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Constitutional Law - Federal Privilege Against Self-Incrimination in State Proceedings

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NOTES

CONSTITUTIONAL LAW — FEDERAL PRIVILEGE AGAINST SELF-INCRIMINATION IN STATE PROCEEDINGS

Petitioner was called to testify before a Louisiana grand jury investigation of the alleged bribery of members of the New Orleans Police Department. He refused to testify, asserting a privilege against self-incrimination. The district attorney, pursuant to statutory authority,[1] granted petitioner immunity from future state prosecution for crimes revealed by his testimony. However, petitioner persisted in his refusal, relying on a claimed federal privilege against self-incrimination. He sought to justify his refusal by alleging that collaboration existed between federal agents seeking evidence of income tax evasion and the state district attorney, and that any testimony which he would give might incriminate him under federal law. On the basis of stipulated facts which admitted federal-state collaboration in the investigation,[2] petitioner was convicted of contempt and the Louisiana Supreme Court refused supervisory writs.[3] On appeal to the

1. "Any person may be compelled to testify in any lawful proceeding against anyone who may be charged with having committed the offense of bribery and shall not be permitted to withhold his testimony upon the ground that it may incriminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceedings, except for perjury in giving such testimony." LA. CONST. art. XIX, § 13. This section is an exception to the general privilege against self incrimination found in *id.* art. I, § 11. Other statutes relating to compelled testimony in bribery cases are LA. R.S. 14:121 and 15:468 (1950).

2. The stipulation, in part, provided: "That there has existed, and now exists, cooperation and collaboration between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and its investigators, as well as with the Police Bureau of Investigation of the City of New Orleans *in reference to members of the New Orleans Police Department* regarding public bribery and income tax evasion." (Emphasis added.) Mills v. Louisiana, 360 U.S. 230, 232 (1959). It is to be noted that the defendant in the instant case was not a member of the police force, therefore in view of the fact that bribery of city police does not constitute a *federal* crime, the stipulation does not show any collaboration as to him. For further consideration of the effect of the stipulation, see text accompanying notes 24-25 *infra*.

3. Record No. 74, p. 97. A detailed analysis of the district court decision and the Louisiana Supreme Court's refusal to exercise its supervisory jurisdiction in the instant case is outside the scope of this Note. However, it appears that the decisions were correct as a matter of state law, since no other prosecution was pending against Mills at the time. The instant case and State v. Ford, 233 La. 992, 99 So.2d 320 (1957) seem to make the availability of the privilege depend on the proximity of the threatened prosecution of the witness in another jurisdiction. The instant case is distinguishable on this basis from State v. Dominguez, 228 La. 284, 82 So.2d 12 (1955) and State *ex rel.* Doran v. Doran, 215 La. 151, 39 So.2d 894 (1949). For a discussion of the various state solutions to this prob-

United States Supreme Court, *held,* per curiam, conviction affirmed. The one sentence opinion cited only the authority of *Knapp v. Schweitzer.*[4] Mr. Chief Justice Warren dissented on the ground that the *Knapp* case left undecided the issues at bar, and therefore he was of the opinion that it was insufficient authority for the per curiam decision.[5] He also expressed dissatisfaction with decisions of the Court which seem to deny a recalcitrant witness in a state proceeding the privilege against self-incrimination but offer no protection against the use of evidence, obtained as a result of the compelled testimony, against him in a subsequent prosecution by federal authorities. Mr. Justice Douglas dissented on the theory that a state court should be compelled to protect the federal right against self-incrimination where no federal protection is available to the witness.[6] *Mills v. Louisiana,* 360 U.S. 230 (1959), *rehearing denied,* 80 S. Ct. 40 (U.S. 1959).

The Fifth Amendment to the United States Constitution embodies the rule that no one shall be compelled to testify against himself in a criminal proceeding. The courts have consistently held that this provision is a restriction on only the federal government.[7] Efforts were made by Congress to circumvent the Fifth Amendment's application in federal proceedings by enacting statutes which purported to grant the witness immunity from future prosecution for crimes revealed by his testimony.[8] These efforts were based on the theory that if the witness were granted complete immunity from future prosecutions the purpose of the privilege would be achieved and there would be no reason for a refusal to testify. In *Brown v. Walker,*[9] the United States Supreme Court approved this reasoning and, after finding the immunity granted broad enough to displace the privilege,[10] affirmed a contempt conviction for refusal to testify.

In both the *Brown* case and the later case of *Jack v. Kansas*[11]

lem, see McNaughton, *Self-Incrimination Under Foreign Law,* 45 VA. L. REV. 1299 (1959).

