

1956

Criminal Law--Ullmann v. United States--Grant of Immunity in Lieu of Privilege Against Self-Incrimination

Charles L. Calk
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Criminal Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Calk, Charles L. (1956) "Criminal Law--Ullmann v. United States--Grant of Immunity in Lieu of Privilege Against Self-Incrimination," *Kentucky Law Journal*: Vol. 45 : Iss. 2 , Article 15.

Available at: <https://uknowledge.uky.edu/klj/vol45/iss2/15>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@sv.uky.edu.

ing that the creation of a lien depends upon levy, the Court unfortunately departed from previously established notions as to the proper function and legal effect of a levy, and in doing so, introduced an element of uncertainty into an otherwise well settled rule affecting the rights of debtors and creditors in attachment proceedings under this statute.

William E. Bivin

CRIMINAL LAW—ULLMANN v. UNITED STATES—GRANT OF IMMUNITY IN LIEU OF PRIVILEGE AGAINST SELF-INCRIMINATION*—A brief historical preface to *Ullmann v. United States*¹ would seem helpful, if not essential, to a full appreciation of the significance of this decision. The *Ullmann* case is the culmination of a great deal of legislative and juristic effort toward a solution of the fundamental problems arising when the need for congressional investigation conflicts with the right of witnesses called pursuant to such investigation to remain silent on the grounds that their testimony will incriminate them. It is clear that the privilege to remain silent as guaranteed by the Fifth Amendment can be replaced by a grant of immunity by Congress. The major problem in the past with regard to the granting of immunity in lieu of the privilege has evolved around the *extent* of protection necessary in order for the immunity to be considered equal to the constitutional privilege to say nothing. The first immunity statute was enacted by Congress in 1857,² immunizing witnesses from *all future prosecution*. Due to the abuse of the statute and the "immunity baths" which followed it, it was replaced in 1862 by a statute which merely immunized the witness from the future use of his testimony.³ The Supreme Court in *Counselman v. Hitchcock*⁴ held an identically worded statute unconstitutional as failing to furnish protection equating the privilege to remain silent. In 1896 the Supreme Court considered a statute⁵ which provided complete immunity from prosecution to witnesses appearing before the Interstate Commerce Commission. This case was *Brown v. Walker*⁶ and that decision was held to be controlling in the instant

* Ed. note. This comment is offered as a follow-up to the symposium on *self-incrimination* which appeared in volume 44 of the Kentucky Law Journal, and should be read in conjunction with that extensive treatment of the subject.

¹ 350 U.S. 422, 76 S. Ct. 497 (1956).

² 11 Stat. 156 (1857), as cited in *Adams v. Maryland*, 347 U.S. 179 n. 2 (1954).

³ 12 Stat. 333 (1862), as cited by King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377 n. 1 (1954).

⁴ 142 U.S. 547 (1892).

⁵ 15 Stat. 37 (1868), as cited in *Counselman v. Hitchcock*, 142 U.S. 547, 555 (1892).

⁶ 161 U.S. 591 (1896).

case. The Court in the *Brown* case held that immunity from *prosecution* was equal to the privilege against self-incrimination.

This solved the problem insofar as the Interstate Commerce Commission was concerned, but the 1862 statute, except for minor amendments, remained as the only immunity which congressional committees, or Federal Courts and grand juries could provide. Since immunity from use of testimony was insufficient to replace the constitutional guaranty of the Fifth Amendment, congressional committees, Federal grand juries and courts were hamstrung until 1954 when the present Act providing for complete immunity from prosecution was passed.⁷ The instant case was the first to reach the Supreme Court testing the validity of the Act.

The defendant was subpoenaed before a grand jury of the Southern District of New York which was investigating matters concerned with attempts to endanger the national security by espionage and conspiracy to commit espionage. The defendant, invoking the privilege against self-incrimination, refused to answer the grand jury's questions relating to his knowledge of such activities, to his participation in such activities, and to his and other persons' membership in the Communist Party. The United States Attorney, pursuant to the provisions of the Immunity Act of 1954,⁸ made application to the United States District Court for an order instructing the witness to testify. The application asserted the requisite public interest, and, in addition, an affidavit of the United States Attorney asserting his own good faith. To the application was annexed a letter from the Attorney General of the United States approving the application. The District Court sustained the constitutionality of the statute and issued an order instructing the defendant to answer the question propounded to him before the grand

⁷ 68 Stat. 745, 18 U.S.C. (Supp. II) sec. 3486 (1954).

⁸ 68 Stat. 745, 18 U.S.C. (Supp. II) sec. 3486 (1954).

