Self-incrimination: Choosing a Constitutional Immunity Standard - Kastigar v. United States

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SELF-INCrimINATION: Choosing a Constitutional
Immunity Standard

Kastigar v. United States

Congress passed the first American immunity statute in 1857 in
order to help secure evidence for an investigation of corruption in the
House of Representatives. The purpose of that statute and subsequent
immunity statutes has been to satisfy the state's need for information
while guaranteeing the witness the protection of the privilege against
self-incrimination. The conflict over what standard will adequately
protect the witness who is compelled to testify has centered around
two types of immunity grants: use immunity and transactional immu-
nity. The 1857 statute provided transactional immunity, which is
absolute immunity from prosecution for crimes arising from any
transaction about which the witness has testified. Because this statute
proved to lead to many abuses in the form of immunity baths, the
statute was repealed in 1862, and Congress passed a statute which
provided for a limited form of use immunity. Use immunity provides
the witness with a guarantee that his testimony or other information
derived from that testimony will not be used against him in any
future prosecution; the limited form of use immunity provided in the


Amendment and Federal Immunity Statutes (pts. 1-2), 22 GEO. WASH. L. REV. 447,
554 (1954); Comment, Immunity Statutes and the Constitution, 68 COLUM. L. REV.
959 (1968); Comment, State Immunity Statutes in Constitutional Perspective, 1968
duke L.J. 311.

3. "No person . . . shall be compelled in any criminal case to be a witness
against himself . . .," U.S. CONST. amend. V. For a survey of the privilege see 8
J. Wigmore, Evidence § 2250 (McNaughton rev. 1961); Corwin, The Supreme
Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1 (1930);
Pittman, The Colonial and Constitutional History of the Privilege Against Self-

An immunity statute accomplishes this purpose by providing that the witness
may be compelled to testify over a claim of the privilege, but will be provided with


5. Comment, The Federal Witness Immunity Acts in Theory and Practice:

The term "immunity bath" is used to describe the "cleansing" of a witness's
sins which occurs when he frees himself from all dangers of prosecution by testifying
in return for an immunity grant.


7. Zicarelli v. New Jersey Comm'n of Investigation, 55 N.J. 249, 261 A.2d 129,
137 (1970), aff'd, 406 U.S. 472 (1972). Zicarelli was heard by the Supreme Court
1862 statute did not protect the witness against derivative use of the testimony.

The Supreme Court considered the validity of a statute\(^9\) which was similar to the 1862 statute, but which applied to judicial proceedings rather than congressional proceedings, when it was first faced with the question of which standard provides adequate protection against self-incrimination in \textit{Counselman v. Hitchcock}.\(^{10}\) The Court, holding that a statute which did not provide protection against derivative use of testimony was not constitutionally adequate, stated that a statute to be valid "must afford absolute immunity against future prosecution for the offense to which the question relates."\(^{11}\)

After \textit{Counselman}, transactional immunity became the accepted constitutional standard under the fifth amendment privilege;\(^{12}\) this standard did not apply to the states because the Court had not yet held that the privilege against self-incrimination was applicable to the states in conjunction with \textit{Kastigar} and is discussed infra at p. 301. A grant of use immunity as such does not prohibit future prosecutions, since independent evidence which has not been derived in any way from the witness's testimony may be used to prosecute and convict him of the crime about which he has been questioned.

8. As used herein, "use immunity" includes protection against derivative use of compelled testimony. Under this standard the prosecution is prohibited from using evidence produced from leads derived from compelled testimony, in addition to being foreclosed from introducing the compelled testimony in a subsequent prosecution against the witness.

9. The statute under consideration was Rev. Stat. tit. XIII, ch. 17, § 860 (2d ed. 1878) (repealed 1910), amending Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37, which provided:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture.

10. 142 U.S. 547 (1892). This case is credited with first enunciating transactional immunity as the constitutional requirement for an immunity statute. The \textit{Counselman} litigation was the result of an investigation by a United States grand jury in the Northern District of Illinois of violations of the Interstate Commerce Act.

11. 142 U.S. at 585–86.

