IMMUNIZATION OF CONGRESSIONAL WITNESSES UNDER THE
COMPULSORY TESTIMONY ACT: CONSTITUTIONALITY
OF THE FUNCTION OF THE DISTRICT COURTS

Included in the internal security legislation enacted in the last days of the
83d Congress was a statute entitled: An Act To Permit the Compelling of Testi-
mony under Certain Conditions and Grant Immunity from Prosecution in Con-
nection Therewith. The immunity grant provided by the Act meets the judicially
approved requirements for compelling testimony from witnesses who claim the
privilege against self-incrimination. However, the procedure established where-

grants before Congress and its committees and during grand jury or trial proceedings. It is
limited in operation to investigations or prosecutions relating to national security.
The power to immunize from prosecution is a sovereign legislative power. In re Doyle, 257
N.Y. 244, 261 (1931); see Burdick v. United States, 236 U.S. 79, 93–95 (1915). Consult Power
of Prosecuting Attorney To Extend Immunity from Prosecution to Witness Claiming Privi-
lege against Self-Incrimination, 13 A.L.R. 2d 1439 (1950). For a comprehensive analysis of
federal immunity legislation see Dixon, The Fifth Amendment and Federal Immunity Statutes,

2 The general theory of immunity statutes is that the grant of immunity from prosecution,
by expurgating the crime, eliminates the privilege of silence under the Fifth Amendment. In
Counselman v. Hitchcock, 142 U.S. 547 (1892), the Supreme Court found constitutionally in-
adequate as a substitute for the privilege against self-incrimination a statute which prohibited
merely the operation of compelled testimony as evidence against the witness in subsequent
criminal proceedings. In 1893 Congress passed a statute, since referred to as the “model act,”
which used an immunity formula thereafter approved in Brown v. Walker, 161 U.S. 591 (1896),
as being coextensive with the privilege to which the witness was entitled under the Fifth
Amendment. The statute provided that the witness could not be “prosecuted or subjected to
any penalty or forfeiture for or on account of any transaction, matter or thing, concerning
which he may testify or produce evidence. . . .” 27 Stat. 443 (1893), 49 U.S.C.A. § 46 (1951).
The provisions of this statute have been incorporated into over twenty regulatory statutes. For
a partial list see Shapiro v. United States, 335 U.S. 1, 6 n. 4 (1948). The Compulsory Testi-
mony Act of 1954 adopts substantially the language of the “model act.” See note 5 infra.

3 The new statute does not explicitly undertake to give the witness immunity from prosecu-
tion under state laws. The report of the House Judiciary Committee indicates, however, that
the prohibition is intended to embrace state prosecutions “if it be determined that the Con-
gress has the constitutional power to do so.” H.R. Rep. No. 2606, 83d Cong. 2d Sess. 7 (1954).
Recently, the Supreme Court held that Congress has the power to prohibit a state from using
testimony previously given by the defendant before a congressional committee as evidence in a
criminal prosecution. Adams v. Maryland, 347 U.S. 179 (1954). The Supreme Court has held
that the privilege against self-incrimination does not extend to possible prosecution under
state laws. United States v. Murdock, 284 U.S. 141 (1931). But the question may not be finally
settled, particularly where the statute is limited to security matters and a federal pre-emption
cit. supra.

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by a congressional committee may, subject to the concurrence of a federal district judge, grant such immunity is a novel one. Under the terms of the Act, the

Read literally, the Fifth Amendment would seem to confine the guaranty against compulsory self-incrimination to criminal proceedings. The Supreme Court, however, has recognized that the Fifth Amendment applies to any type of proceeding in which the witness is compelled to give evidence of his criminal liability. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). Consult Applicability of Privilege against Self-Incrimination to Legislative Investigations, 49 Col. L. Rev. 87 (1949); Morgan, The Privilege against Self-Incrimination, 34 Minn. L. Rev. 1, 30-34 (1949). The privilege has been implicitly recognized by the Supreme Court as applicable to congressional committee proceedings. E.g., United States v. Bryan, 339 U.S. 323 (1950).

The initial immunity legislation enacted by Congress granted immunity to a congressional witness automatically "... for any fact or act touching which he shall be required to testify. ..." 11 Stat. 155 (1857), as amended, 18 U.S.C.A. § 3486 (Supp., 1954). This statute was grossly abused by wrongdoers seeking an "immunity bath" and was amended in 1862 to provide only that the testimony given by a congressional witness shall not be used as evidence in a criminal proceeding against the witness. 12 Stat. 333 (1862), Rev. Stat. §§ 859, 860 (1875). This "partial immunity" statute, though ineffective to compel disclosure, has remained in effect since then as the "old" 18 U.S.C.A. § 3486. Consult Immunity for Witnesses before Congressional Committees: The Scope of Section 3486, 29 St. John's L. Rev. 153 (1954). It has been suggested that the privilege against self-incrimination has been in the modern investigative era the only effective limit to the power of Congress to compel disclosure. Carr, The Un-American Activities Committee and the Courts, 11 La. L. Rev. 282, 290-95 (1951).

The relevant portions of the Act are:

"(a) In the course of any investigation relating to 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 or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. 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 so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence by direction of the presiding officer and

"(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court." Subsection (c) relates to immunity grants during trial and grand jury proceedings. Sub-
procedure involved in granting immunity is as follows: after the witness claims his privilege against self-incrimination, the committee considers whether the witness should be immunized; if two-thirds of the members vote to grant im-

section (d) reads: "No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

No previous legislation has been found which provides for judicial approval of a legislative grant. Moreover, a discretionary power of immunization in congressional committees is unprecedented. It has been suggested that because an immunity statute could validly compel testimony before a grand jury or a regulatory agency, it does not follow that a congressional committee can exercise similar compulsion, given the differences in jurisdiction, protection and advice of witnesses, court supervision, and the fact that grand juries and regulatory agencies are legitimately engaged in law enforcement. Boudin, The Immunity Bill, 42 Geo. L. J. 497, 511-12 (1954). Compare Memorandum of former Solicitor General Perlman, 99 Cong. Rec. 8,346 (1953). Such objections were raised in Congress in 1876 when attempts were made to resurrect the full immunity power of the 1857 act, but with the additional requirements that the witness must first claim his privilege and the committee then rule on whether immunity should be granted. Boudin, supra.

