisen regarding the provisions of CSHB 143, relating to immunity of witnesses. The question is whether testimony compelled in a state prosecution, under a grant of immunity from the use of such testimony, may nevertheless be directly or indirectly used in a federal prosecution.

This issue has been researched extensively and it is unequivocally clear that the landmark opinion of the United States Supreme Court in Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.Ct. 1594 (1964), answers the question in the negative. Additionally, it should be emphasized that the decision in Murphy remains controlling under the Constitution of the United States.

In that case, Mr. Justice Goldberg, in a majority opinion pursuant to a unaminous decision for a Court that included Justices Douglas, Brennan and Black, stated:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity. (emphasis added)

In conclusion, it is clear that federal prosecutors can no more utilize testimony compelled under CS HB 143, which is with minor technical variations identical to the bill introduced by request of the Governor as HB 393, than their counterparts in Alaska.

DWH:am

[406 US 441]

CHARLES JOSEPH KASTIGAR and Michael Gorean Stewart, Petitioners,

v

UNITED STATES

406 US 441, 32 L Ed 2d 212, 92 S Ct 1653, reh den 408 US 931, 33 L Ed 2d 345, 92 S Ct 2478

[No. 70–117]

Argued January 11, 1972. Decided May 22, 1972.

SUMMARY

The United States District Court for the Central District of California ordered the petitioners to appear before a grand jury and to answer its questions under a grant of immunity. The immunity was based upon a provision of the Organized Crime Control Act of 1970 stating that neither the compelled testimony nor any information directly or indirectly derived from such testimony could be used against the witness. Notwithstanding the grant of immunity, the petitioners refused to answer the grand jury's questions and were found in contempt. The United States Court of Appeals for the Ninth Circuit affirmed (440 F2d 954), rejecting the petitioners' contention that it violated their constitutional privilege against self-incrimination to compel them to testify without granting them transactional immunity from prosecution for any offense to which the compelled testimony might relate.

On certiorari, the United States Supreme Court affirmed. In an opinion by Powell, J., expressing the view of five members of the court, it was held that immunity from use and derivative use was coextensive with the scope of the constitutional privilege against self-incrimination, and therefore, despite the lack of a grant of transactional immunity, was sufficient to compel testimony over a claim of the privilege.

Douglas and Marshall, JJ., each dissented in a separate opinion on the grounds that in the absence of transactional immunity, the grant of immunity was not constitutionally sufficient to compel a witness' testimony.

Brennan and Rehnquist, JJ., did not participate.

SUBJECT OF ANNOTATION

Beginning on page 869, infra

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination

Briefs of Counsel, p 867, infra.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Witnesses §§ 79, 84 — self-incrimination — statutory immunity

1. A federal statute (18 USCS § 6002) permitting the government to compel a witness to give testimony, but granting the witness immunity from the use in any criminal case of the compelled testimony or any evidence derived therefrom, does not violate the Fifth Amendment privilege against self-incrimination; transactional immunity, which accords full immunity from prosecution for any offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege; and a statutory grant of immunity from use and derivative use is coextensive with the scope of the privilege, and therefore is constitutionally sufficient to compel testimony over a claim of the privilege, despite the lack of a grant of transactional immunity.

[*See Annotation p 869, infra*]

Witnesses § 72 — compulsion of testimony — self-incrimination

2. The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established, but is not absolute, being subject to a number of exemptions, the most important of which is the Fifth Amendment privilege against self-incrimination.

Witnesses 73 — self-incrimination

3. The Fifth Amendment privilege against self-incrimination may be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.

Witnesses § 79 — self-incrimination

4. The Fifth Amendment privilege against self-incrimination protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.

Witnesses § 84 — self-incrimination — statutory immunity

5. The Fifth Amendment privilege against self-incrimination does not invalidate statutes which compel self-incriminating testimony, but which

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AM JUR 2d, Witnesses (1st ed § 88)
US L ED DIGEST, Witnesses §§ 79, 84
ALR DIGESTS, Witnesses §§ 80, 83
L ED INDEX TO ANNO, Witnesses
ALR QUICK INDEX, Self-Incrimination
FEDERAL QUICK INDEX, Self-Incrimination

ANNOTATION REFERENCES

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination. 32 L Ed 2d 869.

Privilege against self-incrimination as to testimony before grand jury. 38 ALR2d 225.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury. 36 ALR2d 1403.

grant complete immunity from prosecution prior to the compulsion of the incriminatory testimony.

[*See Annotation p 869, infra*]

Contempt § 12 — witness' refusal to testify

6. If an immunity granted under a statute is coextensive with the scope of the constitutional privilege against self-incrimination, a witness who has been offered the immunity is not justified in refusing to answer questions on the basis of the privilege against self-incrimination, and a judgment of contempt for refusal to answer is proper, but if the immunity granted is not as comprehensive as the protection afforded by the privilege, the witness is justified in refusing to answer, and a judgment of contempt must be vacated.

Witnesses § 79 — self-incrimination

7. While a grant of immunity must afford a witness protection commensurate with that afforded by the privilege against self-incrimination, it need not be broader.

[*See Annotation p 869, infra*]

Witnesses § 79 — self-incrimination

8. The sole concern of the Fifth Amendment privilege against self-incrimination is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to criminal acts.

Witnesses § 72 — self-incrimination

9. The scope of the privilege against self-incrimination is the same whether invoked in a state or in a federal jurisdiction.

Witnesses § 79 — self-incrimination

10. An appropriately broad grant of immunity to a witness is compatible with the constitutional privilege against self-incrimination.

[*See Annotation p 869, infra*]

Evidence § 419 — burden of proof — self-incrimination — immunity

11. Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to his federal prosecution, the Federal Government has the burden of showing that its evidence is not tainted, by establishing that it had an independent, legitimate source for the disputed evidence.

Evidence § 419 — burden of proof — self-incrimination — immunity

12. If a person is compelled to give testimony under a grant of immunity from the use in any criminal case of such testimony or any evidence derived therefrom, and if the person is subsequently prosecuted for an offense to which his compelled testimony relates, the prosecution's burden of proof is not limited to a negation of taint; rather, the prosecution has the affirmative duty to prove that all of the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony; and the person prosecuted need only show that he testified under a grant of immunity in order to shift to the government this burden of proof.

Evidence § 682 — voluntariness of confession

13. A defendant raising a coerced confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.

SYLLABUS BY REPORTER OF DECISIONS

The United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 USC § 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege. Transactional immunity would afford

broader protection than the Fifth Amendment privilege, and is not constitutionally required. In a subsequent criminal prosecution, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony.

440 F2d 954, affirmed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, and Blackmun, JJ., joined. Douglas, J., post, p 462, 32 L Ed 2d p 227, and Marshall, J., post, p 467, 32 L Ed 2d p 230, filed dissenting opinions. Brennan and Rehnquist, JJ., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Hugh R. Manes argued the cause for petitioners.

Solicitor General Erwin N. Griswold argued the cause for respondent.

Briefs of Counsel, p 867, infra.

OPINION OF THE COURT

[406 US 442]

Mr. Justice Powell delivered the opinion of the Court.

[1] This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 USC §§ 6002-6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege agair[illegible] self-incrimination, and therefore not sufficient to supplant the p[illegible]ilege and compel their testimony.

The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the Attorney General until either they answered the grand jury's questions or the term of the grand jury expired.[1] The Court of

[406 US 443]

Appeals for the Ninth Circuit affirmed. Stewart v United States, 440 F2d 954 (CA9 1971). This Court granted certiorari to resolve the important question whether testimony may be

1. The contempt order was issued pursuant to 28 USC § 1826.

compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ("use and derivative use" immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ("transactional" immunity). 402 US 971, 29 L Ed 2d 135, 91 S Ct 1668 (1971).

I

[2] The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence.[2] The power with respect to courts was established by statute in England as early as 1562,[3] and Lord Bacon observed in 1612 that all subjects owed the King their "knowledge and discovery."[4] While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common-law principle that "the public has a right to every man's evidence" was considered an "indubitable certainty" that "cannot be denied" by 1742.[5] The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment

[406 US 444]

requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts.[6] Mr. Justice White noted the importance of this essential power of government in his concurring opinion in Murphy v Waterfront Comm'n, 378 US 52, 93–94, 12 L Ed 2d 678, 704, 84 S Ct 1594 (1964):

"Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See Blair v United States, 250 US 273 [63 L Ed 979, 39 S Ct 468]. Such testimony constitutes one of the Government's primary sources of information."

[3, 4] But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty,[7] the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations,[8] and marks

2. For a concise history of testimonial compulsion prior to the adoption of our Constitution, see 8 J. Wigmore, Evidence § 2190 (J. McNaughton rev 1961). See Ullmann v United States, 350 US 422, 439 n. 15, 100 L Ed 511, 525, 76 S Ct 497, 53 ALR 2d 1008 (1956); Blair v United States, 250 US 273, 63 L Ed 979, 39 S Ct 468 (1919).

3. Statute of Elizabeth, 5 Eliz 1, c 9, § 12 (1562).

4. Countess of Shrewsbury's Case, 2 How St Tr 769, 778 (1612).

5. See the parliamentary debate on the Bill to Indemnify Evidence, particularly the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. Hansard, Parliamentary History of England, 675, 693 (1812). See also Piemonte v United States, 367 US 556, 559 n. 2, 6 L Ed 2d 1028, 1031, 81 S Ct 1720 (1961); Ullmann v United States, supra, at 439 n. 15, 100 L Ed at 525, 53 ALR2d 1008; Brown v Walker, 161 US 591, 600, 40 L Ed 819, 822, 16 S Ct 644 (1896).

6. 1 Stat 73, 88–89.

7. See Blair v United States, supra, at 281, 63 L Ed at 982; 8 Wigmore, supra, n 2, §§ 2192, 2197.

8. See Murphy v Waterfront Comm'n, 378 US 52, 55, 12 L Ed 2d 678, 681, 84 S Ct 1594 (1964).

an important advance in the development of our liberty.[9] It can be asserted in any proceeding, civil or criminal, administrative or judical, investigatory or adjudicatory;[10] and it

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protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[11] This Court has been zealous to safeguard the values that underlie the privilege.[12]

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence,[13] are not incom-

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9. See Ullmann v United States, 350 US, at 426; 100 L Ed at 518, 53 ALR2d 1008; E. Griswold, The Fifth Amendment Today 7 (1955).

10. Murphy v Waterfront Comm'n, supra, at 94, 12 L Ed 2d at 704 (White, J., concurring); McCarthy v Arndstein, 266 US 34, 40, 69 L Ed 158, 160, 45 S Ct 16 (1924); United States v Saline Bank, 1 Pet 100, 7 L Ed 69 (1828); cf. Gardner v Broderick, 392 US 273, 20 L Ed 2d 1082, 88 S Ct 1913 (1968).

11. Hoffman v United States, 341 US 479, 486, 95 L Ed 1118, 1123, 71 S Ct 814 (1951); Blau v United States, 340 US 159, 95 L Ed 170, 71 S Ct 223 (1950); Mason v United States, 244 US 362, 365, 61 L Ed 1198, 1199, 37 S Ct 621 (1917).

12. See, e. g., Miranda v Arizona, 384 US 436, 443-444, 16 L Ed 2d 694, 705, 706, 86 S Ct 1602, 10 ALR3d 974 (1966); Boyd v United States, 116 US 616, 635, 29 L Ed 746, 752, 6 S Ct 524 (1886).

13. Soon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or "indemnity," in the English usage, had been granted. See L. Levy, Origins of the Fifth Amendment 328, 495 (1968). Parliament enacted an immunity statute in 1710 directed against illegal gambling, 9 Anne, c 14, §§ 3-4, which became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York. Law of Mar 9, 1774, c 1651, 5 Colonial Laws of New York 621, 623 (1894). These statutes provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his ill-gotten gains, he was "acquitted, indemnified [immunized] and discharged from any further or other Punishment, Forfeiture or Penalty, which he . . . may have incurred by the playing for, and winning such Money . . . ." 9 Anne, c 14, § 4 (1710); Law of Mar 9, 1774, c 1651, 5 Colonial Laws of New York, at 623.

Another notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying, Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery. Lord Chancellor Macclesfield's Trial, 16 How St Tr 767, 1147 (1725). See 8 Wigmore, supra, n 2, § 2281, at 492. See also Bishop Atterbury's Trial, 16 How St Tr 323, 604-605 (1723). The legislatures in colonial Pennsylvania and New York enacted immunity legislation in the 18th century. See, e. g., Resolution of Jan 6, 1758, in Votes and Proceedings of the House of Representatives of the Province of Pennsylvania 1682-1776), 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed 1935); Law of Mar 24, 1772, c 1542, 5 Colonial Laws of New York 351, 353-354; Law of Mar 9, 1774, c 1651, id., at 621, 623; Law of Mar 9, 1774, c 1655, id., at 639, 641-642. See generally L. Levy, Origins of the Fifth Amendment 359, 384-385, 389, 402-403 (1968). Federal immunity statutes have existed since 1857. Act of Jan. 24, 1857, 11 Stat 155. For a history of the various federal immunity statutes, see Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale LJ 1568 (1963); Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. Louis U L Rev 327 (1966); and National Commission on

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with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses,[14]

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and their primary use has been to investigate such offenses.[15] Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century.[16] Indeed, prior to the enactment of the statute under consideration in this case, there were in force over 50 federal immunity statutes.[17] In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes.[18] The commentators,[19] and this Court on several occasions,[20] have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in Ullmann v United States, 350 US 422, 100 L Ed 511, 76 S Ct 497, 53 ALR2d 1008 (1956), such statutes have "become part of our constitutional fabric."[21] Id., at 438, 100 L Ed at 524.

Reform of Federal Criminal Laws, Working Papers, 1406-1411 (1970).

14. See, e. g., Resolution of Jan 6, 1758, n. 13, supra, 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed 1935); Law of Mar 24, 1772, c 1542, 5 Colonial Laws of New York 351, 354; Law of Mar 9, 1774, c 1655, id., at 639, 642. Bishop Atterbury's Trial, 16 Howell's State Trials 323 (1723), for which the House of Commons passed immunity legislation, was a prosecution for treasonable conspiracy. See id., at 604-605; 8 Wigmore, supra, n 2, § 2281, at 492 n. 2 (McNaughton rev 1961). Lord Chancellor Macclesfield's Trial, supra, for which Parliament passed immunity legislation, was a prosecution for political bribery involving the sale of public offices and appointments. See id., at 1147. The first federal immunity statute was enacted to facilitate an investigation of charges of corruption and vote buying in the House of Representatives. See Comment. n. 13, supra, 72 Yale LJ, at 1571.

15. See 8 Wigmore, supra, n. 2, § 2281, at 492. Mr. Justice White noted in his concurring opinion in Murphy v Waterfront Comm'n, 378 US, at 92, 12 L Ed 2d at 702, that immunity statutes "have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion, gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering." Id., at 94-95, 12 L Ed 2d at 704. See n, 14, supra.

16. See Comment, n. 13, supra, 72 Yale L J, at 1576.

17. For a listing of these statutes, see National Commission on Reform of Federal Criminal Laws, Working Papers, 1444-1445 (1970).

18. For a listing of these statutes, see 8 Wigmore, supra, n 2, § 2281, at 495 n. 11.

19. See, e. g., 8 J. Wigmore, Evidence § 2281, at 501 (3d ed 1940); 8 Wigmore, supra, n 2, § 2281, at 496.

20. See Hale v Henkel, 201 US 43, 70, 50 L Ed 652, 663, 26 S Ct 370 (1906); Brown v Walker, 161 US, at 610, 40 L Ed at 825.

21. This statement was made with specific reference to the Compulsory Testimony Act of 1893, 27 Stat 443, the model for almost all federal immunity statutes prior to the enactment of the statute under consideration in this case. See Murphy v Waterfront Comm'n, 378 US, at 95, 12 L Ed 2d, at 704 (White, J., concurring).

II

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[5] Petitioners contend, first, that the Fifth Amendment's privilege against compulsory self-incrimination, which is that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," deprives Congress of power to enact laws that compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful basis for compelling incriminatory testimony. They ask us to reconsider and overrule Brown v Walker, 161 US 591, 40 L Ed 819, 16 S Ct 644 (1896), and Ullmann v United States, supra, decisions that uphold the constitutionality of immunity statutes.[22] We find no merit to this contention and reaffirm the decisions in Brown and Ullmann.

III

Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 USC § 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege: "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information

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directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[23] 18 USC § 6002.

[6] The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege.[24] If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. Brown v Walker, supra. If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated. McCarthy v Arndstein, 266 US 34, 42, 69 L Ed 158, 161, 45 S Ct 16 (1924).