12. While \textit{Counselman}'s adoption of the transactional immunity standard was arguably dicta, since the statute under consideration in that case did not even provide full use immunity as that standard has been defined, the Court reaffirmed its adherence to the transactional immunity standard four years later in upholding a statute which was drafted in response to \textit{Counselman}. Brown v. Walker, 161 U.S. 591 (1896). That statute granted transactional immunity in exchange for testimony in proceedings before the I.C.C. Subsequent federal statutes were drafted to provide transactional immunity. See Grant, \textit{Federalism and Self-Incrimination}, 4 U.C.L.A.L. Rev. 549, 553 (1957). The Court continued to affirm the constitutional necessity of transactional immunity as late as 1956. See \textit{Ullman v. United States}, 350 U.S. 422 (1956).
through the due process clause of the fourteenth amendment. Each state was thus free to apply its own standard of immunity in compelling testimony. Moreover, under the separate sovereignty doctrine, another jurisdiction was not bound by the immunity granted by the jurisdiction which compelled the testimony. The privilege protected the witness only against prosecution by the jurisdiction which compelled the testimony, and no constitutional problems resulted from the use of the testimony by another sovereignty in a prosecution of the witness. The doctrine was based upon the theory that one sovereignty could not curtail the operations of another by its own acts. Thus, until 1964 transactional immunity was important only in determining the effect upon federal prosecutions of immunity given in exchange for testimony compelled by federal officials.

The separate sovereignty doctrine was rejected by the Supreme Court in 1964, when it decided Malloy v. Hogan and Murphy v. Waterfront Commission. In Malloy, the Court held that the fifth amendment privilege against self-incrimination was applicable to the states through the due process clause of the fourteenth amendment. As

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13. For a discussion of the development of this doctrine see Comment, Federalism and the Fifth: Configurations of Grants of Immunity, 12 U.C.L.A. L. Rev. 561, 568 (1965). Critics of this doctrine argued that it left the witness in a position where he could be “whipsawn into inculminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each.” Knapp v. Schweitzer, 357 U.S. 371, 385 (1958) (Black, J., dissenting). The doctrine was also criticized on the ground that it had no basis in the prior case law. See Grant, Federalism and Self-Incrimination, 4 U.C.L.A. L. Rev. 549 (1957).

14. See Knapp v. Schweitzer, 357 U.S. 371 (1958) (holding that a witness granted immunity by a state could not refuse to testify because of fear of federal prosecution); United States v. Murdock, 284 U.S. 141 (1931) (holding that protection against state prosecution was not essential to the validity of federal immunity statutes).

15. See Feldman v. United States, 322 U.S. 487 (1944). An exception to the doctrine was found where a federal immunity statute by its terms prohibited use of the testimony by a state. See Ullman v. United States, 350 U.S. 422 (1956); Adams v. Maryland, 347 U.S. 179 (1954). Congressional power to prohibit such use by the states was found in the “necessary and proper” clause. 347 U.S. at 183.


19. Petitioner Malloy was called as a witness in an inquiry into alleged gambling activities. He refused to answer on the grounds that those answers might tend to incriminate him, and was held in contempt of court and sentenced to jail. The Supreme Court of Errors of Connecticut affirmed the conviction, holding that the privilege was not properly invoked. 150 Conn. 220, 187 A.2d 744 (1963). The court dealt with the state privilege, and with the requirements imposed by the due process clause, but did not feel bound by the fifth amendment as such.
a result, the states were bound to the federal constitutional standard\textsuperscript{20} of the privilege against self-incrimination, and required to grant immunity if they wished to compel testimony over a claim of the privilege. Then in \textit{Murphy}, which was decided on the same day as \textit{Malloy}, the Court held for the first time that a grant of immunity by one jurisdiction might affect the conduct of other jurisdictions with respect to prosecution of a witness compelled to testify.