There is lack of clear authority in the states. Consult Power of Legislature To Grant or Authorize Committee To Grant Immunity from Criminal Prosecution to Witnesses Summoned before Legislative Committee, 87 A.L.R. 435 (1933). State provisions are ordinarily vague as to whether a witness before a legislative committee must first claim his privilege in order to have the benefit of immunity. Consult Commissioners' Prefatory Note to Model State Witness Immunity Act, 9A U.L.A. 141, at 153 (Supp., 1954). Where the statutory language clearly requires that the privilege must first be claimed, e.g., Tex. Civ. Stat. (Vernon, 1941) Art. 5429a, § 3, and Tenn. Code (Michie, 1938) § 172(11), the committee itself would possess discretion as to whether the privilege shall be overridden by a grant of immunity. Consult 8 Wigmore, Evidence § 2282(3), at 508-21 (3d ed., 1940). N.Y. Penal Law (Consol. Supp., 1954) § 584, confers explicitly upon legislative committees as well as on other bodies the power to immunize concerning the crime of conspiracy.

Judicial concurrence to a grant of immunity made in grand jury or trial proceedings is not unusual. The grant may be entirely at the court's discretion. E.g., W. Va. Code (1949) § 5742. More often the grant will be made by order of the court on motion of the state's attorney. E.g., Wis. Stat. (1953) § 325.34. The commentary to the Model Act indicates a preference that the law-enforcement agencies have the complete power, although the Act includes an optional judicial-concurrence term. Commissioners' Prefatory Note to Model State Witness Immunity Act and Act itself, supra, at 146-47, 159. Compare 8 Wigmore, Evidence § 2284 (3d ed., 1940). The note to the Model Act acknowledges that a question of constitutionality may possibly be raised regarding the delegation of the power to control individual grants, but reports that no case has been found raising directly this point in relation to immunity statutes. Commissioners' Prefatory Note to Model State Witness Immunity Act, supra, at 147. The Model Act was drafted by Professor John Kernochan of Columbia and was approved by the Nat'l Conference of Commissioners on Uniform State Laws in 1952.

The Compulsory Testimony Act follows modern federal immunity legislation in expressly requiring a claim of privilege in order for the witness to enjoy immunity. Beginning with the Securities Act of 1933, Congress has enacted seventeen regulatory measures containing provisions for immunity from prosecution in exchange for privileged testimony; fourteen of these expressly require a claim of privilege while three follow the old formula which did not do so. See the dissent of Justice Frankfurter in United States v. Monia, 317 U.S. 424, 442-43 (1943). Under previous statutes there had been hopeless conflict as to whether a claim of the privilege was necessary. Consult Necessity and Sufficiency of Assertion of Privilege against Self-Incrimination as Condition of Statutory Immunity of Witness from Prosecution, 145 A.L.R. 1416, 1420-23, 1424-25 (1943). The result in a particular case appears to have depended upon whether an exchange theory (requiring a plea) or an amnesty or gratuity theory (not requiring a plea) was chosen by the court. See Dixon, op. cit. supra note 1, at 555 et seq., for an extensive discussion of the two theories.
munity, the committee notifies the Attorney General of the proposed grant and then applies to a district court for an order requiring testimony (or an "approval" of the grant); the court issues the order after the Attorney General is accorded an opportunity to be heard; the order then is entered into the record.

The legislative history reveals that the lawmakers were puzzled by the procedural problem of how and by whom the immunity power should be exercised. Congress could not determine whether the immunity power should be exercised by the committee or the Attorney General. The dilemma was resolved by providing that the district court, with access to the views of both, must approve the grant of immunity. The novelty of this procedure poses the ques-

8 Subsection (a) of the Act refers to the court's action as "an order . . . requiring said person to testify or produce evidence." Subsection (b) says that the House or committee must secure "the approval of the United States district court" before granting immunity (italics supplied). See note 5 supra.

9 Subsection (b) is ambiguous as to who shall hear the Attorney General. The report of the House Judiciary Committee recommending passage of the bill in its final version states that he will be permitted to present his views to the court. H.R. Rep. No. 2606, 83d Cong. 2d Sess. 8 (1954).

10 It is unclear whether the required entry of the court order into the record under subsection (a) refers to the committee record or the court record. Where "record" is referred to earlier in the subsection the committee record obviously is meant. Because subsection (c) relating to proceedings before courts and grand juries contains no record requirement, the inference is that the second reference to "record" means committee record. The significance of this requirement is discussed infra.

11 Senator McCarran (D., Nev.) reintroduced on Jan. 7, 1953, as Sen. 16 of the 83d Congress an immunity proposal which the previous Congress had passed over. 99 Cong. Rec. 153 (1953). The bill was favorably reported by the Committee on the Judiciary on April 20, 1953 (Sen. Rep. No. 153, 83d Cong. 1st Sess.) and was passed without record vote by the Senate on July 9, 1953. 99 Cong. Rec. 4,737–43, 8,340–57 (1953). The McCarran bill provided that the Attorney General should be informed at least one week in advance of committee voting on the grant of immunity, but gave the concerned house of Congress the power to override by a majority vote any objection of the Attorney General. The debates reveal considerable senatorial opposition to lodging the final power in Congress. Ibid. Rep. Kenneth Keating (R., N.Y.) introduced in the House on January 6, 1954, H.R. 6899 as a substitute for the Senate bill. 100 Cong. Rec. 20 (1954). This bill, which, unlike Sen. 16, applied to court and grand jury proceedings as well as congressional investigations, left the ultimate power to immunize witnesses in the Attorney General. The Keating bill was supported by Attorney General Brownell. N.Y. Times, p. 19, col. 3 (June 9, 1954). Consult Brownell, Immunity from Prosecution vs. Privilege against Self-Incrimination, 14 Fed. Bar J. 91 (1954). After hearings, it was recommended by a subcommittee of the House Judiciary Committee although opposition was expressed on various grounds by legal groups. See, e.g., 100 Cong. Rec. 12,608 (Aug. 4, 1954), for the views of the Committee on Federal Legislation of the Ass'n of the Bar of the City of New York. The judicial-concurrence provision was added by the House Committee on the Judiciary, which also limited the operation of the bill to investigations and prosecutions of offenses involving the national security. H.R. Rep. No. 2606, 83d Cong. 2d Sess. 3–4 (1954). The bill was reported out on August 3, passed in this form by the House on the next day and approved by the Senate on August 11, 1954. 100 Cong. Rec. 12,602–11, 13,309–11 (Aug. 4 and 11, 1954).

