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Legislation - Witness Immunity Act of 1954 - Constitutional and Interpretative Problem

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LEGISLATION—WITNESS IMMUNITY ACT OF 1954—CONSTITUTIONAL AND INTERPRETATIVE PROBLEMS—The passage in August, 1954 of a federal statute[1] granting immunity under specified conditions to witnesses before congressional committees and in the federal courts marks a third legislative experiment designed to soften the effect of the Fifth Amendment as a limitation on the investigatory power of Congress. The first two attempts[2] were less than successful. This comment will discuss the historical background of immunity legislation, and some possible constitutional pitfalls and problems of construction created by the statutory language.

I. *The Historical Perspective*

In ruling on what was essentially a question of common-law privilege in *United States v. Burr*,[3] Chief Justice John Marshall laid down some fundamental conditions of the privilege against self-incrimination which remain good law today. He stated, inter alia, that a witness might properly claim this privilege where his testimony would furnish

[1] 18 U.S.C.A (Cum. Supp. 1954) §3486.
[2] 11 Stat. L. 156 (1857); 12 Stat. L. 333 (1862).
[3] (C.C. Va. 1807) 25 Fed. Cas. 2, No. 14,692a-14,694a.

a link in the chain of testimony which might lead to his conviction for a crime. As late as 1951, Marshall's statement of the law was relied upon in a decision making a refusal to answer questions concerning communist affiliation a proper one under the Fifth Amendment.[4]

Subsequent cases have added a number of propositions to Marshall's fairly broad definition of the scope of the privilege. These propositions, stated with more finality than should necessarily be ascribed to them, are: (1) The testimony need not be demanded during the trial of an actual criminal case, but testimony in any form, if compellable, is within the scope of the protection.[5] (2) The testimony sought must have a tendency to incriminate and not merely to disgrace.[6] (3) The privilege may be waived voluntarily or may be made meaningless by a previous pardon, or running of the statute of limitations.[7] (4) The privilege must be specifically invoked or it will be deemed waived.[8] (5) The privilege extends to forced disclosure of evidence in violation of the Fourth Amendment to the Constitution,[9] thereby laying a basis for a theory of mutuality of the two provisions.[10] (6) The privilege cannot be invoked on the ground that the witness might be prosecuted in a separate sovereignty.[11] As a corollary to these principles, it should be noted that the privilege was not incorporated in the Fourteenth Amendment so as to apply to state governmental action, though nearly every state has such a provision in its own constitution.[12]

With these doctrines as background, the legislative substitutes for the privilege may now be considered. Congress' first major experiment with an immunity statute came in 1857, when a statute giving immunity from prosecution to all witnesses appearing before congressional committees was passed under circumstances indicating hasty consideration.[13] Under this statute, which contained no procedural safe-

[4] Blau v. United States, 340 U.S. 159, 71 S.Ct. 223 (1950).

[5] Counselman v. Hitchcock, 142 U.S. 547 at 562, 12 S.Ct. 195 (1892).

[6] Brown v. Walker, 161 U.S. 591 at 598, 16 S.Ct. 644 (1896). For historical perspective, see Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1 (1930).

[7] Brown v. Walker, 161 U.S. 591 at 597 et seq., 16 S.Ct. 644 (1896).

[8] Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951).

[9] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886).

[10] See, e.g., Feldman v. United States, 322 U.S. 487, 64 S.Ct. 1082 (1944), esp. Black, J., dissenting.

[11] United States v. Murdock, 284 U.S. 141, 52 S.Ct. 63 (1931); Jack v. Kansas, 199 U.S. 372, 26 S.Ct. 73 (1905).

[12] See Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908). For a recent case on state immunity legislation, see State v. Abdella, (W.Va. 1954) 82 S.E. (2d) 913.

