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Kastigar v. United States: The Immunity Standard Redefined

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KASTIGAR V. UNITED STATES: THE IMMUNITY STANDARD REDEFINED*

One of the most important forms of evidence in any criminal case is testimony. Because of the importance of testimony, witnesses are generally required to cooperate with prosecuting authorities by answering all relevant questions. However, the Anglo-American system of criminal justice, which is based on the investigative, rather than the inquisitorial, method of prosecution, has firmly rejected the notion of a witness being compelled to testify against himself.

On the other hand, crimes such as conspiracy and bribery can only be prosecuted through the testimony of witnesses who necessarily relate events which are incriminating to themselves as well as others. Recognizing this problem, legislatures have enacted statutes which seek to compel a witness to testify by substituting immunity from prosecution for the fifth amendment privilege against self-incrimination.[1] That a grant of immunity can be a satisfactory substitute for the right to remain silent is a well-accepted proposition but the scope of the immunity which must be accorded a witness has long been a subject of intense debate. The case to be discussed in this comment, *Kastigar v. United States,*[2] is the Supreme Court's answer to that question.

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[1] While the fifth amendment privilege applies to incriminating oral testimony, it is generally recognized that it is not a violation of the amendment to require one accused of a crime to submit to such scientific tests as blood analysis, urinalysis or breath tests.

The Supreme Court has held that the withdrawal of blood from an accused by a physician at a state officer's direction, without the consent of the accused, does not violate his privilege against self-incrimination. Schmerber v. California, 384 U.S. 757 (1966) (state prosecution for driving an automobile while under the influence of intoxicating liquor).

[2] 406 U.S. 441 (1972). The Court decided three similar cases on the same day: Kastigar v. United States; Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); and Sarno v. Illinois Crime Investigating Comm'n, 406 U.S.

Petitioners in *Kastigar* were summoned to appear before the United States Grand Jury for the Central District of California. Expecting the prospective witnesses to claim the fifth amendment privilege against self-incrimination, the federal authorities applied to the district court for an order granting petitioners immunity pursuant to 18 U.S.C. §§ 6002-03. When petitioners appeared and, despite the grant of immunity, refused to testify, they were convicted of contempt of court. This conviction was affirmed by the Court of Appeals for the Ninth Circuit.[3]

Underlying the petitioners' continuing refusal to answer the government's questions was their belief that the statutory "use immunity"[4] granted them was insufficient to replace their constitutional privilege against self-incrimination. The Supreme Court upheld the conviction, deciding 5-2, with two Justices abstaining, that use immunity is coextensive with the fifth amendment privilege.[5]

Although they have been the cause of much complex argumentation over the scope of fifth amendment protection, the two basic forms of immunity, "transactional" and "use," are not concepts inherently difficult to understand. The present-day use immunity approved in *Kastigar* (also known as "use plus fruits" immunity) guarantees that the testimony given by a witness may not be used, either directly or indirectly, against him in any criminal proceeding. This means that not only the testimony itself but also other evidence gained through any use of the witness's testimony is inadmissible at trial.[6] A witness granted use immunity may, however, be prosecuted for a crime about which he testifies if evidence is obtained independently of any use of his testimony. Transactional immunity is broader in scope, shielding the witness from prosecution for any crime about which he testifies, regardless of how evidence is obtained. Thus, a prosecutor may have a perfectly sound case against a witness before he testifies, or may at a later time indepen-

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482 (1972). The central issue in the latter two cases was the same as that in *Kastigar*. In the *Zicarelli* case, the petitioner also claimed that the term "responsive" in the statute which limited immunity to answers "responsive" to the questions asked was too vague. The Court denied this claim and also felt that the petitioner's assertion that he would be subject to prosecution by a foreign jurisdiction dealt with too remote a danger. In *Sarno*, the petitioner claimed that Illinois had failed to demonstrate that it was granting him transactional immunity. The decision in *Kastigar* made this contention moot.

[3] Stewart v. United States, 440 F.2d 954 (9th Cir. 1971).

[4] 18 U.S.C. § 6002 reads in pertinent part:

> [T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the oath (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .

Id. This statute has replaced the formerly numerous and diverse federal immunity statutes.

[5] 406 U.S. 462. Mr. Justice Powell wrote the majority opinion. Justices Brennan and Rehnquist took no part in the consideration or decision of the case and Justices Douglas and Marshall filed dissenting opinions. *See* notes 70-84 and accompanying text *infra*.

[6] Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79 n.18 (1964). This is the modern version of *use* immunity. It does not seem that *use* immunity was known to protect against such indirect use of testimony in early interpretations of the statutes. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547 (1892).

dently develop a case against the witness. In both these situations, the state would be barred from prosecuting a witness who had been granted transactional immunity,[7] although a witness testifying under a grant of use immunity could have been prosecuted.

In order to obtain vital information that would otherwise be unavailable, the federal and all state governments have enacted immunity statutes.[8] The legislatures' choice of either use or transactional immunity is a matter of constitutional significance because of the fifth amendment's privilege against self-incrimination,[9] a privilege the immunity statutes are designed to sidestep. The power of the states and the federal government to compel a witness's testimony by immunity legislation is founded on the belief that the only purpose of the fifth amendment is to protect against criminal prosecution.[10] Therefore, the important issue becomes what type of immunity is coextensive with the privilege.

