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Constitutional Law - Privilege Against Self-Incrimination - Congressional Grant of Immunity From State Prosecution

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CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION — CONGRESSIONAL GRANT OF IMMUNITY FROM STATE PROSECUTION

Petitioner was subpoenaed to appear before a federal grand jury investigating violations of federal narcotics laws.[1] When asked questions relevant to the subject before the grand jury he declined to answer on the ground that his answers might tend to incriminate him. Under the provisions of the Narcotics Control Act[2] he was given immunity from prosecution. He still refused to answer on the theory that the privilege against self-incrimination protects against prosecution in state courts, and that since prosecution of narcotics violations is a "subject that has traditionally been within the police power of the states"[3] and reserved to them under the tenth amendment, the immunity granted did not constitutionally extend to state prosecutions and thus was not co-extensive with the privilege it sought to replace. The federal district court held that a federal immunity statute need not grant immunity from state prosecution to be valid since the federal privilege against self-incrimination does not apply in state courts, and found petitioner guilty of contempt for refusing to answer.[4] The court of appeals affirmed.[5] On certiorari[6] to the United States Supreme Court, *held*, affirmed, two Justices dissenting.[7] The Narcotics Control Act validly grants immunity

1. Petitioner was then serving a five-year sentence for a federal narcotics offense. United States v. Reina, 242 F.2d 302 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957).

2. 70 STAT. 574 (1956), 18 U.S.C. § 1406 (1958): "Whenever in the judgment of a United States Attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any violation of [certain federal narcotics statutes] is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify. . . . 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 compelled, after having claimed his privilege against self-incrimination, to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court."

3. Reina v. United States, 81 Sup. Ct. 260, 263 (1960).

4. *In re* Reina, 170 F. Supp. 592 (S.D.N.Y. 1959).

5. United States v. Reina, 273 F.2d 234 (2d Cir. 1959).

6. 362 U.S. 939 (1960).

7. The dissenting opinion was written by Mr. Justice Black, with whom Mr. Chief Justice Warren concurred. The dissenters regard the summary contempt conviction as an "adjudication of guilt for a crime to be committed in the future." 81 Sup. Ct. 260, 265 (1960). They feel that no contempt conviction can stand unless the accused be tried in accordance with the law of the land, including indictment by a grand jury and a determination of guilt by a petit jury. Although the instant note is not concerned with the problem raised by the dissenters, it is interesting to note that, in light of the fact that Mr. Justice Douglas wrote such a vigorous dissent in Ullmann v. United States, 350 U.S. 422 (1956), he did not

from state prosecution. Since the constitutional enactments of Congress are the supreme law of the land, and since Congress has the power to enact narcotics laws, all that is required to justify restricting state power to prosecute in this area is a finding that the legislation is necessary and proper to the effective exercise of the granted power. *Reina v. United States*, 81 Sup. Ct. 260 (U.S. 1960).

The privilege against self-incrimination is available to a defendant in every jurisdiction in the United States.[8] However, most jurisdictions disarm this privilege with statutes[9] granting immunity from prosecution to those who facilitate law enforcement by giving testimony. To meet constitutional requirements, an immunity statute must grant protection at least co-extensive with the privilege it seeks to supplant.[10] Since federal and state governments are considered as separate and distinct sovereignties, it was held in *United States v. Murdock*[11] that a federal immunity statute need only grant immunity from federal prosecution to be valid. However, Congress has enacted statutes that purport to grant immunity from state as well as federal prosecution.[12] Whether Congress may validly do so was first considered in the case of *Brown v. Walker*.[13] There a witness was granted immunity under the provisions of the Interstate Commerce Act,[14] but refused to testify, contending that he was still amenable to state prosecution. In affirming the contempt conviction the Supreme Court indicated that the act validly granted immunity

dissent from the majority opinion. In *Ullmann*, which raised almost identical issues as the instant case, Mr. Justice Douglas found the whole idea behind immunity statutes repugnant to the Constitution. He felt that the privilege against self-incrimination was absolute and protected not only from the danger of conviction with one's own words but also from the risk of prosecution, and from exposure to infamy and disgrace.

8. WIGMORE, EVIDENCE § 2252 (3d ed. 1940).

9. *Id.* § 2281.

10. Counselman v. Hitchcock, 142 U.S. 547 (1892).

11. 284 U.S. 141 (1931). Accord, Hale v. Henkel, 201 U.S. 43 (1906).