[13] The catalyst for the proposal of the bill was the refusal of a newspaper correspondent, Simonton, to answer questions about alleged bribery of members of Congress by unnamed persons. He did not claim any privilege against self-incrimination, but rather

guards against "immunity baths," a number of persons escaped prosecution for serious crimes, while the committees which heard their testimony gained no corresponding enlightenment.[14]

In 1862, the act of 1857 was amended by unanimous vote to limit immunity to the *use* of testimony given by a witness.[15] This second experiment with immunity legislation did not, strictly speaking, provide immunity at all. Rather, it prohibited the introduction of a witness' testimony against him in a criminal trial, or use of it therein.[16] The statute was held (by implication) to be an incomplete substitute for the constitutional privilege when similar legislation applicable to grand jury proceedings was tested in *Counselman v. Hitchcock*.[17] The Supreme Court held that the statute did not provide as broad an immunity as is necessary to protect a witness' constitutional rights under the self-incrimination clause. This statute protected the witness only from the use of his testimony in a direct manner, whereas the Constitution protected him from any disclosure which might provide a part of the evidence leading to his conviction. The Court gave the cue for further legislation, however, saying, "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, unless it is so broad as to have the same extent in scope and effect. . . ."[18] Congress took the cue and applied it the next year in an amendment to the Interstate Commerce Act.[19] Substantially the same provision was included in subsequent legislation creating and governing other federal regulatory bodies.[20]

Thus began the third era of immunity legislation. The provision in the Interstate Commerce Act was upheld by the Supreme Court in 1896 by a bare 5-4 decision in the case of *Brown v. Walker*.[21] The rationale of the majority stemmed principally from the dictum in the *Counselman* case and was bolstered by this policy consideration:

> "The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a

refused to divulge names because of purely moral considerations of personal confidence. The bill was passed by an almost unanimous vote after but two days debate in both houses. See CONG. GLOBE, 34th Cong., 3d sess., pp. 403-445 (1857).

[14] CONG. GLOBE, 37th Cong., 2d sess., p. 428 (1862).
[15] Id. at 431.
[16] 12 Stat. L. 333 (1862).
[17] 142 U.S. 547, 12 S.Ct. 195 (1892).
[18] Id. at 585.
[19] 27 Stat. L. 443 (1893).
[20] See discussion by Frankfurter, J., in his dissent to United States v. Monia, 317 U.S. 424 at 436, 63 S.Ct. 409 (1943).
[21] 161 U.S. 591, 16 S.Ct. 644 (1896).

sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."[22]

The Court suggested that the supremacy clause of the Constitution would prevent the use of the witness' testimony in state prosecutions. The minority argued that no statute could limit a constitutional privilege should the witness choose the privilege and not the statute. Justice Field suggested that the amendment was intended to protect a witness from revealing his past actions in such a way as to disgrace him.[23] The minority also urged further objections: the possibility of prosecutions in state courts was not foreclosed by the statute, and the act usurped the presidential prerogative to grant pardons.[24]

There remained some interpretative problems regarding the immunity provisions in statutes similar to the Interstate Commerce Act. One of significance to the present inquiry arose in 1942 in the case of *United States v. Monia*.[25] The case involved this problem: when a person in obedience to a subpoena appears before a grand jury investigating alleged violations of the Sherman Act and gives testimony substantially touching an offense for which he is later prosecuted, does he obtain immunity from that prosecution without having claimed his privilege under the Fifth Amendment before so testifying? The Court held that the defendant, Monia, was immune, the statute being clear that after subpoena and oath, the testimony in and of itself would raise the umbrella of immunity. The effect of the Interstate Commerce Act was distinguished from some of the New Deal regulatory legislation which included specific provisions limiting immunity to those cases in which the witness claimed the privilege before testifying.[26] Justice Frankfurter dissented on the ground that the ultimate purpose of immunity provisions in all of the regulatory acts was not to grant amnesty, but to aid in the enforcement of the criminal law. He

[22] Id. at 600.
[23] Id. at 631.
[24] Id. at 610, 622.
[25] 317 U.S. 424, 63 S.Ct. 409 (1943).
[26] Id. at 429.

pointed out that in three of the New Deal statutes[27] the immunity grant was substantially in the terms of the former provisions (including the Sherman Act provision), thus negating any specific purpose to differentiate among them in regard to the procedural prerequisites for immunity.[28]

In summary, then, the type of immunity provision appended to various federal regulatory statutes was held to be a sufficient protection for the person testifying. This was true whether or not he was required to claim his privilege before being granted immunity. The importance of decisions under these statutes becomes evident when their language is compared with the 1954 act.

