

2130 - MILITARY COMPTREE - HB 45

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 com-

pel 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

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

- AM JUR 2d, Witnesses (1st ed § 38)
- 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.

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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 de-

rived 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 against self-incrimination, and therefore not sufficient to supplant the privilege 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

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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).

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[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

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requirements that an accused be confronted with the witnesses

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

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

Lord Chancellor Hardwicke, reported in 12 T. Hansard, *Parliamentary History of England*, 675, 693 (1812). See also *Picmonte 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).

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10. *Murphy v Waterfront Comm'n*, 378 US 52, 93-94, 12 L Ed 2d 678, 704, 84 S Ct 1594 (1964); *Blair v United States*, 250 US 273, 63 L Ed 979, 39 S Ct 468 (1919); *Broderick*, 397 US 888, 89 S Ct 1913 (1970).

11. *Hoffman v United States*, 385 US 479, 486, 95 S Ct 814 (1951); *Mason v United States*, 390 US 159, 95 L Ed 1198, 61 L Ed 1198 (1968).

12. See, e.g., *Ullmann v United States*, 350 US 426, 443-44, 76 S Ct 497, 53 ALR2d 1008 (1956); *Ullmann v United States*, 350 US 426, 443-44, 76 S Ct 497, 53 ALR2d 1008 (1956).

13. Soon after the establishment of the privilege against compulsory self-incrimination, or "indemnity," had been granted by the Fifth Amendment to the Parliament in 1710 directed by Anne, the model for the privilege was enacted in the Statute of 1774, c 1651, § 21, 621, 623 (1800). That the loss of the privilege was compelled by the charges. After returning his testimony, indicted, and charged from the government. Forfeiture may

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

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protects against any disclosures that the witness reasonably be-

lieves 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-

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 Wignore, 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

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

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.

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 LJ, 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).

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15] Petitioner the Fifth Amendment against compulsion, which is to be compelled shall be compelled to be a witness against himself," deprives Congress the power to enact laws that punish criminal offenses, even if the immunity from prosecution is granted prior to the commission of the crime. In words, petitioners' immunity statute can afford a compelling incrimination. They ask us to rule *Brown v Walker*, 40 L Ed 819, 16 ALR2d 1008, 76 S Ct 497, 53 ALR2d 1008, 350 US 422, 100 L Ed 511, 76 S Ct 497, 53 ALR2d 1008, 1956 WL 1008, 1956-1 C 1008, 1956-1 CB 1008, 1956-1 CL 1008, 1956-1 CR 1008, 1956-1 CS 1008, 1956-1 CT 1008, 1956-1 CU 1008, 1956-1 CV 1008, 1956-1 CW 1008, 1956-1 CX 1008, 1956-1 CY 1008, 1956-1 CZ 1008, 1956-1 D1 1008, 1956-1 D2 1008, 1956-1 D3 1008, 1956-1 D4 1008, 1956-1 D5 1008, 1956-1 D6 1008, 1956-1 D7 1008, 1956-1 D8 1008, 1956-1 D9 1008, 1956-1 E1 1008, 1956-1 E2 1008, 1956-1 E3 1008, 1956-1 E4 1008, 1956-1 E5 1008, 1956-1 E6 1008, 1956-1 E7 1008, 1956-1 E8 1008, 1956-1 E9 1008, 1956-1 F1 1008, 1956-1 F2 1008, 1956-1 F3 1008, 1956-1 F4 1008, 1956-1 F5 1008, 1956-1 F6 1008, 1956-1 F7 1008, 1956-1 F8 1008, 1956-1 F9 1008, 1956-1 G1 1008, 1956-1 G2 1008, 1956-1 G3 1008, 1956-1 G4 1008, 1956-1 G5 1008, 1956-1 G6 1008, 1956-1 G7 1008, 1956-1 G8 1008, 1956-1 G9 1008, 1956-1 H1 1008, 1956-1 H2 1008, 1956-1 H3 1008, 1956-1 H4 1008, 1956-1 H5 1008, 1956-1 H6 1008, 1956-1 H7 1008, 1956-1 H8 1008, 1956-1 H9 1008, 1956-1 I1 1008, 1956-1 I2 1008, 1956-1 I3 1008, 1956-1 I4 1008, 1956-1 I5 1008, 1956-1 I6 1008, 1956-1 I7 1008, 1956-1 I8 1008, 1956-1 I9 1008, 1956-1 J1 1008, 1956-1 J2 1008, 1956-1 J3 1008, 1956-1 J4 1008, 1956-1 J5 1008, 1956-1 J6 1008, 1956-1 J7 1008, 1956-1 J8 1008, 1956-1 J9 1008, 1956-1 K1 1008, 1956-1 K2 1008, 1956-1 K3 1008, 1956-1 K4 1008, 1956-1 K5 1008, 1956-1 K6 1008, 1956-1 K7 1008, 1956-1 K8 1008, 1956-1 K9 1008, 1956-1 L1 1008, 1956-1 L2 1008, 1956-1 L3 1008, 1956-1 L4 1008, 1956-1 L5 1008, 1956-1 L6 1008, 1956-1 L7 1008, 1956-1 L8 1008, 1956-1 L9 1008, 1956-1 M1 1008, 1956-1 M2 1008, 1956-1 M3 1008, 1956-1 M4 1008, 1956-1 M5 1008, 1956-1 M6 1008, 1956-1 M7 1008, 1956-1 M8 1008, 1956-1 M9 1008, 1956-1 N1 1008, 1956-1 N2 1008, 1956-1 N3 1008, 1956-1 N4 1008, 1956-1 N5 1008, 1956-1 N6 1008, 1956-1 N7 1008, 1956-1 N8 1008, 1956-1 N9 1008, 1956-1 O1 1008, 1956-1 O2 1008, 1956-1 O3 1008, 1956-1 O4 1008, 1956-1 O5 1008, 1956-1 O6 1008, 1956-1 O7 1008, 1956-1 O8 1008, 1956-1 O9 1008, 1956-1 P1 1008, 1956-1 P2 1008, 1956-1 P3 1008, 1956-1 P4 1008, 1956-1 P5 1008, 1956-1 P6 1008, 1956-1 P7 1008, 1956-1 P8 1008, 1956-1 P9 1008, 1956-1 Q1 1008, 1956-1 Q2 1008, 1956-1 Q3 1008, 1956-1 Q4 1008, 1956-1 Q5 1008, 1956-1 Q6 1008, 1956-1 Q7 1008, 1956-1 Q8 1008, 1956-1 Q9 1008, 1956-1 R1 1008, 1956-1 R2 1008, 1956-1 R3 1008, 1956-1 R4 1008, 1956-1 R5 1008, 1956-1 R6 1008, 1956-1 R7 1008, 1956-1 R8 1008, 1956-1 R9 1008, 1956-1 S1 1008, 1956-1 S2 1008, 1956-1 S3 1008, 1956-1 S4 1008, 1956-1 S5 1008, 1956-1 S6 1008, 1956-1 S7 1008, 1956-1 S8 1008, 1956-1 S9 1008, 1956-1 T1 1008, 1956-1 T2 1008, 1956-1 T3 1008, 1956-1 T4 1008, 1956-1 T5 1008, 1956-1 T6 1008, 1956-1 T7 1008, 1956-1 T8 1008, 1956-1 T9 1008, 1956-1 U1 1008, 1956-1 U2 1008, 1956-1 U3 1008, 1956-1 U4 1008, 1956-1 U5 1008, 1956-1 U6 1008, 1956-1 U7 1008, 1956-1 U8 1008, 1956-1 U9 1008, 1956-1 V1 1008, 1956-1 V2 1008, 1956-1 V3 1008, 1956-1 V4 1008, 1956-1 V5 1008, 1956-1 V6 1008, 1956-1 V7 1008, 1956-1 V8 1008, 1956-1 V9 1008, 1956-1 W1 1008, 1956-1 W2 1008, 1956-1 W3 1008, 1956-1 W4 1008, 1956-1 W5 1008, 1956-1 W6 1008, 1956-1 W7 1008, 1956-1 W8 1008, 1956-1 W9 1008, 1956-1 X1 1008, 1956-1 X2 1008, 1956-1 X3 1008, 1956-1 X4 1008, 1956-1 X5 1008, 1956-1 X6 1008, 1956-1 X7 1008, 1956-1 X8 1008, 1956-1 X9 1008, 1956-1 Y1 1008, 1956-1 Y2 1008, 1956-1 Y3 1008, 1956-1 Y4 1008, 1956-1 Y5 1008, 1956-1 Y6 1008, 1956-1 Y7 1008, 1956-1 Y8 1008, 1956-1 Y9 1008, 1956-1 Z1 1008, 1956-1 Z2 1008, 1956-1 Z3 1008, 1956-1 Z4 1008, 1956-1 Z5 1008, 1956-1 Z6 1008, 1956-1 Z7 1008, 1956-1 Z8 1008, 1956-1 Z9 1008.

