High Court Widens Power To Make Witnesses Talk

NYTimes MAY 23 1972

Special to The New York Times

WASHINGTON, May 22—The Supreme Court ruled 5 to 2 today that witnesses can be compelled to testify before grand juries and other governmental panels, even though they may later be convicted on the basis of other evidence for committing the crimes they are forced to discuss.

The Court held that to force witnesses to testify under the threat of imprisonment for contempt did not violate the Fifth Amendment's guarantee against compulsory self-incrimination, as long as the prosecution was barred from using the compelled testimony and any leads developed from it against the witnesses.

Thus the Supreme Court, with three Justices placed on the Court by President Nixon, voting solidly for the prosecution side, resolved a long-standing constitutional issue by broadening prosecutors' power to force recalcitrant witnesses to talk.

Brennan Removes Self

The fourth Nixon nominee on the Court, William H. Rehnquist, did not take part because he had been scheduled to argue the prosecutors' view for the Justice Department before he moved from the post of Assistant Attorney General to the Supreme Court.

Justice William J. Brennan Jr. also disqualified himself, apparently because his son, William Jr., formerly served as

Continued on Page 28, Column 4

Supreme Court Says Witnesses Must Testify Despite Later Risk

Continued From Page 1, Col. 2

an antio-rganized crime lawyer in New Jersey. One of the two cases decided today involved a major gambling figure in New Jersey, Joseph Zicarelli.

The two dissenters were William O. Douglas and Thurgood Marshall, liberal holdovers from the Earl Warren Court.

Theirisolationdemo nstrated how the cohesion of Mr. Nixon's nominees, Chief Justice Warren E. Burger and Justices Harry A. Blackmun and Lewis F. Powell Jr., has enhanced the prospect that conservative views will dominate the present Supreme Court on criminal issues. Today, they were joined by two Justices who frequently dissented against the Warren Court's liberal criminal decisions, Byron R. White and Potter Stewart.

In the two opinions written by Justice Powell, the Court held that a witness's privilege against compulsory self-incrimination is satisfied if his testimony cannot be used against him in any way, because he is left in the same position as if he were permitted to stand on the constitutional privilege and remain mute.

Justice Powell ruled that, if a witness was later prosecuted for crimes related to his testimony, the prosecution must prove "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

Since 1892, when the Supreme Court in Counselman v. Hitchcock struck down a Federal immunity statute that merely ruled out the use of compelled testimony, Congress and most state legislatures have favored laws that granted "transactional" immunityabsolute immunity against prosecution for any offense growing out of the transaction that the witness has been forced to talk about.

But in a 1964 decision the Supreme Court hinted that full "transactional" immunity might not be necessary. With the Nixon ' Administration's urging it, Congress, in the Organized Crime .Control Act of 1970, narrowed its immunity law to prohibit only the use of the compelled testimony and its fruits, and a number of states followed its lead. Now about 24 states employ similar "use" immunity laws.

Today the Supreme Court upheld the Federal provision and a similar New Jersey law. Justice Powell said this was not inconsistent with the Counselman v. Hitchcock decision, because the immunity law it struck down did not prohibit the use of evidence obtained from leads furnished by the reluctant witness.

This distinction was criticized as illusory by the dissenters, who asserted that, as a practical matter, witnesses who were subsequently prosecuted had no way of proving that the state used their compelled testimony to make out its case.

Zicarelli, who was sentenced to jail indefinitely until he agreed to testify before the New Jersey State Commission of Investigation, will not be immediately affected by today's decision because he is serving a subsequent sentence on other charges.

Andrew F. Phelan, executive director of the commission, argued before the High Court that if every state and the Federal Government were forced to give "transactional" immunity before forcing any witness to talk, one prosecutor could give a crime syndicate figure an "immunity bath" by forcing him to testify, when another jurisdiction might be preparing to prosecute him on independent evidence.

George F. Kugler Jr., New Jersey's Attorney General, also argued for the state. Solicitor General Erwin N. Griswold Jr. argued for the United States. Michael A. Querques of Orange, N.J., argued for Zicarelli.

Hugh R. Manes of Los Angeles represented Charles J. Kastigar and Michael G. Stewart, draft-age men who refused to tell a grand jury about a dentist suspected of helping them and others evade the draft by rendering unnecessary "dentalservices."