Petitioners draw a distinction between statutes that provide trans-

22. Accord, Gardner v Broderick, 392 US, at 276, 20 L Ed 2d at 1085; Murphy v Waterfront Comm'n, supra; McCarthy v Arndstein, 266 US, at 42, 69 L Ed at 161 (Brandeis, J.); Heike v United States, 227 US 131, 142, 57 L Ed 405, 454, 33 S Ct 226 (1913) (Holmes, J.).

23. For other provisions of the 1970 Act relative to immunity of witnesses, see 18 USC §§ 6001–6005.

24. See, e. g., Murphy v Waterfront Comm'n, supra, at 54, 78, 12 L Ed 2d at 681, 694; Counselman v Hitchcock, 142 US 547, 585, 35 L Ed 1110, 1121, 12 S Ct 195 (1892).

actional immunity and those that provide, as does the statute before us, immunity from use and derivative use.[25] They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on Counselman v Hitchcock, 142 US 547, 35 L Ed 1110, 12 S Ct 195 (1892), the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a reenactment of the Immunity Act of 1868,[26] provided that no "evidence obtained from a party or witness by means of a judicial

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proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . . ."[27] Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court.[28] On appeal, this Court construed the statute as affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him."[29] Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege,[30] the witness' refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution

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after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute under consideration] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." 142 US, at 585–586, 35 L Ed at 1122.

Sixteen days after the Counselman decision, a new immunity bill

25. See Piccirillo v New York, 400 US 548, 27 L Ed 2d 596, 91 S Ct 520 (1971).

26. 15 Stat 37.

27. See Counselman v Hitchcock, supra, at 560, 35 L Ed at 1113.

28. In re Counselman, 44 F 268 (CC ND Ill 1890).

29. Counselman v Hitchcock, supra, at 564, 35 L Ed at 1114.

30. Precisely, the Court held "that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply [sic] one, at least unless it is so broad as to have the same extent in scope and effect." Id., at 585, 35 L Ed at 1121. See Murphy v Waterfront Comm'n, supra, at 54, 78, 12 L Ed 2d at 681, 694.

was introduced by Senator Cullom,[31] who urged that enforcement of the Interstate Commerce Act would be impossible in the absence of an effective immunity statute.[32] The bill, which became the Compulsory Testimony Act of 1893,[33] was drafted specifically to meet the broad language in Counselman set forth above.[34] The new Act removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission and provided that:

"no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . . ." Act of Feb. 11, 1893, 27 Stat 444.

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This transactional immunity statute became the basic form for the numerous federal immunity statutes[35] until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration.[36] The new statute, which does not "afford [the] absolute immunity against future prosecution" referred to in Counselman, was drafted to meet what Congress judged to be the conceptual basis of Counselman, as elaborated in subsequent decisions of the Court, namely, that immunity from the

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use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.[37]

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31. Counselman was decided Jan. 11, 1892. Senator Cullom introduced the new bill on Jan. 27, 1892. 23 Cong Rec 573.

32. 23 Cong Rec 6333.

33. Act of Feb 11, 1893, 27 Stat 443, repealed by the Organized Crime Control Act of 1970, Pub L No 91-452, § 245, 84 Stat 931.

34. See the remarks of Senator Cullom, 23 Cong Rec 573, 6333, and Congressman Wise, who introduced the bill in the House. 24 Cong Rec 503. See Shapiro v United States, 335 US 1, 28-29 and n. 36, 92 L Ed 1787, 1804, 1805, 68 S Ct 1375 (1948).

35. Ullmann v United States, 350 US, at 438, 100 L Ed, at 524, 53 ALR2d 1008; Shapiro v United States, supra, at 6, 92 L Ed, at 1792. There was one minor exception. See Piccirillo v New York, 400 US, at 571 and n. 11, 27 L Ed 2d, at 610, 611 (Brennan, J., dissenting); Arnstein v McCarthy, 254 US 71, 73, 65 L Ed 138, 142, 41 S Ct 26 (1920).

36. The statute is a product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served as the model for this statute. In commenting on its proposal in a special report to the President, the Commission said:

"We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers." Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar 17, 1969, Working Papers of the Commission, 1446 (1970).

The Commission's recommendation was based in large part on a comprehensive study of immunity and the relevant decisions of this Court prepared for the Commission by Prof. Robert G. Dixon, Jr., of the George Washington University Law Center, and transmitted to the President with the recommendations of the Commission. See National Commission on Reform of Federal Criminal Laws, Working Papers, 1405-1444 (1970).

37. See S Rep No 91-617, pp 51-56, 145 (1969); HR Rep No 91-1549, p 42 (1970).

[1, 7, 8] The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'"[38] Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Our holding is consistent with the conceptual basis of Counselman. The Counselman statute, as construed by the Court, was plainly deficient in its failure to

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prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

"could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . ." 142 US, at 564, 35 L Ed at 1114;

that it:

"could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted," ibid.;

and that it:

"affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." 142 US, at 586, 35 L Ed at 1122.

The basis of the Court's decision was recognized in Ullmann v United States, 350 US 422, 100 L Ed 511, 76 S Ct 497 (1956), in which the Court reiterated that the Counselman statute was insufficient:

"because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution *based on knowledge and sources of information obtained*

38. Ullmann v United States, 350 US, at 438-439, 100 L Ed, at 524, 525, quoting Boyd v United States, 116 US at 634, 29 L Ed at 752. See Knapp v Schweitzer, 357 US 371, 380, 2 L Ed 2d 1393, 1401, 78 S Ct 1302 (1958).

from the compelled testimony." Id., at 437, 100 L Ed at 523, 524. (Emphasis supplied.)

See also Arndstein v McCarthy, 254 US 71, 73, 65 L Ed 138, 142, 41 S Ct 26 (1920). The broad language in Counselman relied upon by petitioners

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was unnecessary to the Court's decision, and cannot be considered binding authority.[39]

In Murphy v Waterfront Comm'n, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594 (1964), the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The Murphy petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted immunity

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from prosecution under the laws of New Jersey and New York.[40] They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under federal law, to which the immunity did not purport to extend. They were adjudged in civil contempt, and that judgment was affirmed by the New Jersey Supreme Court.[41]

The issue before the Court in Murphy was whether New Jersey and New York could compel the witnesses, whom the States had immunized from prosecution under their laws, to give testimony that might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was

39. Cf. The Supreme Court, 1963 Term, 78 Harv L Rev 179, 230 (1964). Language similar to the Counselman dictum can be found in Brown v Walker, 161 US, at 594-595, 40 L Ed, at 820, and Hale v Henkel, 201 US, at 67, 50 L Ed, at 662. Brown and Hale, however, involved statutes that were clearly sufficient to supplant the privilege against self-incrimination, as they provided full immunity from prosecution "for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . ." 161 US, at 594, 40 L Ed at 820; 201 US, at 66, 50 L Ed at 662. The same is true of Smith v United States, 337 US 137, 141, 146, 93 L Ed 1264, 1268, 1271, 69 S Ct 1000 (1949), and United States v Monia, 317 US 424, 425, 428, 87 L Ed 376, 379, 380, 63 S Ct 409 (1943). In Albertson v Subversive Activities Control Board, 382 US 70, 15 L Ed 2d 165, 86 S Ct 194 (1965), some of the Counselman language urged upon us by petitioners was again quoted. But Albertson, like Counselman, involved an immunity statute that was held insufficient for failure to prohibit the use of evidence derived from compelled admissions and the use of compelled admissions as an "investigatory lead." Id., at 80, 15 L Ed 2d at 172.

In Adams v Maryland, 347 US 179, 182, 98 L Ed 608, 612, 74 S Ct 442 (1954), and in United States v Murdock, 284 US 141, 149, 76 L Ed 210, 213, 52 S Ct 63, 82 ALR 1376 (1931), the Counselman dictum was referred to as the principle of Counselman. The references were in the context of ancillary points not essential to the decisions of the Court. The Adams Court did note, however, that the Fifth Amendment privilege prohibits the "use" of compelled self-incriminatory testimony. 347 US, at 181, 98 L Ed at 612. In any event, the Court in Ullmann v United States, 350 US, at 436-437, 100 L Ed, at 523, 524, 53 ALR2d 1008, recognized that the rationale of Counselman was that the Counselman statute was insufficient for failure to prohibit the use of evidence derived from compelled testimony. See also Arndstein v McCarthy, 254 US, at 73, 65 L Ed, at 142.

40. The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat 541.

41. In re Waterfront Comm'n of N. Y. Harbor, 39 NJ 436, 189 A2d 36 (1963).

faced with the question what limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.[42] The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination

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under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

"[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits."[43] 378 US, at 79, 12 L Ed 2d at 695.

The Court emphasized that this rule left the state witness and the Federal Government, against which the witness had immunity only from the *use* of the compelled testimony and evidence derived therefrom, "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." Ibid.

[1, 2] It is true that in Murphy the Court was not presented with the precise question presented by this case, whether a jurisdiction seeking to compel testimony may do so by granting only use and derivative-use immunity, for New Jersey and New York had granted petitioners transactional immunity. The Court heretofore has not

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squarely confronted this question,[44] because post-Counselman immunity statutes reaching the Court either have followed the pattern of the 1893 Act in providing transactional immunity,[45] or have been found de-

42. Reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in Malloy v Hogan, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489 (1964), in which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment. Murphy v Waterfront Comm'n, 378 US, at 57, 12 L Ed 2d, at 682.

43. At this point the Court added the following note: "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." Id., at 79 n. 18, 12 L Ed 2d at 695. If transactional immunity had been deemed to be the "constitutional rule" there could be no federal prosecution.

44. See, e. g., California v Byers, 402 US 424, 442 n. 3, 29 L Ed 2d 9, 25, 91 S Ct 1535 (1971) (Harlan, J., concurring in judgment); United States v Freed, 401 US 601, 606 n. 11, 28 L Ed 2d 356, 361, 91 S Ct 1112 (1971); Piccirillo v New York, 400 US 548, 27 L Ed 2d 596, 91 S Ct 496 (1971); Stevens v Marks, 383 US 234, 244-245, 15 L Ed 2d 724, 731, 732, 86 S Ct 788 (1966).

45. E. g., Murphy v Waterfront Comm'n, supra; Ullmann v United States, supra;

ficient for failure to prohibit the use of all evidence derived from compelled testimony.[46] But both the reasoning of the Court in Murphy and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or in a federal jurisdiction,[47] the Murphy conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege. As the Murphy Court noted, immunity from use and derivative use "leaves the witness and the Federal Government in substantially the same position [406 US 459] as if the witness had claimed his privilege"[48] in the absence of a grant of immunity. The Murphy Court was concerned solely with the danger of incrimination under federal law, and held that immunity from use and derivative use was sufficient to displace the danger. This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.[49]

IV

[1, 10] Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative-use immunity is coextensive with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available

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Smith v United States, 337 US 137, 93 L Ed 1264, 69 S Ct 1000 (1949); United States v Monia, 317 US 424, 87 L Ed 376, 63 S Ct 409 (1943); Hale v Henkel, 201 US 43, 50 L Ed 652, 26 S Ct 370 (1906); Jack v Kansas, 199 US 372, 50 L Ed 234, 26 S Ct 73 (1905); Brown v Walker, 161 US 591, 40 L Ed 819, 16 S Ct 644 (1896). See also n. 35, supra.

46. E. g., Albertson v Subversive Activities Control Board, 382 US, at 80, 15 L Ed 2d, at 172; Arndstein v McCarthy, 254 US, at 73, 65 L Ed, at 142.

47. In Malloy v Hogan, 378 US, at 10–11, 12 L Ed 2d, at 660, 661, the Court held that the same standards would determine the extent or scope of the privilege in state and in federal proceedings, because the same substantive guarantee of the Bill of Rights is involved. The Murphy Court emphasized that the scope of the privilege is the same in state and in federal proceedings. Murphy v Waterfront Comm'n, 378 US, at 79, 12 L Ed 2d, at 695.

48. Ibid.

49. As the Court noted in Gardner v Broderick, 392 US, at 276, 20 L Ed 2d, at 1085, "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute's prohibition

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will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:

"[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." 18 USC § 6002.

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead,"[50] and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

[11, 12] A person accorded this immunity under 18 USC § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in Murphy:

"Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 US, at 79 n. 18, 12 L Ed 2d at 695.

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

[406 US 461]

This is very substantial protection,[51] commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

[13] The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions.[52] A coerced confession, as

50. See, e. g., Albertson v Subversive Activities Control Board, 382 US, at 80, 15 L Ed 2d, at 172.

51. See Murphy v Waterfront Comm'n, 378 US, at 102-104, 12 L Ed 2d, at 708-710 (White, J., concurring).

52. Adams v Maryland, 347 US, at 181, 98 L Ed, at 612; Bram v United States, 168 US 532, 542, 42 L Ed 568, 573, 18 S Ct 183 (1897).

revealing of leads as testimony given in exchange for immunity,[53] is inadmissible in a criminal trial, but it does not bar prosecution.[54] Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from

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legitimate independent sources.[55] On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.[56]

There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

[1] We conclude that the immunity provided by 18 USC § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. The judgment of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

Mr. Justice Brennan and Mr. Justice Rehnquist took no part in the consideration or decision of this case.

SEPARATE OPINIONS

Mr. Justice Douglas, dissenting.

The Self-Incrimination Clause says: "No person . . . shall be compelled in any criminal case to be a witness against himself." I see no answer to the proposition that he is such a witness when only "use" immunity is granted.

My views on the question of the scope of immunity that is necessary to force a witness to give up his guarantee

[406 US 463]

against self-incrimination contained in the Fifth Amendment are so well known, see Ullmann v United States, 350 US 422, 440, 100

53. As Mr. Justice White, concurring in Murphy, pointed out:
"A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. Malloy v Hogan [378 US 1, 7-8, 12 L Ed 2d 653, 658-660, 84 S Ct 1489]; Spano v New York, 360 US 315, 3 L Ed 2d 1265, 79 S Ct 1202; Bram v United States, 168 US 532, 42 L Ed 568, 18 S Ct 183." 378 US, at 103, 12 L Ed 2d at 709.

54. Jackson v Denno, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 1 ALR3d 1205 (1964).

55. See supra, at 460, 32 L Ed 2d, at 226; Brief for the United States 37; Cf. Chapman v California, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (1967).

56. Jackson v Denno, supra.

L Ed 511, 525, 76 S Ct 497, 53 ALR 2d 1008 (dissenting), and Piccirillo v New York, 400 US 548, 549, 27 L Ed 2d 596, 598, 91 S Ct 520 (dissenting), that I need not write at length.

In Counselman v Hitchcock, 142 US 547, 586, 35 L Ed 1110, 1122, 12 S Ct 195, the Court adopted the transactional immunity test: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." Id., at 586, 35 L Ed at 1122. In Brown v Walker, 161 US 591, 40 L Ed 819, 16 S Ct 644, a case involving another federal prosecution, the immunity statute provided that the witness would be protected "on account of any transaction . . . concerning which he may testify." Id., at 594, 40 L Ed at 820. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to testify, a ruling that made "transactional immunity" part of the fabric of our constitutional law. Ullmann v United States, supra, at 438, 100 L Ed at 524.

This Court, however, apparently believes that Counselman and its progeny were overruled sub silentio in Murphy v Waterfront Comm'n, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594. Murphy involved state witnesses, granted transactional immunity under state law, who refused to testify for fear of subsequent federal prosecution. We held that the testimony in question could be compelled, but that the Federal Government would be barred from using any of the testimony, or its fruits, in a subsequent federal prosecution.

Murphy overruled, not Counselman, but Feldman v United States, 322 US 487, 88 L Ed 1408, 64 S Ct 1082, 154 ALR 982, which had held "that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." Murphy v Waterfront Comm'n, supra, at 77, 12 L Ed 2d at 694. But Counselman,

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as the Murphy Court recognized, "said nothing about the problem of incrimination under the law of another sovereign." Id., at 72, 12 L Ed 2d at 691. That problem is one of federalism, as to require transactional immunity between jurisdictions might "deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity [a result which] would be gravely in derogation of its sovereignty and obstructive of its administration of justice." United States ex rel. Catena v Elias, 449 F2d 40, 44 (CA3 1971). Moreover, as Mr. Justice Brennan has pointed out, the threat of future prosecution "substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved." Piccirillo v New York, 400 US, at 568, 27 L Ed 2d at 609 (dissenting).

None of these factors apply when the threat of prosecution is from the jurisdiction seeking to compel the testimony, which is the situation we faced in Counselman, and which we face today. The irrelevance of Murphy to such a situation was made clear in Albertson v Subversive Ac-

tivities Control Board, 382 US 70, 15 L Ed 2d 165, 86 S Ct 194, in which the Court struck down an immunity statute because it failed to measure up to the standards set forth in Counselman. Inasmuch as no interjurisdictional problems presented themselves, Murphy was not even cited. That is further proof that Murphy was not thought significantly to

[406 US 465]

undercut Counselman.[1] See Stevens v Marks, 383 US 234, 244–245; id., at 249–250, 15 L Ed 2d 724, 731, 732, at 734, 735, 86 S Ct 788 (Harlan, J., concurring and dissenting); Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup Ct Rev 103, 164.

