Michigan Law Review

Volume 55 | Issue 2

1956

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MICHIGAN LAW REVIEW

Vol. 55 DECEMBER 1956 No. 2

# COMPELLING THE TESTIMONY OF POLITICAL DEVIANTS*

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At the last term the United States Supreme Court in *Ullmann v. United States*[1] upheld the constitutionality of paragraph (c) of a federal act of August 1954 which seeks to compel the testimony of communists and other political deviants.[2] Paragraph (c) relates to witnesses before federal courts and grand juries. The Court specifically left open the question of the validity of paragraphs (a) and (b) relating to congressional witnesses. Justice Frankfurter delivered the Court's opinion. Justice Douglas, with the concurrence of Justice Black, wrote a dissent.

It is our purpose to consider the background, history and terms of this compulsory testimony act, the validity of the Court's de-

*This article is being published in two instalments.—Ed.

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1 350 U.S. 422 (1956), affirming (2d Cir. 1955) 221 F.(2d) 760, affirming (S.D.N.Y. 1955) 128 F. Supp. 617 (Ullmann spelled with one "n" by the district court). The court of appeals affirmed reluctantly and with regret on the basis of the district court's opinion.

2 The act as originally proposed applied to all types of crime, but it was narrowed before passage. Representative Kenneth B. Keating of New York, who sponsored in the House the bill (S.16, 83d Cong.) which became law, in explaining the final form of this bill stated: "Mr. Speaker, this bill is a very important piece of legislation to further the struggle against the Communist conspiracy on all fronts, in the activities of investigating committees representing the legislative arm of Government and in the prosecutive functions carried on through the executive branch. . . . This bill as now worded and now before us exclusively applies only to investigations dealing with or prosecutions for the crimes of treason, sabotage, espionage, sedition, seditious conspiracy, and violations of certain specific statutes, all of which deal with the Communist conspiracy." 100 CONG. REC. 13323-13324 (1954).

Attorney General Herbert Brownell, Jr., shortly after the passage of the act, in an address at Plymouth, Massachusetts to the twentieth general congress of the General Society of Mayflower Descendants, commented: "Another new law is the so-called Immunity Law. This was requested by the Administration in order to prevent persons from making a sham of the Fifth Amendment privilege against self incrimination. Those persons—subversives, their sympathizers or misguided persons—have been using the Fifth Amendment in order to shield persons they knew to be part and parcel of the communist conspiracy." Sept. 13, 1954, p. 5.

cision, and the history, constitutionality and utility of such acts generally. We shall be particularly concerned with the testimony of political deviants.

*Background and History of the New Federal Act*

The new federal act was a part of our effort against the threat involved in the aggressive and proselytizing course of international communism, a movement which began to make its impact on us from the time when the Bolsheviks seized power in Russia in 1917. Indeed, some of the Russian Bolshevik leaders were in New York City in the early part of that year, among them both Leon Trotsky and Nikolai I. Bukharin. Trotsky was here for two months beginning the middle of January. Bukharin was here even longer. He arrived in November 1916 and left after Trotsky did. Two years later Socialist Party members held a Left Wing conference in New York City, June 21-24, 1919, which adopted a resolution urging all revolutionary socialists to send delegates to a forthcoming Socialist Party convention at Chicago. These delegates were to be prepared to form a new party if the Socialist Party refused to reinstate all suspended and expelled members. The conference also instructed its executive committee to draft and publish the "Left Wing Manifesto" and adopted *Revolutionary Age* as the Left Wing's official newspaper. The Manifesto appeared in the July 5, 1919 *Revolutionary Age* and furnished the basis for the conviction of its business manager, Benjamin Gitlow, of criminal anarchy in New York.[3]

The United States Senate began to investigate communist propaganda in this country as early as 1919.[4] So too did the state of New York. Its legislature created the Joint Committee Investigating Seditious Activities, often called the Lusk Committee, after Senator Clayton R. Lusk, who headed it.[5] Since then there have been many investigations by many committees, state as well as federal, of individuals regarded as communists or communist sympathizers and groups and organizations thought to be communist or communist dominated.

In 1938 came the House of Representative's Special Committee on Un-American Activities,[6] which was continued from time

3 Gitlow v. New York, 268 U.S. 652 (1925).

4 S. Doc. 62, 66th Cong., 1st sess., v.1, p. xxix, v.3.

5 DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 680-681 (Fund for the Republic, 1955).

6 H.R. Res. 282, 83 CONG. REC. 7586 (1938)

to time until 1945, when it became the Committee on Un-American Activities, and a standing committee.[7] Thereafter it was sometimes known by the name of one of its subsequent chairmen, John S. Wood of Georgia, J. Parnell Thomas of New Jersey, Harold H. Velde of Illinois or Francis E. Walter of Pennsylvania.

The peak in congressional investigations of communists and communist sympathizers or those thought to be such occurred in the years 1953 and 1954. During this period Congress had not one but a number of bodies engaged in such investigations. The three most active ones were: Permanent Subcommittee on Investigations of the Committee on Government Operations, chaired by Senator Joseph R. McCarthy of Wisconsin; Subcommittee on Internal Security of the Committee on the Judiciary, headed by Senator William E. Jenner of Indiana; and the House Committee on Un-American Activities, headed by Representative Velde. These three committees were often known from their respective chairmen as the McCarthy, Jenner, and Velde Committees. The Senate Internal Security Subcommittee in turn created a task force under the chairmanship of Senator John M. Butler of Maryland to investigate communist infiltration into labor unions. The House also had a Special Committee to Investigate Foundations, chaired by B. Carroll Reece of Tennessee.[8]

The longest-lived of these committees, and consequently the one that had the most to do with alleged subversives, was the House Committee on Un-American Activities. At first those who refused to testify or produce requested documents before this body raised the objection that the resolution authorizing the committee's investigations was unconstitutional on the ground, among others, that it trespassed on First Amendment freedoms. However the lower federal courts sustained the validity of the resolution, and the Supreme Court denied review.[9]

7 DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 589, 606-607 (Fund for the Republic, 1955).

8 See id. at 523-543, 643-650, and S. Doc. 40, 84th Cong., 1st sess., 297-299, 319-326 (1955), for a summary of the work of these groups.

9 Lawson v. United States, (D.C. Cir. 1949) 176 F.(2d) 49, cert. den. 339 U.S. 934 (1950); Barsky v. United States, (D.C. Cir. 1948) 167 F.(2d) 241, cert. den. 334 U.S. 843 (1948), petition for rehearing den. 339 U.S. 971 (1950); United States v. Josephson, (2d Cir. 1947) 165 F.(2d) 82, cert. den. 333 U.S. 838 (1948), rehearing den. 333 U.S. 858 (1948). In two of a later series of cases the Supreme Court did grant certiorari and reversed the court below, but did so on Fifth rather than First Amendment grounds. Emspak v. United States, 349 U.S. 190 (1955), reversing (D.C. Cir. 1952) 203 F. (2d) 54; Quinn v. United States, 349 U.S. 155 (1955), reversing (D.C. Cir. 1952) 203 F.(2d) 20. In these two cases the defendants relied primarily on the First Amendment, but also tacked on the Fifth Amendment. The Supreme Court granted certiorari in the Emspak case in 1953 (346 U.S. 809) and in the Quinn case in June 1954 (347 U.S. 1008).

Meanwhile the Department of Justice began presenting evidence to a grand jury in the Southern District of New York, and in July 1948 obtained an indictment against William Z. Foster, national chairman, Eugene Dennis, general secretary, and ten other top leaders of the American Communist Party, charging them with a conspiracy to organize the Communist Party of the United States as a group to teach and advocate the overthrow of our government by force and violence in violation of the Smith Act, passed in 1940. This case went to trial in 1949 as to all but Foster, who was severed from it because of ill health, and after nine months resulted in a verdict of guilty as to all remaining eleven defendants. The Court of Appeals for the Second Circuit affirmed a judgment of conviction in July 1950.[10]

With these events witnesses before grand juries and congressional committees began to claim their Fifth Amendment privilege against self-incrimination. One such witness was Patricia Blau, before a federal grand jury in Denver. The Supreme Court sustained her claim in December 1950.[11] That this claim was also available to a witness before a congressional committee was generally recognized, and later cases repeatedly so held.[12] Then the following June the Supreme Court affirmed the *Dennis* [13] case.

The stage was now set for numerous claims of privilege, and they were forthcoming. With them came a mounting demand that witnesses talk, and for an immunity act, which would confront them with the alternative either of doing so or going to jail for

[10] United States v. Dennis, (2d Cir. 1950) 183 F. (2d) 201.

[11] Blau v. United States, 340 U.S. 159 (1950).

[12] Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955); United States v. Costello, (2d Cir. 1952) 198 F. (2d) 200, cert. den. 344 U.S. 874 (1952); Starkovich v. United States, (9th Cir. 1956) 231 F. (2d) 411; Jackins v. United States, (9th Cir. 1956) 231 F. (2d) 405; United States v. Doto (Joe Adonis), (2d Cir. 1953) 205 F. (2d) 416; Aiuppa v. United States, (6th Cir. 1952) 201 F. (2d) 287; Accardo v. United States, (5th Cir. 1952) 196 F. (2d) 1021; Marcello v. United States, (5th Cir. 1952) 196 F. (2d) 437; Poretto v. United States, (5th Cir. 1952) 196 F. (2d) 392; United States v. Fischetti, (D.C.D.C. 1952) 103 F. Supp. 796; United States v. Pechart, (N.D.Cal. 1952) 103 F. Supp. 417; United States v. Nelson, (D.C.D.C. 1952) 103 F. Supp. 215; United States v. Licavoli, (N.D. Ohio 1952) 102 F. Supp. 607; United States v. DiCarlo, (N.D. Ohio 1952) 102 F. Supp. 597; United States v. Cohen, (N.D. Cal. 1952) 101 F. Supp. 906; United States v. Jaffe, (D.C.D.C. 1951) 98 F. Supp. 191; United States v. Raley, (D.C.D.C. 1951) 96 F. Supp. 495; United States v. Fitzpatrick, (D.C.D.C. 1951) 96 F. Supp. 491; United States v. Yukio Abe, (D.C. Hawaii, Jan. 16, 1951) 19 U.S. Law Week 2321; numerous unreported decisions. See Carlson v. United States, (1st Cir. 1954) 209 F. (2d) 209 at 212; Cohen v. United States, (9th Cir. 1953) 201 F. (2d) 386 at 390, cert. den. 345 U.S. 951 (1953); United States v. Yukio Abe, (D.C. Hawaii 1950) 95 F. Supp. 991 at 992. Cf. Emery's Case, 107 Mass. 172, 9 A. 22 (1871); Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931); Ex parte Johnson, 187 S.C. 1, 196 S.E. 164 (1938). See State v. James, 36 Wash. (2d) 882 at 897, 221 P. (2d) 482 (1950). See note, 49 COL. L. REV. 87 (1949).