(c) Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving 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 . . . is necessary to the public interest, he, upon approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying . . . on the ground that the testimony or evidence required of him may tend to incriminate him. . . . But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or an account of any transaction, matter, or thing concerning which he is 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 proceeding . . . against him in any court. [Italics supplied]

jury.⁹ Defendant appealed from this order, but the Court of Appeals for the Second Circuit dismissed the appeal.¹⁰ Defendant again refused to answer the grand jury's questions. He was then brought before the District Court, convicted of contempt and sentenced to six months imprisonment unless he should purge himself of the contempt. Defendant then brought certiorari, and the Supreme Court, in view of the importance of the questions at issue, and differences between legislation previously sustained and the statute under review, granted defendant's application.

Held: The Immunity Act of 1954 is constitutional. *Ullmann v. United States*, 76 S. Ct. 497 (1956).

The petitioner raised four major questions, each of which was considered and answered by Justice Frankfurter in delivering the opinion of the Court:

(1) "Is the immunity provided by the Act sufficiently broad to displace the protection afforded by the privilege against self-incrimination?" The petitioner attempted to draw a distinction between the instant case and *Brown v. Walker*,¹¹ where the Supreme Court upheld a similarly worded immunity statute,¹² by saying that certain disabilities, such as loss of job, passport ineligibility, etc., imposed by federal and state authorities upon those having had Communist affiliations are so oppressive that the statute does not give true immunity. The Court rejected this distinction by saying that the Fifth Amendment applies only to testimony which may expose the witness to a *criminal* charge and that since the immunity granted provides complete protection from criminal prosecution, the immunity equates the privilege and petitioner's relief must lie in the right to claim that sanctions imposed upon him by virtue of his testimony are criminal in nature and prohibited by the immunity granted him under the Act. The Court no

⁹ *In re Ullmann*, 128 F Supp. (SD N.Y. 1955).

Judge Weinfeld met defendant's contentions that the statute was unconstitutional and, if held to be constitutional, that the District Court should, in its discretion, deny the application by saying: (1) that the statute was constitutional (or, at least, no question of its constitutionality was raised by a natural interpretation of the statute's language); and (2) that the District Court had no discretion under sub-section (c) of the statute, but must issue the order if the case is within the framework of the statute.

¹⁰ *United States v. Ullmann*, 221 F 2d 760 (CA2 1955).

Judge Frank's opinion recognized the possible merit in defendant's contention that the doctrine of *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, required modification, but wisely refused to so modify the doctrine due to the absence of any new trends in the Supreme Court's attitude toward it.

¹¹ *Supra*, note 6.

¹² 27 Stat. 443 (1893), as cited in *Brown v. Walker*, 161 U.S. 591, 593 (1896).

doubt recognized the dubious value of such a right, but as Chief Judge Clark so aptly stated in his concurring opinion when the case was reviewed by the Circuit Court of Appeals:

Practically, as we know, no formal immunity can protect a minority deviator from society's dooms when he departs from its norms. . . .¹³

(2) "Assuming that the statutory requirements are met, does the Act give the district judge discretion to deny an application for an order requiring a witness to answer relevant questions put by the grand jury, and, if so, is the court thereby required to exercise a function that is not an exercise of 'judicial power'?" The petitioner argued that since the United States Attorney, after receiving the approval of the Attorney General, must "*make application* to the court that the witness be instructed to testify",¹⁴ the District Court may use discretion in denying or granting the order, and that such discretion is outside the scope of "judicial power". The Court replied that a fair reading of the Act indicates no conferring of discretionary powers upon the district judge, and held that the District Court's sole function is to determine whether or not the case is within the framework of the statute and, if so, if the statutory requirements have been complied with by the grand jury, the United States Attorney and the Attorney General. The Court concluded that this determination was clearly within the scope of "judicial power".¹⁵

(3) "Did Congress, in the passage of the Act of 1954, provide immunity from state prosecution, and, if so, is it empowered to do so?" Petitioner urged that the immunity provided by the Act of 1954 does not prevent state prosecution and is not, therefore, constitutionally sufficient. The Court met this contention by squarely holding that the Immunity Act of 1954 does preclude state prosecution. The Court relied upon the case of *Adams v. Maryland*,¹⁶ and the *Brown v. Walker*, decision which stated that, under a similar statute

. . . the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.¹⁷

The Report of the Committee on the Judiciary of the House of Representatives¹⁸ indicated that Congress' power to prohibit subsequent state prosecution after a grant of immunity under the Act was

¹³ *United States v. Ullman*, 221 F 2d 760, 763 (CA2 1955).

¹⁴ *Supra*, note 8.

¹⁵ For a complete discussion of the constitutional aspects of judicial power, see opinion of Harlan, J., in *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894).

