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Privilege Against Self-Incrimination—DOES A "USE" IMMUNITY PRESERVE THE RIGHTS OF THE WITNESS?—*Stewart v. United States*

The United States Constitution guarantees every person the privilege of refusing to divulge self-incriminating testimony.[1] When the acquisition of such testimony has been deemed necessary by the government, the United States Supreme Court has upheld statutes which require the witness to divulge the testimony, but only when such statutes have granted the witness an immunity which is coextensive with his fifth amendment privilege.[2] There are two concepts as to the adequacy of an immunity which attempts to preserve the constitutional privilege of the witness: 1) a "transactional" immunity which renders the witness free from prosecution in a subsequent criminal proceeding for any crime to which his testimony relates,[3] and 2) a "use" immunity which merely guarantees that the testimony

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[1] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. *See* Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).

> The privilege has sanction in the Bill of Rights, and before that in a long but victorious struggle of the common law. It protects against the force of the court itself. It guards against the ancient abuse of judicial inquisition. Before it judicial power, including contempt, to enforce the usual duty to testify, desolves. No other violence or duress is needed to bring it into play than the asking of a question. It excludes response regardless of its probative value. *Id.* at 268.

See generally Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1 (1930).

[2] *See* Counselman v. Hitchcock, 142 U.S. 547 (1892), wherein Justice Blatchford, delivering the opinion of the Court, stated that,

> It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. *Id.* at 585.

A classic example of such a statute, providing transactional immunity, is the Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 which stated:

> . . . [N]o person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture: but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify. . . .

The constitutional validity of this statute was determined in Brown v. Walker, 161 U.S. 591 (1896). *See* note 12 *infra*. *See generally* Annot. 53 A.L.R.2d 1030 (1957); 70 HARV. L. REV. 1454, 1461 (1957).

[3] The word "transactional" encompasses the phrase "transaction, matter or thing" which is employed in many "transactional" immunity statutes. See Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, note 2 *supra;* 18 U.S.C. § 2514 (1970).

of the witness and the fruits thereof will not be used against him in a subsequent criminal proceeding.[4]

In a recent case, *Stewart v. United States*,[5] a grand jury witness refused to answer self-incriminating questions authorized by a statute granting only a "use" immunity. The witness was cited for contempt. On appeal the Ninth Circuit upheld the defendant's contempt conviction, thereby deciding that the "use" immunity effectively protected the witness' fifth amendment privilege in spite of the damaging testimony requested.[6]

This result seems precluded by *Counselman v. Hitchcock*,[7] a 1892 Supreme Court decision in which a "use" immunity statute was held invalid because it did not adequately preserve the witness' privilege interdicting self-incrimination.[8] The Court felt that a statute which merely protected the witness from the use of such testimony as evidence, and which did not prevent the government from employing his testimony as incentive to discover other evidence with which to convict him, was not coextensive with the requirements of the fifth amendment.[9] In order to be coextensive, an

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[4] For an example of a recently enacted "use" immunity statute, see Organized Crime Control Act, 18 U.S.C. § 6002 (1970) which states:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either house of Congress, . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order . . . may be used against the witness in any criminal case. . . .

[5] 440 F.2d 954 (9th Cir.); *cert. granted sub nom.* Kastigar v. United States, 402 U.S. 971 (1971).

[6] The *Stewart* court, in reference to the Organized Crime Control Act, 18 U.S.C. § 6002 (1970) (see note 4 *supra*), said, "The statute now under question appears clearly within the protective limitations of the Fifth Amendment...." 440 F.2d at 957.

[7] 142 U.S. 547 (1892).

[8] The statute under consideration in *Counselman*, R.S. § 860 (1879), provided that:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this country, . . . shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . .

