BANKRUPT'S IMMUNITY FROM THE USE OR DERIVATIVE USE OF HIS BANKRUPTCY TESTIMONY IN A SUBSEQUENT CRIMINAL PROCEEDING

A person filing for bankruptcy who testifies during certain hearings of the bankruptcy proceedings is provided an immunity from the use or derivative use of that testimony in later criminal proceedings. Section 7a(10) of the Bankruptcy Act[1] provides that "no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge. . . ."[2]

This Note will attempt to analyze section 7a(10) and a bankrupt's immunity thereunder from the perspectives of (1) historical background, (2) constitutionality, (3) scope of application, and (4) sufficiency.

I. Background

The power of the Government to compel persons to testify in court is firmly established.[3] However, this power to compel testimony is not absolute,[4] the most important exception being the fifth amendment privilege against compulsory self-incrimination.[5] Immunity statutes have consequently been enacted enabling the Government to compel self-incriminating testimony by first granting an immunity to the testifier. The immunity statutes "seek a rational accommodation between the imperatives of the privilege and the legitimate demands of the government to compel citizens to testify."[6] The existence of the immunity in the Bankruptcy Act reflects the importance of compelled testimony in a proceeding that is of such a character that the only person capable of giving meaningful testimony is often the bankrupt.[7] It also encourages the bankrupt or its corporate officers to make full disclosure of the facts so that the rights of creditors can be protected.[8]

The bankruptcy testimonial immunity has historically been a use immunity as compared to a transactional immunity.[9] A "transactional" immunity affords

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1. 11 U.S.C. § 25(a)(10) (1970).
2. *Id.*
3. *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956). *See also* 8 J. Wigmore, Evidence in Trials at Common Law § 2190 (McNaughton rev. 1961) [hereinafter cited as Wigmore].
4. *See, e.g.*, Blair v. United States, 250 U.S. 273 (1919). *See also* Wigmore, *supra* note 3, §§ 2192, 2197.
5. U.S. Const. amend. V.
6. Kastigar v. United States, 406 U.S. 441, 446 (1972).
7. Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 94 (1964).
8. 1A W. Collier, Bankruptcy § 7.21, at 1016.1 (14th ed. 1940).
9. Burrell v. Montana, 194 U.S. 572, 577 (1904); *see* Bankruptcy Act of July 1, 1898, ch. 3, § 7, 30 Stat. 548.

absolute immunity against future prosecution for the offense to which the question relates, while a "use" immunity only prohibits the use of the testimony as evidence in a later criminal proceeding.[10] The first case to consider a constitutional challenge to an immunity statute was *Counselman v. Hitchcock*,[11] challenging the Immunity Act of 1868 which provided that "[n]o . . . evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States."[12] This immunity was interpreted by the Supreme Court to be a use immunity, and it was held that it did not protect the witness to the same extent that a claim of the fifth amendment privilege would protect him. The Court stated: "We are 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 conferred by the Constitution of the United States."[13]

The Compulsory Testimony Act of 1893 was drafted to meet the broad language in *Counselman* and provided that "[n]o 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, or produce evidence, documentary or otherwise."[14] The transactional immunity provided by this Act became the basic form for the numerous federal immunity statutes enacted subsequent to the *Counselman* decision with one exception.[15] That exception was the immunity provision first enacted in the Bankruptcy Act of July 1, 1898, which stated that "no testimony given by [the bankrupt] shall be offered in evidence against him in any criminal proceeding."[16]

Burrell v. Montana,[17] interpreting the first Bankruptcy Act, affirmed that the immunity was not transactional: "It does not say that he shall be exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him."[18] The bankruptcy immunity prescribed a rule of competency of evidence, affording the bankrupt an immunity only from the use of evidence directly derived from his bankruptcy testimony in a later criminal proceeding.

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10. Kastigar v. United States, 406 U.S. 441, 449-50 (1972).
11. 142 U.S. 547 (1892).
12. Immunity Act of 1868, ch. 13, § 1, 15 Stat. 37.
13. Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892).
14. Compulsory Testimony Act of 1893, ch. 83, § 46, 27 Stat. 444.
15. Piccirillo v. New York, 400 U.S. 548 (1971).
Ullmann's assertion that transactional immunity has become part of our "constitutional fabric" finds support in the action of Congress in the 78 years since *Counselman* first announced the standard. Congress has written more than 40 immunity provisions into various federal statutes during that time, and with one minor and unexplained exception in 1898 and two exceptions in 1970, every provision has provided for transactional immunity.
Id. at 571. *See also* WIGMORE, *supra* note 3, § 2281 n.11.
16. Bankruptcy Act of July 1, 1898, ch. 3, § 7a(9), 30 Stat. 548. "Professor Wigmore has speculated that the drafters of this provision were hostile to the Bankruptcy Act and purposely drafted an imperfect immunity. . . ." Piccirillo v. New York, 400 U.S. 548, 571 n.11 (1971). *See also* WIGMORE, *supra* note 3, § 2283.
17. 194 U.S. 572 (1904).
18. Burrell v. Montana, 194 U.S. 572, 578 (1904).