The controversy which led to the decision in *Kastigar* was precipitated to a great extent by the Supreme Court's decision in *Murphy v. Waterfront Commission.*[11] While recognizing that a witness testifying under a *state* grant of transactional immunity was protected from the use of that testimony by federal authorities, the Court held that he could be prosecuted if the federal authorities had an independent source for their evidence.[12]

Some courts interpreted *Murphy* as applying only to the actual facts presented, i.e., the duty of one jurisdiction to an individual who has been compelled to incriminate himself under another jurisdiction's grant of transactional immunity.[13] But other courts and legislators interpreted the case as a sub silentio overruling of the transactional rule enunciated in *Counselman v. Hitchcock.*[14] Thus, the decision in the instant case can be traced directly to the *Murphy* decision. In order to fully understand the reasoning and implications of *Kastigar,* however, a brief discussion of the extensive history of the privilege against self-incrimination and immunity statutes will prove helpful.

Historical Development

The privilege originally developed as a limited reaction to the harsh practices en-

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7 Sobel, *The Privilege Against Self-Incrimination, "Federalized"*, 31 BKLYN L. REV. 1, 36-37 (1964) [hereinafter Sobel]. The witness's answer must be responsive in order to be covered by the immunity. Thus, a witness cannot obtain immunity by blurting out that he committed "murder, robbery and rape" in answer to a question which is in no way directed towards the eliciting of such disclosures. But the immunity is said to extend to any "clue fact"; in other words, to any fact which may furnish leads or links to a crime.

8 Comment, *Federalism and the Fifth—Configurations of Grants of Immunity,* 12 U.C.L.A. L. REV. 561, 562 (1965) [hereinafter *Federalism*].

9 U.S. CONST. amend. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

10 *Federalism, supra* note 8, at 563.

11 378 U.S. 52 (1964).

12 *Id.* at 79 n.18.

13 *See, e.g.,* Catena v. Elias, 449 F.2d 40 (8th Cir. 1971).

14 142 U.S. 547 (1892). *See, e.g.,* Zicarelli v. New Jersey Crime Investigating Comm'n, 55 N.J. 249, 261 A.2d 129 (1970); Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), *cert. granted sub nom.,* Kastigar v. United States, 402 U.S. 971 (1971); N.J. STAT. ANN. § 9M-17(b) (1970); Organized Crime Control Act of 1970, 18 U.S.C. §§ 6002-03 (1970).

gaged in by ecclesiastical courts and the infamous English Court of Star Chamber. These courts forced the witness, by variegated means including torture, to answer irrelevant and broad questions not based upon a proper presentment or a reasonable showing that the individual was guilty of a specific charge.[15] There was, of course, strong opposition to the extreme methods employed by the Star Chamber; but the opposition also evidenced a dislike for the practice of putting an individual to the option of convicting himself or committing perjury. The modern version of the privilege, which does not countenance any method of forcing a person to testify against himself, is in no way inconsistent with the earlier development of the privilege.[16]

The right to refuse to provide self-incriminating answers to questions was first recognized because of the determination of an individual named "Freeborn John" Lilburne. In 1637, Lilburne was brought before the Star Chamber court to answer a charge that he had imported heretical books. He refused to take an oath to answer all questions truthfully because such an oath meant that he could not refuse to answer any question, no matter how broad or incriminating. For his refusal, Lilburne was sentenced to be whipped and pilloried. After the sentence was executed, he continued in his refusal and filed a petition with Parliament. In proclaiming the punishment illegal and subsequently awarding him an indemnity of 3000 pounds, Parliament established his right to remain silent. Since that date, the privilege against self-incrimination has been part of the English Common Law.[17] The United States Constitution and the constitutions of all but two states also contain language recognizing the privilege.[18]

Immunity statutes have raised serious questions throughout our legal history as to the scope and purposes of the privilege against self-incrimination. Chief Justice Marshall, while sitting as a circuit judge, outlined the scope of the privilege long before the first immunity statute was passed:

> . . . [A]ccording to their statement [the Counsel for the United States] a witness can never refuse to answer any question unless that answer unconnected with other testimony would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose the chain of testimony

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[15] MCCORMICK, EVIDENCE § 115, at 246-47 (2d ed. 1972). Thus, the concept of allowing a witness the privilege of refusing to answer questions relating to his alleged criminality, even when properly charged, was described by Jeremy Bentham as "overkill." 8 J. WIGMORE, EVIDENCE § 2250, at 292 (McNaughton rev. ed. 1961), *citing* J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE in 7 THE WORKS OF JEREMY BENTHAM 456, 462 (Bowring ed. 1843).

[16] MCCORMICK, EVIDENCE § 115, at 247 (2d ed. 1972).

[17] E. GRISWOLD, THE FIFTH AMENDMENT TODAY 3, 4 (1955). Jewish law recognized the privilege long before modern times and in a more absolute manner, making it impossible for a man to testify against himself, either voluntarily or otherwise. This was probably not, however, the source of our use of the privilege but it did provide "an ancient lineage and a high moral authority" for the principle. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 441 (1968).

[18] 8 J. WIGMORE, EVIDENCE § 2252, at 319 (McNaughton rev. ed. 1961). The two states that do not have such constitutional language are Iowa and New Jersey but both have statutes to the same effect. *Id.* The above source also contains a summary of the wording of each state's provision.