4. 357 U.S. 371 (1958).

5. 360 U.S. 230, 231 (1959).

6. *Id.* at 238-39. Justices Douglas and Black concurred in the dissent written by Chief Justice Warren; and Chief Justice Warren and Justice Black concurred in the dissent written by Justice Douglas.

7. See, e.g., Twining v. New Jersey, 211 U.S. 78 (1908).

8. See, e.g., 27 STAT. 443 (1893), 49 U.S.C. § 46 (1958).

9. 161 U.S. 591 (1896).

10. Four years earlier, in Counselman v. Hitchcock, 142 U.S. 547 (1892), the court found a similar statute invalid because it failed to provide complete protection for the witness. For a history of the development of immunity statutes, see Grant, *Federalism and Self-Incrimination,* 4 U.C.L.A. L. REV. 549 (1957).

11. 199 U.S. 372 (1905).

the concept of federalism presented a new problem. In *Brown* the refusal was prompted by the fear of subsequent federal immunity statute provided no protection from state prosecution for state crimes revealed by testimony compelled in a federal proceeding. The converse situation was presented in *Jack* where the refusal was prompted by the fear of subsequent federal prosecution based on testimony compelled in the state proceeding under a state immunity statute. The Supreme Court in each case held that the immunity statutes were valid and therefore the privilege against self-incrimination was inapplicable. Both decisions were based on the findings of the court that the danger of future prosecution was too "remote" to be considered.[12] In *Ballmann v. Fagin,*[13] where the witness was being prosecuted by the state at the time he was called to testify in a federal proceeding, it was held that his testimony could not be compelled in the federal hearing. This decision seems entirely consistent with the Court's reliance on a "remoteness" test but it gave little warning that the test soon would be discarded. Ten weeks later in the case of *Hale v. Hinkel*[14] the Court, without mentioning the *Ballman* decision, apparently abandoned its reliance on the "remoteness" test and adopted the "dual sovereignty" theory in self-incrimination cases.[15] Under the dual sovereignty theory, designed for use where the sovereign threatening future prosecution is a completely separate entity from the interrogating sovereign, the court need only look to the danger of future prosecution by the sovereign granting the immunity in deciding whether that immunity is comprehensive enough to replace the privilege against self-incrimination. The danger of subsequent prosecution by any other sovereign need not be considered. In *United States v. Murdock*[16] the application of the dual sovereign doctrine was expressly reaffirmed. Mr. Justice Butler, for the Court, said: "The principle established is that full and complete immunity against prosecution by the government compelling the

12. In Brown v. Walker, 161 U.S. 591, 608 (1896), the majority 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 . . . is not a real and probable danger . . . 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."

13. 200 U.S. 186 (1906).

14. 201 U.S. 43 (1906).

15. See Grant, *Self-Incrimination in the Modern American Law*, 5 TEMP. L.Q. 368, 399 (1931) and Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMP. L.Q. 194, 195 (1935).

16. 284 U.S. 141 (1931).

witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."[17]

It was inevitable that the application of the dual sovereignty doctrine would present difficult problems where the two sovereignties involved are as closely associated as the federal-state sovereignties within the United States. One of the first such problems involved the use in a subsequent federal prosecution of testimony obtained by compulsion in a state proceeding. In *Feldman v. United States*[18] the Supreme Court held such evidence to be admissible in the later trial. In *Knapp v. Schweitzer*,[19] relied on by the Court in the instant case, the witness refused to testify before a state grand jury. He persisted in his refusal even after being granted state immunity and argued that a federal crime would be revealed by his testimony which, under the *Feldman* rule, could be used against him. The conviction for contempt was affirmed by a divided Court. Mr. Justice Black, dissenting, voiced the growing concern over self-incrimination decisions: "Indeed things have now reached the point . . . where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each . . . . I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government."[20]

The majority in both the *Feldman* and *Knapp* cases seem to recognize the danger inherent in the decisions. Collaboration between federal and state officials could result in the state being used as an "agent" to compel testimony while leaving the witness powerless to prevent the evidence so obtained being used to his detriment in a later federal prosecution.[21] Although the Court was not presented with the collaboration question in either case, and specifically reserved the issue in *Knapp*,[22] there is language