The Government could still make use of the bankrupt's testimony to obtain indirect evidence such as investigatory leads and names of witnesses. The use immunity failed to protect a witness from future prosecution "based on knowledge and sources of information obtained from the compelled testimony."[19]

In 1970 the Organized Crime Control Act was enacted.[20] This statutory scheme included an addition to the criminal code in the form of specific provisions setting forth a general immunity of witnesses.[21] In order to conform other immunity statutes to this new statute, various other provisions were amended, including the immunity provision of the Bankruptcy Act.[22] As a result of that amendment, the bankrupt is now entitled to both use and derivative use immunity as to any statutorily compelled testimony. The derivative use immunity prohibits the indirect use of the testimony to obtain investigatory leads or names of witnesses. This sweeping proscription of any use, be it direct or indirect, of the compelled testimony requires the Government to use only evidence from legitimate independent sources in its criminal prosecutions.[23]

II. Constitutionality

The principle constitutional issue relating to statutory immunities is whether the immunity is adequate to supplant the federal constitutional privilege against self-incrimination. The Supreme Court has consistently rejected the view that a grant of immunity can never be an adequate substitute for a person's fifth amendment right to refuse to testify against himself.[24] Instead, the Court has emphasized that in order for a grant of immunity to be an adequate substitute, the scope of the immunity must be coextensive, and the protection afforded must be commensurate, with that of the fifth amendment privilege against self-incrimination.[25]

The Court has ruled on the adequacy of each of the three types of immunities: "transactional," "use" and "derivative use." Transactional immunity from criminal prosecution for, or on account of, any transaction, matter, or thing con-

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19. Kastigar v. United States, 406 U.S. 441, 454 (1972).
20. Organized Crime Control Act, 18 U.S.C. §§ 6001-05 (1970).
21. *Id.* § 6002. "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." *Id.*
22. Act of Oct. 15, 1970, Pub. L. No. 91-452, § 207, 84 Stat. 929, *amending* 11 U.S.C. § 25(a)(10) (1956) (codified at 11 U.S.C. § 25(a)(10) (1970)).
23. Kastigar v. United States, 406 U.S. 441, 460 (1972).
24. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Ullmann v. United States, 350 U.S. 422 (1956); Glickstein v. United States, 222 U.S. 139 (1911); Hale v. Henkel, 201 U.S. 43 (1906), *disapproved on other grounds*, Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).
25. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Stevens v. Marks, 383 U.S. 234 (1966); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956); Shapiro v. United States, 335 U.S. 1 (1948); Heike v. United States, 227 U.S. 131 (1913); Counselman v. Hitchcock, 142 U.S. 547 (1892), *disapproved on other grounds*, Kastigar v. United States, 406 U.S. 441 (1972).

cerning which a witness testifies, has consistently been upheld by the Supreme Court as constitutionally adequate to justify compulsion of testimony.[26] Moreover, the immunity has been held adequate even though the witness might be subjected to a criminal proceeding at which he would have the burden of pleading and proving that the grant of immunity precluded such a prosecution.[27]

The use immunity, on the other hand, has been declared by the Supreme Court to be constitutionally inadequate to justify compulsion of testimony.[28] It is inadequate because even if a witness' compelled testimony will be inadmissible at a subsequent criminal proceeding against him, this will not prevent the prosecuting authorities from making derivative use of the testimony to obtain investigatory leads and to search out other evidence against him.[29] Because the immunity granted by the old version of section 7a(10) was not a complete immunity, those protected by it remained free to claim their fifth amendment privilege.[30] However, if a person chose not to "stand on the fifth," he could claim only as much protection from use of the testimony adduced as the statute itself granted:

> Absent some affirmative granting of immunity by the person taking the testimony, the witness faced two alternatives under the older version of the statute; he could choose to testify freely and then later claim whatever protection the statute afforded; or he could refuse to testify on the grounds that the answers sought might be incriminating.[31]

Those who failed to take the fifth amendment before the effective date of the 1970 amendment were entitled only to immunity from the direct use of their testimony in a subsequent criminal proceeding.

It is important to distinguish between the constitutional adequacy of the immunity and the constitutionality of immunity statutes. The decisions do not say that the bankruptcy provision must be read as granting complete immunity to be constitutional. Rather, they suggest that the constitutional privilege must remain available unless a statutory immunity is provided which is as broad as the privilege. A statute is rendered unconstitutional when it forces an individual to choose between answering or being punished for invoking the self-incrimination privilege, without at the same time granting a complete immunity.[32] The rule was stated as follows: "A witness has, we think, a constitutional

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26. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Ullmann v. United States, 350 U.S. 422 (1956); Smith v. United States, 337 U.S. 137 (1949); United States v. Murdock, 284 U.S. 141 (1931).
27. *See, e.g.*, Heike v. United States, 217 U.S. 423 (1910); Hale v. Henkel, 201 U.S. 43 (1906); Brown v. Walker, 161 U.S. 591 (1896).
28. *See, e.g.*, McCarthy v. Arndstein, 266 U.S. 34 (1924); Arndstein v. McCarthy, 254 U.S. 71 (1920); Counselman v. Hitchcock, 142 U.S. 547 (1892).
29. Arndstein v. McCarthy, 254 U.S. 71, 73 (1920).
30. *See, e.g.*, McCarthy v. Arndstein, 266 U.S. 34 (1924); United States v. Goodwin, 470 F.2d 893 (5th Cir. 1973); United States v. Filiberti, 366 F. Supp. 1062 (D. Conn. 1973).
31. United States v. Goodwin, 470 F.2d 893, 904 (5th Cir. 1973).
32. United States v. Lawson, 255 F. Supp. 261, 265 (D. Minn. 1966).

right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him."[33] Although the bankruptcy immunity before 1970 was a use immunity and therefore not as broad as the constitutional privilege, no burdensome choice was placed upon the person required to testify as the constitutional privilege against self-incrimination could still be invoked.[34]

In *Kastigar v. United States*,[35] the Supreme Court, disapproving contrary dicta contained in various earlier decisions,[36] held that a statutory grant of use and derivative use immunity was constitutionally adequate. The use and derivative use immunity was held to be coextensive with the scope of the self-incrimination privilege and therefore sufficient to compel testimony over a claim of the privilege. Since the sole concern of the privilege was to afford protection against being forced to give testimony leading to the infliction of penalties affixed to criminal acts, direct and indirect use immunity which prohibited the prosecutorial authorities from using the compelled testimony in any respect insured that the testimony could not lead to the infliction of criminal penalties. Although the use and derivative use immunity was less broad than the transactional immunity, the latter, the Supreme Court said, actually afforded a witness considerably broader protection than did the fifth amendment privilege, and therefore was not constitutionally required.[37]