[13] Dennis v. United States, 341 U.S. 494 (1951).

contempt. Benjamin F. Wright, the president of Smith College, wrote: "The central issue may be divided into two parts: Should one who is called before such a committee testify about his present and past memberships and activities in the Communist Party? Should a witness give the names of persons whom he knew to be engaged in such activity? In my opinion the answer to both of these questions is 'yes'. . . ."[14] A former magistrate in New York, Morris Ploscowe, in discussing the Fifth Amendment's privilege against self-incrimination, stated: "In the course of this article, I am going to tell you how, by using a very simple, ingenious legal device, we can effectively deal with the gangsters and Communists who are trying to destroy our society while hiding behind this shield which has been furnished them by the Constitution itself."[15] His remedy was of course an immunity statute. In October 1953, Attorney General Herbert Brownell, Jr., in an address before the National Press Club, Washington, D. C., declared, "Subversives and criminals have not been slow to rely upon this provision which was written into our Constitution to protect law-abiding citizens against tyranny and despotism"; and followed by asking, "Can we afford to permit these wrongdoers to destroy the institutions of freedom by hiding behind the shield of this constitutional privilege?"[16] He concluded his address with the announcement that the Department of Justice would seek an immunity statute at the forthcoming session of Congress. President Eisenhower in his State-of-the-Union message in January 1954 referred to the Attorney General's proposed immunity bill.[17]

After the Supreme Court's decision in the *Blau* case various immunity bills were introduced in Congress. The first one was by Senator Pat McCarren of Nevada, in May 1951, S. 1570, 82d Congress.[18] It authorized a congressional committee by a two-thirds vote, including at least one member of the minority party,

14 "Should Teachers Testify," SAT. REV., Sept. 26, 1953, pp. 22, 23.

15 "How to Make Gangsters Talk," THIS WEEK MAGAZINE, Feb. 1, 1953, pp. 7, 34-35. See Dowling, "I Stand on the Fifth Amendment," N.Y. TIMES, April 17, 1953, §6, p. 10.

16 "Remedy for Abuse of Constitutional Privilege Against Self-Incrimination," Oct. 14, 1953, N.Y. TIMES, Oct. 15, 1953, p. 1:5. He repeated the substance of this speech in an address before the Law Club of Chicago, Nov. 6, 1953. "Immunity from Prosecution Versus Privilege Against Self-Incrimination," reprinted in full in U.S. NEWS & WORLD REPORT, Dec. 25, 1953, pp. 90-95, and in 28 TULANE L. REV. 1 (1953); 14 FED. B.J. 91 (1954). REPORT, Dec. 25, 1953, pp. 90-95. In the latter speech he stated that "subversives and In the latter speech he stated that "subversives and criminals have been quick to rely" upon their privilege.

17 N.Y. TIMES, Jan. 8, 1954, p. 10:3.

18 97 CONG. REC. 5972. It was reported favorably by the Committee on the Judiciary. S. Rep. 717, 82d Cong., 1st sess. (1951).

to grant immunity to a witness. In the same session the Special Committee to Investigate Organized Crime in Interstate Commerce, frequently known as the Kefauver Committee, after its chairman, Senator Estes Kefauver of Tennessee, proposed a bill, S. 1747, to vest immunity powers in the attorney general in any proceeding before a federal court or grand jury,[19] and endorsed not only its own bill but also that of Senator McCarran.[20] So too did the American Bar Association Commission on Organized Crime.[21] Neither bill passed, but new bills were introduced in 1953. Senator McCarran's bill was S. 16, 83d Congress, and the Kefauver Committee's bill was S. 565. The Department of Justice, because it was charged with the prosecution of offenses, and aware of the fact that under the law as it then stood all grants of immunity from prosecution rested solely with agents of the executive branch of government, objected to S. 16 on the ground that it gave no participation to the attorney general. Deputy Attorney General William P. Rogers wrote to Senator William Langer, then Chairman of the Senate Committee on the Judiciary: "This Department is disturbed, however, by the failure of the bill to provide that the Attorney General shall participate in the granting of any immunity to a witness before a congressional committee or before either House of Congress. The Attorney General is the chief legal officer of the Government of the United States. . . .Not only must this responsibility be coupled with an authority adequate to permit its discharge, but in addition it would seem inadvisable for others to be cloaked with an authority capable of preventing the Attorney General from fully performing his duty."[22] Nevertheless S. 16 passed the Senate in 1953,[23] but not the House.

In January 1954 Representative Kenneth B. Keating of New York introduced an immunity bill, H.R. 6899, which had the endorsement of the attorney general.[24] This bill applied not only to witnesses before congressional committees or before either House, but also before federal courts or grand juries. The ultimate decision to grant immunity rested in all instances with the attorney general. Yet other immunity bills were introduced in the House, both in 1953 and 1954.[25] Senator McCarran objected to H.R. 6899

19 97 CONG. REC. 7015 (1951).
20 S. Rep. 725, 82d Cong., 1st sess., 94-95 (1951).
21 REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT, vol. 1, pp. 59-60 (1952).
22 S. Rep. 153, 83d Cong., 1st sess., 15 (1953).
23 99 CONG. REC. 8357 (1953).
24 100 CONG. REC. 13323 (1954).
25 H.R. 2737, H.R. 4489, H.R. 6948.

on the ground that "any such grant of a veto power to the Attorney General . . . would be a violation of the separation of powers."[26] Both of Senator McCarran's bills, S. 1570, 82d Congress and S. 16, 83d Congress, which related only to witnesses before congressional committees, provided for a grant of immunity without the approval of any outside agency. After a long tug of war between Senator McCarran and Attorney General Brownell a compromise was finally arrived at pursuant to which S. 16 was revised to provide for three participants in grants of immunity. Two of the participants were to be the attorney general and a federal district court. In the case of congressional witnesses the third hand was to be Congress or one of its committees; and in the case of other witnesses, a federal district attorney. The court was to be the final arbiter in all instances. This revision occurred in the House. The House Report on S. 16 in its revised form stated: "In all cases where the bill authorizes a grant of immunity there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."[27] This statement is not quite accurate, for in the case of congressional witnesses, if the attorney general does not concur, the Congress or one of its committees may nevertheless proceed to grant immunity with the approval of the appropriate federal district court.

On August 4, 1954 the House passed this revision of S. 16 by a vote of 294 to 55.[28] A week later the Senate concurred in the House amendments with but a single dissenting voice, that of Senator Herbert H. Lehman of New York, and even his opposition to the passage of the measure was limited "to the manner in which it has been brought up."[29] On August 20, 1954 the president approved it.[30]

The same day Congressman Keating declared: "This is the most important and effective piece of legislation dealing with the Communist conspiracy that has been enacted at this session. It will loosen the tongues of some reluctant witnesses and prevent higher-ups from escaping punishment for lack of evidence. Armed with this weapon, our law enforcement officials should be greatly fortified in their continuing war against our internal enemies."[31]

26 100 CONG. REC. 13997 (1954).
27 H.R. Rep. 2606, 83d Cong., 2d sess., 8 (1954).
28 100 CONG. REC. 13333 (1954).
29 Id. at 13998.
30 18 U.S.C. (Supp. III, 1956) §3486.
31 N.Y. TIMES, Aug. 21, 1954, p. 6:1.

A few days later President Eisenhower explained: "Last week I signed a bill granting immunity from prosecution to certain suspected persons in order to aid in obtaining the conviction of subversives. Investigation and prosecution of crimes involving national security have been seriously hampered by witnesses who have invoked the constitutional privilege against self-incrimination embodied in the Fifth Amendment. This act provides a new means of breaking through the secrecy which is characteristic of traitors, spies and saboteurs."[32]

As finally passed the new federal immunity act applies to witnesses before either House of Congress, congressional committees, and federal courts and grand juries, and to investigations into treason, sabotage, espionage, sedition, seditious conspiracy and the overthrow of the government by force or violence. Court approval must be secured in every instance. For an offer of immunity to a congressional witness there must be an affirmative vote of a majority of the members present if the witness is before either House, and of two-thirds of the members of the full committee if he is before a committee. The attorney general must be notified when either House or any congressional committee proposes to grant immunity, and also of any application for court approval of the proposed grant. The immunity granted is freedom from prosecution for or subjection to "any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence," except prosecution for "perjury or contempt while giving testimony or producing evidence."

In form, the new immunity act is an amendment of the first federal immunity statute, passed in 1857,[33] and amended in 1862.[34] In fact it was almost a complete substitution.

### *Approval of Proposed Immunity Grants A Nonjudicial Function*

The most serious legal question which the federal act raises is this: does it seek to confer on federal courts a nonjudicial function in violation of Article III, Section 2 of the Constitution? Immunity acts involve the determination of a policy question: is it desirable

[32] N.Y. TIMES, Aug. 25, 1954, p. 16:3.

[33] 11 Stat. 155, 156, §2 (1857).

[34] 12 Stat. 333 (1862). It became successively Rev. Stat. §859 (1875), 28 U.S.C. (1940) §634, and 18 U.S.C. (Supp. III, 1956) §3486.

in a particular instance to grant an offender freedom from prosecution in order to confront him with the choice either of telling what he knows or going to jail? In the past such determinations have been made almost exclusively by agents of the executive branch of government in connection with the investigation and prosecution of offenses. Until the act of August 1954 the only federal exception was the act of 1857 in its broad form, an exception which lasted but five years.

Does the act of August 1954 require federal courts to participate in the determination of the advisability of proposed grants of immunity? It would seem so. Clearly this is the case in the instance of such a proposed grant to a witness before one of the Houses of Congress or a congressional committee, for here paragraph (b) of the act specifically calls for the "approval" of a federal district court. Congress intended no difference in result between this paragraph and the following paragraph (c), relating to a witness before a federal court or grand jury, despite the fact that the latter paragraph refers only to an "order" of a federal district court.

Originally neither Congressman Keating's bill, H.R. 6899, nor Senator McCarran's bill, S. 16, contained any provision for court approval. Then S. 16 was revised in the House to provide for court approval in all instances, or at least so Congress thought. The House Report on S. 16 in its revised form, after summarizing paragraphs (a)-(c), specifically states: "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill."[35] District Judge Weinfeld, before whom the *Ullmann* case arose, tried to escape from the effect of this language by suggesting that the phrase "independent but interested parties" referred, in the case of paragraph (c), to a district attorney and the attorney general.[36] But the language is not "two independent but interested parties"; it is "two other independent but interested parties." The words "two other" can refer only, in the case of paragraph (c), to a district judge as well as the attorney general.

