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The Aftermath of the Iran-Contra Trials: the Uncertain Status of Derivative Use Immunity

Jerome A. Murphy

Comments

THE AFTERMATH OF THE IRAN-CONTRA TRIALS: THE UNCERTAIN STATUS OF DERIVATIVE USE IMMUNITY

INTRODUCTION

The federal witness immunity statute provides a limited grant of immunity to witnesses compelled to testify in congressional or other federal investigations.[1] In essence, the current statute protects compelled witnesses from the direct or indirect use of their immunized testimony in criminal cases against them. The protections afforded witnesses in federal immunity statutes, however, have evolved considerably since the first statute was enacted in 1857.[2] Although immunity statutes have been termed "part of our constitutional fabric,"[3] and serve far-ranging policy goals, they exist in a constant state of tension between the interests of the government and the individual. On the one hand, the government, in prosecuting white-collar crime and enforcing regulatory acts, has a compelling need to get to the truth. On the other hand, compelled witnesses must be afforded protection guaranteed by the Fifth Amendment[4]—protection from compelled self-incrimination.

The current federal witness immunity statute was upheld by the Supreme Court in *Kastigar v. United States*.[5] In *Kastigar*, the Court held that the "use" and "derivative use" immunity provided by the statute was "coextensive" with the Fifth Amendment; it therefore provides adequate protection to an immunized witness.[6] Unfortunately, the *Kastigar* Court did not clearly define the limits of permissible use of immunized testimony or the scope of the term "derivative use." Consequently, courts have been left to their own devices in interpreting the Fifth Amendment's protections.

This Comment first examines the historical development of immunity statutes and Supreme Court jurisprudence on the constitu-

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1. 18 U.S.C. §§ 6002-05 (1988).
2. *See* Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, 156 (1857).
3. Ullmann v. United States, 350 U.S. 422, 438 (1956).
4. The Fifth Amendment provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.
5. 406 U.S. 441 (1972).
6. *See id.* at 462.

tionality of these statutes. The Comment then looks at the Court's decision in *Kastigar* and its subsequent application by lower courts, examining *United States v. North*,[7] *United States v. Helmsley*,[8] and *United States v. Poindexter*[9] as contemporary examples of lower courts' disparate treatment of the use of immunized testimony. The Comment concludes by critiquing recent decisions of the Court of Appeals for the District of Columbia Circuit, arguing that the procedure afforded criminal defendants under these decisions provides more protection than that mandated by the Fifth Amendment.

I. LEGAL CONTEXT

A. The Privilege Against Compelled Self-Incrimination

The Anglo-American legal tradition has long recognized as fundamental the government's right to compel testimony.[10] The government's power is checked, however, by the privilege against compelled self-incrimination,[11] which "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[12] The tension between the government's power to compel and the privilege against compelled self-incrimination is a concept about which Justice Frankfurter's observation still holds true today—" 'a page of history is worth a volume of logic.' "[13]

The foundations of the privilege against compulsory self-incrimination can be traced back to the twelfth century.[14] The privi-

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7. 910 F.2d 843 (D.C. Cir.) (per curiam) (*North I*), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991).

8. 941 F.2d 71 (2d Cir. 1991).

9. 951 F.2d 369 (D.C. Cir. 1991).

10. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 443-44 (1972); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 792-94 (1978).

11. The protection against compelled self-incrimination is customarily referred to as a "privilege." One court, relying on Wigmore, has called it a "portmanteau concept," embodying a number of common-law privileges. State v. McKenzie, 17 Md. App. 563, 578-79 n.8A, 303 A.2d 406, 414-15 n.8A (1973). *But see* LEONARD W. LEVY, *Preface to* ORIGINS OF THE FIFTH AMENDMENT xv (2d ed. 1986) ("Although the legal profession customarily refers to the right against self-incrimination as a 'privilege,' I call it a 'right' because it is one."). Levy claims that by incorporating the common-law privilege into the Fifth Amendment, the framers transformed the privilege into a right. *Id.*

12. *Kastigar*, 406 U.S. at 445.

13. Ullmann v. United States, 350 U.S. 422, 438 (1956) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

14. *See* Erwin N. Griswold, The Fifth Amendment, *in* THE FIFTH AMENDMENT TODAY 2 (1962). For an extensive and thorough account of the historical development of the Fifth Amendment, see LEVY, *supra* note 11. *See also* MARK BERGER, TAKING THE FIFTH 1-23, 235-38 (1980). Strictly speaking, the origin of the privilege against compelled self-

lege developed in the common law of England, growing as the inquisitorial excesses of the Star Chamber reached their nadir.[15] The privilege was imported to colonial America and was constitutionalized by incorporation into the Bill of Rights.[16] Not only is the privilege deeply rooted in history, but it

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial 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;" . . . and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[17]

Thus, the privilege is founded historically on compelling policy grounds and will not easily yield to the government's claim to "every man's evidence."[18]

B. Federal Immunity Statutes

The Fifth Amendment privilege against compelled self-incrimination often stands in the way of judicial, legislative, and regulatory truth-gathering functions.[19] Legislatures have responded to this

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incrimination can be traced to the Jewish legal tradition in biblical times. *See* LEVY, *supra* note 11, at 433-41.

15. *See* Griswold, *supra* note 14, at 4.

16. *See* Brown v. Walker, 161 U.S. 591, 597 (1896); Kevin Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107, 115-23 (1988).

17. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted).

18. *But see, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974) (noting that constitutional, common-law, and statutory privileges are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth"); Charles E. Moylan, Jr. & John Sonsteng, *The Privilege Against Compelled Self-Incrimination*, 16 WM. MITCHELL L. REV. 249, 251-52 & nn.11-12 (1990) ("[T]here is an obligation, as the price of membership in society, to furnish a court of law . . . all available knowledge that may assist in the search for truth.").

19. *See* Kastigar v. United States, 406 U.S. 441, 445-46 (1972); BERGER, *supra* note 14, at 29-31; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1569-70 (1963). *But see* Erwin N. Griswold, Per Legem Terrae, *in* THE FIFTH AMENDMENT TODAY, *supra* note 14, at 31, 67-68 (arguing

problem by enacting immunity statutes, which generally "grant[] an agent of the government the power to compel a witness to testify about any matter, despite the self-incriminating nature of the testimony."[20] Because the testimony is compelled, the government cannot use information derived from the testimony against the witness in any criminal proceeding.[21] Immunity statutes are particularly effective against white-collar crime[22] and other offenses that "are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[23]

1. Historical Development.—The first Anglo-American immunity statute can be traced to an Act of Parliament in 1710,[24] aimed at reducing illegal gambling.[25] Several colonial legislatures imported immunity statutes from England during the eighteenth century.[26] The nineteenth century saw an expansion of the number of states with immunity statutes, as well as the creation of a federal immunity statute.[27]

In 1857, Congress enacted the first federal immunity statute.[28] The statute was passed in response to a *New York Times* correspondent's report that he had been asked by members of the House of Representatives to act as an intermediary in a "vote selling scheme."[29] The reporter refused to answer questions put to him by a House committee on the ground that his answers would tend to incriminate him.[30] The statute provided extensive protections for any witness testifying before Congress under a grant of immunity.[31]

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that Fifth Amendment protections are vital to witnesses called before legislative tribunals because legislative inquiries lack adequate procedural protections).

20. Comment, *supra* note 19, at 1570; *see* 8 JOHN H. WIGMORE, EVIDENCE § 2281, at 495 n.11 (John T. McNaughton rev. ed. 1961) (discussing immunity statutes).

21. 8 WIGMORE, *supra* note 20, § 2281, at 495.

22. *See* John A. Darrow, *Immunity*, 26 AM. CRIM. L. REV. 1169, 1169 (1989); Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351, 351 (1987).

23. *Kastigar*, 406 U.S. at 446.

24. *See* 9 Anne, ch. 14, §§ 3-4 (1710).

25. *Id.*; *see Kastigar*, 406 U.S. at 445 n.13; Comment, *supra* note 19, at 1571 n.13.

26. *See Kastigar*, 406 U.S. at 445 n.13; 8 WIGMORE, *supra* note 20, § 2281, at 495-508 & n.11.

27. *See Kastigar*, 406 U.S. at 445 n.13.

28. *See* Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, 156 (1857).

29. *See* CONG. GLOBE, 34th Cong., 3d Sess. 426-27 (1857); Strachan, *supra* note 10, at 797 n.22; Comment, *supra* note 19, at 1571.

30. *See* CONG. GLOBE, *supra* note 29, at 426-27; Comment, *supra* note 19, at 1571. The bill presented to Congress was passed in two days. CONG. GLOBE, *supra* note 29, at 426-27; Comment, *supra* note 19, at 1571 n.15.

31. *See* Comment, *supra* note 19, at 1571. Section 2 of the statute provided that

An immunized witness was protected from use against him in any criminal proceedings of "any fact or act touching which he shall be required to testify before either House of Congress" while under a grant of immunity.[32] This broad grant of immunity, termed transactional immunity,[33] proved to be unwieldy in application because many witnesses took advantage of the resulting "immunity bath"[34] and confessed to unrelated crimes and offenses while under the grant of immunity.[35]

In response to these abuses, Congress amended the immunity statute in 1862.[36] This act provided for "use" immunity—prohibiting only the use of compelled "testimony [before Congress] . . . as evidence in any criminal proceedings against such witnesses in any

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> no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or before any committee of either House as to which he shall have testified whether before or after the date of this act, and that no statement made or paper produced by any witness before either House of Congress or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness in a court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.

11 Stat. at 156.

32. 11 Stat. at 156.

33. Wigmore termed this type of immunity statute an "*immunity-from-prosecution*" statute. *See* 8 WIGMORE, *supra* note 20, § 2281, at 495 n.11. These statutes "provide that disclosure is compellable but that the *witness shall not be prosecuted* or subject to any penalty on account of any matter concerning which he was required to produce evidence." *Id.*

34. *See* 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1407 (1970) [hereinafter WORKING PAPERS]; Comment, *supra* note 19, at 1572. Witnesses granted transactional immunity were given an incentive "to give wide-ranging but shallow testimony, which . . . would provide absolution for every offense touched upon, while failing to encourage complete candor, specificity and detail." Richard L. Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation"?*, 67 J. CRIM. L. & CRIMINOLOGY 155, 156 (1976).

35. *See* Strachan, *supra* note 10, at 798; Comment, *supra* note 19, at 1572.

36. *See* Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (1862); *see* WORKING PAPERS, *supra* note 34, at 1407; Comment, *supra* note 19, at 1572. One "immunity bath" in particular led to the act's passage. *See* CONG. GLOBE, 37th Cong., 2d Sess. 364, 428-31 (1862). Two Department of the Interior clerks embezzled two million dollars in government bonds, and arranged to testify before a House committee, where they confessed their wrongdoings. *Id.*; *see* Comment, *supra* note 19, at 1572 n.16.

court of justice."[37] This statute was amended six years later[38] to include protection for immunized testimony compelled in "judicial proceeding[s] from any party or witness in this or any foreign country."[39] Thus, the immunity statute was extended to testimony compelled before courts, as well as congressionally compelled testimony.

The amended statute was rarely used until Congress passed the Interstate Commerce Act[40] in 1887.[41] The Supreme Court first ruled on the sufficiency of the statute in 1892. In *Counselman v. Hitchcock*,[42] a Chicago grain merchant, called to testify before a federal grand jury investigating interstate railroad rate violations, refused to answer questions posed by the government, claiming the protection of the Fifth Amendment.[43] The case reached the Supreme Court on a habeas corpus petition after the merchant was found in contempt and imprisoned.[44] The Court held that the 1868 statute did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and [was] not a full substitute for that prohibition."[45] The statute was constitutionally deficient because it "afford[ed] no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness."[46] In other words, the statute prohibited only "direct" use of compelled testimony; it did not prohibit "derivative" use.[47]

Congress was alarmed by the *Counselman* decision;[48] it was

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37. 12 Stat. at 333. Wigmore describes this type of statute as an *"immunity-from-use"* statute. *See* 8 WIGMORE, *supra* note 20, § 2281, at 495 n.11. These statutes "provide, for example, that self-incriminating disclosures may be compelled but that the *testimony shall not afterwards be used* against the witness in any judicial proceeding." *Id.*

38. *See* Act of Feb. 25, 1868, ch. 13, 15 Stat. 37 (1868).