In \textit{Murphy}, the petitioners were adjudged guilty of contempt for refusing to testify before the Waterfront Commission after they had been granted immunity from prosecution under the laws of New York and New Jersey. They contended that their answers might incriminate them under federal law, to which the immunity grant did not extend. The Court held that fear of possible federal prosecution presented a valid ground for invocation of the state privilege and that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."\textsuperscript{21} Thus, in holding that the privilege afforded protection against the actions of another jurisdiction, the Court also accepted use immunity as an adequate standard for the first time. Since \textit{Murphy} may be read to imply that use immunity is coextensive with the privilege against self-incrimination, confusion thereafter arose as to whether its acceptance of use immunity applied only to an inter-jurisdictional situation or whether use immunity would be accepted as an adequate grant to protect the privilege in the intra-jurisdictional case.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{20}378 U.S. at 10. Even prior to \textit{Malloy} all states recognized some form of the privilege. 8 J. \textsc{Wigmore}, \textsc{Evidence} § 2252 (McNaughton rev. 1961). Some states purported to apply the federal standard as well. \textit{See}, e.g., Brown \textit{v. State}, 233 Md. 288, 196 A.2d 614 (1964), which held that the Maryland constitutional provision against self-incrimination was in "\textit{pari materia}" with the provisions of the fifth amendment and should "receive a like construction." 233 Md. at 296, 196 A.2d at 617.

\item \textsuperscript{21}378 U.S. at 79. The Court noted that its holding would apply to all inter-jurisdictional situations as well as that specifically before it. 378 U.S. at 53 n.1.

\item \textsuperscript{22}While the holding in \textit{Murphy} was confined to an inter-jurisdictional setting, the language used implied that use immunity was an adequate replacement for the privilege in either an inter-jurisdictional or intra-jurisdictional situation. Its narrow statement of \textit{Counselman} referred only to the use immunity portion of the holding and made no reference to the transactional immunity standard adopted in that case. \textit{See} 378 U.S. at 78.

The confusion engendered by \textit{Murphy} is illustrated by the results reached by different courts in intra-jurisdictional situations after \textit{Murphy}. Four courts held that \textit{Murphy} did not affect the holding of \textit{Counselman}, and that transactional immunity was still the constitutional standard in the intra-jurisdictional situation. \textit{See} United
During the past term, in *Kastigar v. United States*, the Court was faced with the precise question of whether the transactional immunity standard enunciated in *Counselman* had been limited or overruled sub silentio in *Murphy*. The petitioners in *Kastigar* were subpoenaed to appear before a United States grand jury in the Central District of California. The government obtained from the district court an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to the immunity provisions of the Organized Crime Control Act of 1970. The Act offers only use immunity, and petitioners


Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case.


25. See note 23 supra. The desire of many Congressmen to restrict immunity grants in light of their reading of *Murphy* is shown by the remarks of Representative Poff in introducing the act. He stated that:

The act would make a substantial change in the legal effect of an immunity grant. Present laws give the witness what has been called an 'immunity bath' — that is, a defense to prosecution for any crime revealed or related to his testimony. Under recent Supreme Court decisions it now appears that testimony can be constitutionally compelled by restricting only its use, either directly as evidence or as leads to evidence. . . . By giving the immunity grant only the
contended that transactional immunity was constitutionally necessary. Petitioners were found to be in civil contempt for their persistence in refusing to answer the grand jury's questions, and the Court of Appeals for the Ninth Circuit affirmed, holding that the use immunity grant of the Organized Crime Control Act was coextensive with the constitutional privilege. The Supreme Court's grant of certiorari presented it with the opportunity to resolve the question of which standard of immunity is required by the privilege, and to end the confusion that had existed in this area since Murphy.

The Court resolved the question by holding that use immunity, as provided in the Organized Crime Control Act of 1970, is coextensive with the requirements of the fifth amendment privilege. Justice Powell, writing for the majority, stated that "[t]ransactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege," and thus is not required because "[w]hile a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." Thus the Court, while claiming that its holding was at least "consistent with the conceptual basis of Counselman," completed the constitutional adoption of use immunity which Murphy began.

**Alternatives Before the Court**

The decision in *Kastigar* effectively discarded an immunity standard which had been used for over sixty years. The standard chosen by the Court was only one of three alternatives which might have been adopted, and it is not clear that the choice reflected adequate consideration of the issues involved. The first alternative before the Court was application of a transactional immunity standard in both intra-jurisdictional and inter-jurisdictional situations. This choice was properly rejected since transactional immunity universally applied would

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29. 406 U.S. at 453.