Petitioners' scope of that the scope of the federal statute, 18 USC 6002, is not as extensive with the Amendment privilege. Therefore, there is no reason to plant the privilege over a witness. The statute provides that the witness is compelled to testify.

22. *Accord*, *Garfield v Waterfront Comm'n*, 378 US, at 276, 20 L Ed 2d 1008, 76 S Ct 497, 53 ALR2d 1008, 1956 WL 1008, 1956-1 C 1008, 1956-1 CB 1008, 1956-1 CL 1008, 1956-1 CR 1008, 1956-1 CS 1008, 1956-1 CT 1008, 1956-1 CU 1008, 1956-1 CV 1008, 1956-1 CW 1008, 1956-1 CX 1008, 1956-1 CY 1008, 1956-1 CZ 1008, 1956-1 D1 1008, 1956-1 D2 1008, 1956-1 D3 1008, 1956-1 D4 1008, 1956-1 D5 1008, 1956-1 D6 1008, 1956-1 D7 1008, 1956-1 D8 1008, 1956-1 D9 1008, 1956-1 E1 1008, 1956-1 E2 1008, 1956-1 E3 1008, 1956-1 E4 1008, 1956-1 E5 1008, 1956-1 E6 1008, 1956-1 E7 1008, 1956-1 E8 1008, 1956-1 E9 1008, 1956-1 F1 1008, 1956-1 F2 1008, 1956-1 F3 1008, 1956-1 F4 1008, 1956-1 F5 1008, 1956-1 F6 1008, 1956-1 F7 1008, 1956-1 F8 1008, 1956-1 F9 1008, 1956-1 G1 1008, 1956-1 G2 1008, 1956-1 G3 1008, 1956-1 G4 1008, 1956-1 G5 1008, 1956-1 G6 1008, 1956-1 G7 1008, 1956-1 G8 1008, 1956-1 G9 1008, 1956-1 H1 1008, 1956-1 H2 1008, 1956-1 H3 1008, 1956-1 H4 1008, 1956-1 H5 1008, 1956-1 H6 1008, 1956-1 H7 1008, 1956-1 H8 1008, 1956-1 H9 1008, 1956-1 I1 1008, 1956-1 I2 1008, 1956-1 I3 1008, 1956-1 I4 1008, 1956-1 I5 1008, 1956-1 I6 1008, 1956-1 I7 1008, 1956-1 I8 1008, 1956-1 I9 1008, 1956-1 J1 1008, 1956-1 J2 1008, 1956-1 J3 1008, 1956-1 J4 1008, 1956-1 J5 1008, 1956-1 J6 1008, 1956-1 J7 1008, 1956-1 J8 1008, 1956-1 J9 1008, 1956-1 K1 1008, 1956-1 K2 1008, 1956-1 K3 1008, 1956-1 K4 1008, 1956-1 K5 1008, 1956-1 K6 1008, 1956-1 K7 1008, 1956-1 K8 1008, 1956-1 K9 1008, 1956-1 L1 1008, 1956-1 L2 1008, 1956-1 L3 1008, 1956-1 L4 1008, 1956-1 L5 1008, 1956-1 L6 1008, 1956-1 L7 1008, 1956-1 L8 1008, 1956-1 L9 1008, 1956-1 M1 1008, 1956-1 M2 1008, 1956-1 M3 1008, 1956-1 M4 1008, 1956-1 M5 1008, 1956-1 M6 1008, 1956-1 M7 1008, 1956-1 M8 1008, 1956-1 M9 1008, 1956-1 N1 1008, 1956-1 N2 1008, 1956-1 N3 1008, 1956-1 N4 1008, 1956-1 N5 1008, 1956-1 N6 1008, 1956-1 N7 1008, 1956-1 N8 1008, 1956-1 N9 1008, 1956-1 O1 1008, 1956-1 O2 1008, 1956-1 O3 1008, 1956-1 O4 1008, 1956-1 O5 1008, 1956-1 O6 1008, 1956-1 O7 1008, 1956-1 O8 1008, 1956-1 O9 1008, 1956-1 P1 1008, 1956-1 P2 1008, 1956-1 P3 1008, 1956-1 P4 1008, 1956-1 P5 1008, 1956-1 P6 1008, 1956-1 P7 1008, 1956-1 P8 1008, 1956-1 P9 1008, 1956-1 Q1 1008, 1956-1 Q2 1008, 1956-1 Q3 1008, 1956-1 Q4 1008, 1956-1 Q5 1008, 1956-1 Q6 1008, 1956-1 Q7 1008, 1956-1 Q8 1008, 1956-1 Q9 1008, 1956-1 R1 1008, 1956-1 R2 1008, 1956-1 R3 1008, 1956-1 R4 1008, 1956-1 R5 1008, 1956-1 R6 1008, 1956-1 R7 1008, 1956-1 R8 1008, 1956-1 R9 1008, 1956-1 S1 1008, 1956-1 S2 1008, 1956-1 S3 1008, 1956-1 S4 1008, 1956-1 S5 1008, 1956-1 S6 1008, 1956-1 S7 1008, 1956-1 S8 1008, 1956-1 S9 1008, 1956-1 T1 1008, 1956-1 T2 1008, 1956-1 T3 1008, 1956-1 T4 1008, 1956-1 T5 1008, 1956-1 T6 1008, 1956-1 T7 1008, 1956-1 T8 1008, 1956-1 T9 1008, 1956-1 U1 1008, 1956-1 U2 1008, 1956-1 U3 1008, 1956-1 U4 1008, 1956-1 U5 1008, 1956-1 U6 1008, 1956-1 U7 1008, 1956-1 U8 1008, 1956-1 U9 1008, 1956-1 V1 1008, 1956-1 V2 1008, 1956-1 V3 1008, 1956-1 V4 1008, 1956-1 V5 1008, 1956-1 V6 1008, 1956-1 V7 1008, 1956-1 V8 1008, 1956-1 V9 1008, 1956-1 W1 1008, 1956-1 W2 1008, 1956-1 W3 1008, 1956-1 W4 1008, 1956-1 W5 1008, 1956-1 W6 1008, 1956-1 W7 1008, 1956-1 W8 1008, 1956-1 W9 1008, 1956-1 X1 1008, 1956-1 X2 1008, 1956-1 X3 1008, 1956-1 X4 1008, 1956-1 X5 1008, 1956-1 X6 1008, 1956-1 X7 1008, 1956-1 X8 1008, 1956-1 X9 1008, 1956-1 Y1 1008, 1956-1 Y2 1008, 1956-1 Y3 1008, 1956-1 Y4 1008, 1956-1 Y5 1008, 1956-1 Y6 1008, 1956-1 Y7 1008, 1956-1 Y8 1008, 1956-1 Y9 1008, 1956-1 Z1 1008, 1956-1 Z2 1008, 1956-1 Z3 1008, 1956-1 Z4 1008, 1956-1 Z5 1008, 1956-1 Z6 1008, 1956-1 Z7 1008, 1956-1 Z8 1008, 1956-1 Z9 1008.

