UIC Law Review

Volume 6 | Issue 1 Article 5

Fall 1972

Kastigar v. United States: Compulsory Witness Immunity and the Fifth Amendment, 6 J. Marshall J. of Prac. & Proc. 120 (1972)

John F. Martoccio

NOTES

KASTIGAR v. UNITED STATES: COMPULSORY WITNESS IMMUNITY AND THE FIFTH AMENDMENT

INTRODUCTION

To accommodate the clash between the legitimate right of the state to compel its citizens to testify and the imperatives of the fifth amendment[1] privilege against compulsory self-incrimination, the state has traditionally granted unwilling witnesses immunity from prosecution.[2]

In *Counselman v. Hitchcock*,[3] the United States Supreme Court delineated the constitutionally required parameters of witness immunity. "Transactional immunity" was held to be the minimum standard that was constitutionally tolerable.[4] The witness must be given absolute immunity for all offenses to which the compelled testimony relates. In effect, the witness is given a *tabula rasa*, complete amnesty from prosecution.

The transactional standard went unassailed by the Supreme Court for some 80 years until Mr. Justice Powell delivered the opinion of the Court in *Kastigar v. United States*,[5] and there stated that "[t]he broad language in *Counselman* . . . was unnecessary to the Court's decision and cannot be considered binding authority."[6] *Transactional immunity was dictum.*[7]

In its stead, *Kastigar* promulgated "use and derivative use immunity" as the minimum constitutional standard. Drawing an analogy to the coerced confession cases,[8] the Court held that a grant of immunity need no longer free the witness from future prosecution; however, the use of the witness' compelled

---

[1] "No person . . . shall be compelled in any criminal prosecution to be a witness against himself. . . ." U.S. CONST. amend. V.

[2] *See* L. Levy, *Origins of the Fifth Amendment*, 328, 495 (1968); *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege; New Developments and New Confusion*, 10 ST. LOUIS U.L. REV. 327 (1966).

[3] 142 U.S. 547 (1892).

[4] *Id.* at 585, 586.

[5] 406 U.S. 441 (1972) (Douglas, & Marshall, JJ., dissenting).

[6] *Id.* at 454-55.

[7] This was a wrong turning at a critical point. C. MCCORMICK, EVIDENCE (1954). *Contra, In re* Korman, 449 F.2d 32 at 37 (7th Cir. 1971); *In re* Kinoy, 326 F. Supp. 407 at 412-15 (S.D.N.Y. 1971).

[8] See p. 129 *infra*.

testimony and any investigative leads developed from it are prohibited.[9] An immunized witness can be convicted by evidence derived from a source independent of his compelled testimony. Once the witness has shown that he has testified under a grant of "use and derivative use" immunity before a court, grand jury, legislative committee, or administrative body, *Kastigar* placed the burden upon the Government, in any future prosecution, of establishing that " . . . the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[10] In essence, the plea in bar created by transactional immunity has been reduced by *Kastigar* to a motion to suppress.[11]

Two fundamental questions arise regarding "use and derivative use" immunity and the fifth amendment. Is "use and derivative use" immunity coextensive with the scope of the privilege against self-incrimination? Is the prosecution effectively precluded from utilizing the immunized witness' testimony and its fruits in a subsequent criminal prosecution?

COUNSELMAN AND ITS PROGENY
EIGHTY YEARS OF PRECEDENT

Counselman v. Hitchcock[12] was the first case in which the Supreme Court directly passed upon the constitutional adequacy of an immunity statute.[13] The defendant, Counselman, was called as a witness before a federal grand jury investigation into alleged violations of the Interstate Commerce Act of 1887.[14] He declined to answer specific questions regarding alleged unlawful rebates from railroads. After a state grant of immunity, Counselman persisted in his refusal to answer and was held in contempt.[15] Significantly, the grant of immunity merely purported to prevent direct use of the witness' testimony in a subsequent prosecution.[16] However, no specific prohibition prevented the state from using the witness' testimony to acquire "leads" to other evidence. Although statutes grant-

[9] 406 U.S. at 461.

[10] *Id.* at 460.

[11] Lewis, *The Practical Defender: On Use Immunity*, FOR THE DEFENSE, Nov., 1972, Vol. 7, No. 4.

[12] 142 U.S. 547 (1892). This was also the first case in which the Supreme Court passed upon the question of whether the privilege against self-incrimination, as applied to a witness in a criminal proceeding who was not the accused, was assured by the Constitution or merely by the common law.

[13] The constitutional scope of the privilege against self-incrimination was not litigated until the end of the 19th century partly for the reason that the accused was then disqualified as a witness because of interest. 8 WIGMORE, EVIDENCE §2251 (Mc Naughton rev. 1961).

[14] Act of Feb. 4, 1887, ch. 104, 24 STAT. 379.

[15] 142 U.S. at 552.

[16] The statutory grant of immunity, Act of Feb. 25, 1868, ch. 13, 15 Stat. 37, REV. STAT. §860 (1896), provides in substance that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in

ing immunity merely against "use" of the witness' testimony had been previously upheld by the majority of the state and federal courts, the Court in *Counselman* deliberately adopted the minority rule advocating transactional immunity.[17]

Justice Blatchford, in writing for a unanimous Court, declared that for a compulsory immunity statute to supplant the privilege it must be "coextensive with the constitutional provision"[18] against self-incrimination and must be "as broad as the mischief against which it seeks to guard."[19] The minimum requirement was, therefore, articulated as "transactional immunity." 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 incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. *In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.*[20]

The question of law presented to the Court in *Counselman* was whether a statute providing "use" immunity could constitutionally supplant the fifth amendment privilege against self-incrimination. The Court held that to supplant the constitutional privilege a statute must protect against all perils for which the privilege stands as a barrier;[21] the statute must be coextensive with the scope of the privilege.[22] This disposed of the case. Any additional utterances were dicta.