39. *Id.* at 37; *see* Comment, *supra* note 19, at 1572.

40. Ch. 104, 24 Stat. 379 (1887); *see* Comment, *supra* note 19, at 1573.

41. During the approximately 20-year period between the immunity statute's passage and enactment of the Interstate Commerce Act, only one reported case compelled testimony pursuant to the immunity act. Comment, *supra* note 19, at 1572 n.20 (citing United States v. McCarthy, 18 F. 87 (S.D.N.Y. 1883)).

42. 142 U.S. 547 (1892).

43. *See id.* at 548-52.

44. *See id.* at 552-53.

45. *Id.* at 585-86.

46. *Id.* at 586.

47. The Court, in Kastigar v. United States, 406 U.S. 441 (1972), later clarified the reason for the *Counselman* statute's deficiency: It failed "to prohibit the use against the immunized witness of evidence derived from his compelled testimony." *Id.* at 453-54.

48. Comment, *supra* note 19, at 1573.

feared that without a valid federal witness immunity statute, the Interstate Commerce Act would be unenforceable.[49] Sixteen days after *Counselman* was decided, Congress considered a new immunity bill,[50] which provided full transactional immunity for witnesses compelled to testify before the Interstate Commerce Commission (ICC) or any proceeding held under the provisions of the Interstate Commerce Act.[51] The bill was quickly passed in 1893, and was narrowly tailored to encompass only proceedings held under the Interstate Commerce Act.[52]

The constitutionality of the 1893 statute was challenged in *Brown v. Walker*.[53] In *Brown*, a railway auditor brought before a grand jury refused to answer questions concerning allegations of illegal railroad tariffs; he claimed to be protected by the Fifth Amendment.[54] The Court held that the auditor, Brown, could not validly claim Fifth Amendment protections for two reasons. First, he had not demonstrated that his testimony would incriminate him: "it is entirely clear that he was not the chief or even a substantial offender against the law, and that his privilege was claimed for the purpose of shielding the railway or its officers from answering a charge of having violated its provisions."[55] Rather than the risk of compelled self-incrimination, Brown faced only "personal odium and disgrace" by being compelled to answer.[56]

The second, and perhaps more important ground for the Court's decision,[57] was that allowing witnesses in Brown's position to refuse to answer questions in ICC investigations would hamstring enforcement of the Interstate Commerce Act.[58] The majority recognized that when "it is for the interest of . . . parties to conceal their misdoings, [it] would become impossible [to enforce the Act],

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49. *See Kastigar*, 406 U.S. at 451; Brown v. Walker, 161 U.S. 591, 594 (1896); Comment, *supra* note 19, at 1573-74. Senator Collum, who introduced the subsequent immunity bill, is quoted as saying that " 'unless some such bill can be passed both the Interstate Commerce Commission and the courts will be entirely unable to enforce the law upon the statute books in reference to interstate commerce.' " *Id.* at 1574 n.28 (quoting 23 CONG. REC. 573, 6333 (1892) (remarks of Sen. Collum)).

50. *See Kastigar*, 406 U.S. at 451.

51. *See id.*

52. *See* Interstate Commerce Testimony Act of 1893, ch. 83, 27 Stat. 443; Comment, *supra* note 19, at 1574. This was a departure from the established standard of general immunity bills. *See id.*

53. 161 U.S. 591 (1896).

54. *See id.* at 609.

55. *Id.*

56. *See id.*

57. *See* Comment, *supra* note 19, at 1574-75.

58. *See Brown*, 161 U.S. at 610.

since it is only from the mouths of those having knowledge of the [illegal acts] that the facts can be ascertained."[59] Consequently, the Court held that the statute was constitutional.[60]

Throughout the first half of the twentieth century, Congress, relying in large part on the Court's grant of approval in *Brown*,[61] passed a number of regulatory acts with immunity provisions.[62] In 1954, Congress passed an immunity act whose scope was limited to investigations relating to national security and that permitted the Attorney General to request testimonial compulsion of witnesses "before any grand jury or court of the United States."[63] This act was challenged two years later in *Ullmann v. United States*.[64] The *Ullmann* Court reaffirmed *Brown v. Walker*,[65] upheld transactional immunity as constitutional, and refused to extend Fifth Amendment protections to compelled testimony that might bring a witness opprobrium and harms other than criminal prosecution.[66] Endorsing the federal immunity statute, the *Ullmann* Court stated that "[t]he 1893 statute has become part of our constitutional fabric."[67]

In 1964, the Court extended the Fifth Amendment privilege against compulsory self-incrimination to the states through the Fourteenth Amendment.[68] In another 1964 decision, *Murphy v. Waterfront Commission*,[69] the Court held that immunity granted to a witness by state officials also prohibits federal officials "from making any [prosecutorial] use of compelled testimony and its fruits."[70] The Court went on to term this protection as an "exclusionary

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59. *Id.*

60. *See id.*

61. *See* Comment, *supra* note 19, at 1574-75.

62. *See* Shapiro v. United States, 335 U.S. 1, 6 & n.4 (1948) (listing statutes); Comment, *supra* note 19, at 1575.

63. Immunity Act of 1954, ch. 769, 68 Stat. 745; *see* Comment, *supra* note 19, at 1576-77. This statute was passed during the heyday of the McCarthy anticommunist investigations. *See id.* at 1576.

64. 350 U.S. 422 (1956).

65. 161 U.S. 591 (1896).

66. *See Ullmann*, 350 U.S. at 438-39. Ullmann claimed that his situation was different than that of the witness in *Brown* "because the impact of the disabilities imposed by federal and state authorities and the public in general—such as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium—[was] so oppressive that the statute [did] not give [Ullmann] true immunity." *Id.* at 430. The Court rejected this argument. *See id.* at 431.

67. *Id.* at 438.

68. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964).

69. 378 U.S. 52 (1964).

70. *Id.* at 79. The Court also prohibited state prosecution of federally immunized witnesses based on compelled testimony. *See id.* at 77-78.

rule."[71]

Many saw the Court's language in *Murphy* as a signal that a lesser degree of protection than was given by transactional immunity would satisfy the Fifth Amendment—so long as no use was made of the compelled testimony or its "fruits."[72] In 1970 Congress passed the Organized Crime Control Act,[73] which contained a provision limiting federal grants of immunity to protection of "testimony or other information compelled . . . (or any information directly or indirectly derived from such testimony or other information)."[74] This act attempted to "introduce order into the chaos of fifty-three existing federal witness immunity statutes that controlled different . . . subject matters."[75] The statute was challenged two years later in *Kastigar v. United States*.[76]

2. The Kastigar *Case.*—In *Kastigar*, the Court settled the question of whether the current federal immunity statute,[77] which provides a witness protection from direct and derivative use of immunized testimony, fulfills the requirements of the Fifth Amendment. The Court concluded that the federal immunity statute left "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege."[78] The test, according to the Court, is "whether the immunity granted under [the] statute is coextensive with the scope of the privilege."[79]

The government had issued subpoenas to Kastigar and Stewart,

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71. *See id.* at 79. The exclusionary rule suggested by the Court set the stage for an unfortunate analogy by the Court in Kastigar v. United States, 406 U.S. 441 (1972). In *Kastigar*, the Court compared a witness compelled to testify under a grant of statutory immunity with a criminal defendant who had confessed to a crime under coercion. *Id.* at 461-62. The Court commented that in both situations an exclusionary rule applied. *See id.* The Court in *Kastigar*, however, failed to realize the distinction between a judicially created exclusionary rule designed to deter future police misconduct and remedy past wrongs, and the constitutional prohibition excluding incriminating testimony compelled from a witness. *See infra* notes 178-196 and accompanying text.

72. *See* Humble, *supra* note 22, at 359; Strachan, *supra* note 10, at 802-03.

73. Pub. L. No. 91-452, 84 Stat. 926 (relevant portions codified at 18 U.S.C. §§ 6001-05 (1988)).

74. 84 Stat. at 927 (codified at 18 U.S.C. § 6002).

75. Strachan, *supra* note 10, at 803.

76. 406 U.S. 441 (1972).

77. 18 U.S.C. §§ 6001-05.

78. *Kastigar*, 406 U.S. at 462.

79. *Id.* at 449. The Court derived this test from prior decisions, citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 54, 78 (1964), and Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

ordering them to appear before a federal grand jury.[80] Prior to their appearance, the government granted them immunity under the Organized Crime Control Act of 1970.[81] Because the government feared that the two would refuse to testify before the grand jury, the prosecution requested the district court to order them to testify under the grant of immunity.[82] Both witnesses refused to answer questions, claiming that the immunity statute did not provide them sufficient protection guaranteed by the Fifth Amendment.[83] The district court found both men in contempt.[84]

On certiorari, the Supreme Court rejected the defendants' claim that no statutory grant of immunity compelling incriminating testimony can withstand constitutional scrutiny.[85] More significantly, the Court addressed the defendants' claim that only transactional immunity will meet Fifth Amendment standards. The Court reviewed its holding in *Counselman v. Hitchcock*[86] and concluded that the current federal immunity statute had none of the infirmities found in the *Counselman* statute.[87] The statute at issue in *Counselman* protected the witness only from direct use by the government of immunized testimony; it did not prohibit indirect or derivative use.[88] The *Counselman* Court therefore found the statute violative of the Fifth Amendment.[89]

The current statute provides broader protection for witnesses, however. It prohibits the government's use of "testimony or other information compelled under [an] order (or any information directly or indirectly derived from such testimony or other information)."[90] According to the Court, the additional proscription of derivative use of immunized testimony is "coextensive with the

80. *Kastigar*, 406 U.S. at 442.

81. *Id.*

82. *Id.* Section 6003 sets forth the procedure for granting immunity to witnesses appearing before courts and grand juries. The local United States Attorney requests from the district court "an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003(a) (1988). The United States Attorney has a wide range of discretion and may compel testimony from recalcitrant witnesses holding information that "may be necessary to the public interest," who claim the privilege against compelled self-incrimination. *Id.* § 6003(b).

83. *Kastigar*, 406 U.S. at 443.

84. *Id.*

85. *See id.* at 448.

86. 142 U.S. 547 (1892).

87. *See Kastigar*, 406 U.S. at 449-55.

88. *See supra* text accompanying notes 45-47.

89. *See Counselman*, 142 U.S. at 585-86.

90. 18 U.S.C. § 6002 (1988).

scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."[91] Transactional immunity, then, provides broader protection than what is required by the Fifth Amendment.[92]

Kastigar and Stewart also argued that the immunity statute is unconstitutional because it is impossible to enforce.[93] The statute itself provides no means of enforcement against the government. The Court refused to accept this argument, however, stating that an immunized witness "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."[94] The government has an "affirmative burden of proof,"[95] imposing upon 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."[96]

In order for the prosecution to prove no direct or derivative use of immunized testimony in a subsequent prosecution, a hearing must be held.[97] In this hearing, once the defendant shows prior immunized testimony on the same subject of the current prosecution, the government must affirmatively prove independent sources for all evidence.[98] The Court used an analogy to coerced confession cases to buttress its ruling. In the case of a coerced confession, the confession itself is inadmissible, but it does not preclude prosecution.[99] A grant of immunity, concluded the Court, should not provide any greater protection.[100] In other words, an immunized witness need not be provided amnesty. Furthermore, the Court asserted that an immunized witness is left in a better position than a criminal defendant claiming that his confession was coerced.[101] The criminal defendant "must first prevail in a voluntariness hearing before his confession and evidence from it become inadmissible."[102]

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91. *Kastigar*, 406 U.S. at 453.

92. *See id.*

93. *See id.* at 459-60.

94. *Id.* at 460.

95. *See id.*; Murphy v. Waterfront Comm'n, 378 U.S. 52, 102-04 (1964) (White, J., concurring).

