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IMMUNITY FROM PROSECUTION

VERSUS

PRIVILEGE AGAINST SELF-INCRIMINATION

ADDRESS

BY

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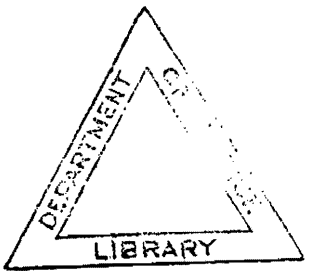
ATTORNEY GENERAL OF THE UNITED STATES



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The Fifth Amendment to the Federal Constitution provides that no person "shall be compelled in a criminal case to be a witness against himself." The courts have construed this provision to mean that a person may remain mute before a Congressional Committee, a grand jury or trial court, if a criminal charge, no matter how remote, may possibly be asserted against him with respect to any matters as to which he is questioned. Subversives and criminals have been quick to rely upon this provision which was written into our Constitution to protect law-abiding citizens against tyranny and despotism.

Many former federal employees and members of the armed services holding key jobs have also refused to answer the $64 question about their Communist affiliations. The problem is a live one too before universities, and other private and public schools, where professors and teachers have claimed their privilege in refusing to testify as to their previous and present associations. The abuses to which the constitutional privilege has been put by the long parade of witnesses suggests the desirability of reviewing the subject to determine whether it is possible to strike a fair balance between the Government's right to obtain vital information and the individual's right not to incriminate himself.

In discussing this important problem with you, I plan first to deal with the history of constitutional privilege and the exchange of immunity for it; second, the function of Congressional investigations and how they as well as courts and grand juries have been thwarted by resort to the privilege; third, pending proposals before Congress for an exchange of immunity for privilege and my suggestions for improvement of these proposals.

First, a few words about the history of the privilege.

The privilege against self-incrimination has deep roots in early English history. The tyranny of Charles I during the years 1629 to 1640 in dealing with non-conformists, and the Star Chamber proceedings in which innocent persons were tortured into confession of crimes which they did not commit, engendered such hostility among the people that strong demands were made to end compulsory testimony as far back as 1647.[1] By early 1650 the privilege against self-incrimination was so well established in the common law of England that it was never even thought necessary by an English Parliament to pass an act touching the matter.[2]

With this heritage it was not surprising that the early settlers in America fiercely resisted attempts of the Governors of the Royal provinces to resort to compulsory testimony for coercing confessions.[3]

By the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself had become fixed in the common law. It was regarded then as now, as a protection to the innocent as well as to the guilty, and an essential safeguard against unfounded and tyrannical prosecution.[4]

The privilege was not included in the Federal Constitution as originally adopted. Subsequently it was placed in one of the group of ten Amendments recommended to the States by the First Congress, and by them adopted. Since then, all the States of the Union have included the privilege in their Constitutions except New Jersey and Iowa where the principle prevails as part of the common law.[5]

During the development of the privilege against self-incrimination, there was experimentation with statutes granting immunity in exchange for compulsory testimony. In 1857, an act was passed by Congress granting a complete legislative pardon for any fact or act as to which the witness was required to testify.[6] This provision of the bill was amended five years later when it was found to have worked greater evil than good.

It was a Senator from Illinois, Senator Turnbull by name, who was largely responsible for its amendment. In debate, Senator Turnbull graphically demonstrated that the Act offered inducement for the worst criminals to appear before an investigating committee to obtain immunity from their crimes. As an example, he pointed to "a man who stole two millions in bonds, if you please, out of the Interior Department. What does he do? He gets himself called as a witness before one of the investigating committees, and testifies something in relation to that matter, and then he cannot be indicted." Senator Turnbull then went on to show how the clerk who purloined two millions in bonds from the Interior Department was discharged, and the indictment against him quashed merely because of some statement in reference to the matter before an investigating committee.

Shortly thereafter the legislative pardon was withdrawn, and an immunity statute was enacted which provided in part that "no * * * evidence obtained from a party or witness * * * shall be * * * used against him * * * in any criminal proceeding."[7] Under this statute it was merely the testimony itself which could not later be used in any criminal proceeding against the witness, but the immunity did not extend to other matters to which this testimony might indirectly lead. This partial

immunity statute was soon challenged in the case of Counselman v. Hitchcock,[8] and the Supreme Court agreed that it was invalid for failing to provide the same complete protection as the constitutional privilege which the witness was required to surrender.

To meet the objection raised in the Supreme Court's decision in the Hitchcock case a clause was thereafter included in the Act relating to proceedings before the Interstate Commerce Commission, in terms broad enough to furnish absolute immunity from prosecution in the Federal Courts.[9]

Sustaining the validity of this immunity statute, the Supreme Court in Brown v. Walker[10] in the year 1896 ruled that it fully accomplished the object of the privilege, and therefore it was adequate to prevent the witness from asserting his right to claim immunity.

Thereafter, the Immunity Act relating to the Interstate Commerce Commission was incorporated in temporary wartime measures and in virtually all of the major regulatory enactments of the Federal Government.[11] To guard against unwise use of their authority, these regulatory agencies have followed the practice of consulting the Attorney General and getting his approval before granting immunity to witnesses.

From what has been said, you can readily see that there is nothing novel about immunity legislation. Indeed, many States have also enacted laws which provide immunity from prosecution where a witness is compelled to testify.