Kastigar dealt with the immunity granted by the Organized Crime Control Act.[38] Arguments were made, particularly in *Goldberg v. Weiner*,[39] that the immunity granted by section 7a(10) of the Bankruptcy Act was not as broad as that granted by the Organized Crime Control Act. The basis for one argument was that while the Organized Crime Control Act barred use of the compelled testimony in a "criminal case," section 7a(10) of the Bankruptcy Act used the term "criminal proceeding."[40] The *Goldberg* court rejected this argument, finding no significance in this difference. The court emphasized the legislative history indicating that the language used in section 7a(10) was intended to grant immunity in conformity with the immunity provided in section 6002 of the Organized Crime Control Act.[41]

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33. Stevens v. Marks, 383 U.S. 234, 246 (1966).
34. Arndstein v. McCarthy, 254 U.S. 71, 72 (1920).
35. 406 U.S. 441 (1972).
36. *E.g.*, McCarthy v. Arndstein, 266 U.S. 34 (1924); Hale v. Henkel, 201 U.S. 43 (1906); Counselman v. Hitchcock, 142 U.S. 547 (1892).
37. Kastigar v. United States, 406 U.S. 441, 454 (1972).
38. 18 U.S.C. § 6002 (1970).
39. 480 F.2d 1067 (9th Cir. 1973).
40. The Organized Crime Control Act, 18 U.S.C. § 6002 (1970) states, ". . . no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . ." The Bankruptcy Act § 7a(10), 11 U.S.C. § 25(a)(10) (1970) states, ". . . no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding. . . ."
41. *See* H.R. REP. No. 91-1188, 91st Cong., 2d Sess. § 14 (1970).

Another argument centered on the closing clause of section 7a(10), which excludes from the immunity "such testimony as may be given by him in the hearing upon objections to his discharge."[42] This clause is not found in section 6002 of the Organized Crime Control Act. The argument was made that since the hearing on objections to discharge was not a "criminal proceeding," use at that hearing could be made of the bankrupt's compelled testimony given at prior hearings of the bankruptcy proceedings. Such prior testimony, if again given at the hearing on objections, could then be excepted from the immunity granted by section 7a(10) and used in a later criminal proceeding. This argument was also rejected in view of the purpose of the statutory scheme which dictated that the testimony given in the hearing upon objections "would not encompass a transcript of a bankrupt's testimony given at a different hearing at which he had been compelled to testify under a statutory promise of immunity."[43]

It was further argued that the immunity provided in section 7a(10) was limited to answers to questions that are within the scope of examination authorized by section 7 of the Bankruptcy Act. Since testimony erroneously compelled outside the proper scope of the examination could be used against the bankrupt in subsequent criminal proceedings, the argument was made that the bankruptcy immunity was not as broad as that provided in the Organized Crime Control Act and therefore was not coextensive with the privilege against self-incrimination.[44] This argument was also rejected. "The statute provides that 'no testimony' given by the bankrupt shall be used in subsequent criminal proceedings, not merely 'relevant' testimony, or only testimony within the proper scope of examination authorized by the statute."[45]

Even if the post-1970 bankruptcy immunity is coextensive with the fifth amendment privilege, it was argued by appellant in *Goldberg* that Congress intended to permit the bankrupt to retain the options of claiming his privilege and refusing to testify. Reliance was placed on

> . . .the presence in 18 U.S.C. § 6002 and absence from section 7a(10) of language stating that the witness may not refuse to testify on the basis of his privilege. [Appellant] also points out that Congress imposed strict conditions upon compelling testimony and granting immunity under 18 U.S.C. § 6002 (*see* 18 U.S.C. § 6003), and suggests that it is unlikely that Congress intended to abrogate the privilege without these safeguards in the bankruptcy context.[46]

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42. Bankruptcy Act § 7a(10), 11 U.S.C. § 25(a)(10) (1970).
43. Goldberg v. Weiner, 480 F.2d 1067, 1070 (9th Cir. 1973).
44. *Id.* Section 7a(10) of the Bankruptcy Act authorizes
> . . . an examination [of the bankrupt] concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge.

11 U.S.C. § 25(a)(10) (1970).
45. Goldberg v. Weiner, 480 F.2d 1067, 1070 (9th Cir. 1973).
46. *Id.* at 1071. The Organized Crime Control Act, 18 U.S.C. § 6002 (1970) pro-

In response, the *Goldberg* court pointed to other provisions of the Bankruptcy Act which it said "demonstrated that Congress intended to require the bankrupt to testify to the extent that he could be legally required to do so."[47] Consequently, since the effective date of the 1970 amendment, the bankrupt is under compulsion to testify and does not have the option of claiming his fifth amendment privilege, as the use and derivative use immunity is coextensive with the privilege against self-incrimination.[48]

III. Scope of Application

A. *To Whom Does the Immunity Apply*

The protection afforded under section 7a(10) applies only to the bankrupt himself.[49] Consequently, it was held in *White v. United States*[50] that the immunity did not extend to protect the attorney for one of the bankrupts. The court in *White* held that there was no error in admitting—in a prosecution for conspiracy brought against the bankrupt's attorney—the testimony of the bankrupt before the referee in bankruptcy even though it included statements made and questions asked by the attorney acting as counsel for the bankrupt, as the immunity applied only to the bankrupt, and "doesn't render incompetent testimony in proceedings against others than himself."[51] Similarly, it was held that witnesses who testified in bankruptcy proceedings in which they were not the bankrupt were not protected by the immunity, and that the evidence adduced therein was competent in a prosecution brought against them for conspiracy to violate the Bankruptcy Act by concealing the bankrupt's property.[52]

When the bankrupt is a corporation, to whom does the immunity apply, if it applies at all? A corporation, of course, has no fifth amendment privilege against compulsory self-incrimination.[53] However, a corporate officer testifying on behalf of the corporation is not barred from asserting his own personal privilege if the answer would incriminate him, even though he may not assert the privilege for the corporation.[54] Some early cases therefore held that the immunity did not apply to the testimony of officers of a bankrupt corporation as they could have invoked the protection of the fifth amendment.[55] However, there

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vides that "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination."