96. *Kastigar*, 406 U.S. at 460.

97. Although the Court did not expressly require a hearing, courts have generally construed *Kastigar* to require such a hearing. *See infra* notes 117-118 and accompanying text.

98. *See Kastigar*, 406 U.S. at 461-62.

99. *See* Jackson v. Denno, 378 U.S. 368 (1964), *cited in Kastigar*, 406 U.S. at 462 n.54.

100. *See Kastigar*, 406 U.S. at 461.

101. *See id.* at 461-62.

102. *Id.* at 462.

The immunized witness, on the other hand, "need only show that he testified under a grant of immunity in order to shift to the government a heavy burden of proving that all of the evidence that it proposes to use was derived from legitimate independent sources."[103]

Dissenting in *Kastigar*, Justice Marshall strongly criticized the majority's analogy to coerced confession cases.[104] He correctly noted that "[t]he exclusionary rule of evidence that applies [in the case of a coerced confession] has nothing whatever to do with [*Kastigar*]."[105] Marshall stated that the exclusionary rule is founded, at least in part, on its deterrent effect on future police misconduct and its remedial effect on past police misconduct.[106]

Marshall pointed to two significant differences between coerced confessions and immunized testimony. First, in the case of a coerced confession, there has been a constitutional violation by law enforcement officials.[107] The exclusionary rule does not obviate that violation; instead, it seeks to limit the harm done by the violation. It does this by limiting the prosecution to evidence obtained independently of the confession.[108] On the other hand, "an immunity statute gives constitutional approval to the resulting interrogation."[109] The government must therefore provide absolute protection from compelled self-incrimination. The "fruit of the poisonous tree" doctrine, according to the dissent, has no place in this situation.[110] In Marshall's view, it is impossible to enforce the Court's requirement that the prosecution use only independent leads. Therefore, the Fifth Amendment demands absolute or transactional immunity.[111]

In addition, Marshall claimed that transactional immunity is appropriate because immunity is granted before interrogation. Requiring the government to grant transactional immunity will not "imperil[] large numbers of otherwise valid convictions."[112] In Marshall's view, it is better to require the government to choose carefully which witnesses it will immunize than to allow the possibility that the government will use immunized testimony impermissi-

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103. *Id.* at 461-62.
104. *See id.* at 470-71 (Marshall, J., dissenting).
105. *Id.* at 470 (Marshall, J., dissenting).
106. *See id.*
107. *See id.*
108. *See id.*
109. *Id.*
110. *See id.*
111. *See id.* at 471 (Marshall, J., dissenting).
112. *Id.*

bly. In light of Justice Marshall's criticism, it is apparent that the Court's analogy is seriously flawed, and although it is dicta, it has caused problems for lower courts.[113]

The importance of *Kastigar* remains its requirement that the prosecution affirmatively prove no direct or derivative use of immunized testimony. The Court did not define derivative use, however, and, as expected, lower courts have applied different standards to this requirement.[114]

C. *Application of* Kastigar

1. The Government's Burden.—Kastigar clearly places on the prosecution the affirmative burden of proving that all its evidence is derived from legitimate sources independent of the compelled testimony.[115] The defendant need not prove that the government used his testimony; he must show only that he testified under a grant of immunity.[116] In order for the government to prove independent sources, courts generally have construed *Kastigar* to require some type of hearing.[117] This hearing is often held before trial, but it may be delayed until after the prosecution has presented evidence, or even after trial.[118]

a. What Standard Should Apply?—Lower courts have not uniformly construed the standard of proof the government must meet in order to satisfy the *Kastigar* burden.[119] Most courts require only that the government prove by a "preponderance of the evidence" that its evidence was obtained from independent sources.[120] A mi-

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113. *See infra* notes 178-196 and accompanying text.

114. *See infra* notes 119-123 and accompanying text.

115. *See Kastigar*, 406 U.S. at 460.

116. *See id.* at 461.

117. *See, e.g.*, United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978); United States v. De Diego, 511 F.2d 818, 824 (D.C. Cir. 1975). This hearing is usually termed a *Kastigar* hearing. *See, e.g.*, United States v. Smith, 580 F. Supp. 1418, 1422 (D.N.J. 1984). *See generally* United States v. Garrett, 797 F.2d 656, 664 (8th Cir. 1986) (listing reasons for requiring an evidentiary hearing).

118. *See Smith*, 580 F. Supp. at 1424-25.

119. *Cf.* United States v. Pantone, 634 F.2d 716, 719 (3d Cir. 1980) ("It has been left to the lower courts to define the exact contours of the standards that the government must meet in varying contexts before evidence will be deemed untainted by association with compelled testimony.").

120. *See, e.g.*, United States v. North, 910 F.2d 843, 854 (D.C. Cir.) (per curiam) (*North I*), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2234 (1991); United States v. Caporale, 806 F.2d 1487, 1518 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); United States v. Rogers, 722 F.2d 557, 560 (9th Cir. 1983), *cert. denied*, 469 U.S. 835 (1984); *Romano*, 583 F.2d at 7 (Courts "requiring more than a preponderance do not purport to enunciate the standard that must be met;

nority of courts have adopted a more rigorous standard, and require the government to present "clear and convincing evidence."[121] Courts have remained sensitive to *Kastigar*'s "heavy burden," but have been careful not to place too stringent a burden on the government.[122] To do so would transform the grant of use immunity into a grant of transactional immunity.[123]

b. What Type of Hearing is Required?—Courts have varied in the type of *Kastigar* hearing required. Many courts have interpreted *Kastigar* to require a full evidentiary hearing to determine whether the government has improperly used immunized testimony.[124] At least one federal circuit court has maintained that the *Kastigar* hearing

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they finesse the question."); United States v. Weiner, 578 F.2d 757, 774 (9th Cir.) (requiring that the government "prove by affidavits and testimony that no government attorneys or personnel connected with them in this case had seen, read, or used" the immunized testimony), *cert. denied*, 439 U.S. 981 (1978); United States v. McDonnel, 550 F.2d 1010, 1012 (5th Cir.), *cert. denied*, 434 U.S. 835 (1977); United States v. Harris, 780 F. Supp. 385, 390 n.10 (N.D. W. Va. 1991).

121. *See, e.g.*, *Smith*, 580 F. Supp. at 1422; United States v. Hossbach, 518 F. Supp. 759, 772 (E.D. Pa. 1980). In *Hossbach*, Judge VanArtsdalen concluded that the term "heavy burden" is most logically construed to require proof by clear and convincing evidence. *Id.* Because the Government's proof in *Hossbach* was deficient under either the preponderance of the evidence standard or the clear and convincing evidence standard, the court did not find it necessary specifically to adopt the clear and convincing evidence test. *See id.* In *Smith*, the court adopted Judge VanArtsdalen's reasoning and held the Government to the higher standard. *See Smith*, 580 F. Supp. at 1422. The Third Circuit, in *Pantone*, held that prosecutors must "be held to a high standard in proving that their actions are untainted by exposure to prior compelled testimony." *Pantone*, 634 F.2d at 723; *see* United States v. Semkiw, 712 F.2d 891, 894 (3d Cir. 1983) (endorsing the "high standard" approach).

122. Thus, a court's choice of standard does not appear to be outcome determinative in the same way as would a court's decision to apply constitutional "strict scrutiny." *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that the Warren Court's Equal Protection Clause "strict scrutiny" analysis "was 'strict' in theory and fatal in fact").

123. *See Pantone*, 634 F.2d at 719 (stating that the "burden was not intended to be an insurmountable barrier").

124. *See, e.g.*, United States v. Rivieccio, 919 F.2d 812, 814 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2852 (1991); *Semkiw*, 712 F.2d at 893; United States v. De Diego, 511 F.2d 818, 822 (D.C. Cir. 1975); United States v. First W. State Bank, 491 F.2d 780, 784 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974); United States v. McDaniel, 482 F.2d 305, 306 (8th Cir. 1973); *Smith*, 580 F. Supp. at 1421; *Hossbach*, 518 F. Supp. at 771-72. *But see* United States v. Turner, 936 F.2d 221, 224 (6th Cir. 1991) (not requiring a *Kastigar* hearing for prosecution's grant of informal immunity).

The *Kastigar* hearing may be held before trial, during the trial as disputed evidence is offered, or after the trial to determine whether the government improperly used immunized testimony, or it may combine these methods. *See De Diego*, 511 F.2d at 824. Most hearings are pretrial hearings. *See Smith*, 580 F. Supp. at 1425. At least one court has read literally *Kastigar*'s requirement that the government must prove the independ-

must be adversarial in nature and must give the defendant an opportunity to cross-examine the prosecution's witnesses.[125] Most courts, however, have not explicitly adopted the cross-examination requirement.

These evidentiary hearings are required to ensure that criminal defendants are not "dependent for the preservation of [their] rights upon the integrity and good faith of the prosecuting authorities."[126] Those courts requiring full evidentiary hearings seem to be responding, at least implicitly, to Justice Marshall's expressed fear that "the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence."[127] By requiring a full evidentiary hearing, the government may be put to task by the defendant to prove independent sources of its evidence.[128]

The rationale put forward by a New Jersey federal district court is typical of the rationale expressed by courts requiring a full evidentiary hearing. In *United States v. Smith*,[129] the court analyzed four possible formats for the evidentiary hearing.[130] The court first rejected the possibility that the Government need only prove that it had erected a "Chinese wall" between the prosecutors of the case at trial and investigators from the agency that had immunized the defendant.[131] The court reasoned that proof of a Chinese wall would

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ent source of "the evidence it *proposes* to use," holding that this language indicates "that a *pre*-trial hearing is the recommended course." *Id.*

125. *See* United States v. Rinaldi, 808 F.2d 1579, 1582 (D.C. Cir. 1987); *De Diego*, 511 F.2d at 822. The District of Columbia Circuit appears to stand alone in this requirement. *See* United States v. North, 920 F.2d 940, 944 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991).

126. *Kastigar*, 406 U.S. at 460.

127. *Id.* at 469 (Marshall, J., dissenting). This fear is particularly poignant to the defendant trying to prove that the government has improperly used his immunized testimony; the government may make subtle use of the testimony in ways that the defendant will never be able to prove.

128. For a detailed discussion of the government's burden and the need for evidentiary hearings, see *Smith*, 580 F. Supp. at 1421-25.

129. 580 F. Supp. 1418 (D.N.J. 1984).

130. The court noted that these possibilities were not intended to be exhaustive. *See id.* at 1422 n.4.

131. *Id.* at 1422 (defining the term "Chinese wall" as an absolute barrier to the passing of information from the immunizing authority to the prosecuting attorney). In rejecting this possibility, the court relied upon United States v. Semkiw, 712 F.2d 891, 895 (3d Cir. 1983), and United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977). The court also reiterated Justice Marshall's concerns as expressed in *Kastigar*. *See Smith*, 580 F. Supp. at 1423 (quoting *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting)).

not satisfy the Government's "heavy burden."[132] Proof of a Chinese wall may be one element of the Government's proof, but it is not itself determinative. Even if prosecutors are insulated, the Government may have made derivative use of the testimony.

The court next considered the possibility that the prosecutors stipulate that they made no use of the immunized testimony.[133] This approach was rejected because it would leave the defendant at the mercy of the " 'integrity and good faith of the prosecuting attorneys.' "[134] The court also rejected a third option that would have allowed the Government to meet its burden by proving only that the prosecution possessed the information testified to by the immunized defendant prior to the grant of immunity.[135] The mere fact that the Government can prove prior knowledge of the evidence does not remove the possibility of derivative use of the testimony.[136]

The test approved by the *Smith* court involved two aspects: The government must prove at the evidentiary hearing that all its evidence to be offered at trial was derived from independent, legitimate sources; the government must also prove that it "did not use the immunized testimony *in any respect*."[137] Although the *Smith* court eventually found that the Government made no improper use of the immunized testimony, the high standard adopted demonstrates the extreme caution some courts have exercised in protecting the immunized defendant from any possibility of governmental taint.