Moreover, Congressman Keating, a member of the Judiciary Committee of the House, and the measure's leading sponsor in that body, specifically took the position that so far as court approval

[35] H. R. Rep. 2606, 83d Cong., 2d sess., p. 8 (1954).
[36] 128 F. Supp. 617 at 626 (1955).

was concerned there was no difference between paragraphs (b) and (c). In debate on the measure he stated:

> ". . . it does not leave the final determination as to the granting of immunity in either the hands of the investigating committee or the Attorney General, but rather the court. . . .
>
> "As to (a), proceedings before a congressional committee, it provides that if a congressional committee or either House of Congress itself concludes that it is desirable to grant immunity to some witness in order to obtain evidence regarding some higher up or someone else, then the congressional committee shall give notice to the Attorney General of an application to a court and the court shall be the final arbiter as to whether or not immunity should be granted. The Attorney General can appear in court and say: 'I agree with the committee,' or he can appear there and say, 'I disagree with the committee. This is a case where immunity should not be granted,' and the court will have the final word in the matter.
>
> "Section (c) deals with proceedings before a court or grand jury. In that case it says that if the United States attorney in a particular area has a prosecution before him and feels that immunity should be granted to some prospective witness, he shall first get the approval of the Attorney General to the granting of that immunity and then shall appeal to the court and the court will pass on the question, and if convinced of the propriety, issue the order for immunity."[37]

After explaining that a grant of immunity was "really a sort of bargaining process," and pointing out that a prosecutor or a congressional committee might sometimes get out-traded, Congressman Keating went on to make plain that courts were to be a part of this process in every instance of a proposed grant of immunity under the new act:

> "The feature of the bill before us which I especially commend to your favorable attention—is intended to take care of this problem of blind bargaining. It requires, in the case of congressional investigations, virtual agreement between all three branches of the Government—legislative, executive, and judicial—before an effective grant of immunity is conferred. In court proceedings it requires approval of both the prosecutor and the court."[38]

[37] 100 CONG. REC. 13323 (1954).
[38] Id. at 13324.

Senator McCarran, who introduced S. 16, and was the bill's leading sponsor in the Senate, took the same position in debate there that Congressman Keating had taken in the House.[39]

Before the *Ullmann* case arose, the Attorney General, too, took the same position as Congressman Keating. In a speech at Plymouth, Massachusetts to the twentieth general congress of the General Society of Mayflower Descendants he said that immunity "will be granted by a Federal District Judge, after advice from the Attorney General, upon petition of a United States Attorney or a representative of Congress."[40]

Judge Weinfeld, after questioning the weight to be given to remarks made in general debate by individual members of a reporting committee in determining congressional intent,[41] referred to a statement by Congressman Francis E. Walter of Pennsylvania, who was also a member of the House Judiciary Committee, and commented that he "took a quite different view" from Congressman Keating. Congressman Walter did say at one point that "before a person can be granted immunity the court is called upon to act on the question of the materiality and the germaneness of the matter under inquiry";[42] but a few moments later, in response to Representative Jacob K. Javits of New York, who remarked, ". . . The court would not I believe inquire into the advisability or lack of it in giving an immunity bath," stated: "After all, when it comes to the question of the wisdom, I just think that is a question of materiality."[43] Either he did not distinguish between the question of the wisdom of a proposed grant of immunity and questions of materiality and pertinency, or he equated all of them. Then this interchange took place:

> "MR. JAVITS. The Congress will have decided that [materiality] and the court will just rely upon the decision made by the committee or the House?
>
> "MR. WALTER. I do not think so. I think this goes much further than that."[44]

[39] 100 CONG. REC. 13997-13998 (1954).

[40] Sept. 13, 1954, p. 5.

[41] He said in a footnote: "Whether or not statements made during general debate by individual members of the reporting committee are sufficient to show a congressional intent may be open to question. See Jackson, J., concurring in Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 395. . .; Note, A Re-evaluation of the Use of Legislative History in the Federal Courts, 52 COL. L. REV. 125." 128 F. Supp. 616 at 627, n. 28.

[42] 100 CONG. REC. 13325 (1954).

[43] Ibid. Congressman Javits was not a member of the House Judiciary Committee. He was one of the 55 who voted against the measure. 100 CONG. REC. 13333 (1954).

[44] Id. at 13325.

Thus he ended up taking the same position as Congressman Keating on the role of the courts: district judges had to pass upon the advisability of proposed grants of immunity. In taking this position he did not distinguish between congressional witnesses and witnesses before federal courts or grand juries.

But the Court in the *Ullmann* case, as had Judge Weinfeld, reduced the role of a federal court under paragraph (c), relating to a witness before a federal court or grand jury, simply to that of ascertaining whether certain formal requirements had been met and if so ordering a witness to testify or produce evidence. Judge Weinfeld stressed the fact that paragraph (b) required the "approval" of a federal district court whereas the following paragraph (c) provided only for the "order" of such a court.[45] However, if the provision of paragraph (c) that the district attorney "shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence," upon which Judge Weinfeld strongly relied, means no more than the Court and he said it did, then it becomes wholly unnecessary. It will require courts to do no more than what they have always done without it. Courts would have continued to do precisely this without any such provision.

The Court, and Judge Weinfeld, relied on *Interstate Commerce Commission v. Brimson*.[46] But that case involved the application of compulsion to a witness before an administrative body, the Interstate Commerce Commission, and this body did not have power to enforce its own subpoena. It had to rely for this purpose on a grant of power to a federal court. Such a court, however, needs no grant of power to apply compulsion to a witness before it or a grand jury under its jurisdiction. It has this power inherently.

In the *Brimson* case the court truly had nothing to do with the determination of the question whether a subpoena ought to issue. This was left solely with the commission. Equating the *Ullmann* case with this case means that the quoted portion of paragraph (c) was an embellishment which served no other purpose than that of deceiving Congress.

Professor Dixon has shown that at least paragraphs (a) and (b)

[45] 128 F. Supp. 616 at 624-625 (1955).
[46] 154 U.S. 447 (1894).

seek to impose on federal courts a nonjudicial function contrary to our constitutional requirements for the separation of governmental powers.[47] Justice Jackson would have been of the same mind. In his *The Supreme Court in the American System of Government,* published posthumously, he described the judicial function, and indicated his doubts as to the validity of legislation of the type which paragraphs (a) and (b) contain:

> "But perhaps the most significant and least comprehended limitation upon the judicial power is that this power extends only to cases and controversies. We know that this restriction was deliberate, for it was proposed in the Convention that the Supreme Court be made a part of a Council of Revision with a kind of veto power, and this was rejected.
>
> "The result of the limitation is that the Court's only power is to decide lawsuits between adversary litigants with real interests at stake, and its only method of proceeding is by the conventional judicial, as distinguished from legislative or administrative, process. This precludes the rendering of advisory opinions even at the request of the nation's President and every form of pronouncement on abstract, contingent, or hypothetical issues. It prevents acceptance for judicial settlement of issues in which the interests and questions involved are political in character. It also precludes imposition on federal constitutional courts of nonjudicial duties. Recent trends to empower judges to grant or deny wiretapping rights to a prosecutor or to approve a waiver of prosecution in order to force a witness to give self-incriminating testimony raise interesting and dubious questions. A federal court can perform but one function—that of deciding litigations—and can proceed in no manner except by the judicial process."[48]

The Court in the *Ullmann* case expressly left open the question whether paragraphs (a) and (b) attempt to confer on federal courts a nonjudicial function.[49] Judge Weinfeld went a bit farther. After quoting these words, "Such an order may be issued by a United States district court judge," from paragraph (a), and these words, "without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein

47 Dixon, "The Doctrine of Separation of Powers and Federal Immunity Statutes," 23 GEO. WASH. L. REV. 501, 627 (1955). See also comment, 22 UNIV. CHI. L. REV. 657 (1955).

48 At 11-12 (1955).

49 350 U.S. 422 at 431-432 (1956) ("We are concerned here only with § (c) and therefore need not pass on this question with respect to §§ (a) and (b) of the Act").

such inquiry is being held," from paragraph (c), and italicizing the words "may" and "approval," he continued: "The language in these sections of the act purports to vest discretion in the court and specifically requires its approval of any grant of immunity."[50]

In reaching its conclusions as to paragraph (c) the Court, as had Judge Weinfeld, assumed that paragraphs (a) and (c) were separable from it without discussing the question. But there would seem to be great doubt about this, for Congress would not have passed one part without the other.

The new federal act consists of but two sections, and of these, one deals with the title. The act thus reduces itself to a single section. It contains no separability clause. Furthermore, in view of the history of the new act and the long struggle between Congress and the attorney general over its form, it is clear that Congress would not have been satisfied with paragraph (c), which the attorney general wanted, if this paragraph had not been accompanied by paragraphs (a) and (b), which Congress wanted.

Whether the invalid parts of an act are separable from the valid ones is a question of legislative intent.[51] Because of the fact that many modern statutes contain a separability clause, the absence of such a clause results in the strict application today of a presumption of indivisibility.[52] The leading federal case on separability and separability clauses is *Carter v. Carter Coal Co.*[53] That case involved a separability clause which read: "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby." After quoting it the Court said: "In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be un-

50 128 F. Supp. 616 at 624 (1955).

51 Carter v. Carter Coal Co., 298 U.S. 238 (1936); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Williams v. Standard Oil Co. of La., 278 U.S. 235 (1929); Dorchy v. Kansas, 264 U.S. 286 (1924).

52 See Stern, "Separability and Separability Clauses in the Supreme Court," 51 HARV. L. REV. 76, 121 (1937). In Family Security Life Ins. Co. v. Daniel, (E.D.S.C. 1948) 79 F. Supp. 62, revd. 336 U.S. 220 (1949), the majority of a three-judge statutory court stated (at 65-66): "In view of the modern form of legislative drafting, the omission of such a provision evidences clearly the legislative intent that this statute must stand or fall as a whole." State cases to this effect are Maury County v. Porter, 195 Tenn. 116, 257 S.W. (2d) 16 (1953); Life and Casualty Ins. Co. v. McCormack, 174 Tenn. 327, 125 S.W. (2d) 151 (1939); Burroughs v. Lyles, 142 Tex. 704, 181 S.W. (2d) 570 (1944).

53 298 U.S. 238 (1936).

constitutional, the presumption is that the remaining provisions fall with it."[54]

A modern statute without a separability clause is not necessarily indivisible. However, the absence of such a clause requires the proponents of divisibility to overcome a strong presumption against them. Even without the benefit of any presumption one can suggest that in the case of the new federal act it affirmatively appears that Congress would not have passed paragraph (c) without paragraphs (a) and (b). All three paragraphs should fall together.

*Necessity of Protection Against the Danger of State Prosecution*

Another problem which the federal act of August 1954 presents involves the question of whether it should, does and can protect against the substantial danger of state prosecutions in the area which it covers. The Court in the *Ullmann* case answered the last two questions in the affirmative. Judge Weinfeld did likewise, but he also answered the first question in the negative.

