Notes

NONEVIDENTIARY USE OF COMPELLED TESTIMONY AND THE INCREASED LIKELIHOOD OF CONVICTION

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INTRODUCTION

The fifth amendment privilege against self-incrimination[1] forbids the government to "pry open one's lips and make him a witness against himself"[2] using coercion to "prove a charge against an accused out of his own mouth."[3] Yet, Anglo-American jurisprudence has long recognized the sovereign's "right to every man's evidence."[4] Congress has historically attempted to reconcile the competing concerns by enacting immunity statutes that allow compulsion of testimony by immunizing the witness from the consequences against which the privilege protects.[5]

Until 1972, the U.S. Supreme Court consistently held that a witness claiming the privilege could be compelled to testify only if he was granted transactional immunity[6] — i.e., the immunity statute must prohibit prosecution of the witness for any "transaction, matter or thing" revealed in the testimony.[7] However, in *Kastigar v. United States*,[8] the U.S. Supreme Court upheld an immunity statute that allowed subsequent prosecution of the witness, but proscribed any direct or indirect use of the compelled testimony.[9] Stating that the fifth amendment privilege

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1. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.
2. Ullmann v. United States, 350 U.S. 422, 446 (1956) (Douglas, J., dissenting).
3. Molloy v. Hogan, 378 U.S. 1, 8 (1964).
4. 12 T. HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 675, 693 (1812)
5. *E.g.*, the Compulsory Testimony Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 provided:

> That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . .

6. Reif, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L. REV. 829, 831-32 (1972).
7. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, 444.
8. 406 U.S. 441 (1972).
9. *Id.* at 453.

had never been construed to prohibit the prosecution of the individual invoking it, the Court held that immunity statutes prohibiting such subsequent prosecution were considerably broader than the protection provided by the fifth amendment.[10] Immunity from the direct and indirect use of the compelled testimony in a subsequent prosecution was sufficient to supplant the privilege.[11] Since that controversial decision,[12] courts and commentators have debated whether *Kastigar's* "use and derivative use"[13] immunity proscribes prosecutorial uses of compelled testimony which do not result in the introduction of evidence at trial.[14]

This Note examines the nonevidentiary uses[15] of compelled testimony and their prejudicial effects. Part I presents the background of the fifth amendment privilege within the context of the leading Supreme Court opinions concerning the constitutionality of compulsory testimony legislation. Part II examines the *Kastigar* opinion and the subsequent efforts by the lower courts to apply that decision and resolve its ambiguities. Part III considers the debate over nonevidentiary use, suggesting that the Supreme Court's construction of the fifth amendment privilege and immunity legislation prohibits any nonevidentiary use that increases the likelihood of criminal penalties for the witness. Part III also challenges the prevalent assumption that the difficulty of proving that no such use has occurred effectively immunizes the witness from prosecution and constitutes a *de facto* return to the transactional immunity standard.[16] Part IV then offers procedural safeguards intended to address the practical problems associated with excluding nonevidentiary uses.

I. HISTORICAL BACKGROUND

The privilege against self-incrimination is deeply rooted in the beginnings of the Judeo-Christian tradition.[17] Recognition of the privilege in early English common law originated in response to the practices of the Ecclesiastical courts, particularly the notorious courts of the Star Chamber and the High Commission for Ecclesiastical Causes.[18] In these courts, a witness could be put upon his oath to

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10. *Id.*

11 *Id.* at 459.

12. Justice Powell's opinion generated considerable interest from the national press as well as the legal community. Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171 (1972) [hereinafter *Standards*]; Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: the Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633, 653-54 (1979); N.Y. Times, May 23, 1972, at 1, cols. 1-2, & at 28, col. 4; *id.*, May 24, 1972, at 28, cols.1-3; *id.*, May 28, 1972, § 4, at 6, cols. 4-6.

13. Also referred to as "use-plus-fruits" immunity or "testimonial" immunity. Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690 (1982); *Standards, supra* note 12.

14. *See* cases and authorities *infra* notes 157-60 and accompanying text.

15. "Nonevidentiary" uses are prosecutorial uses influenced by knowledge of the contents of the immunized testimony that do not result in introduction of evidence before the court. Such uses are primarily tactical and strategic advantages stemming from, for example, advance knowledge of the accused's defense. A discussion of nonevidentiary use follows *infra* at notes 162-66 and accompanying text.

16. *See* authorities cited *infra* at notes 151-53 and the discussion in the accompanying text.

17. Horowitz, *The Privilege Against Self-Incrimination: How Did It Originate?*, 31 TEMP. L.Q. 121, 126 (1958).

18. 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961 & Supp. 1988) [hereinafter WIGMORE]. For additional detailed histories of the privilege, see L. LEVY, ORIGINS

answer all questions posed by church officials without any formal presentment or accusation, merely by virtue of the judge's office ("ex-officio") and based solely upon his suspicion.[19]

The prospect of eternal retribution awaiting violators of religious oaths made the "oath ex-officio" a particularly effective tool for prying open the lips of the reluctant.[20] Abuses of the oath ex-officio were brought to popular attention in England by the "notorious agitation"[21] of John Lilburne.[22] The resulting public outrage brought the rapid demise of the oath along with the courts of Star Chamber and High Commission in 1641.[23] By 1700, the privilege of silence had developed into an established doctrine of English common law: "[N]o man is bound to answer any questions that will subject him to a penalty, or to infamy."[24] Judicial recognition of the privilege provided the foundation for the modern accusatorial system of criminal justice by requiring the prosecution to bear the entire burden of proving guilt without the aid of the accused.[25]

The American colonies began to adopt the common law privilege as a means of checking the abusive practices of the Colonial governors.[26] The fundamental importance of the privilege in the colonies is demonstrated by the fact that each of the original thirteen states recognized the privilege, either by common law practice or by express constitutional provision.[27] State court opinions during the later Eighteenth Century show that the privilege was construed not only to protect against self-incrimination, but also to shield the witness from infamy and disgrace.[28] After the adoption of the fifth amendment in 1791, the federal courts construed the privilege more narrowly than the states, prohibiting the compulsion of self-infamous testimony only where it might also tend to incriminate.[29] The possibility of criminal penalty thus became the only basis for invoking the privilege.

With these developments, it became apparent that the government could compel testimony over a valid[30] assertion of the privilege against self-incrimination

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OF THE FIFTH AMENDMENT (1986); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

19. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 219 (1952).

20. *Id.*

21. Professor Wigmore so characterized the efforts of "Freeborn John" Lilburne who was publicly whipped and pilloried for his "obstinacy" in refusing to take the oath and answer charges of printing and importing heretical and seditious books. 8 WIGMORE, *supra* note 18 § 2250, at 283, 289.

22. 3 HOW. ST. TRIALS 1315-28 (1637); 4 HOW. ST. TRIALS 1269-405 (1649); 5 HOW. ST. TRIALS 407-44 (1653).

23. 8 WIGMORE, *supra* note 18, § 2250, at 289.

24. Trial of Freind, 13 HOW. ST. TRIALS 1, 17 (1696), *quoted in* Note, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 471 (1974) [hereinafter *Practical Problems*].

25. Mykkeltvedt, *supra* note 12, at 635.

26. For example, Virginia governors, following European martial codes, utilized oaths as well as certain forms of torture. Pittman, *supra* note 18, at 786-87.