[9] Referring to the "use" immunity statute, R.S. § 860 (1879) (see note 8 *supra*) the *Counselman* Court stated—

> This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony

immunity statute must grant the witness immunity from prosecution for any charge relating to his testimony in response to inquiry.[10] A statute which subjects a witness to subsequent prosecution does not adequately fulfill constitutional requirements.[11] An examination of the Supreme Court cases following *Counselman* reveals that the doctrine formulated in that case is still law as it has not been overruled either sub silentio or by express language.[12]

The court in *Stewart*[13] felt that *Counselman* had been overruled since a "use" immunity was found to be constitutionally valid in *Murphy v.*

> he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.
>
> The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself;" and the protection of § 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. 142 U.S. at 564-65 (1892).

[10] Justice Blatchford stated—

> In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates. 142 U.S. at 586.

[11] The *Counselman* Court stated that it was,

> . . . clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege confered by the Constitution of the United States. 142 U.S. at 585.

[12] In Brown v. Walker, 161 U.S. 591 (1896), the issue arose as a result of an alleged incompatibility between the protection of the fifth amendment and the Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (see note 2 *supra*), which provided the witness with "transactional" immunity. The Court, upholding the statute, said that the legislation was passed as a result of Counselman v. Hitchcock, 142 U.S. 547 (1892), so as to provide an immunity broad enough to grant the witness his constitutional protection. 161 U.S. at 594.

In 1906 the Supreme Court supported the result reached in *Counselman* when it quoted language from that case to the effect that a valid immunity statute must grant the witness immunity from prosecution for crimes to which his compelled testimony relates. Hale v. Henkel, 201 U.S. 43, 67 (1906).

In 1960, the Court upheld the validity of an immunity statute, stating that:

> . . . in safeguarding him against future federal and state prosecution "for or on account of any transaction, matter or thing concerning which he is compelled" to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Reina v. United States, 364 U.S. 507, 514 (1960).

In 1965 the Supreme Court held that an immunity statute which does not fulfill the *Counselman* requirement is not valid. Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

"Justice after Justice has restated the concept that transactional immunity from prosecution is the safeguard that is coextensive with the guarantee of the Fifth Amendment." Catena v. Elias, 9 Crim. L. Rep. 2475 (3d Cir. 1971).

[13] Stewart v. United States, 440 F.2d 954, 956 (9th Cir. 1971).

Waterfront Commission.[14] Also, the court noted that although "transactional" immunity is a valid immunity there is no Supreme Court case which has stated that "transactional" immunity is the only immunity that will suffice.[15]

Upon examination of the factual situation of *Murphy*, the *Stewart* court's reliance upon that case as authority for the general proposition that a "use" immunity is constitutional appears unsound. The only issue confronting the *Murphy* Court concerned the degree of immunity which the jurisdiction questioning the witness could confer upon him in regard to a subsequent prosecution by another jurisdiction. The Supreme Court held that the secondary jurisdiction was barred only from using the testimony of the witness. The degree of immunity that must be conferred by the questioning jurisdiction, the issue in *Stewart*, was neither discussed nor resolved.[16] Several cases subsequent to *Murphy* have held that the rule in

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14 378 U.S. 52 (1964).

15 The *Stewart* court stated that "[n]o case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none." Stewart v. United States, 440 F.2d 954, 956 (9th Cir. 1971).

16 In *Murphy*, the petitioners refused to respond to questions asked under an immunity granted by New York and New Jersey, on the ground that such testimony might incriminate them under federal law. The Court said:

> . . . the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law. Murphy v. Waterfront Comm'n, 378 U.S. 52, 77-78 (1964).

The Court held that a state grant of immunity to a witness prevented the Federal Government from using his compelled testimony in a subsequent criminal proceeding; however, no mention was made in the case concerning the degree of immunity the witness must be given by the questioning jurisdiction.

