Compelled Testimony with Immunity: Applying the Standard of Use and Derivative Use

William P. Bivins Jr.

Compelled Testimony with Immunity: Applying the Standard of Use and Derivative Use

Defendants were subpoenaed to appear before a federal grand jury. Anticipating that the subpoenaed witnesses would assert the fifth amendment privilege against self-incrimination, the Government obtained an order from the district court directing them to answer questions and produce evidence under a grant of immunity conferred in accordance with the 1970 Immunity Act.[1] Nevertheless, the defendants refused to testify on the ground that the scope of immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination.[2] The district court rejected this contention and held them in contempt of court. The court of appeals affirmed,[3] and the Supreme Court granted certiorari. *Held, affirmed*: Immunity from the use of compelled testimony and of evidence derived from the use of such testimony in subsequent criminal proceedings is coextensive in scope with the fifth amendment privilege against compulsory self-incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972).

I. The Tradition of Compelled Testimony and Immunity Legislation

The tradition of compelled testimony is deeply rooted in legal history. As early as the thirteenth century, when witnesses were becoming an important feature of judicial proceedings, the reluctance of the witness to testify against his neighbor caused problems[4] which could only be resolved by summoning the witness to court and ordering him to testify. The Statute of Elizabeth, enacted in 1562,[5] recognized the right of the courts to compel testimony and penalized any witness who refused to testify after service of process. In the United States, the power of the federal government to compel testimony was

[1] Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-05 (1970). The Act provides that a witness is compelled to testify under an order containing a grant of immunity and issuing from a United States Attorney, with the approval of the Attorney General or his designated assistant. Further, the witness may be compelled to testify before a U.S. court or grand jury, an agency of the United States, or either house of Congress, joint committees of both houses or a committee or subcommittee of either.

[2] The scope of immunity extended only to immunity from use of information given in the witness's testimony, or information that might be derived from the testimony. It did not extend to grant complete immunity from prosecutions for all transactions revealed in testimony if those transactions could be substantiated by information obtained independently of the testimony in question. "[B]ut 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 . . . ." *Id.* § 6002.

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

[4] *See* 8 J. Wigmore, Evidence 65 (J. McNaughton ed. 1961). The early history of compelled testimony relates to the problem which arose when witnesses would not come and testify at trial without compulsion, and indeed, were not welcomed to do so by those who might suffer as a result of the testimony. The concept of privilege from self-incrimination did not come into focus until the eighteenth century, with the result that compelled testimony had then to contend more with this privilege and less with the problem of drawing the witness to trial.

[5] An Act for the Punyshement of Suche Persones as Shall procure or Comit any Wyllful Perjurye, 5 Eliz. 1, c. 9, ¶ 6 (1562).

first recognized in the Judiciary Act of 1789,[6] and was incorporated into subsequent legislation.[7]

Although the power to compel testimony is firmly entrenched in legal history, it has never been absolute. It is conditioned by the legal tradition embodied in the maxim *nemo tenetur seipsum accusare*—no one is bound to accuse himself. Furthermore, the power to compel testimony has never been construed as overriding the exemptions and privileges recognized by law,[8] notably the fifth amendment privilege against self-incrimination.[9] The protection of this privilege has required the passage of statutes granting the witness immunity from punishable acts revealed in his compelled testimony. Immunity statutes were passed in 1857,[10] 1862,[11] and 1868.[12] A reenactment of the 1968 code[13] was found unconstitutional in *Counselman v. Hitchcock*.[14] In response to *Counselman*, Congress formulated a new immunity act in 1893.[15] The constitutionality of this act was upheld in *Brown v. Walker*,[16] and subsequent immunity legislation closely followed the wording of this act. The first immunity act to depart from the pattern was passed in 1970 and is the act challenged in the principal case.

II. THE FIFTH AMENDMENT PRIVILEGE AND COEXTENSIVE IMMUNITY

The issue central to all those cases which have questioned the constitutionality of immunity legislation is whether the scope of immunity provided by the statute is coextensive with the fifth amendment privilege against self-incrimination. In *Counselman v. Hitchcock*[17] the Court declared the 1868

---

[6] Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 88.