This shift from privilege to immunity statutes reflected in part the view of some attorneys and legal scholars that privilege against self-incrimination was somewhat outmoded and should be strictly limited.[12]

As great a guardian of individual rights and liberty as Mr. Justice Cardozo observed in speaking of the privilege of immunity from compulsory self-incrimination: "This, too, might be lost, and justice still be done. Indeed today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. * * * Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."[13/] There are other jurists and legal commentators of distinction who feel that it would be abhorrent to principles of a free government to compel a person to testify even upon an exchange of full immunity.[14/]

With this background before us, I come now to the need for exchanging immunity for compulsory testimony in light of our recent experience with Congressional investigations into subversion, crime and corruption. The history of Congressional investigatory powers, just like the privilege against self-incrimination, goes back to the earlist days of our history.[15/]

Unlike the privilege, however, the Constitution does not expressly provide for any Congressional power to investigate. It is considered as an implied power essential to carry out the general legislative function.[16]

Congressional investigation committees have traditionally been regarded as having these principal functions:[17] to secure information by which Congress may exercise an informed judgment in legislating wisely; and to check administrative agencies for determining whether they are properly enforcing the law and judiciously spending the public funds. For these purposes, Congressional Committees may summon witnesses and require their testimony under penalty of contempt proceedings.[18] But a Congressional hearing is not a trial. Its function is primarily to ascertain facts, and not to decide on the guilt or innocence of the witness.

In recent years many of these investigating committees have been particularly concerned in alerting the American people to the nature of subversive and other criminal activities; the many forms that these activities take; and how they threaten the democratic processes.

Some persons have been critical of these investigations, claiming that they restrict freedom of speech by stigmatizing expressions of unpopular views.[19] Freedom of speech, they say, implies freedom not to

speak at all, even under legal compulsion. Since wide publicity is given to these proceedings by newspapers, radio and television, the complaint is also that these persons investigated are exposed to possible insult, ostracism and loss of employment. It is urged that mere mention of a person's name in connection with an investigation that has wide-spread news value may create a distorted and unfair public impression.[20] Another point made is that "proof of innocence may never catch up" with public "assertions of guilt."[21] It is also said that if these persons decline to profess any statement of belief before a committee they invite punishment for contempt.[22]

Unquestionably, every effort should be exerted to protect the right of our people to speak and think freely. As Chief Justice Hughes has well said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[23]

We should dread the day when the people could justifiably become wary of expressing unorthodox or unpopular opinions or where rumor and gossip are accepted as substitutes for evidence.

As against these threats to our precious liberties, we must also weigh the possible harm to the public safety and welfare, without which there can be no liberty for anyone. While the rights guaranteed by the

First Amendment may not be curtailed, abuse of these rights may properly be curbed.[24]

In his time, Abraham Lincoln expressed the problem in these distressed words: "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"[25] The same problem is with us today. Obviously, if Congress is to legislate wisely with respect to subversion, and other crime and corruption, it must not be obstructed from learning who are its leaders, organizers and members; the nature and scope of their activities; the character and number of their adherents.

I know of no constitutional right of privacy which immunizes a person from giving evidence where an inquiry is conducted by a legally constituted Congressional committee. The person owes this duty as a citizen just as he owes the duty to furnish relevant and truthful testimony in a court of law or grand jury. He violates his duty as a citizen when he suppresses the facts concerning criminal activity known to him. So long as the questions are pertinent and germane to a lawful inquiry of Congress, the individual is not relieved from answering because they delve into his private affairs, his previous utterances, or his affiliations, political or otherwise.[26] The constitutional guarantee of freedom to express one's views does not include immunity from Congressional inquiry as to what one has said, subject to one's privilege against self-incrimination.

Reference to several cases within the last few years demonstrate how effectively Congressional Committees, courts and grand juries have

been blocked in their efforts to uncover subversion, as well as other criminal activities because of reliance by witnesses upon their privilege.

In one case the witness upon ground of privilege refused to answer questions before a grand jury as to whether she knew the names of the State officers of the Communist Party of the State, what its table of organization was; whether she was employed by it; whether she ever had possession of Communist books; and whether she turned the books over to any particular person. At the time, the Smith Act was in effect, making it a crime for any person, knowing its purposes, to be a member of any group which advocates the overthrow of the Government. Upon the refusal of the witness to testify, she was found to be in contempt of court and sentenced to imprisonment for one year. The Court of Appeals affirmed.

However, the Supreme Court felt that her answers might furnish a link in the chain of evidence necessary in a prosecution under the Smith Act, and that the witness was privileged to refuse to furnish any such link. Accordingly, it unanimously reversed upon the ground that "prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent."[27/]

In the same way, a Federal grand jury was prevented from obtaining information in its investigation of narcotic and White Slave traffic as well as bribery, perjury and other serious Federal violations. The witness stood upon his privilege against self-incrimination in refusing to respond to questions as to what he did for a living and whether he

knew certain named persons. Here again, judgment of imprisonment for contempt was upheld by the Court of Appeals, but reversed by the Supreme Court with one judge dissenting[28] upon the ground that any other conclusion would seriously compromise an important constitutional liberty. In this case the court held that the defendant could refuse to answer questions innocent on their face since it appeared from the climate of the investigation and the publicity given defendant's alleged criminal activity, that his answers might implicate him in some federal crime.