The essence of the argument against strict "use" immunity was based upon a theory of facts "tending to incriminate."[23]

---

evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding. This statute had an unusual genesis. The United States Government had brought suit in England against certain English banks to recover assets deposited by the defeated Confederacy. An agent of the Confederate government refused to testify, claiming that his testimony would result in a forfeiture of his property. The immunity act was passed to obtain his testimony. *See* L. Rogge, *Compulsory Testimony Act*, NEW YORK L.J., May 3, 1971.

[17] The Court refused to follow: State v. Quarles, 13 Ark. 307 (1853); Higdon v. Heard, 14 Ga. 255 (1853); *Ex Parte* Rowe, 7 Cal. 184 (1857); Wilkins v. Malone, 14 Ind. 153 (1860); People *ex rel.* Hackley v. Kelly, 24 N.Y. 74 (1871); Instead it specifically adopted: *Emery's Case*, 107 Mass. 172 (1871); Cullen v. Commonwealth, 24 Grattan 624 (Va. 1873); State v. Nowell, 58 N.H. 314 (1878).

[18] 142 U.S. 547 at 565.

[19] *Id.* at 562.

[20] *Id.* at 585-86 (emphasis added).

[21] *Id.*

[22] *See*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 54, 78 (1964); Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

[23] 8 WIGMORE, EVIDENCE §2283 (Mc Naughton rev. 1961).

The privilege concededly protected against the disclosure of facts incriminating per se, and also against facts "tending to incriminate," *i.e.*, "colorless facts having no intrinsic criminal flavor"[24] but furnishing a lead or clue to criminality. Thus, "a compulsory admission though itself prohibited to be used may nevertheless furnish a clue to the discovery of other evidence, the use of which would not be reached by the statute's prohibition and thus the disclosure may, in reality, 'tend' to incriminate in spite of the statute."[25]

The *Counselman* Court reasoned that the inherent unfairness of strict "use" immunity was that it could easily be used to evade the protection offered by the privilege against self-incrimination. The Court stated:

> It [use immunity] could not and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.[26]

This explicit statement, and others, can be found in *Counselman* to support both transactional and "use and derivative use" immunity. Thus, a resonant chord was struck from which later courts culminating in *Kastigar* would justify "use and derivative use" immunity as consistent with the "conceptual basis"[27] of *Counselman*. These courts would reason that since the primary concern in *Counselman* was to prevent the use of investigative leads against a witness, an immunity statute that suppresses lead and clue evidence, "use and derivative use" immunity, would be consistent with *Counselman*.

In response to the *Counselman* mandate requiring transactional immunity, Congress passed a new statute[28] which adopted and codified transactional immunity and for eighty years served as a model for state and federal immunity statutes. The statute reads, in relevant part:

> No . . . 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 compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence . . . .[29]

---

[24] *Id.* §2260.

[25] *Id.* §2283.

[26] 142 U.S. 564.

[27] Stewart v. United States, 440 F.2d 954 at 956-57 (9th Cir. 1971), *aff'd sub nom.* Kastigar v. United States, 406 U.S. 441 (1972).

[28] Act of Feb. 11, 1893, ch. 83, 27 STAT. 443.

[29] Under this statute, the witness need only show that his compelled testimony bears a logical relationship to the transaction which was the subject of future prosecution to absolutely bar that prosecution. *See* Dixon, *Comment on Immunity Provisions*, in WORKING PAPERS OF THE UNITED

The statute was upheld in *Brown v. Walker*.[30] The *Brown* Court was not only asked to decide whether a "transactional" immunity statute could constitutionally supplant the privilege, but also whether *any* statutory grant of immunity could supplant the privilege. The latter question of law was inescapable, since *Brown* was the first Supreme Court case to uphold an immunity statute as constitutional. Thus, the *Brown* Court's utterance in answer to this question of law, that a statutory enactment to be constitutionally valid must afford absolute immunity against future prosecution for the offense to which the question relates, is decisive and in no manner dictum.[31]

The dissenting Justices in *Brown*[32] did so not with a view to a narrower immunity, but rather upon the ground that the witness' right to remain silent was believed to be absolute. Therefore, *no* immunity statute, however broad, could supplant the privilege,[33] since immunity would not protect the citizen from the infamy and disgrace that his self-revelations of guilt would foster.[34]

From the onset, *Counselman* was scrupulously adhered to, and transactional immunity was repeatedly affirmed.[35] In *Ullmann v. United States*, Justice Frankfurter declared that "[transactional immunity] has become part of our constitutional fabric. . . ."[36]

MURPHY — THE HARBINGER OF CHANGE

Murphy v. Waterfront Commission[37] was relied upon by

STATES NATIONAL COMMISSION ON THE REFORM OF CRIMINAL LAW 1405, 1412 (1970).

[30] 161 U.S. 591 (1896).

[31] *Id.* at 594. The *Kastigar* Court all considered the *Brown* holding as dictum. 406 U.S. at 455, n.39.

[32] *See* Brown v. Walker, 161 U.S. 591, 610, 628 (1896) (Shiras, Gray, White and Field, JJ., dissenting). Justices Black and Douglas, in recent times, have maintained the same position *i.e.* no immunity statute can supplant the privilege. *See* Ullmann v. United States, 350 U.S. 422, 440 (1956) (Dissenting opinion).

[33] The Court in *Kastigar* summarily put to rest this argument. 406 U.S. at 448.

[34] The privilege against self-infamy, although recognized at the common law, was never given constitutional sanction separately or as an adjunct to the fifth amendment privilege against self-incrimination. In the United States, the privilege against self-infamy is recognized in the judicial restriction of cross-examination as to character. *See* 8 WIGMORE, EVIDENCE §2255 (Mc Naughton rev. 1961). *But See* Franklin, *Infamy and Constitutional Civil Liberties*, 14 LAWYERS GUILD REV. 1-10 (1954). There are some state statutes which recognize a limited privilege against self-ignominy. *See e.g.*, MONT. REV. CODES ANN. §93-2101-2 (1947); ORE. REV. STAT. §44.070 (1957).