30. *Id.*

31. *Id.*
give the witness too broad an immunity grant.\textsuperscript{32} The granting of transactional immunity represents a conscious decision by the compelling jurisdiction to give up its power to prosecute in return for the individual’s testimony. This would present no problem if our system of government involved only one sovereignty, but to permit one jurisdiction to make that decision for all other jurisdictions would severely limit the independent police power of other jurisdictions. Such a choice would provide a witness with an immunity bath; he would have complete amnesty from prosecution in all jurisdictions. Complete transactional immunity inter-jurisdictionally applied would have therefore been a poor selection.

Another possible alternative is that of a dual standard, under which the witness would be provided with transactional immunity intra-jurisdictionally and immunity from use by any other jurisdiction. The Court’s failure to consider this alternative seems to indicate a faulty conception of the scope of the fifth amendment privilege, and a lack of recognition of the difference between the constitutional restraints upon the government which compels the testimony and those upon other sovereignties. This error is based upon the construction of the privilege which was adopted in \textit{Murphy}. The Court in \textit{Murphy} interpreted the privilege to mean that the prohibition against compelling a person to be a witness against himself “in any criminal case” included a restriction upon government action in criminal proceedings in other jurisdictions;\textsuperscript{33} thus, when one jurisdiction granted immunity in return for testimony, other jurisdictions were prevented by the privilege itself from using that testimony in subsequent prosecutions against the witness. If this interpretation is accepted, then it follows that there can be only one standard of immunity which must be applied against both the compelling jurisdiction and other jurisdictions since the same privilege could not have two different meanings when applied to different sovereignties.

\textsuperscript{32} The words of the Constitution theoretically do not seem to require transactional immunity, since such a standard would apparently give the witness more protection than does the fifth amendment privilege. An immunity grant is required to give only the same protection as does the privilege. 406 U.S. at 449 n.24. The privilege against self-incrimination requires only that a defendant not be forced to be a witness against himself, and does not protect him from prosecution by use of evidence gained from sources independent of the defendant’s own testimony. Therefore use immunity is commensurate with the strict scope of the privilege since in theory it gives the witness the same degree of protection. However, the protection afforded by a use immunity grant may be illusory, and transactional immunity may be necessary to preserve the protection of the privilege. \textit{See} notes 46–52 \textit{infra} and accompanying text.

\textsuperscript{33} 378 U.S. at 78.
However, as Justice Harlan suggested in his concurring opinion in *Murphy*, the imposition of a restriction upon a non-compelling jurisdiction as a result of the privilege afforded by the compelling jurisdiction is not sound reasoning. No support can be found in the case law prior to *Murphy*, or in logic for the proposition that a privilege contained in the constitution of one sovereignty could be a restriction upon the actions of another sovereignty except in instances of a superior power. Any restriction upon use of compelled testimony by a non-compelling jurisdiction must be based not upon the privilege applicable to the compelling jurisdiction but upon the restrictions imposed on the non-compelling jurisdiction by the requirements of due process. Recognition of the fact that restrictions upon different sovereignties with respect to prosecution of a witness who has been compelled to testify by one of those sovereignties flow from different constitutional checks upon governmental power would provide a logical constitutional foundation for a dual standard.

The choice of a dual standard would be a more adequate synthesis of prior case law, in addition to being better constitutional doctrine. *Kastigar*'s reliance on *Murphy*, a case arising in an inter-jurisdictional setting, to support its reasoning in an intra-jurisdictional situation,

34. 378 U.S. at 89-90. Justice Harlan concurred in the judgment, however, because he thought that the Court should in the exercise of its supervisory powers over the administration of federal criminal justice prohibit the federal government from making use of testimony compelled by the state, since use of such testimony by federal officials would violate the policies underlying the federal privilege. 378 U.S. at 91.

35. See notes 13-16 supra and accompanying text.

The cases dealing with double jeopardy have consistently adhered to a separate sovereignty doctrine. See Abbatte v. United States, 359 U.S. 187 (1959) (state prosecution does not bar subsequent federal prosecution for same acts); Bartkus v. Illinois, 359 U.S. 121 (1959) (federal prosecution does not bar state prosecution for same acts).

36. Both the federal government and the states are barred from depriving persons of liberty without due process of law. U.S. Const. amend. V; U.S. Const. amend. XIV. Due process is said to include those principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). See also Rochin v. California, 342 U.S. 165 (1952); Palko v. Connecticut, 302 U.S. 319 (1937).