[7] *See* notes 10-12 *infra*.

[8] "[T]here is a constitutional exemption from being compelled in any criminal case to be a witness against oneself . . . .

"But, aside from exceptions and qualifications . . . the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." Blair v. United States, 250 U.S. 273, 281 (1919).

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

[10] Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156.

[11] Act of Jan. 24, 1862, ch. 11, 12 Stat. 333, *amending* Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156.

[12] Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37.

[13] Act of Feb. 25, 1868, Revised Statutes, ch. 17, § 860 (1878).

[14] 142 U.S. 547 (1892). The grand jury of the District Court of the United States for the Northern District of Illinois was investigating certain alleged violations of the Interstate Commerce Act of Feb. 4, 1887, by officers and agents of various railroad companies having railroad lines in that district. Charles Counselman, engaged in the grain and commission business in Chicago, refused to answer questions concerning rates he had charged on grain shipments, despite a grant of immunity. *See* notes 17-22 *infra*, and accompanying text.

[15] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

[16] 161 U.S. 591 (1896). Brown was subpoenaed as a witness before the grand jury of the District Court of the United States for the Western District of Pennsylvania, to testify regarding violations of the Interstate Commerce Act. As auditor for the railway company, Brown refused to testify regarding freight rates charged by the company. In view of the greatly expanded immunity provisions of the 1893 immunity act, the Court upheld the constitutionality of the act and required Brown to testify. The 1893 immunity act differed from prior acts in that it offered complete immunity from all transactions mentioned in compelled testimony.

[17] 142 US. 547 (1892).

immunity statute unconstitutional because the scope of protection offered by the statute was not coextensive with the privilege against self-incrimination granted by the Constitution. The protection offered by the immunity statute did not prevent conviction of the witness by use of new evidence, even though such evidence was found through the use of evidence given in compelled testimony.[18] The Court stated that, "[i]n 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."[19] This pronouncement set a new standard for immunity legislation. In 1893 an immunity act was passed which had been formulated according to the standard enunciated in *Counselman.* The act provided complete immunity from any "penalty . . . on account of any transaction, matter or thing, concerning which he [the witness] may testify, or produce evidence . . . ."[20] Deciding that there was no right to remain silent by virtue of the fifth amendment privilege, the Court in *Brown v. Walker* upheld the constitutionality of the act.[21] The standard of immunity established in *Counselman* and upheld in *Brown* has been followed, almost without exception, in subsequent state and federal cases.[22]

In a more recent case, *Ullmann v. United States,*[23] the defendant challenged an immunity act enacted in 1954.[24] Ullmann claimed that the act did not offer him protection against non-criminal sanctions. The act, it was contended, provided no immunity from sanctions such as "loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and

---

[18] *Id.* at 564.

[19] *Id.* at 586. Although this pronouncement could be considered dictum, because the Court had already held the act in question unconstitutional, it became the test used for future immunity legislation prior to the decision in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). *See* notes 27-29 *infra.*

[20] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

[21] "Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege." 161 U.S. 591, 600 (1896).

[22] *See* Annot., 53 A.L.R.2d 1030 (1957); Annot., 118 A.L.R. 602 (1939). *See also* Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965) (*Counselman* standard of complete immunity upheld in protecting petitioner from registration requirements of Subversive Activities Control Act of 1950, 50 U.SC. § 783(a) (1970)); Adams v. Maryland, 347 U.S. 179 (1953) (upholding the standard of complete immunity, in accord with the decision in *Counselman,* with reference to a congressional immunity act, Act of June 25, 1948, ch. 645, 62 Stat. 833); United States v. Bryan, 339 U.S. 323 (1950) (witness may remain silent when complete immunity is not offered in return for his testimony); Smith v. United States, 337 U.S. 137 (1949) (petitioner's immunity from prosecution on facts concerning which he was compelled to testify was not waived by subsequent "voluntary statement"); Feldman v. United States, 322 U.S. 487 (1944) (use in federal court of testimony, compelled under a state immunity statute, is not forbidden if no federal officers participated in state proceedings; dissent cited *Counselman*); *cf.* Gardner v. Broderick, 392 U.S. 273 (1968) (applies standard of use and derivative use immunity, but cites *Counselman* regarding grand jury investigation of petitioner's official duties as policeman). *See also* Sarno v. Illinois Crime Comm'n, 406 U.S. 482 (1972); Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472 (1972), both upholding the *Kastigar* decision.