[35] Hale v. Henkel, 201 U.S. 43, 67 (1906); McCarthy v. Arndstein, 266 U.S. 34, 42 (1924); United States v. Murdock, 284 U.S. 141, 149 (1931); United States v. Monia, 317 U.S. 424, 428 (1943) (nothing short of absolute immunity would justify compelling the witness to testify if he claimed the privilege); Smith v. United States, 337 U.S. 137 (1949); Adams v. Maryland 347 U.S. 179 (1954), Ullmann v. United States, 350 U.S. 422 (1956).

[36] 350 U.S. 422 at 438.

[37] 378 U.S. 52 (1964).

the Court in *Kastigar* as advocating "use and derivative use" immunity. In *Murphy,* a bi-state investigating committee granted a witness *transactional immunity* from prosecution in either state. However, the witness refused to testify upon the ground that his answers might incriminate him under federal law to which the grant of immunity did not purport to extend. The Court held that a witness under a state grant of immunity cannot be compelled "[to] give testimony which may be incriminating under federal law *unless the compelled testimony and its fruits* cannot be used . . . against him."[38]

The *Murphy* Court was responding to a dilemma not posed by *Kastigar.* Specifically, *Murphy* can be viewed as an attempt to reconcile within the federal system the problem that immunity granted by one state infringes upon another state's independent power to prosecute.[39] *The abolition of the archaic "Two Sovereign Rule" was the Court's primary concern in Murphy.*

The "two sovereign rule" follows as a logical, albeit harsh, result of the proposition that independent sovereignties can act only within their respective spheres of operation. Hence, an immunity grant is sufficient if it protects the witness merely within the sovereign's domain. Prior to *Murphy,* a witness who was granted immunity in one state could be compelled to speak, although his testimony could be used against him in a prosecution by another state or the federal government.[40]

Justice Goldberg, writing for six members of the *Murphy* Court, found that the policies underlying the privilege were thwarted when a witness can be "whipsawed into incriminating himself under both state and federal law."[41] Justice Goldberg then went on to reevaluate the "two sovereign rule." *United States v. Murdock,*[42] holding that the federal privilege did not extend to the states, was found to be based on a misconstruction of early English and American cases. *Knapp v. Schweitzer,*[43]

---

[38] *Id.* at 79 (emphasis added).

[39] Thus to deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity would be gravely in derogation of its sovereignty and obstruction of its administration of justice.
Catena v. Elias, 449 F.2d 40, 44 (3d Cir. 1971).

[40] The problem that an immunized witness' compelled testimony may be incriminating under the laws of a foreign country was not dealt with in *Murphy.* This problem seems less acute as the likelihood of cooperation between two governments is as slight, as is the probability of prosecution. *See* Zicarelli v. New Jersey Comm'n, 406 U.S. 472 (1972) (question not answered), *In re* Tierney, No. 72-2399 (5th Cir. Aug. 3, 1972) (no substantial risk of foreign prosecution because of the secrecy of grand jury proceedings).

[41] 378 U.S. 55 (1964).

[42] 284 U.S. 141 (1931).

[43] 357 U.S. 371 (1958).

permitting a state to compel a witness to give testimony that might incriminate him under federal law, was found inapplicable in the light of *Malloy v. Hogan*,[44] which applied in full force the fifth amendment privilege to the states. *Feldman v. United States*,[45] holding that testimony compelled by a state could be admitted into evidence in the federal courts, was found to rely on the now untenable doctrine that federal courts could admit evidence unconstitutionally seized by state officials.

After rejecting the "two sovereign rule," two alternatives remained. On the one hand, to allow a state grant of transactional immunity to automatically preclude federal prosecution would be to permit a return to the onerous "immunity baths"[46] of the past which allowed an unscrupulous prosecutor to place his cohorts on the witness stand and permit them to confess to crimes, secure from future prosecutions by the grant of immunity. A corrupt state or local prosecutor would have free rein to immunize bed-fellows from prosecution for the most serious federal crimes. The other alternative, adopted by *Murphy*, was to require immunity from federal "use" of testimony compelled by a state transactional immunity grant.[47] The Federal Government would be free to prosecute a witness granted state immunity, and the need to "accommodate the interests of the state and Federal Governments in investigating and prosecuting crime" would have been met.[48] Thus, *Murphy* did not overrule *Counselman*, but neatly rationalized the inter-jurisdictional dilemma of federalism by extending a state's grant of transactional immunity into the federal sphere, while concurrently limiting its effect to "use and derivative use" immunity within the federal sphere.[49]

The *Murphy* Court did not directly confront the question presented in *Kastigar*, whether a single sovereign must afford transactional immunity;[50] in fact, *Murphy* carefully avoided this issue. This is supported by the lack of citation in *Murphy* of the multitude of federal transactional immunity statutes. Moreover, *Murphy* fails to make any reference to the precedents

---

[44] 378 U.S. 1 (1964).

[45] 322 U.S. 487 (1944)

[46] It was stated in Congress that "[Every] day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the Act of 1857. . . ." CONG. GLOBE, 37th Cong. 2d Sess. 364, (1862) remarks of Cong. Wilson of Iowa. "[The] zeal of persons criminally involved in election bribery, frauds in Indian Trust funds and the like . . . to confess their sins . . . compelled Congress [in 1862] to amend the statute." L. Mayers, *Shall We Amend the Fifth Amendment* 135 (1959).

[47] 378 U.S. at 79.

[48] *Id.*

[49] *Id.*

[50] This was noted in *Kastigar*, 406 U.S. at 457.

supporting transactional immunity where only one sovereign is involved.