Former §3486 of Title 18, United States Code, the lineal descendant of the 1857 and 1862 acts relating to testimony before congressional committees, remains in the historical background of the 1954 legislation. Under this statute (repealed by the 1954 act), testimony given by a witness before a committee could not be used in subsequent prosecutions "in any court." In *Adams v. Maryland*[29] it was decided that by force of the phrase "in any court," a state could not introduce in a state prosecution the testimony of a person given before a congressional committee. The theory of this result was logically outlined as follows: Congress has power to summon witnesses; the necessary and proper clause of the Constitution gives Congress power to pass laws which will effectuate that power; the supremacy clause of the Constitution makes the statutory exercise of the power binding on state courts so as to prevent the admission of testimony protected by the federal statute. It should be noted that the Court's decision was based upon the language of the statute involved. The Fifth Amendment does not require the same result as to state prosecutions.[30]

Beginning with the frequent invocation of the Fifth Amendment privilege before committees inquiring into matters of security and loyalty, a considerable amount of dissatisfaction with such use began to appear in Congress. In January of 1953, Senator McCarran introduced S. 16.[31] In its original form, this bill would, upon an affirmative vote

[27] Motor Carrier Act, 49 Stat. L. 550 (1935); Industrial Alcohol Act, 49 Stat. L. 875 (1935); Fair Labor Standards Act, 52 Stat. L. 1065 (1938).

[28] "To attribute caprice to Congress is not to respect its rational purpose when, as here, we find a uniform policy deeply rooted in history even though variously phrased but always directed to the same end of meeting the constitutional requirement." Frankfurter, J., in United States v. Monia, 317 U.S. 424 at 446, 63 S.Ct. 409 (1943).

[29] 347 U.S. 179, 74 S.Ct. 442 (1954).

[30] See Jack v. Kansas, 199 U.S. 372, 26 S.Ct. 73 (1905).

[31] See H. Rep. 2606, 83d Cong., 2d sess. (1954); 99 CONG. REC. 265 (1953), for the substance and permutations of this bill.

of two-thirds of a committee, have immunized the witness from criminal prosecution on any relevant matters about which he gave testimony. No provision was made for extending immunity to witnesses testifying in judicial proceedings. It did not provide that the attorney general be apprised of the proposed grant of immunity, nor for a court order preceding effectuation of the grant. A later amendment by Senator McCarran provided for notice to the attorney general.

The administration, represented by the attorney general, was not satisfied with the McCarran bill and approved an alternative proposal introduced in the House as H.R. 6899 by Representative Keating in January of 1954.[32] This bill was broader in scope than S. 16, in that it extended the immunity provision to judicial proceedings. In addition, it provided that immunity could not be granted in congressional proceedings without the assent of the attorney general. This bill did not contain any provision requiring court approval of the grant.

The bill finally enacted into law was a substitute version drafted by the House Judiciary Committee. It combined features of the two major proposals outlined above but contained some unique provisions. Instead of committee approval alone, or committee approval plus the assent of the attorney general, the latter official was relegated essentially to an advisory position, while court approval of the committee's recommendation of immunity was required. Instead of a broad provision relating to witnesses' testimony on any matter, the immunity could be granted only as to testimony relating to certain criminal acts against the national defense and security.[33] In addition to so limiting the scope of the statute, Congress also eliminated the restricted testimonial immunity which had been provided by former §3486. The important portions of the 1954 Witness Immunity Act are set forth below.[34]

[32] See H. Rep. 2606, 83d Cong., 2d sess. (1954); H. Hearings before Subcommittee No. 1 of the Committee on Judiciary on Internal Security Legislation, 83d Cong., 2d sess., p. 149 (1954) (brief of the attorney general).

[33] Included in the scope of immunity grantable by a congressional committee: ". . . any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence. . . ." 18 U.S.C.A. (Cum. Supp. 1954) §3486.