> which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself.[19]

The first immunity statute was passed in January, 1857, to aid Congress in its investigation of a vote-selling scheme. A *New York Times* Washington correspondent claimed that he had been approached by certain members of the House of Representatives concerning the voting scheme but, when questioned by a House committee, he refused to testify on fifth amendment grounds.[20] In response, Congress passed an immunity act which granted anyone testifying before a Congressional committee immunity from prosecution for any act about which he testified.[21] This statute led to what were known as "immunity baths," with witnesses eager to divulge all their criminal activities, whether related or unrelated to the subject under investigation, in order to be free from prosecution.[22] As a result, Congress amended the statute in 1862 to limit the immunity of the witness to exclusion of the testimony actually given (limited *use* immunity, not use plus fruits immunity), rather than complete freedom from prosecution.[23] This immunity statute was not put to use immediately, therefore delaying determination of its constitutional validity until 1892.

In 1868, Congress extended the Congressional hearings immunity to court proceedings.[24] Yet it was not until the passage of the Interstate Commerce Act[25] in 1887

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[19] 1 BURR'S TRIAL 244 (1808). *See* Tehan v. Scott, 382 U.S. 406 (1965) which speaks of the purpose of the privilege against self-incrimination as

> . . . preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load."

Id. at 415. *See also* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) where the Court outlined the values which the privilege serves to protect:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual-balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. at 55 (footnotes omitted).

[20] Comment, *The Federal Witness Immunity Act in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L.J. 1568, 1571 (1963) [hereinafter Comment].

[21] Act of Jan. 24, 1857, ch. 19, 11 Stat. 155-56.

[22] Modern statutes avoid such immunity baths by requiring that answers be responsive to the question in order to fall under the grant of immunity. The *Counselman* case implicitly recognized the responsiveness requirement by stating that a statute must "afford absolute immunity against future prosecution for the offense to which the *question* relates," 142 U.S. at 586 (emphasis added). In its 1862 amendment of the immunity statute, Congress chose to limit the immunity itself in order to solve the immunity baths problem.

[23] Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

[24] Act of Feb. 25, 1868, ch. 13, 15 Stat. 37. *See* Comment, note 19 *supra,* at 1572.

[25] Act of Feb. 4, 1887, ch. 104, 24 Stat. 379. 49 U.S.C. § 1 *et seq.* (1954).

that the immunity act was invoked and subsequently put to the constitutional test. A witness before a grand jury investigation into alleged violations of the Interstate Commerce Act refused to testify. He was granted immunity under the 1868 Act, but he continued his refusal and was held in contempt of court.[26] The appeal of this contempt citation led to the landmark decision of *Counselman v. Hitchcock*[27] which found that the statute of 1868 did not grant an immunity coextensive with the privilege against self-incrimination and could not, therefore, be used to compel a witness's testimony.[28] As mentioned above, the immunity granted by this statute was of the *use* type, guaranteeing only that the testimony of the witness could not be used as evidence in a subsequent criminal proceeding brought against him. The Court stressed that such a grant of immunity would not protect against use of the testimony by the prosecution in the acquisition of new evidence.[29] In other words, the prosecution was free to use what it learned about the witness's activities or associates as a starting point for an investigation, presenting only the newly discovered evidence at the trial of the witness.

The *Counselman* decision led to the enactment of the Immunity Act of 1893[30] which granted *transactional* immunity rather than the more limited use immunity given under the previous statute. Important questions concerning the scope of the fifth amendment privilege remained unresolved, however. A federal district court held that the Act of 1893 was invalid because it did not grant protection from private reprisals.[31] That ruling was overturned by the

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[26] Comment, *supra* note 20, at 1573.

[27] 142 U.S. 547 (1892).

[28] *Id.* at 585-86.

> 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.

Id. The Court rejected the contention that the courts of Virginia, New Hampshire and Massachusetts had held that the immunity statute must be so broad as to give complete freedom from prosecution because the constitutions of those states gave to the witness a broader privilege than that of the United States. The Court said that the differences in the wording of the statutes should not be considered crucial because they were all protecting against the same evil. *Id.* at 584-86.

[29] *Id.* at 574.

[30] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, which provided:

> But no 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. . . .

[31] United States v. James, 60 F. 257 (D.C.N.D. Ill. 1894). In holding that the Fifth Amendment was meant to protect against private reprisals as well as public, Judge Grosscup maintained that the history of the Anglo-Saxon, as contrasted with the Latin people, put a great importance on the value of men as individuals and their right to privacy, rather than simply the place and value of a man as part of the state. *Id.* at 262. *See also* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968):

> The clause by its terms also protected against more than just "self-incrimination," a phrase that had never been used in the long history of its origins and development. The right against self-incrimination is a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal

Supreme Court in *Brown v. Walker*,[32] where it was held that the privilege extended only to freedom from criminal prosecution.[33] The Court also held that the statute granted immunity from state as well as federal prosecution.[34] Thus, it was determined that a statute which granted immunity from prosecution (*transactional* immunity) as a substitute for the privilege met the requirement of coextensiveness with the privilege which was laid down in the *Counselman* case.[35]

In 1903, Congress passed a new immunity act[36] which dealt with the compulsion of testimony in all actions brought under the Antitrust Acts.[37] This 1903 immunity statute, following the guideline of the *Brown* decision, provided for complete immunity from future prosecution, i.e., transactional immunity. Alluding to the decision in *Brown*, the Supreme Court held this statute constitutional in *Hale v. Henkel*.[38] But the Court also emphasized the practical considerations that justify immunity acts as substitutes for the fifth amendment privilege:

> As the combinations or conspiracies provided against by the Sherman Anti-Trust Act can ordinarily be proved only by the testimony of parties thereof, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare those combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?[39]

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cases, to the self-production of any adverse evidence including evidence that made one the herald of his own infamy, thereby publicly disgracing him.