23. For other pr

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,

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 1896).

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

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 incriminating 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

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 who urged the Interstate Commerce Commission bill, which provided for a broad language in the testimony statute, which was moved to the floor and provided "no person shall be subjected to any civil or criminal action, matter, or proceeding, in which he may be interested, on the basis of evidence, do . . ."

Stat 444.

31. *Counselman v Hitchcock*, 142 US 547, 35 L Ed 1110, 12 S Ct 195 (1892). Senator

32. 23 Cong

33. Act of 1868, 15 Stat 37, repealed by the Control Act of 1874, 18 Stat 931.

34. See the 23 Cong R. 1874, Congressman William Shapero v United States, 36, 9; S Ct 1375 (1892).

35. *Ullman v State*, 350 US 405, 16 L Ed 2d 438, 100 L Ed 179, 179 S Ct 179 (1956), exception. S Ct 1375 (1892), 611.

36. *Arnstein v*, 389 US 155, 18 L Ed 2d 138, 138 S Ct 138 (1967).

36. The study and Commission on Federal Laws, Commission on Reform the recommendable statute

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 statutes³⁵ 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

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 444, 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 *Picirillo v New York*, 400 US, at 571 and n. 11, 27 L Ed 2d, at 419, 611 (Brennan, J., dissenting); *Arnsteln 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 pro-

posal 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 con-

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

strued 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

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 (Emphasis supplied)

See also *Arndsteiner v American Council on Education*, 351 US 71, 73, 65 L Ed 26 (1920). The Counselman relief is available to

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In *Murphy v Waterfront Comm'n of New York Harbor*, 378 US 52, 12 L Ed 2d 1594 (1964), the Court considered immunized witnesses compelled testimony derived therefrom. Counselman relief was granted where witnesses were subpoenaed at a hearing on the waterfront of New York Harbor. Although the witnesses refused to answer certain questions, the Court held that the a

39. Cf. *The Supreme Court*, 78 Harv L Rev 179, 2 similar to the Counselman statute found in *Brown v Board of Education*, 347 US 483, 594-595, 40 L Ed 746, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 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2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556,

from the compelled testimony." to incriminate them, petitioners Id., at 437, 100 L Ed at 523, 524. were granted immunity (Emphasis supplied.) [406 US 456]

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

[406 US 455]

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

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

[406 US 457]

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

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

in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." 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

[406 US 458]

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-

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 of use of all evidence compelled testimony reasoning of the and the result conclusion that use immunity sufficient to cover a claim of the privilege is fully scope is the same in a state or in tion,⁴⁷ the *Murphy* a prohibition on use secures a witness privilege and by the Federal demonstrates that immunity derivative use the scope of the *Murphy* Court use and derivative witness and the in substantially

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as if the witness privilege"⁴⁸ in the of immunity.

was concerned whether of incrimination law, and held that use and derivative to displace the

Smith v United States, 378 US 1, 12 L. Ed 2d 653, 84 S Ct 1489 (1964); *United States v Henkel*, 201 US 370 (1906); *Jack Walker*, 161 US 556, 644 (1896). See also

46. E. g., *Alberta Activities Control Board v Canada*, 378 US 1, 12 L. Ed 2d, at 172; 254 US, at 73, 65 S Ct 111, 12 L. Ed 2d, at 172.

47. In *Malloy v Hogan*, 378 US 1, 12 L. Ed 2d, at 682, the Court held that the privilege determines the

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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 pro-

tection 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

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

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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

[406 US 460]

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 re-

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).

lated 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

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).

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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

[406 US 462]

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*,

[406 US 464]

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, 15 L Ed 2d 16 which the Court's immunity statute measure up to forth in *Counselman* no interjurisdiction presented themselves not even cited. proof that *Murphy* significantly to

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man.¹ See *Stevenson*, 234, 244-245; *id.*, 12 L Ed 2d 724, 731, 84 S Ct 788 (Harlan dissenting); *Marshall's Case: Co. Privilege Against the Government*, 1966

If, as some have argued, the Fifth Amendment's "right of Rights containing of moderation" and legislatures according to their tradition, then today's Self-Incrimination Fifth Amendment is standable. But true, starting with *Marshall's opinion*

1. In *Albertson v Subversive Activities Control Board*, 388 US 86, 86 S Ct 194, the Court held that the Fifth Amendment's protection against self-incrimination, and the "transactional immunity statute" (the introduction of which would prevent a federal prosecution under the Act. this immunity provision in *Counselman*;

"In *Counselman v Hitchcock*, 142 US 547, [35 L Ed 1110] in 1892, the Court's [immunity] statute wh

406 US 441, 32 L Ed 2d 212, 92 S Ct 1653

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,

[406 US 466]

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(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 incriminating 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 has taken away. For while the precise testimony that is compelled may not be used, leads from that testimony may

[406 US 467]

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

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

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

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).

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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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on prosecution, or to forgo the testimony.

For both these reasons it is clear to me that an immunity statute must be tested by a standard far more demanding than that appro-

priate 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*.

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PARK

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.

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 62, 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.

Since a grant of immunity is valid only if it is coextensive with the scope of the privilege
Headnote 2 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 development of our liberty—'one of the great 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 court 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

Headnote 1 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.

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

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In reviewing the contentments which form the basis of the New Jersey Supreme Court's holding that petitioners should, at the hearing, waive their right to self-incrimination. 39 N.J. 436, 452-458, 189 A2d 36, 44.

4. The quotation is from the Fifth Amendment Today

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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.

*1378 US 581

*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 dis-

cover 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-

*1378 US 591

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 inter-related 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 395; 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.

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.

*[379 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 not 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

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

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

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 *Ir 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 prosecu-

tion 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, el 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

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;

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-

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 601, 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 courts¹² 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, 73 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 989, *aff'd* on other grounds, 241 US 73, 60 L ed 807, 36 S Ct 503, 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, *rev'd* 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-
*1378 US 721
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
*1378 US 731

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, 336, 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, 83 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] Government” 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 court.⁴

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

In *Elkins v United States*, 364 US 206, 4 L ed 2d 1639, 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 663, 84 S Ct 1489, draws into question the continuing authority of the statements to the contrary in *United States v Murdock*, 281 US 141, 76 L ed 210, 52 S Ct 63,

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.

32 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 *1378 US 771

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

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

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 courts¹⁷ 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

*1378 US 781
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

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).