In another case, a Congressional Committee attempted in vain to obtain information from a witness relating to the names of persons engaged in the manufacture and sale of gambling equipment and other matters. Finally, exasperated chief counsel for the Committee said: "Let the record show that the witness just sits there mute, chewing gum, saying nothing."

The witness was found guilty of contempt of court and sentenced to six months in jail but judgment was reversed on appeal. The Court of Appeals declared that the methods used by the Committee for examination of witnesses constituted a triple threat: "answer truly and you have given evidence leading to your conviction for a violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment."[29] In the opinion of the court, the predicament in which the witness was placed was contrary to fair play and in direct violation of the Fifth Amendment.

These decisions could be multiplied and undoubtedly represent prevailing law. Almost every heinous crime on the law books, committed by individuals or by groups, remains uncovered because of the privilege against self-incrimination. But it is in the area of subversion and disloyalty particularly that the privelege has a "field day." It is here that legislative committees and grand juries are held at bay for years from learning which leaders are plotting the country's destruction, merely because witnesses are relieved of giving essential information upon the ground of privilege.

It is little wonder that law-abiding citizens frequently are heard to say that subversives and other wrongdoers are unduly coddled by existing law. They express amazement that the Congress and the Courts should continue to put up with subterfuge and concealment in place of truth at a time when the peril from Communism is so great and when crime is so rampant. They earnestly urge upon us the vital need for modernizing the legal weapons for fighting subversion and crime.

These pleas of the people for more drastic action against subversion and other misconduct have not gone unheeded. Some States and cities provide for the dismissal of public employees who refuse to testify on grounds of self-incrimination or who refuse to waive immunity from prosecution.[30/]

Some States prescribe loyalty oaths for admission to the Bar which go beyond the traditional promise to uphold the State and National Constitutions.[31/]

Some States and municipalities have passed statutes requiring affidavits of public employees that they are not and have never been Communists.[32/] Some States make ineligible to teach in any public school a person who was a member of an organization which advocates the

overthrow of the Government by force.[33] Some of these statutes have been upheld as valid by the Supreme Court,[34] including the provision of the New York State law which provides that membership by a person in an organization listed as subversive by the Board of Regents shall constitute prima facie evidence of disqualification for employment in the public schools.[35] This was the so-called Feinberg Law aimed at protecting the school children of New York against teachers who were spreading communist propoganda. The poisonous propaganda was sufficiently subtle to escape detection in the class room. The New York Legislature recognized that while the schools must attract and protect the critical minds, the schools were not sanctuaries for those who were committed to follow in the footsteps of Klaus Fuchs. It sought the next best solution by excluding from teaching those affiliated with certain organizations listed by the Board of Regents which advocated the overthrow of the government.

One of the main constitutional objections to the law was that it violated the First Amendment by creating an atmosphere of fear which would inevitably stifle freedom of speech. The Court, in an opinion by Judge Minton, formerly of the Court of Appeals for this Circuit, rejected the contention that the law interfered with free speech since persons "have no right to work for the state in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[36]

The Supreme Court was also wholly unimpressed by the contention that the law condoned guilt by association contrary to democratic concepts of justice. On this point the Court said: "A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds toward the society in which they live. In this the state has a vital concern. It must

preserve the integrity of the schools. That the school authorities have the right and duty to screen the officials, teachers and their employees as to their fitness to maintain the integrity of the schools as a part of an ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep."[37/]

The Federal Government also has taken effective measures to protect the interests of national security. One long step forward in that direction was to enact legislation requiring non-Communist affidavits from trade union leaders whose unions wanted to resort to the advantages of the Taft-Hartley Act.[38/] The purpose of this requirement was to prevent disruption of industry in obedience to Communist Party orders.[39/] If the union leader's affidavit was false, he could be sent to jail.

The Federal Government has also tried its best to "clean its own house." On April 27, 1953, the President by Executive order established his security requirements for employment so that persons employed by the Federal Government will be reliable, trustworthy, of good character and loyal to the United States.[40/] On October 13, 1953, the President amended his Executive order so as to provide that where a government employee refuses to testify before a Congressional Committee regarding charges of his disloyalty or misconduct, an agency may take this factor into consideration in determining whether the person's continued employment is inconsistent with the national security.[41/] This amendment to the President's Executive order is in accord with my opinion that a government employee who claims privilege in a Congressional investigation may be too much of a risk to be retained in Federal Service.