In concluding that the federal act did, and constitutionally could, protect against state prosecutions it would seem that no one gave sufficient consideration to several factors. To begin with, the federal act became a part of the federal criminal code. It was in the form of an amendment of one of the sections of this code. Another section of the same title expressly provides: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."[55] This provision, as the dissent in *Pennsylvania v. Nelson*,[56] decided a week after the *Ullmann* case, pointed out, is but a recognition of the fact that under our federal system the prosecution of offenses is committed primarily to the states: "It recognizes the fact that maintenance of order and fairness rests primarily with the states."[57] In another recent case, *Rochin v. California*,[58] Justice Frankfurter speaking for the Court stated: "In our federal system the administration of criminal justice is predominantly committed to the care of the states. The power to define crimes belongs to Congress

[54] Id. at 312.

[55] 18 U.S.C. (1952) §3231.

[56] 350 U.S. 497 (1956), affirming 377 Pa. 58, 104 A. (2d) 133 (1954), reversing 172 Pa. Super. 125, 92 A. (2d) 431 (1952).

[57] 350 U.S. 497 at 519 (1956). Justice Reed wrote the dissenting opinion, in which Justices Burton and Minton joined.

[58] 342 U.S. 165 (1952).

only as an appropriate means of carrying into execution its limited grant of legislative powers."[59] But if the new federal act protects against state prosecutions then the jurisdiction of state courts will be impaired.[60] No one discussed this point.

In the second place, no one gave sufficient weight to the significant difference in wording in the federal act between the prohibition against prosecution and that against the use of testimony given. In the former case the act simply says that "no such witness shall be prosecuted"; but in the latter case it provides that no testimony which a witness is compelled to give shall be used as evidence "in any criminal proceeding . . . against him in any court." Such a difference in language has been differently treated by the Supreme Court. In *Ensign v. Pennsylvania,*[61] which involved an immunity provision (in the Bankruptcy Act of 1898) simply prohibiting the use of testimony compelled from a bankrupt against him "in any criminal proceeding," the Court left open the question whether this prohibition included state court proceedings. But in *Adams v. Maryland,*[62] which involved the very prohibition against the use of compelled testimony "in any court"[63] that we are here considering, the Court held that the prohibition included state courts. Also, Justice Jackson in a concurring opinion was careful to point out that the prohibition

[59] Id. at 168. Or as Justice Douglas put it for the Court in Jerome v. United States, 318 U.S. 101 at 104, 105 (1943): ". . . Since there is no common law offense against the United States (*United States v. Hudson,* 7 Cranch 32; *United States v. Gradwell,* 243 U.S. 476, 485), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. . . ." See Malinski v. New York, 324 U.S. 401 at 412, 413 (1945) ("Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States.") (concurring opinion of Justice Frankfurter). The Court adverted to this point in Marcello v. United States, (5th Cir. 1952) 196 F. (2d) 437 at 443, in sustaining a claim of privilege before a subcommittee of the Kefauver Committee, although the claim was really based on a fear of state prosecution: "It must be remembered also that, in our federal system, the administration of criminal justice rests preponderantly with the states."

[60] Cf. Sexton v. California, 189 U.S. 319 (1903); In re Dixon, 41 Cal. (2d) 756, 264 P. (2d) 513 (1953); Nastasi v. Aderhold, 201 Ga. 237, 39 S.E. (2d) 403 (1946); People v. Fury, 279 N.Y. 433, 18 N.E. (2d) 650 (1939); People v. Welch, 141 N.Y. 266, 36 N.E. 328 (1894).

[61] 227 U.S. 592 (1913). Various state cases held that testimony of a bankrupt given under this immunity provision was inadmissible in a state court criminal proceeding against him. Clark v. State, 68 Fla. 433, 67 S. 135 (1914); People v. Lay, 193 Mich. 17, 159 N.W. 299 (1916); People v. Lay, 193 Mich. 476 at 488, 160 N.W. 467 (1916); People v. Donnenfeld, 198 App. Div. 918, 189 N.Y.S. 951 (1921), affd. without opinion, 233 N.Y. 526, 135 N.E. 903 (1922); People v. Elliott, 123 Misc. 602, 206 N.Y.S. 54 (1924).

[62] 347 U.S. 179 (1954).

[63] This prohibition was in 18 U.S.C. (1952) §3486 as it stood before it was amended by the new federal act, and was retained.

against the use of compelled testimony left "Maryland with complete freedom to prosecute."[64]

Moreover, the difference in language between the two types of prohibition represents a difference in intent on the part of Congress. In the prohibition against use of compelled testimony Congress specified "in any court," with the express intent of including state courts; but in the prohibition against prosecution Congress omitted these words, and did so with the deliberate intent of leaving this prohibition ambiguous. The House Report on S.16, in discussing the power of Congress to prohibit state prosecution, points out:

> "The answer to the precise question is not too clear. . . . In any event the question can only be resolved by a decision of the Supreme Court. Even though the power of Congress to prohibit a subsequent State prosecution is doubtful, such a constitutional question should not prevent the enactment of the recommended bill. The language of the amendment that 'no such witness shall be prosecuted. . . ', is sufficiently broad to ban a subsequent State prosecution if it be determined that the Congress has the constitutional power to do so. In addition, the amendment recommended provides the additional protection—as set forth in the Adams case, by outlawing the subsequent use of the compelled testimony in any criminal proceeding—State or Federal."[65]

In other words what Congress, almost in express language asked the Supreme Court to do on the point of the prohibition of state prosecution was to legislate: if such a prohibition was constitutional the Court was to rule that it was included; if not, the Court was to rule otherwise. The Court should have left the ambiguous prohibition against prosecution just as ineffective as Congress made it.

That the prohibition in the new act against prosecution was ambiguous was pointed out on the floor of the House during the debate on the measure. Congressman Thomas J. Dodd of Connecticut in arguing against S.16 stated: "For example, from a reading of it, no one can tell whether the immunity granted extends to prosecutions in State courts and this is but one of the obscurities in the legislation."[66] Nevertheless, Congress took no

[64] 347 U.S. 179 at 185 (1954).
[65] H.R. Rep. 2606, 83d Cong., 2d sess., 7 (1954).
[66] 100 CONG. REC. 13328 (1954).

step to meet this objection, which it could easily have done by adding the words "in any court": it left the prohibition against prosecution ambiguous.

However, both the Court and the district judge read the House Report on S.16 as indicating an intent on the part of Congress to prohibit state prosecution.[67] According to the district judge such an intent "was expressly stated by the House Committee."[68] It is submitted that the judge is mistaken, and that the quoted portion from the House Report demonstrates this.

The Court pointed out that the prohibition against prosecution in the new federal act was substantially the same as that in the act of 1893,[69] sustained in *Brown v. Walker.*[70] While it is true that the Court in that case commented that the act of 1893 "contains no suggestion that it is to be applied only to the Federal courts," the Court in the next paragraph went on to say that the possibility of prosecution by another sovereignty "is not a real and probable danger."[71]

In the third place, no one gave sufficient attention to the area covered by the new federal act, the area of treason, sedition, subversion and sabotage, and the mass of state and local legislation in this area. During the past fifty years the states have had more legislation in this area than the federal government; and likewise, until the Smith Act cases, which only began in 1948, more prosecutions.[72]

In 1902, the year after Leon Czolgosz, an anarchist, assassinated President McKinley, New York passed a criminal anarchy act. Fourteen other states followed in its lead. Immediately after World War I some seventeen states adopted criminal syndicalism laws. In a single year, 1919, twenty-six states, more than half, passed laws against the display of red flags.

Today all of the states either in their Constitutions or statutes,

67 350 U.S. 422 at 435 (1956); 128 F. Supp. 617 at 623, 624 (1955).

68 128 F. Supp. 617 at 624 (1955).

69 350 U.S. 422 at 434 (1956).

70 161 U.S. 591 (1896).

71 Id. at 607, 608.

72 Four excellent books containing treatments of this field are CHAFEE, FREE SPEECH IN THE UNITED STATES 285-438 (1948); EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 376-600 (1952); THE STATES AND SUBVERSION (Gellhorn ed. 1952); DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 241-487, 669-686 (Fund for the Republic, 1955). The work edited by Gellhorn contains presentations by six persons, Barrett, Harsha, Prendergast, Mowitz, Chamberlain and Countryman, of the activities against subversion in six states, California, Illinois, Maryland, Michigan, New York and Washington.

and often in both, have provisions defining treason. Thirty-three states prohibit misprision of treason. Nineteen states and Hawaii have criminal anarchy statutes; of these states four also make it a crime knowingly to attend an assemblage of persons defined as criminal anarchists, or to permit an assemblage of such persons on one's premises. Twenty jurisdictions, including Alaska and Hawaii, have statutes on criminal syndicalism; of which statutes fourteen also forbid participation in meetings and permitting such meetings on one's premises. Thirty-five states have laws prohibiting the display of certain types of flags and other emblems. Thirty-three jurisdictions, including Alaska and Hawaii, have sedition statutes. Twenty-eight states have provisions against insurrection and rebellion. Thirty-two jurisdictions, including Alaska and Hawaii, have some form of statute dealing with sabotage. Fifteen jurisdictions, including Hawaii, have on their books, often with some variations or modifications, the Model Sabotage Prevention Act, which was drafted in 1941 after the Federal-State Conference on Law Enforcement Problems of National Defense, held under the auspices of the Department of Justice, the Interstate Commission on Crime, the National Association of Attorneys General, the Governors' Conference, and the Council of State Governments. In addition, various of the states have registration statutes, provisions for loyalty oaths, teachers' loyalty statutes, and laws excluding communists and subversives from elective office, from public office, and from state employment.[73]

In 1949 Maryland enacted a comprehensive and drastic statute against subversion, the Ober Law, formally designated as the Subversive Activities Act of 1949, and New York passed an act for further insuring the loyalty of its teachers, the Feinberg Law, which provided for the preparation of a black list of organizations. During the next few years eight states, Florida, Georgia, Louisiana, Mississippi, New Hampshire, Ohio, Pennsylvania and Washington, followed Maryland's lead and put on their statute books acts modeled in substantial parts in the Ober Law.[74] Ten states,

[73] These acts are listed in DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 241-451 (Fund for the Republic, 1955), and THE STATES AND SUBVERSION, App. B., 414-440 (Gellhorn ed. 1952).

[74] Fla. Stat. (1955) §§876.22 to 876.31; Ga. Code Ann. (1953; Supp. 1955) §§26-901a to 26-914a; La. Rev. Stat. (Supp. 1954) §§14.366 to 14.380; Miss. Code (Supp. 1954) §§4046-01 to 4064-12; N.H. Rev. Stat. (1955) §§588.1 to 588.16 and (Supp. 1955) §§588.3-a, 588.3-b; Ohio Rev. Code (Baldwin, Supp. 1956) §§2921.21 to 2921.27; Pa. Stat. Ann. (Purdon, Supp. 1955) tit. 65, §§211 to 225; Wash. Rev. Code (1951; Supp. July 1953) §§9.81.010 to 9.81.130.