27. Mykkeltvedt, *supra* note 12, at 635; Reif, *supra* note 6, at 845; *Practical Problems*, *supra* note 24, at 471.

28. Mykkeltvedt, *supra* note 12, at 635.

29. *Practical Problems*, *supra* note 24, at 471 n.12; Mykkelvedt, *supra* note 12, at 636.

30. The danger of incrimination must be "real and appreciable." Queen v. Boyes, 1 Best & Smith 311, 330-31 (Q.B. 1861) (Opinion of Chief Justice Cockburn).

by guaranteeing that the testimony would not result in the subsequent infliction of criminal penalties. In Professor Wigmore's formulation, "[l]egal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases; and with the criminality the privilege."[31] Acting on this assumption, Congress enacted the first federal immunity statute in 1857.[32] The act provided "transactional" or "prosecutorial" immunity by assuring that the witness could not be prosecuted for any act or transaction disclosed in his testimony. The natural reluctance of a witness to reveal his involvement in criminal activities was overcome by the guarantee that he could not face any criminal penalty for any matters he discussed.

The Act served its purpose of developing previously inaccessible testimony apparently too well. Witnesses were eager to volunteer incriminating information in order to draw "immunity baths" that would release them from liability for any crimes revealed in their testimony.[33] To rectify the abuse of immunity grants, Congress limited the statute to protect against merely evidentiary use of the witness's actual testimony.[34] While the statute no longer immunized the *witness* from prosecution for acts or transactions disclosed, it did immunize the *testimony* from being used as evidence against him in a subsequent prosecution.[35] This statute, affording immunity from direct use, provided the Supreme Court its first opportunity to consider the constitutionality of immunity legislation in the leading case of *Counselman v. Hitchcock*.[36]

The petitioner, Charles Counselman, was a grain shipper who had been called to testify before a federal grand jury investigating alleged railway company violations of Interstate Commerce Commission regulations.[37] The regulations

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31. 8 WIGMORE, *supra* note 18, § 2279, at 481.

32. The Compulsory Testimony Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155, provided that: "[N]o person examined 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 compelled to testify . . . ."

33. The statutes were less than carefully worded. A witness could secure immunity for any illegalities mentioned, whether or not related to the matter under investigation. Strachan, *Self- Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 797-98 (1978); Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 277 (1976); *Practical Problems, supra* note 24, at 473; Mykkeltvedt, *supra* note 12, at 636.

34. *Practical Problems, supra* note 24, at 473; Mykkeltvedt, *supra* note 12, at 636; Strachan, *supra* note 33, at 798. The Compulsory Testimony Act of Jan. 24, 1862, ch. 11, 12 Stat. 333, provided that: "the testimony of a witness examined and testifying before either House of Congress . . . shall not be used as evidence in any criminal proceedings against such witness in any court of justice . . . ."

35. Strachan, *supra* note 33, at 798.

36. 142 U.S. 547 (1892). The Supreme Court's analysis of compulsory testimony legislation has been frequently recounted. *See* Reif, *supra* note 6, at 833-42; *Practical Problems, supra* note 24, at 473-77; Mykkeltvedt, *supra* note 12, at 636-53; Strachan, *supra* note 33, at 797-806. Similar treatments are also set forth in: Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571-78 (1963); Note, *Kastigar v. United States, Compulsory Witness Immunity and the Fifth Amendment*, 6 J. MARSHALL J. PRAC. & PROC. 120, 120-33 (1972); Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616, 622-43 (1971); Note, *Immunity, the Dilemma of "Transactional" Versus "Use,"* 25 OKLA. L. REV. 109, 109-14 (1972); Comment, *Immunity From Prosecution: Transactional Versus Testimonial or Use*, 17 S.D.L. REV. 166, 167-85 (1972); Comment, *Immunity Grants to Suspected Criminals to Secure Testimony*, 18 LOY. L. REV. 115, 116-23 (1972).

37. Counselman v. Hitchcock, 142 U.S. 547, 564 (1892).

made it a federal crime for shippers and railway agents to contract to ship grain at less than the tariff or open rate.[38] Counselman was granted immunity and subsequently convicted of contempt when he persisted in claiming his fifth amendment privilege.[39] Counselman feared that his honest answers concerning railway activities might reveal involvement in crimes against the Interstate Commerce Act for which he might later be prosecuted.[40] Consequently, he appealed to the United States Supreme Court, contending that the immunity provision in question did not supplant his constitutional privilege against self-incrimination.[41]

Construing the immunity provision to prohibit only the direct use of compelled testimony, the Court unanimously upheld Counselman's right to assert his constitutional privilege because it found that the protection of the immunity statute was "not co-extensive with the constitutional provision."[42] While the immunity statute prevented the direct use of the compelled testimony as evidence in a subsequent prosecution, it did not prevent the use of the evidence to search out other testimony and evidence, otherwise unobtainable, which could be used to convict the witness.[43]

After surveying the approaches employed by various state courts reviewing similar state constitutional provisions,[44] the Court concluded that no statute leaving a witness subject to prosecution after answering an incriminating question could supplant the fifth amendment privilege.[45] To be valid, immunity statutes "must afford absolute immunity against future prosecution for the offense to which the question relates."[46]

For nearly eight decades it was virtually undisputed that *Counselman* stood for the proposition that all testimonial immunity statutes, to be constitutionally valid, must afford "absolute immunity against future prosecution."[47] In fact, sixteen days after the decision, Congress introduced legislation restoring transactional immunity in response to the dictates of the Court.[48] Moreover, the main point of contention between the majority and the dissent in the next Supreme Court

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38. *Id.* at 559.
39. Counselman v. Hitchcock, 44 F. 268 (1890).
40. *Counselman*, 142 U.S. at 562.
41. The Act for the Protection of Witnesses, Feb. 25, 1868, ch. 13, 15 Stat. 37 provided:

> That no answer or other pleading of a party, and no discovery, or evidence obtained by means of a judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States . . . in respect to any crime, or for the enforcement of any penalty of forfeiture . . . .

42. *Counselman*, 142 U.S. at 565.
43. *Id.* at 564.
44. The Court examined opinions from Pennsylvania, Arkansas, Georgia, California, Indiana, New York, Massachusetts, Virginia, New Hampshire, and North Carolina. *Id.* at 565-84.
45. *Id.* at 585.
46. *Id.* at 586.
47. Reif, *supra* note 6, at 831, 837-38; *Practical Problems, supra* note 24, at 474.
48. *Kastigar*, 406 U.S. at 451. *Counselman* was decided Jan. 11, 1892. Congress introduced a new immunity bill on Jan. 27, 1892. *Id.* n. 31. The bill provided that: "[N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify . . . ." Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

opinion to consider immunity legislation, was whether *any* grant of immunity could override the fifth amendment right to silence.[49]