12 Although the evidence is slight, the Committee on the Judiciary may have been relying on the Model State Witness Immunity Act, note 6 supra. Consult King, Immunity for Witnesses: An Inventory of Caveats, 40 A.B.A.J. 377, 381 n. 34 (1954). The Model Act includes judicial concurrence as an optional term in trial and grand jury proceedings. The Model Act does not provide means for immunizing legislative witnesses. Moreover, the commentary by
tion of whether the court's function is a proper one for the judiciary to perform.\textsuperscript{13}

I

The federal judicial power is limited under Article 3, §2 of the Constitution to cases or controversies.\textsuperscript{14} A case or controversy can be defined as a present dispute\textsuperscript{15} over legal rights\textsuperscript{16} between adverse parties\textsuperscript{17} who will be bound by the court's decision.\textsuperscript{18}

The factual situation contemplated by the Act is that of a congressional committee engaged in investigating security matters desiring to grant immunity to a witness who has pleaded the Fifth Amendment. There are possible justiciable matters inherent in this situation which fall within the traditional case or controversy rationale. Theoretically, at least, parties with potentially adverse interests may be present, since disputes may exist between the committee and the Attorney General, the committee and the witness, and the Attorney General and the witness. The Attorney General may object to a grant of immunity on various grounds. He may question the validity of the plea against self-incrimination.\textsuperscript{19} He may consider public disclosure injurious to the interests of national


\textsuperscript{14} U.S. Const. Art. 3, § 2, cl. 1. For much-cited formulations of what constitutes a case or controversy see Osborn v. Bank of the United States, 9 Wheat. (U.S.) 738, 819 (1824); Smith v. Adams, 130 U.S. 167, 173 (1889). While "judicial power," "cases" and "controversies" have sometimes been given separate definitions, common elements are present. See Muskrat v. United States, 219 U.S. 346, 356–57 (1911).


\textsuperscript{16} A declaration on rights as they stand must be sought. In re Summers, 325 U.S. 561, 567 (1945).

\textsuperscript{17} A "case" implies the existence of possible adverse parties whose claims are submitted to the court for adjudication. Muskrat v. United States, 219 U.S. 346, 357 (1911).

\textsuperscript{18} Gordon v. United States, 117 U.S. 697, 702 (1864).

\textsuperscript{19} This possibility is unlikely as the Attorney General and the witness are not in adverse positions, the Attorney General taking no part in the committee proceedings.
security and the investigative function of the Department of Justice.\textsuperscript{20} His plans for public prosecution may be undermined by the grant.\textsuperscript{21} The committee in applying to the court introduces the rival considerations which may have entered into its determination to seek immunity for the witness. It may consider the plea a valid one and wish the witness immunized because it values the information which it hopes will result from the compelled testimony. The committee may wish, however, to put the validity of the plea of the Fifth Amendment into issue.\textsuperscript{22} The witness, on the other hand, may want to raise objections to the grant on the ground that he is being unconstitutionally deprived of his privilege,\textsuperscript{23} or he may wish to contest the jurisdiction of the committee\textsuperscript{24} or the relevance of its questions to the purpose of its inquiry.\textsuperscript{25} Despite these possibilities, the matter presented to the court need not be the subject of any present dispute since all parties may favor a grant of immunity.

As to the finality of the order issued by the court the possibilities exist that it be conditionally or unconditionally binding on the interested parties. The committee may be required by the order both to question the witness and grant

\textsuperscript{20} This possibility should perhaps be emphasized inasmuch as the Compulsory Testimony Act relates solely to national security offenses; in this area considerations of secrecy and the protection of informational sources must weigh heavily.

\textsuperscript{21} Consult Brownell, op. cit. supra note 11, at 108–10. Attorney General Brownell was convinced that concurrence by the Attorney General in conferring immunity was necessary in order that the Department of Justice maintain its responsibility for the "proper administration of the Criminal law." Ibid., at 109. This is the traditional argument for vesting control of individual grants of immunity in the central law-enforcement agency.

\textsuperscript{22} See note 30 infra.

\textsuperscript{23} See note 30 infra.

\textsuperscript{24} Where the hearings are without a legislative purpose, the defendant cannot be charged with contempt for refusal to answer. The power of congressional investigation is not unlimited. Kilbourn v. Thompson, 103 U.S. 168 (1880). Consult McGeary, Congressional Investigations: Historical Development, 18 U. of Chi. L. Rev. 425, 428 et seq. (1951); Constitutional Limitations on the Un-American Activities Committee, 47 Col. L. Rev. 416, 423–28 (1947).


If the witness refuses to answer on the ground that Congress has exceeded its powers or that the inquiry is not pertinent, he construes the law at his peril. A good-faith error is no defense to fine and imprisonment for contempt. Eisler v. United States, 170 F. 2d 273, 280 (App. D.C., 1948); Townsend v. United States, 95 F. 2d 352, 361 (App. D.C., 1938). On the misdemeanor statute for contempt of Congress consult Hitz, Criminal Prosecution for Contempt of Congress, 14 Fed. Bar J. 139 (1954).