The Supreme Court reaffirmed transactional immunity more than one year after *Murphy* in *Albertson v. Subversive*[51] *Activities Control Board. Counselman* was quoted with approval: "[N]o [immunity] statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the affect of supplanting the privilege . . . ."[52] Nevertheless, viewing *Murphy* as a mandate expressing blanket approval of "use and derivative use" immunity,[53] Congress, in the Organized Crime Control Act of 1970, incorporated a general immunity provision providing for "use and derivative use" immunity.[54]

The federal circuits immediately split on the question of whether this "use and derivative use" immunity statute was constitutional. The Seventh Circuit held that *Counselman* remained authoritative in its advocacy of transactional immunity where a single prosecuting sovereign granted immunity and limited *Murphy* to the dual sovereignty setting.[55] The Ninth Circuit, in *Stewart v. United States*,[56] reviewed in *Kastigar*, extended *Murphy*, advocating "use and derivative use" immunity in both the single and dual sovereignty settings. To resolve this apparent conflict the Supreme Court granted certiorari.[57]

KASTIGAR V. UNITED STATES

A DIAMETRIC CHANGE

In *Kastigar*, the witnesses were adjudged in civil contempt by a United States District Court[58] for refusal to answer questions of a federal grand jury investigating alleged violation of the Selective Service law. After having been granted "use and derivative use" immunity pursuant to the Organized Crime

[51] 382 U.S. 70 (1965); *See also* Stevens v. Marks, 383 U.S. 234, 244 (1966); *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971); *In re* Korman 449 F.2d 32 (7th Cir. 1971); Catena v. Elias, 449 F.2d (3d Cir. 1971).

[52] 382 U.S. at 80.

[53] *See* U.S. CONG. CODE AND AD. NEWS, 91st Cong., 2d Sess., No. 12, Oct. 15,, 1970, at 1073.

[54] 18 U.S.C. §6002 (1970) provides in relevant part:

> [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. . . .

[55] *In re* Korman, 449 F.2d 32 (7th Cir. 1971). *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y., 1971).

[56] 440 F.2d 954 (9th Cir. 1971).

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

[58] C.D. Cal. The contempt order was issued pursuant to 28 U.S.C. §1826.

Control Act of 1970,[59] the witnesses persisted in their refusal to answer, contending that "use and derivative use" immunity was not an adequate substitute for the fifth amendment privilege.

The Court was faced with the problem of balancing[60] the conflicting interests of the fifth amendment and the "public's right to everyman's evidence."[61] It recognized that without this right to compel the testimony of every person as to matters within his knowledge, law enforcement would be all but impossible.[62] "Such testimony constitutes one of the Government's primary sources of information."[63] Just as vital, however, is the fifth amendment privilege against compulsory self-incrimination. The values it protects are manifold. Dean Wigmore[64] synthesized these kaleidoscopic interests into three prime values; first, to prevent abusive tactics by overzealous prosecutors; secondly, to require the Government not to disturb the peace of the individual with compulsory appearances and compulsory disclosures, *i.e.*, fishing expeditions, which may lead to his conviction, unless sufficient evidence exists to establish probable cause; and finally, to require the Government to shoulder the entire load if it does prosecute.

The balance was resolved in favor of the Government's power to inquire, thus narrowing the scope of the privilege.[65] Mr. Justice Powell, in writing for the majority of the Court, dismissed *Counselman*[66] as overly broad, extended *Murphy*,[67] and held that "use and derivative use" immunity is the minimum constitutional standard necessary to supplant the privilege against self-incrimination, even though the *sovereign granting immunity may later be the prosecuting sovereign.*

We hold that such immunity from use and derivative use is coex-

---

[59] Pub L. No. 91-452, Title II, 84 STAT. 922.

[60] The Court rejected the argument that it is improper to balance a statutory objective, the Government's power to inquire, with an explicit constitutional prohibition, the fifth amendment privilege against compulsory self-incrimination. 406 U.S. at 452.

[61] This is Lord Chancellor Hardwicke's classic statement of the government's power to inquire. 12 CORBETT'S PARLIAMENTARY HISTORY 693 (1812).

[62] The accused's Constitutional right to have the aid of the court in issuing compulsory process for obtaining witnesses in his favor illustrates the fundamental nature of the Government's power to inquire. *See* Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694 (1926).

[63] Murphy v. Waterfront Comm'n, 378 U.S. at 94 (1964).

[64] 8 WIGMORE, EVIDENCE §2251 (Mc Naughton Rev., 1961). *See* Murphy v. Waterfront Comm'n, 378 U.S. at 93-94.

[65] Although on its face the privilege may seem more absolute and fixed than certain other constitutional provisions and less likely to yield to competing interests, in actual application it has been as capable of narrow or broad interpretation as more obviously elastic Constitutional provisions. Mansfield, *The Albertson Case*, 1966 SUPREME COURT REV. at 117.

[66] 406 U.S. at 454-55.

[67] *Id.* at 458.

> tensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.[68]

The *Kastigar* Court found that the "sole concern"[69] of the fifth amendment was to prevent a witness' testimony from "leading" to the imposition of criminal penalties. The Court reasoned that if the state cannot use a witness' testimony or its fruits, the compelled testimony cannot "lead" to the infliction of criminal penalties.

> It [use and derivative use immunity] prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[70]

The *Kastigar* Court defended use and derivative use immunity by drawing a parallel[71] between immunity statutes and the exclusionary rule[72] against coerced confessions and illegal searches and seizures. To implement the basic constitutional guarantees[73] against coerced confessions and illegal searches and seizures, prior Courts evolved the exclusionary rule prohibiting the use of illegally obtained evidence at trial, and the "fruit of the poisonous tree"[74] doctrine, prohibiting the indirect use of such evidence as leads or clues to procure additional evidence. The exclusionary rule requires the state to shoulder the burden of proving that its evidence is from an untainted source. The *Kastigar* Court reasoned that since "a coerced confession . . . does not bar prosecution" and is "as revealing of leads as testimony given in exchange for immunity,"[75] an immunity statute, therefore, need not provide transactional immunity, nor act as a bar to future prosecution to be constitutional. *Kastigar* held that the fifth amendment prohibition against compulsory self-incrimination can be supplanted by an immunity grant which acts as an exclusionary rule preventing a witness' testimony and its fruits from being used against him in a criminal prosecution.[76]

---

[68] *Id.* at 453.