A recent Senate Report entitled "Interlocking Subversion in Government" [42] fully documents how former government employees were able to spin their web of intrigue in positions of influence. The Report states:

> "The subcommittee examined in public session 36 persons about whom it had substantial evidence of membership in the Communist underground in Government. All of them invoked the fifth amendment and refused to answer questions regarding Communist membership, on the grounds of self-incrimination. Many refused even to acknowledge their own signatures on official Government documents, in which they had sworn to nonmembership in the past.
>
> "Almost all of the persons exposed by the evidence had some connection which could be documented with at least one--and generally several--other exposed persons. They used each other's names for reference on applications for Federal employment. They hired each other. They promoted each other. They raised each other's salaries. They transferred each other from bureau to bureau, from department to department, from congressional committee to congressional committee. They assigned each other to international missions. They vouched for each other's loyalty and protected each other when exposure threatened. They often had common living quarters. * * *"

Suppression of truth in any case is bad enough. In no event can it be justified by a Government employee or applicant for Government employment in the face of a Congressional inquiry where the interests of the national security are at stake. No one denies that the Government employee or applicant for such employment may constitutionally claim his privilege against self-incrimination. On the other hand, no one has a constitutional right to a Government job. 43/ True, the Supreme Court has held that the "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 44/ But, in my opinion, there is nothing either arbitrary or discriminatry about dismissing a federal employee where he refuses to waive the privilege against self-incrimination guaranteed him by the Constitution. We find an analogous situation presented in the recent decision of the Supreme Court in Orloff v. Willoughby. 45/ In that case, the petitioner, a physician, was denied a commission in the Army, principally for the reason that when asked whether he was a member in any Communist organizations he replied, "Federal Constitutional privilege is claimed." 46/ In its opinion through Mr. Justice Jackson, the Supreme Court said:

> "It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question

is whether he can at the same time take the position that to tell the truth about himself would incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No.'"

There is no law which requires the Government to sit supinely by until the suspected employee has been convicted of disloyalty or other similar misconduct inconsistent with the interests of the national security before it can separate him from the Government service. There is no law which requires the Government to assume or endure such a risk. As was pointed out in an apt case by the Supreme Court in American Communications v. Douds, speaking through the beloved late Chief Justice Vinson,

"That (first) amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal."

I have not overlooked the fact that the loyalty and honesty of the overwhelming majority of all Government employees is beyond question. But their good reputations and character are far better protected from unwarranted criticism when we root out the few who are unreliable and disloyal. 47/

What the critical situation of our time calls for is a law compelling testimony within the framework of the Constitution. The answer to this need is immunity legislation which will be as broad as the privilege which is supplanted. [48] Then if a person is adjudged in contempt for refusing to testify before a Congressional committee, he will know that the judgment of contempt will more likely stand up on appeal free from constitutional challenge.

At the same time, the law will also provide more adequate protection for the witness.

At present the witness is in a "box" so to speak. The witness is not excused from answering merely because he believes his answers will incriminate him. "His say-so does not of itself establish the hazard of incrimination." [49] Where he claims his privilege, it is the function of the judge to determine whether the silence of the witness is justified or whether the danger to be apprehended is too remote to be substantial. To save himself from being held in contempt, the witness may often be compelled to disclose those very facts which he claims are privileged. [50]

Witnesses are also aided by a broad immunity statute in still another way. Under our law, unlike that of England's, disclosure of any incriminating fact constitutes a waiver of the privilege as to details concerning that fact. [51] Having made a partial disclosure of

facts, the witness loses the right to cease answering interrogations and rely upon his privilege at a later point in his testimony.

In one case, the defendant freely disclosed that she was Treasurer of the Communist Party in Colorado, and testified that she had given the books of the party to another person. When asked to divulge the name of the latter, she refused upon the ground that the answer might incriminate her under the Smith Act. Affirming her conviction for contempt, the Supreme Court, speaking through Chief Justice Vinson, said:

> "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details." 52/

This decision leaves the law in a rather anomolous position for the witness. A witness who refuses to answer all questions and fails to cooperate to any extent may be protected by the claim of privilege.53/ But there is no equal protection afforded by the decisions to the witness who commences to cooperate but stops at a point where further disclosure may incriminate him. 54/

Moreover, if the witness refuses to answer on the ground that Congress has exceeded its powers or that the inquiry is lacking in pertinancy, he construes the law at his peril. If mistaken, his good faith error of law constitutes no defense to fine and imprisonment.[55/]

Then again, it is claimed by some that a person's election to remain silent upon the ground of privilege does not necessarily mean he has anything sinister to hide. There are undoubtedly some people of sincere principle who refuse to disclose information to authorized investigating authorities because of their feeling that no one has any right to inquire about their beliefs even if germane to the inquiry at hand.[56/] There are other persons who refuse to answer because they feel their recollections of events long past are feeble, and that falsehood even on trivial or irrelevant matters may subject them to a charge of perjury. There are still others less innocent who say that coercing them to testify under pain of contempt "resembles the Soviet tactic of requiring those guilty, not only to pay for, but also to proclaim their guilt."[57/]

The use of broad immunity statutes serves to remove the dangers mentioned for the innocent, and operates as an incentive for the guilty to tell the truth.

There are already two proposals pending in Congress which seek to compel the answer by witnesses of questions put to them before Congressional Committees, grand juries or courts. In exchange for this compulsory testimony, the witnesses will obtain complete immunity from prosecution.

One Bill is S. 565.[58] This proposal grants immunity to witnesses before a grand jury or court of the United States when in the discretion of the Attorney General, it is necessary to do so in the public interest. In exchange for this immunity, the witness is compelled to testify and to produce his books, papers or records. S. 565 uses broad immunity language in stating that the witness shall not be prosecuted on account of any transaction, matter, or thing concerning which he is compelled, after claiming his privilege, to testify or produce evidence.

In this respect, S. 565 is almost identical to the immunity provision sustained as valid by the Supreme Court as far back as 1896.[59] This Bill does not extend the immunity to witnesses before Congressional Committees.