¹⁶ 347 U.S. 179 (1954).

¹⁷ *Supra*, note 6, at 608.

¹⁸ H.R. Rep. No. 2606, 83rd Cong., 2d Sess. 7 (1954).

doubtful. The Court, however, did not share this hesitancy, but stated flatly that Congress' authority in safeguarding national security justified this restriction placed upon the exercise of state power. The Court cited the "necessary and proper" clause of the Constitution,¹⁹ noted that a similar restriction had been upheld under the Commerce Clause,²⁰ and stated that they could,

. . . find no distinction between the reach of congressional power with respect to commerce and its power with respect to national security.²¹

(4) "Does the Fifth Amendment prohibit compulsion of what would otherwise be self-incriminating testimony no matter what the scope of the immunity statute?" The petitioner contended that if *Brown v. Walker* be considered controlling, then that case should be overruled and the privilege to remain silent should be placed beyond the power of legislative compulsion of testimony through a grant of immunity. The Court rather curtly dismissed this contention by expressly affirming the holding in *Brown v. Walker* to the effect that an immunity statute which guarantees immunity from prosecution effectively displaces the privilege against self-incrimination.

Black and Douglas, J. J., dissented primarily upon the thought that the immunity statute does not protect the witness from the disgrace and infamy which is certain to follow an admission of Communist affiliation. Douglas, J., pointed out the holding in *Boyd v. United States*,²² which held that the Fifth Amendment prohibition against the compulsion of testimony protected one from forfeiture of property as well as conviction of a crime. He further argued that rights of citizenship are entitled to "at least as much dignity as property" and that until the immunity provided protects against the loss of such rights as the right to hold a job or receive a passport, its protection is not a complete substitute for the privilege of remaining silent. Justice Douglas also pointed out that a literal reading of the Fifth Amendment would place the right of silence beyond the reach of government. He reviewed the historical use of infamy as a form of punishment and said:

When public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.²³

¹⁹ U.S. Const., art. 1, sec. 8, cl. 18.

²⁰ *Brown v. Walker*, 161 U.S. 591 (1896).

²¹ *Ullmann v. United States*, 350 U.S. 422, 436 (1956).

²² 116 U.S. 616 (1886).

²³ *Supra*, note 21 at 454.

Justice Douglas urged that *Brown v. Walker* be overruled. He demonstrated little patience with any ruling which followed *Brown v. Walker* because "it is an old and established decision",²⁴ and denied that *Brown v. Walker* had any greater claim to sanctity than the "other venerable decisions which history showed had outlived their usefulness or were conceived in error".²⁵

Conclusion

The Supreme Court in this well-considered opinion has resolved the confusion which has stemmed from a multitude of decisions regarding the grant of immunity to witnesses in lieu of their Constitutional privilege against self-incrimination. The Court considered this privilege to be one so fundamental and important as to be "one of the great landmarks in man's struggle to make himself civilized."²⁶ At the same time, the Court recognized the compelling need for successful Congressional investigation as a means of insuring national security and arrived at a decision which, despite the hardships sometimes resulting from a compulsion of testimony pointed out by Douglas, J.,²⁷ was a just and desirable one.

Charles L. Calk

ESTATE TAXATION—MARITAL DEDUCTION—POWER OF APPOINTMENT TERMINABLE UPON WIFE'S INCAPACITY—Frank E. Tingley, a resident of Rhode Island, left part of his residuary estate in trust for his wife for life with a general power to invade corpus. The trust instrument provided that in the event of the wife's incapacity or the appointment of a guardian, her power to invade corpus was to cease.¹ The Tax Court held that the trust corpus did not qualify for the marital deduction. Upon appeal, the Court of Appeals for the First Circuit *affirmed*.

²⁴ *Id.* at 455.

²⁵ *Ibid.*

²⁶ Griswold, *The Fifth Amendment: An Old and Good Friend*, 40 A.B.A.J. 502, 503 (1954). Cited by the Court in the principal case at 350 U.S. 422, 426.

²⁷ For a further discussion of the undesirable aspects of the granting of immunity, see King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377 (1954).

¹ The trust instrument also provided that upon incapacity or appointment of a guardian the wife's right to income was to cease. Under local law, without the terminating conditions of the instrument, the wife would be entitled to the income for life, regardless of her capacity. Therefore, the wife's rights are substantially less under the terms of the instrument than under local law. If the court had based its decision upon this provision in the trust instrument the decision reached by the court would be justified. But the court said, and counsel for both parties agreed, that the only issue to be decided was whether the widow's power to invade corpus was exerciseable by her "alone and in all events."