The witness is often "boxed in a paradox" by the requirement of legitimacy of the plea and easy possibility of its waiver. See, e.g., Rogers v. U.S., 340 U.S. 367, 373–75 (1951). The complexity of the privilege and the high risks involved may operate unfairly against witnesses. For proposals which would remedy this unfairness see Maslow, supra, and the Keating plan discussed in note 34 infra.
him immunity, or it may be required to grant immunity only if it proceeds with
the questions. An alternative possibility is that the committee may not be bound
to grant immunity even though it proceeds with the questioning. The court ac-
tion would then be merely permissive (an "approval") rather than mandatory
(an "order"). Since the grant may be conditioned upon further committee ac-
tion, the court order may not bind the Attorney General, that is, serve as a bar
to prosecution. The witness may or may not be automatically in contempt for
a refusal to answer after the issuance of the court order. Thus, it would seem that
the possibilities inherent in the situation include matters within the judicial
competence.

The Act itself requires judicial approval of every congressional immunity
grant without regard to whether there exists a dispute of any kind among the
interested parties. That there may exist a dispute does not detract from the
significance of this requirement. In addition, the Act does not in terms contem-
plate the witness as an adverse party; there is no provision for service of process
on the witness or that he be given a hearing before the court. Explicit provi-
sion is made for a hearing of the Attorney General. The committee, of course,
in making its application gains access to the court. Thus, the terms of the Act
contemplate the Attorney General and the committee as potential adverse
parties. But no provision delimits the subject matter of a dispute between these
parties.

The question of finality in the court order is left ambiguous by the language
of the Act. Under the terms of subsection (b) the committee grants immunity
after "approval" of the district court has been secured. Subsection (a) provides
that the court order "requiring [the witness] to testify or produce evidence" be
entered into the record before the witness is deprived of his privilege of silence.
The presence of these clauses and the absence of any language indicating that
the court order is binding upon the committee suggest strongly that the com-
mittee has discretion as to whether it will take advantage of an approval of the
immunity grant. A denial of judicial concurrence, on the other hand, would pre-
clude a grant. Although the language of subsection (b) describes such concur-
rence as an "order . . . requiring [the witness] to testify," since no provision is
made for jurisdiction over the witness it cannot be inferred from the Act that
his interests are concluded by the court action. By the terms of the Act the

26 See subsection (b) set forth in note 5 supra.
27 Ibid.
28 The use of "approval" of the congressional grant in subsection (b) as describing the
court's action, and that of "order . . . requiring said person to testify . . . " in subsection (a)
presents not the least of the act's ambiguities. The former suggests a non-adversary proceed-
ing, the latter a regular court function. See note 30 infra.
29 See note 10 supra.
30 In the absence of interested parties and without their having an opportunity to be heard,
a court would be without jurisdiction to make an adjudication affecting them. New Orleans
Waterworks Co. v. New Orleans, 164 U.S. 471, 480 (1896); Scott v. McNeal, 154 U.S. 34, 46
(1894).

The apparent lack of jurisdiction over the witness offers one of the most enigmatic aspects
only "finality" attributable to the court order would seem to be that inherent in vesting or denying in the committee a power to compel testimony by granting immunity.

The provisions of the Act, in summary, provide for a dispute between the committee and the Attorney General, but participation by the court is not conditioned upon its existence. The subject matter of such a dispute is not delimited and its determination by the court results in an approval or a denial of the committee's power to grant immunity. In other words, the court possesses an absolute veto power.

An examination of the available evidence of legislative intent tends to confirm this interpretation of the Compulsory Testimony Act. Although mention was made on the floor of the House that the procedure would allow for the determination of matters presently in dispute between the committee and the witness, there is nothing in the report of the House Judiciary Committee, the body responsible for the judicial-concurrence provision, indicating that the provisions of the Compulsory Testimony Act. It has been pointed out that "[i]t is doubtful that a witness has any legal right to be granted or denied immunity. Nor would he ordinarily be qualified to speak on the value, for legislative purposes, of the evidence requested by the committee and withheld by him under claim of privilege." Taylor, The Grand Inquest 296 (1955). The witness may, however, have other objections to the power of the committee to compel him to answer, placing in doubt the binding effect of a court order "requiring [the witness] to testify or produce evidence." If, on the other hand, the witness were allowed to appear to contest the committee's authority the result, as suggested by Taylor, would be anomalous in that a witness who pleads the privilege could challenge the committee's authority before risking a contempt prosecution, whereas this opportunity would not be present for a witness who did not invoke the privilege. Ibid., at 297.

Attorney General Brownell is reported to have a different conception of the effect of the court order: "Immunity, Mr. Brownell said, will be granted by a Federal District judge, after advice from the Attorney General, upon petition of a United States Attorney or [in the case of congressional witnesses] a representative of Congress. Immunity is to be accompanied by a court order to answer the questions. Failure to do so will expose the witness to a court contempt citation." N.Y. Times, p. 16, col. 5 (Sept. 14, 1954) (italics supplied).

The record here is scant. The House Judiciary Committee reported out the bill (rather drastically amended) on August 3, 1954. The measure was passed by the House on the next day with debate limited to forty minutes. 100 Cong. Rec. 12,602-11 (Aug. 4, 1954). The Senate approved the amended House version on August 11 after negligible consideration with only passing reference to the judicial-concurrence provision. 100 Cong. Rec. 13,309-11 (Aug. 11, 1954).

The following exchange on the floor of the House between Rep. Javits (R., N.Y.), a critic of the bill, and Rep. Walter (D., Pa.), a member of the committee, reveals that some members of Congress thought the court would review the power of the committee to compel testimony. The exchange also underlines the congressional confusion as to what was expected of the court:

JAVITS. Will the court pass upon the advisability or lack of inadvisability in fact of granting immunity?

WALTER. I am sure that it is intended that the matter be submitted to the court in order to pass in the first instance on the question of whether or not failure to answer a question would be grounds for contempt. That, of course, brings it very squarely within the purview of those decisions that hold that the question asked must be material.