Id. at 427.

[32] 161 U.S. 591 (1896).

[33] *Id.* at 598. "[T]he fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure." *Id.* at 605.

See also Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959, 966 (1968):

> By far the most difficult problem presented by immunity statutes concerns the scope of the consequences against which the witness must be immunized to satisfy the *Counselman* requirement that the immunity be coextensive with the privilege. That scope cannot be unlimited: the privilege does not and the immunity therefore need not protect against social ostracism, degradation, or criticism. Immunity would clearly be impossible if it were required that the Government protect the witness against all private consequences of the facts revealed by his testimony.

[34] 161 U.S. at 608; *see also* Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 345 (1966) [hereinafter Wendel]. The author states:

> Justice Brown disposed of the question of the immunity law's adequacy in the light of possible state prosecution by ruling: (1) Since the Fifth Amendment does not apply to the states, it would not seem necessary to extend immunity to state proceedings; (2) but, as a matter of fact, the Immunity Act of 1893 is sufficiently broad to grant such immunity; and (3) even if the immunity statute did not provide sufficiently broad immunity against the state, the danger of state prosecution is so remote that it would not disturb the validity of the law.

[35] 161 U.S. at 610.

[36] Act of Feb. 25, 1903, ch. 755, 32 Stat. 904.

[37] *Id.*

[38] 201 U.S. 43 (1906). The grand jury had subpoenaed the witness, an employee of a corporation, as well as some of the books and papers of the corporation. The Court rejected the petitioner's claim that he could not be compelled to testify and also rejected the argument that the fourth amendment protected against the seizure of the books and papers. *Id.* at 73.

[39] *Id.* at 70.

Although the 1903 transactional statute was to serve as a model for legislation in many jurisdictions, Congress refined two statutes granting transactional immunity through separate amendments in 1903 and 1914.[40] The amendments eliminated corporations from immunity grants and made it impossible for a witness to volunteer testimony in order to gain immunity.[41]

The need to update all immunity statutes was highlighted by the case of *Adams v. Maryland*.[42] In that case, the witness testified before a Senate committee investigating gambling and admitted his gambling activity. He testified without once claiming the fifth amendment privilege but was nevertheless held to have been granted immunity under the statute of 1862.[43] Although this statute fell under the *Counselman* rule, it was still in force. The court noted that it was the only statute applicable to Senate hearings in 1954,[44] and that it granted immunity automatically even if a witness did not claim his fifth amendment privilege.[45] The Court also held that the ruling of unconstitutionality in *Counselman* did not remove the statute's ability to grant immunity, but meant only that the immunity so conferred was insufficient to replace the privilege.[46] Since the defendant in *Adams* was interested only in preventing *use* of his testimony, the 1862 act was sufficient for his purposes. Thus, the witness gained immunity from use of his testimony although he had not claimed fifth amendment privilege.

The Immunity Act of 1954[47] cleared up the problem which the *Adams* case highlighted. The act was also applicable to Congressional hearings[48] but, unlike the 1862 statute, it required the witness to claim the privilege in order to gain im-

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[40] Act of Feb. 14, 1903, ch. 552, 32 Stat. 825; Act of Sept. 26, 1914, ch. 311, 38 Stat. 717. These refinements were in answer to the loopholes found to exist in the immunity statutes after the case of United States v. Armour & Co., 142 F. 808 (D.C.N.D. Ill. 1906). Wendel, *supra* note 34 at 347, n. 1. Most immunity statutes have in common several factors which must be complied with in order to supplant the witness's fifth amendment privilege. (1) The witness must be faced by the state with an attempt to exercise its power to compel testimony. Thus, if the witness were to wrongfully refuse to answer he would be subject to legal punishment. (2) The witness must refuse to answer based upon the privilege. The state has no interest in granting immunity to a witness who would voluntarily divulge the sought-after testimony. (3) The prosecution authorities must make the application for the grant of immunity, weighing the value of the witness's testimony against the right to prosecute him. This factor is much less significant under a use type immunity statute than under a transactional type. (4) The grant of immunity must be approved by the court. This formalizes the procedure, puts the witness on notice that he must now answer all questions, and operates as a check on the prosecutor's power. MCCORMICK, EVIDENCE 143, at 306-07 (2d ed. 1972).

[41] Wendel at 349.

[42] 347 U.S. 179 (1954).

[43] *Id.* at 182. The petitioner here had been prosecuted by the State of Maryland based on the testimony which he gave before Congress. In rejecting the contention that the federal statute could not be held binding against the states, the Court stated that "Article I of the Constitution permits Congress to pass laws 'necessary and proper' to carry into effect its power to get testimony." *Id.* at 183.

[44] *Id.*

[45] *Id.* at 181.

[46] *Id.* at 182.

[47] Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745.