If, as some have thought, the Bill of Rights contained only "counsels of moderation" from which courts and legislatures could deviate according to their conscience or discretion, then today's contraction of the Self-Incrimination Clause of the Fifth Amendment would be understandable. But that has not been true, starting with Chief Justice Marshall's opinion in United States v Burr,

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25 F Cas 38 (No. 14692e) (CC Va), where he ruled that the reach of the Fifth Amendment was so broad as to make the privilege applicable when there was a mere possibility of a criminal charge being made.

The Court said in Hale v Henkel, 201 US 43, 67, 50 L Ed 652, 662, 26 S Ct 370, that "if the criminality has already been taken away, the Amendment ceases to apply." In other words, the immunity granted is adequate if it operates as a complete pardon for the offense. Brown v Walker, 161 US, at 595, 40 L Ed at 820. That is the true measure of the Self-Incrimination Clause. As Mr. Justice Brennan has stated: "[U]se immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality." Piccirillo v New York, supra, at 567, 27 L Ed 2d at 609 (dissenting).

As Mr. Justice Brennan has also said:

"Transactional immunity . . . provides the individual with an assurance that he is not testifying

1. In Albertson v Subversive Activities Control Board, 382 US 70, 15 L Ed 2d 165, 86 S Ct 194, the Court was faced with a Fifth Amendment challenge to the Communist registration provision of the Subversive Activities Control Act of 1950, 64 Stat 987. We held that the provision violated the prospective registrant's privilege against self-incrimination, and that the registration provision was not saved by a so-called "immunity statute" (§ 4(f)) which prohibited the introduction into evidence in any criminal prosecution of the fact of registration under the Act. The Court's analysis of this immunity provision rested solely on Counselman:

"In Counselman v Hitchcock, 142 US 547, [35 L Ed 1110, 12 S Ct 195,] decided in 1892, the Court held 'that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . ,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard . . .' by affording 'absolute immunity against future prosecution for the offence to which the question relates.' Id., at 585–586, [35 L Ed at 1122.]. *Measured by these standards*, the immunity granted by § 4(f) is not complete." 382 US, at 80, 15 L Ed 2d at 172. (Emphasis added.)

Thus, the Albertson Court, which could have struck the statute by employing the test approved today, went well beyond, and measured the statute solely against the more restrictive standards of Counselman.

about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony." 400 US, at 568–569, 27 L Ed 2d at 609 (dissenting).

When we allow the prosecution to offer only "use" immunity we allow it to grant far less than it h s taken away. For while the pre ise testimony that is compelled may not be used, leads from that testimony may

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be pursued and used to convict the witness.[2] My view is that the framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The Self-Incrimination Clause creates, as I have said before, "the federally protected right of silence," making it unconstitutional to use a law "to pry open one's lips and make him a witness against himself." Ullmann v United States, 350 US, at 446, 100 L Ed at 528 (dissenting). That is indeed one of the chief procedural guarantees in our accusatorial system. Government acts in an ignoble way when it stoops to the end which we authorize today.

I would adhere to Counselman v Hitchcock and hold that this attempt to dilute the Self-Incrimination Clause is unconstitutional.

Mr. Justice Marshall, dissenting.

Today the Court holds that the United States may compel a witness to give incriminating testimony, and subsequently prosecute him for crimes to which that testimony relates. I cannot believe the Fifth Amendment permits that result. See Piccirillo v New York, 400 US 548, 552, 27 L Ed 2d 596, 599, 91 S Ct 520 (1971) (Brennan, J., dissenting from dismissal of certiorari).

The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him. A grant of immunity

[406 US 468]

may strip the witness of the right to refuse to testify, but only if it is broad enough to eliminate all possibility that the testimony will in fact operate to incriminate him. It must put him in precisely the same position, vis-à-vis the government that has compelled his testimony,* as he would have been in had he remained silent in reliance on the privilege. Ullmann v United States, 350 US 422, 100 L Ed 511, 76 S Ct 497, 53 ALR2d 1008 (1956); McCarthy v Arndstein, 266 US 34, 69

2. As Mr. Justice Marshall points out, post at 469, 32 L Ed 2d at 231, it is futile to expect that a ban on use or derivative use compelled testimony can be enforced.

It is also possible that use immunity might actually have an adverse impact on the administration of justice rather than promote law enforcement. A witness might believe, with good reason, that his "immunized" testimony will inevitably lead to a felony conviction. Under such circumstances, rather than testify and aid the investigation, the witness might decide he would be better off remaining silent even if he is jailed for contempt.

* This case does not, of course, involve the special considerations that come into play when the prosecuting government is different from the government that has compelled the testimony. See Murphy v Waterfront Comm'n, 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594 (1964).

L Ed 158, 45 S Ct 16 (1924); Hale v Henkel, 201 US 43, 50 L Ed 652, 26 S Ct 370 (1906); Brown v Walker, 161 US 591, 40 L Ed 819, 16 S Ct 644 (1896); Counselman v Hitchcock, 142 US 547, 35 L Ed 1110, 12 S Ct 195 (1892).

The Court recognizes that an immunity statute must be tested by that standard, that the relevant inquiry is whether it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." Ante, at 462, 32 L Ed 2d at 227. I assume, moreover, that in theory that test would be met by a complete ban on the use of the compelled testimony, including all derivative use, however remote and indirect. But I cannot agree that a ban on use will in practice be total, if it remains open for the government to convict the witness on the basis of evidence derived from a legitimate independent source. The Court asserts that the witness is adequately protected by a rule imposing on the government a heavy burden of proof if it would establish the independent character of evidence to be used against the witness. But in light of the inevitable uncertainties of the fact-finding process, see Speiser v Randall, 357 US 513, 525, 2 L Ed 2d 1460, 1472, 78 S Ct 1332 (1958), a greater margin of protection is required in order to provide a reliable guarantee that the witness

[406 US 469]

is in exactly the same position as if he had not testified. That margin can be provided only by immunity from prosecution for the offenses to which the testimony relates, i. e., transactional immunity.

I do not see how it can suffice merely to put the burden of proof on the government. First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." Ante, at 460, 32 L Ed 2d at 226. For the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. Cf. Giglio v United States, 405 US 150, 31 L Ed 2d 104, 92 S Ct 763 (1972); Santobello v New York, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971). The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net.

[406 US 470]

In my view the Court turns reason on its head when it compares a stat-

utory grant of immunity to the "immunity" that is inadvertently conferred by an unconstitutional interrogation. The exclusionary rule of evidence that applies in that situation has nothing whatever to do with this case. Evidence obtained through a coercive interrogation, like evidence obtained through an illegal search, is excluded at trial because the Constitution prohibits such methods of gathering evidence. The exclusionary rules provide a partial and inadequate remedy to some victims of illegal police conduct, and a similarly partial and inadequate deterrent to police officers. An immunity statute, on the other hand, is much more ambitious than any exclusionary rule. It does not merely attempt to provide a remedy for past police misconduct, which never should have occurred. An immunity statute operates in advance of the event, and it authorizes—even encourages—interrogation that would otherwise be prohibited by the Fifth Amendment. An immunity statute thus differs from an exclusionary rule of evidence in at least two critical respects.

First, because an immunity statute gives constitutional approval to the resulting interrogation, the government is under an obligation here to remove the danger of incrimination completely and absolutely, whereas in the case of the exclusionary rules it may be sufficient to shield the witness from the fruits of the illegal search or interrogation in a partial and reasonably adequate manner. For when illegal police conduct has occurred, the exclusion of evidence does not purport to purge the conduct of its unconstitutional character. The constitutional violation remains, and may provide the basis for other relief, such as a civil action for damages (see 42 USC § 1983 and Bivens v Six Agents, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971)), or a criminal prosecution of the responsible

[406 US 471]

officers (see 18 USC §§ 241-242). The Constitution does not authorize police officers to coerce confessions or to invade privacy without cause, so long as no use is made of the evidence they obtain. But this Court has held that the Constitution does authorize the government to compel a witness to give potentially incriminating testimony, so long as no incriminating use is made of the resulting evidence. Before the government puts its seal of approval on such an interrogation, it must provide an absolutely reliable guarantee that it will not use the testimony in any way at all in aid of prosecution of the witness. The only way to provide that guarantee is to give the witness immunity from prosecution for crimes to which his testimony relates.

Second, because an immunity statute operates in advance of the interrogation, there is room to require a broad grant of transactional immunity without imperiling large numbers of otherwise valid convictions. An exclusionary rule comes into play after the interrogation or search has occurred; and the decision to question or to search is often made in haste, under pressure, by an officer who is not a lawyer. If an unconstitutional interrogation or search were held to create transactional immunity, that might well be regarded as an excessively high price to pay for the "constable's blunder." An immunity statute, on the other hand, creates a framework in which the prosecuting attorney can make a calm and reasoned decision whether to compel testimony and suffer the resulting ban

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For both these reasons it is clear to me that an immunity statute must be tested by a standard far more demanding than that appropriate for an exclusionary rule fashioned to deal with past constitutional violations. Measured by that standard, the statute approved today by the Court fails miserably. I respectfully dissent.

EDITOR'S NOTE

An annotation on "Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination," appears p 869, infra.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

PARR

Judiciary

*[378 US 52]

*WILLIAM MURPHY and John Moody, Sr., Petitioners,

v

WATERFRONT COMMISSION OF NEW YORK HARBOR

378 US 52, 12 L ed 2d 678, 84 S Ct 1594

[No. 138]

Argued March 5, 1964. Decided June 15, 1964.

SUMMARY

Notwithstanding the grant of immunity under the laws of New Jersey and New York, petitioners, as witnesses before the Waterfront Commission of New York Harbor, refused to answer questions on the ground that the answers might tend to incriminate them under federal law, to which the grant of immunity did not purport to extend. Petitioners were thereupon held in civil and criminal contempt of court. The New Jersey Supreme Court affirmed the civil contempt judgments, holding that a state may constitutionally compel a witness to give testimony which might be used in a federal prosecution against him. (39 NJ 436, 189 A2d 36.)

On certiorari, the United States Supreme Court vacated the judgment of contempt and remanded the cause to the New Jersey Supreme Court. In an opinion by GOLDBERG, J., expressing the views of five of the justices, the Court, overruling its earlier decisions to the contrary, held that (1) the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law; and (2) the federal government is prohibited from making any use of testimony which the petitioners were compelled to give after grant of immunity under the state laws. It was also held that in the light of this development, the petitioners should be afforded an opportunity to answer the questions.

BLACK, J., concurred in the Court's opinion for the reasons stated therein and for the reasons stated in various separate opinions written by him.

HARLAN, J., joined by CLARK, J., concurred on the basis that the rule that testimony compelled in a state proceeding over a witness' claim of the privilege against self-incrimination may not be used against the witness in federal prosecution rests on the Court's supervisory power over the administration of federal criminal justice, rather than on constitutional grounds.

WHITE, J., joined by STEWART, J., also concurred, elaborating the view that the privilege against self-incrimination does not require absolute immunity from prosecution in other jurisdictions.

378 US 52, 12 L ed 2d 678, 84 S Ct 1594

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Witnesses § 81 — self-incrimination — waiver of privilege

1. A witness before an administrative agency does not waive his privilege against self-incrimination by expressly declining to assert it at the first hearing or by asserting in contempt proceedings that the agency's investigation constituted an unlawful interference with innocent conduct, where at later hearings the agency and the trial court recognized the witness' right to assert the privilege and moreover the agency never raised the question of waiver in the trial court.

[*See annotation reference* 1]

Witnesses § 79 — self-incrimination — validity of grant of immunity

2. A grant of immunity from prosecution is valid only if it is coextensive with the scope of the privilege against self-incrimination.

[*See annotation references* 2, 3]

Witnesses §§ 72, 94 — self-incrimination — facets of privilege

3. The constitutional privilege against self-incrimination has two primary interrelated facets: the government may not use compulsion to elicit self-incriminating statements and may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion.

Witnesses § 72 — self-incrimination — danger of prosecution in another jurisdiction

4. The constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

[*See annotation reference* 4]

Courts § 781; Witnesses § 72 — self-incrimination — federal standards as controlling

5. The availability of the federal privilege against self-incrimination to a witness in a state inquiry is to be determined according to the same standard that is applicable in a federal proceeding.

Witnesses § 79 — self-incrimination — state witness — federal prosecution

6. As a matter of constitutional law, a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.

[*See annotation references* 5–8]

ANNOTATION REFERENCES

1. Waiver or loss of privilege against self-incrimination, as regards person other than accused. 95 L ed 354.

2. Adequacy of immunity offered as condition of denial of privilege against self-incrimination. 53 ALR2d 1030. See also 48 L ed 860, 65 L ed 138.

3. Validity and adequacy, as a matter of constitutional law, of federal statute granting immunity in lieu of privilege against self-incrimination. 100 L ed 533, 5 L ed 2d 950.

4. As to the pre-existing law, see annotations in 59 ALR 895 and 82 ALR 1380, dealing with "Privilege against self-incrimination as extending to danger of prosecution in another jurisdiction."

5. Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction. 2 ALR2d 631.

6. Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction. 154 ALR 994.

7. Use in subsequent prosecution of self-incriminating testimony given without invoking privilege. 5 ALR2d 1404.

8. Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed. 157 ALR 428.

Witnesses § 94 — federal use of state witness' testimony

7. Neither the testimony of a state witness compelled under state immunity law and incriminating under federal law nor the fruits of such testimony can be used by the federal government in investigating and prosecuting crime.

[*See annotation references* 5–8]

Evidence § 419 — self-incrimination — state immunity — federal use of testimony — burden of proof

8. Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to his federal prosecution, the federal government has the burden of showing that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence.

Witnesses § 84 — statutory immunity — effect

9. A witness in a state investigation of crime who, under state law, is granted immunity from prosecution may be compelled to answer questions incriminating under federal law, the federal government being prohibited from making any use of such testimony or its fruit in a federal prosecution.

[*See annotation references* 5–8]

Contempt § 24 — purging — change of relevant law

10. A witness held in contempt of court for his refusal to answer questions in a state inquiry into crime will be afforded an opportunity to answer these questions where at the time he refused to answer he had a reasonable fear, based on a decision of the United States Supreme Court, that the federal authorities might use his answers in connection with a federal prosecution and thereafter the United States Supreme Court, overruling its earlier decision, held that the federal government may make no such use of the answers.

APPEARANCES OF COUNSEL

Harold Krieger argued the cause for petitioners.
William P. Sirignano argued the cause for respondent.
Briefs of Counsel, p 1317, infra.

OPINION OF THE COURT

*[378 US 53]

*Mr. Justice Goldberg delivered the opinion of the Court.

We have held today that the Fifth Amendment privilege against self-incrimination must be deemed fully applicable to the States through the Fourteenth Amendment. Malloy v Hogan, 378 US 1, 12 L ed 2d 653, 84 S Ct 1489. This case presents a related issue: whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction.[1]

Petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor concerning a work stoppage at the Hoboken, New Jersey, piers. After refusing to respond to certain questions about the stoppage on the ground that the answers might tend to incriminate them, petitioners were granted immunity from prosecution under the laws of New Jersey and New York.[2] Notwithstanding this grant of immu-

1. Since the privilege is now fully applicable to the State and to the Federal Government, the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government.

2. The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat 541.

nity, they still refused to respond
*[378 US 54]
to the questions on the *ground that the answers might tend to incriminate them under *federal* law, to which the grant of immunity did not purport to extend. Petitioners were thereupon held in civil and criminal contempt of court. The New Jersey Supreme Court reversed the criminal contempt conviction on procedural grounds but, relying on this Court's decisions in Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302; Feldman v United States, 322 US 487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982; and United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376, affirmed the civil contempt judgments on the merits. The court held that a State may constitutionally compel a witness to give testimony which might be used in a federal prosecution against him.[3] 39 NJ 436, 452–458, 189 A2d 36, 46–49.

Headnote 2

Since a grant of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination, Counselman v Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195, we must now decide the fundamental constitutional question of whether, absent an immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction. The answer to this question must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes.

*[378 US 55]

*I. THE POLICIES OF THE PRIVILEGE.

The privilege against self-incrimination "registers an important advance in the develop ent of our liberty—'one of the gr at landmarks in man's struggle to make himself civilized.'" Ullmann v United States, 350 US 422, 426, 100 L ed 511, 518, 76 S Ct 497, 53 ALR2d 1008.[4] It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev, 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," United States v Grunewald, 233 F2d 556, 581–582 (Frank, J.,

3. At a prior hearing, petitioners had refused to answer the questions, not on the ground of self-incrimination, but on the ground that the Commission had no statutory authority to investigate the work stoppage because it involved a labor dispute over which the National Labor Relations Board had exclusive jurisdiction. This claim was litigated through the state courts and rejected, 35 NJ 62, and this courts and rejected, 35 NJ 62, 171 A2d 295, and this Court denied review, 368 US 32, 7 L ed 2d 91, 82 S Ct 146. Petitioners thereupon purged themselves of contempt but again refused to answer the questions, this time on the ground of self-incrimination. In reviewing the contempt judgments which form the bases of this case, the New Jersey Supreme Court correctly held that petitioners did not, at the prior hearing, waive their privilege against self-incrimination. 39 NJ 436, 449, 189 A2d 36, 44.