[23] 350 U.S. 422 (1956). Petitioner Ullman was called before a grand jury which was investigating attempts to endanger the national security by espionage and conspiracy to commit espionage. Ullmann refused to answer questions regarding his knowledge of and activities in the Communist Party, and the participation of others in that party. Although the Court affirmed the sufficiency of the grant of immunity from prosecution for any matters related in testimony, it did not approve the extension of immunity beyond criminal prosecution to include noncriminal penalties.

[24] Immunity Act of 1954, ch. 769, § 1, 68 Stat. 745.

general public opprobrium . . . ."[25] The Supreme Court, upholding the *Counselman* standard, ruled that the protection offered by the statute fulfilled the guarantees of the fifth amendment and need not extend to penalties of a non-criminal nature.[26]

The first significant diversion from the standard of immunity established in *Counselman* occurred in *Murphy v. Waterfront Comm'n*,[27] in which the Court held that immunity was coextensive with the fifth amendment privilege if it prohibited both the use of compelled testimony and the use, in subsequent prosecutions, of evidence derived from compelled testimony. In *Murphy* the petitioners refused to answer questions, though granted immunity under state laws, because they felt they could be incriminated under federal laws. The Court's ruling proscribed the use of the testimony and its fruits in federal prosecution where a witness was compelled to testify under *state* immunity statutes. In summarizing its holding in *Murphy*, the Court concluded, "we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[28]

The difference between the *Murphy* standard and the *Counselman* standard is significant. The standard in *Counselman* required that the witness be provided complete and absolute immunity from future prosecution for any criminal act revealed in compelled testimony. Such immunity, termed "transactional immunity," allowed "full immunity from prosecution for the offense to which the compelled testimony relates . . . ."[29] The standard established in *Murphy* was considerably less broad. That standard provided immunity only from prosecution which was based on the use or derivative use of compelled testimony. By the *Counselman* standard, even subsequent evidence from totally unrelated sources could not be used to prosecute a witness for a transaction revealed in the compelled testimony; the witness was totally immunized. By the *Murphy* standard, a witness could be prosecuted for criminal acts revealed in his testimony so long as the evidence used was not derived directly or indirectly, from the compelled testimony.

---

[25] 350 U.S. at 430.

[26] Non-criminal penalties imposed by society upon a witness after compelled testimony represent a strong argument against immunity legislation. *See* Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L. REV. 327, 353 (1966).

[27] 378 U.S. 52 (1964). The Court decided that a state witness may not be compelled to testify unless such testimony and its fruits cannot be used in connection with a federal prosecution against him. This issue involves interjurisdictional problems with respect to grants of immunity. *See* Knapp v. Schweitzer, 357 U.S. 371 (1958); Feldman v. United States, 322 U.S. 487 (1944); United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906); Ballmann v. Fagin, 200 U.S. 186 (1906); Jack v. Kansas, 199 U.S. 372 (1905); all of which are altered or overruled by the *Murphy* decision. The surprising aspect of the *Murphy* decision, however, is the Court's adoption of the use and derivative use standard, rather than the standard of *Counselman*. This was unprecedented. The reasoning behind adopting the new standard is suggested in Justice White's concurring opinion in which he notes that the *Counselman* standard "clearly has no validity, and by its own terms, no applicability, where the inquiry does not concern any federal offense, no less a particular one, and the government seeking the testimony has no purpose or authority to prosecute for federal crimes." 378 U.S. at 106.

[28] *Id.* at 79.

[29] 406 U.S. at 453.