[48] Wendel at 349.

munity.[49] Like other immunity statutes, it was enacted for practical reasons. The investigative function of Congress was being severely hampered by witnesses' refusing to testify.[50] In 1953 alone, 317 witnesses invoked the privilege before Congressional committees.[51]

Ullmann v. United States[52] was the first major test of the Immunity Act of 1954. The major point in the *Ullmann* petitioner's attack was that the statute did not protect against state prosecution. The Court reaffirmed *Brown* and stated that the Act prohibited states from prosecuting Congressional witnesses.[53]

Malloy v. Hogan[54] and *Murphy v. Waterfront Commission of New York Harbor*,[55] decided on the same day, are two of the more important cases on the scope of the fifth amendment privilege. *Malloy* held that the amendment is binding on the states through the due process clause of the fourteenth amendment and its requirements are to be determined as a matter of federal constitutional law.[56] The *Murphy* case decided that federal prosecutors could not *use* testimony taken by compulsion from a witness under a state grant of immunity.[57] Thus, *Murphy* apparently replaced with a less stringent standard the rule of the *Counselman* and *Brown* decisions that only complete freedom from prosecution is sufficient to replace the privilege:

> *Counselman* and *Murphy* thus provide two rules to govern substantially the same situation. Under *Counselman*, if the testimony will incriminate, the privilege to remain silent cannot be replaced unless the witness is granted coextensive immunity from prosecution. Under *Murphy*, a state witness

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[49] Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745, which said that the witness would be ". . . granted immunity . . . after having claimed his privilege against self-incrimination."

[50] *See* Wendel at 349.

[51] *Id.*

[52] 350 U.S. 422 (1956). The petitioner in this case was summoned before a federal grand jury investigating attempts to endanger the security of the United States by espionage. He claimed that even if the act were held to be constitutional, the Court should exercise its discretion and not accept the application of the U.S. Attorney for immunity because it was not in the public interest in this case. However, the Court held that the act did not grant the judge any discretion. *Id.* at 432.

[53] *Id.* at 431-32.

[54] 378 U.S. 1 (1964). In this case, the petitioner had been compelled by the State of Connecticut to testify before a referee concerning certain gambling activities in which he had been involved. The highest state court ruled that he was not protected from prosecution because he had not properly invoked the state privilege and the federal privilege (fifth amendment) did not apply to him. The United States Supreme Court held that the fifth amendment did apply to the petitioner and that the privilege is uniform throughout the land. *Id.* at 3, 11.

[55] 378 U.S. 52 (1964).

[56] 378 U.S. at 8. The Court noted:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence.

Id.

[57] 378 U.S. at 79 n.18. The Court implemented its decision by stating:

> Once a defendant demonstrates that he has testified under a state grant of immunity to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

Id.

> granted state immunity has no right to remain silent even if the testimony will incriminate him under federal law because use of the testimony or its fruits against him in a federal (or state) prosecution is constitutionally prohibited. Thus, while the former holds that only immunity from prosecution replaces the privilege, the latter holds that immunity from use will suffice.[58]

If not for the decision in *Malloy,* the difference between *Murphy* and *Counselman* could have been explained as the difference between the fourteenth and fifth amendment self-incrimination privileges. But the *Malloy* case "rejects the view that the privilege applicable against the federal government can be measured by a different standard than that applicable against the states."[59]

Justice Goldberg's majority opinion in *Murphy* introduced the present-day concept of use immunity since it emphasized that the government may not make use of the testimony of the witness *or* the fruits of that testimony. This reference to standards for excluding evidence indicates that *Counselman* may well have laid down its broader standard because it was decided before the exclusionary rules of evidence were developed.[60]

After *Murphy* and before the decision in *Kastigar,* there was much confusion about the type and nature of immunity which should or must be granted in exchange for the privilege. This was evidenced by two New York cases, *People v. LaBello*[61] and *Gold v. Menna.*[62] In *LaBello,* the witness testified before the grand jury concerning an assault and was granted immunity under New York law. Two days later, a policeman testified to the grand jury that the witness had attempted to bribe him to dispose of the evidence of the assault. The witness was subsequently indicted and convicted of attempted bribery. The New York Court of Appeals affirmed the conviction, stating that the New York statute prescribed use, rather than transactional, immunity. That decision was reversed, as to the type of statutory immunity, by the same court in the *Gold* case with the notation that the reinterpretation did not mean that *LaBello* was incorrectly decided. The Court of Appeals reasoned that the attempted bribery in *LaBello* was not part of the transaction that the witness actually testified about.[63]

On its face, the dictum in *Gold* as to what related matters are covered by transactional immunity does not seem illogical but, when compared with a prior statement of the Supreme Court, it is a rather strict construction of the term. In *Heike v. United States,*[64] a case involving im-

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58 *Federalism, supra* note 8, at 577.

59 *Id.*

60 *Id.* at 584. The author feels that, at the time of the *Counselman* decision, the heavier burden placed upon the prosecution was balanced by the necessity of protecting the witness. He states that the Supreme Court's subsequent mandate of exclusionary rules of evidence, in cases of coerced confessions, for example, has eliminated the need for this prosecution burden.

61 24 N.Y.2d 598, 249 N.E.2d 412, 301 N.Y.S.2d 544 (1969), *cert. granted sub nom.,* Piccirillo v. New York, 397 U.S. 933 (1970), *cert. dismissed,* 400 U.S. 548 (1971).

62 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969).