These requirements would be violated if a non-compelling jurisdiction made use of testimony compelled by another jurisdiction in a prosecution of the witness. Although the non-compelling jurisdiction is not bound by the privilege applicable to the jurisdiction which compels the testimony, "the accusatorial system has become a fundamental part of the fabric of our society." Malloy v. Hogan, 378 U.S. 8, 10 (1964). Evasion of a principle that has become so fundamental seems to be a violation of due process. Using the witness's own testimony to convict him would be such an evasion.

37. The Court stated that "... both the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative use immunity
reflects its view that *Counselman* was overruled by *Murphy*. Such a view is erroneous, however, since *Murphy* dealt only with the effect of a grant of immunity by one jurisdiction upon prosecutions by other jurisdictions, and thus should not be read as providing any assistance in deciding what standard the privilege imposes upon the compelling jurisdiction.

In its attempt to reconcile its decision with that of *Counselman*, the majority in *Kastigar* relied upon the fact that the statute held inadequate in *Counselman* was a limited use statute. Although it is true that the Court in *Counselman* focused upon the fact that the statute provided no immunity from derivative use, it did not expressly or implicitly accept use immunity as adequate. In fact, the Court stated:

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States . . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

Therefore, *Counselman* and *Kastigar* do not seem to be as consistent as the Court indicates.

The choice of a dual standard would have combined the principles of the *Murphy* and *Counselman* decisions, leaving each operative in the sphere in which it was originally applied. The dangers inherent in the application of use immunity lead to the conclusion that transactional immunity is necessary to secure to the witness the full protection of the privilege applicable to the compelling jurisdiction. There would be

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38. Justice Douglas suggested that such was the Court's view. 406 U.S. at 463 (Douglas, J., dissenting).
39. *Id.* at 463-64.
40. *See* note 9 *supra* and accompanying text.
41. 142 U.S. at 586.
42. *Id.* at 585-86.
43. *See* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 44 (3d Cir. 1971), adopting the dual standard because of the court's view that it would best combine the distinct considerations underlying the *Counselman* and *Murphy* decisions.
44. The privilege's guarantee to the witness that he will not be compelled to be a witness against himself might easily be evaded where prosecutorial officials are already in possession of the incriminating testimony. *See* note 52 *infra* and accompanying text. For this reason, and because the compelling jurisdiction "has had an opportunity to elect whether it will forego prosecuting the witness as a price worth paying for his testimony," United States *ex rel.* Catena v. Elias, 449 F.2d 40, 44
no infringement upon the independent police power of other jurisdictions since they would still be free to prosecute using sources other than the compelled testimony. Imposition of use immunity on these jurisdictions would also recognize the fact that due process may place a less stringent restriction upon a non-compelling jurisdiction than the privilege imposes upon a jurisdiction which compels testimony.\textsuperscript{45}

The Court did not consider such an alternative in \textit{Kastigar}, however, and chose instead to make use immunity the standard in both the intra-jurisdictional and inter-jurisdictional situations. Such a choice involves dangers which may easily lead to infringement of a witness's constitutional right not to be compelled to incriminate himself.

\textbf{THE CHOICE OF USE IMMUNITY}

Use immunity as a standard for protection of the fifth amendment privilege involves two important elements, both of which raise problems serious enough to suggest that perhaps the Court's choice of use immunity as an adequate intra-jurisdictional standard was ill advised.\textsuperscript{46} First, \textit{Kastigar}'s choice of use immunity represents the application of the exclusionary rule of evidence in the immunity area;\textsuperscript{47} compelled

\begin{quote}
(3d Cir. 1971), transactional immunity may properly be imposed upon that jurisdiction.
\end{quote}

It may be argued that the considerations which lead to a requirement of transactional immunity in the intra-jurisdictional situation would also warrant adoption of an equal standard in the inter-jurisdictional situation. In view of the close cooperation of state and federal law enforcement officials it might be possible for officials of non-compelling jurisdictions to obtain the testimony and make illicit use thereof. Hofstadter and Levittan, \textit{Immunity and the Privilege Against Self-Incrimination — Too Little and Too Much}, 39 N.Y.S.B.J. 105, 111 (1967). While this danger exists, it seems to be more remote than the dangers of illicit use by the compelling jurisdiction, since officials of other jurisdictions do not have immediate access to the incriminating information. This problem does not seem to be sufficiently serious to require transactional immunity inter-jurisdictionally, particularly in light of the infringement upon the power of the non-compelling jurisdiction which would result from transactional immunity.