In *Brown v. Walker*,[50] the Supreme Court considered the constitutionality of the immunity legislation enacted in response to the *Counselman* decision. Over vigorous dissent,[51] the Court refused to endorse a broad interpretation of the constitutional privilege that included protection from infamy, disgrace and the trouble and expense of employing counsel and providing a defense. Instead, the Court identified the peril against which the privilege protected as the possible infliction of criminal penalties.[52] The Court further declared that in those circumstances where the peril had already been removed — i.e., where criminal prosecution was barred by double jeopardy, the statute of limitations, or by executive pardon — the privilege no longer applied.[53] *Brown* reaffirmed the *Counselman* rationale that once the criminality is removed there can be no compelled self-incrimination. Consequently, the Court upheld the power of Congress to compel testimony by removing criminality with the grant of immunity from prosecution.[54]

After *Brown v. Walker*, federal testimonial immunity grants uniformly afforded transactional immunity.[55] There were no significant developments regarding immunity legislation until the Supreme Court made its pronouncements concerning the fifth amendment privilege binding on the states in *Malloy v. Hogan*.[56] By declaring that the same standards must determine whether invocation of the privilege against self-incrimination is justified in a federal or state proceeding,[57] the Court had to resolve the problem of delineating the scope of immunity afforded to a witness immunized under state law in a subsequent federal prosecution. The problem arises when the *state* grants immunity and compels testimony which may incriminate the witness under *federal* law. The state immunity, by its own terms, cannot protect the witness from possible federal penalties. If the federal government could prosecute the witness on the basis of testimony compelled under a state grant of immunity, the privilege would be meaningless. If, on the other hand, the federal government must honor the immunity granted by the state, the state would be in a position to hamstring federal efforts to prosecute violations of federal law, thereby violating the supremacy clause.[58]

The Court confronted this issue in *Murphy v. Waterfront Comm'n of N.Y. Harbor*,[59] when a bistate investigating commission compelled petitioners to testify

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49. Brown v. Walker, 161 U.S. 591 (1896).
50. 161 U.S. 591 (1896).
51. The Court split five-four, with Justices Field, Shiras, Gray, and White dissenting. *Id.* at 610-38.
52. *Id.* at 597.
53. *Id.* at 599, 603-04.
54. *Id.* at 610.
55. Mykkeltvedt, *supra* note 12, at 642; *Practical Problems, supra* note 24, at 474; Strachan, *supra* note 33, at 803. Over 50 such federal immunity statutes were in effect prior to repeal by the Organized Crime Control Act of Oct. 15, 1970, Pub. L. No. 91-452, §§ 259-60, 84 Stat. 931. *Kastigar*, 406 U.S. at 447. *See* National Commission on Reform of Federal Criminal Laws, Working Papers, 1444-45 (1970).
56. 378 U.S. 1 (1964).
57. *Id.* at 11.
58. *See Standards, supra* note 12, at 173. *Cf.* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 44 (3d Cir. 1971), *cert. dismissed*, 406 U.S. 952 (1972).
59. 378 U.S. 52 (1964).

about work stoppages on the New Jersey piers.[60] Despite a state grant of transactional immunity, petitioners refused to testify on the ground that the answers would incriminate them in a subsequent federal prosecution.[61] The Court accommodated the conflicting interests of the state and federal governments by allowing the state to compel testimony that may be incriminating under federal law, yet also permitting the federal government to prosecute the witness, as long as the "compelled testimony and its fruits" were not used in any manner in connection with the prosecution.[62]

By prohibiting the federal government from using the testimony and its fruits, the Court fashioned an "exclusionary rule"[63] purporting to protect the witness from incrimination, yet impinging neither the state's ability to compel testimony, nor the federal government's ability to prosecute. Because the testimony could not be used against the witness, and the federal government was still free to prosecute despite the state immunity, the parties were held to be "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[64] The Court found that "use-plus-fruits" immunity prohibited the federal government from making any use of compelled answers, thereby protecting the witness to the same extent as if he had not given those answers — i.e., as if he had successfully claimed the privilege.[65]

The *Murphy* decision revealed a marked departure in the Court's attempts to insure that immunity provisions adequately protected against self-incrimination. The traditional approach, beginning with *Brown*, emphasized that the possibility of self-incrimination could be eliminated by removing the criminality of the transactions disclosed. In *Murphy*, the transactions disclosed retained their criminal character, but the possibility of self-incrimination was removed by forbidding the government from putting the compelled testimony to any incriminating use. Whether the *Murphy* holding applied only to the particular problems arising when separate jurisdictions are involved is a matter of some debate[66] which remains unclarified by later decisions.[67] At any rate, in holding that a prohibition against the use of immunized testimony and its fruits could adequately protect witnesses against self-incrimination, the *Murphy* court provided the theoretical basis for the rejection of transactional immunity.

Efforts were soon underway to enact legislation that would immunize witnesses without the attendant drawback of letting confessed wrongdoers go unpunished.[68] These efforts culminated in the Congressional enactment of the Organized

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60. *Id.* at 52, 53.
61. *Id.* at 53, 54.
62. *Id.* at 79.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Kastigar*, 406 U.S. at 464 (Douglas, J., dissenting). *See also* Reif, *supra* note 6, at 841; *Practical Problems, supra* note 24, at 475; Mykkeltvedt, *supra* note 12, at 646-49.
67. *Compare* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 80 (1965) (citing *Counselman*'s requirement that immunity statutes must provide absolute immunity), *with* Gardner v. Broderick, 392 U.S. 273, 276 (1968) (answers may be compelled where there is immunity from the use of compelled testimony or its fruits).
68. *Kastigar*, 406 U.S. at 452 n. 36. The National Commission on Reform of Federal Criminal Laws prepared a study of federal witness immunity statutes and authored a model act. The Commission proposed that a grant of use-plus-fruits immunity would be found constitutionally sufficient under the standards of the Supreme Court. *Id.* National Commission

Crime Control Act of 1970.[69] Soon after its passage, the lower courts split over whether the immunity provisions of the Act provided adequate constitutional protection.[70] In order to resolve the issue, the Supreme Court confronted the question of whether use-plus-fruits immunity provided adequate protection for the constitutional privilege against self-incrimination in the single jurisdiction setting in *Kastigar v. United States*.[71]

II. *KASTIGAR* AND SUBSEQUENT FEDERAL CASES

Kastigar v. United States

Charles Kastigar was subpoenaed by a federal grand jury investigating a dentist suspected of helping Kastigar and others evade the Vietnam draft by providing unnecessary dental services.[72] Kastigar was convicted of contempt for refusing to testify after receiving use and derivative use immunity under the new Act.[73] He contended on appeal that the scope of the immunity provided was not coextensive with the scope of the privilege against self-incrimination.[74] Writing for a five-two majority, Justice Powell upheld the constitutionality of the statute. The opinion analyzed the history of immunity legislation within the context of the court's construction of the fifth amendment privilege and declared that the sole concern of the privilege is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'"[75] Immunity from use and indirect use of compelled testimony prevented the prosecutorial authorities from using the compelled testimony "in *any* respect," and therefore insured that the testimony could not lead to the infliction of criminal penalties on the witness.[76]

The Court held that transactional immunity provides considerably broader protection to a witness than does the fifth amendment, because it bars subsequent prosecution of the witness where the privilege does not.[77] On that basis, the Court characterized *Counselman*'s requirement of absolute immunity as "broad language . . . unnecessary to the court's decision" and not "binding authority."[78] The Court

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on Reform of Federal Criminal Laws, Working Papers, 1405-44 (1970). *See also* Strachan, *supra* note 33, at 801-02.