There are other Bills pending, S. 16,[60] and H. R. 2737,[61] with equally broad immunity authority. The Senate has passed its Bill, but the House Bill still awaits action. Both these Bills grant immunity to witnesses before Congressional Committees, but not to witnesses before grand juries or courts.

The proposed Bills are worded so that the witness will not get an "immunity bath" merely by testifying. He must first raise specifically his claim for privilege, and thus put the Committee on notice whether for the greater good the witness should be required to testify and given immunity, or whether he should be excused from testifying.[62]

However, the discretionary power to grant the immunity is not vested in the Attorney General but lies with the body conducting the investigation.

If the proceeding is one before one of the Houses of Congress, then a majority vote of the members present is necessary. Under S 16, if it is a proceeding before a committee, two thirds of the members must vote to grant the immunity. In that event the two-thirds vote must include at least two members of each of the two political parties having the largest representation on such committee. The House Bill does not provide for notice to the Attorney General of the proposed grant of immunity. The Senate Bill provides for one week's notice to the Attorney General of the proposal, but if the latter fails or refuses to assent to grant of immunity it may be conferred by majority vote of either House. It is hoped that this legislation will only be resorted to where full disclosure by witnesses is deemed of greater importance than the possibility of punishing them for past offenses. By permitting one or several criminals to escape prosecution, the larger public peril contained in a gang of criminals or in their leaders may be uncovered, and the guilty brought to justice.

The legislative proposals mentioned have much to commend them. In my opinion, these bills would better achieve their purposes if they required the concurrence of the Attorney General in the granting of any immunity to a witness by a Joint Congressional Committee or either House committee, or by Congress. The Attorney General is the chief legal officer of the Government of the United States. As such, it is his responsibility to prosecute persons who offend the criminal laws of the United States. This responsibility must be coupled with adequate authority to permit its discharge. It would seem to be more advisable

for the Attorney General who has immediate knowledge of a criminal's background and propensities to decide whether immunity should be granted for such a person. To allow the Attorney General to participate in the ultimate decision as to whether immunity should be granted would not impair Congressional investigations in the fields of internal security, crime and corruption. Nor would it discourage witnesses from providing information of importance to the investigation if the Attorney General's permission was required before immunity was granted.

On the other hand, if these Bills were enacted in their present form, they might subject members of Congress to undue pressures for granting immunity to criminals who are ineligible to receive it. Also, they could very easily cause embarrassment to Congress by impeding or blocking prosecutions planned by the Department of Justice on any matter even incidentally testified to upon these investigations.[63/]

The unfortunate experience which Congress had as far back as 1857 in granting immunity without concurrence of the Attorney General[64/] should teach that a similar course of action may be marked by even greater failure today. The witness might readily turn this division of authority between Congress and the Department of Justice to his advantage by obtaining an immunity from the legislative committee or from Congress over the objection of the Attorney General. Thereafter he would be free to testify concerning a broad area of activities without fear that he could be held to account criminally for other violations however unrelated to the matter under investigation.

Thus, for example, a Congressional Committee or Congress might furnish immunity to a person to obtain his testimony about his illicit traffic in slot machine operations between states. This person may also be guilty either of espionage or subversion or of selling narcotics to youngsters as to which an indictment is soon to be obtained. To foreclose prosecution on these more serious crimes, the witness would be glad to volunteer information on his other activities if he knew in advance that immunity would follow for all of them. Therefore, greatest care must be exercised in granting immunity, and then only upon a fully informed judgment of all the facts. The Department of Justice would, of course, through the Federal Bureau of Investigation, the Criminal and Tax Divisions, and the United States Attorneys' offices, be most likely to know the facts and the plans for prosecution. Concurrence by the Attorney General in conferring the immunity would also enable the Department of Justice to maintain its responsibility for the proper administration of the criminal law.

The provision in S. 16 for one week's notice to the Attorney General of the proposed grant of immunity does not fully cure this Bill of its weakness in failing to require his affirmative concurrence in every case. Experience indicates that at times the views of the person who is charged with prosecuting criminals are disregarded by Congressional Committees. For example, the successful criminal conviction obtained by the Department of Justice of the internal revenue collector in one of the largest cities was recently nullified because of the action of a House Committee in holding widely publicized hearings in the district in

which the trial subsequently took place.[65/] These hearings took place over the strong objection of the Department of Justice that the proposed hearing would be of prejudice to the defendant on the trial which was about to be initiated and would injure the Government's case in disclosing its evidence. In reversing the conviction, Chief Judge Magruder observed that the character of the defendant was blackened and discredited as the day of trial approached because of the publicity "invited and stimulated" by the Committee over the radio and television. Thus, mere advance notification to the Attorney General of a proposed grant of immunity would never be a guarantee that the Committee would be guided by the views of the Attorney General.

S. 16 and H. R. 2737 would also more readily carry out the aim of obtaining evidence against leaders of subversion and criminal enterprises, if provision for immunity were granted to obtain testimony not only before Congressional Committees, but likewise before courts and grand juries.

For these reasons, it is my opinion that if any measure is to be enacted permitting the granting of immunity to witnesses before either House of Congress, or its committees, it should vest the Attorney General, or the Attorney General acting with the concurrence of appropriate members of Congress, with the authority to grant such immunity, and if the testimony is sought for a court or grand jury that the Attorney General alone be authorized to grant the immunity.