12. 70 STAT. 574 (1956), 18 U.S.C. § 1406 (1958); 68 STAT. 745 (1954), 18 U.S.C. § 3486 (1958); 62 STAT. 833 (1948), 18 U.S.C. § 3486 (1958); 27 STAT. 443 (1893), 49 U.S.C. § 46 (1958); REV. STAT. §§ 859, 860 (1875); 11 STAT. 155 (1857). A collection of immunity statutes may be found in Shapiro v. United States, 335 U.S. 1, n. 4 (1948). A state cannot constitutionally grant immunity from federal prosecution. Jack v. Kansas, 199 U.S. 372 (1905). However, some states have held that a witness may not be compelled to testify under a state immunity statute where he would be amenable to prosecution by the federal government. Boynton v. State, 75 So.2d 211 (Fla. 1954); State *ex rel.* Mitchell v. Kelly, 71 So.2d 887 (Fla. 1954); Commonwealth v. Rhine, 303 S.W.2d 301 (Ky. App. 1957); State v. Dominguez, 228 La. 284, 82 So.2d 12 (1955); State *ex rel.* Doran v. Doran, 215 La. 151, 39 So.2d 894 (1949); People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947).

13. 161 U.S. 591 (1896).

14. 27 STAT. 443 (1893), 49 U.S.C. § 46 (1958).

from state prosecution.[15] In *Adams v. Maryland*[16] the Court affirmed the right of Congress to prevent states from using testimony obtained before a congressional investigatory body in a criminal proceeding. The opinion of the Court used language strongly indicating that Congress also had the power to grant immunity from state prosecution.[17] The problem was recently considered in *Ullmann v. United States*.[18] Although granted immunity under the provisions of the Federal Compulsory Testimony Act,[19] Ullmann refused to testify on the grounds that the immunity granted did not extend to state prosecution, urging that Congress may not limit the right of the states to enforce criminal law. In upholding Ullmann's contempt conviction the Court said that the paramount authority of Congress to safeguard national security justified the grant of immunity from state prosecution and restriction of state authority in this area.[20] Although in all three of these cases the Court used the "necessary and proper"[21] and "supremacy"[22] clauses as vehicles for justifying federal restrictions on state criminal proceedings, it must be noted that the statutes in question were based on exclusive and pre-emptive federal powers, i.e., the commerce power in *Brown v. Walker*; the congressional investigatory power in *Adams v. Maryland*; and internal security and national defense in *Ullmann v. United States*. For this reason some doubt has been expressed as to the power of Congress to grant immunity from state prosecution where federal power is not occupying such a paramount position.[23]

15. 161 U.S. 591, 606-07 (1896).
16. 347 U.S. 179 (1954).
17. Adams v. Maryland, 347 U.S. 179, 183 (1954): "Little need be said about the contention that Congress lacks power to bar state courts from convicting a person for crime on the basis of evidence he has given to help the national legislative bodies carry on their governmental functions. Congress has power to summon witnesses before either House or before their committees. McGrain v. Daugherty, 273 U.S. 135. Article I of the Constitution permits Congress to pass laws 'necessary and proper' to carry into effect its power to get testimony. We are unable to say that the means Congress has here adopted to induce witnesses to testify is not 'appropriate' and 'plainly adopted to that end.' McCulloch v. Maryland, 4 Wheat. 316, 421. And, since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by § 3486, even though it affects their rules of practice. Brown v. Walker, 161 U.S. 591, 606-608."
18. 350 U.S. 422 (1956).
19. 68 STAT. 745 (1954), 18 U.S.C. § 3486 (1958).
20. 350 U.S. 422, 436 (1956).
21. U.S. CONST. art. I, § 8.
22. *Id.* art. VI.
23. See Tedesco v. United States, 255 F.2d 35, 39 (6th Cir. 1958); Comment, 11 WESTERN RESERVE L. REV. 264, 270 (1960); Note, 29 ROCKY MT. L. REV. 127, 129 (1956).