[69] *Id.*

[70] *Id.* (emphasis added).

[71] *Id.* at 461-62.

[72] The "exclusionary rule" of evidence had its genesis in Weeks v. United States, 232 U.S. 383 (1914). The rule as developed by the Court and applied to states in Mapp v. Ohio, 367 U.S. 643 (1961), bars the use of evidence obtained through an illegal search and seizure, abrogating the common law rule that the admissibility of evidence is not affected by the illegality of the means by which it is obtained.

[73] U.S. CONST. amend IV, amend V.

[74] Wong Sun v. United States, 371 U.S. 471 (1963). The rule excludes derivative physical evidence and derivative testimonial evidence, including the testimony of witnesses discovered as a result of an illegal search, and confessions or admissions made by the defendant when confronted with incriminating evidence illegally obtained.

[75] 406 U.S. at 461.

[76] Justice White concurring in Murphy v. Waterfront Comm'n, 378 U.S.

The basic fault with this analogy is twofold. First, the coerced confession exclusionary rule protects the public and the accused from the "constable's blunder,"[77] frequently the result of a policeman's decision made under rapid fire or emergency circumstances. However, by contrast, a grand jury investigation is conducted only after meticulous preparation by a professional prosecutor. A coerced confession does not and should not bar a prosecution, since a prohibition would be a high price indeed for the "constable's blunder." However, to permit an immunity grant to bar prosecution, allowing the prosecutor to choose whether to have this witness' testimony or to prosecute him would not be unfair.

Secondly, the exclusionary rule acts in retrospect as a remedial measure to cure a breach of the accused's rights, while immunity statutes act prospectively as a guide to prevent future breaches. As Justice Marshall notes in his dissent in *Kastigar*: "the Constitution does not authorize police officers to coerce confessions or to invade privacy without cause, so long as no use is made of the evidence they obtain."[78] In essence, the protections offered by the exclusionary rule are procedural and derived from the Court's supervisory power, while the fifth amendment is a substantive right guaranteed by the Constitution.

The majority in *Kastigar*, however, rejected the argument that an immunity statute is a form of coercion barred by the fifth amendment.[79] This argument is based upon the literal import of the fifth amendment privilege that "no person . . . shall be *compelled* . . . to be a witness against himself,"[80] and a marked shift in the later coerced confession cases from an original emphasis on physical brutality to the present requirement of complete voluntariness.[81] An immunity grant may

---

at 106 (1964) provided the basis for the adoption of this view:

> In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation. . . . It is precisely this possibility of a prosecution based on untainted evidence that we must recognize.

[77] 406 U.S. 490 (Marshall, J., dissenting).

[78] *Id.* at 471.

[79] *Id.* at 452-53.

[80] U.S. CONST. amend V (emphasis added).

[81] *Compare* Brown v. Mississippi, 297 U.S. 278 (1936) (physical beating); Chambers v. Florida, 309 U.S. 227 (1940) (physical and mental pressure); Watts v. Indiana, 338 U.S. 49 (1949) (protracted interrogation); Spano v. New York, 360 U.S. 315 (1959) (false sympathy coupled with denial of counsel); McNabb v. United States, 318 U.S. 332 (1943) (prolonged interrogation); Blackburn v. Alabama, 361 U.S. 199 (1960) (psychological pressure); Miranda v. Arizona, 384 U.S. 436 (1966) (denial of counsel); Moore v. Michigan, 355 U.S. 155 (1957) (plea of guilty from fear of mob violence); Garrity v. New Jersey 385 U.S. 493 (1967) (threat of loss of

thus coerce an involuntary confession, but the exclusion of the witness' testimony at trial prevents an unconstitutional violation from arising.

To protect the witness against the state's use of his testimony, *Kastigar* placed on the prosecution, in a subsequent criminal proceeding, the burden of establishing that its evidence is from a source independent of the witness' compelled testimony.[82] *Murphy v. Waterfront Commission* had similarly required the prosecution to show that its evidence was "not tainted . . . by establishing an independent, legitimate source for the disputed testimony."[83]

Kastigar, however, reaffirmed and refined the burden:

> This burden of proof . . . 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.*[84]

The "wholly independent" language used by the Court was not merely for emphasis, but was an attempt to prevent the attenuation theory from operating upon the Court's standard.

The attenuation theory[85] is recognized in many states as an exception to the exclusionary rule, and in effect permits tainted evidence to be admitted where the connection between the "poisonous tree" and its "fruits" is so attenuated as to dissipate the original illegal taint. For example, in *People v. Ditson,*[86] the California Supreme Court held that although the police did not discover certain evidence independently of the "poisonous tree," the evidence was nevertheless admissible because the police could have discovered it independently. Thus, the courts have generally held that it is not necessary to find that all evidence is the "fruit of the poisonous tree" merely because it would not have come to light "but for" the illegal

employment); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) (fear of prosecution).

[82] 406 U.S. at 460.

[83] 378 U.S. at 79 n.18.

[84] Note 82 *supra* (emphasis added).

[85] Two other limitations to the "fruit of the poisonous tree doctrine" are recognized permitting the admission of derivative evidence where the primary evidence is tainted by illegal police conduct. The independent source doctrine, after which the *Kastigar* standard is modeled, permits admission of derivative evidence even though it is not from an independent source, so long as it is also the product of a concurrent lawful investigation. Warren v. Hawaii 119 F.2d 936 (9th Cir. 1941). The inevitable discovery doctrine permits admission of derivative evidence where it appears that the evidence would have been discovered without the illegal police conduct. United States v. Seohnlein 423 F.2d 1051 (4th Cir. 1970).