17. *Id.* at 149.
18. 322 U.S. 487 (1944).
19. 357 U.S. 371 (1958).
20. *Id.* at 385.
21. It seems apparent that the *testimony* given in the state proceeding would be inadmissible in the federal trial. See Byars v. United States, 273 U.S. 28 (1927). However, the dissenting Justices in the instant case express concern over the possibility that the compelled testimony may furnish the basis for a subsequent federal prosecution.
22. "Whether, in a case of such collaboration between state and federal officers, the defendant could successfully assert his privilege in the state proceeding, we need not now decide, for the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation." 357 U.S. 371, 380 (1958).

in both opinions which seemed to indicate that the witness would be protected in such a situation.[23]

The Supreme Court's per curiam disposition of the instant case creates doubt as to its exact meaning. The decision is subject to several interpretations. It is probable that the majority did not find sufficient evidence of collaboration to remove the case from the *Knapp* rule.[24] The stipulated facts did not prove collaboration by federal and state authorities against the *defendants in the instant case.*[25] However, both dissenting opinions found that other circumstantial facts, when considered with the stipulation, conclusively established such collaboration. If the majority found no such proof, its reliance on the *Knapp* decision as authority is unassailable. Another possible interpretation is that the Court found collaboration. If this is correct, the Court's reliance on the *Knapp* case is erroneous because the collaboration question was specifically reserved by the Court in that decision.[26] As a matter of speculation, assuming the majority of the Court found sufficient evidence of collaboration, the decision could mean either that it will attach no significance to such collaboration or that the compelled testimony will be inadmissible in a subsequent federal prosecution.[27] The latter possibility furnishes the basis for Mr. Chief Justice Warren's dissenting opinion. His dissent was prompted by the fear that the witness will have no protection against the use of evidence obtained as a result of leads provided by the compelled testimony, even though the testimony itself would be inadmissible in the subsequent federal trial.[28] Mr. Justice Douglas, obviously concerned with the lack of protection afforded the *federal* privilege by the *federal* courts,

23. Justice Frankfurter, who wrote both decisions, said in the *Feldman* case: "When a representative of the United States is a participant in the extortion of evidence or its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained . . . and its admission, after timely motion for its suppression, vitiates a conviction." 322 U.S. 487, 492 (1944). In the *Knapp* decision, he stated: "Of course the Federal Government may not take advantage of . . . the State's autonomy in order to evade the Bill of Rights. If a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play." 357 U.S. 371, 380 (1958).

24. Since the *Knapp* decision did not involve collaboration between federal and state officials, the Supreme Court's reliance on that decision as controlling the instant case would seem to support the inference that the majority failed to find persuasive proof of collaboration.

25. See note 2 *supra.*

26. See note 22 *supra.*

27. Compare, e.g., Byars v. United States, 273 U.S. 28 (1927), holding that when a federal agent is a participant in an illegal search, the evidence so obtained is inadmissible in the federal courts.

28. See note 27 *supra.*

seems to believe that the *state* courts should be required to furnish the protection guaranteed the witness by the Fifth Amendment.

Whichever interpretation of the *Mills* case is correct, it seems clear that the satisfactory disposition of the problems required more than a per curiam opinion. The result of the case, in the light of the dissenting opinions and the silence of the majority, has been to increase the uncertainty in this area. Some explanation by the Court would have resulted in the assurance that witnesses relying on their privilege against self-incrimination would be able to make decisions based on settled law rather than questionable assumptions.

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CONSTITUTIONAL LAW — FIRST AND FIFTH AMENDMENTS CLARIFIED WITH REGARD TO CONGRESSIONAL INVESTIGATIONS

Petitioner was convicted of contempt of Congress[1] for refusing to answer questions of the House Un-American Activities Committee relating to Communist methods of infiltration into the field of education.[2] Petitioner was present when the subject under inquiry was read by committee counsel.[3] He also heard testimony of an earlier witness to the effect that petitioner had been a member of a Communist club while a graduate student in college. After answering several introductory questions relating to his background, petitioner refused to answer five questions[4] concerning his political associations, acquaintances, and member-

1. 2 U.S.C. § 192 (1938): "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000, nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. The printed report of this committee appears as: House Comm. on Un-American Activities, "Communist Methods of Infiltration (Education—Part 9) H.R. Doc. 30172, 83rd Cong. 2d Sess. 5754 (1954). (Hereinafter cited as 1954 *Hearings*).

3. "The field covered will be in the main communism in education and the experiences and background in the party by Francis X. T. Crowley.

"It will deal with activities in Michigan, Boston, and in some small degree, New York." 1954 *Hearings* 5754. See note 2, *supra*.

4. "Are you now a member of the Communist Party?

"Have you ever been a member of the Communist Party?