

Michigan Law Review

Volume 56 | Issue 6

1958

Constitutional Law - Privilege Against Self-Incrimination - Danger of Prosecution in Other Jurisdictions

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Recommended Citation

George R. Haydon, Jr., *Constitutional Law - Privilege Against Self-Incrimination - Danger of Prosecution in Other Jurisdictions*, 56 MICH. L. REV. 1014 (1958).

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CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—DANGER OF PROSECUTION IN OTHER JURISDICTIONS—Defendant, a witness called by the New Hampshire attorney general in an investigation of subversive activities, was granted statutory immunity in New Hampshire from criminal prosecution which might arise from his testimony¹ and was ordered to testify. Since any disclosures would create serious danger of prosecution by the United States and Massachusetts, whose agencies were also investigating his activities, defendant refused to testify despite the grant of immunity, invoking the privilege against self-incrimination guaranteed by the state constitution.² He was found guilty of contempt,³ subject to his exceptions regarding the constitutionality of the immunity statute. On hearing before the state supreme court, *held*, exceptions overruled, one justice dissenting. The constitutional privilege may be invoked only if there is danger of prosecution within the state. Since this danger is removed by the grant of immunity, the immunity statute, being as broad as the privilege, is constitutional. *Wyman v. De Gregory*, (N.H. 1957) 137 A. (2d) 512.

The privilege against self-incrimination embodied in the Fifth Amendment⁴ may be invoked by a witness in federal proceedings. Although the Constitution does not require the states to recognize this privilege,⁵ a similar provision is incorporated in the constitutions of forty-six states.⁶ This does not, however, guarantee an absolute right to silence,⁷ and a witness may be compelled to testify if immunity from prosecution as broad as the protection secured by the privilege is granted.⁸ Whether the privilege exists when

¹ N.H. Laws (1955), c. 312.

² N.H. CONST., pt. I, art. 15. "No subject shall . . . be compelled to accuse or furnish evidence against himself."

³ For prior proceedings in this case, see *Wyman v. De Gregory*, 100 N.H. 163, 121 A. (2d) 805 (1956), committal to jail for contempt suspended and stayed 100 N.H. 513, 132 A. (2d) 133 (1957), assigned for reargument 101 N.H. 82, 133 A. (2d) 787 (1957).

⁴ U.S. CONST., Amend. V.

⁵ The Fifth Amendment is not directly applicable to the states. *Barron v. Mayor and City Council of Baltimore*, 7 Pet. (32 U.S.) 243 (1833). Nor is it indirectly applicable by incorporation in the "privileges or immunities" or "due process" clauses of the Fourteenth Amendment. *Twining v. New Jersey*, 211 U.S. 78 (1908); *Adamson v. California*, 332 U.S. 46 (1947). See *Knapp v. Schweitzer*, 2 N.Y. (2d) 975, 142 N.E. (2d) 649 (1957), cert. granted 355 U.S. 804 (1957), argued March 6 and 10, 1958, 26 U.S. LAW WEEK 3271 (1958), on the question whether the Fifth Amendment is applicable before a state grand jury when testimony would reveal a federal crime. See generally Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights," 2 STAN. L. REV. 5 (1949); Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights," 2 STAN. L. REV. 140 (1949).

⁶ See 8 WIGMORE, EVIDENCE, 3d ed., §2252, n. 3 (1940), setting forth the state constitutional provisions. The remaining two states also recognize the privilege. Iowa recognizes it as part of "due process" in the state constitution. *State v. Height*, 117 Iowa 650, 91 N.W. 935 (1902). New Jersey recognizes it as part of the common law. *State v. Zdanowicz*, 69 N.J.L. 619, 55 A. 743 (1903).

⁷ *Brown v. Walker*, 161 U.S. 591 (1896).

⁸ *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See 118 A.L.R. 602 (1939); 53 A.L.R. (2d) 1030 (1957). See also 8 WIGMORE, EVIDENCE, 3d ed., §2281, n. 11 (1940), setting forth at length the state immunity statutes.

the testimony would be incriminating under the laws of another jurisdiction thus becomes a decisive factor in determining the constitutionality of immunity statutes. Since the privilege may be invoked against the federal government only when there is danger of federal prosecution, a grant of immunity from federal prosecution is sufficient to overcome the privilege notwithstanding a real danger of state prosecution.⁹ The constitutional provisions of a majority of states have been interpreted in harmony with this federal ruling, the courts holding that the privilege applies only when there is danger of prosecution in the state.¹⁰ Thus, as in the principal case, statutes granting immunity from state prosecution are considered coextensive with the privilege. These decisions are based on the "two sovereignties" theory. The federal government and the individual states are separate sovereignties and constitutional provisions against self-incrimination are enforceable only against the sovereignty whose constitution guarantees the privilege. Such provisions, therefore, pertain only to the protection of a witness from prosecution by the government whose conduct they limit.¹¹ Since the Fifth Amendment does not forbid use in a federal proceeding of disclosures made under the protection of a state immunity statute,¹² the "two sovereignties" rule presents the anomalous situation in which the privilege is a constitutional limitation on both the federal and state govern-

⁹ *United States v. Murdock*, 284 U.S. 141 (1931). But cf. *United States v. Saline Bank*, 1 Pet. (26 U.S.) 100 (1828); *Ballmann v. Fagin*, 200 U.S. 186 (1906); *Marcello v. United States*, (5th Cir. 1952) 196 F. (2d) 437; *United States v. Di Carlo*, (N.D. Ohio 1952) 102 F. Supp. 597, noted in 66 HARV. L. REV. 186 (1952); *Ullmann v. United States*, 350 U.S. 422 (1956), where the Court, while recognizing that an immunity statute must be as broad as the privilege, indicated that the federal statute in question granted immunity from state prosecution. Since state prosecution was not involved in the case, this statement was required only if the federal privilege also applies to danger of state prosecutions; otherwise (and very possibly) it was dictum. See generally Grant, "Immunity from Compulsory Self-Incrimination in a Federal System of Government," 9 TEMP. L. Q. 57, 194 (1934-1935); Rogge, "Compelling the Testimony of Political Deviants," 55 MICH. L. REV. 163 (1956); 82 A.L.R. 1380 (1933).