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

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 pro-

protects a state witness against federal prosecution, supra, at 694, and that

"the same standards

Headnote 5 must determine whether

Headnote 6 [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 tes-

timony and its fruits cannot be used

in any manner by federal officials

in connection with a criminal prose-

cution against him. We conclude,

moreover, that in order to implement

this constitutional rule and accom-

modate the interests of the State and

Federal Governments in investigat-

ing and prosecuting

Headnote 7 crime, the Federal Gov-

ernment must be prohib-

ited from making any such use of

compelled testimony and its fruits.¹⁸

This exclusionary rule, while permit-

ting the States to secure information

necessary for effective law enforce-

ment, leaves the witness and the

Federal Government in substantially

the same position as if the witness

had claimed his privilege in the ab-

sence of a state grant of immunity.

It follows that petitioners here

may now be compelled to answer the

questions propounded to

Headnote 9 them. At the time they

Headnote 10 refused to answer, how-

ever, petitioners had a

reasonable fear, based on this

Court's decision in Feldman v

United States, supra, that the fed-

eral authorities might use the an-

swers against them in connection

*[378 US 50]

with a federal *prosecution. We

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.

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.

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

*[378 US 81]

case may have rested 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

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).

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

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 Willeox*, 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 forfei-

ture 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 cites 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); *Brownword 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

opinion in *Halo v Henkel*, 201 US 41, 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.

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

3. In *United States v Murdock*, 290 US 359, 356, 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 63-69, 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*, 281 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 in-

criminate 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

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 111, 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 in 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 against the *States* is quite obviously not any basis for a constitutional

*[378 US 90]

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 an-

nounced 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 *Maloy v Hogan*, 378 US 1, 12 L ed 2d 658, 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,

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*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: "[I]f 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

Lillenthal, *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*, § 2284, 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 employes, 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.

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 offend-

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*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

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*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

ers 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, 4411-4413, 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 L.J 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

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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

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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

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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

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

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

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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 entronement of federal agencies as the only law enforcement authorities with effective

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 1668, 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 prose-

cute 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*, 317 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

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, 93 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 § 12-63; Fla Stat Ann, § 55.59 and § 350.60; Idaho Code Ann § 48-308 (Supp 1963); Ill Ann Stat c. 100, § 1; 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

*[378 US 105]

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

other statutes barring use but not prosecution unconstitutional.

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

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 51. 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.

Law Review Commentaries

Fifth amendment's proxy—Transactional or use immunity? (1971) 3 Seton Hall L.Rev. 199.

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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. Sotterlou*, 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*, 197 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 claimed 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 inuendo 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 pre-existing power to punish a recalcitrant witness for criminal contempt. *State v. Sotterlou*, 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. Sotterlou*, 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*, 197 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*, 197 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. Sotterlou*, 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 indictments 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 indictments at which he was called to testify had ended, since there were still pending and awaiting trial several counts of the indictment against the co-defendant and others. *Id.*

Where defendant, after being subpoenaed to testify at the trial of a co-defendant, 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 pertaining to the indictment and others in a multi-count indictment, but where defendant, after the request for transcription of the transcript of his refusal to testify, refused to testify, it was proper for the trial judge, under this section, to commit 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 indictments 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 the fact that the bail posted on the witness' arraignment of the original criminal charges against him was only in the amount of \$25,000. *State v. Sotterlou*, 123 N.J.Super. 434, 303 A.2d 585 (1973).

New Jersey

HB

6

AMENDMENT

IN THE HOUSE

BY THE JUDICIARY COMMITTEE

TO: HOUSE BILL NO. 6

Page 1, line 6: delete all matter and insert:

"For an Act entitled: "An Act relating to the negligent use of flammable materials."

Page 1, line 10: delete all matter and insert:

"Sec. 11.15.340. NEGLIGENT USE OF FLAMMABLE MATERIALS. A person who, negligently or recklessly causes a fire-"

Page 1, line 13: delete all matter and insert:

"to another person or in damage to the property of another, is guilty of a misdemeanor,-"

CAUTION

ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 70-27

IT IS UNLAWFUL TO SMOKE IN BED

32.05.010. **SMOKING.** Whoever, by reason of careless or willful conduct in smoking or in the use of lighters or matches shall set fire to any bedding, carpet, curtains, drapes, furniture, household equipment or other goods or chattels or to any building shall be guilty of a misdemeanor.

32.05.020. **DEFINITION.** The term "careless conduct in smoking" shall include as used herein, any of the following acts of commission or omission.

Permitting a spark or sparks from a lighted cigar, cigarette, or pipe to fall upon or into anything flammable; placing any lighted smoking material on or about or in close proximity to any flammable article or articles; falling asleep with lighted smoking material of any kind at hand; throwing lighted smoking material out of a window or into an elevator pit or elsewhere than in a proper receptacle therefore; dropping a lighted cigarette or cigar or part thereof into a mail chute in any building; failure to extinguish the fire of a match or any kind of lighter device after use of the same; failure to destroy the lighted part of a cigar or cigarette when disposing of it; failure to destroy the burning smidgen or smidgens of tobacco from a pipe when cleaning or unloading a pipe.

32.05.030. **NOTICE TO BE POSTED.** A plainly printed notice of the provisions of this chapter shall be posted in a conspicuous place in every sleeping room of every hotel, motel, rooming house, tourist home, tourist court, or other place renting rooms for the accommodation of the public. Such notice shall be posted by the owner, proprietor, lessee or managing agent of such establishment.

32.05.040. **VIOLATIONS A MISDEMEANOR.** Any person, firm, co-partnership or corporation violating any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than three hundred dollars (\$300.00) and imprisoned for not more than thirty (30) days, or both.

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HB 6

Amendment proposed by Rep. Parr

Line 13

in damage to the property of another,

language in SB 44 which has passed the Senate

Line 13

to another person is guilty

proposed language of letter of intent

This new criminal offense is not intended to preclude prosecutions for homicide in appropriate cases.

HB

45

WESTERN GOVERNMENTAL RESEARCH ASSOCIATION

OFFICE OF THE EXECUTIVE SECRETARY
INSTITUTE OF GOVERNMENTAL STUDIES
UNIVERSITY OF CALIFORNIA
BERKELEY 94720

State Capitol
Juneau
22 January 1975

Representative Terry Gardiner, Chairman
House Judiciary Committee
State Capitol
Juneau

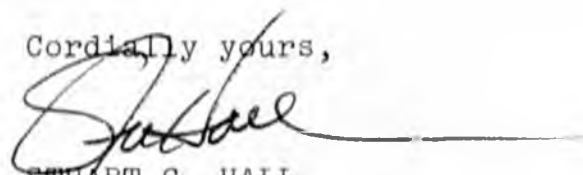
Dear Terry:

Professor Stanley V. Anderson of the University of California, Santa Barbara, faculty who will be one of the principal panelists at the "Colloquium on an Alaskan Ombudsman" on Saturday, February 1, will be arriving in Juneau on Thursday, January 30th.

His schedule for Thursday evening and all day Friday is free, and he will be available to discuss the Ombudsman legislation with you, members of your staff, or with legislative committees individually or jointly, should you wish to arrange it. I would like to set up a tentative "agenda" for his stay here for these two days. If you would like to meet privately with him, or to have him meet with the committees considering these bills, this would be a good opportunity to do so. Please contact me in the Legislative Affairs Agency office (Room 101, State Capitol; 465-3800) should you wish to meet with him.

Professor Anderson is probably one of the best informed people in the United States, if not worldwide, on the Ombudsman concept and its operation. I am also enclosing an invitation to, and a program for, the Saturday, February 1st, colloquium.