Alabama, Arkansas, California, Delaware, Louisiana, Michigan, Montana, New Mexico, South Carolina and Texas passed registration acts or elaborated existing ones.[75] The acts of Alabama, Arkansas, Delaware, Louisiana, Michigan, New Mexico and Texas referred specifically to the Communist Party. The Delaware statute requires every communist or front member who resides in or passes through the state to register. Four states, Indiana, Massachusetts, Pennsylvania and Texas, passed laws which outlawed the Communist Party by name.[76]

Beginning in 1950 a hundred or more cities and counties across the country adopted measures against subversion. The list included: Bessemer and Birmingham, Alabama; Los Angeles, Oakland and Redondo Beach, California; Jacksonville and Miami, Florida; Atlanta and Macon, Georgia; Indianapolis and Terre Haute, Indiana; Cumberland, Maryland; Detroit and Saginaw, Michigan; Minneapolis, Minnesota; Omaha, Nebraska; Jersey City, New Jersey; New Rochelle, New York; Cincinnati, Columbus and Lorain, Ohio; Erie, Lancaster, McKeesport and York, Pennsylvania; Knoxville, Tennessee; and Tacoma and Seattle, Washington. Los Angeles, California and New Rochelle, New York by ordinance required registration with the police of any member of a "communist organization" who "resides in, is employed in, has a regular place of business in, or who regularly enters or travels through any part" of the city. Birmingham, Alabama by ordinance imposed a fine and imprisonment for each day that a known communist remained in the city. A Jacksonville, Florida ordinance made it unlawful for any Communist Party member to be within the city limits during the period of hostilities in Korea. A Seattle, Washington ordinance made it unlawful for any subversive organization to rent or use the Civic Auditorium. Various ordinances of other cities prohibited advocacy, required the registration of communists and subversives, forbade

[75] Ala. Code (Supp. 1955) tit. 14, §§97(1) to 97(8); Ark. Stat. Ann. (Supp. 1955) §§41-4125 to 41-4127; Cal. Corp. Code (Deering, 1953) §§35000 to 35302; Del. Code Ann. (Supp. 1954) tit. 20, §§3501 to 3503; La. Rev. Stat. Ann. (Supp. 1954) §§14-358 to 14-365; Mich. Comp. Laws (Supp. 1954) §§752.321 to 752.332; Mont. Rev. Code Ann. (Supp. 1955) §§94-4411 to 94-4427; N.M. Stat. Ann. (1953) §§4-15-1 to 4-15-3; S.C. Code (1952) §§16-581 to 16-589; Tex. Civ. Stat. (Vernon, Supp. 1956) §§6889—3, 3A.

[76] Ind. Stat. Ann. (Burns, 1956) §§10-5201 to 10-5209; Mass. Ann. Laws (1956) c. 264, §§16 to 23; Pa. Stat. Ann. (Purdon, Supp. 1955) tit. 18, §3811; Tex. Civ. Stat. (Vernon, Supp. 1956) §6889—3A. Sections 16A and 17 of the Massachusetts act provide: "The Communist Party is hereby declared to be a subversive organization" and "A subversive organization is hereby declared to be unlawful."

the use of certain types of flags, and provided for loyalty oaths. Many cities prescribed loyalty oaths for their employees. Los Angeles and Detroit set up administrative procedures for determining the loyalty of their employees.[77]

Various of the states, Arizona, California, Florida, Illinois, Montana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Washington, and Hawaii, have set up committees or commissions to investigate un-American activities. Of these bodies the most active have been the Tenney Committee in California; the Broyles Commission in Illinois; the Lusk (1919-20) and Rapp-Coudert Committees in New York; and the Canwell Committee in the state of Washington.[78]

Not only have the states had all manner of measures in the area covered by the new federal act, but they have also brought many prosecutions under various of the statutes to which reference has been made. Most of these prosecutions of course did not go to reviewing courts. Of the few that did, a still smaller number reached the United States Supreme Court. There, although a number of these statutes were invalidated,[79] a number of others were sustained. While it is true that in the most recent decision, *Pennsylvania v. Nelson,*[80] the Court ruled against the validity of a Pennsylvania sedition law, and cast doubt on such laws of other states, on the ground that the federal Smith Act pre-empted the field, the Court was careful to confine its ruling to that field. The prosecution in that case was for sedition, not against Pennsylvania, but against the United States. Chief Justice Warren writing for the Court took pains to point out the boundaries of the opinion: ". . . Neither does it limit the right of the state to protect itself at any time against sabotage or attempted violence of all kinds.

77 For a description of these measures see EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 599 (1952); THE STATES AND SUBVERSION 382-383 (Gellhorn ed. 1952). Many of these ordinances are reproduced in DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES 455-488 (Fund for The Republic, 1955).

78 The activities of these bodies were described by Barrett, Harsha, Chamberlain, and Countryman in THE STATES AND SUBVERSION (Gellhorn ed. 1952).

79 Pennsylvania v. Nelson, 350 U.S. 497 (1956) (Pennsylvania sedition act); Wieman v. Updegraff, 344 U.S. 183 (1952) (Oklahoma statute prescribing loyalty oath for state officers and employees); Herndon v. Lowry, 301 U.S. 242 (1937) (Georgia statute against insurrection as applied); DeJonge v. Oregon, 299 U.S. 353 (1937) (Oregon criminal syndicalism law as applied); Stromberg v. California, 283 U.S. 359 (1931) (California red flag law); Fiske v. Kansas, 274 U.S. 380 (1927) (Kansas criminal syndicalism statute as applied).

80 350 U.S. 497 (1956).

Nor does it prevent the state from prosecuting where the same act constitutes both a Federal offense and a state offense under the police power. . . ."[81]

In earlier cases the Court sustained the validity of various state statutes dealing with subversion. It upheld the constitutionality of three of New York's statutes, two of them in prosecutions: the criminal anarchy act of 1902 in *Gitlow v. New York;*[82] its registration act in *New York ex rel. Bryant v. Zimmerman;*[83] and the Feinberg Law in *Adler v. Board of Education.*[84] The Court upheld a Minnesota sedition act in a criminal prosecution in *Gilbert v. Minnesota;*[85] and the California criminal syndicalism act in criminal prosecutions in *Whitney v. California*[86] and *Burns v. United States.*[87] The Court, in *Garner v. Board of Public Works,*[88] sustained the validity of the oath requirements which Los Angeles prescribed by ordinance for its office holders and employees; and, in *Gerende v. Board of Supervisors,*[89] on a restricted interpretation of what the law required, held valid an oath provision of Maryland's Ober Law.

Not only do the states have a multitude of measures against subversion and not only have there been many prosecutions under these provisions, but also the states are going to insist on what they deem their rights and powers to proceed with further such prosecutions. Indeed, of late, state officials have increasingly urged that the states play an even greater role than heretofore in the fight against subversion. Moreover, Attorney General Brownell has encouraged state action in this field.

In *Pennsylvania v. Nelson,*[90] when Pennsylvania petitioned the federal Supreme Court for certiorari, four states, Illinois, Massachusetts, New Hampshire and Texas, filed briefs as amici curiae supporting the petitioner; and the attorneys general of twenty-four states, including Massachusetts, joined in the brief of

81 Id. at 500.
82 268 U.S. 652 (1925).
83 278 U.S. 63 (1928).
84 342 U.S. 485 (1952).
85 254 U.S. 325 (1920).
86 274 U.S. 357 (1927).
87 274 U.S. 328 (1927).
88 341 U.S. 716 (1951).
89 341 U.S. 56 (1951).
90 350 U.S. 497 (1956).

the state of New Hampshire.[91] The United States too, after the Court's invitation to the solicitor general for the views of the federal government, filed a brief amicus curiae in which it supported the validity of Pennsylvania's sedition law. In this brief the United States, after pointing out that,

> ". . . Forty-two states plus Alaska and Hawaii have statutes which prohibit advocacy of the violent overthrow of established government. Most of these statutes have been in existence for many years. . . .
>
> ". . . Every state has made provisions for treason either in its constitution or statutes, often in both. . . .
>
> ". . . As of January 1955, some 30 states plus Alaska and Hawaii had sedition laws on their statute books, and 12 others had either criminal syndicalism or criminal anarchy statutes or both, making a total of 42 states plus Alaska and Hawaii which had criminal legislation in this general field. . . ."[92]

took the position:

> ". . . Moreover the problem of subversion, as we think Congress recognized, is of such magnitude as to invite federal-state cooperation in the enforcement of their respective sedition laws. Thus the Attorney General of the United States recently informed the attorneys general of the several states in this connection that a full measure of federal-state cooperation would be in the public interest."[93]

The role of the states in the fight against subversion was also one of the main topics of discussion at the 1954 and 1955 conferences of the National Association of Attorneys General, an association comprised of the attorneys general of all the states and territories. At the 1954 conference Attorney General Louis C. Wyman of New Hampshire asserted that the states had a place in the fight against subversion alongside the federal government.[94] He said that a state investigation, properly conducted would supplement the work of the F.B.I. and other federal agencies

[91] 348 U.S. 814 (1954). The states were Arizona, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, Washington and Wisconsin.

[92] Brief, pp. 5, 15, 22.

[93] Brief, p. 31.

[94] For an account of this session see N.Y. TIMES, Dec. 10, 1954, p. 16:4-6.

engaged in the enforcement of security statutes. He described the procedures under New Hampshire's legislation against subversion,[95] and referred to various New Hampshire cases[96] which, in his opinion, supported the view that this legislation did not conflict with federal statutes. A committee headed by the attorney general of Massachusetts presented a report recommending that the association in its fight against subversion set up a standing committee to interchange information and ideas with the legislative and executive branches of the federal government.

At the 1955 conference Mr. Wyman declared that it was "sheerest nonsense" to say that the federal government had the exclusive right to investigate subversive activities within the states. He was apprehensive of the possible influence "of the smiles and blandishments of Communist diplomats." If this resulted in "further curbing of the Federal security program," the attorneys general of the states were to see to it that state security programs were "not so susceptible to seduction."[97]

The association's committee on subversive activities recommended that each state set up a permanent division of subversive activities in its state police system to cooperate with the local police and the Federal Bureau of Investigation.[98] The association approved a resolution urging its members to take such action as they deemed compatible with the interests of their own states in the promotion of national security.[99]

Indeed, the attorneys general were not satisfied that the states should have simply a share in the struggle against subversion: they wanted an immunity act which would protect witnesses in state cases against the danger of federal prosecution. State prosecutors had complained that their investigations had been hampered by the fact that witnesses who might have given valuable

[95] N.H. Rev. Stat. (1955) §§588.1 to 588.16 (Subversive Activities Act of 1951); N.H. Laws 1953, c. 307, p. 524 at 525 (joint resolution directing the attorney general "to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state," and "to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violations thereof," and "to report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation").