III. KASTIGAR V. UNITED STATES

The constitutionality of immunity statutes seems well defined by *Counselman*, *Ullmann*, and *Murphy*. *Counselman* stands for the broad proposition that, for an immunity statute to be constitutional, it must insure complete immunity from any prosecution relating to matters revealed in the compelled testimony. *Ullmann* upheld this standard, but, unlike *Counselman*, made mention that immunity did not extend to penalties of a noncriminal nature. And finally, *Murphy* held that immunity, to be coextensive with the fifth amendment privilege, need extend only to use or derivative use of compelled testimony in subsequent prosecution.

In *Kastigar* the Supreme Court of the United States upheld the *Murphy* standard, applying it to the new 1970 immunity act. It held that complete transactional immunity was unnecessarily broader than the fifth amendment privilege and that the *Murphy* use and derivative use standard was coextensive with the fifth amendment privilege. In the context of the development of immunity acts, the *Kastigar* decision added little to what *Murphy* had already settled. As it stands, *Kastigar* upholds the constitutionality of the 1970 immunity act, formulated in consideration of the *Murphy* ruling. *Kastigar* also affirms the tradition of compelled testimony and underscores the importance of this valuable procedure in criminal proceedings.

A. *The Reasoning of Kastigar*

The Court's ruling in *Kastigar* was prefaced by establishing the importance of compulsory testimony in government proceedings. Justice Powell, in delivering the opinion of the Court, cited *Murphy*: "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies . . . . Such testimony constitutes one of the Government's primary sources of information."[30] Implicit was the argument that, because the governmental need to compel testimony is frequently important, it should not be limited except to protect the privileges and exemptions as derived primarily from the fifth amendment: "There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination."[31] With regard to the limitation of its consideration of privileges to those arising from the fifth amendment, the Court stated that the fifth amendment in no way prohibits Congress from enacting laws which compel self-incrimination.[32]

Consideration was given to the contention that complete transactional immunity must be the basis for any immunity act. Clearly the 1970 statute did not provide complete transactional immunity; but the Court said that the 1970 statute was drafted to meet "what Congress judged to be the *conceptual* basis of *Counselman*,"[33] or, more exactly, the conceptual basis of *Counselman*

[30] 378 U.S. at 93-94.
[31] 406 U.S. at 444.
[32] *Id.* at 448.
[33] *Id.* at 452 (emphasis added).

as construed by *Murphy*. The Court noted that the *Counselman* statute was ruled unconstitutional because it did not "prohibit the use against the immunized witness of evidence derived from his compelled testimony."[34] The broad language in *Counselman*, requiring full transactional immunity, "was unnecessary to the Court's decision [in *Counselman*], and cannot be considered binding authority."[35] As a result, the Court upheld the use and derivative use standard as completely fulfilling the conceptual basis of *Counselman*. Unfortunately, in upholding the *Murphy* use and derivative use standard, the Court in *Kastigar* was not concerned about the factual distinction between *Kastigar* and *Murphy*. *Murphy* dealt with the protection provided by state immunity laws against possible federal prosecution of a witness compelled to testify under state immunity statutes. The *Murphy* Court specifically applied the standard of use and derivative use immunity to federal inquiry into matters revealed in state testimony under state immunity statutes.[36] Although in *Kastigar* there were no interjurisdictional, federal-state problems, the *Kastigar* Court apparently saw the *Murphy* standard as useful in the approach to federal immunity legislation. Perhaps the Court tacitly assumed that the standards of immunity should be the same, whether state, federal, or interjurisdictional proceedings were involved.

The Court made an attempt, in *Kastigar*, to justify the limited approach to immunity privileges. The Court noted that immunity from use and derivative use of compelled testimony was a "very substantial protection."[37] It compared compelled testimony to coerced confessions, the latter being inadmissible at trial, but not barring prosecution.[38] While a defendant making a coerced confession claim must prove that the information in question was not volunteered, a defendant testifying under an immunity statute need only claim that prosecution is based on compelled testimony to shift the burden to the government to prove otherwise. It is evidently in such a comparison that the conclusion that the standard is a "substantial protection" is found.