63 *Id.* at 481, 255 N.E.2d at 238, 307 N.Y.S.2d at 37.

64 227 U.S. 131 (1913).

munity under the Sherman Anti-Trust Act,[65] the Court construed the word "transaction" somewhat more liberally.

Although *Heike* held that the crime with which the petitioner was charged was not part of the "transaction" about which he had previously testified, the explanation was phrased in these terms:

> The evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that they were dealings of the same sugar company.[66]

In *LaBello,* the subsequent prosecution *was* related to a matter the witness had been questioned about since the subject area was the same and the connection of the facts involved was proximate. Therefore, the question of whether or not New York was actually granting an immunity coextensive with the privilege seemed to be still ripe for decision but the Supreme Court, after *Gold,* declined to hear the *LaBello* appeal.[67]

The Kastigar Case

Until this year, the Supreme Court had ratified only one legislative attempt to satisfy the fifth amendment requirement by means of use immunity statutes. This important exception existed in the case of public employees where the sanction for refusal to testify is dismissal from employment rather than a contempt citation. In *Uniformed Sanitation Men Association v. Commissioner of Sanitation of New York,*[68] the court stated:

> Granted that . . . the threat of dismissal constitutes compulsion, such a public employee given use immunity is not being required "to be a witness against himself."[69]

In all other cases, however, transactional immunity had not been specifically overruled as the standard[70] and the confusion and controversy made the issue most ripe for decision in *Kastigar.*

The immunity statute at issue in *Kastigar,* a section of the Organized Crime Control Act of 1970, was admittedly "designed to reflect the use-restriction immunity concept of *Murphy v. Waterfront Commission*"[71] as opposed to the transactional standard which had previously been considered necessary by the Supreme Court in *Counselman* and *Brown.*

The primary reasons that Congress saw fit to make the change to use immunity were its less inhibiting effect on law enforcement and the suggestions found in the *Murphy* decision—albeit mainly obtained by reading between the lines—that a use immunity statute which protected

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[65] Act of Feb. 25, 1903, ch. 755, 32 Stat. 854, 15 U.S.C. § 32, *as amended,* Act of June 30, 1906, 34 Stat. 798, 15 U.S.C. § 33.

[66] 227 U.S. at 143.

[67] Piccirillo v. New York, *cert. dismissed,* 400 U.S. 548 (1971).

[68] 426 F.2d 619 (2d Cir. 1970), *cert. denied,* 403 U.S. 917 (1971).

[69] *Id.* at 626. *See also* Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

[70] *See, e.g.,* Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

[71] H. R. Rep. No. 91-1188, 91st Cong., 2d Sess. 4017-18 (1970).

against use of the testimony as an investigatory lead would be upheld by the Court.[72] Of course, the *Murphy* case dealt with the problem of two separate jurisdictions and there were many who felt that the case could be explained simply as a compromise between the federal government's right to decide who it wished to be able to prosecute and the witness's need for some real safety.[73] Those who held this view believed that the *Counselman* case, which had never been challenged directly, stood for the proposition that no less than complete immunity from prosecution would suffice to replace the privilege.[74] Others believed that the transactional language of *Counselman* was taken out of context and was not the basis of the holding in that case.[75]

Thus, in adopting the use immunity statute as the constitutional standard, the

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[72] In his concurring opinion in *Murphy,* Justice White clearly stated his opinion that use immunity is coextensive with the privilege:

> The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecution of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. 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. . . .

378 U.S. 52, 106.

[73] *See, e.g.,* United States ex rel. Catena v. Elias, 449 F.2d 40 (8th Cir. 1971):

> 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 obstructive of its administration of justice.

Id. at 44; *see also* Piccirillo v. New York, 400 U.S. 548 (1971) (Brennan, J., dissenting at 563); *In Re* Kinoy Testimony, 326 F. Supp. 407 (S.D.N.Y. 1971). This view was also expressed by Justice Douglas in his dissenting opinion in Kastigar v. United States, 406 U.S. 464 (1972).

[74] The language used at the conclusion of the *Counselman* opinion, *supra,* note 28 does provide an *apparently* sound basis for such a position. Justices Douglas and Marshall, dissenting in *Kastigar,* firmly support this position, Justice Douglas arguing that a grant of immunity is adequate only "if it operates as a complete pardon for the offense." 406 U.S. at 466.

[75] *See, e.g., In re Kinoy* Testimony, 326 F. Supp. 407 (S.D.N.Y. 1971); even the case of Brown v. Walker, 161 U.S. 591 (1896), which is cited to show the necessity of transactional immunity, used words which add credence to this view, saying that the privilege could be satisfied by a statute that ". . . secur[ed] the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure . . ." *Id.* at 595; *see also* Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), which case was relied upon by the petitioners in *Kastigar* to a large extent and is illustrative of the ambiguity which started with *Counselman* and continued until the *Kastigar* decision. The case arose over the failure of certain members of the Communist party to file necessary registration forms. They claimed that the requirement of filing the forms violated their privilege against self-incrimination because they could be prosecuted for their membership, which the registration would provide evidence of, under the Smith Act, 18 U.S.C. § 2385. The Court held that the registration requirement did violate the privilege and, quoting from the *Counselman* transactional immunity language, stated, "Measured by these standards, the immunity granted by § 4(f) is not complete." *Id.* at 80. However, the Court went on to explain the infirmity of the immunity by noting that "it does not preclude the use of the admission as an investigatory lead, a use which is barred by the privilege." *Id.* Interestingly, this opinion was written by Justice Brennan who was later to indicate, in his dissent to *Piccirillo*; that he considered only transactional immunity sufficient to replace the privilege. The wording of his opinion in *Albertson* certainly gave no clue that the other Justices felt the same way, however.