47. Goldberg v. Weiner, 480 F.2d 1067, 1071 (9th Cir. 1973). Among the sections noted were Bankruptcy Act §§ 7a, 21a, 41a(4), 11 U.S.C. §§ 25(a), 44(a), 69(a)(4) (1970).

48. Goldberg v. Weiner, 480 F.2d 1067 (9th Cir. 1973); United States v. Goodwin, 470 F.2d 893 (5th Cir. 1972).

49. Goldstein v. United States, 11 F.2d 593, 594 (5th Cir. 1926).

50. 30 F.2d 590 (1st Cir. 1929).

51. White v. United States, 30 F.2d 590, 592 (1st Cir. 1929).

52. Kaplan v. United States, 7 F.2d 594 (2d Cir.), *cert. denied*, 269 U.S. 582 (1925).

53. *E.g.*, United States v. Kordel, 397 U.S. 1 (1970); George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968).

54. *E.g.*, United States v. Kordel, 397 U.S. 1 (1970); Curcio v. United States, 354 U.S. 118 (1957).

55. *E.g.*, Kolbrenner v. United States, 11 F.2d 754 (5th Cir. 1926); Kaplan v. United States, 7 F.2d 594 (2d Cir.), *cert. denied*, 269 U.S. 582 (1925).

were contra opinions that the immunity did apply to the testimony of a corporate officer.[56] This conflict was resolved by the Chandler amendments to the Bankruptcy Act in 1938 which added subdivision b to supplement section 7a (wherein are set forth the general obligations of a bankrupt to file schedules and a statement of affairs): "where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title."[57]

Dicta by the majority in *In re Bush Terminal Co.*[58] indicated that the above subdivision did not broaden the statute so as to include within its scope a former stockholder and director who was neither at the time of filing for bankruptcy.[59] However, subsequent cases have given this provision a wide scope and suggest that it was designed to reach not only the officers but also fiduciaries of a bankrupt corporation,[60] all of whom have a quite positive duty to "aid the honest administration of the estate in all its aspects."[61]

A further step in this development was to hold that those people designated by the bankruptcy court to perform the duties imposed upon the bankrupt corporation under section 7b were entitled to the benefit of section 7a(10). In *United States v. Weissman*,[62] the sole owner of a number of corporations, although he was neither an officer, director, nor a shareholder of record, was designated by the court under section 7b to testify for the bankrupt corporations as he was the only person financially interested in any of them and had absolute control of their conduct.[63] In holding the designee entitled to the benefit of section 7a(10), the court stated: "We see no reason for denying to such a person the protection that is given to the bankrupt obviously for insuring a full disclosure of the facts."[64]

In *United States v. Castellana*,[65] the relationship between the immunity in section 7a(10) and the designation in section 7b of who is to perform the duties of a bankrupt corporation was discussed.

> [A] meaningful distinction, rooted in the statutory language, should be drawn between the corporate officer who testifies voluntarily, and thus cannot claim the [immunity], and the one who, having been *directed* to appear by the bankruptcy court, has thereby been "designated by the court [to] perform the duties imposed upon the bankrupt by this title."[66]

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56. *E.g.*, People v. Lay, 193 Mich. 17, 159 N.W. 299 (1916).
57. Bankruptcy Act § 7b, 11 U.S.C. § 25(b) (1970).
58. 102 F.2d 471 (2d Cir. 1939).
59. *In re* Bush Terminal Co., 102 F.2d 471 (2d Cir. 1939).
60. Greene v. Harris, 240 F.2d 275 (2d Cir. 1957); United States v. Weissman, 219 F.2d 837 (2d Cir. 1955).
61. Goldie v. Cox, 130 F.2d 695, 708 (8th Cir. 1942).
62. 219 F.2d 837 (2d Cir. 1955).
63. United States v. Weissman, 219 F.2d 837 (2d Cir. 1955).
64. *Id.* at 841.
65. 349 F.2d 264 (2d Cir. 1965).
66. United States v. Castellana, 349 F.2d 264, 273 (2d Cir. 1965).

In *Castellana* the court held that two of the defendants were not performing the bankrupt's statutorily imposed duty when they were examined nor were they designated or directed to perform any of the bankrupt's other duties.

> Section 7, sub. b, in merely stating who may be designated to perform the duties imposed upon a corporate bankrupt, makes no explicit reference to extension of the Section 7, sub. a(10) privilege. Thus, we believe that Section 7, sub. b cannot be read in a vacuum and must be considered in the light of Section 7, sub. a as conferring immunity only if the director or shareholder is specifically designated to perform the bankrupt's duties.[67]

Professor Collier, in his treatise on bankruptcy, has taken issue with this rather narrow approach of the Second Circuit. "It would seem, however, that even if the officer of the bankrupt corporation testifies voluntarily rather than at the designation of the court, the immunity should nonetheless apply if he is performing the duties imposed upon the bankrupt by § 7a."[68] This was also the position of the dissent in *Castellana*, which suggested that the privilege should not depend on "technical" concepts of corporate identity,[69] since the purpose of section 7a(10) was to encourage corporate officers, directors and shareholders to testify freely and fully as to the pre-bankrupt corporate activities.[70]

The most recent case on the issue is *United States v. Dornau*,[71] where, in reference to Dornau's designation by the court of bankruptcy it was stated that:

> there does not appear to be any question that Dornau, though not himself the bankrupt, was entitled to the immunity granted by this section since he testified at the first meeting of creditors after apparently being designated as one of the corporate officers required to perform the duties of the bankrupt.[72]

While designation by the bankruptcy court was still required, it appears that the *Dornau* court was willing to assume such designation when a corporate officer testified at the first meeting of the creditors. In light of the above, it would be a good practice for the corporate representative to obtain a specific designation by the bankruptcy court before giving his testimony in order to assure himself that he will be protected by the immunity.