In addition to providing a forum for the defendant to glean information from the government, evidentiary hearings also ensure that the government is given an opportunity to prove that no improper use was made of immunized testimony. In *United States v. De Diego*,[138] the District of Columbia Circuit reversed a district court's dismissal of a criminal prosecution because the district court failed to afford the Government an evidentiary hearing to allow it to meet its "heavy burden."[139]

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132. *Smith*, 580 F. Supp. at 1422-23 (finding proof of a "Chinese wall" to be "insufficient to guarantee the absence of taint").

133. *See id.* at 1423.

134. *See id.* (quoting *Kastigar*, 406 U.S. at 460).

135. *See id.* at 1423-24.

136. *Id.* (Such a showing "would not prove that the case against the defendant was derived from sources wholly independent of the immunized testimony.").

137. *Id.* at 1424.

138. 511 F.2d 818 (D.C. Cir. 1975).

139. *See id.* at 824-25. *De Diego* involved a federal prosecution for conspiracy. The defendant, De Diego, moved to dismiss the federal indictment, claiming that the Government had improperly used testimony he had given under a Florida state grant of immunity. *Id.* at 821. The district court refused to grant the Government a pretrial

Other courts have not read *Kastigar* to require a full evidentiary hearing. These courts permit trial courts to conduct a more abbreviated examination of the government's evidence.[140] Most courts seem willing to allow a more abbreviated examination when the trial court makes specific findings of fact on the record.[141] Appellate courts generally review these findings of fact using a "clearly erroneous" standard.[142]

2. Impermissible Use.—For a period of about eighty years, prior to the enactment of the Organized Crime Control Act of 1970,[143] all grants of immunity were transactional grants, and there was no problem of unauthorized prosecutorial use of immunized testimony.[144] Under grants of transactional immunity, prosecution arising out of the immunized testimony is precluded.[145] The Organized

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evidentiary hearing, stating that it would unduly delay the trial and would generate adverse pretrial publicity. *Id.* at 824. The circuit court concluded that the district court abused its discretion in failing to conduct a hearing, holding that by refusing the Government an opportunity to prove lack of taint, the district court usurped the Government's prosecutorial discretion. *Id.* In the District of Columbia Circuit's opinion, therefore, evidentiary hearings protect not only the defendant, but the Government as well.

140. *See, e.g.*, United States v. Helmsley, 941 F.2d 71, 82-83 (2d Cir. 1991) (rejecting Helmsley's argument that the immunity issue in that case should be remanded for a hearing), *cert. denied*, 112 S. Ct. 1162 (1992); United States v. Provenzano, 620 F.2d 985, 1006 (3d Cir.) ("Aside from *pro forma* and unnecessary testimony of the authors of the documents concerning their authenticity, nothing could have been added by holding a hearing."), *cert. denied*, 449 U.S. 899 (1980); United States v. Romano, 583 F.2d 1, 8 (1st Cir. 1978) (permitting the Government to provide affidavits from principal investigators showing that evidence was acquired independently of immunized testimony).

141. *See, e.g.*, United States v. Rinaldi, 808 F.2d 1579, 1583 (D.C. Cir. 1987) ("The absence of similar specific factual findings as to the source of the government's proffered evidence, however, prevents us from affirming the trial court's rulings on [the defendant's] various motions to suppress."); United States v. Semkiw, 712 F.2d 891, 894-95 (3d Cir. 1983) (remanding the case to the district court to "conduct an evidentiary hearing and make findings of fact and conclusions of law"); United States v. Rivera, 23 C.M.A. 430, 432, 50 C.M.R. 389, 391 (1975) (finding derivative use by Government based on review of trial record, even though trial court failed to hold a *Kastigar* hearing); State v. Strong, 542 A.2d 866, 875 (N.J. 1988) (relying on the trial record).

142. *See, e.g.*, United States v. Streck, 958 F.2d 141, 144 (6th Cir. 1992); United States v. Serrano, 870 F.2d 1, 15 (1st Cir. 1989); United States v. Garrett, 849 F.2d 1141, 1142 (8th Cir. 1988); United States v. Brimberry, 803 F.2d 908, 917 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); *Romano*, 583 F.2d at 7.

143. Pub. L. No. 91-452, 84 Stat. 926 (1970) (codified at 18 U.S.C. § 1955 (1988)). The earlier Interstate Commerce Testimony Act of 1893, ch. 83, 27 Stat. 443, provided for grants of transactional immunity. *See id.* at 444. Prior to that, the federal immunity statute was interpreted to grant only use immunity. *See* Thornburgh, *supra* note 34, at 160; *see also* Counselman v. Hitchcock, 142 U.S. 547 (1892) (holding a pure use immunity statute violative of the Fifth Amendment).

144. *See* Thornburgh, *supra* note 34, at 160.

145. *See id.*

Crime Control Act's restriction of federal grants of immunity to use and derivative use immunity, however, raised the question of what use was prohibited.

In *Kastigar*,[146] decided two years after the Organized Crime Control Act's passage, the Supreme Court did not specifically define the limits of impermissible derivative use. The *Kastigar* Court focused its analysis on the government's ability to "obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution."[147] The Court recognized that the prosecution may in "subtle ways . . . disadvantage a witness, especially in the jurisdiction granting the immunity."[148] The Court's failure to define derivative use has led both courts and commentators to speculate on the limits of the derivative use proscription.[149]

a. What is Nonevidentiary Use?—The first problem encountered in considering nonevidentiary use is the lack of a precise definition. Professor Kristine Strachan opened the debate in 1978[150] by describing nonevidentiary use "as use of immunized disclosures that does not culminate directly or indirectly in the presentation of evidence against the immunized person in a subsequent criminal pros-

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146. 406 U.S. 441 (1972).

147. *Id.* at 459.

148. *Id.*

149. The Court's use of the term "derivative use" in *Kastigar* must be read against the backdrop of its decision in Counselman v. Hitchcock, 142 U.S. 547 (1892). See *supra* notes 42-47 and accompanying text for a discussion of the relationship between *Counselman* and *Kastigar*. In *Counselman*, the Court struck down a federal use immunity statute because the statute "could not, and would not, prevent the use of [the defendant's] testimony to search out other testimony to be used against him or his property in a criminal proceeding." *Counselman*, 142 U.S. at 564; *see* Thornburgh, *supra* note 34, at 161 (citing *Counselman* as "the first Supreme Court prohibition of the 'derivative' use of compelled testimony"). The Court's focus in *Counselman* appears clearly to be on evidentiary use of immunized testimony.

The *Kastigar* decision, on the other hand, has created confusion among commentators—it is not clear whether the Court meant to proscribe only evidentiary use or whether it will not tolerate "any" use, including nonevidentiary use. *Compare* Humble, *supra* note 22, at 360-63 (arguing that only evidentiary use is prohibited) *with* Strachan, *supra* note 10, at 806-07 (arguing that nonevidentiary use is also prohibited). Courts have been similarly stymied by *Kastigar*'s language. *Compare* United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973) (forbidding "all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury") *with* United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988) (declining to follow *McDaniel*'s prohibition of prosecution in cases in which "immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial"), *cert. denied*, 490 U.S. 1011 (1989). *See also* United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989) (listing decisions addressing nonevidentiary use).

150. *See* Strachan, *supra* note 10.

ecution. This definition is too vague to be very helpful, but it can serve as a starting point."[151] In the only other significant academic work to address nonevidentiary use, Gary Humble provided a more succinct, but no more useful definition in 1987—those "uses that do not furnish a link in the chain of evidence against the defendant."[152]

Neither of these definitions is very helpful. Courts grappling with nonevidentiary use questions have generally followed Professor Strachan's lead and have offered examples attempting to define the term.[153] The Eighth Circuit was the first court specifically to address the nonevidentiary use question. In *United States v. McDaniel*,[154] the court set forth a number of possible nonevidentiary uses: "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."[155] Despite this full definition, neither courts nor commentators have agreed on the extent to which *Kastigar* applies to

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151. *Id.* at 807.

152. Humble, *supra* note 22, at 353. Humble's definition is a restatement, in negative terms, of the Supreme Court's "liberal construction" of the Fifth Amendment privilege in Hoffman v. United States, 341 U.S. 479, 486 (1951).

153. *See* Strachan, *supra* note 10, at 807; *see, e.g.*, *Serrano*, 870 F.2d at 16; United States v. Semkiw, 721 F.2d 891, 895 (3d Cir. 1983).

154. 482 F.2d 305 (8th Cir. 1973).

155. *Id.* at 311; *see also Semkiw*, 712 F.2d at 894-95 (finding that the prosecutor's "access" to compelled testimony may have improperly advantaged the Government in its preparation of and performance at trial). *But see* United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988) ("To the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning."), *cert. denied*, 490 U.S. 1011 (1989); United States v. Byrd, 765 F.2d 1524, 1530-31 (11th Cir. 1984) ("We do not read *Kastigar* to require a court to inquire into a prosecutor's motives in seeking indictment.").

Humble has digested a number of nonevidentiary uses compiled by Professor Strachan, *see* Strachan, *supra* note 10, at 807-09. Humble's summary is as follows:

a) Prosecutorial decision:
   1. Evaluate decisions to prosecute or plea bargain.
   2. Preserve resources by focusing investigation on known guilty parties.
b) Trial preparation and strategy:
   1. Clarify information already known.
   2. Frame questions, decide order of evidence, and structure jury arguments.
c) Discovery:
   1. Psychologically disadvantage defendant who does not have similar access to the state's case.
   2. Motivates a search for independent sources.
d) Psychological threat of a perjury prosecution if defendant's trial testimony conflicts with his immunized testimony.

Humble, *supra* note 22, at 354 n.15.

nonevidentiary use, if it applies at all.[156] Most courts have been reluctant to adopt the Eighth Circuit's expansive proscription set forth in *McDaniel*.[157]

The problem in interpretation stems from imprecise language in the federal immunity statute[158] and inconsistent language by the Court in *Kastigar*.[159] The immunity statute prohibits prosecutorial use of "any information directly or indirectly derived from such testimony or other information."[160] The Court's opinion in *Kastigar* variously interprets this proscription, at times applying it to the prosecutorial use of compelled testimony "*in any respect*,"[161] but also limiting the prosecution's burden to proving only "that all of the *evidence* it proposes to use was derived from legitimate independent sources."[162] *Kastigar*'s ambiguity has left unsettled the nonevidentiary use question.

Another subset of the derivative use problem can be seen in courts' divergent treatment of cases involving prosecutorial exposure to immunized testimony and cases involving independent witness exposure to compelled testimony.

b. Prosecutorial Exposure Versus Independent Witness Exposure.— Those courts accepting the proposition that *Kastigar* allows nonevidentiary use of compelled testimony generally will find governmental taint only when the government fails to prove a legitimate, independent source for its evidence.[163] In *United States v.*

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156. *See supra* note 149.

157. *See, e.g.*, *Serrano*, 870 F.2d at 16 (disagreeing with *McDaniel*); *Mariani*, 851 F.2d at 600-01; United States v. Crowson, 828 F.2d 1427, 1431-32 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); *Byrd*, 765 F.2d at 1528-31. *But see, e.g.*, *Semkiw*, 712 F.2d at 894 (following *McDaniel*); United States v. First W. State Bank, 491 F.2d 780, 787-88 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974); United States v. Smith, 580 F. Supp. 1418, 1421-22 (D.N.J. 1984).

158. *See* 18 U.S.C. § 6002 (1988). One commentator has offered an alternative formulation of the statute: "No testimony or other information compelled under an immunity order which the witness would have been privileged under the fifth amendment to the United States Constitution not to give may be used in any manner which would violate that privilege." Peter Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1737 (1982).

159. *See* Kastigar v. United States, 406 U.S. 441, 453, 462-63 (1972).

160. 18 U.S.C. § 6002.

161. *Kastigar*, 406 U.S. at 453.

162. *Id.* at 461-62 (emphasis added).

163. *See, e.g.*, United States v. Caporale, 806 F.2d 1487, 1518 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); United States v. Byrd, 765 F.2d 1524, 1528-29 (11th Cir. 1985); United States v. McDonnel, 550 F.2d 1010, 1012 (5th Cir.), *cert. denied*, 434 U.S. 835 (1977).