69. The new immunity provisions of the Act are codified in 18 U.S.C. §§ 6001-05 (1970). Specifically, the statute differed from the previous transactional immunity statute by providing that: "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." *Id.* at § 6002.

70. Strachan, *supra* note 33, at 804; *Practical Problems*, *supra* note 24, at 476. The Ninth Circuit upheld the constitutionality of the statute while the Third, Fifth, and Seventh Circuits did not. *Compare* Bacon v. United States, 446 F.2d 667 (9th Cir. 1971), *vacated*, 408 U.S. 915 (1972); Charleston v. United States, 444 F.2d 504 (9th Cir.), *petition for cert. dismissed*, 404 U.S. 916 (1971) *and* Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), *aff'd sub nom.*, Kastigar v. United States, 406 U.S. 441 (1972), *with* United States *ex rel* Catena v. Elias, 449 F.2d 40 (3d Cir. 1971), *rev'd*, 406 U.S. 952 (1972); United States v. Cropper, 454 F.2d 215 (5th Cir. 1971), *rev'd*, 406 U.S. 952 (1972), and *In re* Korman, 449 F.2d 32 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972).

71. 406 U.S. 441 (1972).

72. N.Y. Times, May 23, 1972, at 28, col. 4.

73. 406 U.S. at 442.

74. *Id. See supra* note 69.

75. *Id.* at 453 (quoting Ullman v. United States, 350 U.S. 442, 438-39 (1956)).

76. *Id.* (emphasis in original).

77. *Id.*

78. *Id.* at 454-55.

found that the immunity statute[79] provided a complete ban on any use of the compelled testimony and information derived therefrom.[80] Use and derivative use immunity was considered coextensive with the constitutional privilege against self-incrimination because an immunized witness, just as a defendant claiming the privilege, is protected from having compelled testimony used against him, yet remains subject to criminal prosecution.[81] *Kastigar* thus extends to the intrajurisdictional setting *Murphy's* rationale that the peril of self-incrimination is removed when the government is prohibited from using compelled testimony for incriminating purposes.[82]

To insure that the witness would be protected from incrimination because of his testimony, the government has the burden of proving that it made no use of the compelled testimony.[83] Characterizing the burden as "heavy,"[84] the Court imposed on the government the affirmative duty to prove that any evidence adduced at trial is derived from legitimate, wholly independent sources.[85] As long as the government establishes an independent basis for the evidence adduced at trial, the Court considered the witness adequately protected against use of his compelled testimony.[86] Justice Powell's opinion has been widely criticized and much maligned, not only for its analysis of prior Court opinions, but also for the questions it left unresolved.[87] One such question is whether *Kastigar's* prohibition against use and indirect use precludes nonevidentiary uses. For example, it is unclear after *Kastigar* whether a prosecutor can seek a criminal indictment of a grand jury witness *solely* on the basis that the compelled testimony reveals his involvement in illegal activities. While the opinion calls for a "sweeping" and "total"[88] prohibition against using compelled testimony "in *any* respect,"[89] the Court indicated that the government may meet its burden of proving non-use by showing that its *evidence* is derived from wholly independent sources.[90] The issue of nonevidentiary was left for the lower courts to resolve.[91]

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79. *See supra* note 69.
80. 406 U.S. at 460.
81. *Id.* at 453.
82. *See supra* notes 61-66 and accompanying text.
83. 406 U.S. at 460.
84. *Id.* at 461.
85. *Id.* at 460.
86. *Id.*
87. *See supra* note 12. Criticism has come from courts and commentators alike. *See, e.g., Kastigar*, 406 U.S. at 467 (Douglas, J., dissenting); State v. Miyasaki, 62 Haw. 269, 282, 614 P.2d 915, 923 (1980). *See also Standards, supra* note 12, at 175; Strachan, *supra* note 33, at 806. Given the unlikely return to transactional immunity, this Note assumes that Justice Powell's characterization of the Court's prior decisions supports the theoretical sufficiency of use-plus-fruits immunity as a substitute for the fifth amendment privilege. It is the thesis of this Note that this theoretical sufficiency entails a prohibition of any use, evidentiary or otherwise, that increases the likelihood of infliction of criminal penalties upon the witness.
88. *Kastigar*, 406 U.S. at 460.
89. *Id.* at 453 (emphasis in original).
90. *Id.* at 460.
91. Kastigar's request for a hearing on the nonevidentiary issue was denied. 408 U.S. 931 (1972). Subsequent Supreme Court decisions on compelled testimony have not addressed nonevidentiary use. United States v. Apfelbaum, 445 U.S. 115 (1980) (truthful immunized testimony may be used in a prosecution for perjury); New Jersey v. Portash, 440 U.S. 450 (1979) (state may not use immunized testimony to impeach the witness).

Lower Court Treatment

In the years following the decision, federal courts typically held that *Kastigar* banned nonevidentiary uses.[92] In *United States v. Dornau*,[93] an assistant U.S. Attorney, prior to seeking an indictment before a grand jury, requested and read a transcript of the defendant's immunized testimony in a previous bankruptcy proceeding.[94] The court noted the difficulty of speculating about the effect that reading the transcript may have had on "the conduct and thinking processes of the Assistant charged with the prosecution of the case."[95] Concluding that the prosecutor may have used the testimony in a variety of ways, and could not, under the circumstances, clearly show that the use did not occur, the court dismissed the indictment.[96]

Relying on *Dornau*, the Eighth Circuit Court of Appeals expanded the analysis of nonevidentiary use in *United States v. McDaniel*.[97] Pursuant to a grant of transactional immunity compelled under the North Dakota Corrupt Practices Act,[98] McDaniel filled three volumes of testimony with admissions of his illegal activities involving bank assets.[99] Unaware that the testimony was immunized, the U.S. Attorney requested and read the entire transcript. McDaniel was indicted in federal court three months later, and subsequently convicted on eleven counts of embezzlement and related charges.[100]

In response to McDaniel's challenge that it used the compelled testimony, the government produced voluminous FBI reports to establish an independent source of the evidence adduced at McDaniel's trial.[101] Reiterating *Kastigar*'s proscription of "any use, direct or indirect," the court held that the doctrine of coextensiveness required that the immunity protection must forbid all prosecutorial use of the testimony, "not merely that which results in the presentation of evidence before the jury."[102] In its often cited formulation, the court defined nonevidentiary use to include "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning a trial strategy."[103]

The court commented repeatedly upon the "unusual circumstances" that compelled its findings.[104] First, the U.S. Attorney was unaware that the testimony was immunized and was therefore unaware of any need to segregate the evidence.[105] Second, whereas *Kastigar* envisioned full exploration of purported misuse in a pretrial hearing, the *McDaniel* court was faced with the question after a

92. *See* Mykkeltvedt, *supra* note 12, at 656-58.
93. 359 F. Supp. 684 (S.D.N.Y. 1973).
94. *Id.* at 686-87.
95. *Id.* at 687.
96. *Id.*
97. 482 F.2d 305 (8th Cir. 1973).
98. 3 N.D. CENT. CODE §16-20-01 *et seq.* (Supp. 1971), now codified at §16.1-10-01 *et seq.* (Supp. 1987).
99. *McDaniel*, 482 F.2d at 307.
100. Transcripts were requested November 6, 1969. Indictments were returned February 4 and July 31, 1970. *Id.* at 308.
101. *Id.* at 309.
102. *Id.* at 311.
103. *Id.*
104. *Id.* at 311-12.
105. *Id.* at 311.