¹⁰ *State v. Morgan*, 164 Ohio St. 529, 133 N.E. (2d) 104 (1956), noted in 41 MINN. L. REV. 349 (1957); *Cabot v. Corcoran*, 332 Mass. 44, 123 N.E. (2d) 221 (1954), noted in 35 BOST. UNIV. L. REV. 297 (1955); *Republic of Greece v. Koukouras*, 264 Mass. 318, 162 N.E. 345 (1928); *Koenck v. Cooney*, 244 Iowa 153, 55 N.W. (2d) 269 (1952); *State v. Wood*, 99 Vt. 490, 134 A. 697 (1926); *Ex parte Copeland*, 91 Tex. Crim. Rep. 549, 240 S.W. 314 (1922); *State v. March*, 46 N.C. 526 (1854). See 59 A.L.R. 895 (1929); 2 A.L.R. (2d) 631 (1948); 38 A.L.R. (2d) 225 at 266 (1954).

¹¹ See note 10 supra; *United States v. Murdock*, note 9 supra; 8 WIGMORE, EVIDENCE, 3d ed., §2258 (1940).

¹² *Feldman v. United States*, 322 U.S. 487 (1944), noted in 53 YALE L. J. 364 (1944). Although no authority has been found, states following the majority doctrine would probably apply the Feldman rationale and hold that the state privilege does not forbid use in a state criminal prosecution of evidence obtained under a grant of immunity in another jurisdiction. This result seems consistent with the "two sovereignties" theory. But see *Clark v. State*, 68 Fla. 433, 67 S. 135 (1914), holding that the state constitutional privilege in a jurisdiction following the minority view forbids use in a state court of testimony a bankrupt was compelled to give in a federal bankruptcy proceeding. Cf. *State v. Drew*, 110 Minn. 247, 124 N.W. 1091 (1910). See 154 A.L.R. 994 (1945).

ments but a witness may nevertheless be compelled to give testimony which may very likely lead to his criminal prosecution. A minority of state courts have therefore more realistically reached the result urged by the dissenting judge in the principal case. By recognizing that the federal and state governments are but parts of one integrated governmental system, they hold that the privilege extends protection when there is a substantial danger of prosecution in other jurisdictions.¹³ Immunity from prosecution in the state alone thus becomes insufficient to overcome the privilege, and the witness cannot be forced to testify. The result in the principal case points out the dilemma confronting a witness in jurisdictions following the majority doctrine. He must either submit to a contempt proceeding in the state ordering the testimony or face a grave risk of prosecution in another jurisdiction. It would seem that where the judiciary has given the self-incrimination privilege a narrow construction leading to this dilemma, the legislature should assure a witness the full protection afforded by the minority view. Congress, having power to grant immunity from state prosecution,¹⁴ has recognized the need and obviated the danger accordingly.¹⁵ The states cannot reach this result by extending immunity beyond their boundaries.¹⁶ They could, however, follow the approach taken by the Illinois legislature and require a denial of immunity when the testimony would be incriminating elsewhere, thus permitting the witness to remain silent.¹⁷

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¹³ *People v. DenUyl*, 318 Mich. 645, 29 N.W. (2d) 284 (1947); *Commonwealth v. Rhine*, (Ky. 1957) 303 S.W. (2d) 301, noted in 106 UNIV. PA. L. REV. 127 (1957); *Lorenzo v. Blackburn*, (Fla. 1954) 74 S. (2d) 289; *State v. Kelly*, (Fla. 1954) 71 S. (2d) 887; *State ex rel. Doran v. Doran*, 215 La. 151, 39 S. (2d) 894 (1949). Cf. *Application of Herlands*, 204 Misc. 373, 124 N.Y.S. (2d) 402 (1953); *In re Amato*, 204 Misc. 454, 124 N.Y.S. (2d) 726 (1953). See *State v. Dominguez*, 228 La. 284, 82 S. (2d) 12 (1955), noted in 34 TEX. L. REV. 639 (1956), holding the Fifth Amendment to be applicable in a state proceeding when there was danger of federal prosecution. See also Rogge, "Compelling the Testimony of Political Deviants," 55 MICH. L. REV. 163 at 200 (1956).

¹⁴ *Adams v. Maryland*, 347 U.S. 179 (1954); *Ullmann v. United States*, note 9 supra.

¹⁵ 18 U.S.C. (Supp. IV, 1957) §3486.

¹⁶ *Feldman v. United States*, note 12 supra.

¹⁷ Ill. Rev. Stat. (1953) c. 38, §580a. See *People v. Burkert*, 7 Ill. (2d) 506, 131 N.E. (2d) 495 (1955).