Headnote 1

4. The quotation is from Griswold, The Fifth Amendment Today (1955), 7.

nity, they still refused to respond

*[378 US 54]

to the questions on the *ground that the answers might tend to incriminate them under *federal* law, to which the grant of immunity did not purport to extend. Petitioners were thereupon held in civil and criminal contempt of court. The New Jersey Supreme Court reversed the criminal contempt conviction on procedural grounds but, relying on this Court's decisions in Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302; Feldman v United States, 322 US 487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982; and United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376, affirmed the civil contempt judgments on the merits. The court held that a State may constitutionally compel a witness to give testimony which might be used in a federal prosecution against him.[3] 39 NJ 436, 452-458, 189 A2d 36, 46-49.

Headnote 2

Since a grant of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination, Counselman v Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195, we must now decide the fundamental constitutional question of whether, absent an immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction. The answer to this question must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes.

*[378 US 55]

*I. THE POLICIES OF THE PRIVILEGE.

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4. The quotation is [illegible] Fifth Amendment Toda[illegible]

dissenting), revd 353 US 391, 1 L ed 2d 931, 77 S Ct 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Quinn v United States, 349 US 155, 162, 99 L ed 964, 972, 75 S Ct 668, 51 ALR2d 1157.

Most, if not all, of these policies and purposes are defeated when a witness "can be whipsawed into incriminating himself under both state and federal law even though" the constitutional privilege against self-incrimination is applicable to each. Cf. Knapp v Schweitzer, 357 US 371, 385, 2 L ed 2d 1393, 1404, 78 S Ct 1302 (dissenting opinion of Mr. Justice Black). This has become espe-

*[378 US 56]

cially true in our age of *"cooperative federalism," where the Federal and State Governments are waging a united front against many types of criminal activity.[5]

*[378 US 57]

*Respondent contends, however, that we should adhere to the "established rule" that the constitutional privilege against self-incrimination does not protect a witness in one jurisdiction against being compelled to give testimony which could be used to convict him in another jurisdiction. This "rule" has three decisional facets: United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376, held that the Federal Government could compel a witness to give testimony which might incriminate him under state law; Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302, held that a State could compel a witness to give testimony which might incriminate him under federal law; and Feldman v United States, 322 US

5. It has been argued that permitting a witness in one jurisdiction within our federal structure to invoke the privilege on the ground that he fears prosecution in another jurisdiction: "is rational only if the policy of the privilege is assumed to be to excuse the witness from the unpleasantness, the indignity, the 'unnatural' conduct of denouncing himself. [But] the policy of the privilege is not this. The policy of the privilege is to regulate a particular government-governed relation—first, to help prevent inhumane treatment of persons from whom information is desired and, second, to satisfy popular sentiment that, when powerful and impersonal government arrays its forces against solitary governed, it would be a violation of the individual's 'sovereignty' and less than fair for the government to be permitted to conscript the knowledge of the governed to its aid. Where the crime is a foreign crime, any motive to inflict brutality upon a person because of the incriminating nature of the disclosure—any 'conviction hunger' as such—is absent. And the sentiments relating to the rules of war between government and governed do not apply where the two are not at war. . . .

"Thus, reasoning from its rationales, the privilege should not apply no matter how incriminating is the disclosure under foreign law and no matter how probable is prosecution by the foreign sovereignty. This is so whether the relevant two sovereignties are different nations, different states, or different sovereignties (such as federal and state) with jurisdiction over the same geographical area." 8 Wigmore, Evidence (McNaughton rev, 1961), 345.

As noted in the text, however, the privilege against self-incrimination represents many fundamental values and aspirations. It is "an expression of the moral striving of the community. . . . a reflection of our common conscience . . . ." Malloy v Hogan, 378 US 9, n. 7, 12 L ed 2d 660, quoting Griswold, The Fifth Amendment Today (1955), 73. That is why it is regarded as so fundamental a part of our constitutional fabric, despite the fact that "the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect." Kalven, Invoking the Fifth Amendment—Some Legal and Impractical Considerations, 9 Bull Atomic Sci 181, 182. It will not do, therefore, to assign one isolated policy to the privilege, and then to argue that since "the" policy may not be furthered measurably by applying the privilege across state-federal lines, it follows that the privilege should not be so applied.

487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982, held that testimony thus compelled by a State could be introduced into evidence in the federal courts.

Our decision today in Malloy v Hogan, supra, necessitates a reconsideration of this rule.[6] Our review of the pertinent cases in this Court and of their English antecedents reveals that Murdock did not adequately consider the relevant authorities and has been significantly weakened by subsequent decisions of this Court, and, further, that the legal premises underlying Feldman and Knapp have since been rejected.

*[378 US 58]

*II. The Early English and American Cases.

A. *The English Cases Before the Adoption of the Constitution.*

In 1749 the Court of Exchequer decided East India Co. v Campbell, 1 Ves sen 246, 27 Eng Rep 1010. The defendant in that case refused to "discover" certain information in a proceeding in an English court on the ground that it might subject him to punishment in the courts of India. The court unanimously held that the privilege against self-incrimination protected a witness in an English court from being compelled to give testimony which could be used to convict him in the courts of another jurisdiction. The court stated the rule to be: "that this court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime . . . and that he is punishable appears from the case of Omichund v Barker, [1 Atk 21.] as a jurisdiction is erected in Calcutta for criminal facts: where he may be sent to government and tried, though not punishable here; like the case of one who was concerned in a rape in Ireland, and sent over there by the government to be tried, although the court of B. R. here refused to do it . . . for the government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals." 1 Ves sen, at 247, 27 Eng Rep, at 1011.

In the following year, this rule was applied in a case involving separate systems of courts and law located within the same geographic area. The defendant in Brownsword v Edwards, 2 Ves sen 243, 28 Eng Rep 157, refused to "discover, whether she was lawfully married" to a certain individual, on the ground that if she admitted to the marriage she would be confessing to an act which, although legal under the com-

*[378 US 59]

mon law, would render her *"liable to prosecution in ecclesiastical court." The Lord Chancellor said:

"This appears a very plain case, in which defendant may protect herself from making a discovery of her marriage; and I am afraid, if the court should over-rule such a plea, it would

6. The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, see, e. g., Counselman v Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. See, e. g., Haynes v Washington, 373 US 503, 10 L ed 2d 513, 83 S Ct 1336. In every "whipsaw" case, either the "compelling" government or the "using" government is a State, and, until today, the States were not deemed fully bound by the privilege against self-incrimination. Now that both governments are fully bound by the privilege, the conceptual difficulty of pinpointing the alleged violation of the privilege on "compulsion" or "use" need no longer concern us.

Headnote 3

be setting up the oath ex officio; which then the parliament in the time of Charles I. would in vain have taken away, if the party might come into this court for it. The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land." 2 Ves sen, at 244-245, 28 Eng Rep, at 158.

B. *The Saline Bank Case.*

It was against this background of English case law that this Court in 1828 decided United States v Saline Bank of Virginia, 1 Pet 100, 7 L ed 69. The Government, seeking to recover certain bank deposits, brought suit in the District Court against the bank and a number of its stockholders. The defendants resisted discovery of "any matters, whereby they may impeach or accuse themselves of any offence or crime, or be liable by the laws of the commonwealth of Virginia, to penalties and grievous fines . . . ." Id., at 102, 7 L ed at 70. The unanimous opinion of the Court, delivered by Chief Justice Marshall, reads as follows:

"This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.

"The Court below decided in favour of the validity of the plea, and dismissed the bill.

"It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger.
*[378 US 60]
The rule *clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it.

"The decree of the Court below is therefore affirmed." Id., at 104, 7 L ed at 71.

This case squarely holds that the privilege against self-incrimination protects a witness in a federal court from being compelled to give testimony which could be used against him in a state court.

C. *Subsequent Development of the English Rule.*

In 1851, the English Court of Chancery decided King of the Two Sicilies v Willcox, 1 Sim (NS) 301, 61 Eng Rep 116, a case in which this Court in United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376, erroneously cited as representing the settled "English rule" that a witness is not protected "against disclosing offenses in violation of the laws of another country." Id., at 149, 76 L ed at 213. Defendants in that case resisted discovery of information, which, they asserted, might subject them to prosecution under the laws of Sicily. In denying their claim, the Vice Chancellor said:

"The rule relied on by the defendants, is one which exists merely by virtue of our own municipal law and must, I think, have reference, exclusively, to matters penal by that law: to matters as to which, if disclosed, the judge would be able to say, as matter of law, whether it could or could not entail penal consequences." 1 Sim (NS), at 329, 61 Eng Rep, at 128.

Two reasons were given in support of this statement: (1) "The impossibility of knowing, as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend . . .," id., at 331, 61 Eng Rep, at 128; and (2) the

fact that "in such a case, in order to make the disclosure dangerous to
*[378 US 61]
the *party who objects, it is essential that he should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated,"[7] ibid, 61 Eng Rep, at 128.

Within a few years, the pertinent part of King of the Two Sicilies was specifically overruled by the Court of Chancery Appeal in United States of America v McRae, LR, 3 Ch App 79 (1867), a case n t mentioned by this Court in United States v Murdock, supra. In McRae, the United States sued in an English court for an accounting and payment of moneys allegedly received by the defendant as agent for the Confederate States during the Civil War. The defendant refused to answer questions on the ground that to do so would subject him to penalties under the laws of the United States. The United States argued that the "protection from answering applies only where a person might expose himself to the peril of a penal proceeding in this country [England], and not to the case where the liability to penalty or forfeiture is incurred by the breach of the laws of
*[378 US 62]
*a foreign country [the United States]." LR, 3 Ch App, at 83-84. The United States relied on King of the Two Sicilies v Willcox, supra. The Lord Chancellor sustained the claim of privilege and limited King of the Two Sicilies to its facts. He said:

"I quite agree in the general principles stated by Lord Cranworth, and in their application to the particular case before him. . . . [The defendants there] did not furnish the least information what the foreign law was upon the subject, though it was necessary for the Judge to know this with certainty before he could say whether the acts done by the persons who objected to answer had rendered them amenable to punishment by that law or not. . . . [Moreover,] it was doubtful whether the Defendants would ever be within the reach of a prosecution, and their being so depended on their voluntary return to [Sicily]." LR, 3 Ch App, at 84-87.

In refusing to follow King of the Two Sicilies beyond its particular facts, the court said:

"But in giving judgment Lord Cranworth went beyond the particular case, and expressed his opinion that the rule upon which the Defendants relied to protect them from answering was one which existed merely by virtue of our own municipal law, and which must have reference exclusively to matters penal by that law. It was unnecessary to lay down so broad a proposition to support the judgment which he pronounced . . . . What would have

7. In The Queen v Boyes, 1 B & S 311, decided by the Queen's Bench in 1861, a witness had declined to answer a question on the ground that it might tend to incriminate him, whereupon the "*Solicitor General* then produced a pardon of the witness." Id., at 313. The witness nevertheless refused to answer the question on the ground that he could still be impeached by the Parliament. The court held: "that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. . . .
Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment . . .
No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of." Id., at 330-331.

been Lord Cranworth's opinion upon [the present] state of circumstances it is impossible for me to conjecture; but it is very different from that which was before his mind in that case, and I cannot feel that there is any judgment of his which ought to influence my decision upon the present occasion." Id., at 85.

*[378 US 63]

*The court then concluded that under the circumstances it could not "distinguish the case in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." Id., at 87. This decision, not King of the Two Sicilies, represents the settled "English rule" regarding self-incrimination under foreign law. See Heriz v Riera, 11 Sim 318, 59 Eng Rep 896.

III. THE RECENT SUPREME COURT CASES.

In 1896, in Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644, this Court, for the first time, sustained the constitutionality of a federal immunity statute. Appellant in that case argued, inter alia, that: "while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts." Id., at 606, 40 L ed at 824.

The Court construed the applicable statute, however, to prevent prosecutions either in state or federal courts.[8]

8. The Court in Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644, signified approval of the English rule announced in The Queen v Boyes, supra, as follows:

"But even granting that there were still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in The Queen v Boyes, 1 B & S 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate." 161 US, at 608, 40 L ed at 825. See note 7, supra.

The lower federal courts were also following the English rule that a refusal to answer questions could legitimately be based on the danger of incrimination in another jurisdiction. In the case of In re Graham, 10 Fed Cas 913 (No. 5,659), for example, the witness refused to answer questions asked by a federal official on the ground that answers to such questions might expose "him to a criminal prosecution under the laws of the state of New York." Id., at 914. Judge Blatchford held that the witness was "privileged from answering the questions." Ibid. In the case of In re Hess, 134 F 109, decided in 1905, where a bankrupt refused to answer certain questions on the ground that they might tend to incriminate him under state law, the court said:

"Section 860 of the Revised Statutes only prohibits the use of evidence that may be obtained from the bankrupt's books in prosecutions in the federal courts. There is nothing in this section which extends that immunity to the use of such evidence in the state courts, and there is nothing to prevent the trustee from making use of the bankrupt's books in a criminal prosecution against him instituted in the state courts. Obviously, therefore, if section 7, cl 9, of the bankrupt act, does not protect him against the use of the evidence which he alleges is contained in his books, of an incriminating nature, in either the state or federal courts, and section 860 of the Revised Statutes extends the immunity only to federal courts, and not to state courts, it is plain that whatever incriminating evidence the books may contain could be used without restriction in the state courts for the purpose of convicting him of any crime for which he might be indicted there, and, in consequence of this danger to him, the plea of

*[378 US 64]

*Shortly thereafter, the Court decided Jack v Kansas, 199 US 372, 50 L ed 234, 26 S Ct 73, in which the state court had held plaintiff in error in contempt for his refusal to answer certain questions on the ground that they would subject him to possible incrimination under federal law. In rejecting plaintiff's claim, this Court said that the Fifth Amendment "has no application in a proceeding like this," and hence "the sole question in the case" is whether "the denial of his claim of right to refuse to answer the questions was in violation of the Fourteenth

*[378 US 65]

*Amendment to the Constitution. . . ." Id., at 380, 50 L ed at 236. The Court stated that it did "not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the Government for such purpose." Id., at 382, 50 L ed at 237. Then, without citing any authority, the Court added the following cryptic dictum: "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." Ibid.

That this dictum related solely to the "legal immunity" under the Due Process Clause of the Fourteenth Amendment is apparent from the fact that it was regarded, five weeks later in Ballmann v Fagin, 200 US 186, 50 L ed 433, 26 S Ct 212, as wholly inapplicable to cases decided under the Self-Incrimination Clause of the Fifth Amendment.[9] Ballmann had been held in contempt of a federal court for refusing to answer certain questions before a federal grand jury. He claimed that his answers might expose him "to the criminal law of the State in which the grand jury was sitting." Id., at 195, 50 L ed at 437. Justice Holmes, writing for a Court which included the author of Jack v Kansas, supra, squarely held that "[a]ccording to United States v Saline Bank, 1 Pet 100 [7 L ed 69], he was exonerated from disclosures which would have exposed him to the penalties of the state law. See Jack v Kansas, 199 US 372 [50 L ed 234, 26 S Ct 73], decided this term." 200 US, at 195, 50 L ed at 437.

A few months after Ballmann, the Court decided Hale v Henkel, 201 US 43, 50 L ed 652, 26 S Ct 370. Appellant had been held in contempt of a federal court for refusing to answer certain questions and produce certain documents. His refusal was based in part on the argument that the federal immunity statute did not protect him from state prosecution. The Government argued, on the authority of Brown v Walker, supra, that the statute did protect

*[378 US 66]

him *from state prosecution. The Government assumed that it was settled that a valid federal immunity statute would have to protect against state prosecution. It never suggested, therefore, that immunity from federal prosecution was all that was required. Appellant similarly assumed, without argument, that the Constitution required immunity from state conviction as a condition of requiring incriminating testimony in a federal court. Thus the critical constitutional issue—whether the Fifth Amendment protects a federal witness from incrim-

his constitutional privilege must prevail." Id., at 112.

Also see, e. g., In re Koch, 14 Fed Cas 832 (No. 7,916); In re Feldstein, 103 F 269; Re Henschel, 7 Am Bankr R 207; In re Kanter, 117 F 356; In re Hooks Smelting Co. 138 F 954, 146 F 336.