B. *The Effect of Kastigar*

Since the enactment of the 1954 immunity act and the *Ullmann* decision, much comment has appeared concerning immunity laws.[39] *Kastigar*, insofar as it upholds the traditional thinking in the matter of compelled testimony with immunity, is not likely to effect a slowdown of critical comment. Some of the problems remaining are discussed in Justice Douglas' dissenting opinion in *Kastigar*. He suggested that the *Murphy* standard was not relevant to *Kastigar* in that there was not an interjurisdictional problem,[40] which was an important

---

[34] *Id.* at 454.
[35] *Id.* at 455.
[36] 378 U.S. at 79.
[37] 406 U.S. at 461.
[38] Jackson v. Denno, 378 U.S. 368 (1964).
[39] *See generally* Soebel, *The Privilege Against Self-Incrimination "Federalized,"* 31 BROOKLYN L. REV. 1 (1964); Wendel, *supra* note 26; Comment, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A.L. REV. 561 (1965); Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).
[40] 406 U.S. at 464.

consideration in *Murphy*.[41] Therefore, the Justice implied, *Murphy* should not have formed the basis for the *Kastigar* ruling. Particularly pertinent to the understanding of Justice Douglas' criticism of the majority opinion is his dissent in *Ullmann* in which he discussed the "mischief" in immunity legislation:[42] the risk, not only of conviction but of prosecution; the violation of the guarantee against self-incrimination, which is a safeguard of "conscience and human dignity and freedom of expression"[43] as well as a protection against conviction and prosecution; and finally, violation of the right of silence.[44] Such criticisms challenge the apparent rationality of the *Kastigar* decision. Justice Marshall, in a separate dissent,[45] pointed out impractical aspects of the *Kastigar* holding, such as the difficulty of proving that evidence used in subsequent criminal proceedings was not derived from the compelled testimony.

Kastigar has clearly established the standard for federal immunity statutes coextensive with the fifth amendment privilege. However inapplicable the holding of *Murphy* is to the factual situation in *Kastigar*, the Court has set the *Murphy* standard as binding law with respect to federal immunity statutes and purely federal inquiry into federal matters.

IV. CONCLUSION

Whereas previously, complete transactional immunity was held to be the only proper assurance to the witness that his fifth amendment privilege would not be violated, the standard has now become one of immunity from use or derivative use of compelled testimony only. The problem of coextensive immunity will certainly come into question again when an actual case arises in which a witness is convicted for offenses revealed in compelled testimony. Merely because such offenses were related in testimony given under a grant of immunity would raise a strong presumption against subsequent attempts to convict. In this regard, the grants of immunity issued in proceedings before the Senate subcommittee hearings on the Watergate scandals may possibly prove to be a fertile testing ground for the *Kastigar* standard of use and derivative use immunity. If it becomes difficult or impossible to prove that subsequent convictions of Watergate defendants were not based on testimony obtained under grants of immunity, the result may be a return to the standard of complete transactional immunity, first outlined in *Counselman*. While *Kastigar* has ostensibly established the use and derivative use standard, perhaps

[41] It is not clear that the Court in *Murphy*, dealing with federal-state immunity issues, was applying the use and derivative use standard to purely federal inquiry into federal matters where there would be no interjurisdictional, federal-state problems. Justice White, in his concurring opinion in *Murphy*, suggested that there may possibly be a dual standard. *See* note 27 *supra*. If *Counselman* has no application to nonfederal offenses, as White indicates, there must be another standard which does. This dilemma is not resolved in White's opinion.

[42] Ullmann v. United States, 350 U.S. 422, 440 (1956) (Douglas, J., dissenting). Justice Douglas referred to Justice Blatchford's wording in *Counselman*: "[t]he [immunity] privilege is limited to criminal matters, but it is as broad as the mischief which it seeks to guard." 142 U.S. at 551.

[43] 350 U.S. at 445.

[44] *See* Comment, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A.L. REV. 561, 564-65 nn.16, 17 (1965).

[45] 406 U.S. at 467.