Caporale,[164] the Eleventh Circuit found no *Kastigar* violation in a case in which the chief prosecutor read the defendant's immunized testimony prior to filing the indictment against him.[165] The court interpreted *Kastigar* as requiring an inquiry "not [into] whether the prosecutor was aware of the contents of the immunized testimony, but whether he used the testimony *in any way* to build a case against the defendant."[166] The court found that the prosecution had independent leads for its sources, and therefore concluded that there was no Fifth Amendment violation.[167] Courts following *McDaniel*,[168] however, are more likely to find a Fifth Amendment violation if there is prosecutorial exposure to the immunized testimony.[169] These courts may require that the government prove lack of nonevidentiary use, in addition to independent leads for its evidence.[170]

Courts are similarly divided over independent witness exposure to immunized testimony. The few courts that have tackled this issue have focused on the witness's motivation for testifying.[171] In *United States v. Kurzer*,[172] for example, the Second Circuit required the Government to prove that a Government witness's decision to testify was not influenced by his exposure to the defendant's immunized testimony.[173] The court reasoned that if the Government's witness was motivated to testify by the defendant's compelled testimony, the Government would be unable to prove that its witness "was a source wholly independent of the [immunized] testimony."[174] The few courts that have considered questions of independent witness taint have held the government to a high standard of proof.[175]

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164. 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987).

165. *See id.* at 1518.

166. *Id.* (emphasis added).

167. *See id.*

168. United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); *see supra* notes 154-155 and accompanying text.

169. *See supra* note 157 (listing cases following *McDaniel*).

170. *See supra* note 157.

171. *See, e.g.*, United States v. Brimberry, 803 F.2d 908, 915-17 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); United States v. Hampton, 775 F.2d 1479, 1489 (11th Cir. 1985); United States v. Kurzer, 534 F.2d 511, 517-18 (2d Cir. 1976).

172. 534 F.2d 511 (2d Cir. 1976).

173. *See id.* at 517.

174. *Id.* (brackets in original).

175. *See, e.g., Brimberry*, 803 F.2d at 915 (requiring the Government to make a "strict showing" that witness testimony was obtained independently of compelled testimony); *Hampton*, 775 F.2d at 1489 (requiring the Government to meet an "affirmative burden of establishing that [the witness's] testimony was derived independently of [the defendant's] immunized testimony and its fruits").

3. Kastigar*'s Poisonous Fruit.*—The protections afforded an immunized witness under the Fifth Amendment appear at first glance to be similar to those protections afforded criminal defendants in coerced confession and illegal search cases.[176] The similarities, however, are more apparent than real.[177] The *Kastigar* Court, relying on language in *Murphy v. Waterfront Commission*,[178] used an unfortunate analogy when it compared incriminating testimony compelled by a statutory grant of immunity with coerced confessions.[179] The Court's analogy has been criticized both by courts and commentators.[180]

This criticism is apt. The exclusionary rule applied to Fourth Amendment violation cases is not a constitutional imperative.[181] The Fourth Amendment exclusionary rule has three major policy imperatives as its basis—to provide a remedy for a constitutional violation,[182] to promote judicial integrity,[183] and, most importantly, to deter future police and official misconduct.[184] The Court has emphasized repeatedly that the exclusionary rule's deterrent effect is its principal function.[185] Fifth Amendment protection of an immunized witness, on the other hand, provides no deterrent effect

176. In both cases, evidence against the defendant is excluded at trial based upon an "exclusionary rule."

177. *See* Kastigar v. United States, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting).

178. 378 U.S. 52 (1964) (prohibiting prosecutorial use of "fruits" of compelled testimony); *see id.* at 103 (White, J., concurring) (discussing the exclusionary rule as it relates to coerced confessions, and search and seizure cases).

179. *See Kastigar*, 406 U.S. at 461-62; *cf. id.* at 470 (Marshall, J., dissenting) ("[T]he Court turns reason on its head.").

180. *See* United States v. Kurzer, 534 F.2d 511, 516 & n.8 (2d Cir. 1976); *In re* Grand Jury Proceedings, 497 F. Supp. 979, 982-83 (E.D. Pa. 1980); State v. Strong, 542 A.2d 866, 870-71 (N.J. 1988); People v. Lucas, 435 N.Y.S.2d 466, 473-74 (N.Y. Sup. Ct. 1980); Note, *Standards for Exclusion in Immunity Cases After* Kastigar *and* Zicarelli, 82 YALE L.J. 171, 176-78 (1972); Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 185-88 (1972).

181. *See* Stone v. Powell, 428 U.S. 465, 482 (1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."); Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring) ("[T]he Fourth Amendment does not itself contain a provision expressly precluding the use of [illegally obtained] evidence.").

182. *See Mapp*, 376 U.S. at 651-53.

183. *See id.* at 659.

184. *See id.* at 656.

185. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966); Linkletter v. Walker, 381 U.S. 618, 637 (1965).

whatsoever.[186]

The Second Circuit, in *United States v. Kurzer*,[187] set forth the differences between the Fourth Amendment exclusionary rule and the Fifth Amendment protection of an immunized witness:

> [T]he principal function of the Fourth Amendment exclusionary rule is to deter unlawful police misconduct, and it can be argued that it serves little deterrent purpose to exclude evidence which is only indirectly and by an attenuated chain of causation the product of improper police conduct. The Fifth Amendment, in contrast, is by its terms an exclusionary rule, and as implemented in the immunity statute it is a very broad one, prohibiting the use not only of evidence, but of "information," "directly or indirectly derived" from the immunized testimony. The statute requires not merely that the evidence be excluded when such exclusion would deter wrongful police or prosecution conduct, but that the witness be left "in substantially the same position as if [he] had claimed the Fifth Amendment privilege."[188]

Justice Marshall's dissent in *Kastigar* points out another flaw in the coerced confession analogy.[189] The constitutional violation in the coerced confession case occurs at the time of the illegal interrogation.[190] The judicially created exclusionary rules are designed to minimize the harm caused by this violation.[191] In contrast, when a witness is granted immunity under an immunity statute, the constitutional wrong occurs "when compelled testimony is used against the testifier in a criminal prosecution."[192] A new constitutional violation occurs each time immunized testimony is improperly used against the defendant in a criminal case.[193] The constitutional harm

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186. *See* United States v. Kurzer, 534 F.2d 511, 516 (2d Cir. 1976); Kastigar v. United States, 406 U.S. 441, 470 (1972) (Marshall, J., dissenting).

187. 534 F.2d 511 (2d Cir. 1976).

188. *Id.* at 516 (citations omitted) (quoting *Kastigar*, 406 U.S. at 462) (brackets in original).

189. *See Kastigar*, 406 U.S. at 470-71 (Marshall, J., dissenting).

190. *See id.* ("[I]n the case of exclusionary rules it may be sufficient to shield the witness from the fruits of the illegal search or interrogation in a partial and reasonably adequate manner."); *see also* United States v. Calandra, 414 U.S. 338, 354 (1974) ("Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong.").

191. *See Calandra*, 414 U.S. at 348; Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., dissenting).

192. *In re* Grand Jury Proceedings, 497 F. Supp. 979, 983-84 (E.D. Pa. 1980); *see also Kastigar*, 460 U.S. at 471.

193. In re *Grand Jury Proceedings*, 497 F. Supp. at 984.

protected by an immunity statute is the improper use of immunized testimony against a criminal defendant. Only when compelled testimony is used against the defendant is the Fifth Amendment protection against compelled self-incrimination violated. An exclusionary rule, therefore, is an inappropriate analogy.[194]

The Court appears to have distanced itself somewhat from this analogy in a subsequent decision.[195] Nevertheless, the fundamental flaw of the Court's analogy still confuses lower courts.[196] It is understandable that courts have looked to exclusionary rule analogies for a clear answer when faced with difficult questions of fact concerning possible governmental taint. A recent case, which was highly publicized, serves as an instructive example, evidencing contemporary problems in defining the constitutional limits of the federal witness immunity statute.

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194. The Court of Appeals for the District of Columbia Circuit has stated that "[t]he fruit of the poisonous tree metaphor is actually backwards as applied to a *Kastigar* problem." United States v. North, 920 F.2d 940, 946 n.7 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991).

195. In New Jersey v. Portash, 440 U.S. 450 (1979), the Court stated that the

> [b]alancing of interests was thought to be necessary in [prior cases] when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

Id. at 459.

196. *See, e.g.*, People v. Briggs, 709 P.2d 911 (Colo. 1985). In *Briggs*, a criminal prosecution for murder, the defendant was offered informal immunity by the police investigating a burglary. *Id.* at 914. Briggs admitted involvement in the burglary and implicated another individual, Martin. *Id.* The police traced a rifle stolen in the burglary to the murder of Briggs's former roommate. *Id.* at 913. Based on information provided by Briggs, investigators also confronted Martin, who was not previously a target in the investigation. *Id.* at 914. Martin was promised informal immunity and subsequently secretly recorded incriminating statements by Briggs. *Id.*

The court purported to distinguish between Fourth and Fifth Amendment exclusionary rules, *see id.* at 919, but instead examined "free will" bases for Martin's decision to request immunity, *see id.* at 920. Had the court fully grasped the distinction set forth in *Kurzer*, *see supra* text accompanying notes 187-188, it would have found such an examination unnecessary. The court claimed an unwillingness "to establish a per se rule that the immunized testimony can never be an act of free will on the part of the witness sufficient to attenuate the taint of the initial illegality." *Briggs*, 709 P.2d at 920. The court's focus on the possibility of "attenuation" of the taint, however, belies its implicit reliance on Fourth Amendment concerns. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); *North II*, 920 F.2d at 946 n.7; In re *Grand Jury Proceedings*, 497 F. Supp. at 983.

II. UNITED STATES V. NORTH[197]

A. Facts

Retired Marine Lieutenant Colonel Oliver L. North's troubles stemmed from his role in executing controversial foreign policy while he was assigned to the National Security Council. The Reagan administration feared that political discontent in Nicaragua threatened national security. In addition, the administration faced political pressure to free American hostages held by fundamentalist Moslems in Iran. In response to these pressures and beliefs, North and others in the Reagan administration allegedly sold arms illegally to Iran in exchange for proposed hostage releases, and diverted profits to Nicaraguan rebels ("Contras").[198] After a November 1986 report by an obscure Lebanese newspaper that the United States was secretly selling arms to Iran, Congress commissioned two select committees ("Iran-Contra committees") to investigate the allegations of unlawful trading.[199]

At the same time the Iran-Contra committees were conducting their investigations, Attorney General Edwin Meese requested that an Independent Counsel be appointed.[200] The Special Division of the United States Court of Appeals for the District of Columbia Circuit appointed Lawrence Walsh as Independent Counsel and gave him authority to investigate any criminal wrongdoing by administration officials in the Iran-Contra matter.[201] A grand jury was also empaneled to assist Walsh's investigation.[202]

Before Walsh had completed his investigation, the Iran-Contra

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197. 910 F.2d 843 (D.C. Cir.) (per curiam) (*North I*), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991).

198. Not all Reagan administration officials backed this plan. One former defense official is quoted as saying " '[i]f the ideas I heard to fight the Sandinistas get on public TV, they'll laugh North and his cohorts out of Washington.' " Nicholas M. Horrock, *Foreign Policy on Trial*, CHI. TRIB., Jan. 11, 1987, at C1.

199. United States v. North, 910 F.2d 843, 851 (D.C. Cir.) (per curiam) (*North I*), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991). Each house of Congress formed its own committee. The Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House of Representatives Select Committee to Investigate Covert Arms Transactions with Iran merged during the investigation, pooling resources and holding joint hearings. *See* United States v. Poindexter, 698 F. Supp. 300, 303 & n.2 (D.D.C.), *appeal dismissed*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). For more detailed information on the Congressional proceedings, see *Report of the Congressional Committees Investigating the Iran-Contra Affair*, H.R. REP. No. 100-433, S. REP. No. 100-216, 100th Cong., 1st Sess. (1987).

200. *Poindexter*, 698 F. Supp. at 303.