Cordially yours,



STUART C. HALL
Alaska Representative, WGRA

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WESTERN GOVERNMENTAL RESEARCH ASSOCIATION

OFFICE OF THE EXECUTIVE SECRETARY
 INSTITUTE OF GOVERNMENTAL STUDIES
 UNIVERSITY OF CALIFORNIA
 BERKELEY 94720

17 January 1975

MEMORANDUM

TO : All Alaska Members, Western Governmental Research Association

FROM : Stuart C. Hall, WGRA Alaska Representative

SUBJECT: Colloquium on an Alaska Ombudsman, 1 February 1975, Juneau

I want to extend a cordial invitation to you to attend a WGRA event jointly sponsored with the Southeast Alaska Chapter of the American Society for Public Administration (ASPA) and the University of Alaska, Juneau: A Colloquium on an Alaska Ombudsman, starting at 9:30 a.m. and continuing throughout Saturday, February 1st, in the handsome new 5th Floor Conference Room of the new State Office Building in Juneau.

We're extraordinarily fortunate in being able to secure two of the most knowledgeable men in the United States on the origin, development and operation of the Ombudsman: Professor Stanley V. Anderson of UC, Santa Barbara, a California attorney and political scientist, and a prolific writer on the subject of the Ombudsman, and Mr. Herman Doi, Ombudsman for the State of Hawaii. Their observations on the Ombudsman concept as it is working today in the U.S. are particularly relevant at this time because the First Session of the Ninth Alaska Legislature, which convenes Monday, January 20, will be considering several measures creating that position. Inasmuch as establishment of the Ombudsman enjoys active gubernatorial support for the first time, enactment of Ombudsman legislation in 1975 appears brighter than it has since the first such bill was introduced in 1966. The bills introduced in the current legislative session also will be reviewed, and the local ASPA chapter has prepared a bill for the governor's consideration.

The colloquium is open to interested members of our profession and the public. There is no registration fee; however, the luncheon with Lieut. Governor Lowell Thomas, Jr., as speaker is \$5. Please feel free to circulate this memorandum among interested friends and colleagues. If you have any questions -- and for those from out of town who might require hotel accommodations -- please contact me by mail (P.O. Box 90, Juneau, AK 99802) or by telephone: 465-3800 (office), or 586-3489 (residence).

Save February 1st -- I'll look forward to seeing you then!

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Utah
 Fred N. [unclear]
 Brigham Young University

Washington - Monica Knoll, University of Washington

Wyoming - Kenneth Carlson, City of Casper

COLLOQUIUM ON AN ALASKA OMBUDSMAN

Sponsored by the University of Alaska
in conjunction with
The American Society for Public Administration
and
The Western Governmental Research Association

Saturday, February 1, 1975
Fifth Floor Conference Room, New State Office Building

9:30 AM.	Program Introduction	Dr. Robert E. Newton, Associate Professor of Political Science, University of Alaska, Colloquium Chairman
9:40 AM.	The Origin and Development of the Ombudsman Movement in America	Dr. Stanley V. Anderson, Professor of Political Science, University of California, Santa Barbara
10:40 AM.	Alaska and the Ombudsman Movement	Mr. Gary E. Wilson
11:00 AM.	The Alaska Ombudsman Bill	To be coordinated with Governor Hammond's Office
11:45 AM.	Luncheon Reception for Mr. Herman Doi, Ombudsman for Hawaii. (Capital Room, Hotel Baranof)	
12:30 PM.	Luncheon (Lunchstring, Hotel Baranof)	lt. Governor Lowell Thomas, Luncheon Speaker Mr. Donald P. Fisher, President, Southeast Alaska Chapter, Amer- ican Society for Public Admin- istration, Toastmaster
2:00 PM.	The Hawaiian Experience with the Ombudsman's Office	Mr. Herman Doi, Ombudsman State of Hawaii
3:00 PM.	Panel Discussion on the Applica- bility of the Office of Ombudsman to Alaska State Government	Mr. Ronald W. Wasiele, Student Regent, University of Alaska, Moderator Mr. Herman Doi, Dr. Stanley V. Anderson, Dr. George W. Rogers, Professor of Economics, University of Alaska, Panelists

File

AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION

SOUTHEAST ALASKA CHAPTER

Box 292 Juneau, Alaska 99802

March 13, 1975

Hon. Terry Gardiner
State Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Gardiner:

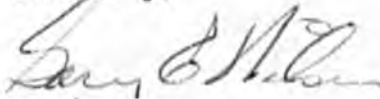
The attached Anchorage Daily Times editorial and my reply which the paper subsequently published, provide information and insights into the ombudsman bill which you are now considering. For this reason I would like to provide you with copies of both.

The entire program in which Hawaii Ombudsman Herman S. Doi participated here in Juneau last February 1, has been recorded on both sound and audio-visual tape. Very shortly we hope to have copies of the written transcript available for all interested parties. (We are a non-profit, volunteer organization which must accomplish its work on nights and week-ends, and consequently, have not had the time yet to make the complete transcription.) But let me also provide you with the attached excerpt in which Ombudsman Doi explains the development of his budget and staff.

As I said in my letter to the Times, I think Doi's work can be duplicated here in Alaska. Let me add to that, that I think it can be duplicated here with the same proportionate costs and that the justification for this "new start" is simply the fact that the public is expecting something like this very much.

Last summer I mailed you a copy of my study, The Ombudsman: Its Potential Applicability to the State of Alaska. If you did not receive it, or if it has been mislaid or lost, you may obtain a copy from either the Secretary of the Senate or the Clerk of the House. Thank you for your courtesy and attention.

Sincerely,



Gary E. Wilson
Member, Ombudsman Committee

Enclosure

Anchorage Daily Times

Editorials

Page 6

Tuesday, February 18, 1975

Monstrous Creature

THE OMBUDSMAN is the motherhood issue of the moment before the Alaska Legislature.

To speak against it is certain to infuriate those who vibrate to anything that smacks of "consumerism" and all that holy word embraces these days.

But the truth needs to be said. And the fact is that the legislature, as Sen. Robert Ziegler of Ketchikan expressed it, is creating a monster with this piece of business.

The Senate, which should know better, passed a bill last week to establish an ombudsman's office as an independent agency of the state government. The House, which loves this sort of thing, can be expected to boom the bill through by a landslide within the next week or so — and Gov. Jay Hammond will sign it into law.

BEFORE TOO many years have passed, however, we expect Alaskans will rue the day the ombudsman ever came into being, at least in the form and fashion contemplated by the existing legislation.

As proposed by the Senate, the office would begin functioning with a budget of \$118,500 for the next fiscal year. That includes \$40,000 for the salary of the first ombudsman, a figure which matches that of the state's Superior Court judges. Another \$31,000 is tossed in for the salary of a deputy ombudsman, with the remaining \$48,500 to cover additional staff and operating expenses.

But this clearly is not the end. And it probably is nowhere near the beginning, if the office is to

function with all the force and power outlined in the Senate bill.

Before too many budgets have passed, that initial \$118,500 is likely to escalate into a monster costing millions.

BEFORE THE END is reached, if it ever is, the ombudsman is going to wind up with a bigger staff than the district attorney and the legislature combined, doing work that should be handled by the people's elected representatives and the Department of Law — all of whom are paid on a year-round basis to do what the ombudsman is supposed to do.

Moreover, the office is going to become — by its very nature — a meddling arm of government that probably will cause more confusion and red tape than it untangles. Other agencies of the government will seek additional appropriations to hire the people and do the paperwork that will be generated by the ombudsman's eager venture into every nook and cranny of the government.

And there will be reams of paperwork and reports, endless hearings and more travel vouchers and per diem expense payments than ever dreamed of at the outset.

Lt. Gov. Lowell Thomas protests this isn't so, because the ombudsman will not be a "super cop to ride herd on all facets of government."