There remain for discussion two principal objections to this proposed legislation which may be briefly considered here. One objection

is that when a witness is compelled to testify, even under the protection of immunity from criminal punishment, he is not relieved from personal disgrace which attaches to the exposure of his crime. The answer to this objection is contained in a land mark decision of the Supreme Court in Brown v. Walker:[66]

> "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good."

The reasoning of this decision has never been questioned, and has only recently been approved by the Supreme Court.[67]

The other chief objection to the proposed legislation is that while a witness may receive immunity from federal prosecution, he may still be subject to prosecution under state law. The Supreme Court has held that this is not a valid objection to federal immunity laws, since the self-incrimination clause in the Fifth Amendment operates as a limitation on the federal government only. In United States v. Murdock[68] the defendant was indicted for refusing to answer questions of a revenue agent relating to certain income tax returns. The refusal was based on the plea that his answers might incriminate him in a state court. The Court said on this point:

"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."

Similarly, a witness before a state tribunal cannot refuse to answer because of the threat of federal prosecution.[69] However, the Federal District Court in Ohio recently held in United States v. Di Carlo[70] that the defendant had the right to assert his privilege because of possible prosecution under state law, since the Senate committee was authorized to investigate violations, not only of the laws of the United States, but also of the states.[71] The Murdock case was distinguished upon the ground that the danger of state prosecution in that case was remote and uncertain, while in the Di Carlo case the danger of state prosecution was imminent and real.

The Di Carlo case has been received with mixed comment.[72] It has not been followed so far as we know.[73] It appears to be contrary to decisions of courts of appeals which have consistently adhered to the principles of the Murdock case.[74] In my opinion, this decision of a district court does not detract from the binding effect of the Supreme Court's decision in the Murdock case.

The Department of Justice will recommend to the Congress in January an immunity bill of the type I have described, which protects the constitutional privileges of witnesses before Congressional Committees, courts and juries, but will at the same time aid materially in stamping out criminal and subversive activities.

Footnote References to Address Entitled

Immunity From Prosecution

Versus

Privilege Against Self-Incrimination

1/ Pittman, "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America", 21 Va. L. R. 763, 764, 770-773 (1935); Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause", 29 Mich. L. R. 1, 5-12 (1930); "Applicability of Privilege Against Self-Incrimination to Legislative Investigations, 49 Col. L. R. 87 (1949).

2/ Pittman, Id. at 774.

3/ Id. at 787.

4/ Twining v. New Jersey, 211 U. S. 78, 92 (1908).

5/ Id. at 91.

6/ 34th Cong., 3d sess., Globe, pp. 427, 433, 445. See Eberling, "Constitutional Investigations", pp. 304-315.

7/ Eberling, Id. at 320-323.

8/ 142 U. S. 547 (1892). This Act of 1862 revised an old statute into two new sections by an amendment which sought to insure that a witness who testified before a federal grand jury or court (R. S. § 860 (1875)) or a Congressional Committee (R. S. § 859 (1875)) would not be later subjected to the use of his testimony in any criminal proceeding against him. Section § 860 of the amendment dealing with grand juries and courts came under attack in Counselman v. Hitchcock, supra and was held to be invalid. Since this part of the immunity provision failed to accomplish its purpose, Congress repealed it in 1910 (36 Stat. 352 (1910)). Congress apparently felt that § 859 applying to Congressional Committees was still of value and left it in force to this date (R. S. §§ 859 (1875)), as amended 52 Stat. 943 (1938), 18 U.S.C. § 3486 (Supp. V, 1952); see, "The Privilege Against Self-Incrimination versus Immunity: Proposed Statutes", 41 Georgetown L. J. 511, 514 (1953); United States v. Bryan, 339 U. S. 323, 335-337 (1950).

9/ It read in part as follows:

> "No person shall be prosecuted * * * for or on account of any transaction, matter or thing concerning which he may testify or produce evidence. * * *"

Act of Feb. 11, 1893, C. 83, 27 Stat. 443, 49 U.S.C.A. §§ 46; See too, Smith v. United States, 337 U. S. 137, 146-147 (1949). Note, "Denying the Privilege against Self-Incrimination to Public Officers", 64 Harv. L. R. 987, 988 (1951).

10/ 161 U. S. 591 (1896).

11/ Shapiro v. United States, 335 U. S. 1, 6-7 (1948), where various statutes are collated in the footnote. The customary provision in these statutes provides as follows: "No person shall be excused from complying with any requirements of this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 * * * shall apply with respect to any individual who specifically claims such privilege."

12/ Rapacz, "Limiting the Plea of Self-Incrimination", 20 Georgetown L. J. 329, 353 (1932); see footnote 3 of Palko v. Connecticut, 302 U. S. 319, 326 (1937). Note "The Privilege Against Self-Incrimination; the Doctrine of Waiver", 61 Yale L. J. 104, 110 (1952).

13/ Palko v. Connecticut, 302 U. S. 319, 326 (1937).

14/ See, dissents of Mr. Justices Shiras, Gray and White in Brown v. Walker, supra, 161 U. S. 630-638. Cf. dissent of Mr. Justice Black in Rogers v. United States, 340 U. S. 367, 376 (1950).