JAVITS. I think this is the turning point of the bill. In my opinion as a lawyer, the court would only pass on the issue of the germaneness of the testimony to the legislative inquiry and the jurisdiction of the committee. The court would not I believe inquire into the advisability or lack of it in giving an immunity bath. Therefore, I believe, the opinion of the Associa-
procedure was considered a means for resolving disputes between the committee and the witness.\(^3\) Moreover, it is clear that the author of the House bill regarded the procedure as serving no such function.\(^4\)

There is no doubt, on the other hand, that those responsible for the judicial-concurrence provision contemplated the possibility of a dispute between the committee and the Attorney General.\(^5\) This consideration dominates the legislative history of the Act from Senator McCarran's introduction of Sen. 16 in January, 1953, to Senate approval of the amended House version of the bill in August, 1954.\(^6\) The key to an understanding of the purpose of the court's participation lies in the dilemma created by the reluctance of Congress, on the one
hand, to delegate the immunity power to the Attorney General and the strong congressional feeling, on the other hand, that the Attorney General must be given an impartial hearing and safeguards provided against misuse of the immunity power by Congress. The court emerged as the necessary impartial arbiter and ultimate safeguard against abuse. As such it would determine the advisability of granting immunity rather than decide a legal dispute. There is little in the legislative history which sheds light on the nature of the "finality" to be attributed to the court order beyond the absolute veto power over the grant for which the Act clearly provides.

A consideration of the legislative history of the Act confirms a careful reading of its provisions—the Act not only does not require but does not contemplate submission of a matter to the district court which constitutes a case or controversy within the strict meaning of Article 3, Section 2 of the Constitution.

II

Some special functions performed by federal constitutional courts have been or perhaps can be rationalized on the basis of "case" or "controversy" even though the immediate proceedings may not include all the elements required by the formula for justiciability set forth above. Such proceedings are generally ex parte. It has been held, for example, that a petition for naturalization provides a "case" within the meaning of Article 3, Section 2 even though there may be no present dispute and immediate adversary parties. The proceedings are litigious insofar as the government may oppose the grant and reserves the

The majority report of the House Committee on the Judiciary acknowledges that opposition to congressional immunity grants had stemmed largely from the possibility of abuse in procedural matters, i.e., free "immunity baths." "In regard to such matters, cognizance has been taken of the innate frailties of the human being—he be within or without Government—executive, legislative, or judicial—and sufficient procedure established to reduce the possibility for abuse to the minimum consonant with an effective operation of the statute." H.R. Rep. No. 2606, 83d Cong. 2d Sess. 6 (1954).

38 See note 32 supra.

The Attorney General apparently believes the court order will put the witness in contempt of court should he still refuse to answer. See note 30 supra. The majority report speaks in terms of "approval" as well as "order." H.R. Rep. No. 2606, 83d Cong. 2d Sess. 4, 8 (1954). Finally, there is this perplexing statement in the majority report: "In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill." Ibid., at 8 (italics supplied). The minority report of the Judiciary Committee plainly regards the immunity power as being lodged in Congress and its committees, "with the conditions precedent of Attorney General notification and judicial approval." Ibid., at 12 (italics supplied).


41 As, for example, in United States v. Bischof, 35 F. 2d 186 (S.D. N.Y., 1929).
rights of an adverse party to have the grant set aside for fraud or illegality in its procurement. The court in determining whether there has been compliance with the statutory requirements for naturalization decides a legal question. The grant of citizenship possesses finality subject only to the government's reservation of rights. Thus, although the proceedings are generally ex parte, they follow the case-or-controversy rationale to the extent that the government is at least potentially an adverse party, legal questions are to be determined, and the grant possesses finality except for the government's reserved rights.

The proceedings under the Compulsory Testimony Act are comparable to naturalization proceedings insofar as no present dispute is required to establish a basis for judicial participation. In addition, what is required of the court in each case is not so much an adjudication of rights as a creation of rights. However, legal criteria for a determination must be used in naturalization proceedings whereas in the approval of an immunity grant the presence of any legal matter would seem to be dependent upon the existence of a legal issue between the committee and the witness; yet the act has not provided for jurisdiction over the witness nor reserved his rights. Court approval of immunity therefore would possess not even the tentative conclusiveness of a certificate of citizenship.

Another judicial function which seems to lie outside the strict case-or-controversy category, the issuance of a search warrant, has not generally been rationalized on that basis. It has been suggested that the function conferred on the court under the Act may be comparable to that which the court assumes in the issuance of a warrant. The similarity between the constitutional safeguards against unreasonable search and seizure and the privilege against self-incrimination suggests that parallel judicial functions may be involved. Both privileges represent fundamental safeguards against an arbitrary power of investigation in government. The issuance of a warrant upon a showing of probable cause and the judicial compulsion under an immunity grant of testimony otherwise privileged both represent court supervision of what appears to be an official "invasion" of personal privilege. A critical examination will reveal, however, that the functions are similar only in the above superficial respects and that the

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44 In Maney v. United States, 278 U.S. 17, 22 (1928), the Supreme Court said that naturalization proceedings, though judicial, "are not for the usual purpose of vindicating an existing right but for the purpose of getting granted to an alien rights that do not yet exist." Compare the effect of an immunity grant, note 58 infra.

45 If it were provided that the witness might reserve his rights against the committee a further analogy, though tenuous, might be argued. The witness would then appear in the position of the government in naturalization proceedings. Such a proceeding would be absurd, however, for the witness' legal rights against the committee are such as to require immediate protection.