But that's what this behemoth will turn out to be, once the legislature has breathed life into him and he goes stalking off down the trail.

Anchorage Daily Times

ROBERT B. ATWOOD
Editor and Publisher

WILLIAM J. TOBIN
Associate Editor
And General Manager

CLINTON T. ANDREWS JR.
Managing Editor

Letters

Page 4

Monday, March 3, 1975

Successful Ombudsman

Dear Editor:

It was refreshing to read your editorial, "Monstrous Creature," with regard to the ombudsman bill now being considered by the Alaska Legislature. While I am an enthusiastic supporter for the bill's passage, I see the same "motherhood issue" that you do and I am more than a little concerned about it. Essentially I think too many people are reading too much into this modest proposal and will be expecting some kind of super-human performance far beyond anything one might reasonably expect of an effective ombudsman's office.

Recently we were privileged here in Juneau to have an opportunity to explore how an ombudsman's office is supposed to work with Herman S. Doi who has served the past five years as Ombudsman for the State of Hawaii. He came over at our invitation to be the featured speaker at a University of Alaska sponsored public conference on the applicability of the office to Alaska state government.

Doi has processed 8,500 citizens' grievances in his five years of service with a small staff and a very modest budget. The office has grown with the increased caseload and the increasing public knowledge of the availability of his services during this period of time. Besides himself, Doi now has a deputy, four investigators and four secretaries and clerks. Seated by a unanimous vote of the Hawaii legislature, he has turned back surplus monies to that body each year. This past fiscal year \$185,000 was appropriated to him, of which he returned \$22,000.

The 8,500 figure for the caseload does not reflect the informational services which the Hawaii Ombudsman's office furnishes. Often Hawaiians think they have a grievance against a

governmental agency when all they really need is some reliable information to solve their problem.

Doi is armed with the same extensive subpoena power which is included in the bill before the Alaska Legislature, but it is interesting to note that he has never had to use it and that he is a popular figure among state government agencies. This stems from the fact that he and his staff have the kind of mediatory skills which are needed most often to solve problems between citizens and government.

I am persuaded that the same kind of job which Doi and his staff have done in Hawaii can be duplicated here in Alaska. He is quite a person, I can assure you.

This state does not lack for equally qualified people who can establish and maintain a low-budget, non-bureaucratic citizens' grievance processing service. That is the essence of the ombudsman's office wherever it has been successfully implemented.

The ombudsman can be no white knight on a steed who solves all the problems. But someone like Doi, I think, can help a lot of Alaskans, both private citizens and the government employees, to reconcile differences and to raise the public's confidence that our state government really can serve us the way it is supposed to.

Gary E. Wilson
Juneau

AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION

SOUTHEAST ALASKA CHAPTER

Box 292 Juneau, Alaska 99802

March 3, 1975

Excerpts from Hawaii Ombudsman Herman Doi's presentation pertaining to budget and staff development. Colloquium on an Alaka Ombudsman, Juneau, February 1, 1975--The full text of Mr. Doi's question and answer session is being prepared for publication and will be available at a recent date.

AUDIENCE QUESTION: I'm wondering, your first fiscal year, do you recall what your budget figure was, total operating budget?

OMBUDSMAN DOI: The appropriation for the first fiscal year that I received was for \$103,000 of which the Ombudsman expended \$90,000, 90,349.92. And then the second year the appropriation was \$176,000 of which we spent \$157,395. The third year the appropriation was for \$233,000 of which we expended \$159,760. The fourth year the appropriation was for \$192,000, and we expended \$157,595. The fifth year the appropriation was for \$185,000, of which we expended \$163,000. So we've always been below the actual amount that has been appropriated and the amounts that have been appropriated reflect the amounts of the request that we sent to the legislature and we've always gone in with the idea that look, we really cannot predict where this complaint load is going. Now we know that we are asking for perhaps a little bit more money than we actually are going to spend, but we promise you that whatever we do not spend will be lapsed back into the general fund. And on that basis we have received the appropriation as requested. So, I've had during that period of time, at least one standby position that I could fill, if the complaint load rose during that fiscal year to a level where we could not handle it with the staff we had.

AUDIENCE QUESTION: The first fiscal year you staff numbered?

OMBUDSMAN DOI: The first year I operated by myself, one secretary and toward the end of the fiscal year we hired and trained three additional secretaries and three additional staff members if my recollection is correct.

AUDIENCE QUESTION: And presently your staff includes?

OMBUDSMAN DOI: Presently my staff includes six professionals including myself and four secretaries for a total of ten.

ALLEN T. COMPTON

ATTORNEY AT LAW

201 FRANKLIN STREET

JUNEAU, ALASKA 99801

TELEPHONE 907-586-2482

February 11, 1975

Honorable Frank R. Ferguson
Chairman, State Affairs Committee
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Honorable Terry Gardiner
Chairman, Judiciary Committee
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99811

RE: SB 1 - Ombudsman
HB 45 - Ombudsman

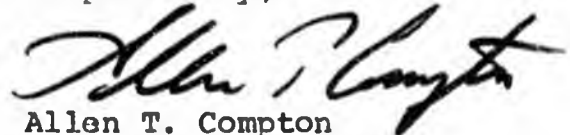
Gentlemen:

At its recent meeting, the Board of Governors of the Alaska Bar Association endorsed the concept of a state Ombudsman for Alaska. This endorsement was based upon a recommendation by the Association's Administrative Law Committee.

The Board did not specifically endorse either SB 1 or HB 45, recognizing in part that the mechanics of such an office are best left to legislative scrutiny. However, the endorsement does recognize that such an office could provide a valuable service to citizens who so often find themselves confounded by a bureaucracy seemingly unresponsive to their complaints.

It would be appreciated if this endorsement could be included in your public record.

Respectfully,



Allen T. Compton
Legislative Counsel
Alaska Bar Association

ATC/bt

cc: Honorable Jay Kerttula
Frances Ulmer, Esquire

House Judiciary Committee
February 11, 1975

HB 45 Ombudsman

The meeting was called to order at 1:05 by Chairman Gardiner. All members were present.

Appointment - the committee agreed to keep nomination by the Legislative Council.

page 1, line 23, delete "majority" and add 3/4 vote of the ^{Approval} members of each house of the legislature. Delete joint session. _{of} O
Rep. Brown moved Amendment 1. There being no objection, the amendment passed.

Art Peterson testified regarding the stipulation that the Ombudsman could not run for political office for a given period of time after serving as Ombudsman: The legislature cannot impose additional qualifications on legislative eligibility. This was an Attorney General's opinion and a court decision in 1968 (Benish case). The committee requested that the constitutionality of such a provision be investigated.

Regarding stipulation that the Ombudsman and his staff shall refrain from partisan political activity, Stu Hall testified that the proposed language is similar to legislative employee regulations.

Rep. Fink moved the addition of amendment 2. There being no objection, the amendment passed after the language "which would tend to undermine . . ." was deleted. ?

Art Peterson suggested that the additional language be in a separate section or that the title of the previous section be amended to include the new language stipulations.

Regarding term of office, Rep. Parr moved that six years be amended to five. There being no objection, amendment 3 passed.

Representative Brown moved that the language "but may not serve for more than three terms" be deleted. There being no objection, amendment 4 passed.

The meeting was adjourned at 1:55 p.m.

House Judiciary Committee
February 12, 1975

Ombudsman

The meeting was called to order at 1:05 p.m. by Chairman Gardiner. All members were present.