[86] 57 Cal. 2d 415, 369 P.2d 714 (1962). This point, that the attenuation doctrine has a "stultifying" affect upon the exclusionary rule, was argued before the Court in *Kastigar*. *See* 40 U.S.L.W. 3328.

police conduct.[87] However, the *Kastigar* standard requiring the Government to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony seems tantamount to a "but for" or *sine qua non* test. Clearly, where there is a de facto causal connection between the compelled testimony and the Government's evidence, the *Kastigar* standard would seem to require suppression of that evidence, although the connection is so attenuated as to dissipate the illegal taint.

If the coerced confession analogy was indeed substantially parallel to immunity statutes, both involving the same risks to the witness, then presumably the same standard would be applied. Yet, *Kastigar* fashioned a more stringent exclusionary rule where immunity, rather than a coerced confession, is the basis for exclusion. The Court thus recognized[88] a greater risk of self-incrimination to the witness from the prosecution granting immunity than from the constable coercing a confession, and the greater need to deter potential official illegality.

The difficulty of evidence tracing is a paramount factor to be considered in assessing the actual weight of the Government's burden of establishing a "wholly independent source" for its evidence; "For the question of taint is uniquely within the knowledge of the prosecuting authorities."[89] Thus, evidence tracing raises factual issues not encountered when the privilege is simply invoked.

The burden on the prospective defendant to rebut a prima facie showing by the state that its evidence is untainted is onerous indeed,[90] even presuming the good faith of the prosecution in refraining from constructing any independent sources of evidence or masking tainted sources. The Government's sources are neither accessible[91] to the accused nor does he necessarily have the ability or opportunity to untangle the fact gathering processes of a large bureaucracy.[92] Moreover, the problem is compounded when more than one police jurisdiction is involved.

---

[87] Note 85 *supra.*

[88] *See* U.S.L.W. 3328.

[89] 406 U.S. at 469 (Marshall, J., dissenting).

[90] To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of the average defendant in a criminal case. *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971).

[91] The accused's task of determining whether the Government's evidence is gained from independent sources is made more formidable by the Jencks Act, amended by Congress to preclude the accused witness' discovery of grand jury testimony of Government informants until time of trial. 18 U.S.C. §3500. *But see* United States v. Westmoreland, 41 F.R.D. 419 (1967).

[92] Note 89 *supra.*

The prospective defendant's perplexity is enhanced by the fact that frequently the Government may be unaware of its sources of evidence.[93] Evidence passing through many hands may become tainted without the prosecution in fact knowing it. The Government may, in practice, be able to sustain its burden of establishing a "wholly independent source" for its evidence by mere assertion, particularly if the witness can furnish no contrary evidence.

PROCEDURAL ASPECTS OF KASTIGAR

The procedural impact of *Kastigar's* "use and derivative use" immunity is equally as vital as the already discussed substantive standard. Therefore, it is necessary to examine, first, the scope of the immunity statute approved by *Kastigar*, and secondly, the context in which "use and derivative use" immunity will be most frequently employed: namely, the special investigatory grand jury.

The immunity statute constitutionally upheld by *Kastigar* was incorporated into an omnibus anti-crime statute euphemistically labeled the Organized Crime Control Act of 1970.[94] "Use and derivative use" immunity was the first of the "new weapons and tools"[95] requested by the Attorney General to be employed in the fight against organized crime.[96] The immunity provision of the statute is not, as its name would imply, limited to investigations into organized crime.[97] In fact, there is no longer any limitation as to the type of investigation in which "use and derivative use" immunity may be granted.[98] Immunity statutes, historically, have never been of such general appli-

[93] *See, e.g.*, Caun v. United States, 355 U.S. 399 (1968); Lawn v. United States, 355 U.S. 339 (1958) in which the Government inadvertently used tainted grand jury evidence.

[94] 18 U.S.C. §6001 *et seq.* (1970).

[95] *Hearings on S. 30 before the Subcom. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. at 227, 448 (1969).

[96] The immunity portion of the statute was authored by Professor Robert G. Dixon, Jr. in *Recommendations on Witness Immunity of the National Comm. on Reform of Federal Laws*, set forth in HEARINGS ON S. 30, n.95 *supra* at 289. Congressional discussion of the immunity portion of the bill was cursory. U.S. CODE CONG. & AD. NEWS 4008, 4017 (1970).

[97] "Use and derivative use" immunity may be granted, 18 U.S.C. §6002 (1970) provides:

> Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —
> 1. A court or grand jury of the United States,
> 2. An agency of the United States,
> 3. Either House or Congress, a joint committee of the two Houses, or a committee or sub-committee of either House . . . .

A pre-trial deposition hearing, for example, would be ancillary to a court proceeding.

[98] The grand jury need not be investigating a crime of any sort, under the Organized Crime Control Act of 1970, the special grand jury is author-

cation but, instead, have been limited to particular enumerated statutes.[99] Federal immunity provisions have generally been appended to statutes providing for some form of economic regulation.[100]

As the Supreme Court in *Kastigar* recognized, "use and derivative use" immunity was designed as a weapon to be used against the sophisticated criminal involved in organized crime, large scale conspiracy cases, racketeering and the like, where "the only persons capable of giving useful testimony are those implicated in the crime."[101] However, the scope of "use and derivative use" immunity is not so limited under the statute, and it may, for example, be used in small-time conspiracy cases, in cases of individual crimes of violence,[102] and even in political dissent[103] or belief probe cases.[104] The *Kastigar* case is itself illustrative; the use-immunized witness was questioned by a grand jury merely investigating alleged violations of the Selective Service law and not investigating organized crime.