\textsuperscript{45} Due process requires, \textit{inter alia}, fundamental fairness. Rochin v. California, 342 U.S. 165 (1952). Fundamental fairness does not seem to require that a witness be given absolute immunity in all jurisdictions because he is compelled to testify in one. The test of fundamental fairness would be met if the witness is not prejudiced in other jurisdictions by what he is compelled to do in one jurisdiction.

\textsuperscript{46} These problems were analyzed by Justice Marshall in his dissent. 406 U.S. at 467. He argued that transactional immunity is necessary to provide a reliable guarantee that the testimony will not be used against the witness. 406 U.S. at 471.

\textsuperscript{47} The Court stated that "[t]he statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions." 406 U.S. at 461. It also noted with approval the conclusions of the National Commission on Reform of Federal Criminal Laws that the immunity with respect to compelled testimony should be of a level equal to that applied with respect to fruits of illegal searches,
testimony will be excluded from subsequent prosecutions in the same manner as items of evidence resulting from an illegal search and seizure. While there is some merit to the Court's conclusion that exclusion of compelled testimony from further use in prosecution leaves the witness in the same position as if he had not testified at all, the application of the exclusionary rule in the immunity area does not fit quite so neatly. In the search and seizure, coerced confession, and right to counsel cases, the rule involves merely removing pieces of evidence from the court's consideration, while in the immunity area the problem is one of maintaining the individual's right not to incriminate himself. The exclusionary rule is a remedial device, designed to "provide a partial and inadequate remedy" to victims of unconstitutional infringement, which does not "purge the conduct of its unconstitutional character." On the other hand, the purpose of an immunity standard is to provide an advance framework by which prosecutorial officials can measure their conduct. The exclusion of evidence has heretofore been a tool used only when such officials mistakenly exceeded their bounds, and such a remedial device seems misplaced if an immunity standard is initially to satisfy the scope of the privilege against self-incrimination. The Court's adoption of the exclusionary rule seems certain to lead to confusing retrospective inquiries as to whether illicit use of compelled testimony was made, instead of providing a clear cut guide for prosecutorial actions.

The burden of proof problems which are inherent in these inquiries further illustrate the difficulties of use immunity. Transactional immunity precludes any burden of proof problem, since the compelled witness must prove only that he had received an earlier grant of immunity in exchange for testimony that relates to the immediate prosecution. A use immunity standard involves proving that no use of the testimony was made in the subsequent prosecution of a compelled witness. While the Court asserts that the burden is placed on the prosecution to prove that it has made no use of the compelled testimony, the practical application of this standard is not clear.

48. See note 32 supra.

49. See Hofstadter and Levittan, Immunity and the Privilege Against Self-Incrimination — Too Little and Too Much, 39 N.Y.S.B.J. 105, 111 (1967). The authors state that where immunity statutes are concerned, "it is no longer a question of invoking an exclusionary rule as a mere matter of deterrence, but rather one of keeping or making a defendant whole."

The majority in *Kastigar* stated that the prosecution’s “burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.” However it is questionable whether the prosecution really bears such a burden. There is without question a possibility of secret misuse of compelled testimony, since there is no great difficulty in finding sources “wholly independent” for a conclusion already reached from the leads of compelled testimony. Once an independent source is found, the burden will shift to the defendant who then must prove that illicit use was made of the testimony, and that the prosecution against him was the result of such illicit use.

It is here that *Kastigar*’s formulation of use immunity seems to be most questionable. The task of proving that evidence offered is the result of illicit use of compelled testimony is an impossible burden on a defendant. In an intra-jurisdictional situation, the testimony is in the hands of the officials, and the defendant would be forced to trace the investigatory processes of the prosecution. No defendant is in a position to pierce the law enforcement process and prove to a court that illicit use was made of his testimony. The Court therefore seems to place a burden on the witness which he is incapable of sustaining.