46 Consult Taylor, The Grand Inquest 298 (1955), for a brief but disapproving view of the suggestion.
deliberation and judicial action involved in the two cases differ significantly. The issuance of a warrant can be justified as a judicial function in terms of the case-or-controversy rationale. The complaint presented to the court by the affiant must set forth facts sufficient to support a reasonable belief that a legal infraction has been committed; the person served by the warrant and the government stand as potential adverse parties. The judicial nature of the function performed by the court in issuing the warrant is most exactly seen in terms of the criteria for determining whether a warrant shall issue. These criteria were shaped historically by the concept of reasonableness which is embodied in the Fourth Amendment by the requirement of "probable cause." Probable cause is a compounded question of law and fact, namely, whether there is evidence sufficient to support a reasonable belief of the existence of facts which constitute an offense against the law and that the property is in the place sought to be searched. The finding of probable cause amounts therefore to a legal conclusion. The function of finding probable cause can, however, be delegated because it represents no definite and final adjudication; in this respect it has been termed a quasi-judicial act and not judicial "in the proper sense." The warrant binds the person whose premises are to be searched, although he may appear in court to quash the warrant.

Moreover, the procurement of a warrant represents an initial step in the process of the enforcement of the criminal law, whether the warrant be for arrest or search. "It is a proceeding of a semicriminal nature, or rather ancillary or supplemental to a criminal action." The warrant asserts the jurisdiction of

48 Under Rule 41(b) of the Federal Rules of Criminal Procedure a warrant may be issued to search for and seize any property (1) stolen or embezzled in violation of the laws of the United States; or (2) designed or intended for use or which is or has been used as the means of committing a criminal offense; or (3) possessed, controlled, or intended for use or which is or has been used in violation of 18 U.S.C. § 957 (possession of property in aid of foreign government).

49 Notions of reasonableness in official searches and seizures are very ancient. Consult Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13–18 (1937). In England the principle that a search and seizure must be reasonable, involving a balancing of considerations of judicial administration and individual freedom, was gradually becoming an underlying concept of jurisprudence by the seventeenth century. Ibid., at 34.

50 Probable cause, if properly raised in a trial, is a question of mixed law and fact to be decided by the court and not by the jury. Steele v. United States, 267 U.S. 498, 505 (1925) (probable cause for search warrant); Simmons v. United States, 206 F. 2d 427, 429 (App. D.C., 1953) (probable cause for arrest without warrant).

51 Probable cause must be proven by competent legal testimony, just as in the case of a trial. Grau v. United States, 287 U.S. 124, 128 (1932).


54 As, e.g., in Dumbra v. United States, 268 U.S. 435 (1925).
55 United States v. Giovanetti, 6 Alaska 454, 460 (1921).
the court after the judicial power has been activated by the showing of probable cause.

A similar rationale does not justify the function of the court under the Compulsory Testimony Act as judicial or even quasi-judicial in character. An essential difference exists between the nature of the privileges secured by the Fourth and Fifth Amendments. The privilege against search and seizure is not absolute but secures only a partial immunity to the citizen; it is qualified by the concept of probable cause. The privilege against self-incrimination, on the other hand, is absolute; no degree of "probable cause" can compel a man to incriminate himself. Accordingly, privileged testimony can be compelled only when the possibility of criminal prosecution is removed. This difference between the privileges reveals the non-judicial character of the act of granting immunity. To confer immunity from prosecution is not to adjudicate existing rights as in the determination of probable cause but rather to substitute a new legal relationship between the government and the individual. Whereas the grant of immunity is a denial of the possibility of prosecution, the issuance of a warrant is an initial step in that direction.

III

It would seem, therefore, that the immunity procedure cannot be justified by analogy with some of the special functions which follow the case-or-controversy rationale and traditionally have been accepted by federal constitutional courts. Rather the function conferred on the judiciary under this Act contains elements which place the matter presented within certain categories historically refused by the federal courts. The non-adversary character of the proceeding and its lack of conclusiveness on the interests of the parties suggest that what is required of the court is really an advisory opinion. Strictly defined, an advisory opinion is an ex parte proceeding in which one branch of the government seeks the opinion of the judiciary on pending legislation or other matters. The lack of a real and

By this it is meant that the privilege, subject to waiver, is absolute within one jurisdiction. See note 2 supra.

See note 2 supra.

Privilege signifies the non-compellability to speak about the offense. Immunity establishes a non-liability for the offense itself, removing any reason for the privilege. Under privilege, the offender's guilt continues; with immunity it ceases. Consult 8 Wigmore § 2281, at 469 (3d ed., 1940). For a court to create rights, i.e., "legislate," rather than adjudicate is perhaps not wholly novel. See note 44 supra.

The grant of immunity, of course, may be intimately related to law enforcement and thus to prosecution—but not of the witness himself. By further contrast, however, it is to be remembered that the theory of criminal proceedings in the United States has always been accusatory; as in a petition for a search warrant, and not inquisitorial. See, e.g., United States v. James, 60 Fed. 257, 259 (N.D. Ill., 1894).

Consult Hall, Cases on Constitutional Law 44–45 n. (1926 ed. with supp.); Declaratory Judgments in the Federal Courts, 49 Harv. L. Rev. 1351, 1352 n. 6 (1936). In Anglo-American law the term "advisory opinion" relates traditionally to legal advice on pending legislation, a present practice in those states whose constitutions allow advisory opinions. Consult Ad-
substantial controversy involving parties with adverse legal interests, and the subjection of the court determination to review by a non-judicial body are well-recognized criteria indicating the presence of an advisory opinion.

The judicial concurrence, moreover, possesses a further characteristic which differentiates it from the usual advisory opinion and renders it even more subject to attack as not a proper function for the judiciary. An advisory opinion usually involves legal, though hypothetical, questions. The matter presented to the court under the Act would seem to constitute what has been termed, without precise definition, a "political question." Lack of satisfactory criteria for judicial determination, in effect a policy decision which under our tradition of government would more appropriately be made by one of the other branches, seems to be of the essence of a political question. Tested by these standards the question of whether immunity should be granted is one which the political

61 The plaintiff must have a substantial legal interest in the question. New Jersey v. Sargent, 269 U.S. 328 (1926); Massachusetts v. Mellon, 262 U.S. 447 (1923). The proceeding must not be an attempt to secure an abstract determination by the court of the validity of a statute. Texas v. Interstate Commerce Comm'n, 258 U.S. 158 (1922); Muskrat v. United States, 219 U.S. 346 (1911). Although these cases were not commenced by another branch of government, they fall within that category now termed "advisory opinions."