full trial and conviction.[106] Under these circumstances, the court found the heavy burden imposed by *Kastigar* "insurmountable."[107] Thus, despite the production of the FBI reports and the U.S. Attorney's assertion that he did not use the testimony in any form, the government failed to prove that it did not use the testimony "in some significant way short of introducing tainted evidence."[108] Many courts have followed the Eighth Circuit's lead on the issue of nonevidentiary use.[109]

In *United States v. Pantone*,[110] after the petitioner's first conviction had been reversed, but prior to his second trial on the same charge, the U.S. Attorney participated in a grand jury proceeding at which the petitioner gave immunized testimony concerning criminal activities that were similar, but unrelated, to those currently charged against him.[111] The court decided that the unique facts of the case provided Pantone sufficient protection because any prosecutorial deviation from the conduct of the first trial would reveal use of the immunized testimony.[112] Such use could be easily exposed by referring to the transcript of the first trial to compare evidence adduced and strategy employed in the second.[113] These circumstances enabled the court to find that the government had discharged its burden of proving non-use despite exposure to the previously compelled testimony.[114]

In *United States v. Semkiw*,[115] the defendant, an Amtrak purchasing agent, was under investigation for accepting a gift from a subcontractor in violation of federal anti-kickback statutes.[116] Prior to his indictment, the government granted use immunity and compelled Semkiw to testify about the transaction before a grand jury.[117] Semkiw argued that by compelling his testimony the government had, in effect, taken a pretrial "discovery deposition" which revealed his defense and provided the government with an unfair strategic advantage as the prosecutor in his case had reviewed the immunized testimony.[118] The prosecution conceded that it already possessed all of the evidence it intended to use prior to compelling the testimony, but asserted that there was no proof that it had compelled Semkiw's testimony in order to gain a strategic advantage at trial.[119]

The court noted that, unlike *Pantone*, the record did not show whether the use immunity was violated.[120] The court blamed the inadequacy of the record on the government's failure to fully recognize its affirmative duty to prove the

106. *Id.* at 312. An anomaly not noted by the court was the fact that the prosecutor read the transcript before the Supreme Court decided *Kastigar*, and therefore could not have known of the procedural safeguards that decision would impose.
107. *Id.* at 311.
108. *Id.*
109. *See, e.g.*, United States v. Pantone, 634 F.2d 716, 723 (3d Cir. 1980); United States v. Barker, 542 F.2d 479, 483 (8th Cir. 1976); United States v. First Western State Bank, 491 F.2d 780, 787-88 (8th Cir. 1974), *cert. denied*, 419 U.S. 825 (1975); United States v. Carpenter, 611 F. Supp. 768, 779 (N.D. Ga. 1985); United States v. Smith, 580 F. Supp. 1418, 1421-23 (D.N.J. 1984).
110. 634 F.2d 716 (3d Cir. 1980).
111. *Id.* at 718.
112. *Id.* at 721.
113. *Id.* at 722.
114. *Id.*
115. 712 F.2d 891 (3d Cir. 1983).
116. 41 U.S.C. §§ 51 *et. seq.* (1982).
117. *Semkiw*, 712 F.2d at 892.
118. *Id.* at 893.
119. *Id.*
120. *Id.* at 894-95.

defendant's testimony had not been used against him in any respect.[121] Because the government admitted that it already possessed all of its evidence against the defendant before compelling his testimony, the court assumed the government intended to use the defendant's testimony to its own advantage in the preparation of the case against him.[122] Listing possible nonevidentiary uses, the court concluded that the record did not show that the defendant remained in substantially the same position as if he had not testified.[123]

In contrast to these decisions, the recent trend among courts and commentators is to maintain that *Kastigar* provides no impediment to nonevidentiary use of testimony compelled over an assertion of the privilege against self-incrimination.[124] In *United States v. Byrd*,[125] the petitioner was indicted by a federal grand jury after giving testimony compelled under a grant of use immunity in a separate proceeding.[126] Byrd argued that access to his immunized testimony provided the government with significant advantages at trial, such as deciding which witnesses to call, planning cross-examination of defense witnesses, interpreting previously discovered evidence, and making other strategic decisions concerning the evidence to be introduced at trial.[127] Byrd also maintained that the decision to indict him was induced by the content of his compelled testimony and the fact that a U.S. Attorney who had heard the testimony participated in the decision to indict.[128]

The Eleventh Circuit dismissed Byrd's concerns about these nonevidentiary uses, announcing that the privilege against self-incrimination is concerned only with "direct and indirect *evidentiary* uses" of compelled testimony, and not with matters of prosecutorial discretion.[129] The Supreme Court's decision in *Kastigar* did not require that the position of the parties remain absolutely identical in all respects because that would place a "virtually insurmountable burden of proof upon the government, and would approach (if not result in) *de facto* transactional immunity."[130] The court discounted Byrd's fears of prejudicial nonevidentiary use by declaring that "until tainted evidence is actually adduced at trial, Byrd's testimony simply has not been used against him."[131]

The Ninth Circuit examined the issue of nonevidentiary use of compelled testimony in *United States v. Crowson*.[132] After several appearances before a grand jury pursuant to a grant of use immunity, Crowson was subsequently indicted and convicted on charges of fraud and racketeering.[133] Crowson contended that the government must follow reliable procedures for segregating the immunized testimony and its fruits from officials pursuing a subsequent investigation because

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121. *Id.* at 895.
122. *Id.*
123. *Id.*
124. *See, e.g.*, Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351 (1987); United States v. Crowson, 828 F.2d 1427 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 87, 102 L. Ed. 2d 63 (1988); United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).
125. 765 F.2d 1524 (11th Cir. 1985).
126. *Id.* at 1526.
127. *Id.* at 1531.
128. *Id.* at 1530.
129. *Id.* at 1531 (emphasis in original).
130. *Id.* at 1530.
131. *Id.* at 1531.
132. 828 F.2d 1427 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 87, 102 L. Ed. 2d 63 (1988).
133. *Crowson*, 828 F.2d at 1428.

access to the testimony could result in impermissible use at trial.[134] The court rejected this claim, citing *Byrd* for the proposition that erecting a "Chinese wall" between the testimony and the prosecution would be the equivalent of transactional immunity.[135] Because the government had proved a prior, independent source for its evidence, the court concluded that any nonevidentiary use in planning trial strategy would have been developed anyway.[136] The court held that the government met its burden of proving non-use even though the record was silent as to the possible use of the testimony in planning cross-examination, interpreting evidence, and otherwise generally planning trial strategy.[137]

By holding that prosecutorial use of compelled testimony may be determined solely by examining whether evidence adduced at trial is derived from independent sources, *Byrd* and *Crowson* demonstrate a marked shift away from the concerns over nonevidentiary use espoused in *McDaniel* and *Semkiw*. In contrast to the earlier decisions, *Byrd* and *Crowson* construe the privilege against self-incrimination and the *Kastigar* decision to forbid only the introduction of tainted evidence in a criminal prosecution. Uses that fall short of the introduction of evidence at trial are considered matters of prosecutorial discretion which are "inevitable and harmless."[138]