Kastigar Court relied upon the opinion that the *Counselman* transactional language was dictum[76] and adopted the viewpoint that the *Murphy* rationalization of use immunity in a dual jurisdictional setting was equally applicable to a single jurisdiction.[77]

Indeed, the *Counselman* Court had explained the infirmity of the statute in question by saying, "[i]t 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. . . ."[78] Thus, *Kastigar* merely construed the later wording of the *Counselman* opinion calling for a statute providing complete immunity from future prosecution as the earlier Court's suggestion as to what type of statute would protect against such use.[79]

Having disposed of the *Counselman* decision as a binding precedent, the next question before the Court was whether or not the statute's promise not to use the testimony of the witness as an investigatory lead could be kept as a practical matter. The issue was resolved by comparing the problem to that of coerced confessions. A defendant can suppress only the confession itself, not the entire prosecution, it was noted.[80] However, the analogy is not perfect because the main purpose of the exclusionary rules with respect to coerced confessions is to deter authorities from engaging in coercive practices by banning their fruits.[81] An immunity statute, on the

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[76] 406 U.S. at 453.

[77] *Id.* at 458. Mr. Justice Douglas strongly disagreed with this contention. *Murphy,* he felt, was merely an effort to solve a problem of federalism, *i.e.,* the ability of one jurisdiction, through a grant of transactional immunity, to deprive another of the right to prosecute a violation of its laws. The Court, in deciding *Murphy,* never intended to affect the *Conselman* mandate of transactional immunity within a single jurisdiction, according to Justice Douglas. *Id.* at 463 (Douglas, J., dissenting).

[78] 142 U.S. at 564.

[79] *See also* Ullmann v. United States, 350 U.S. 422, 437 (1956), which foreshadowed this interpretation of *Counselman.*

[80] The Court related the compelled testimony problem to coerced confessions and declared:

> There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

406 U.S. at 462. In fact, transactional immunity is the only method of suppressing evidence that completely bars further prosecution.

[81] Mapp v. Ohio, 367 U.S. 534 (1961). Justice Marshall severely criticized the majority's analogy to exclusionary rules applicable to coerced confessions, stating that an immunity statute differs from an exclusionary rule "in at least two critical respects:" (a) the statute's approval of interrogation, which approval obliges the Government "to remove the danger of incrimination completely and absolutely" and (b) the fact that the statute acts in advance of the questioning, giving the prosecution time to make a reasoned choice between compulsion of the testimony with consequent loss of prosecution rights or retention of prosecution rights without the right to compel testimony. The latter factor prevents transactional immunity from "imperiling large numbers of otherwise valid convictions," Justice Marshall noted. 406 U.S. at 470-71 (Marshall, J., dissenting). Justice Brennan has also argued against this comparison:

> Historically, one of the major evils sought to be allayed by the development of the privilege was the use of torture to extract a confession, not the subsequent use of the confession in a criminal trial. We continue to recognize this distinction; for example, we permit the use of voluntary confessions in criminal prosecutions. Thus, we object not so much to con-

other hand, sanctions the coercion in advance, with the proviso that the compelled testimony may be used only against others.

The Court also emphasized that the burden of proof as to the independent source of information, should a later prosecution occur, is on the government. Justice Powell, speaking for the *Kastigar* majority, called this "very substantial protection, commensurate with that resulting from invoking the privilege itself."[82] Thus, a witness who has testified under a grant of immunity and is later prosecuted concerning an incident about which he testified, does not have to demonstrate that the government used his testimony to aid its prosecution. Rather, the government must prove that it did not.

It is not the theory of use plus fruits immunity that its critics quarrel with, however. Instead, they question whether, in practice, it will be sufficient to bar use of the fruits of coerced testimony. Suppose, for example, that the prosecution's only reason for starting an investigation was the defendant's admissions in prior immunized testimony. The proponents of transactional immunity argue that, in such a case, it would indeed be difficult for the defendant to rebut the government's claim that it had made no use of his testimony. The counter-argument is that a witness may expose himself to investigation merely by claiming the fifth amendment privilege, a risk which it could not reasonably be argued that the courts should protect against. But, on behalf of the use immunity critics, it must be admitted that "when an incriminating disclosure has actually been made, a subsequent investigation is, realistically, likely to be more focused."[83]

victing a man on the basis of evidence from his own mouth, but rather to the practice of compelling him to incriminate himself regardless of a subsequent prosecution.

Piccirillo v. New York, 400 U.S. 548, 564 (1971) (Brennan, J., dissenting) (citations omitted).

[82] 406 U.S. at 462.

[83] Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 165. *See also* United States *ex rel.* Catena v. Elias, 449 F.2d 40 (8th Cir. 1971):

> In a criminal case, one of the most important decisions a defendant must make is whether to testify. If an individual, after being granted use immunity, is subsequently prosecuted for the same or a related transaction and elects to testify at trial in his own behalf, he must, of course, subject himself to cross-examination. The prosecution is obviously in a position to tailor his questions, consciously or otherwise, on the basis of the defendant's prior testimony and can do so without any overt reference to the testimony given under immunity. In these circumstances, could defense counsel effectively object on the ground that the immunity grant was thereby violated? I think not.