62 Hayburn's Case, 2 Dall. (U.S.) 409, 411 (1792); Gordon v. United States, 117 U.S. 697 (1886); United States v. Ferreira, 13 Haw. (U.S.) 40 (1851). In the Gordon case, supra, at 704, the court had been authorized to certify its opinion to the Secretary of the Treasury regarding certain claims whose payment depended upon subsequent congressional appropriation. Chief Justice Taney stated: "This Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

63 Though directed to the traditional advisory opinion the following statement by a present Supreme Court Justice is peculiarly appropriate to the Compulsory Testimony Act: "To submit legislative proposals to the judicial judgment, instead of the deliberate decision of the legislature, is to submit legislative doubts instead of legislative convictions. The whole focus of the judicial vision becomes thereby altered." Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005 (1924).

64 See Coleman v. Miller, 307 U.S. 433, 454 (1939). For a provocative discussion of the "political question" consult the following: Finkelnstein, Judicial Self-Limitation, 37 Harv. L. Rev. 338 (1924); Weston, Political Questions, 38 Harv. L. Rev. 296 (1925); Finkelnstein, Further Notes on Judicial Self-Limitation, 39 Harv. L. Rev. 221 (1925). It is Finkelnstein's view that the boundaries of "political question" are marked off by a process of judicial self-limitation, Weston's that orthodox constitutional interpretation based on the separation of powers is involved. Whichever view one might choose to adopt, it is clear that the Supreme Court has given no clear answer to the question of the scope of the application of the "political question" standard.

65 See note 65 supra. Some examples of political questions are the following: Ware v. Hylton, 3 Dall. (U.S.) 199, 260 (1796) (foreign affairs); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (constitutional guaranty of republican form of government in the states); Chicago & S. Air Lines v. Waterman Corp., 333 U.S. 103 (1948) (discretionary acts of an executive officer); Japanese Immigrant Case, 189 U.S. 86 (1903) (policies concerning the admission and deportation of aliens); Barry v. United States, 279 U.S. 597 (1929) (the qualifications of election of members of the legislative body).
departments should decide. It involves a difficult policy decision which weighs the public benefits supposedly to result from the information sought against the secrecy requirements of the law-enforcement branch and the desirability of criminal prosecution. Congress and the executive branch in viewing the question in the light of their respective purposes may well differ on the advisability of granting immunity. The Act by vesting a veto power in the court would compel it not only to determine a "political question" but to act as arbiter between representatives of the other two branches of government.

Thus another objection to the proceeding is its defiance of the separation-of-powers principle. Not only is this principle violated by involving the judiciary in policy disputes between the other branches; but even were the committee alone represented, the court would appear to be acting in aid of the proceedings of another branch without the justification that it was also performing a judicial function. The federal courts have refused to act in a mere ancillary capacity. Because the Act allows the judiciary to veto a congressional grant of immunity the court's function is not only ancillary but may also be considered supervisory over the activities of a legislative committee. There is little doubt that the federal courts should refuse to accept such a supervisory function.

6 Where judicial concurrence to an immunity grant is required in trial and grand jury proceedings, the court participation may be justified as an incident to a judicial function. At any rate the question of judicial propriety has apparently not been challenged. See note 6 supra. For jurisdiction over grand jury proceedings see In re Pacific Ry. Comm'n, 32 Fed. 241, 257 n. (C.C. Cal., 1887); opinion of Chief Justice Marshall on circuit in United States v. Hill, 1 Brock. (Fed.) 156 (C.C. Va., 1809); Clark, Criminal Procedure 127-37 (2d ed., 1918).

68 When the Interstate Commerce Comm'n and Pacific Railway Comm'n were created by Congress in 1887, it was provided that the testimonial powers of those bodies could be enforced by federal court order. In that year a circuit court declared the act unconstitutional because Congress could not make the courts its instruments in conducting mere legislative investigations. In re Pacific Railway Comm'n, 32 Fed. 241 (C.C. Cal., 1887). Justice Field said in that case: "If it was expected that the court, when its aid is invoked, should examine the subject of the inquiries to see their character, so as to be able to determine the propriety and pertinency of the questions, and the propriety and necessity of producing the books, papers, and documents asked for before the commission, then it would be called upon to exercise advisory functions in an administrative or political proceeding, or to exercise judicial power. If the former, they cannot be vested in the court; if the latter, the power can only be exercised in the cases or controversies enumerated in the constitution, or in cases of habeas corpus." Ibid., at 257-58. In Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894), the statutory enforcement procedure was upheld, thus overruling In re Pacific Railway Comm'n. The court based its decision, however, on an interpretation of the statute whereby the courts were to review the Commission's authority to compel evidence. "Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness." Ibid., at 476. Thus, a justiciable controversy was present; the proceeding was "not merely ancillary and advisory." Ibid., at 487. It was the procedure approved in the Brimson case which H.R. 4975 (see note 34 supra) was designed to provide for the benefit of congressional committees. On this general subject consult the excellent article by Lilienthal, The Power of Governmental Agencies To Compel Testimony, 39 Harv. L. Rev. 694 (1926).

69 Because of the separation-of-powers principle federal courts have refused to enjoin the activities of legally constituted congressional committees. Fischler et al. v. McCarthy, 117 F.
IV

There is a final constitutional objection to the Compulsory Testimony Act. Because of the difficulty in interpreting the court’s function, the Act can be attacked on the ground of vagueness. Though the considerable ambiguities of the Act may allow interpretations of the statute varying from that herein presented it would seem that any interpretation which accords the judiciary a veto of congressional immunity grants would involve constitutional difficulties. Were the function here conferred on district courts delegated to tribunals other than those deriving their sole powers from Article 3, Section 2, it is possible that the procedure would present no constitutional objections. The high courts of the District of Columbia, for example, might in their capacity as legislative courts be delegated the power to immunize. In this manner the practical ob-

Supp. 643 (S.D. N.Y., 1954) (injunction will not lie to enjoin Senate committee chairman from forcing plaintiffs to produce documents in their possession with respect to loyalty board proceedings at army installations); Nelson v. United States, 208 F. 2d 505 (App. D.C., 1953) (court cannot enjoin a congressional committee from making an unconstitutional search and seizure); Hearst v. Black, 87 F. 2d 68 (App. D.C., 1936) (court cannot restrain Senate committee from making use of contents of unlawfully obtained private telegraph messages). State courts, however, have used injunctive process to review the investigative powers of legislatures. See cases cited in Taylor, Judicial Review of Legislative Investigations, 29 Notre Dame Lawyer 242, 281 n. 156 (1954).