[34] After providing that no witness shall be excused from testifying or producing evidence before a committee (or either House, or a joint committee) on the ground that the testimony or evidence may tend to incriminate him, subsection (a)(2) describes the conditions under which such excuse shall be ineffective in proceedings before a committee: ". . . that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and that an order of the United States district court for the district wherein

II. *Constitutional Problems*

In the attorney general's brief submitted to the House Judiciary Committee the supposition is made that no constitutional problems of any magnitude are raised by the immunity bill endorsed by him, i.e., H.R. 6899.[35] This supposition appears to be a sound one in view of the decisions construing former immunity legislation. Although other grounds of attack may be proposed, it is believed that attention will center principally on the separation of powers in the national government, the distinction in fundamental purpose between committee investigations and those of regulatory agencies, the reasonableness of the procedure set up as a substitute for the Fifth Amendment, and the argument based upon the usurpation of the executive pardoning power.

A. *Separation of Powers.* The doctrine of separation of powers appears to be the most serious ground of attack on the statute.[36] It will be seen that the power of Congress to endow courts with something like administrative duties (under the necessary and proper clause) is

the inquiry is being carried on has been entered into the record requiring such person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected 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, nor shall testimony so compelled be used as evidence in any criminal proceedings (except prosecutions described in subsection (d) hereof) against him in any court." Prosecutions under subsection (d) here referred to are for contempt or perjury.

Subsection (b) provides: "Neither house nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness 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 such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court."

Subsection (c) provides for a similar grant of immunity in "any case or proceeding before any grand jury or court of the United States" on application to the court by the United States attorney and with the approval of the attorney general. The areas in which such immunity grant may be made, in addition to those enumerated in subsection (a), include several specific statutes relating to internal security. The requirement is also included that the testimony be in the judgment of the United States attorney "in the public interest." A substantive grant of immunity is provided similar to that of subsection (a).

[35] See H. Hearings before Subcommittee No. 1 of the Committee on Judiciary on Internal Security Legislation, 83d Cong., 2d sess., p. 149 (1954).

[36] One aspect of this objection not set forth herein was touched upon by Senators Lehman and Cooper in debate on the original S. 16. Their attack centered on a theory that the executive power to administer the criminal law would be obstructed by congressional assumption of power to grant witnesses immunity in particular instances. See 99 CONG. REC. 8342, 8351 (1953). But since such agencies as the Interstate Commerce Commission are not purely executive, and since they do not administer the criminal law per se, query as to the force of this argument.

at least theoretically at odds with the idea that the executive, legislative, and judicial functions are separate and that each of these functions is exercisable only by the department created for this purpose by the Constitution.[37] The usual situation where the separation of powers question has arisen is in the exercise of so-called quasi-legislative powers by administrative agencies or by the President. It has generally been held that the exercise of such powers is constitutional if reasonably limited by legislative criteria and necessary to the effectuation of the legislative purpose.[38] The present problem seldom arises in the operation of the national government, but it appears that exercise of administrative powers by a federal district court is not wholly invalid.[39] Where it is sought, however, to invest such a court with power to adjudicate when there is no case or controversy, a contrary result is reached because of the plain words of article III.[40] The instant statute, in succeeding subsections, seems to present the judiciary with an admixture of administrative and judicial functions. Under subsection (a), no witness shall be excused from testifying after a recommendation by a two-thirds vote of a committee that he be granted immunity, provided the record shows "that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence." In subsection (b), it is prescribed that neither the House nor any committee "shall grant immunity to any witness without first . . . having secured the approval of the United States district court. . . ." The substance of these two provisions appears to be in conflict. The first seems to require the court to decide the rights of the witness (whether he shall be compelled to testify notwithstanding his privilege); the second may require the court to determine only the propriety of a grant of immunity. If two different qualities of acts are contemplated by the two subsections—and this is arguable as a matter of in-

[37] THE FEDERALIST, Nos. 47-51. Cf. Hayburn's Case, 2 Dall. (2 U.S.) 408 (1792), and note thereto.

[38] Compare Field v. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892), where the necessary limiting criteria were held to be present, with Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935), where they were held not to be present.