The following additional amendments to HB 45 were passed.

page 2, Line 17 and 18: change the words "shall" to may
Amendment 5 passed

(appoint a deputy)

page 3, Line 7: after "salaries" add "and benefits"
Amendment 6 passed

(other legis employees)

page 4, Lines 7 - 9: Mr. Fink's motion to delete was defeated.

page 3, Line 24: after "unless he" add "reasonably"
Amendment 7 passed

page 4, Line 3 and 4: delete and renumber section
Amendment 8 passed

Complainant does not have sufficient personal interest

Chairman Gardiner requested Stu Hall to draft alternate language for this deleted language.

page 3, line 19: Rep. Brown's motion that the language "and administrative acts of any public official" be inserted after "agencies" was withdrawn.

page 4, Line 16 and 17: After "reasons" insert a period and delete the remaining language in both lines.
Amendment 9 passed.

unless mapped to state reasons

page 5, line 7: after inefficient add "or discourteous"
Amendment 10 passed.

Meeting adjourned shortly after beginning discussion on page 5, line 6 -- whether this line contained an implied requirement that reasons be given.

House Judiciary Committee
February 13, 1975

Ombudsman

The meeting was called to order at 10:45 a.m. by Chairman Gardiner. Representatives Bradley, Cotton and Brown were absent.

The following are amendments to HB 45:

Page 5, Line 6: change "unaccompanied" to "unsupported"
Amendment 11 passed.

statement of reason

Page 6, Lines 2 - 8: Rep. Fink moved that the language be redrafted to state that in seeking confidential information, the Ombudsman must receive the approval of the superior court or the court of appropriate jurisdiction. Check into the statutes regarding disclosure of confidential information and make sure that it is a felony. The motion passed.

access to info confidential under fed law.

Page 6, Lines 8 - 11: delete sentence beginning "however"
Amendment 12 passed.

Page 6, Line 11: after "information" insert "required by law to be confidential." Delete "confidential" at end of line 10 and beginning of line 11.
Amendment 13 passed.

O present opinion to

Page 7, Line 9: after "legislature" insert "a grand jury,"
Amendment 14 passed.

Page 7, lines 12 - 15: delete all but title of this section and insert "After a reasonable time has elapsed, the ombudsman shall notify the complainant of the actions taken by him and by the agency."
Amendment 15 passed.

Page 7, Line 21: after "to" insert "a grand jury"
Amendment 16 passed.

O refer to

Page 7, Line 29, Page 8, Lines 1 and 2: After the title delete remaining language and insert "No civil action may be brought against the ombudsman or a member of his staff for anything done, said or omitted in performing his duties or responsibilities under this chapter."
Amendment 17 passed.

House Judiciary Committee
February 13, 1975
page 2

Page 9, Line 1: after "governor," delete the remaining language of the section and insert "and members of the legislature."
Amendment 18 passed.

exclude

Page 8, Line 24: strike "branch" and insert "or judicial branches"
Amendment 19 passed.

include

Page 8, Line 24 and 26: after "commission" insert in both places "corporation, authority, committee, council"
Amendment 20 passed.

include

Page 9, Line 5: after "legislation" insert "or substantive content of any judicial order, decision or opinion."
Amendment 21 passed.

*not admin
act*

Page 9, Line 9: Insert a new section to read "Sec. 24.55.320. CITIES AND BOROUGHES. A city or borough may by ordinance elect to become subject to the jurisdiction of the ombudsman appointed under this chapter. If a city or borough so elects, it shall notify the ombudsman of that election and shall thereafter be considered an agency for purposes of this chapter." Change section numbering. Stu Hall will rearrange the sections in Article 6 to make the definitions come last.

Munis.

The meeting was adjourned at 11:55 a.m.

House Judiciary Committee
February 18, 1975

The meeting was called to order at 3:10 p.m. by Chairman Gardiner. Members present: Gardiner, Bradley, Fink, Cotton, Brown.

HB 45 Ombudsman

Stu Hall presented the committee substitute which incorporated the amendments requested by the committee. Rep. Fink moved that the CS be adopted after language on page 9 concerning the judicial branch be deleted. Mr. Brown amended Mr. Fink's motion to delete the language on the first two lines of page 10 also. Mr. Brown's amended motion failed. Mr. Fink's motion passed and so the CS was adopted. Mr. Brown moved that when the committee receives SB 1 that the CS HB 45 be substituted and that it do pass. There being no objection, Mr. Brown's motion passed.

HB 129 Smoking in Public

Mr. Gardiner indicated that he wished only an idea of what the committee intended to do with this bill. Mr. Fink stated that he would attempt to prove that smoking is not "dangerous" and would then add other habits that bother people to the bill. Mr. Brown recommended that the definition of public accommodation in the 1964 Civil Rights Act be checked to possibly include more public places. Other committee members mentioned other possible amendments including the substitution of approved air conditioning for separate areas.

HB 154/HB 74

Mr. Cotton moved that in 220 six months be changed to 1 year. Amendment 1 passed.

Mr. Brown moved that in 190 the language in lines 22 and 23 relating to imposition of fine be added. Amendment 2 passed.

Mr. Brown will draft language to cover reckless actions to be another section either before or after Sect 4.

A M E N D M E N T S

IN THE HOUSE

BY THE JUDICIARY COMMITTEE

1 TO: HOUSE BILL NO. 45

2
3 Page 1, line 23, strike out "a majority" and insert "concurrent majorities"

4 Page 1, line 23, after "members" insert:

5 "of each of the two major political parties in each house"

6 Page 1, line 24, after "lature" insert "voting separately but"

7 Page 1, line 26, strike out "one" and insert "two"

8 Page 2, between lines 2 and 3, insert: *Amend 2*

9 "(b) The ombudsman and members of his staff shall maintain the
10 integrity of the ombudsman's functions and services by refraining
11 from joining or supporting, including but not limited to the making
12 of contributions to, any partisan political organization, faction
13 or activity [which would tend to undermine the essential nonpartisan
14 nature of their functions and services.] The ombudsman and members
15 of his staff may not participate in nonpartisan political activity
16 in any city or borough that is subject to the ombudsman's jurisdiction
17 under sec. 320 of this chapter. However, this subsection does not
18 restrict the ombudsman or members of his staff from expressing
19 private opinion, registering as to party, or voting."

20 Page 4, strike out lines 6 - 9, inclusive, and insert:

21 "(6) because the fiscal and staff resources of the
22 ombudsman's office are insufficient for adequate investigation,
23 there are complaints more worthy of the ombudsman's attention."

24 Page 6, line 8, strike out "However, access to information does"; strike
25 out all matter on line 9; and on line 10 strike out "regulation."

26 Page 6, lines 10 and 11, strike out "confidential information" and insert:

27 "information required by law to be confidential"

28 Page 7, line 12, strike out "Within a reasonable" and strike out all matter
29 on lines 13 - 15, inclusive, and insert:

1 "After a reasonable time has elapsed, the ombudsman shall notify
2 the complainant of the actions taken by him and by the agency."

3 Page 7, line ²⁹21, strike out "The ombudsman has the"; strike out all matter
4 ^{P8} on lines ¹22 and ²23, inclusive, and insert:

5 "No civil action may be brought against the ombudsman or a member of
6 his staff for anything done, said or omitted in performing his duties
7 or responsibilities under this chapter."