Procedurally, the witness is placed in a position of uncertainty. General grand jury procedure leaves the United States attorney with complete discretion as to when, where, and to whom a grand jury subpoena will issue.[105] This discretion extends to the right to choose the situs of the grand jury investigation, effectively permitting the United States attorney to conduct a grand jury investigation several hundred miles from

---

ized to conduct a probe tending only a general public report on corruption, 18 U.S.C. 3333 (1970).

[99] Rogge, *Testimony of Political Deviants*, 55 MICH. L. REV. 375, 383 (1957).

[100] *Id.* at 384.

[101] See note 53 *supra*.

[102] In the arguments before the Court in *Kastigar*, Justice Stewart pointed out that the statute was not meant to be used in cases of individual crimes of violence; it was designed to get organized crime. 40 U.S.L.W. 3325 (1972).

[103] The privilege against self-incrimination, now removed by *Kastigar*, aids in the frustration of "bad" laws and "bad procedures" especially in the area of political and religious belief. As Dean Wigmore notes:

> Adequate First Amendment protections are absent. There is no solid tradition of official self-restraint in the 'anti-belief' area and no established privilege not to disclose matters related closely to religious, political and moral belief and activities. It is difficult therefore to condemn the misuse of the device [the privilege] which has always been particularly effective to frustrate 'belief probes' and which is often the only device available to do the job.

8 WIGMORE, EVIDENCE §2251 (Mc Naughton Rev. 1961).

[104] The past year and a half has seen dramatic escalation in the use of federal grand juries to investigate the activities of political dissenters. Largely engineered by the Justice Department's Internal Security Division, these investigations have spanned 10 cities, involved no fewer than 13 separate inquests and subpoenaed over 200 persons. *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 433 (1972).

[105] *Id.* at 446. *See* FED. R. CRIM. P. 17(d).

the residence of a subpoenaed witness.[106] Under the immunity provisions of the Organized Crime Control Act of 1970, the state is not required to set forth in any particularity the grounds for compelling the witness' testimony. No probable cause nor reasonable nexus between the prospective witness and the subject matter of the investigation need be shown.

The immunity statute as approved by *Kastigar* requires[107] merely that the United States District Court order the witness to appear and testify under a conclusory showing by the United States attorney that: (1) he deems the witness' testimony to be in the public interest; (2) the witness has invoked or is likely to invoke his fifth amendment privilege; and (3) the Attorney General, or a subordinate, has approved of it. Thus, the court's role in granting the order is ministerial; to find the conclusory facts on which the order is predicated.[108]

In addition, the statute authorizes a prospective grant of immunity, prior to the witness appearing before the grand jury and claiming his privilege.[109] Thus, a witness immunized under the *Kastigar* "use and derivative use" immunity may be compelled to travel far from his residence, and there be compelled to answer questions of a grand jury investigation into crime of any sort without the least showing of need or relevancy.

KASTIGAR AND THE GRAND JURY

"Use and derivative use" immunity as sanctioned by *Kastigar* will also function within the context of the special investigatory grand jury.[110]

The Organized Crime Control Act of 1970 provides for the convening of special investigatory grand juries empowered to sit up to 36 months.[111] A grand jury has, generally, two distinct functions. The first or protective function is to shield the individual from unfair prosecution by requiring proof of probable cause. The second or investigatory function is to uncover criminal activity within its jurisdiction.[112] A special

[106] Blair v. United States, 250 U.S. 273 (1919); United States v. Neff, 212 F.2d 297 (3d Cir. 1954) (grand jury witness has no standing to challenge venue of grand jury).

[107] 18 U.S.C. §6003.

[108] *See* 40 U.S.L.W. 3328.

[109] 18 U.S.C. §6003.

[110] "Use and derivative use" immunity may be employed in administrative proceedings, the order may be issued by the agency, with the approval of the Attorney General, without recourse to the court; or in Congressional proceeding, by court order. *See* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 557 (1963).

[111] 18 U.S.C. §3331 (1970).

[112] *See, e.g.*, 8 J. MOORE, FEDERAL PRACTICE — CIPES, CRIMINAL RULES 16.04 n.1 (2d ed. 1970).

investigatory grand jury's purpose is, therefore, to discover crime.

Since the "public's right to everyman's evidence" is the paramount objective in a grand jury proceeding, the Government has great latitude[113] in conducting the proceeding. To protect a witness' constitutional rights and to encourage complete disclosure, grand jury proceedings are conducted under a veil of secrecy.[114] The Government's attorney is not only present in the grand jury room, but also propounds the questions and conducts the examination of witnesses. The witness' attorney is not permitted in the grand jury room, nor can he make any objections as to the inquiries made of his client.[115] No elementary objection can be made as to the form, substance, relevancy, or scope of the questions;[116] the state may, thus, go on a "fishing expedition."

Wigmore notes that "the probable-cause requirements, with the privilege tacitly built in, prevent the 'fishing expedition' in regular criminal proceedings. Sometimes, however, in grand jury or legislative and administrative inquiries, where there is no probable cause requirement, there is only the privilege against self-incrimination to perform this function."[117] "Use and derivative use" immunity, once granted, removes the privilege as a barrier to fishing expeditions,[118] effectively permitting *Kastigar* immunity to be used by the prosecution as a broad discovery device.[119]

Thus, the Government can, under threat of contempt,[120] compel the witness to state the precise details of a crime with which he may later be charged. The prosecution then knows whether a subsequent case can effectively be made against the witness-accused and, if so, its probable outcome.[121] The actual

---

[113] Blair v. United States, 250 U.S. 273 (1919); United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

[114] See Calkins, *The Federal Myth of Grand Jury Secrecy*, 1 JOHN MAR. J. PRAC. & PROC. 18 (Spring, 1967).

[115] *In re* Groban, 352 U.S. 330 (1957).

[116] Costello v. United States, 350 U.S. 359 (1956).