III. NONEVIDENTIARY USE, THE FIFTH AMENDMENT AND *KASTIGAR*

The fifth amendment privilege against self-incrimination plays a pivotal role in ensuring the proper functioning of the American accusatorial system of criminal justice.[139] The privilege reflects our fundamental values and highest aspirations.[140] It embodies our basic sense of fairness by demanding that the government carry the entire burden when it attempts to inflict criminal penalties upon an individual.[141] Since the demise of the "oath ex-officio," it has been deeply ingrained in Anglo-American jurisprudence that the defendant need not provide the government with the means to convict him. The government may not marshall its considerable forces against the individual and compel him to accuse himself or otherwise provide evidence of his guilt.[142] The privilege against self-incrimination is implicated whenever a witness is asked to give testimony which would increase the likelihood of his conviction of a criminal offense.[143] The extensive reach of the

134. *Id.* at 1429.
135. *Id.* at 1431-32.
136. *Id.* at 1432.
137. *Id.* at 1431.
138. *Id.* at 1432.
139. Mykkeltvedt, *supra* note 12, at 634-35.
140. *Murphy*, 378 U.S. at 55.
141. 8 WIGMORE, *supra* note 18, § 2251, at 317.
142. *Molloy*, 378 U.S. at 8.
143. Professor Leshing's detailed analysis of the Supreme Court's fifth amendment holdings and discussions reveals that:

> [A] person is a witness 'against' himself within the text of the privilege against self-incrimination when there is a non-remote chance that his testimony, by revealing information that helps to show commission of a crime, or by revealing information which could lead to such information, would increase the likelihood of conviction or enhancement of his sentence.

Leshing, *supra* note 13, at 1696-708.

privilege comports with the Supreme Court's firmly established directive that the privilege must be liberally construed.[144]

But even construed liberally, the privilege has never been absolute. Congress and the courts have long recognized the necessity of compelling testimony, especially in the prosecution of white collar crime, bribery, and corruption cases where conviction is extremely difficult, if not impossible, without the testimony of those implicated in the crime.[145] It is equally clear that such testimony can be compelled only by granting the witness immunity which removes the peril against which the privilege protects.[146] Any statute compelling the revelation of information that would increase the likelihood of conviction is, therefore, unconstitutional. It follows that any use, evidentiary or otherwise, of the revealed information which increases the likelihood of conviction impermissibly impinges upon the privilege against self-incrimination.[147] This effect of nonevidentiary use is easily demonstrated.

Taking the most pernicious example of nonevidentiary use, a prosecuting attorney with prior knowledge of the accused's defense clearly possesses an advantage over a prosecutor with precisely the same evidence to present at trial but no prior knowledge of the defense. When this advantage means the difference between conviction and acquittal, the defendant is obviously not in substantially the same position as if he had successfully claimed the fifth amendment privilege.[148]

It is also apparent that the outcome of a criminal trial is not a simple function of the evidence adduced. While nonevidentiary use, by definition, does not furnish "a link in the chain of evidence"[149] against the defendant, it is nevertheless true that the verdict often turns upon the skill with which that chain is rattled. To believe otherwise is to completely ignore the often decisive effects of trial strategy in the American criminal justice system.

The language in *Kastigar* which calls for "[i]mmunity from the use of compelled testimony, *as well as* evidence derived directly and indirectly therefrom"[150] cannot be construed as dictum as it is essential to insure that use immunity is fully coextensive with the privilege against self-incrimination. Only a "sweeping

144. Boyd v. United States, 116 U.S. 616, 635 (1886) ("[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."); *Counselman*, 142 U.S. at 562; Brown v. Walker, 161 U.S. at 631 (Field, J., dissenting); Quinn v. United States, 349 U.S. 155, 162 (1955).

145. *See Kastigar*, 406 U.S. at 446; *Murphy*, 378 U.S. at 94-95 (White, J., concurring). *See also* Humble, *supra* note 124, at 351-52.

146. *Counselman*, 142 U.S. at 586.

147. *See* Humble, *supra* note 124, at 374 n.152, for the view that nonevidentiary use is permissible regardless of the effect on the outcome of the trial because the fifth amendment protects witnesses only from providing evidence or leads to evidence. This view begs the question by misconstruing the privilege too narrowly given the Supreme Court's requirement of liberal construction. *Cf.* Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

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

149. Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

150. *Kastigar*, 406 U.S. at 453 (emphasis added).

proscription of any use"[151] will assure that compelled testimony will not incriminate a witness because information revealed under compulsion can lead to the infliction of criminal penalties in "way[s] short of introducing tainted evidence."[152] The practical problem remaining in the *Kastigar* opinion is the failure to provide specific guidelines for the government to follow in establishing that nonevidentiary use of the compelled testimony and information derived therefrom has not occurred. Without guidance from the Supreme Court, lower courts have been left to grapple with the task of determining exactly how the government can prove that compelled testimony has not been put to a nonevidentiary use.

Problems of Proof

Due largely to the *McDaniel* decision, it is widely believed that the difficulties inherent in detecting nonevidentiary use place a "virtually insurmountable burden of proof upon the government" that results in *de facto* transactional immunity.[153] Indeed, this belief is propounded by those who advocate no restrictions upon nonevidentiary use, as well as those who favor a return to transactional immunity.[154] Because nonevidentiary use concerns primarily prosecutorial decisions and trial strategy, courts have characterized the inquiry into nonevidentiary use as one of "metaphysical subtlety,"[155] requiring examination of the prosecutor's motives and thought processes.[156] The problem of discerning the subjective impact of exposure to immunized testimony, as well as the difficulty of proving the effect of this exposure on the course of a subsequent criminal prosecution, naturally engenders the belief that such inquiry is hopeless.

It is, of course, no solution to propose that constitutional protections must be abandoned because they prove difficult to enforce.[157] Moreover, proponents of this view fail to recognize that, in all but the most exceptional cases, the government is, prior to granting immunity, in a unique position to evaluate any possible proof problems and take the necessary prophylactic measures to insure that its burden can be met.[158] In other words, if proving that nonevidentiary use has not occurred results in *de facto* transactional immunity, it does so because, as the court pointed out in *Semkiw*, "[t]he government failed to recognize that it had the 'affirmative duty to prove' that the defendant's testimony would not be used against him in any respect."[159]

The unique logistical problems encountered by an immunized witness facing subsequent prosecution provide another basis for the view that the government's burden in regard to nonevidentiary use is insurmountable. As Justice Marshall indicated in his dissenting opinion in *Kastigar*,[160] placing the burden of proof on the government to show non-use of compelled testimony creates substantial practical problems for the defendant given the fact that "information relevant to the question of taint is uniquely within the knowledge of the prosecuting

151. *Id.* at 460.
152. *McDaniel*, 482 F.2d at 311.
153. *Byrd*, 765 F.2d at 1530. *See also*, United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989).
154. *Compare* Humble, *supra* note 124, at 382, *with* Strachan, *supra* note 33, at 833.
155. *Pantone*, 634 F.2d at 723.
156. *Dornau*, 359 F. Supp. at 687; *McDaniel*, 482 F.2d at 312.
157. *See infra* note 170.
158. *Crowson*, 828 F.2d 1427; *Byrd*, 765 F.2d 1524. Humble, *supra* note 124.
159. *Semkiw*, 712 F.2d at 895 (citation omitted).
160. *Kastigar*, 406 U.S. at 467-71 (Marshall, J., dissenting).

authorities."[161] The most common fact pattern arising in the subsequent prosecution of a witness who has been compelled to testify involves a defendant who can prove that the prosecution had access to the compelled testimony, and therefore suspects that the testimony has been or will be used against him in his criminal trial. Without access to the government's sources, it is virtually impossible for the defendant to present facts rebutting the government's contention that its burden has been met. Under these circumstances, the defendant must resort to the claim that the prosecution cannot, as a matter of law, furnish the degree of proof that *Kastigar* requires. An examination of possible nonevidentiary uses and suggested procedural safeguards, however, reveals certain measures that the prosecution may take, and the defendant may rely upon, to insure that the burden of proof is met.