8 Page 7, line 21, after "to" insert "a grand jury or to"

9 Page 8, line 24, strike out "branch" and insert "or judicial branches"

10 Page 8, line 26, after "commission," insert "corporation, authority"

11 Page 9, line 2, strike out "and judicial branches" and insert "branch"

12 Page 9, line 2, after the semicolon, insert:

13 "for the purpose of this paragraph, the personal staff of the lieutenant
14 governor does not include those members of the lieutenant governor's
15 staff engaged in the administration of elections;"

16 Page 9, line 5, after "legislation" insert "or the preparation or issuance
17 of the substantive content of any judicial order, decision or opinion"

18 Page 9, between lines 9 and 10, insert:

19 "Sec. 24.55.320. CITIES AND BOROUGHES. A city or borough may
20 by ordinance elect to become subject to the jurisdiction of the
21 ombudsman appointed under this chapter. If a city or borough so
22 elects, it shall notify the ombudsman of that election and shall
23 thereafter be considered an agency for purposes of this chapter."

24 Page 9, line 10, strike out "320" and insert "330"

25
26 COUNSEL'S NOTE: In the preparation of a committee substitute for HB 45,
27 the location of the definitions (sec. 300) will be shifted
28 to the next to the last section in the proposed ch. 55 of
29 Title 24.

"An Act creating the office of the ombudsman; amending Rule 43(h) of the Rules of Civil Procedure; and providing for an effective date."

1/22/75

COMMITTEE REPORT

FINANCE

HOUSE

Mr. Speaker:

Date Feb 18, 1975

The Committee on Judiciary has had HB 45

under consideration. A Majority of the members of the Committee

() recommends it DO PASS

() recommends it DO NOT PASS

() recommends it DO PASS WITH ATTACHED AMENDMENT(S)

() recommends it BE REPLACED WITH CS FOR HR 45 AND THAT

CS FOR HR 45 DO PASS

() "and" recommends it BE REFERRED TO THE _____

COMMITTEE

() reports it back WITHOUT RECOMMENDATION

() "other"

Members signing the Majority report:

Members NOT concurring in the Majority report:

_____ recommends:
_____ recommends:
_____ recommends:
_____ recommends:
_____ recommends:

Terry Lindley Chairman

A BILL

For an Act entitled: "An Act creating the office of the ombudsman, amending AS 39.25.110, and amending Rule 43 (h) of the Rules of Civil Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. AS 24 is amended by adding a new chapter to read:

CHAPTER 55. OFFICE OF THE OMBUDSMAN.

ARTICLE I. ORGANIZATION.

Sec. 24.55.010. OFFICE OF THE OMBUDSMAN. There is created in the legislative branch of the state the office of the ombudsman.

Sec. 24.55.020. APPOINTMENT OF THE OMBUDSMAN. (a) A candidate for appointment as the ombudsman shall be nominated by the ombudsman selection committee composed of the president of the senate, the minority leader of the senate or a minority member of the senate appointed by him, the speaker of the house, the minority leader of the house or a minority member of the house appointed by him, the chairman of the senate judiciary committee, and the chairman of the house judiciary committee.

(b) The ombudsman selection committee shall examine persons to serve as the ombudsman regarding their qualifications and ability and shall place the name of the person selected in nomination before the legislature for appointment as the ombudsman. The appointment of a person nominated as the ombudsman by the committee is effective if his candidacy is approved by a majority of the members of the legislature in joint session.

Sec. 24.55.030. QUALIFICATIONS. No person may serve as
ombudsman

(1) within one year following his term of office as a
member of the legislature;

(2) while he is a candidate for or holds any other
national or state political office; or

(3) while he is engaged in any other regular occupation
for which he receives compensation.

Sec. 24.55.040. TERM OF OFFICE. The term of office of the
ombudsman is six years. An ombudsman may be reappointed but may
not serve for more than three terms. In the event the term of an
ombudsman expires without a successor having been appointed under
this chapter, the incumbent ombudsman shall continue in office
until a successor is so appointed.

Sec. 24.55.050. REMOVAL. The legislature, by a two-thirds
vote in each house, may remove or suspend the ombudsman from
office, but only for neglect of duty, misconduct, or disability.

Sec. 24.55.060. COMPENSATION. (a) The ombudsman shall
receive an annual salary equal to that of a superior court judge.

(b) This first assistant to the ombudsman shall receive an
annual salary equal to that of a district court judge.

Sec. 24.55.070. STAFF AND DELEGATION. (a) The ombudsman
shall appoint a first assistant and such other assistants and
clerical personnel as may be necessary to carry out the provisions
of this chapter.

(b) The ombudsman may delegate to his assistants any of his
duties except those specified in secs. 190 and 200 of this chapter;

provided that during the ombudsman's absence from his principal business offices, the ombudsman may, at his discretion, delegate the powers and duties specified in secs. 190 and 200 of this chapter to the first assistant for the duration of the absence; and provided further, that during any temporary disability of the ombudsman to exercise and discharge the powers and duties of his office, the powers and duties specified in secs. 190 and 200 of this chapter shall devolve upon the first assistant for the duration of the disability.

(c) The ombudsman and the first assistant and other staff appointed by him are in the exempt service under AS 39.25.110.

Sec. 24.55.075. VACANCIES. If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the first assistant to the ombudsman becomes the acting ombudsman until a new ombudsman is appointed for a full term at a regular or special session of the legislature.

Sec. 24.55.080. OFFICE FACILITIES AND ADMINISTRATION.

(a) The Legislative Council shall provide suitable office space and equipment for the ombudsman and his staff.

(b) The salary and benefits of the ombudsman and his permanent staff shall be paid through the same procedures used for payment of the salaries of other permanent legislative employees.

(c) The ombudsman shall submit a budget for each fiscal year to the Executive Director of the Legislative Affairs Agency for submission to the Legislative Council.

Sec. 24.55.090. PROCEDURE. The ombudsman may establish procedures for receiving and processing complaints, conducting investigations, and reporting his findings. However, he may not levy fees for the submission or investigation of complaints.

ARTICLE 2. JURISDICTION AND INITIATION OF INVESTIGATIONS.

Sec. 24.55.100. JURISDICTION. (a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.

(b) The ombudsman may exercise his powers without regard to the finality of any administrative act.

Sec. 24.55.110. INVESTIGATION OF COMPLAINTS. The ombudsman shall investigate any complaint indicating an appropriate subject for investigation under sec. 150 of this chapter, unless he believes that

- (1) there is presently available an adequate remedy for the grievance stated in the complaint;
- (2) the complaint relates to a matter that is outside the jurisdiction of the ombudsman;
- (3) the complaint relates to an administrative act of which the complainant has had knowledge for too long a time before the complaint was submitted;
- (4) the complainant does not have a sufficient personal interest in the subject matter of the complaint;
- (5) the complaint is trivial or made in bad faith;
- (6) the facilities of the ombudsman's office are insufficient for adequate investigation; or
- (7) there are other complaints more worthy of the

ombudsman's attention.

Sec. 24.55.120. INVESTIGATION ON THE OMBUDSMAN'S MOTION.

The ombudsman may investigate on his own motion if he reasonably believes that an appropriate subject for investigation under sec. 150 of this chapter exists.

Sec. 24.55.130. NOTICE TO COMPLAINANT. (a) If the ombudsman decides not to investigate, he shall inform the complainant of that decision and shall state his reasons except in exceptional circumstances in which he reasonably believes it is inappropriate to do so.

(b) If the ombudsman decides to investigate, he shall notify the complainant of his decision.

Sec. 24.55.140. NOTICE TO THE AGENCY. If the ombudsman decides to investigate, he shall notify the agency of his intention to investigate.

ARTICLE 3. INVESTIGATIONS

Sec. 24.55.150. APPROPRIATE SUBJECTS FOR INVESTIGATION.

(a) An appropriate subject for investigation by the ombudsman is an administrative act of an agency which the ombudsman has reason to believe might be

(1) contrary to law;

(2) unreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law;