201. *Id.* Walsh was appointed on December 19, 1986. *Id.*

202. *Id.*

committees held hearings "to fix individual responsibility for conduct [they] considered unauthorized by law."[203] North was called to testify before the committees and refused, asserting his Fifth Amendment right, claiming possible incrimination.[204] On June 3, 1987, North was granted use immunity pursuant to the federal immunity statute.[205] North began testifying on July 7, 1987; his extensive testimony was broadcast on national television and radio, and was widely reported by both print and electronic media.[206]

Prior to North's immunized testimony, the Independent Counsel took steps to ensure that neither he nor his staff was exposed to North's immunized testimony.[207] In addition, Walsh sealed transcripts of witness interviews, investigative leads, and a detailed analysis of prosecutorial strategy prior to North's testimony.[208] During North's testimony, the grand jury was in recess.[209] Further, the Independent Counsel never presented the grand jury with any immunized testimony and instructed jurors to avoid exposure to the immunized testimony.[210]

On March 16, 1988, North was indicted on twelve counts stemming from the Iran-Contra affair.[211] North and the other defendants moved to dismiss the charges against them, claiming that their Fifth Amendment rights were violated by the Government's impermissible use of their compelled testimony.[212] The district court denied this motion and the defendants appealed, requesting mandamus from the circuit court.[213]

The District of Columbia Circuit Court denied the defendants' request for mandamus and dismissed the interlocutory appeal.[214] The district court then heard pretrial motions on North's claim that

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203. *Id.*

204. *Id.*

205. *Id.* at 303-04; *see* 18 U.S.C. §§ 6001-05 (1988).

206. *North I*, 910 F.2d at 851; *Poindexter*, 698 F. Supp. at 308.

207. *North I*, 910 F.2d at 860. The district judge found that Walsh "undertook to enforce a prophylactic system" designed to prevent indirect and direct exposure of the prosecution to the testimony. *Poindexter*, 698 F. Supp. at 308. Walsh followed procedures recommended in the United States Attorneys' Manual. *Id.*; *see* 3(a) DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-23.330 (1988).

208. *Poindexter*, 698 F. Supp. at 312-13. This process is known as "canning." *See North I*, 910 F.2d at 871.

209. *Poindexter*, 698 F. Supp. at 308.

210. *Id.* at 308-09.

211. *Id.* at 302; *North I*, 910 F.2d at 851.

212. *Poindexter*, 698 F. Supp. at 302.

213. *See* United States v. Poindexter, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

214. *See id.* at 222-23.

the Government improperly used his immunized testimony. The court found no prosecutorial impropriety and held that there was no Fifth Amendment violation.[215] Subsequently, in May 1989, North was convicted on three counts.[216] He again appealed, claiming that the Government improperly used his immunized testimony to refresh the memory of grand jury witnesses and that the district court erroneously failed to hold a hearing to ensure that the Government made no use of North's immunized testimony.[217] In a per curiam opinion, the District of Columbia Circuit Court agreed with North and ordered the district court to hold a more extensive hearing on the Government's use of North's immunized testimony.[218] The Independent Counsel petitioned for a rehearing, claiming that the circuit court's order was too stringent. Although the court withdrew a portion of its prior opinion in response, it essentially maintained its position on the immunized testimony.[219] Subsequently, Walsh decided that the requirements set forth by the court were too onerous and announced that he would not seek to reinstate North's conviction.[220]

B. Analysis

1. North I.[221]—In the original per curiam opinion, *North I*, the District of Columbia Circuit remanded the case for a *Kastigar* hearing.[222] The court interpreted *Kastigar* to require an examination of

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215. *See* United States v. North, 713 F. Supp. 1446, 1447 (D.D.C. 1989).

216. *North I*, 910 F.2d at 851. North was found guilty of "aiding and abetting an endeavor to obstruct Congress . . . ; destroying, altering, or removing official NSC documents . . . ; and accepting an illegal gratuity, consisting of a security system for his home." *Id.* at 851-52.

Considering the amount of publicity North's congressional testimony attracted, it is both amazing and alarming that twelve jurors were found, in the District of Columbia, with no "rudimentary prior knowledge of North's immunized testimony or other issues in the case." United States v. North, 713 F. Supp. 1444, 1445 (D.D.C. 1989) (denying North's request for change of venue due to the adverse pretrial publicity). Judge Gesell, the trial judge, justified the jurors' ignorance of North's testimony, claiming that the jury was "a group of conscientious hard-working persons, many of whom are well-informed regarding local affairs but who understandably have less interest in national affairs because District of Columbia residents cannot vote for a Senator or voting Representative." *Id.* Judge Gesell's rationalization stands on shaky ground, to say the least.

217. *See North I*, 910 F.2d at 853.

218. *See id.* at 852.

219. *See id.*

220. *See* Haynes Johnson & Tracy Thompson, *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1.

221. 910 F.2d 843 (D.C. Cir.) (per curiam) (*North I*), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991).

222. *See id.* at 852.

testimony given before the grand jury and at trial when a defendant's immunized testimony may have affected the content of the grand jury and trial witnesses' testimony.[223] The court ignored practical problems with this requirement,[224] and focused its attention on the individual rights of the immunized witness, rather than accommodating both individual and governmental concerns. The *North II* dissent aptly chastised the *North I* per curiam for upsetting the "delicate tension" in which statutory use immunity and the Fifth Amendment exist.[225]

a. Nonevidentiary Use.—The court first addressed North's claims that the Independent Counsel made improper nonevidentiary use of North's immunized testimony, and concluded that the Independent Counsel sufficiently insulated himself and his staff from North's testimony so that no nonevidentiary use was made of the testimony.[226] The court was unable to articulate a precise definition of nonevidentiary use, opting instead for the approach taken by other courts—"delineat[ing it] by example rather than definition."[227]

Nonevidentiary use generally is considered to encompass use made by the prosecution in planning trial strategy, developing leads, narrowing an investigation, and other intangible uses.[228] The court avoided becoming trapped in the vagueness of the definition by concluding that the Independent Counsel had no significant exposure to North's testimony, and "[w]ithout significant exposure, [he] could not have made significant nonevidentiary use, permissible or impermissible."[229] Though the court did not reach the nonevidentiary use question, it hinted that it would join those courts following the Eighth Circuit's decision in *United States v. McDaniel*.[230] Courts following *McDaniel* read *Kastigar* to prohibit nonevidentiary prosecutorial use of compelled testimony.[231]

The circuit court, though failing to offer its own definition of nonevidentiary use, rejected the district court's conclusion that "the use of immunized testimony to refresh the memories of witnesses is a nonevidentiary matter and that therefore refreshment should not

223. *See id.* at 872.
224. *See North II*, 920 F.2d at 951 (Wald, C.J., dissenting).
225. *Id.*
226. *See North I*, 910 F.2d at 856.
227. *Id.* at 857; *see supra* notes 146-162 and accompanying text.
228. *See supra* notes 147-155 and accompanying text.
229. *North I*, 910 F.2d at 860.
230. 482 F.2d 305 (8th Cir. 1973); *see North I*, 910 F.2d at 856.
231. *See supra* notes 155-157 and accompanying text.

be subject to a *Kastigar* hearing."[232] Instead, the circuit court stated that "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes *indirect evidentiary* not *nonevidentiary use*."[233]

b. Refreshment of Witnesses' Memories.—Because the circuit court determined that use of the immunized testimony by witnesses to refresh their memories is evidentiary use, it held that the district court must conduct a *Kastigar* hearing to determine whether there was any impermissible use.[234] It rejected the trial court's conclusion that if a witness's testimony after exposure remains consistent with earlier testimony, then no taint exists.[235] A hearing was required because the district court failed to conduct an inquiry into each witness's testimony.[236]

The court also rejected the Independent Counsel's argument that only the prosecution is prohibited from using immunized testimony.[237] The Independent Counsel relied upon the Supreme Court's decision in *United States v. Apfelbaum*[238] for this argument, but the court rejected his characterization of *Apfelbaum*. *Apfelbaum* involved the criminal prosecution of an immunized witness for perjury committed while he was testifying under immunity.[239] Apfelbaum claimed that his immunized testimony was inadmissible, except for those portions charged in the indictment as false. The trial judge allowed admission of the immunized testimony to prove that Apfelbaum knowingly made the false statements.[240] The Supreme Court upheld the trial court's ruling, claiming that Congress, in enacting the federal immunity statute, "intended the perjury and false-declarations exception to be interpreted as broadly as constitutionally permissible."[241] The Court also indicated that the scope of the immunity statute should not be read to "preclude all

232. *North I*, 910 F.2d at 860.
233. *Id.* The court offered the further explanation that, "[s]trictly speaking, the term *direct evidentiary use* may describe only attempts by the prosecutors to offer the immunized testimony directly to the grand jury or trial jury, as by offering the testimony as an exhibit." *Id.*
234. *See id.* at 861.
235. *See id.*
236. *Id.* at 862.
237. *See id.* at 861.
238. 445 U.S. 115 (1980).
239. *Id.* at 118.
240. *Id.* at 119.
241. *Id.* at 122.

uses of immunized testimony."[242]

The *Apfelbaum* Court did not appear to imply the broad characterization made by the Independent Counsel, however. The circuit court rejected the Independent Counsel's argument and reasoned that *Apfelbaum* merely held that the Fifth Amendment does not protect against "consequences of a noncriminal nature."[243] The circuit court recognized the difficult nature of the requirement it imposed on the district court and the Independent Counsel.[244] In part, then, its ruling can be read as chastising both the congressional committees and the Independent Counsel.[245]

c. Content of Witnesses' Testimony.—The circuit court held that the district court failed to delve deeply enough into the content of the exposed witnesses' testimony.[246] The court ruled that not only should the district court have verified that "the names of witnesses were derived independently of the immunized testimony," it was also required to determine "the extent to which the substantive content of the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony."[247] The district court had warned witnesses not to testify about anything they had learned through exposure to North's immunized testimony, but this was not sufficient, according to the circuit court's test.[248]

The circuit court reasoned that witnesses could not be relied upon to "filter" their testimony through the district court's warning.[249] The only accurate way to determine the effect of taint, concluded the court, is to hold a *Kastigar* hearing.[250] The government has a "heavy burden" to bear—it is not enough to instruct witnesses to avoid testifying to facts relating to exposure to immunized testimony. The burden cannot be shifted, and the only way the govern-

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242. *Id.* at 125.

243. *North I*, 910 F.2d at 861 (citing *Apfelbaum*, 445 U.S. at 125).

244. *See id.* at 862. "It may be that it is possible in the present case to separate the wheat of the witnesses' unspoiled memory from the chaff of North's immunized testimony, but it may not. . . . If it proves impossible to make such a separation, then it may well be the case that the prosecution cannot proceed." *Id.*

245. The court used Walsh's own memorandum to the Iran-Contra committees against him. *See id.* at 863. The Independent Counsel had warned that " 'any grant of use and derivative use immunity would create serious—and perhaps insurmountable—barriers to the prosecution of the immunized witness.' " *Id.* (quoting Memorandum of Independent Counsel Concerning Use Immunity 1 (Jan. 13, 1987)).

246. *See id.*

247. *Id.*

248. *See id.* at 868.