Prejudicial Nonevidentiary Use

In the wake of *Kastigar*, commentators were eager to point out possible nonevidentiary uses that would impermissibly disadvantage the defendant.[162] *McDaniel*'s initial formulation of such uses included "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."[163] Specific advantages enure to the prosecution in the allocation of government resources. Much time and effort is saved in the process of establishing an independent source of evidence when compelled testimony has revealed exactly where that evidence can be found.[164]

Prior knowledge of the accused's defense also provides strategic advantages at trial in the framing of questions to ask witnesses, deciding the order of presentation of evidence, and structuring arguments to the jury. Quite often compelled testimony will reveal details of the accused's defense that could not be gleaned from an examination of the independent sources of evidence. The prosecution may elicit, on direct examination and on cross-examination of defense witnesses, facts that anticipate and undermine the accused's defense.[165] Eliciting such facts is an example of nonevidentiary use which, contrary to *Crowson*, could not "have been developed anyway" from prior, independent sources.[166]

Armed only with independent sources for his evidence, the government prosecutor would not know before trial specific details of the defense revealed by the accused in his prior testimony. The prosecutor would therefore be unable to specify which facts would undermine that defense, and which trial techniques would best elicit those facts. Exposure to immunized testimony thus provides nonevidentiary advantages which may mean the difference between acquittal and conviction. It follows that evidentiary safeguards requiring legitimate, independent sources for evidence adduced at trial are insufficient, in themselves, to protect a defendant from facing the increased likelihood of conviction if prejudicial nonevidentiary uses are allowed.

While the *McDaniel* opinion provides the basis for the view that the burden of proving that nonevidentiary use has not occurred is insurmountable, it cannot be

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161. *Id.* at 469.

162. *See, e.g., Standards, supra* note 12, at 185; Note, *The Unconstitutionality of Use Immunity: Half a Loaf is Not Enough*, 46 S. CAL. L. REV. 202, 207-09 (1972).

163. *McDaniel*, 482 F.2d at 311.

164. *See* Note, *supra* note 162 at 208; Strachan, *supra* note 33, at 809.

165. *See* Humble, *supra* note 124, at 354 n. 15.

166. 828 F.2d at 1432.

read to imply that every attempt to provide workable nonevidentiary safeguards is necessarily doomed. To the contrary, the court repeatedly emphasized the unusual circumstances which rendered the government's burden "virtually undischargeable."[167] As noted in Part II, these circumstances include the problem of determining the possible use of compelled testimony after the trial, rather than in the pretrial evidentiary hearing envisioned by *Kastigar*, and the fact that the prosecutor, unaware that the testimony had been immunized, perceived no need to segregate the testimony from his other sources of evidence.[168] In light of the principles promulgated in *Kastigar*, the court added that the unusual circumstances at hand were unlikely to recur with any degree of frequency.[169] The court apparently assumed that once the government is aware of the burden it must shoulder when dealing with known immunized testimony, it will take the necessary precautions, such as segregating the testimony, to insure that burden would not be insurmountable. However, the subsequent failure of the government to take sufficient precautions, demonstrated repeatedly in the cases since *McDaniel*, has rendered the court's assumption unduly optimistic.

By allowing an immunized witness to be prosecuted for the matters about which he testifies, as long as the government proves that it made no use of that testimony, the *Kastigar* court left only procedural safeguards to protect the witness from compelled self-incrimination. It follows that the adequacy of the protection of the constitutional privilege depends upon the procedures provided and the tenacity with which these procedures are observed and enforced. The guidelines suggested in the next section will permit the courts to protect the witness from impermissible nonevidentiary use, and insure that the government can meet its burden of proving non-use, thereby preserving its right to prosecute the witness.

IV. SUGGESTED GUIDELINES

Restricted Access and Prima Facie *Use*

The nonevidentiary uses considered are possible only through prosecutorial knowledge of the contents of the immunized testimony. The possibility of such use would be eliminated simply by restricting access to the testimony.[170] The procedure for implementing this restriction can be found in the government's own U.S. Attorney's manual.[171] The manual states that an attorney requesting approval for the prosecution of an immunized witness can show affirmatively that nonevidentiary use has not occurred by having the prosecution handled by an attorney unfamiliar with the contents of the compelled testimony.[172]

The courts should follow the manual's recommendations on nonevidentiary use and adopt the rule that prosecutorial access to immunized testimony constitutes

167. 482 F.2d at 312.
168. *Id.* at 311.
169. *Id.* at 312.
170. In the rare instances where immunized testimony is of significant public interest and widely disseminated through the electronic and print media, the problem of restricting access is, of course, particularly acute. Strachan, *supra* note 33, at 815. For an account of the independent prosecutor's attempts to avoid the taint of exposure to testimony in the Iran-Contra hearings, see TIME, July 27, 1987, at 14, 17.
171. United States Attorneys' Manual § 1-11.400 (July 1, 1985).
172. *Id.*, ch. 11, at 21.

prima facie use.[173] Absent a *Pantone* scenario, where circumstances such as the existence of the transcript of a prior conviction provide the court with a method of determining whether nonevidentiary use has occurred, the courts should adopt a *per se* rule requiring the withdrawal of a prosecutor who may be privy to compelled testimony. Most jurisdictions possess a sufficient number of prosecutors to enable assigning the prosecution to an attorney unfamiliar with the compelled testimony. The reluctance of the federal courts to adopt a *per se* rule that would normally cost the prosecuting jurisdictions little, if any, additional expenditure of resources is difficult to understand, especially in light of the Justice Department's recommendations in the U.S. Attorney's Manual. Indeed, some state courts have already taken the lead in recognizing the necessity of a *per se* rule.[174]

In order to implement the *per se* rule, prosecution staff must swear that they have neither acquired nor attempted to acquire knowledge of the substance of the immunized testimony.[175] The obvious inadequacies of relying on the oaths of law enforcement officials to protect the constitutional rights of the defendant can be tempered somewhat by requiring physical restrictions on access to the immunized testimony. Such restrictions should include recordation and transcription of the immunized testimony with a copy furnished to the witness to assist in the detection of possible use in any later prosecution,[176] and strict control on subsequent access to the testimony, including detailed records of persons to whom access was granted and the purpose for which the testimony was examined.[177] Information regarding access to immunized testimony must be a matter of public record, readily available to the witness to insure that protection of the privilege against self-incrimination does not depend solely on the good faith of the prosecution.[178]

The weakness of such restrictions is that they cannot guard against the inadvertent and unknown disclosure of contents of compelled testimony that almost invariably results when the same jurisdiction which compelled the testimony subsequently prosecutes the witness.[179] However, when strict access controls are coupled with restrictions designed to preclude evidentiary use, such as prior certification of all evidence to be adduced at trial and independent verification of each

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173. *See, e.g.*, State v. Munoz, 103 N.M. 40, 702 P.2d 985 (1985). *Cf.* People v. Casselman, 583 P.2d 933 (Colo. 1978) (participation by attorney at hearing of immunized testimony was *prima facie* use).