[39] See 34 COL. L. REV. 344 (1934); Katz, "Federal Legislative Courts," 43 HARV. L. REV. 894 (1930). In Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911), the Supreme Court instructed the Court of Claims to dismiss the petition for want of jurisdiction, on the basis that there was no case or controversy presented, a necessary element to exercise of the judicial power under article III of the Constitution. Since the Court of Claims is a "legislative" court, query whether there was necessarily a want of jurisdiction in that tribunal. Cf. Pope v. United States, 323 U.S. 1 at 13, 14, 65 S.Ct. 16 (1944) as to the dual nature of the Court of Claims.

[40] Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911).

terpretation—the element of "approval" in the second subsection will in effect condition the outcome under the first subsection. If the act is viewed in these terms, subsection (a) seems to contemplate a judicial proceeding with the requisite adversity of parties (on questions of materiality of the inquiry, procedural steps, etc.), while subsection (b) seems to require what is in the nature of an administrative act. It is doubtful that a witness would have standing to object to the approval of a grant of immunity for himself. Although appeal from the district court's decision seems to have been assumed in the debate on the enacted bill,[41] Supreme Court review of a decision relative to the wisdom of a proposed immunity grant may be foreclosed by the *Muskrat* case.[42] It is debatable at any rate whether any discretionary act is to be performed by the court under the terms of the statute. This problem will be touched upon in section III below.

B. *Distinction Between Purposes of Congressional Committees and Regulatory Agencies.* An argument based upon the distinction in purpose between congressional committees and regulatory agencies would seem to have little weight. Granted that a congressional body is not charged with administering the criminal law and that its need for an immunity statute may thus be smaller, still the courts place little limit on the investigating power, and any statute which serves to advance that function within the limits of the Constitution is likely to be held valid.[43] There is some force in the argument, however, when the somewhat grudging decision in *Brown v. Walker* is considered. If the rationale of the constitutionality of immunity statutes lies in a public policy aimed at eliminating obstructions to enforcement of criminal justice, which can outweigh the irregularity of substituting a statute for a constitutional provision, it may be said that in the case of congressional investigations that policy is not so clearly served.[44]

[41] See 100 CONG. REC. 12602 et seq. (Aug. 4, 1954).

[42] ". . . If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases and controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning." 219 U.S. 346 at 362, 31 S.Ct. 250 (1911). It can be argued that congressional action in granting immunity to a witness falls squarely within the language above quoted.

[43] See generally, on the investigative power, McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927).

[44] This is the argument of the minority of the House Judiciary Committee when the bill was reported out. H. Rep. 2606, 83d Cong., 2d sess. (1954).

C. *Substitution of Immunity for Constitutional Privilege.* So long as the *Brown* case remains good law, the substitution of immunity for the Fifth Amendment privilege is constitutionally adequate. An argument based upon the reasonableness of the substitution alone would necessarily run afoul of that decision. Since the time it was handed down, the Court has tacitly approved it in cases where the issue might have been raised.[45]

D. *Usurpation of Executive Pardoning Power.* The argument based upon usurpation of the executive pardoning power, raised anew in the minority report of the House Judiciary Committee, seems also to be foreclosed by the *Brown* case.[46] Some language in the dissenting opinion of Justice Frankfurter in *United States v. Monia* may give some small comfort to proponents of this argument. But that language may well have been used as a verbal means of reaching the particular end in that case.[47]

These are believed to be the chief constitutional obstacles to the new act. Only the argument relating to separation of powers appears to be serious enough to merit a more thorough examination than is offered here.

III. *Some Problems of Construction*

One of the chief criticisms of the new act is the loose nature of its language. It will be recalled that while the language of former §3486 covered only testimony before a congressional committee, the Witness Immunity Act applies to two different situations—both committee testimony and testimony before a grand jury or court of the United States. There is some contrast in the substance of these provisions. The approval of the attorney general is not a prerequisite to granting immunity to a witness before a committee. Where the testimony is

[45] See, e.g., United States v. Monia, 317 U.S. 424, 63 S.Ct. 409 (1943); Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375 (1948).

[46] It may be argued that a direct statutory grant of immunity, as in the case of the regulatory agencies, is distinguishable from the instant legislation, which necessitates a vote of the committee, and which is, in one sense, an immunity grant *ad hoc* by that committee. But this appears to be chiefly a verbal quibble, as conditions are prescribed before immunity is forthcoming under either statute.