B. *When Does the Immunity Apply*

The immunity of section 7a(10) applies to the testimony of the bankrupt only when the statute requires him to testify.[73] Section 7a(10) provides for the mandatory attendance of the bankrupt to give testimony on three separate occasions: (1) at the first meeting of the creditors; (2) at any other hearings

67. *Id.* at 274.
68. 1A W. COLLIER, BANKRUPTCY § 7.21, at 1024 n.27a (14th ed. 1940).
69. United States v. Castellana, 349 F.2d 264, 278 (2d Cir. 1965).
70. *Id.*; *accord*, United States v. Piccini, 412 F.2d 591 (2d Cir. 1969).
71. 491 F.2d 473 (2d Cir. 1974).
72. United States v. Dornau, 491 F.2d 473, 479 n.10 (2d Cir. 1974).
73. Goldstein v. United States, 11 F.2d 593 (5th Cir. 1926).

the court may direct; and (3) at the hearing upon objections to the bankrupt's discharge. Since the bankrupt cannot be compelled to testify unless the Act imposes upon him a duty to do so, it is only in the above enumerated situations that testimonial immunity is provided.[74]

It follows from what has been said above that the immunity does not apply when the bankrupt is called merely as a witness in a proceeding in which it is not made his duty to testify. The court so held in *Goldstein v. United States*,[75] where the bankrupt voluntarily appeared in a hearing to show cause why he should not deliver to the trustee property described in the petition, and in default thereof, why he should not be found in contempt of court.[76] The bankrupt was under no duty to either appear in person or to testify at the hearing to show cause, as he could have appeared through counsel or allowed the rule to go by default, and the referee did not have the power to commit him for contempt. Therefore, his voluntary testimony at the hearing was not immune.[77]

Similarly, in *United States v. Castellana*,[78] the court held that the corporate officers were not performing statutorily imposed duties of the Bankruptcy Act when they were examined in related but separate civil case depositions: "We see no reason to broaden the privilege so that it encompasses private civil case discovery examinations. The purpose of the privilege—assuring complete disclosure in those proceedings where the Government and the public have a vital interest—is adequately served if section 7, sub. a(10) is limited."[79]

With reference to the first of the above-enumerated situations when testimonial immunity is provided—at the first meeting of the creditors—this "first meeting" may actually be a series of hearings. It must be established, however, that subsequent meetings were actually continuations of the meeting of creditors. The Bankruptcy Act requires the presence of the referee at the first meeting of creditors,[80] and by implication his presence would be necessary at all continuations of such a meeting.[81] Even if the hearing was a first meeting of the creditors, however, admissions off the stand may not qualify for the immunity. *Cajiafas v. United States*[82] held that where the bankrupt, during the course of an examination, made a statement while going over his books with an auditor and a witness in a library adjoining the courtroom, such statement was allowable into evidence in a subsequent criminal proceeding.[83]

The second enumerated situation providing for the mandatory attendance of the bankrupt is at the hearings ordered by the court. There are limitations

74. United States v. Seiffert, 501 F.2d 974, 981 (5th Cir. 1974).
75. 11 F.2d 593 (5th Cir. 1926).
76. Goldstein v. United States, 11 F.2d 593, 594 (5th Cir. 1926).
77. *Id.* at 594-95.
78. 349 F.2d 264 (2d Cir. 1965).
79. United States v. Castellana, 349 F.2d 264, 274 (2d Cir. 1965).
80. Bankruptcy Act §§ 55b, 336, 11 U.S.C. §§ 91(b), 736 (1970).
81. United States v. Seiffert, 501 F.2d 974, 981 (5th Cir. 1974).
82. 38 F.2d 3 (9th Cir. 1930).
83. Cajiafas v. United States, 38 F.2d 3, 4 (9th Cir. 1930).

on the scope of statutorily compulsory examinations of the bankrupt as a result of court order provided for in sections 7a(10) and 21 of the Act. The creditors can seek an order compelling the bankrupt to give testimony, but the granting of such an order is subject to the discretion of the court.[84] If the court exercised its discretion to order such hearing, the compelled testimony would be immune according to *Goldberg v. Weiner*,[85] wherein it was stated: "We see no reason why such an examination [under section 21a] does not fall within the class of examinations held 'at such other times as the court shall order.' "[86]

Often, however, the discretion is exercised by the bankruptcy court to preclude court-ordered examinations to avoid aiding creditors in bolstering their claims against the bankrupt. The Bankruptcy Act has filled this gap by making explicit provisions for other forms of discovery or examination of the bankrupt by creditors, but such procedures do not require the bankrupt to give compelled testimony. Section 21b provides that the same rules which govern the taking of depositions in civil actions are equally applicable to bankruptcy proceedings.[87] The immunity is inapplicable to the voluntary deposition testimony given by a bankrupt.[88]

The third enumerated situation providing for compulsory attendance by the bankrupt is the hearing upon objections to the discharge. Testimony at this hearing, however, has been specifically excluded from the immunity provision by the statute. But in *United States v. Seiffert*[89] it was stated: "We note in passing that the validity of the related provisions withdrawing the statutory immunity from testimony at the hearing on objections to the discharge is suspect."[90] Historically, the courts have

> . . .not deviated from the principle that the discharge in bankruptcy is a mere privilege which can be denied constitutionally where the bankrupt refuses to answer a material question approved by the court, even if the refusal to answer is based, properly, upon the assertion of the right not to incriminate oneself.[91]

Since the Supreme Court has not yet ruled on the question of whether the discharge can be denied for refusal to answer a court-approved question at the hearing, any predicted response by the Court is at this time conjectural. In two

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84. "The court *may*, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct or property of a bankrupt. . . ." Bankruptcy Act § 21a, 11 U.S.C. § 44(a) (1970) (emphasis added).

85. 480 F.2d 1067 (9th Cir. 1973).