While these problems do not necessarily invalidate the Court’s constitutional sanctioning of use immunity, they seemingly would justify maintaining use immunity in the narrow perspective in which it was applied in *Murphy*. The possibility of evasion of fifth amendment rights is not adequately answered by the Court’s formula, and thus transactional immunity should have been retained at least in the intra-jurisdictional setting.

Although the Court did not select the best alternative it did put an end to the uncertainty created by *Malloy* and *Murphy*. In light of its resolution in favor of the use immunity standard it is now possible for Maryland to revamp its immunity structure.

**Possibilities for Change in Maryland**

The *Kastigar* decision does not directly apply to Maryland, because the Court was faced only with the question of the constitutionality of a federal statute arising in a federal prosecution. However,

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51. 406 U.S. at 460.

the *Kastigar* holding was made directly applicable to state immunity grants through the Court's companion decision in *Zicarelli v. Investigation Commission of New Jersey*.

Argued and decided in conjunction with *Kastigar*, *Zicarelli* involved the constitutionality of the New Jersey immunity statute granting use immunity. In upholding that statute, the Court followed its opinion in *Kastigar* and ruled that state immunity statutes need only grant use immunity to be constitutionally co-extensive with the privilege against self-incrimination.

An analysis of the numerous Maryland statutes which involve grants of immunity indicates that the great majority presently grant transactional immunity in exchange for compelled testimony. In the midst of the past confusion in the immunity area, the Maryland position has been to uphold transactional immunity, without venturing into the intricacies of whether it was constitutionally necessary. In *Roll v. State*, the Maryland Court of Special Appeals, upholding a transactional immunity statute, reflected that "[h]opefully the Supreme Court will shed some light on the question in the near future." *Kastigar* has shed such light, and those statutes granting transactional immunity now afford broader protection than is constitutionally mandated. The dangers which accompany adoption of a use immunity standard might warrant retention of transactional immunity by Maryland. However, it is doubtful that legislators and prosecuting authorities would favor the stricter standard in light of considerations of effective law enforcement.


57. 15 Md. App. at 38, 288 A.2d at 609.
The Court’s choice of use immunity has been well received by prosecuting authorities throughout the state. Application of the transactional immunity standard in Maryland causes problems, since a unique feature of the Maryland criminal justice system is the independence of the individual State’s Attorneys in granting immunity to compel testimony.\(^{58}\) Thus, the effect of transactional immunity in Maryland is to give the compelled witness an immunity bath throughout the state, since the grant of immunity by one State’s Attorney completely bars subsequent prosecution by another.

This problem was a definite consideration in the minds of the State’s Attorneys and the Attorney General’s office when the Attorney General’s “organized crime package” was introduced before the 1972 session of the Maryland General Assembly. The proposed legislation included a bill, introduced in both the Senate and the House of Delegates, which would have granted use immunity in exchange for compelled testimony,\(^{59}\) thus putting an end to the immunity bath problem. The bill was referred to committee in both houses, but received unfavorable reports.\(^{60}\) In light of *Kastigar* there is likely to be reconsideration of such legislation by the General Assembly at its next session. It is suggested that any statute adopting use immunity for compelled testimony should be modeled upon the New Jersey statute upheld in *Zicarelli*. Such careful draftsmanship can serve to obviate some of the dangers of use immunity.

New Jersey’s immunity statute,\(^{61}\) which grants use immunity, requires that the witness be given advance notice of the subject of the inquiry at which he may be compelled to testify.\(^{62}\) In addition, the witness has the right to have counsel present.\(^{63}\) The Maryland bill proposed at the 1972 legislative session included such an advance notice provision, and it seems prudent to add a right to counsel provision.

A key provision of the New Jersey statute is the “responsiveness” limitation, pursuant to which the compelled witness is immune only from the use of “responsive” testimony.\(^{64}\) The *Zicarelli* Court rejected the contention that such a limitation was unconstitutionally

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58. While most of the Maryland immunity statutes do not specifically state who is responsible for granting immunity they do speak in terms of being compelled to testify in court or before a grand jury, both of which proceedings are conducted by the State’s Attorney. See, e.g., Md. Ann. Code art. 27, § 23 (Supp. 1972).
60. Id.
vague, noting that it served as "a barrier to those who would intentionally tender information not sought in an effort to frustrate . . . criminal prosecution." Use immunity by itself does not necessarily preclude the problem of the witness gaining an immunity bath. A compelled witness may still gain "undue protection by volunteering what the State already knows or will likely come upon without the witness's aid." Such a limitation seems desirable to prevent a potential immunity bath problem.