249. *See id.*

250. *See id.*

ment can meet its burden is through an "open adversary hearing."[251]

d. Legal Standard on Remand.—The court next considered the appropriate legal standard for the district court to apply on remand.[252] The district court was directed to consider, during the mandatory *Kastigar* hearing, whether immunized testimony was used in the grand jury proceeding from which North's indictment arose.[253] The circuit court refused to adopt the Second Circuit's view, set forth in *United States v. Hinton*,[254] which is "a *per se* rule requiring dismissal of the indictment where it is shown that the indicting grand jury has been exposed to any immunized testimony."[255] Instead, the court explained, the Government must be granted an opportunity to meet its "heavy burden" at a *Kastigar* hearing.[256]

The court distinguished between situations in which a "grand jury has considered evidence that would be inadmissible at trial because that evidence was obtained in violation of some constitutional or statutory prohibition"[257]—such as evidence obtained through an illegal search and seizure, or hearsay[258]—and the use of immunized testimony before a grand jury.[259] The distinction is vital, and has eluded some courts.[260]

In the case of a grand jury's consideration of illegally seized evidence, the Fourth Amendment violation occurs at the time of the warrantless seizure. The use of this illegally obtained evidence in a grand jury proceeding does not further violate the Fourth Amendment.[261] On the other hand, "what is prohibited and unconstitutional under the Fifth Amendment and *Kastigar* is the *very presentation of the immunized testimony*."[262] If immunized testimony is used before a grand jury, "[t]here is no independent violation that can be reme-

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251. *Id.* at 867.
252. *See id.* at 868-72.
253. *Id.* at 872.
254. 543 F.2d 1002 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).
255. *North I*, 910 F.2d at 870 (citing *Hinton*, 543 F.2d 1002).
256. *Id.* at 873; *see* United States v. De Diego, 511 F.2d 818 (D.C. Cir. 1975).
257. *North I*, 910 F.2d at 869; *see, e.g.*, Midland Asphalt Corp. v. United States, 489 U.S. 782 (1989); United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956).
258. *See North I*, 910 F.2d at 871-72.
259. *See id.*
260. *See, e.g.*, United States v. Society of Indep. Gasoline Marketers of Am., 624 F.2d 461, 473-74 (4th Cir. 1979), *cert. denied sub nom.* Amerada Hess Corp. v. United States, 449 U.S. 1078 (1981).
261. *North I*, 910 F.2d at 869; *supra* notes 181-188 and accompanying text.
262. *North I*, 910 F.2d at 869.

died by a device such as the exclusionary rule: the grand jury process itself is violated and corrupted, and the indictment becomes indistinguishable from the constitutional and statutory transgression."[263] Though the court did not specifically state it in this discussion, the standard followed by most courts in determining the propriety of placing immunized testimony before the grand jury is the "harmless beyond a reasonable doubt" standard.[264] Following this standard in North's case, it was not necessary to dismiss the indictment. The *North I* court, however, overlooked this reasonable standard and adopted a significantly more stringent standard for the Government to meet.

According to the court, the district court did not make adequate factual findings for the circuit court to review the extent of the grand jury's use of immunized testimony.[265] Before North gave his immunized testimony, the Independent Counsel sealed and filed with the court "both evidence and prosecution theories."[266] The district court, however, failed to review this material in adequate detail for the circuit court.[267]

The circuit court set a high standard for the Independent Counsel to prove, on remand, that Government witnesses did not use immunized testimony either before the grand jury or at trial:

> For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by establishing that the witness was never exposed to North's immunized testimony, or that the allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred.[268]

The inquiry at the *Kastigar* hearing "must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item."[269]

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263. *Id.*

264. *Id.* at 854; *see, e.g.*, United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989); United States v. Byrd, 765 F.2d 1524, 1529 n.8 (11th Cir. 1985); United States v. Beery, 678 F.2d 856, 863 (10th Cir. 1982), *cert. denied*, 471 U.S. 1066 (1985); United States v. Shelton, 669 F.2d 446, 464 (7th Cir.), *cert. denied sub nom.* Bledsoe v. United States, 456 U.S. 934 (1982).

265. *See North I*, 910 F.2d at 871-72.

266. *Id.* at 871.

267. *See id.* at 871-72.

268. *Id.* at 872-73.

269. *Id.* at 872. The court did refuse, however, to "require an unprecedented *Kasti-*

At this point, the court departed from the majority of circuits and from the logic of *Kastigar*.[270] By requiring that the Independent Counsel prove that he had "canned"[271] the witnesses' testimony prior to North's immunized testimony, the court sent what the dissent in *North II* described as a clear message: "either can the witness or can his testimony."[272]

e. A Departure From the "Harmless Use" Standard?—The dissent disagreed with the court's interpretation of the *Kastigar* burden to be imposed on the Independent Counsel on remand. Chief Judge Wald pointed out that the court's new standard was a complete departure from *United States v. Rinaldi*.[273] In *Rinaldi*, a drug dealer was offered immunity by police investigators in exchange for cooperation. Rinaldi reneged on the agreement by informing other suspects that police were investigating their activities.[274] Subsequently, Rinaldi was indicted and convicted, based in part on testimony by a witness whose identity may have been learned by police through Rinaldi's immunized testimony.[275] Vacating the conviction, the circuit court held that the district court had not made specific findings of fact on whether the Government independently obtained witnesses and evidence.[276] In effect, *Rinaldi* seems to set forth an independent source rule.[277] In fairness to the per curiam, however, it must be noted that the *Rinaldi* court also looked to the content of a primary trial witness's testimony.[278]

Clearly, though, *Rinaldi* did not contemplate the test set forth by the court in *North I*. In *Rinaldi*, the court appeared willing to accept testimony from a witness exposed to immunized testimony, provided the prosecution prove that "the police approached and developed her as a witness independent of Rinaldi, and she knew all the salient facts of the [illegal] scheme."[279] The court did not re-

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gar-type hearing concerning possible exposure of individual grand jurors through the media." *Id.*

270. *See North I*, 910 F.2d at 917 (Wald, C.J., dissenting); *e.g.*, United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989); United States v. Crowson, 828 F.2d 1427, 1430 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); United States v. Byrd, 765 F.2d 1524, 1529 (11th Cir. 1985).

271. *See supra* note 208 and accompanying text.

272. *North II*, 920 F.2d at 952 (Wald, C.J., dissenting).

273. 808 F.2d 1579 (D.C. Cir. 1987) (per curiam).

274. *Id.* at 1581-82.

275. *Id.* at 1582.

276. *See id.* at 1583-84.

277. *See id.* at 1584.

278. *See id.* at 1583.

279. *Id.*

quire the Government to "can" the witness's testimony beforehand. It appears that in *Rinaldi*, the witness's truthful testimony would meet the court's requirements. Conversely, the court's test in *North I* would prohibit testimony by witnesses exposed to immunized testimony, but who have made no significant "use" of it. The requirements imposed by the court in *North I* make grants of immunity virtually unworkable. The court effectively transformed the grant of use and derivative use immunity to Oliver North into a far-reaching grant of testimonial immunity.

2. North II.[280]—The Independent Counsel requested that the circuit court reconsider its decision set forth in *North I*. The court rejected Walsh's claims that *Rinaldi* was misapplied, but seemed to back down on the requirement that exposed witnesses' testimony be "canned." [281] The court correctly maintained that *Rinaldi* called "for an inquiry on remand into the content and circumstances of witnesses' testimony."[282] Addressing the issue of the appropriate standard of proof, however, the court stressed that in *North I* it intended only to provide examples of ways in which the prosecution's burden may be met.[283] The court claimed that its use of the term "may" in the original opinion was not meant to be restrictive.[284] The prosecution, according to the court, may prove absence of taint in other ways, though the court listed none and intimated that "it may well be extremely difficult for the prosecutor to sustain its burden of proof" following other methods.[285]

The court also maintained its position that prosecutorial exposure and independent witness exposure to immunized testimony are both constitutionally impermissible "uses" of compelled testimony.[286] In her dissent, Chief Judge Wald agreed with the per curiam on this point;[287] however, her focus of inquiry—whether the "use" was "harmless error"[288]—demonstrates the irreconcilable chasm between her interpretation and that of the per curiam.

Chief Judge Wald advocated a more limited *Kastigar* inquiry. If

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280. United States v. North, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (*North II*), *cert. denied*, 111 S. Ct. 2235 (1991).

281. *See id.* at 941-42.

282. *Id.* at 942.

283. *See id.*

284. *See id.* at 942-43 & n.2.

285. *Id.* at 943.

286. *See id.* at 945-46.

287. *See id.* at 951 (Wald, C.J., dissenting).

288. *See id.* at 957 & n.10 (Wald, C.J., dissenting).

the Independent Counsel can establish a "*prima facie* case, the defense then bears a burden to produce some specific evidence that the testimony—either in source or content—is tainted."[289] The merit of this approach is that it provides a practical standard, unlike the "line-by-line," "witness-by-witness" standard of the per curiam. Chief Judge Wald also looked to policy justifications for her approach.[290] She warned that the per curiam was rushing to "lay down absolute and intolerable burdens on the prosecution in a media-dominated age."[291] The per curiam, by requiring the trial judge to conduct a lengthy hearing "as to the source of every line of testimony emanating from any witness who has been exposed to immunized testimony, wholly independent of any action by the prosecutor, and even when the defense can provide no evidence whatsoever that the witness was influenced by the exposure,"[292] tilts the balance struck between the needs of the government to find the truth and the Fifth Amendment protection of the immunized witness so far as virtually to grant the immunized witness transactional immunity.

C. North*'s Impact*

1. United States v. Helmsley.[293]—In *Helmsley*, the Second Circuit considered the extent of the Fifth Amendment's protection of an immunized witness from testimony or "use" of the immunized testimony by independent, exposed witnesses.[294] *Helmsley* involved the criminal prosecution of Leona Helmsley, a New York City hotelier, for conspiracy, income tax violations, and mail fraud.[295] Helmsley claimed that her Fifth Amendment rights were abridged because the prosecution used her immunized testimony in its investigation against her.[296] Helmsley testified under a grant of immunity before state grand juries investigating sales tax fraud by two New York City jewelers; she testified about a state sales tax fraud

289. *Id.* at 954 (Wald, C.J., dissenting).

290. "In cases like North's several goals and values must be accommodated: the immunized person's fifth amendment privilege; Congress' purposes in enacting the use-immunity statute; the function and integrity of the Office of the IC; and the government's need for workable guidelines." *Id.*

291. *Id.* at 958 (Wald, C.J., dissenting).

292. *Id.*

293. 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992).

294. *See id.* at 79-83.

295. *See id.* at 75-76.

296. *See id.* at 79.

scheme in which she participated.[297] Court documents linking Helmsley to the fraud scheme, coupled with other sources, led a *New York Post* reporter, perceiving a "morality connection" with an earlier investigation, to renew a nascent investigation into Helmsley. Subsequently, the *Post* published an article detailing Helmsley's involvement.[298]

Federal prosecutors widened an ongoing, unrelated investigation of Helmsley after the *Post* article was published.[299] In addition, prosecutors used information developed by the *Post* reporter—some of which may have been derived from Helmsley's immunized testimony.[300] The Second Circuit rejected Helmsley's Fifth Amendment claims, asserting that there was nothing in any court's prior decision to "suggest[] that the Fifth Amendment applies to situations in which publicity concerning immunized testimony triggers a purely private investigation into an entirely different matter solely because each matter involved dishonest conduct."[301]

The Second Circuit declined to follow the *North* decisions, and declared that there are two situations in which the Fifth Amendment prohibits the use of immunized testimony: "(1) where the immunized testimony has some evidentiary effect in a prosecution against the witness, or (2) where there is a recognizable danger of official manipulation that may subject the immunized witness to a criminal prosecution arising out of the investigation in which the testimony is given."[302] The court found neither situation in *Helmsley* and declined to expand the term "evidentiary effect" to include an independent witness, who may have been exposed to immunized testimony. The court limited its inquiry into "the evidentiary effect in a prosecution" to the prosecution's use of the immunized testimony.[303] Although the Second Circuit found the facts of *Helmsley* distinguishable from those in the *North* decisions, the court termed *North II* "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony,"[304] hinting that the Second Circuit, at least, will not follow *North II* in the future.

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297. *See id.*

298. *See id.*; Kirk Johnson, *Leona Helmsley is Said to Evade Sales Taxes*, N.Y. TIMES, Nov. 6, 1986, at B4.

299. *Helmsley*, 941 F.2d at 80.

300. *See id.*

301. *Id.* at 83.

302. *Id.* at 82.

303. *See id.*

304. *Id.*

2. United States v. Poindexter.[305]—In *Poindexter*, a case arising out of the same facts as the *North* decisions, the Court of Appeals for the District of Columbia Circuit reaffirmed its holding in the *North* decisions, "that a prohibited 'use' occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way 'shaped, altered, or affected,' by such exposure."[306] The consequences of the *Poindexter* court's opinion highlight the unfortunate results mandated by the *North II* court's logic.