Any uncertainty which may have existed about the power of Congress to grant immunity from state prosecution in the latter situation has been dispelled by the instant case. In precise language the Court held that if Congress has the power to legislate, it has the power to grant immunity from state prosecution as long as it was necessary and proper to do so.[24] The Court stated that no support could be found in the Constitution for making distinctions among *particular* granted powers. Thus since Congress has undoubted power to enact narcotics laws[25] and since a grant of immunity from state prosecution would enhance enforcement of these laws, the grant of immunity from state prosecution was constitutional even though the states have traditionally exercised authority in this area.[26]

The instant case is important in two particular aspects. First, it clearly sets forth the formula to be applied for determining when the federal government may limit state law enforcement. Because of the broad and extensive powers of Congress to legislate in almost any area, it is at least theoretically possible for it to severely restrict state criminal prosecutions. Although it is not certain to what extent federal immunity statutes will be used in actual practice, nevertheless, it would seem that such a system is open to abuse. For example, if a person with some degree of influence were in danger of state prosecution, arrangements might be made to summon him before an investigating committee or a federal grand jury where he could be given an "immunity bath." Secondly, the instant case marks the second time that the Supreme Court has avoided reconsidering *United States v. Murdock*,[27] wherein it was held that a federal immunity statute need only grant immunity from federal

24. 81 Sup. Ct. 260, 263 (1960): "Congress may legislate immunity restricting the exercise of state power to the extent necessary and proper for the more effective exercise of a granted power. . . . The relevant inquiry here is thus simply whether the legislated state immunity is necessary and proper to the more effective enforcement of the undoubted power to enact the narcotics laws."

25. United States v. Sanchez, 340 U.S. 42 (1950); Nigro v. United States, 276 U.S. 332 (1928); Alston v. United States, 274 U.S. 289 (1927); Yee Hem v. United States, 268 U.S. 178 (1925); United States v. Doremus, 249 U.S. 86 (1919); Brolan v. United States, 236 U.S. 216 (1915).

26. 81 Sup. Ct. 260, 263-64 (1960) ("[D]istinctions based upon the particular granted power concerned have no support in the Constitution. . . . And the supersession of state prosecution is not the less valid because the states have traditionally regulated the traffic in narcotics."). It could well be argued that the broad language of the instant case is dictum since the power of Congress to control the flow of narcotics is based on the paramount and preemptive powers of Congress in the fields of interstate commerce and taxation. If such is the case, then little consolation has been afforded the authorities cited in note 23 *supra*.

27. 284 U.S. 141 (1931). The first time that the Court avoided reconsidering *Murdock* was in Ullmann v. United States, 350 U.S. 422 (1956).

prosecution to be constitutional. In disposing of the instant case the Court could simply have said, as did the lower courts, that since the narcotics control act grants immunity from federal prosecution, this case is controlled by *United States v. Murdock*, and it would have been unnecessary to consider whether or not it was constitutional to grant immunity from state prosecution in this area. The instant case might be urged to support the position that the *Murdock* decision is open to question[28] but for the fact that since the *Ullmann* decision the Court has continually espoused the "two sovereignties" theory.[29] It may be that the Court by-passed the *Murdock* rationale and seized upon both *Ullmann* and *Reina* to set the limits of Congress' power to grant immunity from state prosecution.

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CONSTITUTIONAL LAW — SEGREGATION OF FACILITIES USED BY AN INTERSTATE BUS LINE

Petitioner, a Negro, was travelling by interstate bus through the South. During a stopover he entered a terminal restaurant and found that it was segregated into white and colored sections. Disregarding the division, petitioner sat down in the white section where he was refused service and was eventually arrested by an officer upon request of the proprietor. He was subsequently convicted and fined $10.00 in the Police Justice's Court of Richmond for violating a Virginia trespass law. The terminal restaurant which petitioner entered was leased by the Trailways Bus Terminal, Inc., a Virginia corporation, to the manager of the restaurant. The lease provided that the operation of the restaurant should be in keeping with the character of service of a modern bus terminal.[1] Petitioner appealed to the city court of

28. That the *Murdock* holding is open to question is especially true in light of the following extract taken from the majority opinion in the instant case (81 Sup. Ct. 260, 262): "Both courts below passed the question whether the statute grants state immunity because, assuming only federal immunity is granted, they held that United States v. Murdock, 284 U.S. 141, 52 S. Ct. 63, 76 L. Ed. 210, settled that the Fifth Amendment does not protect a federal witness from answering questions which might incriminate him under state law. D.C., 170 F. Supp. at page 595; 2 Cir., 273 F.2d at page 235. Petitioner contends that Murdock should be re-examined and overruled. *We have no occasion to consider this contention, since in our view § 1406 constitutionally grants immunity from both federal and state prosecutions.*" (Emphasis added.)

29. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); Knapp v. Schweitzer, 357 U.S. 371 (1958).

1. Actually, this was only one provision in the lease. The majority opinion summarized the lease provisions as follows: "Terminal covenanted to lease this