

# Michigan Law Review

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Volume 48 | Issue 2

---

1949

## CONSTITUTIONAL LAW-PRIVILEGE AGAINST SELF- INCRIMINATION-WAIVER UNDER COMPULSORY TESTIMONY ACT

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### Recommended Citation

John A. Nordberg, *CONSTITUTIONAL LAW-PRIVILEGE AGAINST SELF-INCRIMINATION-WAIVER UNDER COMPULSORY TESTIMONY ACT*, 48 MICH. L. REV. 230 ().

Available at: <https://repository.law.umich.edu/mlr/vol48/iss2/10>

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CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—WAIVER UNDER COMPULSORY TESTIMONY ACT—Smith, sole owner and officer of a clothing corporation, appeared before an OPA examiner in response to a subpoena to produce the corporate books. Under the Emergency Price Control Act<sup>1</sup> these records were required to be kept and preserved. Smith said that the records were “destroyed, lost, or misplaced.” Then, on claiming privilege against self-incrimination, he testified as to activities of the corporation and contents of the absent records. During the interrogation Smith made a long statement in partial summation of his testimony. When he finished, he was asked, “This is a voluntary

<sup>1</sup> 56 Stat. L. 23, §202(b) (1942); 50 U.S.C. (1944) §922.

statement. You do not claim immunity with respect to that statement?" He answered, "No." Smith was later convicted of conspiracy to violate the EPCA by intentionally misusing priority ratings. On appeal, there was a partial reversal on the ground that under the Compulsory Testimony Act<sup>2</sup> Smith had obtained immunity from prosecution to that portion of his testimony to which he had claimed his privilege, but not to that portion to which there was an express waiver.<sup>3</sup> On certiorari, *held*, reversed. It was not shown whether the "no" applied to the examiner's first or second statement, and no effort was made to clarify its meaning. In view of the specific claim of privilege, the equivocal "no" did not constitute a waiver of his privilege against self-incrimination, and therefore, by his testimony, Smith gained full immunity from prosecution. *Smith v. United States*, 337 U.S. 137, 69 S.Ct. 1000 (1949).

Constitutional provisions against self-incrimination regardless of the wording<sup>4</sup> are construed to give the privilege to an individual of not incriminating himself<sup>5</sup> in his own trial or any future trial<sup>6</sup> by oral testimony or forced production of records.<sup>7</sup> However, in opposition to this protection of the individual is the necessity of having witnesses in order to get at the facts in a case. By judicial construction this privilege does not apply to corporations<sup>8</sup> or to those records that are required by law to be kept.<sup>9</sup> Also, as governmental regulative functions

<sup>2</sup> 56 Stat. L. 23, §202(g) (1942): "No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of . . . 1893 . . . shall apply with respect to any individual who specifically claims such privilege." Compulsory Testimony Act of 1893, 27 Stat. L. 443, c. 83, 49 U.S.C. (1937) §46: "No person shall be excused from . . . testifying or from producing books . . . . But no person shall be prosecuted . . . on account of any transaction, matter, or thing concerning which he may testify or produce evidence . . . before said commission or in obedience to its subpoena . . . ."

<sup>3</sup> *United States v. Daisart* (C.C.A. 2d, 1948) 169 F (2d) 856 at 861.

<sup>4</sup> U.S. Const., Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." This provision does not apply to the states. *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14 (1908).

<sup>5</sup> *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1885) extends this privilege to quasi-criminal proceedings as well.

<sup>6</sup> *Counselman v. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195 (1892); 8 WIGMORE, EVIDENCE, §2252 at p. 324 (1940); Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 1 (1930).

<sup>7</sup> See footnote 5, *supra*. *State v. Davis*, 108 Mo. 666, 18 S.W. 894 (1892); *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2 (1910); 8 WIGMORE, EVIDENCE §2264 (1940). *Contra*: *Smith v. State*, 247 Ala. 354, 24 S. (2d) 546 (1946). See 97 UNIV. PA. L. REV. 441 (1949) for a list of cases on which types of testimony are covered by this privilege. For the history and present policy considerations of the privilege, see 8 WIGMORE, EVIDENCE, §§2250, 2251 (1940); 49 YALE L. J. 1059 (1940).