174. In State v. Munoz, 103 N.M. 40, 702 P.2d 985 (1985), the New Mexico Supreme Court held that "a different district attorney than the one who elicits immunized testimony should always handle to prosecution of a defendant who has given such immunized testimony and steps should be taken to fully insulate such district attorneys and staff." *Id.* at 45, 702 P.2d at 990. *Cf.* People v. Garewal, 173 Cal. App. 3d 285, 218 Cal. Rptr. 690 (1985) (requiring withdrawal of prosecutor exposed to transcript of incriminating interview conducted by private investigator, and "insulation" of new prosecutors from learning of interview); Gray v. State, 469 So. 2d 1252 (Miss. 1985) (subsequent prosecution of defendant by attorney who had previously gained confidential information from accused relative to pending charges inherently incompatible with right to fair trial).

175. *Standards, supra* note 12, at 186.

176. *See* NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE THE GRAND JURY § 8.13(b) (1985) [hereinafter WITNESSES].

177. Strachan, *supra* note 33, at 822 n.137; Thornburg, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture," or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 164 (1976).

178. Although the majority opinion in *Kastigar* held that the government's heavy burden of proof would not leave the defendant dependent upon the good faith of the prosecutors, Justice Marshall, in dissent, expressed his reservations on that score. *Kastigar*, 406 U.S. at 469.

179. *Standards, supra* note 12, at 187.

source of evidence, it is difficult to envision how such inadvertent knowledge could significantly affect trial strategy.[180]

An additional weakness of even the strictest requirements of access controls and prosecutorial oaths is that they may be easily circumvented by the unscrupulous or overzealous prosecutor who wishes to exploit the information revealed under compulsion.[181] While the defendant remains vulnerable to misconduct of this nature, he is left with the hope that the existing apparatus for deterring such misconduct — i.e., the cost of being caught[182] — will provide sufficient protection against this criminal behavior.

Prejudicial nonevidentiary use of compelled testimony is impossible without prosecutorial knowledge of the contents of the immunized testimony. A *per se* rule requiring the withdrawal from prosecution of any attorney who has had access to the testimony is the most effective means of protecting the witness from such use. Prosecutorial oaths, supported by recorded access restrictions, while not foolproof, are the most effective procedural means of implementing a *per se* rule and providing documentary evidence on the issue of proving non-use to the defendant as well as to the government. Moreover, a *per se* rule eliminates the need for inquiry into the subjective processes of prosecutorial discretion and imposes no significant additional burdens upon prosecuting jurisdictions.

Declaration of Intent to Prosecute Prior to Compulsion

To further insure that the decision to prosecute is not based on the contents of the compelled testimony, the government should be required to declare its intention to prosecute the witness prior to the grant of immunity. The decision must be based on untainted evidence which has been certified before the request for immunity is made. A decision not to prosecute may be reconsidered only when additional evidence, derived from wholly independent sources, surfaces after the compelled testimony has been given, and where no one with knowledge of the contents of the testimony participates in the subsequent decision to prosecute. Adherence to these guidelines would protect the witness from any increased likelihood of prosecution and provide the government with a method for proving that the immunized testimony did not indirectly enter into the subsequent decision to prosecute.[183] The guidelines would also protect governmental interests by preserving the option to prosecute.

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180. The prosecutor may come across details relating to the accused's defense which, he realizes, could not have been developed through examination of his independent sources of evidence. The good faith prosecutor will know that he has been indirectly exposed to the substance of the compelled testimony and must consequently withdraw because he will be unable to swear that he has not acquired knowledge of the contents of the testimony.

181. The prosecutor, for example, may arrange an unrecorded briefing by attorneys and witnesses who participated in the original proceeding, or by third parties allowed to review the testimony under some pretext. The defendant will be hard pressed to prove collusion of this sort as he presumably won't have the option of compelling the prosecution, under threat of perjury or contempt, to disclose the details of such an arrangement. The seemingly innocent access records and perjured prosecutorial oaths will no doubt carry the government's burden in the absence of any other evidence presented by the defendant.

182. A perjury conviction in these circumstances may well constitute grounds for disbarment, effectively terminating the prosecutor's career. *See Standards, supra* note 12, at 187 n.71.

183. *Byrd*, 765 F.2d at 1531 (the court stated that it was "almost impossible to conceive of a method" that would achieve the desired result).

The Standard of Proof

Adequate protection against compelled self-incrimination depends not only upon adherence to the procedures provided in *Kastigar*, but also upon the judicial allocation of evidentiary standards to determine whether those procedures have been observed and enforced. Given the uncertainties inherent in any fact finding process and the fact that, even with complete compliance with oath and access requirements, most of the information concerning impermissible use will remain with the prosecuting authorities,[184] the courts should uniformly require at least clear and convincing proof that the government has not used the immunized testimony in any respect. The required liberal construction of the privilege against self-incrimination renders the risks of the lesser preponderance of the evidence standard unacceptably high.[185] Moreover, as *Kastigar* unmistakably characterized the imposed burden as "heavy," courts should not be permitted to substitute the "lightest" evidentiary standard available.[186] Emphasis on the standard of proof necessary to safeguard fundamental constitutional rights is especially crucial when courts, in cases like *Crowson*, are willing to find the burden as to certain nonevidentiary uses satisfied by a silent record.[187]

CONCLUSION

In order to fully protect the citizen's fifth amendment privilege against self-incrimination, the government can compel testimony only if it immunizes the witness from revealing information that would increase the likelihood of conviction. The likelihood of conviction is increased whenever information revealed in compelled testimony provides the prosecution with strategic advantages it would otherwise lack. The possibility for prejudicial nonevidentiary use springs from knowledge of the contents of immunized testimony. The government can easily meet its burden of proving non-use by adhering to standards denying prosecutorial access to the testimony.

A *per se* rule requiring the withdrawal of any prosecutor who has had access to immunized testimony protects the witness from the most prejudicial nonevidentiary uses. The rule imposes no significant administrative burdens on the prosecuting jurisdiction and eliminates the need for judicial inquiry into the subjective effects of exposure to compelled testimony. Implementation of the rule by means of prosecutorial oaths and strictly recorded access restrictions will provide both parties with documentary evidence on the issue of whether the government has impermissibly used the compelled testimony against the witness. If the fifth amendment means anything, it means that a witness cannot be forced to help the government convict him.

184. *Kastigar*, 406 U.S. at 468-69 (Marshall, J., dissenting).
185. *See* WITNESSES, *supra* note 176.
186. *Id.*
187. *Crowson*, 828 F.2d at 1431.