[96] See, e.g., Nelson v. Wyman, 99 N.H. 33, 105 A. (2d) 756 (1954), sustaining the validity of the legislation cited in the preceding note.

[97] N.Y. TIMES, Sept. 13, 1955, p. 23:1.

[98] Ibid.

[99] N.Y. TIMES, Sept. 15, 1955, p. 19:2-3.

information under grant of state immunity were reluctant to do so because of fears of federal prosecution. The attorneys general after a sharp debate approved by a vote of 23 to 14 a resolution for the enactment of a law that would grant immunity from federal prosecution to witnesses who would receive immunity in state cases involving subversion.[100]

It was at this conference that Attorney General Brownell assured the attorneys general of the states that the department of justice did not regard the country's internal security as the exclusive prerogative of the federal government. He advised them that the government would take this position in its amicus curiae brief in *Pennsylvania v. Nelson,* and added, "We believe that state sedition laws should be enforced and that a full measure of Federal-state cooperation will be in the public interest."[101] The following month the government filed its brief, in which it took this position.

Despite the Supreme Court's decision in *Pennsylvania v. Nelson* and its denial of a petition for rehearing,[102] the controversy which this decision raised has by no means come to an end. The attorneys general of thirty-four states and the territory of Alaska joined Pennsylvania in its petition for rehearing.[103] Immediately after the Court's decision Representative Howard W. Smith of Virginia, the principal draftsman of the Smith Act, and other members of Congress who were members in 1940 and voted for it, publicly stated that they never intended supersession of state laws.[104] Congressman Smith called for a law which would permit the states to proceed with prosecutions under their own sedition laws. He had introduced a broad bill to cover this situation after the decision of the Pennsylvania Supreme Court.[105] The Subversive Activities Liaison Committee of the National Association of Attorneys General adopted a resolution urging amendatory legislation; and Senator Styles Bridges of New Hampshire and later Congressman Walter introduced bills simi-

100 Id. at col. 3.

101 Id. at col. 1-2.

102 351 U.S. 934 (1956).

103 The states were Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming.

104 Petition for Rehearing, p. 4; N.Y. TIMES, April 4, 1956, p. 16: 6.

105 H.R. 3, 84th Cong., 1st sess. (1955).

lar to, but more narrowly drawn than, Congressman Smith's bill.[106] Senator Bridges' bill had the co-sponsorship of fourteen other senators, eleven Republicans and three Democrats, and both bills had the endorsement of the Department of Justice. Deputy Attorney General Rogers wrote to Senator James A. Eastland of Mississippi, chairman of the Senate Judiciary Committee, and to Congressman Emanual Celler of New York, chairman of the House Judiciary Committee:

> "It is the view of the Department of Justice that in the fields of sedition and subversion, the Federal and State Governments can work together easily and well. . . . This legislation would clearly express the congressional intent that such cooperation between the Federal and State Governments in this field is to be encouraged.
>
> "The Department of Justice favors enactment of the bill."[107]

The National Association of Attorneys General by a vote of 31 to 10 approved a resolution in favor of the "enactment of Federal legislation authorizing the enforcement of state statutes prescribing criminal penalties for subversive activities involving state or national governments or either of them";[108] and the Conference of Governors at its 48th annual meeting by what was described as an almost unanimous vote adopted a resolution which "recommended to the Congress that Federal laws should be so framed that they will not be construed to pre-empt any field against state action unless this intent is stated. . . ."[109] The Senate Judiciary Committee approved Senator Bridges' bill, and the House Judiciary Committee Congressman Smith's bill,[110] with an amendment to make it identical with that of Congressman Walter, but the Congress did not get to the passage of one of them. However, the opposition of the states to federal action which trespasses

[106] S. 3617, H.R. 11341, 84th Cong., 2d sess. (1956); 102 CONG. REC. 5473-5474 (April 11, 1956). The concern of many members of Congress over what they regard as federal encroachment on the reserved powers of the states has resulted in the introduction of some 70 measures affecting federal courts which have been referred to the Senate or House Judiciary Committees. See N.Y. TIMES, May 14, 1956, p. 25:1.

[107] S. Rep. 2117, 84th Cong., 2d sess., 3 (1956); H.R. Rep. 2576, 84th Cong. 2d sess., 5 (1956). The fourteen senators who co-sponsored Senator Bridges' bill were Messrs. Martin (Pa.), Cotton, Knowland, Daniel, Bricker, McClellan, Jenner, Welker, McCarthy, Stennis, Hruska, Saltonstall, Carlson and Potter.

[108] N.Y. TIMES, May 24, 1956, p. 19:2.

[109] N.Y. TIMES, June 28, 1956, p. 1:5, p. 20:6.

[110] S. Rep. 2117, H.R. Rep. 2576, 84th Cong., 2d sess. (1956).

on their reserved powers has been aroused, and their resistance to such action will continue and probably even increase.

Moreover, the area covered by the new federal immunity act is so large that it involves the police power of the states to a great extent, and the Supreme Court has ruled repeatedly that the "intention of Congress to exclude States from exercising their police power must be clearly manifested."[111] If Congress intended the new federal act to protect against the danger of state prosecution, it should have put that intent into express language. It did not do so.

If one considers the state legislation in the area covered by the new federal act, the prosecutions which have taken place under this legislation, and the mounting determination on the part of the states to be included in the struggle against subversion, one cannot dismiss as lightly as either the Court or the district judge did the point that if the federal act contains a prohibition against state prosecutions it may then violate the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." One can certainly make a strong argument that subversion covers such a large area that some of it is bound to be within the scope of reserved powers beyond the reach of Congress. Indeed, in *Pennsylvania v. Nelson* the Court specifically excluded from the scope of its opinion sabotage, attempted violence of all kinds, and offenses under the police power of the states.[112] In *Burns v. United States*[113] the Court indicated that the punishment of those who intentionally

111 International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 at 253 (1949). For further illustrations see Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); Kelly v. Washington, 302 U.S. 1 (1937); Reid v. Colorado, 187 U.S. 137 (1902). In Kelly v. Washington, the Court said, speaking through Chief Justice Hughes (at 10): "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is 'so direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" In Reid v. Colorado, the Court ruled (at 148): "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."

In Schwartz v. Texas, 344 U.S. 199 (1952), where the Court sustained the use of wiretap evidence in a state court proceeding, the Court said (at 202-203): ". . . If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

112 350 U.S. 493 at 500 (1956). See note, 66 HARV. L. REV. 327 (1952).

113 274 U.S. 328 at 331 (1927).

destroyed or damaged the property of others was within the province of the states. Such destruction or damage is involved in either sabotage or insurrection. In an early case, the Court, after adverting hypothetically to a local insurrection, stated: "In such cases the State has inherently the right to use all the means necessary to put down the resistance to its authority, and restore peace, order, and obedience to law."[114] The states would likewise seem to have the power to punish those who swore falsely under a state statute requiring loyalty oaths of state employees or office holders,[115] or a municipal ordinance with a similar requirement.[116]

The Tenth Amendment point gains further support from the fact that the prosecution of offenses is primarily the concern of the states.[117]

Attorney General Wyman of New Hampshire in that state's amicus curiae brief in *Pennsylvania v. Nelson*,[118] joined by the attorneys general of twenty-four other states, made the Tenth Amendment his basis for asserting: "Congress lacks constitutional power to supersede either expressly or by implication the States' reserved right to make criminal within their border acts seeking overthrow of their own government by force and violence."[119] At the 1955 conference of the National Association of Attorneys General he enlarged his position, and challenged the power of Congress, under the Tenth Amendment, "to take from the states their reserve power to seek to find out who within their borders conspires to overthrow" either a state or the federal government.[120]

It is also relevant to observe that we are in a period of time when there is an emphasis on states' rights. In August 1956 at the 79th annual meeting of the American Bar Association the dominant note in the welcoming speech of Governor Allan Shivers of Texas and in the address of the association's president, E. Smythe Gambrell, was that concentration of power in the federal government threatened to destroy states' rights. Governor Shivers welcomed the members of the association "to a state whose people believe in the Tenth Amendment." Mr. Gambrell declared that in the "clamor of controversy" over the first eight amendments to the Constitution "our people seem to have overlooked the

114 White v. Hart, 13 Wall. (80 U.S.) 646 at 650-651 (1871).
115 See Gerende v. Board of Supervisors, 341 U.S. 56 (1951).
116 See Garner v. Board of Public Works, 341 U.S. 716 (1951).
117 See notes 57-59 supra.
118 348 U.S. 814 (1954).
119 Brief, p. 16.
120 N.Y. TIMES, Sept. 13, 1955, p. 23:1.

Ninth and Tenth Amendments."[121] In the same month the speakers at the Conference of Chief Justices, composed of the highest judicial officers of the forty-eight states, took up the same theme.[122] In part this emphasis on states' rights may be the result of the discussions which have been taking place about world government and the powers, if any, that international organizations ought to have over national states. With national states seeking to preserve their sovereignties the states within our federal union have been stressing their reserved powers. And the pendulum has been swinging toward them. For instance they won out on the issue of ownership of tidelands oil.[123] They may yet win by legislation on the issue involved in *Pennsylvania v. Nelson.*[124]

With the states contending vigorously for their part in the struggle against subversion, and with subversion covering a territory so extensive that it includes such diverse items as injury to property on the one hand and false loyalty oaths on the other, it is difficult to see how the entire area constitutionally can be held to be within the scope of a federal immunity act which prohibits state prosecutions. In any event, since Congress deliberately left the prohibition against prosecution ambiguous, the Court should not have increased the prohibition to include state prosecution.

Judge Weinfeld was also of the opinion, relying on *United States v. Murdock,*[125] that the new federal act did not need to pro-

121 N.Y. TIMES, Aug. 28, 1956, p. 1:4.

122 N.Y. TIMES, Aug. 25, 1956, p. 13:1.

123 See Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. (Supp. III, 1956) §§1301-1315; Alabama v. Texas, 347 U.S. 272 (1954).

124 In the meantime, however, the highest courts of two states have invalidated state sedition indictments. Braden v. Commonwealth, (Ky. 1956) 291 S.W.(2d) 843; Commonwealth v. Gilbert, (Mass. 1956) 134 N.E. (2d) 13. Cf. Commonwealth v. Hood, (Mass. 1956) 134 N.E. (2d) 12. State courts in Massachusetts quashed state sedition indictments against a total of eight persons, including Prof. Dirk Struik, Massachusetts Institute of Technology mathematician. N.Y. TIMES, May 26, 1956, p. 6:1.

125 284 U.S. 141 (1931). In United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927), the Court, after holding that a claim of privilege had not been made in that case, went on to say (at 113) that this conclusion made it unnecessary "to consider the extent to which the 5th Amendment guarantees immunity from self-incrimination under state statutes. . . ."