[117] 8 WIGMORE, EVIDENCE §2251 (Mc Naughton rev. 1961).

[118] *See, e.g.*, Dionisio v. U.S., 442 F.2d 276 (7th Cir. 1971).

[119] The Supreme Court has held recently that a grand jury witness can challenge questions put to him on grounds that such questions were the product of illegal electronic surveillance. Gelbard v. United States, 408 U.S. 41 (1972). *But see In re* Womack No. 71-1782 (7th Cir. Aug. 10, 1972).

[120] A witness who refuses to testify after a grant of immunity can be incarcerated for contempt until he testifies or the term of the grand jury expires; in any event, no longer than 18 months, *see* Shillitani v. United States, 384 U.S. 364 (1966); Harris v. United States, 382 U.S. 162 (1965). The witness is not entitled to bail during the pendency of his contempt appeal, 28 U.S.C. §1826 (1970), where a basis for appeal exists. *See* United States v. Kelly No. 72-1028 (5th Cir. July 3, 1972), *In re* Tierney, No. 72-2333 (5th Cir. Aug. 3, 1972).

[121] Standing alone, this fact is tactically crucial. The state's bargaining

decision whether or not to prosecute may be determined by the prospective defendant's own words.[122] Although the witness' own testimony cannot be introduced into evidence in a subsequent criminal prosecution, it can be used as impeachment material.[123] Thus, in addition, a prosecutor would be tempted to press the witness into contradictory statements that he would be locked into at a later trial.[124]

As one commentator has noted, the possible prosecutive uses for *Kastigar* "use and derivative use" immunity are manifold.

> . . . [N]one of them [is] consistent with the assumption of prosecutive good faith. The intent to capitalize on compelled testimony in the prosecution of the defendant himself, by dissembling as to the original source of the information, is one obvious possibility. The intent to extract discovery depositions in preparation for criminal prosecutions is another. The most probable of all, however, is the hope the subject can be made to perjure himself.[125]

The federal "two witness perjury rule"[126] was abolished by the Organized Crime Control Act of 1970. Instead, a witness, under that statute, can now be convicted of perjury[127] solely on the basis of one federal agent's testimony.[128] Moreover, inconsistent grand jury answers constitute perjury per se.[129] There is no need to prove the falsity of either statement.[130] Thus, a witness granted "use and derivative use" im-

---

position is enhanced in proportion to its ability to predict the outcome of any prosecution.

[122] Testimony may be used other than as evidence for impeachment purposes. To illustrate, the state may utilize the witness' testimony under "use immunity" as a key to explain information not previously understood by the prosecution or as a guide to assemble bits of independent evidence already in the possession of the state or to pinpoint the precise importance of crucial evidence heretofore unnoticed or thought unimportant. *See* DeLorenzo v. United States, 151 F.2d 122 (2d Cir. 1945).

[123] This is consistent with Harris v. New York, 401 U.S. 222 (1971) where the Court held defendant's inadmissible statement, obtained in violation of *Miranda* may, if trustworthy, be used for impeachment.

[124] [I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the question is put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the early state trials . . . made the system so odious as to give rise to a demand for its total abolition. Brown v. Walker, 161 U.S. 591, 597 (1896). *See, e.g.*, Berger v. United States, 295 U.S. 78 (1934) (overbearing interrogation).

[125] Lewis, *The Practical Defender: On Use Immunity*, FOR THE DEFENSE, Nov., 1972 Vol. 7, No. 4.

[126] Hammer v. United States, 271 U.S. 620 (1926).

[127] Immunity does not extend to immunity from perjury or contempt in the process of making the disclosure itself. United States v. Bryan, 339 U.S. 323, 342 (1950).

[128] 18 U.S.C. §1623 (1970).

[129] *Id.* at §1623(b).

[130] A grand jury empowered merely to obtain perjury is incompetent. *See* United States v. Cross, 170 F. Supp. 303 (D.C.D.C. 1959).

munity, constitutionally sanctioned by *Kastigar,* may be compelled to speak over his claim of self-incrimination, knowing both that his testimony may be used by the state for non-evidentiary purposes and that each inconsistent statement will be perjury.[131]

Transactional immunity had effectively removed the witness' apprehension of prosecution, thereby increasing his motivation to speak[132] and giving his testimony greater credibility. Conversely, the fear of prosecution and perjury under *Kastigar* immunity may make the witness more likely to say what the prosecution wants to hear,[133] or more likely to suffer the pain of contempt by refusing to speak at all.

CONCLUSION

Kastigar represents an attempt by the Supreme Court to reconcile the fundamental conflict between authority and freedom. The necessity for authority is apparent with the progressive growth of organized crime and the concurrent need to probe the labyrinth created by the sophisticated criminal through public exposure and prosecution. "Use and derivative use" immunity, given constitutional sanction by the Supreme Court in *Kastigar,* can be either a tool to prevent the growth of organized crime or a bludgeon in the hands of an unscrupulous prosecutor. The potential for either is present. The choice lies with the Government.

John F. Martoccio

---

[131] Each falsehood or material inconsistency uttered during the witness' testimony is a separate offense of perjury in some jurisdictions, United States v. Richards, 408 F.2d 884 (5th Cir.) *cert. denied,* 395 U.S. 986 (1969). A false disclaimer of memory is perjury, United States v. Nicoletti, 310 F.2d 359 (7th Cir. 1962).

[132] A subsidiary problem arises when the witness volunteers information, *e.g.,* confesses to crimes not inquired into by the prosecution in order to bathe himself in the newly acquired immunity. This problem has been obviated by permitting immunity only for responsive answers. *See* Zicarelli v. New Jersey Comm'n, 406 U.S. 472 (1972).

[133] *See* Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956); Mesarosh v. United States, 352 U.S. 1 (1956); Flynn v. United States, 130 F. Supp. 412 (S.D.N.Y. 1955).