[47] In order to justify his view that the privilege against self-incrimination had to be claimed before the immunity could come into force, absent such a requisite in the statute, Justice Frankfurter argued that these statutes were not statutes of "general amnesty," but were aimed at the more efficient administration of criminal justice. 317 U.S. 424 at 436, 63 S.Ct. 409 (1943). This terminology—that immunity legislation is aimed toward "amnesty"—was the rationale of the majority in Brown v. Walker when the usurpation-of-pardoning-power argument was dealt with. 161 U.S. 591 at 601, 16 S.Ct. 644 (1896). But see Heike v. United States, 227 U.S. 131, 33 S.Ct. 226 (1913).

given in court or before a grand jury, the attorney general's approval *is* necessary, in addition to an order of "the court." (It may be questioned just which court the statute refers to in requiring an application to be made by the United States attorney. The section refers in part to grand jury proceedings and so there is no necessary implied specification of the tribunal with jurisdiction in the premises.) In subsection (c), the provision relating to courts and grand juries, specific criminal statutes such as the Atomic Energy Act and Internal Security Act are spelled out, as bases for grants of immunity, in addition to the general grounds found in subsection (a), the congressional committee provision. Under these circumstances, the court may be faced with the problem of whether Congress by implication intended to exclude from the general area where immunity may be granted under subsection (a) the specific areas enumerated in subsection (c). The problem could be resolved by regarding the enumeration in subsection (c) as surplusage. At any rate, the difference in approach is puzzling.

A more serious problem is presented by the procedure set up in subsections (a) and (b) for a congressional grant of immunity. It is evident that the district court is to participate in the grant, but the direction and degree of that participation is left somewhat uncertain.[48] Under subsection (a) an order "may be issued by a United States district court judge" requiring the witness to give testimony. No criteria are specified upon which to condition such an order. Presumably, the judge must satisfy himself that the committee has recommended a grant of immunity and that application has been made for an order. It can be argued that a showing of materiality of the question asked to the investigation being carried on under the committee's authorization would also be a prerequisite to such an order. But nothing in the statute itself requires this conclusion.[49] The problem involving separation of powers may thus be made more acute, since this subsection contemplates what seems to be a judicial (as contrasted with an administrative) act on the part of the district judge, for a court order not supplementary to a judicial proceeding would seem to be an anomaly. But if some element of controversy is introduced, e.g., the materiality of the questions asked, then the constitutional injunction should be satisfied.

In subsection (b), it is provided that no immunity shall be granted without notification of the attorney general and the securing of "ap-

[48] Debate on the House floor did not reveal any greater degree of certainty. 100 CONG. REC. 12604 (Aug. 4, 1954).

[49] Query as to whether a court order under the statute would be conclusive on the witness as to the question of materiality if raised in a contempt proceeding.

proval from the United States district court for the district wherein such inquiry is being held." This requisite again lacks any clearcut criteria for the action of the district judge. It may be questioned whether his power is one of veto, going to the wisdom of the immunity grant, or whether it is a formal rubber-stamp, designed only to prevent hasty action by committees.[50] There is also the possibility that the phrasing in subsection (b) is a mere repetition, in slightly different language, of the procedure set forth in subsection (a). The sentence succeeding the provision under discussion may aid the interpretation that the district court is to exercise discretion as to the wisdom of the grant of immunity. It provides that the attorney general shall be given an opportunity to be heard with respect to the "proposed application" for the court's approval. If no latitude in regard to the wisdom of the grant resides in the court, then the attorney general's opportunity to be heard would be a rather empty one. It should also be noted that whereas in subsection (a) the district court *judge* is specified as the acting force, subsection (b) specifies the district *court*, apparently as a juridical entity. Should the statute be technically interpreted so as to emphasize this difference in terminology, then the constitutional bugaboo raised in *Hayburn's Case* (a court is being required to do an executive act) is somewhat more acute than if the *judge* were specified.

There appears to be little change in substance from the type of law upheld in *Brown v. Walker* as to the necessary broadness of the immunity. The terminology seems largely to be taken from the regulatory statutes before discussed.