86. Goldberg v. Weiner, 480 F.2d 1067, 1071 (9th Cir. 1973).

87. "Except as herein otherwise provided, the right to take depositions in proceedings under this title shall be determined and enjoyed according to the laws of the United States now in force, or such as may be hereafter enacted, relating to the taking of depositions." Bankruptcy Act § 21a, 11 U.S.C. § 44(b) (1970). *See also* FED. R. CIV. P. 26, 30, 32, 37.

88. United States v. Seiffert, 501 F.2d 974, 981 (5th Cir. 1974).

89. *Id.*

90. *Id.* at 981 n.4.

91. 1A W. COLLIER, BANKRUPTCY § 7.21, at 1018 (14th ed. 1940).

1967 decisions the Supreme Court held it was unconstitutional for a resultant consequence of asserting the right against self-incrimination to be in any way a sanction.[92] Denial of the discharge in bankruptcy is a sanction and logically the Court might hold such a refusal of discharge improper if it resulted from the claim of privilege. However, in 1973 the Supreme Court decided *United States v. Kras*,[93] holding that the filing fee requirement of the bankruptcy law did not deny the petitioner equal protection of the law, even though he was an indigent and unable to pay the fee. The Court held that there was no constitutional right to obtain a discharge of one's debts in bankruptcy and no fundamental interest was gained or lost depending on the availability of a discharge in bankruptcy.[94] While the Court recognized the importance to the petitioner in eliminating his debt burden and obtaining his desired new start in life, the interest did not rise to the same constitutional level, under the due process clause, as a married person's interest in dissolving a marriage.[95] The question, then, would appear to be whether the interest of the bankrupt would rise to the same constitutional level as the interest of a policeman in being discharged from his livelihood or of an attorney in being disbarred, which were the situations in the 1967 cases. Because of the Court's emphasis on bankruptcy as a benefit or favor to be accepted upon such terms as Congress might impose, it is unlikely that the Court would so find.

There existed a conflict in the circuit courts as to whether the derivative use immunity appled to testimony given by the bankrupt before the effective date of the 1970 amendment when the criminal proceeding occurred after the effective date. Based on *Turner v. United States*,[96] the Fifth Circuit on the first appeal of *United States v. Seiffert*[97] held that since the amendment was effective at the time of trial the bankrupt had both use and derivative use immunity.[98] The rationale was that because the grant of immunity was coextensive with the fifth amendment, the section 7a(10) amendment was not substantive but was procedural or remedial and as such became immediately applicable to pending cases.[99] However, in the subsequent case of *United States v. Goodwin*,[100] the court held that the 1970 amendment did not confer derivative use immunity on testimony given before its effective date but sought to be used as evidence thereafter. The position of *Goodwin* was followed by the Second Circuit in *United States v. Dornau*.[101] The House Reports appear to support the position of *Goodwin* and *Dornau* that in enacting the 1970 amend-

92. Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).
93. 409 U.S. 434 (1973).
94. United States v. Kras, 409 U.S. 434, 445-46 (1973).
95. *Id.*
96. 410 F.2d 837 (5th Cir. 1969).
97. 463 F.2d 1089 (5th Cir. 1972).
98. United States v. Seiffert, 463 F.2d 1089, 1091 (5th Cir. 1972).
99. *Id.*
100. 470 F.2d 893 (5th Cir. 1973).
101. 491 F.2d 473 (2d Cir. 1974).

ment as part of the Organized Crime Control Act, Congress did not have in mind the remedial purpose suggested by *Seiffert* of conferring additional immunity upon witnesses who had already chosen to testify under a grant of use immunity.[102] Rather, Congress intended to achieve "effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege"[103] in order to enable bankruptcy referees for the first time to compel the testimony by granting the immunity.

Subsequently, upon the second appeal of *Seiffert*[104] to the Fifth Circuit Court of Appeals, the court expressed substantial doubts about its holding in the earlier *Seiffert* decision. Because the immunity in effect at the time of the testimony in the bankruptcy proceedings was a use immunity and not coextensive with the fifth amendment,

> there is doubt . . . that in the earlier appeal of this case the 1970 amendment was "procedural or remedial" and therefore "immediately applicable to pending cases," . . . for the Fifth Amendment privilege itself was available prior to the 1970 amendment, and that privilege is as potent a "remedy" against the evils of compelled testimony as the use and derivative use immunity that supplants it under the statutory changes.[105]

Therefore, it is suggested that the better position is that testimony given in a bankruptcy proceeding prior to the effective date of the 1970 amendment is protected by the use immunity only, even if the subsequent criminal proceeding occurs after the effective date of the amendment.

The immunity statutes have generally been construed not to apply when the subsequent criminal proceeding involves a crime by the bankrupt committed after the testimony in the bankrupt proceedings; that is, the immunity applies only to past transactions.[106] This does not, however, bar the admission of testimony in a criminal prosecution for alleged false statements made at the first meeting of the bankrupt's creditors or during other examinations.[107] "If the statute were so construed, it would put a premium on false swearing in a bankruptcy proceeding, and would constitute a license to commit perjury. . . . This construction is supported by the adjudicated cases."[108]

One final aspect as to when the immunity applies: the immunity only prevents the use of privileged testimony in a subsequent criminal proceeding. The bankrupt may still be subjected to certain civil liabilities[109] and disabilities such as loss of job, expulsion from labor unions, liability under state registration and

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102. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970).
103. United States v. Dornau, 491 F.2d 473, 480 (2d Cir. 1974).
104. 501 F.2d 974 (5th Cir. 1974).
105. United States v. Seiffert, 501 F.2d 974, 980 (5th Cir. 1974).
106. Meer v. United States, 235 F.2d 65 (10th Cir. 1956).
107. Cameron v. United States, 231 U.S. 710 (1914); Meer v. United States, 235 F.2d 65 (10th Cir. 1956).
108. Meer v. United States, 235 F.2d 65, 68 (10th Cir. 1956).
109. Ullmann v. United States, 350 U.S. 422, 430-31 (1967).

investigation statutes, and loss of passport eligibility.[110] Needless to say, the immunity does not protect a bankrupt from personal disgrace, general public opprobrium, or reprisal by persons against whom testimony is given.[111]

C. *To What Does the Immunity Apply*

Under the settled construction of the bankruptcy immunity, the immunity pertains only to testimony given in oral evidence by the bankrupt.[112] The immunity does not protect schedules required to be filed with the court, or books and records of the individual or corporate bankrupt.