9. At this time, the privilege against self-incrimination had not yet been held applicable to the States through the Fourteenth Amendment.

inating himself under state law—was not briefed or argued in Hale v Henkel. Nor was its resolution necessary to the decision of the case, for the Court could have decided the relevant point on the authority of Brown v Walker, supra, which had held that a similar federal immunity statute protected against state prosecution. Nevertheless, the Court went on to say:

"The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. Queen v Boyes, 1 B & S 311; King of the Two Sicilies v Willcox, 7 State Trials (NS), 1049, 1068; State v March, 1 Jones (N Car), 526; State v Thomas, 98 N Car 599.

"The case of United States v Saline Bank, 1 Pet 100 [7 L ed 69], is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law

*[378 US 67]

which imposed *the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." 201 US, at 69, 50 L ed at 663.

This dictum, subsequently relied on in United States v Murdock, supra, was not well founded.

The settled English rule was exactly the opposite of that stated by the Court. The most recent authoritative announcement of the English rule had been that made in 1867 in United States of America v McRae, supra, where the Court of Chancery Appeals held that where there is a real danger of prosecution in a foreign country, the case could not be distinguished "in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law." Supra, at 686. The dictum from King of the Two Sicilies cited by the Court in Hale v Henkel had been rejected in McRae. Moreover, the two factors relied on by the English court in King of the Two Sicilies were wholly inapplicable to federal-state problems in this country. The first—"The impossibility of knowing, as matter of law, to what cases the [danger of incrimination] may extend . . . ," supra, at 684—has no force in our country where the federal and state courts take judicial notice of each other's law. The second—that "in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated," supra, at 684, 685—is equally inapplicable in our country where the witness is generally within "the jurisdiction" of the State under whose law he claims danger of incrimination, and where, if he is not, the State may demand his extradition. The second case relied on in Hale v Henkel, supra—The Queen v Boyes, supra—was irrelevant to the issue there presented. The Queen v

*[378 US 68]

Boyes did not involve *different jurisdictions or systems of law. It merely held that the danger of prosecution "must be real and appreciable . . . not a danger of an imaginary and unsubstantial character

. . . ." It in no way suggested that the danger of prosecution under foreign law could be ignored if it was "real and appreciable."[10]

Thus, the authorities relied on by the Court in Hale v Henkel provided no support for the conclusion that under the Fifth Amendment "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty." Nor was its attempt to distinguish Chief Justice Marshall's opinion in United States v Saline Bank of Virginia, supra, more successful. The Court's reading of Saline Bank suggests that the state, rather than the federal, privilege against self-incrimination applies to federal courts when they are administering state substantive law. The most

*[378 US 69]

reasonable *reading of that case, however, and the one which was plainly accepted by Justice Holmes in Ballmann v Fagin, supra, is that the privilege against self-incrimination precludes a federal court from requiring an answer to a question which might incriminate the witness under state law.[11] This reading is especially compelling in light of the English antecedents of the Saline Bank case. See East India Co. v Campbell, discussed, supra, at 683; and Brownsword v Edwards, discussed supra, at 683, 684.

10. See note 7, supra. Nor were the North Carolina cases relied on in Hale v Henkel settled authority in favor of the proposition that the Fifth Amendment did not protect a federal witness from incriminating himself under state law. In State v March, 1 Jones (NC) 526, the North Carolina Supreme Court in 1853 did say that the North Carolina "[c]ourts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them." That court, of course, was not applying either the Fifth Amendment or the Fourteenth Amendment (which was not yet enacted), and the North Carolina rule against self-incrimination apparently was narrower in scope than the federal rule. See State v Thomas, 98 NC 599, 603, 4 SE 518, 520 (citing cases). In any event, the authority of the March case had been significantly diminished, if not discredited, by the second of the North Carolina cases relied upon in Hale v Henkel. In State v Thomas, supra, the North Carolina Supreme Court conceded that the March "case is not distinguishable in principle from that before us." It continued: "We prefer, however, to put our decision upon other ground—*more satisfactory to our own minds* and well sustained by adjudications in other Courts." 98 NC, at 604, 4 SE, at 520-521. (Emphasis added.) The court then held that the witness had waived his privilege against self-incrimination.

11. It has been argued that "[i]t is abundantly clear . . . that Saline Bank stands for no constitutional principle whatever. It was merely a reassertion of the ancient *equity rule* that a court of equity will not order discovery that may subject a party to criminal prosecution. In fact, the decision was cited in support of that proposition by an esteemed member of the very Court that decided the case. 2 Story, Commentaries on Equity, § 1494, n. 1 (1836)." Hutcheson v United States, 369 US 599, 608, note 13, 8 L ed 2d 137, 147, 82 S Ct 1005 (opinion of Mr. Justice Harlan).

The cited authority does not, however, support the argument "that Saline Bank stands for no constitutional principle whatever." That case was cited by Story, intermingled with more than a dozen other cases, in a footnote to the following statement: "Courts of Equity . . . will not compel a discovery in aid of a criminal prosecution . . . for *it is against the genius of the Common Law to compel a party to accuse himself; and* it is against the general principles of Equity to aid in the enforcement of penalties or forfeitures." (Emphasis added.) This statement suggests that the common-law privilege and the equitable rule are so intermeshed that it serves no useful purpose to attempt to ascertain whether a given application by a Court of Equity rested on the former or the latter.

The weakness of the Hale v Henkel dictum was immediately recognized both by lower federal courts[12] and by this Court itself. In Vajtauer v Commissioner of Immigration, 273 US 103, 71 L ed 560, 47 S Ct 302, decided in 1927 by a unanimous

*[378 US 70]

*Court, appellant refused to answer certain questions put to him in a deportation proceeding on the ground that they "might have tended to incriminate him under the Illinois Syndicalism Law . . . ." Id., at 112, 71 L ed at 565. Instead of deciding the issue on the authority of the Hale v Henkel dictum, the Court held that the privilege had been waived. The Court then said:

"This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes or whether this case is to be controlled by Hale v. Henkel, 201 US 43 [50 L ed 652, 26 S Ct 370]; Brown v. Walker, 161 US 591, 608 [40 L ed 819, 825, 16 S Ct 644]; compare United States v. Saline Bank, 1 Pet 100 [7 L ed 69]; Ballmann v. Fagin, 200 US 186, 195 [50 L ed 433, 437, 26 S Ct 212]." 273 US, at 113, 71 L ed at 566.

In a subsequent case, decided in 1933, this Court said that the question—whether "one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law"—was "specifically reserved in Vajtauer v Comm'r of Immigration," and was not "definitely settled" until 1931. United States v Murdock, 290 US 389, 396, 78 L ed 381, 386, 54 S Ct 223.

In 1931, the Court decided United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376, the case principally relied on by respondent here. Appellee had been indicted for failing to supply certain information to federal revenue agents. He claimed that his refusal had been justified because it rested on the fear of federal and state incrimination. The Government argued that the record supported only a claim of state, not federal, incrimination, and that the Fifth Amendment does not protect against a claim of state incrimination. Appellee did not respond to the latter argument, but instead rested his entire case on the claim that his refusals had in each instance been based on federal as well as state in-

*[378 US 71]

crimination. In support of *its constitutional argument, the Government cited the same two English cases erroneously relied on in the Hale v Henkel dictum—King of the Two Sicilies v Willcox, supra, which had been overruled, and The Queen v Boyes, supra, which was wholly inapposite. An examination of the briefs and summary of argument indicates that neither the Government nor the appellee informed the Court that King of the Two Sicilies had been overruled by United States of America v McRae, supra.[13]

This Court decided that appellee's refusal to answer rested solely on a fear of state prosecution, and then concluded, in one brief paragraph,

12. See, e. g., United States v Lombardo, 228 F 980, aff'd on other grounds, 241 US 73, 60 L ed 897, 36 S Ct 508, where the court accepted defendant's contention that if she answered certain questions, she might "incriminate herself under the criminal laws of Washington." See also, e. g., Buckeye Powder Co. v Hazard Powder Co. 205 F 827; In re Doyle, 42 F2d 686, revd without opinion, 47 F2d 1080.

13. The Government also relied on the North Carolina case of State v March, supra, which, as previously noted, see note 10, supra, had been discredited by the subsequent case of State v Thomas, supra.

that such a fear did not justify a refusal to answer questions put by federal officers.

The Court gave three reasons for this conclusion. The first was that:

"Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2." 284 US, at 149, 76 L ed at 213.

This argument, however, begs the critical question. No one would suggest that state law could prevent a proper federal investigation; the Court had already held that the Federal Government could, under the Supremacy Clause, grant immunity from state prosecution, and that, accordingly, state law could not prevent a proper federal investigation. The critical issue was whether the Federal Government, *without granting immunity from state prosecution*, could compel testimony which would incriminate under state law. The Court's first "reason" was not responsive to this issue.

The second reason given by the Court was that:

"The English rule of evidence against compulsory self-incrimination, on which historically that con-
*[378 US 72]
tained* in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. King of the Two Sicilies v Willcox, 7 State Trials (N.S.) 1050, 1068. Queen v Boyes, 1 B. & S. 311, 330." 284 US, at 149, 76 L ed at 213.

As has been demonstrated, the cases cited were in one instance overruled and in the other inapposite, and the English rule was the opposite from that stated in this Court's opinion: The rule did "protect witnesses against disclosing offenses in violation of the laws of another country." United States of America v McRae, supra.

The third reason given by the Court in Murdock was that:

"This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. Counselman v. Hitchcock, 142 U.S. 547 [35 L ed 1110, 12 S Ct 195]. Brown v. Walker, 161 U.S. 591, 606 [40 L ed 819, 824, 16 S Ct 644]. Jack v. Kansas, 199 U.S. 372, 381 [50 L ed 234, 236, 26 S Ct 73]. Hale v. Henkel, 201 U.S. 43, 68 [50 L ed 652, 663, 26 S Ct 370)." 284 US, at 149, 76 L ed at 213.

This argument—that the rule in question had already been "established" by the past decisions of the Court—is not accurate. The first case cited by the Court—Counselman v Hitchcock—said nothing about the problem of incrimination under the law of another sovereign. The second case—Brown v Walker—merely
*[378 US 73]
held that the *federal immunity statute there involved did protect against state prosecution. The third case—Jack v Kansas—held that the Due Process Clause of the Fourteenth Amendment did not prevent a State from compelling an answer to a question which presented no "real danger of a Federal prosecution." 199 US, at 382, 50 L ed at 237. The

final case—Hale v Henkel—contained dictum in support of the rule announced which was without real authority and which had been questioned by a unanimous Court in Vajtauer v Commissioner of Immigration, supra. Moreover, the Court subsequently said, in no uncertain terms, that the rule announced in Murdock had not been previously "established" by the decisions of the Court. When Murdock appealed his subsequent conviction on the ground, inter alia, that an instruction on willfulness should have been given, the Court affirmed the Court of Appeals' reversal of his conviction and said that:

"Not until this court pronounced judgment in United States v. Murdock, 284 U S. 141 [76 L ed 210, 52 S Ct 63, 82 ALR 1376], 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. The question was involved, but not decided, in Ballmann v. Fagin, 200 U. S. 186, 195 [50 L ed 433, 437, 26 S Ct 212], and specifically reserved in Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 113 [71 L ed 560, 566, 47 S Ct 302]." United States v Murdock, 290 US 389, 396, 78 L ed 381, 386, 54 S Ct 223.

Thus, neither the reasoning nor the authority relied on by the Court in United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376, supports its conclusion that the Fifth Amendment permits the Federal Government to compel answers to questions which might incriminate under state law.

In 1944 the Court, in Feldman v United States, 322 US 487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982, was confronted with the situation where evidence compelled by a State under a grant of state immunity was "availed of by the [Federal] Govern- *[378 US 74] ment" and *introduced in a federal prosecution. Jack v Kansas, 199 US, at 382, 50 L ed at 237. This was the situation which the Court had earlier said it did "not believe" would occur. Ibid. Nevertheless, the Court, in a 4-to-3 decision, upheld this practice, but did so on the authority of a principle which is no longer accepted by this Court. The Feldman reasoning was essentially as follows:

"[T]he Fourth and Fifth Amendments, intertwined as they are, [express] supplementing phases of the same constitutional purpose . . . ." 322 US 489–490, 88 L ed 1412.

"[O]ne of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the [Federal] Government whose conduct they alone limit." Id., at 490, 88 L ed 1413.

"And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v United States, supra; . . . incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. Burdeau v. McDowell, 256 U.S. 465 [65 L ed 1048, 41 S Ct 574, 13 ALR 1159]." 322 US, at 492, 88 L ed at 1414.

The Court concluded, therefore, by analogy to the then extant search and seizure rule, that evidence compelled by a state grant of immunity could be used by the Federal Government. But the legal foundation upon which that 4-to-3 decision rested no longer stands. Evidence illegally seized by state officials may not now be received in federal courts.

In Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437, the Court held, over the dissent of the writer of the Feldman decision, that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's

*[378 US 75]

*timely objection in a federal criminal trial." 364 US, at 223, 4 L ed 2d at 1681. Thus, since the fundamental assumption underlying Feldman is no longer valid, the constitutional question there decided must now be regarded as an open one.

The relevant cases decided by this Court since Feldman fall into two categories. Those involving a federal immunity statute—exemplified by Adams v Maryland, 347 US 179, 98 L ed 608, 74 S Ct 442—in which the Court suggested that the Fifth Amendment bars use by the States of evidence obtained by the Federal Government under the threat of contempt. And those involving a state immunity statute—exemplified by Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302—where the Court, applying a rule today rejected, held the Fifth Amendment inapplicable to the States.[14]

In Adams v Maryland, supra, petitioner had testified before a United States Senate Committee investigating crime, and his testimony had later been used to convict him of a state crime. A federal statute at that time provided that no testimony given by a witness in congressional inquiries "shall be used as evidence in any criminal proceeding against him in any court . . . ." 62 Stat 833. The State questioned the application of the statute to petitioner's testimony and the constitutionality of the statute if construed to apply to state courts. The Court, in an opinion joined by seven members, made the following significant statement: "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." 347 US, at 181, 98 L ed at 612.[15] This state-

*[378 US 76]

ment suggests *that any testimony elicited under threat of contempt by a government to whom the constitutional privilege against self-incrimination is applicable (at the time of that decision it was deemed applicable only to the Federal Government) may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable. This statement, read in light of today's decision in Malloy v Hogan, 378 US at 1, 12 L ed 2d at 653, 84 S Ct 1489, draws into question the continuing authority of the statements to the contrary in United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63,

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14. In Mills v Louisiana, 360 US 230, 3 L ed 2d 1193, 79 S Ct 980, the Court, without opinion, simply applied the rule announced in Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302. In Hutcheson v United States, 369 US 599, 8 L ed 2d 137, 82 S Ct 1005, there was no opinion of the Court.

15. The Court in Adams v Maryland, 347 US 179, 98 L ed 608, 74 S Ct 442, went on to construe the statute as affording more protection than would be provided by the Fifth Amendment alone. It held that the statute applied even where, as there, the witness had not claimed his privilege against self-incrimination before being required to testify. It held, as well, that the statute did, and constitutionally could, prevent use of the testimony in state as well as federal courts.

82 ALR 1376, and Feldman v United States, supra.[16]

Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302, involved a state contempt conviction for a witness' refusal to answer questions, under a grant of state immunity, on the ground that his answers might subject him to prosecution under federal law. Petitioner claimed that "the Fifth Amendment gives him the privilege, which he can assert against either a State or the National Government, against giving testimony that might tend to implicate him in a violation" of federal law. Id., at 374, 2 L ed 2d at *[378 US 77] 1397. The Court, applying *the rule then in existence, denied petitioner's claim and declared that:

"It is plain that the [Fifth Amendment] can no more be thought of as restricting action by the States than as restricting the conduct of private citizens. The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." Id., at 380, 2 L ed 2d at 1401.

The Court has today rejected that rule, and with it, all the earlier cases resting on that rule.

The foregoing makes it clear that there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.

IV. Conclusions.

In light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts[17] and by Chief Justice Marshall and Justice Holmes. See United States v Saline Bank of Virginia, supra; Ballmann v Fagin, supra. We reject—as unsupported by history or policy—the deviation from that construction only recently adopted by this Court in United States v Murdock, supra, and Feldman v United States, supra. We hold that the constitutional privilege *[378 US 78]

Headnote 4

*against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

We must now decide what effect this holding has on existing state immunity legislation. In Counselman v Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195, this Court considered a federal statute which provided that no "evidence obtained from a party or witness by means

16. In Ullmann v United States, 350 US 422, 100 L ed 511, 76 S Ct 497, 53 ALR2d 1008, decided two years after Adams, the Court did not reach the constitutional question of whether a State could prosecute a person on the basis of evidence obtained by the Federal Government under a federal immunity statute. The Court again construed the applicable statute, which related to testimony involving national security, to apply to the States and held that the paramount federal "authority in safeguarding national security" justifies "the restriction it has placed on the exercise of state power . . . ." Id., at 436, 100 L ed at 523.