A number of lower federal courts sustained a claim of privilege where the basis for it was the danger of state prosecution. United States v. Lombardo, (W.D. Wash. 1915) 228 F. 980, affd. on another ground 241 U.S. 73 (1916); In re Gasteiger, (E.D.N.Y. 1923) 290 F. 410; In re Hooks Smelting Co., (E.D. Pa. 1905) 138 F. 954; In re Hess, (E.D. Pa. 1905) 134 F. 109; In re Kanter, (S.D.N.Y. 1902) 117 F. 356; In re Nachman, (D.C.S.C. 1902) 114 F. 995; In re Franklin Syndicate, (E.D.N.Y. 1900) 114 F. 205; In re Feldstein, (S.D.N.Y. 1900) 103 F. 269; In re Scott, (W.D. Pa. 1899) 95 F. 815; In re Graham, (S.D.N.Y. 1876) 10 Fed. Cas. 913, No. 5659; Buckeye Powder Co. v. Hazard Powder Co., (D.C. Conn. 1913) 205 F. 827 at 829.

District Judge Woolsey in sustaining a claim of privilege in 1930, in In re Doyle, (S.D.N.Y. 1930) 42 F. (2d) 686, made a careful review of the authorities, quoting the

tect against the danger of state prosecution. It is submitted that the *Murdock* case has come to be overestimated.

Under *Counselman v. Hitchcock*,[126] an immunity act, to be valid, must give a protection that is coextensive with the privilege accorded by the Fifth Amendment. This would seem to mean, under our close-knit federal system, that a federal immunity act to be constitutional would have to protect against prosecution under state laws wherever the danger of such prosecution is of the same substantiality as prosecution under federal laws. Our federal and state governments are but parts of one integrated governmental system. Taken together they form the government of one federal state. It would therefore seem that a federal immunity act would have to protect against the danger of state prosecution to the same extent that it protects against the danger of federal prosecution.

A good illustration of the measure of protection that is necessary against federal prosecution may be found in *Heike v. United States*.[127] There the defendant pleaded in bar to an indictment for frauds on the revenue the immunity provision in an act aimed at the correction of certain corporate abuses. He had previously testified in a grand jury investigation into possible violations of the Sherman anti-trust act. During the course of this testimony he had produced a table showing how many pounds of sugar his company had melted during a certain period of time. Some of this sugar was also involved in the fraud case. But the Court held that the immunity provision did not protect him, saying through Justice Holmes:

> ". . . We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. . . .
>
> ". . . When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does

opinion in United States v. Saline Bank, 1 Pet. (26 U.S.) 100 (1828), and two pertinent paragraphs from Ballmann v. Fagin, 200 U.S. 186 (1906). However, he was reversed on appeal, without opinion. United States v. Doyle, (2d Cir. 1931) 47 F. (2d) 1086. Shortly after the decision on appeal the federal government nolleprossed an indictment against Doyle. Comment, 41 YALE L. J. 618 at 622 (1932). The Doyle in this case was the same one who was involved in Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).

For a recent dictum in accord with Judge Weinfeld's opinion see George v. Lindberg, (D.C. Minn. 1956) 138 F. Supp. 77 at 80.

126 142 U.S. 547 (1892).

127 227 U.S. 131 (1913).

not extend to remote possibilities out of the ordinary course of law. . . ."[128]

It would thus seem that a federal immunity provision should extend this measure of protection against the danger not only of federal but also state prosecution. Indeed, such a formulation will reconcile the results in all the Supreme Court cases as well as most of the various statements in the opinions.

In two of the first cases dealing with the danger of state prosecution the Supreme Court held that such a danger did provide the basis for a claim of privilege. In one case, *United States v. Saline Bank,*[129] the opinion was by Chief Justice Marshall, and in the other, *Ballmann v. Fagin,*[130] by Justice Holmes. The former case involved a creditors' bill for discovery and other relief and a plea that the discovery would subject the defendants to penalties under a Virginia statute which prohibited unincorporated banks. The Court sustained the plea: "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."[131] In the latter case a claim of privilege included reliance on an Ohio statute which made it a crime to operate a "bucket shop." The Court ruled for the accused: "According to *United States v. Saline Bank* . . . he was exonerated from disclosures which would have exposed him to the penalties of the state law."[132]

In the same term as *Ballmann v. Fagin* there were two decisions which have been taken as pointing in an opposite direction to that case. However, Justice Holmes, who wrote the opinion in *Ballmann v. Fagin,* sat in both of those cases and dissented in neither. One of them, *Hale v. Henkel,*[133] did not involve the problem at all: it held that an agent or officer of a corporation may not claim the right of silence on its behalf.

The other, *Jack v. Kansas,*[134] involving an immunity provision of an antitrust act of the state of Kansas, may be explained

128 Id. at 142, 144. In Mason v. United States, 244 U.S. 362 (1917), the Court ruled that a valid claim of privilege must be based on a real danger of prosecution.

129 1 Pet. (26 U.S.) 100 (1828).

130 200 U.S. 186 (1906).

131 1 Pet. (26 U.S.) 100 at 104 (1828).

132 200 U.S. 186 at 195 (1906). This statement has been called a dictum, United States v. Murdock, 290 U.S. 389 at 396 (1933); Melltzer, "Required Records, the McCarran Act, and the Privilege Against Self-Incrimination," 18 UNIV. CHI. L. REV. 687 at 688, n. 11 (1951); and apparently a dictum, United States v. DiCarlo, (N.D. Ohio 1952) 102 F. Supp. 597 at 604. But it is submitted that it is one of the alternative grounds of decision.

133 201 U.S. 43 (1906).

134 199 U.S. 372 (1905), affirming 69 Kan. 387, 76 P. 911 (1904).

on the ground of the remoteness of the danger of federal prosecution. The state court, after pointing out that the inquiries in that case were limited to intrastate transactions, and discussing *Brown v. Walker,*[135] concluded that the possibility that the defendant's answers might disclose violations of the federal antitrust law "was not a real and probable danger."[136] The United States Supreme Court agreed.

A little earlier, in *Brown v. Walker,* supra, the first federal Supreme Court decision sustaining the constitutionality of an immunity act, the Court, in answer to an objection that the federal act there involved did not grant immunity from state prosecution, stated:

> "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 *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."[137]

Thus the law stood until *United States v. Murdock,* supra, a case which has been regarded as establishing the proposition that a federal immunity act need not protect against state prosecution. But that case, too, may be explained upon the ground that there was no real danger of state prosecution. The defendant in each of two federal income tax returns had deducted $12,000 which he claimed to have paid to others. A revenue agent wanted him to name the recipients. He declined and claimed his privilege. That there was no real danger of state prosecution is indicated in this language of the Court: "The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appro-

135 161 U.S. 591 (1896).
136 69 Kan. 387 at 405 (1904).
137 161 U.S. 591 at 608 (1896).

priate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients."[138]

However, the Court did say, among other things: "The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. . . ."[139]

But in neither of the two English cases which the Court cited for this proposition was there any real danger of prosecution by any country. One of the cases, *Queen v. Boyes*,[140] did not involve another jurisdiction at all. There the defendant took the position that a pardon from the Crown did not take away the recipient's right of silence for the reason that it was not pleadable to an impeachment by the House of Commons. The court held against the defendant on the ground that the danger of such an impeachment was imaginary and unsubstantial.

In the other case, *King of the Two Sicilies v. Willcox*,[141] agents of a revolutionary government in Sicily bought a vessel in England and registered her in the name of two English subjects. The king of the Two Sicilies brought a bill for discovery. The defendants, none of whom was in Sicily, pleaded that their production of the requested documents would expose them to criminal prosecution in Sicily. Again there was no real danger of prosecution, and the court ruled against the defendants.

Today, for instance, if a witness in this country were to claim a right of silence on the ground that his answer might incriminate him in Russia, no court would pay any attention to it. But if a witness before a congressional committee or a federal court or grand jury were to claim his privilege on the ground of substantial danger of state prosecution why should his claim not be respected?

In the later English case of *United States v. McRae*[142]

138 284 U.S. 141 at 149 (1931).

139 Ibid.

140 1 B. & S. 311, 121 Eng. Rep. 730 (1861).

141 19 L. J. (n.s.) (Ch.) 202 (1850), 20 L. J. (n.s.) (Ch.) 417 (1851), 7 St. Tr. (n.s.) 1049 (1850-1851).

142 L.R. 4 Eq. 327 (1867), affirmed on the point of the claim of privilege, L.R. 3 Ch. 79 (1867). Cf. East India Co. v. Campbell, 1 Ves. Sr. 246, 27 Eng. Rep. 1010 (1749). But see In re Atherton, [1912] 2 K.B. 251 at 253-254, a case arising out of the public examination of a bankrupt, an area in which the English courts have not given a due regard to the right of silence.

involving a bill for discovery by the United States against a confederate agent, both the lower court and the Court of Appeal in Chancery ruled for the defendant on the ground that to compel him to make discovery might expose him to a forfeiture in the United States, another international state. Both courts distinguished *King of the Two Sicilies v. Willcox,* and restricted any language in the opinion in that case to the actual holding. Referring to that case, Lord Chancellor Chelmsford in the *McRae* case said: "There it was not shewn that the Defendants had rendered themselves liable to criminal prosecution. . . . There it was doubtful whether the Defendants would ever be within the reach of a prosecution. . . ."[143] Indeed, it was the decision in the *McRae* case which produced the second federal immunity act, the act of 1868,[144] later Rev. Stat., section 860. The English law thus goes further than the position we are urging, for it extends the protection of the privilege to cover the danger of a prosecution or infliction of a penalty by a foreign state, whereas we are asking no more than that the privilege cover the danger, and a substantial one, of a prosecution by another governmental unit of the same federal state.

After citing *King of the Two Sicilies v. Willcox* and *Queen v. Boyes,* the Court in the *Murdock* case went on to say that immunity from state prosecution was not essential for the validity of a federal immunity act and a lack of state power to protect against federal prosecution did not defeat a state immunity statute. For these propositions the Court cited *Counselman v. Hitchcock,*[145] *Brown v. Walker,*[146] *Jack v. Kansas,*[147] and *Hale v. Henkel.*[148] As we have already seen, in only two of these cases, *Brown v. Walker* and *Jack v. Kansas,* was the problem involved; and in both of these cases the danger of prosecution by another jurisdiction was so remote that it was not entitled to serious consideration.[149]

143 L.R. 3 Ch. 79 at 87 (1867).
144 15 Stat. 37 (1868).
145 142 U.S. 547 (1892).
146 161 U.S. 591 (1896).
147 199 U.S. 372 (1905).
148 201 U.S. 43 (1906).
149 Murdock was subsequently convicted, but his conviction was reversed for the double reason that the judge in the circumstances of that case expressed an opinion as to the defendant's guilt and refused to give a requested charge on willfulness. United States v. Murdock, 290 U.S. 389 (1933), affirming (7th Cir. 1932) 62 F. (2d) 926. A good discussion of the problem presented in the Murdock case may be found in Grant, "Immunity from Compulsory Self-Incrimination in a Federal System of Government," 9 TEMP. L.Q. 57, 194 (1934-5).