<sup>8</sup> *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911); *Essgee Co. of China v. United States*, 262 U.S. 151, 43 S.Ct. 514 (1923). The custodian of corporate records cannot refuse to produce them although they will incriminate him as well. *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494 (1946).

<sup>9</sup> *Dicta* in *Wilson v. United States*, *supra*, note 8, led to *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1947). See also 8 WIGMORE, EVIDENCE, §2259(c) (1940). The privilege extends to aliens. *United States v. Brooks* (D.C. Mich. 1922) 284 F. 908.

increase there is a great need for some complete limitation to compel testimony in order to facilitate the enforcement of these regulations.<sup>10</sup> Thus, by statute, the privilege to refuse to answer a question is destroyed by giving immunity from prosecution<sup>11</sup> in return for the normally privileged testimony.<sup>12</sup> This privilege must be claimed or it is held to be waived.<sup>13</sup> Then it is also limited by the holding that these federal immunity statutes need protect witnesses from federal prosecution only.<sup>14</sup> A tendency to limit this privilege even further was indicated when a federal district court decided that oral testimony on self-incriminating matters disclosed in absent unprivileged records should not be privileged.<sup>15</sup> This holding was advanced in the principal case, but the court of appeals refused to go this far.<sup>16</sup> It was not discussed on certiorari. Finally, on the question of waiver, this decision shows the tendency to demand a clearer showing of waiver than the lower courts have sometimes required in the past.<sup>17</sup> "Waiver of constitutional rights is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege and consequent immunity on vague and uncertain evidence."<sup>18</sup> It is submitted this is the proper, practical view, for often these interrogations are long confusing affairs during which an unwary businessman might otherwise lose his privilege before a skillful examiner. If the privilege is desirable, its existence should not be so precarious.

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<sup>10</sup> 41 *YALE L. J.* 618 (1932); 49 *YALE L. J.* 1059 at 1075 (1940); 8 *WIGMORE, EVIDENCE*, §2281 (1940). This also contains a complete list of federal and state statutes granting immunity.

<sup>11</sup> This is where the immunity is as broad as the privilege. *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644 (1895); *State v. Ruff*, 176 Minn. 308, 223 N.W. 144 (1929); 8 *WIGMORE, EVIDENCE* §2283 (1940).

<sup>12</sup> See footnote 11, *supra*. *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1947); *United States v. Weisman* (C.C.A. 2d, 1940) 111 F. (2d) 260; 8 *WIGMORE, EVIDENCE* §§2281, 2282 (1940).

<sup>13</sup> 56 Stat. L. 23 §202(g); *Foster v. People*, 18 Mich. 266 (1869).

<sup>14</sup> *United States v. Murdock*, 284 U.S. 141, 52 S.Ct. 63 (1931). A similar rule has been adopted by most states. *Republic of Greece v. Koukouras*, 264 Mass. 318, 162 N.E. 345 (1928). For further authority see 45 *HARV. L. REV.* 595 (1932). For a slight restriction on this rule, see *People v. Den Uyl*, 318 Mich. 645, 29 N.W. (2d) 284 (1947).

<sup>15</sup> *Porter v. Heend* (D.C. Ill. 1947) 6 F.R.D. 588. "...defendant cannot by maintaining defective records, require the plaintiff to exchange immunity from prosecution for the balance of information to which the plaintiff is entitled." *Fleming v. Silverman*, (D.C. Ill. 1947) 7 F.R.D. 29 at 31.

<sup>16</sup> *United States v. Daisart Sportswear*, *supra*, note 3.

<sup>17</sup> *United States v. DeLorenzo* (C.C.A. 2d, 1945) 151 F. (2d) 122.

<sup>18</sup> Principal case at 150.