17. The English rule apparently prevails also in Canada, Australia and India. See Grant, Federalism and Self-Incrimination: Common Law and British Empire Comparisons, 5 UCLA L Rev 1 (1958).

of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . . ." Id., at 560, 35 L ed at 1113. Notwithstanding this statute, appellant, claiming his privilege against self-incrimination, refused to answer certain questions before a federal grand jury. The Court said "that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." Id., at 585, 35 L ed at 1122. Applying this principle to the facts of that case, the Court upheld appellant's refusal to answer on the ground that the statute: "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court . . . ," id., at 564, 35 L ed at 1114, that it: "could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted . . . ," ibid., and that: "affords no protection against that use of compelled testimony which consists in gaining

*[378 US 79]

therefrom a *knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." Id., at 586, 35 L ed at 1122.

Applying the holding of that case to our holdings today that the privilege against self-incrimination protects a state witness against federal prosecution, supra, at 694, and that "the same standards must determine whether [a witness'] silence in either a federal or state proceeding is justified," Malloy v Hogan, 378 US at 11, 12 L ed 2d at 661, we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.[18] This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

Headnote 5
Headnote 6
Headnote 7

It follows that petitioners here may now be compelled to answer the questions propounded to them. At the time they refused to answer, however, petitioners had a reasonable fear, based on this Court's decision in Feldman v United States, supra, that the federal authorities might use the answers against them in connection

*[378 US 80]

with a federal *prosecution. We

Headnote 9
Headnote 10

18. Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

Headnote 8

have now overruled Feldman and held that the Federal Government may make no such use of the answers. Fairness dictates that petitioners should now be afforded an opportunity, in light of this development, to answer the questions. Cf. Raley v Ohio, 360 US 423, 3 L ed 2d 1344, 79 S Ct 1257. Accordingly, the judgment of the New Jersey courts ordering petitioners to answer the questions may remain undisturbed. But the judgment of contempt is vacated and the cause remanded to the New Jersey Supreme Court for proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Black concurs in the judgment and opinion of the Court for the reasons stated in that opinion and for the reasons stated in Feldman v United States, 322 US 487, 494, 88 L ed 1408, 1415, 64 S Ct 1082, 154 ALR 982 (dissenting opinion), as well as Adamson v California, 332 US 46, 68, 91 L ed 1903, 1917, 67 S Ct 1672, 171 ALR 1223 (dissenting opinion); Speiser v Randall, 357 US 513, 529, 2 L ed 2d 1460, 1475, 78 S Ct 1332 (concurring opinion); Bartkus v Illinois, 359 US 121, 150, 3 L ed 2d 684, 705, 79 S Ct 676 (dissenting opinion); and Abbate v United States, 359 US 187, 201, 3 L ed 2d 729, 738, 79 S Ct 666 (dissenting opinion).

SEPARATE OPINIONS

Mr. Justice Harlan, whom Mr. Justice Clark joins, concurring in the judgment.

Unless I wholly misapprehend the Court's opinion, its holding that testimony compelled in a state proceeding over a witness' claim that such testimony will incriminate him may not be used against the witness in a federal criminal prosecution rests on *constitutional* grounds. On that basis, the contrary conclusion of Feldman v United States, 322 US 487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982, is overruled.

I believe that the constitutional holding of Feldman was correct, and would not overrule it. To the extent, however, that the decision in that case may have rested *[378 US 81] also on a refusal to exercise this Court's "supervisory power" over the administration of justice in federal courts, I think that it can no longer be considered good law, in light of this Court's subsequent decision in Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437. In Elkins, this Court, exercising its supervisory power, did away with the "silver platter" doctrine and prohibited the use of evidence unconstitutionally seized by state authorities in a federal criminal trial involving the person suffering such a seizure. I believe that a similar supervisory rule of exclusion should follow in a case of the kind now before us, and solely on that basis concur in this judgment.

I

The Court's constitutional conclusions are thought by it to follow from what it terms the "policies" of the privilege against self-incrimination and a re-examination of various cases in this Court, particularly in the context of early English law. Almost entirely absent from the statement of "policies" is any reference to the particular problem of this case; at best, the statement suggests the set of values which are on one side of the issue. The discussion of precedent is scarcely more helpful. It intertwines decisions of this Court with decisions in English courts, which *perhaps* follow a dif-

*[378 US 82]

ferent rule,[1] and casts *doubt for one reason or another on every American case which does not accord with the result now reached. When the skein is untangled, however, and the line of cases is spread out, two facts clearly emerge:

(1) With two early and somewhat doubtful exceptions, this Court has consistently rejected the propo-

*[378 US 83]

sition that *the danger of incrimination in the court of another jurisdiction is a sufficient basis for invoking a privilege against self-incrimination;

(2) Without any exception, in every case involving an immunity statute in which the Court has treated the question now before us, it has rejected the present majority's views.

The first of the two exceptional cases is United States v Saline Bank of Virginia, 1 Pet 100, 7 L ed 69, decided in 1828; the entire opinion in that case is quoted in the majority opinion, ante, p. 684. It is not clear whether that case has any bearing on the privilege against self-incrimination at all.[2] The second case is

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1. The English rule is not clear. In United States of America v McRae, LR 3 Ch App 79 (1867), the case on which the majority primarily relies, the United States came into court as a party and sought to elicit from the defendant answers which would have subjected him to a forfeiture of property under the laws of the United States. Upholding the defendant's refusal to answer, the Lord Chancellor pointed out that the ". . . Plaintiffs calling for an answer are the sovereign power by whose authority and in whose name the proceedings for the forfeiture are instituted, and who have the property to be forfeited within their reach." Id., at 85. That case, in which one sovereign, as a party in a civil proceeding, attempted to use the judicial process of another sovereign to obtain answers which would subject the witness to a forfeiture under the laws of the former is clearly distinguishable from the present case.

In King of the Two Sicilies v Willcox, 1 Sim (NS) 301, 61 Eng Rep 116 (1851), the Vice-Chancellor had said that "the rule of protection [against self-incrimination] is confined to what may tend to subject a party to penalties *by our own laws* . . . ." 1 Sim (NS), at 331, 61 Eng Rep, at 128 (emphasis added). The Lord Chancellor said in McRae, supra, that King of the Two Sicilies had been "most correctly decided," LR, 3 Ch App, at 85, but that the general rule there laid down was unnecessarily broad. He declined to apply the rule in McRae on the ground that "the presumed ignorance of the Judge as to foreign law . . . [had been] completely removed by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated . . . ," LR, 3 Ch App, at 85, and the further ground, noted above, that the property subject to a forfeiture was "within the power of the United States," id., at 87.

The other two English cases which the majority cities in this connection were decided more than 100 years earlier than King of the Two Sicilies. Moreover, both cases involved disclosures which would have been incriminating under a separate system of laws operating within the same legislative sovereignty. East India Co. v Campbell, 1 Ves sen 246, 27 Eng Rep 1010 (Ex 1749); Brownsword v Edwards, 2 Ves sen 243, 28 Eng Rep 157 (Ch 1750). In King of the Two Sicilies, which involved the laws of another sovereign, the Vice-Chancellor observed that there was an "absence of all authority on the point" raised before him. 1 Sim (NS), at 331, 61 Eng Rep, at 128.

There is little agreement among the authorities on the effect of these cases. See Grant, Federalism and Self Incrimination: Common Law and British Empire Comparisons, 5 UCLA L Rev 1-8; 8 Wigmore, Evidence (3d ed 1940), § 2258, n. 3; Kroner, Self Incrimination: The External Reach of the Privilege, 60 Col L Rev 816, 820, n. 26; McNaughton, Self-Incrimination Under Foreign Law, 45 Va L Rev 1299, 1302.

2. Compare McNaughton, supra, note 1, at 1305-1306, with Kroner, supra, note 1, at 818. See Hutcheson v United States, 369 US 599, 608, note 13, 8 L ed 2d 137, 147, 82 S Ct 1005; Feldman v United States, supra, 322 US at 494, 88 L ed at 1415.

That this case has meant different things to different people is evidenced by the

Ballmann v Fagin, 200 US 186, 50 L ed 433, 26 S Ct 212, decided in 1906. The statement that the appellant "was exonerated from disclosures which would have exposed him to the penalties of the state law," id., at 195, 50 L ed at 437, was at best an *alternative* holding and probably not even that.[3] Ballmann had based his refusal to testify before the Grand Jury solely on the possibility of incrimination under state law, id., at 193–194, 50 L ed at 436. Nevertheless, before considering the effect of state incrimination at all, the Court pointed out that the facts showed a likelihood

*[378 US 81]

*of incrimination under *federal* law. Id., at 195, 50 L ed at 437. The Court then proceeded to say:

"Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop,' and so subject to the criminal law of the State in which the grand jury was sitting. According to United States v Saline Bank, 1 Peters, 100 [7 L ed 69], he was exonerated from disclosures which would have exposed him to the penalties of the state law. See Jack v Kansas, 199 US 372 [50 L ed 234, 26 S Ct 73], decided this term. One way or the other we are of opinion that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him." Id., at 200 US 195–196, 50 L ed at 437.

Since the Jack case which the Court cited immediately after referring to Saline Bank had been decided just a few weeks before Ballmann and was contrary to Saline Bank, it is plain that the Court was *not* approving and applying the latter case. The explanation for the Court's inclusion of this ambiguous and inconclusive discussion of state incrimination is surely the fact that Ballmann had failed to set up the claim of federal incrimination on which the Court relied.

Neither of these two cases, therefore, "squarely holds," ante, p 684; see ante, p 687, that a danger of incrimination under state law relieves a witness from testifying before federal authorities. More to the point, whatever force these two cases provide for the majority's position is wholly vitiated by subsequent cases, which are flatly contradictory to that position.

*[378 US 85]

*In Jack v Kansas, 199 US 372, 50 L ed 234, 26 S Ct 73, decided in 1905, the Court considered a Kansas immunity statute. The witness had refused to testify on the ground that his testimony might incriminate him under federal law. The Court upheld his commitment for contempt over his claim that the immunity granted by the state statute was not "broad enough," id., at 380, 50 L ed at 236, and that his imprisonment therefore violated the Fourteenth Amendment. The Court said:

"We think the legal immunity is

opinion in Hale v Henkel, 201 US 43, 50 L ed 652, 26 S Ct 370, in which the Court distinguished Saline Bank, presumably inadequately, on the ground that in it "the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." 201 US, at 69, 50 L ed at 663.

3. In United States v Murdock, 290 US 389, 396, 78 L ed 381, 386, 54 S Ct 223, the Court said that the question whether "one under examination in a federal tribunal could . . . refuse to answer on account of probable incrimination under state law" had been "involved, but not decided" in Ballmann.

in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough. Id., at 382, 50 L ed at 237.

The present majority characterizes this statement as "cryptic dictum," ante, p. 687. But, I submit, there is nothing cryptic about it. Nor is it dictum. The Court assumed for purposes of that case that the Fourteenth Amendment required that a state statute "give sufficient immunity from prosecution or punishment," id., at 380, 50 L ed at 236, and it is evident from the opinion that the Court regarded the remoteness of a danger of prosecution in the courts of another jurisdiction, including the federal courts, as a basis for holding *generally*, and not merely on the facts of the case before it, that a state immunity statute need not protect against such danger. See id., at 381-382, 50 L ed at 236, 237.

The next case is Hale v Henkel, 201 US 43, 50 L ed 652, 26 S Ct 370, decided one year later, shortly after Ballmann. The Court there rejected the appellant's argument that the federal immunity statute to be valid had to confer immunity from punishment under state law. It said:

"The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in Brown v Walker and held to be no answer. The converse of this was also decided in Jack v Kansas, 199 US 372 [50 L ed 234, 26 S Ct 73], namely,

*[378 US 86]

that the fact *that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. . . ." 201 US, at 68-69, 50 L ed at 663.[4]

4. In Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644, on which the Court relied in Hale, the Court intimated that a federal immunity statute need not protect a witness from "a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty." 161 US, at 608, 40 L ed at 825.

In Jack, supra, the Court described Brown as follows:

"In the subsequent case of Brown v Walker, 161 US 591, [40 L ed 819, 16 S Ct 644], the statute there involved was held to afford complete immunity to the witness, and he was therefore obliged to answer the questions that were put to him, although they might tend to incriminate him. In that case it was contended, on the part of the witness, that the statute did not grant him immunity against prosecutions in the state courts, although it granted him full immunity from prosecution by the Federal Government. This contention was held to be without merit. While it was asserted that the law of Congress was supreme, and that judges and courts in every State were bound thereby, and that therefore the statute granting immunity would *probably* operate in the state as well as in the Federal

In Vajtauer v Commissioner of Immigration, 273 US 103, 71 L ed 560, 47 S Ct 302, which did not involve an immunity statute, the *[378 US 87] Court *found it unnecessary to consider the question, extensively argued by the parties, whether "the Fifth Amendment guarantees immunity from self-incrimination under state statutes . . . ," id., at 113, 71 L ed at 566; the Court indicated that it did not necessarily regard Hale and Brown, supra, as conclusive of that question, ibid. Cf. United States v Murdock, 290 US 389, 396, 78 L ed 381, 385, 54 S Ct 223. Any doubts on this score, however, were settled in 1931, in United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376. The Court there held unmistakably that an individual could not avoid testifying in federal proceedings on the ground that his testimony might incriminate him under state law.

"This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immu- *[378 US 88] nity statute. *The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination." Id., at 149, 76 L ed at 213.

The Court has not until now deviated from that definitive ruling. In later proceedings in the Murdock case, the Court said it was "definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." 290 US 389, 396, 78 L ed 381, 386, 54 S Ct 223. The Court adhered to this view in Feldman, supra, where it established an equivalent rule allowing the use in a federal court of testimony given in a state court. The general principle was said to be one of "separateness in the operation of state and federal criminal laws and state and federal immunity provisions." 322 US, at 493–494, 88 L ed at 1415.[5]

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courts, yet still, and *aside from that view*, it was said that while there might be a bare possibility that a witness might be subjected to the criminal laws of some other sovereignty, it was not a real and probable danger, but was so improbable that it needed not to be taken into account." 199 US, at 381, 50 L ed at 236. (Emphasis added.)

Brown is cited for the proposition that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination," in United States v Murdock, 284 US 141, 149, 76 L ed 210, 213, 52 S Ct 63, 82 ALR 1376. And see Vajtauer v Commissioner of Immigration, 273 US 103, 113, 71 L ed 560, 566, 47 S Ct 302.

The majority is incorrect when it states, ante, p. 688, that the Court in Hale, relying on King of the Two Sicilies, supra, disregarded a "settled English rule" contrary to its own conclusion. See note 1, supra.

5. This was the principle underlying the decision in Feldman rather than the so-called "Feldman reasoning," ante, p. 692, which, as described by the majority, consists of phrases plucked from separate paragraphs appearing on four different pages of the reported opinion, see Feldman, supra, at 489–492, 88 L ed at 1412–1414. The Court referred to the "silver platter" doctrine only to illustrate a related principle then applicable in the area of search-and-seizure. See id., at 492, 88 L ed at 1414.

The majority is, however, correct stating that the decision in Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80

In Adams v Maryland, 347 US 179, 98 L ed 608, 74 S Ct 442, the Court held that a federal immunity statute,[6] the language of which "could be no plainer," id., at 181, 98 L ed at 612, prohibited the use in a state criminal trial of testimony given before a Senate Committee. Quite obviously, the remark in Adams that the Fifth Amendment protects a witness "from the use of self-incriminating testimony he is compelled to give over his objection," ibid., does not even remotely suggest "that any testimony elicited

*[378 US 89]

under threat of contempt by *a government to whom the constitutional privilege against self-incrimination is applicable . . . may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable," ante, p. 693.

In Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302, the Court again upheld the validity of state immunity statutes against the charge that they did not, as they could not, confer immunity from federal prosecution. The Court adhered to its position in Knapp, supra, in 1959, in Mills v Louisiana, 360 US 230, 3 L ed 2d 1193, 79 S Ct 980.

This, then, is the "history" mustered by the Court in support of overruling the sound constitutional doctrine lying at the core of Feldman.

II

Part I of this opinion shows, I believe, that the Court's analysis of prior cases hardly furnishes an adequate basis for a new departure in constitutional law. Even if the Court's analysis were sound, however, it would not support reversal of the Feldman rule on *constitutional* grounds.

If the Court were correct in asserting that the "separate sovereignty" theory of self-incrimination should be discarded, that would, as the Court says, lead to the conclusion that "a state witness [is protected] against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." Ante, p 694. However, dealing strictly with the situation presented by this case, that conclusion does *not* in turn lead to a constitutional rule that the testimony of a state witness (or evidence to which his testimony leads) who is compelled to testify in state proceedings may not be used against him in a federal prosecution. Protection which the Due Process Clause affords agaist the *States* is quite obviously not any basis for a consti-

*[378 US 90]

tutional *rule regulating the conduct of *federal* authorities in *federal* proceedings.