Section 7a(8) requires the bankrupt to file schedules with the court,[113] section 7a(9) requires the filing of a statement of affairs, and section 7a(11) states that when required by the court, the bankrupt will prepare, verify, and file a detailed inventory. Earlier decisions consistently held that schedules required by the above sections of the Bankruptcy Act were admissible in later criminal proceedings as they were not oral testimony and therefore not protected by the use immunity.[114]

On the question of whether the bankrupt could invoke his fifth amendment privilege against self-incrimination and refuse to file the schedules, it was held that a bankrupt could decline to file schedules on the ground that they might tend to incriminate him.[115] By failing to invoke the privilege at the time he filed the schedules he waived his privilege as to any use to which such schedules would be put, including evidence in a criminal prosecution. However, the principle was laid down as early as 1922 that a complete refusal by a bankrupt to file the schedules required under section 7 of the Bankruptcy Act was unjustifiable, and that a naked statement even under oath that the schedules might prove incriminating was not enough to justify noncompliance with the statutory requirement.[116] "It must at least appear to the court from the character of the information sought or the question propounded, that his claim is justified, or the bankrupt must produce facts on which he bases such claim, in order that the court may judge of their sufficiency to support it."[117]

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110. *Id.*

111. *E.g.*, Piemonte v. United States, 367 U.S. 556 (1961); Reina v. United States, 364 U.S. 507 (1960); Ullmann v. United States, 350 U.S. 422 (1956); Smith v. United States, 337 U.S. 137 (1949); Brown v. Walker, 161 U.S. 591 (1896).

112. *E.g.*, Ensign v. Pennsylvania, 227 U.S. 592 (1913); *In re* U.S. Hoffman Can Corp., 373 F.2d 622 (3d Cir. 1967).

113. The bankrupt must "prepare, make oath to, and file in court . . . a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors . . . showing . . . the amount due to or claimed by each of them. . . ." Bankruptcy Act § 7a(8), 11 U.S.C. § 25(a)(8) (1970). "There are 11 schedules which the bankrupt is required to file; five of them concern its debts, while the remaining six relate to its property. The information required by the schedules is quite detailed, in accord with the statutory purpose of assuring a complete account of the bankrupt's financial situation." *In re* U.S. Hoffman Can Corp., 373 F.2d 622, 624 n.2 (3d Cir. 1967).

114. *E.g.*, Ensign v. Pennsylvania, 227 U.S. 592 (1913); Optner v. United States, 13 F.2d 11 (6th Cir. 1926); Slakoff v. United States, 8 F.2d 9 (3d Cir. 1925).

115. Czarlinsky v. United States, 54 F.2d 889 (10th Cir. 1931).

116. *In re* Arend, 286 F. 516 (2d Cir. 1922).

117. Podolin v. Lesher Warner Dry Goods Co., 210 F. 97, 103 (3d Cir. 1914).

While the protection against self-incrimination has been broadened since the two prior cited decisions, the result is still sound.[118] Therefore, in *In re U.S. Hoffman Can Corp.*[119] the court found that, absent special circumstances not revealed, many of the numerous items of information required by the schedules could not possibly be incriminating no matter how broadly the privilege was construed.[120] The bankrupt, then, cannot refuse altogether to supply any of the information required by the schedules and the statement of affairs, and it is in the first instance for the trial judge to determine which of the many questions are subject to a legitimate invocation of the privilege against self-incrimination.[121]

The compelled production of an individual's books and records falls within the ambit of the privilege against self-incrimination accorded by the fifth amendment.[122] Possession, rather than ownership, of the potentially incriminating documents is the necessary and sufficient condition of claiming the privilege.[123] However, the constitutional immunity from the use of such books ceases as soon as they are duly taken out of the bankrupt's possession and control, either by an order directing their delivery into the hands of a receiver or by the passing of the books to the trustee under section 70.[124]

> While [the books and papers] are, in the due course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them, secured him under the Fourth and Fifth Amendments, does not inure to his protection. He has lost any right to object to their use as evidence because, not for the purpose of evidence, but in the due investigation of his alleged bankruptcy and the preservation of his estate pending such investigation, the control and possession of his books and papers relating to his business were lawfully taken from him.[125]

It follows, therefore, that the bankrupt has no right to delay the transfer of his books to the receiver or trustee on the ground that they will incriminate him,[126] and once out of his possession by such lawful means, there is no protection of

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118. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964); Hoffman v. United States, 341 U.S. 479 (1951); *In re* U.S. Hoffman Can Corp., 373 F.2d 622 (3d Cir. 1967); United States v. Coffey, 198 F.2d 438 (3d Cir. 1952).

119. 373 F.2d 622 (3d Cir. 1967).

120. Thus, for example, it does not appear how, in the absence of further evidence, appellants might have been endangered by disclosing how many horses, cows, sheep, and other animals were owned by the bankrupt (Schedule B-2), how much they had paid to counsel for services in the bankruptcy proceedings (Schedule B-4), or any of the information required by Schedule B-5, relating to property exempt from the Bankruptcy Act.

In re U.S. Hoffman Can Corp., 373 F.2d 622, 627 n.7 (3d Cir. 1967).

121. *Id.* at 629.

122. Boyd v. United States, 116 U.S. 616 (1886); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).

123. United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).

124. *In re* Fuller, 262 U.S. 91 (1923); Johnson v. United States, 228 U.S. 457 (1913); *In re* Harris, 221 U.S. 274 (1911).