15/ Potts, "Power of Legislative Bodies to Punish for Contempt", 74 U. of Pa. L. R. 691, 780 (1926); Liacos, "Rights of Witnesses Before Congressional Committees", 33 Boston U. L. R. 337, 340 (1953).

16/ Liacos, Id. at 341.

17/ McGeary, "The Developments of Congressional Investigative Power", p. 23 (1940); McGrain v. Daugherty, 273 U. S. 135 (1927).

18/ Sinclair v. United States, 279 U. S. 263 (1929); Marshall v. United States, 176 F. 2d 473 (D.C. Cir. 1949); 2 U.S.C. §§ 192 (Supp. 1950).

19/ New York City Bar Ass'n Committee on the Bill of Rights, Report on Congressional Committees presented December 14, 1948, p. 1.

20/ Galloway, "Congressional Investigations, Proposed Reforms", 18 U. of Chi. L. R. 478, 479-481 (1951).

21/ Dilliard, "Congressional Investigations: The Role of the Press", 18 U. of Chi. L. R. 585, 587 (1951).

22/ Edgerton, J., dissenting in Barsky v. United States, 167 F. 2d 241, 252 (D.C. Cir., 1948); cert. denied 334 U. S. 843 (1948); petition for rehearing denied 339 U. S. 971 (1951).

23/ De Jonge v. Oregon, 299 U. S. 353, 364, 365 (1937).

24/ Id.

25/ 6 Richardson, "Messages and Papers of the Presidents", p. 23, July 4, 1861.

26/ See, United States v. Josephson, 165 F. 2d 82 (2 Cir., 1947), cert. denied 333 U. S. 838 (1948); Lawson v. United States, 176 F. 2d 49 (D.C. Cir., 1949), cert. denied 339 U. S. 934 (1950); Barsky v. United States, 167 F. 2d 241 (D.C. Cir., 1948), cert denied 334 U. S. 843 (1948); McGrain v. Daugherty, 273 U. S. 135 (1927); and cf. Rumely v. United States, 197 F. 2d 166 (D.C. Cir., 1952), aff'd 73 S. Ct. 543 (1953).

27/ Blau v. United States, 340 U. S. 159 (1950).

28/ Hoffman v. United States, 341 U. S. 479 (1951). See too Singleton v. United States, 343 U. S. 944 (1952); Note, "Recent Extensions of the Witness' Privilege Against Self-Incrimination", 53 Col. L. R. 275 (1953).

29/ Aiuppa v. United States, 201 F. 2d 287, 300 (6 Cir., 1952).

30/ Note, "Mandatory Dismissal of Public Personnel and The Privilege Against Self-Incrimination", 101 U of Pa. L. R. 1190, 1191, fn. 8 (1953).

31/ Brown & Fassett, "Loyalty Tests for Admission to the Bar", 20 U. of Chi. L. R. 480, 483 (1953).

32/ Garner v. Los Angeles Board, 341 U. S. 716 (1951); Gerende v. Board of Supervisors, 341 U. S. 56 (1951); but compare Wieman v. Updegraff, 344 U. S. 83 (1953).

33/ Adler v. Board of Education, 342 U. S. 485 (1951).

34/ See footnote 32.

35/ Adler v. Board of Education, 342 U. S. 485 (1951).

36/ Id. at 492

37/ Id. at 493

38/ Sec. 9(h) of the Labor Management Relations Act of 1947, 29 U.S.C.A. Supp. III, Sec. 141, Sec. 159(b).

39/ American Communications Association v. Douds, 339 U. S. 382 (1950), sustaining the validity of Sec. 9(h) against the challenge that it violated the First Amendment, Ex Post Facto Laws and other fundamental rights.

40/ Executive Order No. 10450, issued April 27, 1953 (18 F. R. 2489).

41/ Executive Order No. 10491, issued October 13, 1953 (18 F. R. 6583).

42/ Report of Senate Committee on the Judiciary, "Interlocking Subversion in Government Departments", 83d Cong., 1st sess., July 30, 1953, p. 21. Being a communist is not a crime under federal law, although it is in some states (see Liacos, supra note 15, at 375). The Smith Act (18 U.S.C. Sec. 2385 et seq.) makes advocating or teaching the violent overthrow of any government of the United States, or being a member of such a group, and knowing its purposes, a federal crime.

43/ See, Bailey v. Richardson, 182 F. 2d 46 (D.C. 1950), aff'd by an evenly divided court 341 U. S. 918 (1951); Washington v. McGrath, 182 F. 2d 375 (D.C. 1950), aff'd 341 U. S. 923 (1951); Orloff v. Willoughby, 345 U. S. 83, 91 (1953); Mr. Justice Douglas concurring in Anti-Fascist Committee v. McGrath, 341 U. S. 123, 182-183 (1951); United Public Workers v. Mitchell, 330 U. S. 75 (1947); Angilly v. United States, 199 F. 2d 642, 644 (1950); cf. McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) per Holmes, J., "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" (Id. at 220, 29 N.E. at 517).

44/ Wieman v. Updegraff, 344 U. S. 83 (1953). The Court ruled as contrary to due process the Oklahoma loyalty oath statute forbidding public employment of persons who belonged to certain organizations, regardless of their knowledge of the character of those organizations, because of the "indiscriminate classification of innocent with knowing activity" (Id. at 91).