In *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971), which held that the same "use" immunity statute appearing in *Stewart* was unconstitutional because the immunity it granted was not broad enough, the court attempted to explain the effect of the *Murphy* decision upon a situation similar to the one appearing in *Stewart*. The court said that Congress had relied upon the decision in *Murphy* when it enacted the Organized Crime Control Act of 1970 (see note 4 *supra*) and that the government relied upon the *Murphy* decision for its claim that the *Counselman* requirement of "transactional" immunity had been overruled sub silentio. The court felt that the reason *Murphy* allowed a "use" immunity to be extended to a subsequent jurisdiction was because of a consideration of federalism. This would enable the law enforcement prerogatives of a non-questioning jurisdiction to encounter only a minimum of interference. The court stated,

> The *Murphy* decision is, therefore, not properly cast as a sub silentio overruling of Counselman's transactional immunity requirement as between the questioning state and witness. 326 F. Supp. at 416.

Another federal case, Catena v. Elias, 9 CRIM. L. REP. 2475 (3d Cir. 1971), holding a "use" immunity invalid, attempted to explain the decision reached in *Murphy*. The court pointed out that it would be unjust to hold that when one state grants "transactional" immunity all other states must do the same for that particular witness. Accordingly *Murphy* merely prohibited other states from the use of the compelled

Counselman is still controlling in factual situations similar to *Stewart*.[17]

Although the Supreme Court has never expressly stated that a "transactional" immunity is the only immunity that could adequately fulfill the constitutional requirement, it did establish the minimum standard for such a statute when it said:

> We are clearly of [the] opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.[18]

Such a statement implies that nothing less than immunity from prosecution for acts of which the witness was compelled to testify can meet this minimum standard. A "use" immunity is clearly too narrow.[19]

Since 1892 the Supreme Court has held that a statute compelling self-incriminating testimony must grant the witness an immunity which provides

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testimony. This prevents an intrusion by one state upon the judicial process of another, or more accurately it results in less intrusion by one state upon the judicial process of another than would exist if a "transactional' immunity were extended to the witness.

The court in light of the close question as to whether the government may ever grant an immunity sufficient to compel the witness to divulge incriminating testimony said—

> Mindful of this, courts have reluctantly sanctioned the immunity device, but in doing so have minimized the erosion of Fifth Amendment protection by insisting that the coercing state protect the witness against the possibility of consequent harm as completely as it can. *Id.* at 2476.

The *Murphy* Court then, allowed the questioning jurisdiction to grant the witness the greatest amount of immunity it could confer upon him, with respect to the powers of subsequent jurisdictions.

[17] *See* Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965). In this case the Supreme Court struck down an immunity statute because its provisions did not sufficiently safeguard the witness under the *Counselman* standard. For other cases so holding *see e.g.*, United States v. McDaniel, 10 CRIM. L. REP. 2094 (8th Cir. 1971); Catena v. Elias, 9 CRIM. L. REP. 2475 (3d Cir. 1971); *In re* Korman, 9 CRIM. L. REP. 2161 (7th Cir. 1971); Carter v. United States, 417 F.2d 384 (9th Cir. 1969); *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971); Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235 (1969). *See also* Piccrillo v. New York, 400 U.S. 548, 552 (1971) (Brennan & Marshall, JJ., dissenting):

> I believe that the Fifth Amendment's privilege against self-incrimination requires that any jursdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony. *Id.* at 562.

[18] Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

[19] *See In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971) where the court stated that a "use-restriction immunity as opposed to prosecution immunity plainly does not protect a witness against all of the perils which are manifestly within the orbit of the privilege." *Id.* at 418.

him with protection that is as near as possible to that provided by the fifth amendment.[20] Although the Court has allowed a "use" immunity to be valid in the *Murphy* situation it has been held consistently that when circumstances similar to those in *Stewart* arise, an immunity from all prosecution concerning acts of which the witness gave testimony must be granted.[21] The Supreme Court will have an opportunity to resolve the issue in the near future since it has granted certiorari in the *Stewart* case.[22] Hopefully the Court will rule consistently with *Counselman* as it has for the past seventy-nine years, thereby allowing the constitutional privilege of the witness to be preserved.

J. H. J.

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20 *See* cases cited note 12 *supra.*
21 *See* cases cited notes 12 & 16 *supra.*
22 *See* note 5 *supra.*