Id. at 45 (Seitz, C.J., concurring).

It is this practical objection that Justice Marshall highlighted in his dissent to *Kastigar*. He felt that a "use plus fruits" immunity approach meets the fifth amendment standard in theory only. Justice Marshall asserted:

> . . . I cannot agree that a ban on use will in practice be total, if it remains open for the Government to convict the witness on the basis of evidence derived from a legitimate independent source.
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> . . . 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.

406 U.S. at 468-69.

Anxious to guard against erosion of the privilege,[84] the critics conclude that a use immunity statute is too unreliable a substitute for the right to remain silent.

The *Kastigar* majority chose an alternative line of reasoning, however, relying upon the concurring opinion of Mr. Justice White in *Murphy*. Justice White stated that "[i]t is carrying a premise of perjury and judicial incompetence to excess to believe that this procedure [use immunity] poses any hazard to the rights of an accused."[85] Thus, how well the rights of the accused are actually protected will depend upon the diligence of the authorities in complying with the spirit of the law as well as its letter. By placing the burden of proof on the government, the Court has attempted to give the words of the federal use immunity statute real meaning. Nevertheless, one cautionary point mentioned earlier is worthy of reiteration: the type of "fruit" that results from immunized testimony of a witness is not the same as the fruit of an involuntary confession because the former type of coercion is officially sanctioned. Therefore, the exclusionary rules, which have permitted convictions under the "attenuation" and "harmless error" doctrines in cases involving illegally obtained evidence, should not be applied to the use of immunized testimony.[86] In im-

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[84] The need to safeguard against erosion of the privilege was best explained 76 years ago in these words:

> As already said, the very fact that the founders of our institutions, by making the immunity an express provision of our Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against *any* act professing to dispense with the Constitutional privilege. It may not be said that, by no form of enactment, can Congress supply an adequate substitute, but doubtfulness of its entire sufficiency, uncertainty of its meaning and effect, will be fatal defects.

Brown v. Walker, 161 U.S. 591, 621 (1896) (Shiras, J., dissenting).

[85] Murphy v. Waterfront Comm'n, 378 U.S. 52, 103-04 (1964) (White, J., concurring).

[86] The basic purpose of "use plus fruits" immunity is to prevent the prosecution from profiting, either directly or indirectly, from the compelled testimony of the witness. This does not mean that the particular matters testified to will never be the basis of a prosecution, for "[i]f knowledge of them is gained from an independent source they may be proved like any others but the knowledge gained by the government's own wrong cannot be used by it. . . ." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). On the other hand, under the exclusionary rules, the fact that the government would not have obtained the evidence were it not for the illegal activity does not bar its use. Rather, it has been held that:

> . . . the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Wong Sun v. United States, 371 U.S. 471, 488, (1962), *quoting* MAGUIRE, EVIDENCE OF GUILT 221 (1959). Another example of this approach is afforded by the case of Nardone v. United States, 308 U.S. 338 (1939). In *Nardone,* the Court dealt with a wiretap which had been conducted illegally. The evidence obtained via the wiretap had previously been excluded but the contention on this appeal was that the government had used the evidence as a stepping stone to obtain the evidence actually used to convict. Although the Supreme Court reversed the lower court because it had not given this contention proper consideration, the language that the Court used to explain how a determination as to "fruits" should be made sharpens the fears of those who anticipate that a similar interpretation of "use plus fruits" will be made in the immunity area:

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government proof. As a matter of good sense, however, such

plementing *Kastigar,* the courts should not only place the burden of proof on the prosecution but also resolve all doubts as to use in favor of the witness-defendant.

CONCLUSION

The viability of use plus fruits immunity as a substitute for the fifth amendment privilege depends upon the integrity with which it is enforced. Since the privilege has for some time been deemed to protect only against a witness's incriminating himself, the logic of an approach which permits a prosecution to be based on independently obtained evidence is sound. Laws cannot be written in an overly protective manner with distrust of authorities as their foundation. Therefore, we should be willing to grant the government as much power as it can exercise without infringing upon individual rights.

Because use plus fruits immunity does give such power to governmental authorities, it places a great deal of responsibility on them. The burden of proof outlined by *Kastigar* is only the secondary aspect of this new responsibility; its primary requirement is that of good faith.

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connection may have become so attenuated as to dissipate the taint.

308 U.S. at 341. The Supreme Court of California has formulated a rule whereby a court may decide that the prosecution had a sound case without the illegal evidence (harmless error) and, therefore, its admissibility would be irrelevant. People v. Ditson, 57 Cal. 2d 415, 20 Cal. Rptr. 165, 369 P.2d 714 (1962). The case involved a murder, and a confession obtained by coercion had been held inadmissible. While confessing, a defendant mentioned the name of a man who had aided in burying the body of the victim. Subsequently, the police located the body by questioning the man named by the defendant. The Supreme Court held that because "every essential element of the crime was known to the law enforcement officers before defendants were arrested and Cisneros made the subject confession," and because it appeared that the police would have procured the evidence in any event, the finding of the body was not the fruit of the involuntary confession and was, therefore, admissible. *Id.* at 445.