The Court avoids this problem by mixing together the Fifth Amendment and the Fourteenth and talking about "the constitutional privilege against self-incrimination," ante, p. 694. Such an approach, which deals with "constitutional" rights at large, unrelated either to particular provisions of the Constitution or to relevant differences between the States and the Federal Government warns of the dangers for our federalism to which the "incorporation" theory of the Fourteenth Amendment leads. See my dissenting opinion in Malloy v Hogan, 378 US 14, 12 L ed 2d p 663.

S Ct 1437, discarding the "silver platter" doctrine has an important bearing on this case. See infra, p. 702.

6. See Adams, supra, at 180, note 1, 98 L ed at 611.

The Court's reasons for overruling Feldman thus rest on an entirely new conception of the *Fifth Amendment*, namely that it applies to federal use of state-compelled incriminating testimony. The opinion, however, contains nothing at all to contradict the traditional, well-understood conception of the Fifth Amendment, to which, therefore, I continue to adhere:

"The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." Knapp v Schweitzer, supra, 357 US at 380, 2 L ed 2d at 1401.

It is no service to our constitutional liberties to encumber the particular provisions which safeguard them with a gloss for which neither the text nor history provides any support.

Accordingly, I cannot accept the majority's conclusion that a rule prohibiting federal authorities from using in aid of a federal prosecution incriminating testimony compelled in state proceedings is constitutionally required.

*[378 US 91]
*III

I would, however, adopt such a rule in the exercise of our supervisory power over the administration of federal criminal justice. See McNabb v United States, 318 US 332, 340-341, 87 L ed 819, 823, 824, 63 S Ct 608. The rule seems to me to follow from the Court's rejection, in the exercise of its supervisory power, of the "silver platter" doctrine as applied to the use in federal courts of evidence unconstitutionally seized by state officers. Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437.

Since I reject the majority's argument that the "separate sovereignty" theory of self-incrimination is historically unfounded, I do not base my conclusion on the holding in Malloy, 378 US 1, 12 L ed 2d 653, 84 S Ct 1489, that due process prohibits a State from compelling a witness to testify. My conclusion is based rather on the ground that such a rule is protective of the values which the federal privilege against self-incrimination expresses, without in any way interfering with the independent action of the States and the Federal Government in their respective spheres. Increasing interaction between the State and Federal Governments speaks strongly against permitting federal officials to make prosecutorial use of testimony which a State has compelled when that same testimony could not constitutionally have been compelled by the Federal Government and then used against the witness. Prohibiting such use in no way limits federal power to investigate and prosecute for federal crime, which power will be as full after a State has completed an investigation as before.[7] This adjustment between state investigations

*[378 US 92]

of local crime *and federal prosecutions for federal crime seems par-

7. Speculation that federal agents may first have "gotten wind" of a federal crime by a witness' testimony in state proceedings would not be a basis for barring federal *prosecution*, unaided by the state testimony. As I understand the rule announced today, albeit resting on premises which I think are unsound, it is a prohibition against *the use of state-compelled incriminating evidence or the "fruits" directly attributable thereto* in a federal prosecution.

ticularly desirable in view of the increasing, productive cooperation between federal and state authorities in the prevention of crime. By insulating intergovernmental cooperation from the danger of any encroachment on the federal privilege against self-incrimination, such a rule in the long run will probably make joint programs for crime prevention more effective.[8]

On this basis, I concur in the judgment of the Court.

Mr. Justice White, with whom Mr. Justice Stewart joins, concurring.

The Court holds that the constitutional privilege against self-incrimination is nullified "when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." Ante, p 682. Whether viewed as an exercise of this Court's supervisory power over the conduct of federal law enforcement officials or a constitutional rule necessary for meaningful enforcement of the privilege, this holding requires that compelled incriminating testimony given in a state proceeding not be used in any manner by federal officials in connection with a federal criminal prosecution. Since these petitioners declined to answer in the belief that their very testimony as well as evidence derived from it could be used by federal authorities in a criminal prosecution against them, they should be afforded an opportunity to purge themselves of the civil contempt convictions by answering the questions. Cf. Raley v Ohio, 360 US 423, 3 L ed 2d 1344, 79 S Ct 1257.

In reaching its result the Court does not accept the far-reaching and in my view wholly unnecessary con-

*[378 US 93]

stitutional *principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions but also absolute immunity in these jurisdictions from any prosecution pertaining to any of the testimony given. The rule which the Court does not adopt finds only illusory support in a dictum of this Court and, as I shall show, affords no more protection against compelled incrimination than does the rule forbidding federal officials access to statements made in exchange for a grant of state immunity. But such a rule would invalidate the immunity statutes of the 50 States since the States are without authority to confer immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. It would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violate state criminal laws, regardless of the wishes or needs of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation. That rule, read in conjunction with the holding in Malloy v Hogan, 378 US 1, 12 L ed 2d 653, 84 S Ct 1489, that an assertion of the privilege is all but conclusive, would mean that testimony in state investigatory proceedings, and in trials also, is on a voluntary basis only. The Federal Government would become the only

8. The question whether *federally* compelled incriminating testimony could be used in a state prosecution is not involved in this case and would, of course, present wholly different considerations.

law enforcement agency with effective power to compel testimony in exchange for immunity from prosecution under federal and state law. These considerations warrant some elaboration.

I

Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel

*[378 US 94]

residents to *testify in court or before grand juries or agencies. See Blair v United States, 250 US 273, 63 L ed 979, 39 S Ct 468.[1] Such testimony constitutes one of the Government's primary sources of information. The privilege against self-incrimination, safeguarding a complex of significant values, represents a broad exception to governmental power to compel the testimony of the citizenry. The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, McCarthy v Arndstein, 266 US 34, 40, 69 L ed 158, 160, 45 S Ct 16; United States v Saline Bank, 1 Pet 100, 7 L ed 69, and it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used. Mason v United States, 244 US 362, 61 L ed 1198, 37 S Ct 621; Hoffman v United States, 341 US 479, 95 L ed 1118, 71 S Ct 814. Because of the importance of testimony, especially in the discovery of certain crimes for which evidence would not otherwise be available and the breath of the privilege, Congress has enacted over 40 immunity statutes and every State, without exception, has one or more immunity acts pertaining to certain offenses or legislative investigations.[2] Such statutes have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion,

*[378 US 95]

*gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering. This Court, in dealing with federal immunity acts, has on numerous occasions characterized such statutes as absolutely essential to the enforcement of various federal regulatory acts. In Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644, the case in which the Court first upheld a congressional immunity act over objection that the witness' right to remain silent was inviolate, the Court said: "[If] witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible." 161 US 591, at 610, 40 L ed 819, at 825. Again in Hale v Henkel, 201 US 43, 50 L ed

1. The power and corresponding duty are recognized in the Sixth Amendment's commands that defendants be confronted with witnesses and that they have the right to subpoena witnesses on their own behalf. The duty was recognized by the first Congress in the Judiciary Act of 1789, which made provision for the compulsion of attendance of witnesses in the federal courts. 1 Stat 73, 88 (1789). See also Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv L Rev 694–695 (1926); 8 Wigmore, Evidence, §§ 2190–2193 (McNaughton rev. 1961).

2. For a listing of Federal Witness Immunity Acts see Comment, 72 Yale LJ 1568, 1611–1612; the state acts may be found in 8 Wigmore, Evidence, § 2281, n. 11 (McNaughton ed 1961).

652, 26 S Ct 370, the Court noted the highly significant role played by immunity acts in the enforcement of federal legislation:

"As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of the parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?" Id., at 70, 50 L ed at 663.

And only recently the Court declared that immunity statutes have "become part of our constitutional fabric . . . included '. . . in virtually all of the major regulatory enactments of the Federal Government,' " and "the States . . . have passed numerous statutes compelling testimony in exchange for immunity in the form either of complete amnesty or of prohibition of the use of the compelled testimony." Ullmann v United States, 350 US 422, 438, 100 L ed 511, 524, 76 S Ct 497, 53 ALR2d 1008.

*[378 US 96]

*These state statutes play at least an equally important role in compelling testimony necessary for enforcement of state criminal laws. After all, the States still bear primary responsibility in this country for the administration of the criminal law, most crimes, particularly those for which immunity acts have proved most useful and necessary, are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system. See Abbate v United States, 359 US 187, 195, 3 L ed 2d 729, 734, 79 S Ct 666; Screws v United States, 325 US 91, 109, 89 L ed 1495, 1506, 65 S Ct 1031, 162 ALR 1330; United States v Cruikshank, 92 US 542, 553–554, 23 L ed 588, 591, 592; United States v Ah Hung, 243 F 762 (DCED NY). Cf 18 USC § 5001, 18 USC § 659.[3]

*[378 US 97]

*Whenever access to important testimony is barred by possible state prosecution, the State can, at its option, remove the impediment by a grant of immunity; but if the witness is faced with prosecution by the Federal Government, th

3. See also Rutkin v United States, 343 US 130, 139–147, 96 L ed 833, 840–844, 72 S Ct 571 (Black, J., dissenting).

The Senate Crime Committee stated in its third interim report:

"Any program for controlling organized crime must take into account the fundamental nature of our governmental system. The enforcement of the criminal law is primarily a State and local responsibility." S Rep No. 307, 82d Cong, 1st Sess, 5 (1951).

Attorney General Mitchell commented: "Experience has shown that when Congress enacts criminal legislation of this type [dealing with local crime] the tendency is for the State authorities to cease their efforts toward punishing the offenders and to leave it to the Federal authorities and the Federal Courts. That has been the experience under the Dyer Act." 72 Cong Rec 6214 (1930).

National enactments which touch upon these areas are not designed directly to suppress activities illegal under state law but to assist state enforcement agencies in the administration of their own statutes. See Int Rev Code of 1954, §§ 4701–4707, 4711–4716 (narcotics tax); Int Rev Code of 1954, §§ 4401–4404, 4411–4418, 4421–4423 (wagering tax). See generally, Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law and Contemp Prob 64, 83–86 (1948); Comment, 72 Yale LJ 108, 140–142.

State is wholly powerless to extend immunity from prosecution under federal law in order to compel the testimony. Almost invariably answers incriminating under state law can be claimed to be incriminating under federal law. Given the extensive sweep of a host of federal statutes, such as the income tax laws, securities regulation, laws regulating use of the mails and other communication media for an illegal purpose, and regulating fraudulent trade practices, and given the very limited discretion, if any, in the trial judge to scrutinize the witness' claim of privilege, Malloy v Hogan, 378 US 1, 12 L ed 2d 653, 84 S Ct 1489, investigations conducted by the State into matters of corruption and misconduct will obviously be thwarted if immunity from prosecution under federal law was a constitutionally required condition to testimonial compulsion in state proceedings. Wherever the witness, for reasons known only to him, wished not to respond to orderly inquiry, the flow of information to the State would be wholly impeded. Every witness would be free to block vitally important state proceedings.

It is not without significance that there were two ostensibly inconsistent lines of cases in this Court regarding the external reach of the privileges in respect to the laws of another jurisdiction. In the cases involving refusals to answer questions in a federal grand jury or discovery proceedings on the ground of incrimination under state law, absent any immunity statute, the Court suggested that the Fifth Amendment privilege protected such answers, United States v Saline Bank, 1 Pet 100, 7 L ed 69; Ballmann v Fagin, 200 US 186, 50 L ed 433, 26 S Ct 212, while in the cases involving refusals to answer after immunity was conferred, the Court indicated that immunity in

*[378 US 98]

regard to a prosecution *in the jurisdiction conducting the inquiry satisfied the privilege. Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644; Jack v Kansas, 199 US 372, 50 L ed 234, 26 S Ct 73; Hale v Henkel, 201 US 43, 50 L ed 652, 26 S Ct 370. Cf. United States v Murdock, 284 US 141, 76 L ed 210, 52 S Ct 63, 82 ALR 1376. The decision in Ballmann that a witness in a federal grand jury proceeding could not be compelled to make disclosures incriminating under very similar federal and state criminal statutes was announced by members of the same Court and within a very short time of the decisions in Jack and Hale, holding that immunity under the laws of one sovereign was sufficient. The basis for these latter holdings, as well as Knapp v Schweitzer, 357 US 371, 2 L ed 2d 1393, 78 S Ct 1302, upholding a state contempt conviction for a refusal to answer after a grant of state immunity, was not a niggardly view of the privilege against self-incrimination but "the historic distribution of power as between Nation and States in our federal system." 357 US 371, at 375, 2 L ed 2d 1393, at 1398, 78 S Ct 1302. As the concurring and dissenting members of the Court in Knapp pointed out, the dilemma posed to our federal system by federally incriminating testimony compelled in a state proceeding was not really necessary but for the prior decision in Feldman v United States, 322 US 487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982, which upheld the Federal Government's use of incriminatory testimony compelled in a state proceeding. Although Feldman was questioned, no one suggested in

Knapp that the solution to the problem lay in forbidding the State to ask questions incriminating under federal law.

To answer that the underlying policy of the privilege subordinates the law enforcement function to the privilege of an individual will not do. For where there is only one government involved, be it state or federal, not only is the danger of prosecution more imminent and indeed the likely purpose of the investigation to facilitate prosecution and conviction, but that authority has the choice of exchanging immunity for the needed testimony. To transform possible federal prosecution
*[378 US 99]
into a source of *absolute protected silence on the part of a state witness would leave no such choice to the States. Only the Federal Government would retain such an option.

Nor will it do to say that the Congress could reinstate state power by authorizing state officials to confer absolute immunity from federal prosecutions. Congress has established highly complicated procedures, requiring the approval of the Attorney General, before a limited group of federal officials may grant immunity from federal prosecutions. E. g., 18 USC § 3486,[4] 18 USC § 1406. The decision to grant immunity is based upon the importance of the testimony to federal law enforcement interest, a matter within the competence of federal officials to assay. These procedures would create insurmountable obstacles if the requests for approval were to come from innumerable local officials of the 50 States. Obviously federal officials could not properly evaluate the extent of the State's need for the testimony on a case-by-case basis. Further, the scope of the immunity conferred wholly depends on the testimony
*[378 US 100]
given, a matter of considerable *difficulty to determine after, no less than before, the question is answered, the time when federal approval would be necessary, Heike v United States, 227 US 131, 57 L ed 450, 33 S Ct 226; Lumber Products Assn v United States, 144 F2d 546 (CA 9th Cir), and a matter whose determination requires intimate familiarity with both the nature and details of the investigation and the background of the witness. Finally, it is very doubtful that Congress would, if it had the power to, authorize one State to confer immunity on persons subject to prosecution under the criminal laws of another State.

II

Neither the conflict between state and federal interests nor the consequent enthronement of federal agencies as the only law enforcement authorities with effective

4. The debates on the bill leading to the statute which granted a congressional committee the power to confer immunity well reveal the concern over immunization from federal prosecution without the express approval of the Attorney General in each case. 99 Cong Rec 4737-4740, 8342-8343; HR Rep No. 2606, 83d Cong, 2d Sess (1954). See Brownell, Immunity From Prosecution Versus Privilege Against Self-Incrimination, 28 Tul L Rev 1 (1953):

"[I]f any measure is to be enacted permitting the granting of immunity to witnesses before either House of Congress, or its committees, it should vest the Attorney General, or the Attorney General acting with the concurrence of appropriate members of Congress, with the authority to grant such immunity, and if the testimony is sought for a court or grand jury that the Attorney General alone be authorized to grant the immunity." (Remarks of Attorney General Brownell.) Id., at 19.

Congress adopted this view in recent immunity statutes. 18 USC § 3486; 18 USC § 1406. See also Comment, 72 Yale LJ 1568, 1598-1610 (1963).

power to compel testimony is necessary to give full effect to a privilege against self-incrimination whose external reach embraces federal as well as state law. The approach need not and, in light of the above considerations, should not be in terms of the State's power to compel the testimony rather than the use to which such testimony can be put. It is unquestioned that an immunity statute, to be valid, must be coextensive with the privilege which it displaces, but it need not be broader. Counselman v Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195; Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644; Hale v Henkel, 201 US 43, 50 L ed 652, 26 S Ct 370. If the compelled incriminating testimony in a state proceeding cannot be put to any use whatsoever by federal officials, quite obviously the witness' privilege against self-incrimination is not infringed. For the privilege does not convey an absolute right to remain silent. It protects a witness from being compelled to furnish evidence that could result in his being subjected to a criminal sanction, Hoffman v United States, 341 US 479, 95 L ed 1118, 71 S Ct 814; Mason v United States, 244 US 362, 61 L ed 1198, 37 S Ct 621, if, but only if, after the disclosure the witness will be in greater danger of prosecution

*[378 US 101]

and conviction. *Rogers v United States, 340 US 367, 95 L ed 344, 71 S Ct 438, 19 ALR2d 378; United States v Gernie, 252 F2d 664 (CA2d Cir). When federal officials are barred not only from introducing the testimony into evidence in a federal prosecution but also from introducing any evidence derived from such testimony, the disclosure has in no way contributed to the danger or likelihood of a federal prosecution. This approach secures the protections of the privilege against self-incrimination for all defendants without impairing local law-enforcement and investigatory activities. It, of course, forecloses the use of state-compelled testimony in any manner by federal prosecutors, but the privilege in my view commands that the Federal Government should not have the benefit of compelled incriminatory testimony. Both the Federal Government and the witness are in exactly the same position as if the witness had remained silent.[5] And state immunity statutes remain constitutional and state law enforcement agencies viable.