None of the counsel or the Court in the *Murdock* case as much as cited the *McRae* case.[150] The quoted language in the *Murdock* case was accordingly based on an inadequate presentation by counsel on both sides, and a misunderstanding of the English law by the court.

Between the *Murdock* case and the *Ullman* case there were several Supreme Court decisions which did not show the regard for the right of silence that one should wish,[151] but none is inconsistent with the proposition that a federal immunity act, to be valid, must give protection against the danger of state prosecution wherever that danger is substantial. Indeed, this proposition will reconcile the result in the *Murdock* case with the results and opinions in the earlier Supreme Court cases.

The time has come for a reexamination of the opinion in the *Murdock* case, and two federal courts, the Court of Appeals for the Fifth Circuit and the District Court for the Northern District of Ohio, in recent cases have done just this. Both cases involved claims of privilege before a subcommittee of the Kefauver Committee. In both the real danger was not federal but state prosecution. In both the court sustained the claim. In both it reached for this result, in the one by going out of its way to find a danger of federal prosecution and in the other by stressing the fact that the investigation was into violations of state law. In both the court relied on *United States v. Saline Bank*[152] and *Ballmann v. Fagin*,[153] and refused to apply the *Murdock* case. In one of these two recent cases, *Marcello v. United States*,[154] the defendant was asked whether he knew one

150 Although the government in its brief (at 15-16) quoted at length from the opinion in King of the Two Sicilies v. Willcox, supra note 141, it in no way indicated that the quoted language had been qualified and restricted in the later case of United States v. McRae, supra note 142.

151 Feldman v. United States, 322 U.S. 487 (1944) (testimony given by a debtor in a discovery proceeding in a state court in New York, most of which was given under a limited immunity provision which simply forbade the use of such testimony in a subsequent criminal proceeding against the debtor, held admissible against him in a federal court on the trial of a mail fraud indictment); United States v. Kahriger, 345 U.S. 22 (1953) (federal occupational tax on gamblers sustained as to persons in the states); Irvine v. California, 347 U.S. 128 (1954) (federal wagering tax stamp and documentary evidence from federal internal revenue collector's office permitted in evidence in state court criminal proceeding); Lewis v. United States, 348 U.S. 419 (1955) (federal occupational tax on gamblers upheld as to persons in the District of Columbia); Regan v. New York, 349 U.S. 58 (1955) (state criminal contempt conviction sustained because of broad state immunity statute).

152 1 Pet. (26 U.S.) 100 (1828).

153 200 U.S. 186 (1906).

154 (5th Cir. 1952) 196 F. (2d) 437.

Vitalli, who was supposed to be connected with a murder. The trial judge considered the murder a state offense and ruled against the defendant's claim of privilege. The court of appeals reversed, pointing out that the defendant might be confronted with a charge of causing Vitalli to travel in interstate or foreign commerce with intent to avoid prosecution. In the course of its opinion the court said:

> ". . . With much inconsistency, we may indulge the hope that more state courts will follow the lead of the Supreme Court of Michigan in the view that,
>
> 'It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution.' . . ."[155]

In the other recent case, *United States v. DiCarlo,*[156] the court after discussing *United States v. Saline Bank,* with a quotation of the opinion in extenso, and *Ballmann v. Fagin,* with a pertinent quotation, continued:

> "Thus, in cases decided before United States v. Murdock, supra, two of the most illustrious jurists ever to sit upon the Supreme Court, speaking for the court, recognized the privilege of the witness and of parties in a federal proceeding, to immunity against disclosures that would expose them to the danger of state prosecutions; and in the only Supreme Court decision relied upon by the government the court made special note of the absence of any matter of 'state concern.' "[157]

Law review comment generally has been favorable to the *Di Carlo* decision.[158]

Reference may also be made to the fact that a number of state court decisions have extended the protection of the right of silence to the danger of prosecutions in other jurisdictions,

[155] Id. at 443.

[156] (N.D. Ohio 1952) 102 F. Supp. 597.

[157] Id. at 604.

[158] See, e.g., notes 22 UNIV. CIN. L. REV. 193 (1953); 26 TEMP. L. Q. 64 (1952); 66 HARV. L. REV. 185 (1952); 31 TEX. L. REV. 433 (1953). *Contra:* comment, 4 STAN. L. REV. 594 (1952). The first writer stated: "The *DiCarlo* case is a step forward in protecting the individual citizen from any arbitrary encroachments by one of the government's many investigating committees, at least where the investigation is directly aimed at violation of state laws." 22 UNIV. CIN. L. REV. 193 at 204. The second writer said: "The *DiCarlo* case well illustrates the fallacy of the two sovereignties theory." 26 TEMP. L. Q. 64 at 69.

wherever that danger has been substantial.[159] The Michigan Supreme Court, in *In re Watson,*[160] after a careful consideration of the authorities rejected the opinion in the *Murdock* case, and stated:

> "We believe that this ancient privilege should be maintained against limitations that we conceive tend to make it ineffectual, futile, and subversive of the spirit and letter of the Bill of Rights. Under our Federal system of government, with co-extensive jurisdiction of State and national government, a person subject to the laws of a State is, at the same time, subject to the laws of the Federal government. A citizen of a State is a citizen of the United States. . . . After a review of the authorities and a consideration of the constitutional provisions and the principles involved, we are of the opinion that the privilege against self-incrimination exonerates from disclosure whenever there is a probability of prosecution in State or Federal jurisdictions. . . .
>
> "To overcome the privilege, the extent of the immunity would have to be of such a nature that it would protect, not only against State prosecution, but also against any reasonably probable Federal prosecution. The claim of the privilege in the face of a State immunity statute cannot be used as a subterfuge or pretense to refuse to answer in proceedings to detect or suppress crime. But neither can the grant be used to compel answers that will lead straight to Federal prosecution. Whenever the danger of prosecution for a Federal offense is substantial and imminent as a result of disclosures to be made under a grant of immunity by the State, such immunity is insufficient to overcome the privilege against self-incrimination."[161]

The court's opinion in a recent Michigan case, *People v. Den Uyl,*[162] termed the restriction of the privilege accorded by a state to exclude federal prosecutions "a travesty on verity."[163]

[159] See, e.g., State v. Dominguez, 228 La. 283, 82 S. (2d) 12 (1955); State v. Doran, 215 La. 151, 39 S. (2d) 894 (1949); People v. Hoffa, 318 Mich. 656, 29 N.W. (2d) 292 (1947); People v. DenUyl, 318 Mich. 645, 29 N.W. (2d) 284 (1947); In re Watson, 293 Mich. 263 at 284-286, 291 N.W. 652 (1940); Frad v. Columbian Nat. Life Ins. Co., 178 Misc. 705, 37 N.Y.S. (2d) 250 (1941), affd. without opinion, 264 App. Div. 836, 35 N.Y.S. (2d) 756, motion for leave to appeal denied, 264 App. Div. 853, 36 N.Y.S. (2d) 178 (1942). *Contra,* State v. Morgan, 164 Ohio St. 529, 133 N.E. (2d) 104 (1956).

[160] 293 Mich. 263, 291 N.W. 652 (1940).

[161] Id. at 284-286.

[162] 318 Mich. 645, 29 N.W. (2d) 284 (1947).

[163] Id. at 651.

This language was quoted with approval in *Marcello v. United States.*[164]

In *Matter of Doyle,*[165] a case arising out of an investigation by a joint committee of the legislature into bribery of public officials in the city of New York, the New York Court of Appeals, in an opinion by Chief Judge Cardozo, "put aside as remote and unsubstantial the supposed peril of exposure to prosecution for the making of false tax returns to State or Federal officers."[166] Many, if not most, of the state cases which have denied a claim of privilege where it was based on the danger of a prosecution by another jurisdiction can be explained on the ground that the danger of such prosecution was too remote to be given serious consideration.[167] Wherever danger of prosecution by another jurisdiction, at least within our own federal system is substantial, the danger should furnish a sufficient basis for a claim of privilege. That the danger of state prosecution in the area covered by the new federal act is substantial we have already abundantly seen.

*[To be concluded.]*

[164] (5th Cir. 1952) 196 F. (2d) 437 at 443.

[165] 257 N.Y. 244, 177 N.E. 489 (1931).

[166] Id. at 267.

[167] See, e.g., Lorenzo v. Blackburn, (Fla. 1954) 74 S. (2d) 289; State v. Kelly, (Fla. 1954) 71 S. (2d) 887; People v. Butler Street Foundry, 201 Ill. 236, 66 N.E. 349 (1903); Koenck v. Cooney, 244 Iowa 153, 55 N.W. (2d) 269 (1952); Republic of Greece v. Koukouras, 264 Mass. 318, 162 N.E. 345 (1928) (foreign state); In re Cohen, 295 Mich. 748, 295 N.W. 481 (1940); In re Ward, 295 Mich. 742, 295 N.W. 483 (1940); In re Schnitzer, 295 Mich. 736, 295 N.W. 478 (1940); In re Pillo, 11 N.J. 8, 93 A. (2d) 176 (1952); State v. March, 46 N.C. *526 (1854); In re Greenleaf, 176 Misc. 566, 28 N.Y.S. (2d) 28 (1941), affd. 266 App. Div. 658, 41 N.Y.S. (2d) 209, affd. 291 N.Y. 690, 52 N.E. (2d) 588 (1943); In re Cappeau, 198 App. Div. 357, 190 N.Y.S. 452 (1921); In re Werner, 167 App. Div. 384, 152 N.Y.S. 862 (1915); Matter of Herlands (Carchietta), 204 Misc. 373, 124 N.Y.S. (2d) 402 (1953); Ex parte Copeland, 91 Tex. Cr. 549, 240 S.W. 314 (1922); State v. Wood, 99 Vt. 490, 134 A. 697 (1926). In People v. Butler Street Foundry, supra, the court said (at 252): "But if it be conceded that there is a bare possibility that the affidavit might contain disclosures which would furnish evidence of a violation of the Anti-trust statute of some other State of the Union or of the United States, we think, within the meaning of the authorities, that such disclosure is not a real and probable danger, and does not fall within the danger which the constitutional privilege was intended to obviate." In Ex parte Copeland, supra, the court ruled (at 559): "The further reason urged that relator should not answer the questions because the State court and district attorney had no right to guarantee immunity from Federal prosecution has such a shadowy and uncertain basis that we scarcely deem it necessary to discuss it." In Gould v. Gould, 201 App. Div. 674, 194 N.Y.S. 742 (1922), prosecution in a foreign jurisdiction had already been concluded.