125. Dier v. Banton, 262 U.S. 147, 150 (1923).

126. Dier v. Banton, 262 U.S. 147 (1923); *In re* Fuller, 262 U.S. 91 (1923).

immunity from the use of the books and records in subsequent criminal proceedings.[127] The only protection available is that indicated in *United States v. Seiffert*:[128] "We would, of course, have a different case if it were shown that compelled testimony led to the investigation of records which could take on an incriminating cast only upon analysis and assembly in a certain manner suggested by such testimony."[129] Therefore it would appear that although the books and papers can be used as evidence in subsequent criminal proceedings, the Government must show that the particular evidence extracted from the books and records was not a product of derivative use of the compelled oral testimony of the bankrupt.

As to invoking the protection of either the privilege against self-incrimination or the immunity for corporate records and books, an additional consideration is relevant. An exception to the fifth amendment privilege against self-incrimination is applicable to the records of a corporation or other impersonal organization.[130] The production of corporate records may be compelled even through a natural individual claiming privileges has acquired both possession and title.[131] The fact that a person is the sole stockholder of a corporation, and consequently it is in effect his corporate alter ego, does not render the principle inapplicable.[132]

IV. Sufficiency

Although the Supreme Court has held that the use and derivative use immunity is coextensive with the fifth amendment privilege against self-incrimination, it is questioned whether the immunity in reality adequately protects a bankrupt from various possible incriminating uses of the compelled testimony. In raising a claim under the immunity statute, the bankrupt need only show that he testified under a grant of immunity to shift the burden of proof to the Government.[133] The burden of proof on the Government "is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[134] The Government must therefore show how it acquired all of the evidence admitted below and establish that the compelled testimony was not used to obtain investigatory leads or the names of witnesses. If any of the evidence is found to be tainted, a new trial must be granted.[135] The burden of proof upon the Government is

127. United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974).
128. 501 F.2d 974 (5th Cir. 1974).
129. United States v. Seiffert, 501 F.2d 974, 982 (5th Cir. 1974).
130. United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Hoyt, 53 F.2d 881 (2d Cir. 1931).
131. Grant v. United States, 227 U.S. 74 (1913); Wheeler v. United States, 226 U.S. 478 (1913).
132. United States v. Hoyt, 53 F.2d 881 (2d Cir. 1931).
133. Kastigar v. United States, 406 U.S. 441 (1972).
134. *Id.* at 460.
135. United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972).

to demonstrate by a preponderance of the evidence, rather than proof beyond a reasonable doubt, that all evidence was derived from an independent source.[136]

Despite these safeguards, however, the argument made by the petitioner in *Kastigar v. United States*[137] and the dissenting opinion therein by Justice Douglas[138] have some justification. The prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available, and it would be difficult if not impossible to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness.

> A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. . . . Second, . . . the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.[139]

V. Conclusion

The sufficiency of the present form of the use and derivative use immunity in the Bankruptcy Act cannot be determined without again asking if it is a "rational accommodation between the imperatives of the privilege [against self-incrimination] and the legitimate demands of government to compel citizens to testify."[140] Because of the courts' continued references to the bankruptcy provisions as a benefit bestowed by Congress to be accepted by the bankrupt upon such terms as Congress might impose, and due to the uniqueness of the bankruptcy proceedings in which compelling the testimony of the bankrupt is often the only meaningful way to protect creditors, it is likely that the courts, at least in the bankruptcy area, will give greater weight to the legitimate demands of the Government to compel citizens to testify.

Genelle Schlichting

136. United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974).
137. 406 U.S. 441 (1972).
138. Kastigar v. United States, 406 U.S. 441, 462 (1972) (dissenting opinion).
139. *Id.* at 469.
140. *Id.* at 446.

FEDERAL INTERVENTION IN ONGOING STATE PROCEEDINGS: EXPANSION OF AN ABSTENTION DOCTRINE

I. INTRODUCTION

Recent developments in the exercise of judicial restraint by the federal courts are bringing about a marked change from the 1960's in the role played by the national and state judiciaries in civil rights litigation. Decisions of the United States Supreme Court under Chief Justice Burger have served to increase the role of state courts in deciding federal constitutional questions and to discourage the challenge of state statutes in federal forums. This ongoing "alteration of the role of federal courts in the vindication of civil rights"[1] has been characterized by retired Justice William O. Douglas as "the strangulation of 42 *U.S.C.* § 1983 that has recently been evident."[2] In contrast, Judge Ruggero J. Aldisert of the Third Circuit welcomes the developing change, having been strongly critical of the expansion of section 1983 litigation[3] in the federal courts since *Monroe v. Pape*[4] and the "drift toward a national court system."[5]

It appears that the views of Judge Aldisert are gaining support, turning the tide of civil rights litigation away from the federal judiciary to the state court systems. This trend is likely to continue in future years as the abstention doctrines are further expanded.[6] This note will examine the growth of one type of federal court abstention: that in which a state court proceeding is pending when federal action is requested. More particularly, it will focus on the application to civil cases of the principles of *Younger v. Harris*,[7] prohibiting federal intervention in ongoing state criminal proceedings except in unusual and narrow

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1. Meiburger & Goldman, *Federal Practice and Jurisdiction*, N.Y.U. ANN. SURV. AM. L. 577 (1973). *See also* Comment, *The Extension of Younger v. Harris to Non-Criminal Cases*, 8 CREIGHTON L. REV. 454 (1974-75).

2. Boehning v. Indiana State Employees Ass'n, 96 S. Ct. 168, 170 (1975) (Douglas, J., dissenting).

3. Section 1983 of the Civil Rights Act of 1871 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

4. 365 U.S. 167 (1961).

5. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 571 [hereinafter cited as Aldisert].

6. *See, e.g.*, Hicks v. Miranda, 95 S. Ct. 2281 (1975). In *Hicks*, the Court held the principles of *Younger v. Harris*, 401 U.S. 37 (1971) (discussed *infra*) applicable to state criminal actions instituted after the filing of the federal complaint if no proceedings of substance have taken place in the federal court.

7. 401 U.S. 37 (1971).