In addition, the statute should incorporate a present feature of the federal immunity grant statute, which will lessen the possibility of immunity baths. Under the federal system the Attorney General must approve all orders compelling a witness to testify over a claim of the privilege, except in the case of immunity grants in connection with proceedings before Congress. This provision could be incorporated into the Maryland statute by provision for an investigative commission in the Attorney General's office which would have the sole authority to grant immunity in exchange for testimony.

Such a system would alleviate any potential immunity bath problem, since the decision to grant immunity would be made by one central body. This body would have a perspective not possessed by any individual State's Attorney, to balance the state's interest in prosecuting against the desirability of obtaining the testimony and consequently guard against excessive immunity grants.

65. 406 U.S. at 477.
67. See note 23 supra.
68. 18 U.S.C. § 6003 (1970) provides that a United States attorney may, with the approval of the Attorney General, request an order to compel a witness who has been or may be called to testify at a proceeding before a court or grand jury of the United States to testify over a claim of the privilege against self-incrimination. 18 U.S.C. § 6004 (1970) provides that an agency of the United States may, with the approval of the Attorney General, issue such an order in any proceeding before the agency. Both sections provide that an official may issue such an order when, in his judgment, "the testimony or other information from such individual may be necessary to the public interest." 18 U.S.C. §§ 6603(b)(1), 6004(b)(1) (1970).
69. 18 U.S.C. § 6005 (1970) does not provide that approval of the Attorney General is necessary. Under section 6005, district courts are to issue orders compelling testimony where the request for the order is approved by two-thirds of the committee, if the proceeding is before a congressional committee, or by a majority of the House of Congress before whom the proceeding is had. However, it is necessary to show that the Attorney General has been served with notice of intention to request the order. 18 U.S.C. § 6005(b)(3) (1970). Furthermore, the court may defer the issuance of the order for up to twenty days on the requests of the Attorney General. 18 U.S.C. § 6005(c) (1970). Thus, while the Attorney General is not empowered to prevent Congress from granting immunity, he will have notice of all congressional immunity grants. This fact is consistent with the central source concept.
Although the concept of a central authority has much to recommend it from the state's point of view, it seems to do little to ameliorate the problems raised for the defendant by the Kastigar standard. The burden of proving that illicit use was made of the compelled testimony is an equally heavy imposition upon the defendant with or without the central authority. Once such an authority granted immunity and gave the testimony to the individual State's Attorney for use in an investigation it would have no control over the use that was made of the testimony; the individuals in the offices of the State's Attorneys would have the same opportunities to misuse the testimony that they have under the present system. The possibilities of illicit use of testimony are not attributable to any particular form of administration but are endemic to any system which accepts the use immunity standard. In essence such a standard leaves "the witness 'dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.'" 70

CONCLUSION

The Kastigar decision resolved the long debate over the scope of immunity required by the Constitution to supplant the fifth amendment privilege against self-incrimination. In selecting use immunity, the Supreme Court established a standard which allows greater flexibility on the part of the prosecutor, yet undermines the protection of the compelled witness. While Kastigar's choice of use immunity is arguably constitutionally correct, it appears that the problems inherent in use immunity and the existence of a viable alternative would have justified keeping use immunity in the narrow perspective in which Murphy originally applied it.

Nevertheless, now that use immunity has been established as the standard constitutionally required of immunity statutes, there is clearly a need for the uniform restructuring of such statutes in Maryland. The numerous Maryland statutes that presently grant transactional immunity in exchange for compelled testimony have resulted in the problem of immunity baths, and are, in fact, no longer constitutionally mandated. These statutes could be revised in light of the federal experience with a central authority but should be carefully drafted to provide safeguards against misuse by the prosecutor. Even with the most careful draftsmanship it is doubtful that the exchange of use immunity for compelled testimony is a fair exchange for the accused.

70. 406 U.S. at 469 (Marshall, J., dissenting).