Admiral John M. Poindexter was the National Security Advisor to President Reagan and, among his other duties, he supervised Oliver North.[307] Poindexter allegedly authorized North's illegal involvement in the Iran-Contra "arms for hostages" plan.[308] Both Poindexter and North became targets of congressional investigations into the scheme. The Iran-Contra committees granted Poindexter use immunity and compelled him to testify about his role in the illegal scheme.[309]

After an investigation by Independent Counsel Lawrence Walsh, Poindexter and North were indicted by a grand jury.[310] Prior to their trials, they "moved to dismiss the indictment on the ground that their immunized testimony had been used against them before the grand jury."[311] The trial judge, however, refused to dismiss the indictments.[312] Subsequently, Poindexter's case was severed from North's and assigned to a different trial judge.[313]

Poindexter's new trial judge "adopted the prior judge's rulings as to the indictment, but took a number of steps in order to prevent the use of Poindexter's immunized testimony against him at trial, as required by *Kastigar*."[314] The trial court, ex parte, compared expected trial testimony of witnesses exposed to Poindexter's immunized testimony with statements made by the witnesses prior to their exposure to the immunized testimony. The trial court held adversarial hearings for three witnesses who did testify at trial.[315] After

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305. 951 F.2d 369 (D.C. Cir. 1991).
306. *Id.* at 373 (citing *North I*, 910 F.2d at 860-61).
307. *Id.* at 371.
308. *Id.*
309. *Id.* at 372.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 372-73.

an ex parte review and *Kastigar* hearings, the trial court was satisfied that the exposed witnesses "would be able to testify from personal knowledge."[316] Poindexter was subsequently tried and convicted under all five counts of the indictment filed against him.[317]

Poindexter appealed his conviction, claiming that "the Independent Counsel ha[d] not carried his burden of showing that Poindexter's compelled testimony was not used against him at his trial in violation of [the immunity statute] and the Fifth Amendment."[318] The Court of Appeals for the District of Columbia Circuit agreed with Poindexter, and reversed his convictions.[319] The court claimed to follow the *North* decisions, but as the dissent pointed out, *Poindexter* extends the logic of the *North* decisions.[320]

a. Refreshment of Witness Memory as "Use."—The trial court focused its inquiry into the extent of the "taint" of exposed witnesses on "whether there are independent leads, or independent knowledge, by the witness to matters which Admiral Poindexter testified to in his immunized statements before the Congress."[321] The trial court expressly rejected Poindexter's argument that "the government must demonstrate affirmatively that the immunized testimony did not, somehow, in some way, come to the attention of the witnesses . . . and [have] an influence on their thinking, even one for which they cannot at this time consciously account."[322] The circuit court held that *North II*, decided after the trial court's rulings, required a more searching inquiry than that contemplated by the trial court.[323]

The circuit court specifically addressed the trial testimony of Oliver North. North was exposed to Poindexter's immunized testimony—he had studied it in preparation for his own trial—and claimed to be unable to articulate "the effects of his exposure on his . . . recollection" at Poindexter's trial.[324] The trial judge did not believe North and allowed him to testify to matters that had not been previously "canned."[325]

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316. *Id.* at 373.
317. *Id.* at 372.
318. *Id.* at 371.
319. *Id.* at 377.
320. *See id.* at 388-90 (Mikva, C.J., dissenting).
321. *Id.* at 374.
322. *Id.*
323. *Id.* at 374-75.
324. *Id.* at 375.
325. *Id.*

The circuit court held that the trial court's ruling was reversible error.[326] By permitting North to testify to matters not previously "canned," the trial court permitted the Government to "use" Poindexter's immunized testimony against him. The circuit court found that the Independent Counsel did not meet his burden under *Kastigar*.[327] The Government has an affirmative burden of proving "that a witness exposed to immunized testimony has not shaped his or her testimony in light of the exposure."[328] By permitting North's testimony regarding matters not previously "canned," the trial court allowed the Government to escape its burden.

b. Judicial Usurpation of Prosecutorial Discretion?—The circuit court's next step expanded *North II*'s holding. The *Poindexter* court refused to remand the case to the trial court for a *Kastigar* hearing. The court reasoned that the Government had "full opportunity and every incentive [at trial] to make any argument and offer any evidence tending to show that North's testimony was not influenced by his exposure."[329] The court concluded that because the Independent Counsel failed to suggest an alternative method of meeting his burden, remand would be futile.[330]

The dissent argued that the Independent Counsel, not the court of appeals, should determine whether it is worthwhile to try to meet the new burden set forth by the *North II* court: "the decision to prosecute belongs to the prosecutor, and the decision to dismiss belongs to the trial judge, and . . . this Court usurps their authority by denying them the chance to exercise it."[331] The trial court found North's statements that he could not separate what he knew independently through his memory and what he knew because of Poindexter's immunized testimony to be "totally incredible."[332] The dissent acknowledged that it would be difficult for the Independent Counsel to meet his burden "without the benefit of canned statements," but reiterated that the court's holding usurps the prosecutor's discretion by refusing to permit him to try to meet the burden.[333]

As in *North II*, the *Poindexter* court claimed that "canning" of

326. *See id.* at 376-77.
327. *See id.* at 376.
328. *Id.*
329. *Id.* at 376-77.
330. *See id.* at 377.
331. *Id.* at 388-89 (Mikva, C.J., dissenting).
332. *Id.* at 389 (Mikva, C.J., dissenting).
333. *Id.* at 390 (Mikva, C.J., dissenting).

witness testimony was not the only possible means for the Government to meet its burden. Apparently, other "unimagined 'technique[s]' " are available.[334] The *Poindexter* court, however, satisfied itself, by a review of the trial record, that the Independent Counsel would be unable to fashion an acceptable "technique" with which to prove lack of taint. Effectively, then, the court has adopted as its test Chief Judge Wald's restatement of *North II*'s test: "either can the witness or can his testimony."[335]

c. "A Well Timed Case of Amnesia"?—In *North II*, Chief Judge Wald also predicted the consequences of the majority's extension of *Kastigar* to independent witnesses: "But it is also true that if *Kastigar* is read to require pre-recording of all government-witness testimony, then a witness *hostile* to the government could 'listen to the compelled testimony and use it' to insulate himself from testifying."[336] It is ironic that Wald's prediction in *North II* was brought to fruition by Oliver North himself.

The facts of *Poindexter* point to the problems associated with the *North II* standard. North listened to Poindexter's testimony and later claimed to forget whether his subsequent testimony was based on his own memory or Poindexter's immunized testimony. Under the *North II-Poindexter* standard, once an exposed "witness claims to have trouble remembering what he knew before he was exposed to immunized testimony, all of his own testimony is presumptively tainted."[337] The *Poindexter* dissent aptly pointed out that "all [that future defendants will] need to evade responsibility is a well timed case of amnesia."[338]

III. INSURMOUNTABLE POLICY CHOICES?

Both *North II* and *Poindexter* point out the fundamental public policy debate at the heart of the question on the limits of "use" and "derivative use" immunity under the Fifth Amendment—how to balance the government's interest in attaining the truth and the individual's protection against compelled self-incrimination. The District of Columbia Circuit's solution to this conflict, however, is to side with the individual, at all costs. The court framed the issue this way: "The decision as to whether the national interest justifies [the

334. *Id.* at 376.
335. *North II*, 920 F.2d at 952 (Wald, C.J., dissenting).
336. *Id.* at 953 (Wald, C.J., dissenting).
337. *Poindexter*, 951 F.2d at 390 (Mikva, C.J., dissenting).
338. *Id.*

hardship faced by the prosecution] in the enforcement of the criminal laws is, of course, a political one to be made by Congress. Once made, however, that cost cannot be paid in the coin of a defendant's constitutional rights."[339]

No one can seriously question the court's statement. This formulation, however, evades the true question: what are the limits of "use" and "derivative use" as defined by *Kastigar*? Both *North II* and *Poindexter* correctly hold that testimony of independent witnesses, the content of which was derived directly from exposure to a criminal defendant's immunized testimony, constitutes "use" under *Kastigar*'s standards. The burden upon the government as set out by the District of Columbia Circuit, "that a witness exposed to immunized testimony has not shaped his or her testimony in light of the exposure,"[340] however, virtually hamstrings the prosecution. Following this test, any hesitation on the part of a witness as to whether his testimony is based solely on his own memory is enough to disqualify him from testifying. Thus, the net cast by the court catches not only those witnesses whose testimony is influenced by immunized testimony, but also those witnesses who purposely expose themselves to the testimony and conveniently "forget" the true basis of their knowledge of the events about which they testify.

More importantly, the District of Columbia Circuit refused to consider the practical ramifications of its ruling. In essence, the court has ruled that prior "canning" of a witness's statement is the only way the government can meet its *Kastigar* burden. Admittedly, the *North II* court reserved judgment about other "unimagined techniques";[341] however, in *Poindexter*, when the court refused to allow the Government to attempt to use these techniques to meet its burden,[342] the court made clear the actual limits on the prosecution's ability to meet its burden.

By limiting exposed witness testimony to testimony supported by statements previously "canned," the District of Columbia Circuit, at least in high-publicity cases, has expanded the dictates of *Kastigar*. When considering whether to grant immunity to an individual slated to testify before a factfinding body, Congress is now forced to choose between the need of the government and its citizens to hear the testimony in an attempt to reach the truth, and the possibility of future criminal prosecution of the individual. If the government

339. *North II*, 920 F.2d at 945.
340. *Id.* at 943.
341. *See North II*, 920 F.2d at 943; *supra* notes 283-285 and accompanying text.
342. *See Poindexter*, 951 F.2d at 376-77.

chooses to bring criminal charges against the individual, not only must the prosecution protect itself against exposure to the immunized testimony; it also must anticipate all witnesses and questions to be posed to those witnesses and "can" statements before the immunized testimony, or forego the testimony of those witnesses altogether.

The *North II-Poindexter* decisions also limit the efficacy of congressional grants of immunity. If the possibility exists that a witness will be prosecuted for offenses arising out of the same subject matter as his potentially immunized testimony, then the investigative body considering whether to grant immunity must delay hearings until the prosecution is able to "can" statements from all potential witnesses. The delays caused by this procedure will likely be extensive because at an early stage in the prosecution, the government must anticipate all witnesses and their testimony. The delay in hearing the immunized testimony may limit the effectiveness of congressional factfinding investigations. The need for prompt, efficient factfinding militates against the District of Columbia Circuit's unworkable standard.

CONCLUSION

The conflicts seen in the District of Columbia Circuit's rulings in *North II* and *Poindexter*, as well as the Second Circuit's decision in *Helmsley*, demonstrate the problems courts face in attempting to define the limits and the permissible scope of "derivative use" of immunized testimony. The District of Columbia Circuit expanded the protection an immunized witness is afforded under the Fifth Amendment and, in doing so, it expanded the federal immunity statute's grant of use and derivative use immunity to be essentially a grant of transactional immunity, at least in high-publicity cases.

In addition, the District of Columbia Circuit abandoned the traditional "balancing test" followed by courts since *Brown v. Walker*.[343] Historically, courts have attempted to balance the immunized witness's privilege to be free from compelled self-incrimination against the government's need to get to the truth, and have upheld immunity statutes, recognizing the "delicate tension" in which they exist.[344] The *North II* per curiam decision lost sight of the policy considerations underlying statutory grants of immunity and the Fifth Amendment, and created a virtually insurmountable

343. 161 U.S. 591 (1896).
344. *North II*, 920 F.2d at 951 (Wald, C.J., dissenting).

hurdle for criminal prosecution of immunized witnesses in high-publicity cases. A better alternative is Chief Judge Wald's proffered standard—requiring the government to establish a prima facie case, then shifting the burden to the defense "to produce some specific evidence that the testimony—either in source or content—is tainted."[345] This procedure protects a criminal defendant without tilting the constitutionally mandated balance completely in favor of the defendant.

JEROME A. MURPHY

345. *Id.* at 954 (Wald, C.J., dissenting).