45/ 345 U. S. 83 (1953).

46/ Id. at 90.

47/ 339 U. S. 382, 412 (1950), sustaining the non-communist affidavit requirement of union leaders under the Taft-Hartley Act.

48/ Hoffman v. United States, 341 U. S. 479 (1951), suggests such legislation if Congress concludes the need is great enough.

See too, Comment, "The Privilege Against Self-Incrimination Versus Immunity; Proposed Statutes", 41 Georgetown L. J. 511 (1953); S. Rept. 153 on S. 16, 83d Cong., 1st sess., pp. 1 and 2, April 17, 1953; Report of Senate Committee on the Judiciary, "Interlocking Subversion in Government Departments", July 30, 1953, 83d Cong., 1st sess., p. 50.

49/ Hoffman v. United States, 341 U. S. 479, 486 (1951).

50/ Id; United States v. Weisman, 111 F. 2d 260, 262 (2 Cir. 1950).

51/ Note, 61 Yale L. J. 105, 109 (1952).

52/ Rogers v. United States, 340 U. S. 367, 375 (1951).

53/ See e.g. Blau v. United States, 340 U. S. 159 (1950).

54/ Note, "Congressional Investigations--Self-Incrimination, Condemnation and Fair Hearing", 22 U. of Cinn. L. R. 193, 199-200 (1953).

55/ See Townsend v. United States, 95 F. 2d 352, 361 (D.C. Cir. 1938), cert. denied 303 U. S. 664 (1938).

56/ Byse, "A Report on the Pennsylvania Loyalty Act", 101 U. of Pa. L. R. 480, 481-484 (1953); Wright, "Should Teachers Testify?", Saturday Review, Sept. 26, 1953, p. 23.

57/ See, Meltzer, "Required Records, The McCarran Act and The Privilege Against Self-Incrimination", 19 U. of Chi. L. R. 687, 722 (1951).

58/ 83d Cong. 1st Sess. 1953. Also known as the Kefauver Bill.

59/ Brown v. Walker, 161 U. S. 591 (1896).

60/ S. 16, 83d Cong., 1st sess., 1953, passed the Senate July 9, 1953, after extensive debate Cong. Rec. 8646-8663, July 9, 1953. S. 16 amends § 3486 of Title 18. Sec. 3486 presently furnishes witnesses immunity from prosecution for testimony before either House or their Committees. It appears to suffer from the same deficiency present in a similar statute condemned in Counselman v. Hitchcock, 142 U. S. 547 (1892). S. 16 is intended to supply the omission in the Hitchcock case, by providing not only that a witness' testimony may not be used against him, but that such witness shall be immune with respect to "any transaction, matter, or thing concerning which" he has been compelled to testify.

61/ 83d Cong., 1st sess., 1953.

62/ S. Rept. 153, 83d Cong., 1st sess., p. 2 (1953).

63/ See, Comment, "The Privilege Against Self-Incrimination Versus Immunity: Proposed Statutes", 41 Georgetown L. J. 511, 523 (1953).

64/ Supra, footnote 7.

65/ Delaney v. United States, 199 F. 2d 107 (1 Cir. 1952).

66/ 161 U. S. 591, 605, 606 (1896). Moreover, under 2 U.S.C.A. §§ 193, no witness is privileged to refuse to testify upon the ground that his testimony may tend to disgrace him or otherwise render him infamous. See too, Dodd, "Self-Incrimination by Witness Before Congressional Committees", 11 Fed. R. D. 245 (1951).

67/ Smith v. United States, 337 U. S. 137, 146-147 (1949).

68/ 284 U. S. 141, 149 (1931); see also Feldman v. United States, 332 U. S. 487, 491-492 (1944); Brown v. Walker, 161 U. S. 591 (1896); Adamson v. California, 332 U. S. 46 (1946); 26 Temple L. Q. 64, 68 (1952); 8 Wigmore on Evidence 2258 (3d ed. 1940).

69/ Jack v. Kansas, 199 U. S. 372 (1905).

70/ 102 F. Supp. 597 (N.D. Ohio 1952).

71/ Senate Resolution 202, approved May 3, 1950, 81st Cong., 2nd sess. See Aiuppa v. United States, 201 F. 2d 287 (6 Cir. 1952).

72/ See, e.g., 4 Stanford L. R. 594 (1952); 66 Harv. L. R. 186 (1952); 31 Texas L. R. 433 (1953); 22 U. of Cinn. L. R. 193 (1953); 26 Temple L. Q. 64 (1952).

73/ United States v. Pechart, 103 F. Supp. 417 (N.D. Cal.), cites the Di Carlo case in a footnote but does not follow it. It declares in accord with the majority rule that "The incrimination must be with respect to a Federal offense or violation of Federal Law" (Id. at 418).

74/ See, United States v. Pierre, 128 F. 2d 979 (2 Cir. 1942); Camarota v. United States, 111 F. 2d 243 (3 Cir. 1940), cert. denied 311 U. S. 651 (1940); Graham v. United States, 99 F. 2d 746 (9 Cir. 1938); and see 8 Wigmore on Evidence, § 2258 (3d ed. 1940); 26 Temple L. Q. 64, 68 footnote 22.