It is argued that a rule only forbidding use of compelled testimony does not afford absolute protection against the possibility of a federal prosecution based in part on the compelled testimony. It is said that absent any deliberate attempt by federal officers to utilize the testimony the very identification and testimony of the witness in the state proceedings, perhaps in the news-

*[378 US 102]

papers, may *increase the possibility of a federal prosecution and alter-

5. Feldman v United States, 322 US 487, 88 L ed 1408, 64 S Ct 1082, 154 ALR 982, allowed the use of testimony compelled in exchange for a grant of state immunity to secure a conviction for a federal offense. I think the Court in Feldman erred in its assumption that an effective exclusionary rule would allow the States to determine on the basis of local policy which offenders should be immune from federal prosecution. The Federal Government can prosecute and convict persons who have received immunity for testimony in a state investigation. But it must do so without the assistance of the compelled incriminatory testimony.

That case also relied on the doctrine since repudiated in Elkins v United States, 364 US 206, 4 L ed 2d 1669, 80 S Ct 1437, that evidence illegally seized by state officials is admissible in federal courts.

natively that the defendant may not be able to prove that evidence was intentionally and unlawfully derived from his compelled testimony. These are fanciful considerations, hardly sufficient as a basis for a constitutional adjudication working a substantial reallocation of power between state and national governments.

In the absence of any misconduct or collusion by federal officers, whatever increase there is, if any, in the likelihood of federal prosecution following the witness' appearance before a state grand jury or agency results from the inferences drawn from the invocation of the privilege to specific questions on the ground that they are incriminating under federal law and not from the fact the witness has testified in what is frequently an in camera proceeding under a grant of immunity. Whether in camera or not, the testimony itself is hardly reported in newspapers and the transcripts and records of the state proceedings are not part of the files of the Federal Government. Access and use require misconduct and collusion, a matter quite susceptible of proof. But this is quibbling, since the very fact that a witness is called in a state crime investigation is likely to be based upon knowledge, or at least a suspicion based on some information, that the witness is implicated in illegal activities, which knowledge and information are probably available to federal authorities.

The danger that a defendant may not be able to establish that other evidence was obtained through the unlawful use by federal officials of inadmissible compelled testimony is insubstantial. The privilege protects against real dangers, not remote and speculative possibilities. Brown v Walker, 161 US 591, 599–600, 40 L ed 819, 821, 822, 16 S Ct 644; Heike v United States, 227 US 131, 57 L ed 450, 33 S Ct 226; Mason v United States, 244 US 362, 61 L ed 1198, 37 S Ct 621. First, one might just as well argue that the Constitution requires absolute immunity from prosecution

*[378 US 103]

wherever *the Government has obtained an inadmissible confession or other evidence through an illegal search and seizure, an illegal wiretap, illegal detention, and coercion. A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. Malloy v Hogan, 378 US pp 7–8, 12 L ed 2d pp 659, 660, 84 S Ct 1489; Spano v New York, 360 US 315, 3 L ed 2d 1265, 79 S Ct 1202; Bram v United States, 168 US 532, 42 L ed 568, 18 S Ct 183. In all these situations a defendant must establish that testimony or other evidence is a fruit of the unlawfully obtained evidence, Nardone v United States, 308 US 338, 84 L ed 307, 60 S Ct 266; Wilson v United States, 218 F2d 754 (CA 10th Cir); Lotto v United States, 157 F2d 623 (CA 8th Cir), which proposition would seem a fortiori true where the Government has not engaged in illegal or unconstitutional conduct and where the inadmissible testimony is obtained by a government other than the one bringing the prosecution and for a purpose unrelated to the prosecution. Second, there are no real proof problems in this situation. As in the analogous search and seizure and wiretap cases—where the burden of proof is on the Government once the defendant establishes the unlawful search or wiretap, United States v Coplon, 185 F2d 629 (CA2d Cir); United States v Goldstein, 120 F2d 485, 488 (CA2d Cir),

aff'd, 316 US 114, 86 L ed 1312, 62 S Ct 1000—once a defendant demonstrates that he has testified in a state proceeding in exchange for immunity to matters related to the federal prosecution, the Government can be put to show that its evidence is not tainted by establishing that it had an independent, legitimate source for the disputed evidence. Since the Government has the relevant information within its control, valid prosecutions need not be sacrificed and infringement of the privilege through use of compelled testimony, direct or indirect, need not be tolerated. It is carrying a premise of perjury and judicial incompetence *[378 US 104] *to excess to believe that this procedure poses any hazards to the rights of an accused. Third, greater requirements or difficulties of proof by a defendant inhere in the rule of absolute immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment or conviction. Heike v United States, 217 US 423, 54 L ed 821, 30 S Ct 539. The witness must plead and prove, as an affirmative defense, that he has received immunity and that the instant prosecution is on account of a matter testified to in exchange for immunity, Heike v United States, 227 US 131, 57 L ed 450, 33 S Ct 226, which may pose considerable difficulties where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in an in camera administrative proceeding. See Edwards v United States, 312 US 473, 85 L ed 957, 61 S Ct 669; 131 F2d 198 (CA 10th Cir) (retrial), certiorari denied, 317 US 689, 87 L ed 552, 63 S Ct 262, United States v Lumber Products Assn., 42 F Supp 910 (DCND Cal) rev'd, sub nom Ryan v United States, 128 F2d 551 (CA 9th Cir); Lumber Products Assn. v United States (plea of immunity finally upheld after trial), 144 F2d 546 (CA 9th Cir). Cf. Pandolfo v Biddle, 8 F2d 142 (CA 8th Cir).

Counselman v Hitchcock, 142 US 547, 35 L ed 1110, 12 S Ct 195, does not require that absolute immunity from state prosecution be conferred on a federal witness and the Court has declined on many occasions to so read it, the limitation of the privilege to one sovereign rationale aside, Brown v Walker, 161 US 591, 40 L ed 819, 16 S Ct 644; Adams v Maryland, 347 US 179, 98 L ed 608, 74 S Ct 442; Ullmann v United States, 350 US 422, 100 L ed 511, 76 S Ct 497, 53 ALR2d 1008; Reina v United States, 364 US 507, 5 L ed 2d 249, 81 S Ct 260.[6]

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6. As Mr. Justice Black stated for the Court in Adams v Maryland, a case dealing with the use of federally compelled testimony in a state proceeding "[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." 347 US, at 181, 98 L ed at 612.

Neither Congress nor the States have read Counselman to mean that the Constitution requires absolutely immunity from prosecution. There are numerous statutes providing for immunity from use, not prosecution, in exchange for incriminatory testimony. E. g., 30 Stat 548 (1898), 11 USC § 25; 18 USC § 1406; 49 USC § 9; 18 USC § 3486. Ala Code, Tit 9, § 39; Ala Code, Tit 29, § 171; Ariz Rev Stat Ann § 13-384; Ark Const, Art III, § 9; Cal Const, Art 4, § 35; Colo Rev Stat § 40-8-8; id., § 40-17-8; Conn Gen Stat (1958 rev), § 12-2 and § 12-53; Fla Stat Ann, § 55.59 and § 350.60; Idaho Code Ann § 48-308 (Supp 1963); Ill Ann Stat c. 100½, § 4; Ky Rev Stat § 124.330; Mich Stat Ann § 7.411(17); NJ Rev Stat, § 2A:93-9.

The effect of the rule petitioners urge would be to hold the above and numerous

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It does not therefore require *that absolute immunity from federal prosecution be conferred on a state witness. Counselman, an officer of an interstate railroad, refused to reveal whether he engaged in discriminatory rate practices, a criminal offense, under the Interstate Commerce Act, before a federal grand jury investigating specific violations of that Act. The Court established for the first time that the coverage of the privilege extended to not only a confession of the offense but also disclosures leading to discovery of incriminating evidence, a matter of considerable doubt at the time. See United States v Brown, 1 Saw 531, 536, Fed Cas No. 14,671, United States v McCarthy, 18 F 87, 89 (CCSD NY); Re Counselman, 44 F 268 (CCND Ill). It then invalidated the first immunity statute to come before it because "[the statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on

*[378 US 106]

*which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." 142 US 547, at 564, 35 L ed 1110, at 1114, 12 S Ct 195. In a dictum indicating that some immunity statutes are valid, the Court added that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution *for the offence to which the question relates*." Id., at 586, 35 L ed at 1122. Whatever may be the validity of this dictum where the witness is being investigated by a grand jury for the purpose of indictment for a particular offense and where the grand jury proceedings are conducted by the same government attempting to obtain a conviction for the offense—the facts of Counselman—it clearly has no validity, and by its own terms, no applicability, where the inquiry does not concern any federal offense, no less a particular one, and the government seeking the testimony has no purpose or authority to prosecute for federal crimes.

The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation. Likewise it is possible that information gathered by a state government which has an important but wholly separate purpose in conducting the investigation and no interest in any federal prosecution will not in any manner be used in subsequent federal proceedings, at least "while this Court sits" to review invalid convictions. Panhandle Oil Co. v Knox, 277 US 218, at 223, 72 L ed 857, at 859, 48 S Ct 451, 56 ALR 583 (Holmes, J., dissenting). It is precisely this possibility of a prosecution based on untainted evidence that we must recognize. For if it

*[378 US 107]

is meaningful *to say that the Federal Government may not use compelled testimony to convict a witness

other statutes barring use but not prosecution unconstitutional.

of a federal crime, then, of course, the Constitution permits the State to compel such testimony.

"The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him." Feldman v United States, 322 US 487, 500, 88 L ed 1408, 1418, 64 S Ct 1082, 154 ALR 982 (Black, J., dissenting). I believe the State may compel testimony incriminating under federal law, but the Federal Government may not use such testimony or its fruits in a federal criminal proceeding. Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination.

2A:81-17.2a3 Removal for commission of misdemeanor

Any public employee who admits the commission of a misdemeanor or high misdemeanor relating to his employment or touching the administration of his office or position before any court, grand jury or the State Commission of Investigation shall be subject to removal from such office, position or employment.

L.1970, c. 72, § 4, eff. May 21, 1970.

2A:81-17.2a4 Removal proceedings

If any public employee has subjected himself to removal as provided in section 2 or section 4 of this act,[1] a proceeding may be instituted to effect such removal in the Superior Court by the Attorney General or a county prosecutor of this State by proceeding in lieu of prerogative writ.

L.1970, c. 72, § 5, eff. May 21, 1970.

[1] Sections 2A:81-17.2a1, 2A:81-17.2a3.

2A:81-17.2a5 Other laws relating to removal of public employees

Nothing in this act shall be construed to annul or modify any other law of this State or any rule or regulation promulgated pursuant to any other law of this State relating to the removal of public employees from office, position or employment.

L.1970, c. 72, § 6, eff. May 21, 1970.

ARTICLE 5B. COMPELLING WITNESSES IN CRIMINAL PROCEEDING TO TESTIFY; IMMUNITY [NEW]

2A:81-17.3 Order compelling person to testify or produce evidence; immunity from use of such evidence; contempt

In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby and if the Attorney General or the county prosecutor with the approval of the Attorney General, in writing, requests the court to order that person to answer the question or produce the evidence, the court shall so order and that person shall comply with the order. After complying and if but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, such testimony or evidence, or any information directly or indirectly derived from such testimony or evidence, may not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered without regard to the expiration of the grand jury; provided, however, that if the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court.

L.1968, c. 195, § 1, eff. July 19, 1968. Amended by L.1973, c. 112, § 1, eff. May 7, 1973.

Cross References

Self-incrimination, see § 2A:84A-17 et seq.

Title of Act:

An Act providing for the compelling of evidence from certain persons in criminal proceedings and for the granting of immunity to such persons from the use of such evidence against them in certain cases. L.1968, c. 195.

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1. In general

Nothing in this section even suggests that a witness who has been granted immunity and ordered to testify, but refuses, may continue to refuse if he is willing to accept the penalty of incarceration for a fixed term for criminal contempt of court. State v. Sotteriou, 123 N.J.Super. 434, 303 A.2d 585 (1973).

Only if court had ruled that there was basis for claim of privilege against self-incrimination would prosecutor have been put to choice of granting immunity or abandoning inquiry. State v. Craig, 107 N.J.Super. 196, 257 A.2d 737 (1969).

Provision of Model State Witness Immunity Act that makes immunity from prosecution dependent ultimately on whether privilege against self-incrimination was in truth available when it was cl[illegible]ned is intended to prevent spurious claim of privilege and does not make claim available without any inquiry by court. In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968).

This section requires an inquiry by court as to validity of claim before claim will be upheld, and will come into play only if court finds basis for claim of self-incrimination. Id.

Once it was established that witness called by prosecution intended to claim his privilege of immunity to self-incrimination under the Fifth Amendment, trial court committed prejudicial error in permitting prosecutor to continue line of questioning which placed before jury innuendo evidence or inferences of evidence, which implicated defendant in robberies, and which the prosecution could not get before the jury by direct testimony of the witness. State v. Cullen, 103 N.J.Super. 360, 247 A.2d 346 (1968).

Practice of prosecution in calling a co-defendant as a witness where prosecution has knowledge that co-defendant will claim his privilege against self-incrimination is improper because it operates to prejudice defendant in eyes of jurors. Id.

1.5 Purpose

Legislative intent in enacting this section was to broaden the power of courts and grand juries to ascertain relevant facts by providing an additional remedy more effective than the preexisting power to punish a recalcitrant witness for criminal contempt. State v. Sotteriou, 123 N.J.Super. 434, 303 A.2d 585 (1973).

2. Immunity

Remedy enunciated in this section extends to proceedings before a court as well as to proceedings before a grand jury. State v. Sotteriou, 123 N.J.Super 434, 303 A.2d 585 (1973).

Witness who had already been convicted for his participation in crime and had exhausted his appeal from such conviction could not refuse to answer questions at trial of alleged co-participant in crime in absence of disclosure of any criminal exposure justifying invocation of privilege against self-incrimination. State v. Craig, 107 N.J.Super. 196, 257 A.2d 737 (1969).

Grant of immunity under this section for offering evidence despite valid claim of Fifth Amendment privilege against self-incrimination operates in same way to prevent witness' reliance on Fourth Amendment. In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968).

Showing sufficient for reliance on Fifth Amendment privilege against self-incrimination in order not to produce records subpoenaed by grand jury without grant of immunity should be sufficient to support reliance on Fourth Amendment prohibition against unreasonable searches and seizures when purpose is to obtain things that incriminate subpoenaed individual. Id.

3. Contempt

Court properly discharged its duty to explain applicable law to defendant charged with contempt for failing to answer questions after his invocation of claim of self-incrimination was overruled. State v. Craig, 107 N.J.Super. 196, 257 A.2d 737 (1969).

4. Penalty or forfeiture

Employment of the term "penalty" in this section does not limit a court in its remedy, upon a refusal to testify following a grant of immunity, to incarceration for a stated term. State v. Sotteriou, 123 N.J.Super. 434, 303 A.2d 585 (1973).

Since order compelling witness to testify, following a grant of immunity, included "all matters" pertaining to coindictee and others enumerated in indictment, the commitment of the witness to jail for refusal to testify was not arbitrary and punitive on ground that the trial of the coindictee at which he was called to testify had ended, since there were still pending and awaiting trial several counts of the indictment against the coindictee and others. Id.

Where defendant, after being subpoenaed to testify at the trial of a coindictee, invoked his Fifth Amendment privilege against self-incrimination, where the state then submitted a petition to compel testimony under this section, where the trial judge then signed an order compelling defendant to testify in all matters relating to the coindictee and others in a multicount indictment, but where defendant, after his request for transactional rather than use immunity was denied, continued his refusal to testify, it was proper for the trial judge, under this section, to hold defendant in contempt and to commit him to the county jail until he should purge himself of his contumacious conduct by testifying. Id.

5. Bail

Although, with respect to the incarceration of a witness who refuses to testify despite a grant of immunity, the fixing of bail is not mandated by this section, the trial court, whose order compelling certain witness to testify included "all matters" pertaining to coindictee and others enumerated in the indictment, did not abuse its discretion in setting bail following incarceration of the witness for his continuing refusal to testify despite the grant of immunity, considering the uncertainty of trial dates on the pending counts of the indictment; nor did the court abuse its discretion in setting bail in the amount of $25,000, despite fact that the bail posted on the witness' arraignment of the original criminal charges against him was only in the amount of $20,000. State v. Sotteriou, 123 N.J.Super. 434, 303 A.2d 585 (1973).