A further serious interpretative problem relates to the decision in *Adams v. Maryland*.[51] It must be remembered that that case involved a situation where state rules of practice (evidentiary in nature), and not the administration of local criminal law, were forced to bow to the supremacy clause of the federal Constitution.[52] Since the instant statute gives full immunity from prosecution (former §3486 prohibited only the use of testimony in any court), it is highly questionable whether the reasoning of the *Adams* case can be extended to its language. This is so although the pivotal language of the former statute—"No testimony . . . shall be used as evidence in any criminal proceedings against him in any court . . ."—is repeated in substance in the

[50] For a similar doubt, see the remarks of Representative Reams, 100 CONG. REC. 12608 (Aug. 4, 1954).

[51] 347 U.S. 179, 74 S.Ct. 442 (1954).

[52] Cf. United States v. Murdock, 284 U.S. 141, 52 S.Ct. 63 (1931).

new law, together with the full immunity provision. It may well be doubted that the national government has any power to grant *full immunity* from prosecution of an individual under state law merely on the theory that such power is necessary as an incident to obtaining testimony before congressional committees. The supremacy clause is strong, but it does not go that far, because the effect of full immunity would be to nullify state criminal law in the substantive sense, even though state officers may base a prosecution on wholly independent evidence. It might be proper to construe the new statute to mean that evidentiary matters in state proceedings are controlled by the limitation on the use of compelled testimony given before a committee or grand jury, as decided in the *Adams* case, but that states are free to prosecute witnesses for crimes revealed in their testimony if the evidence relied upon is independent. The exact language of the statute, with the testimonial provision in a clause separate from the full immunity provision, gives weight to this thesis. However, there must remain some doubt on the matter until the Court has spoken.[53]

One more problem, chiefly a practical one, should be noted. The language of the statute permits a grant of immunity as to the "transactions, matters, or things concerning which he is compelled" to testify. The witness, as has been seen, must claim his privilege in response to questions before committee action may be taken to grant immunity. But nothing is directly provided as to the relevancy of his response after immunity has been granted. Perhaps it may be presumed that in later criminal proceedings a court may determine whether the revelation made by the defendant before a committee was germane to the question or questions asked. But the statute might have been made clear in this regard. Lack of express language in the act led some lawmakers to voice fears of a repetition of the "immunity baths" under the 1857 statute.[54]

It may be stated, in conclusion, that the Witness Immunity Act of 1954 needs definitive interpretation by the courts before either committees or witnesses can safely operate under it. The vague language employed as to the district court's part in the immunity grant is susceptible of varying interpretations. So is the scope of the immunity

[53] See the testimony of the Chicago Bar Association, quoted in the minority report of H. Rep. 2606, 83d Cong., 2d sess., p. 14 (1954).

[54] See remarks of Senator Kefauver: "The bill does not set out affirmatively that the response must be germane to the question, and many of the fears expressed by the Senator from Oklahoma [Mr. Monroney] might be well founded in the granting of immunity to a dangerous criminal." 99 CONG. REC. 8349 (1953).

grant itself in its relation to state criminal prosecutions. The narrow field the statute embraces will at least limit the impact of the legislation on congressional investigations and federal criminal proceedings.[55]

George S. Flint, S.Ed.

[55] Constitutionality of the grand jury provisions [subsection (c)] of the statute here discussed was upheld by the Court of Appeals for the Second Circuit in the case of William Ludwig Ullman, N.Y. TIMES, April 5, 1955, p. 1:3. Appeal from this decision is likely. Justices Frank, Clark, and Galston wrote separate opinions upholding the district court decision holding Ullman in contempt after immunity had been granted and he continued to refuse to answer certain questions, 23 LAW WEEK 2393 (Jan. 31, 1955). The court refused to adopt defendant's theory that the purpose of granting immunity was to entrap him into a perjury charge. But all three judges expressed doubt as to the continued soundness of the settled Supreme Court rule upholding such statutes, as first enunciated in Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644 (1896). Clark, C.J., concurring, said: "I concur but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those Justices of the Supreme Court who by the narrowest of margins gave support to the trend in the Eighteen Nineties." The more serious problems connected with subsections (a) and (b), relating to testimony before congressional committees, were of course not involved in this decision.