A statute so uncertain that its meaning cannot be determined by known rules of construction is inoperative and void. E.g., In re Di Torio, 8 F. 2d 279 (N.D. Ill., 1925). Where penalties may be assessed the language must be particularly explicit in order that those subject to penalties may know what conduct will render them liable. See Champlin Refining Co. v. Corporation Comm’n of Oklahoma, 286 U.S. 210, 242-43 (1932). The following remarks by Rep. Celler (D., N.Y.) are perhaps relevant: “It has been said—and these are not my words—that the [immunity] bill is so loosely drawn that it rattles. It bristles with constitutional snarls and questions. It is full of befuddlement, puzzlement, and devilment.” 100 Cong. Rec. 12,605 (Aug. 4, 1954).

If the statute allowed for submission to the district court of matters in dispute between the committee and the witness, and the committee were to petition the court for a ruling on the legitimacy of a plea against self-incrimination, it might be contended that the court could incidentally approve an immunity grant were the plea found to be a valid use of the Fifth Amendment. Were committee counsel to be armed with an application for an immunity grant should the plea be upheld, and were the grant to issue from the court in the form of a binding decree, the proceedings might appear less objectionable. It may be argued that the court, though still deciding a “political question,” would now be doing so incidentally to the performance of a judicial function. Actually, of course, the controversy would have been resolved and the immunity grant would not be incidental to a judicial function, as in the conduct of trial proceedings, but ancillary to the congressional investigation. The difficulty is not easily avoided.

Regulatory agencies have long possessed the power to immunize. See notes 2 and 6 supra.

It has long been held that Congress may use the District of Columbia courts in exercise of its plenary powers of government over the District under Art. 1, § 8, cl. 17. See cases cited in Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 899-903 (1930). There seems to be no question but that in this capacity these courts may exercise legislative and administrative functions on matters with national as distinguished from District purport. See, e.g., Postum
jectives of the Compulsory Testimony Act could be secured. Assuming that a congressional immunity power is necessary, there is merit in a scheme which would guard against abuses of the power while affording both Congress and the Attorney General an impartial hearing on the advisability of its exercise in each instance.

It is perhaps unfortunate, however, that before Congress felt itself compelled to resort to immunity legislation it did not provide a means for immediate access to the courts on questions actually in dispute between its committees and witnesses. It might be discovered that such a procedure would reduce the need for a congressional immunity power and eliminate the necessity for a delegation to the judiciary of a function which would compromise seriously its independence.

Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 698-99 (1927). A more difficult question, perhaps, is that presented were the Supreme Court of the District of Columbia to be met with a committee application for an approval of immunity under the terms of this Act. Under the doctrine of "dual jurisdiction" laid down in O'Donoghue v. United States, 289 U.S. 516, 543-48 (1933), the District of Columbia Supreme Court and Court of Appeals are regarded as constitutional courts under Art. 3, § 2 as well as legislative courts. See also National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-92 (1949). The question is whether the Supreme Court of the District may properly assume its legislative court jurisdiction although the function it is exercising was conferred on all federal district courts.

It is not improbable that such a procedural remedy would be upheld. Cf. Attorney General v. Brissenden, 271 Mass. 172 (1930). The New York Civil Practice Act (Gilbert-Bliss, 1942) § 406 permits legislative committees to bring witnesses before the court and seek an order, violation of which is punishable as contempt of court, to compel testimony. Court orders have been used in support of administrative proceedings even though unrelated to law enforcement or adjudication. Consult Davis, The Administrative Power of Investigation, 56 Yale L.J. 1111, 1120-26, 1153 (1947). See note 8 supra. It was decided in McGrain v. Daugherty, 273 U.S. 135 (1927), that Congress could enforce its subpoenas issued in the course of legislative investigations.

See note 34 supra. That the adoption of H.R. 4975 might have materially diminished the Fifth Amendment problems of Congress and put such teeth into its contempt powers as to obviate the need for legislative immunity legislation was recognized by Rep. Keating. Keating, The Investigating Powers of Congress, 14 Fed. Bar J. 171, 180 (1954); see also Keating, Proposed Remedial Legislation: Protection for Witnesses in Congressional Investigations, 29 Notre Dame Lawyer 212, 223-24 (1954). This was also recognized by both friends and critics of the immunity bill. See King, op. cit. supra note 12, at 380; compare remarks of Rep. Javits (R., N.Y.) on floor of House, 100 Cong. Rec. 12,609 (Aug. 4, 1954). It is obvious that a ruling on the propriety of the Fifth Amendment plea is logically precedent to a grant of immunity. But H.R. 4975, and not the immunity bill, was intended to provide for this precedence. See note 68 supra for legislation similar to that advocated by Keating but relating to the enforcement of the testimonial powers of regulatory commissions. H.R. 4975 was reintroduced in the 84th Congress by Rep. Keating as H.R. 780, 101 Cong. Rec. 119 (Jan. 6, 1955).

It was reportedly proposed on November 17, 1954, that the House Un-American Activities Committee activate the Compulsory Testimony Act in proceedings before it. Committee lawyers were ordered "to lay the groundwork for use of the new statute." New York Times, p. 38, col. 5 (Nov. 18, 1954). On February 1, 1955, the first court order under the Act was issued in connection with grand jury proceedings in New York. N.Y. Times, p. 1, col. 7 (Feb. 2, 1955).