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Disclosure and Civil Use of Immunized Testimony

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RECENT DEVELOPMENT

Disclosure and Civil Use of Immunized Testimony

I. INTRODUCTION

During the grand jury stage[1] of a criminal prosecution, the federal government[2] often will compel the testimony of a witness despite the witness' fifth amendment claim of privilege against self-incrimination,[3] by granting him use immunity pursuant to the federal statute.[4] The statute provides that once the witness receives a grant of immunity, compelled testimony or information derived directly or indirectly therefrom cannot be used against him in a criminal proceeding.[5] If criminal prosecution of the witness ensues, the government[6] must bear the affirmative burden of proving that its evidence derives from a source independent of the immunized testimony.[7] The government often grants use immunity to a witness who is not the immediate target of criminal prosecution but whose testimony constitutes valuable evidence against a crimi-

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1. This study focuses on the problems posed by the disclosure and civil use of immunized grand jury testimony, as opposed to trial testimony. This study does not discuss permissible uses of immunized testimony in the criminal context. For discussion of those uses, see United States v. Apfelbaum, 445 U.S. 115 (1980); Dunn v. United States, 442 U.S. 100 (1979); New Jersey v. Portash, 440 U.S. 450 (1979); Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421 (1980).

2. A United States attorney acts for the federal government in initiating a grant of use immunity. *See* 18 U.S.C. § 6003 (1976).

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

4. 18 U.S.C. §§ 6001-6005 (1976) contain all provisions of the federal immunity statute.

5. 18 U.S.C. § 6002 (1976). Protection does not extend to perjured, immunized testimony or to cases in which the witness fails to comply with the order granting immunity. *Id.*

6. Both federal and state prosecutors may proceed against an immunized witness as long as the evidence does not derive from the immunized source. *See infra* text accompanying notes 24-27.

7. *See infra* text accompanying notes 28-30.

nal suspect.[8]

Immunization[9] only protects a witness from the use of his testimony in criminal, not civil contexts.[10] Since certain criminal acts subject the perpetrator to concurrent civil liabilities,[11] an immunized witness often will be asked to repeat his testimony for purposes of subsequent related civil litigation. Moreover, if a plaintiff sues the defendant in a criminal prosecution on a related civil matter, the plaintiff may seek to depose or obtain the immunized testimony of the nontarget witness if the testimony constitutes valuable evidence of the defendant's civil liability.

Courts hold that a witness who *voluntarily* repeats his immunized testimony in a separate proceeding waives his privilege against self-incrimination. The repeated testimony of the witness then constitutes an independent source of information that a prosecutor may use against the witness in a subsequent criminal proceeding without fear of taint.[12] An immunized witness seeking to preserve the fifth amendment protection is thus well advised to decline to repeat voluntarily the substance of his immunized statements. Only official coercion in the form of a second grant of immunity assures the witness that his repeated statements will remain a protected source of evidence that cannot be used against him in a criminal proceeding. If a civil plaintiff who is trying to obtain the immunized testimony of the witness is a private party,

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8. 1 Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 715 (5th ed. 1980) [hereinafter cited as KAMISAR].

9. Immunization in this context refers to both "use" and "transactional" immunity. Transactional immunity protects a witness from prosecution for any transaction about which he testifies or produces evidence. *See infra* notes 19-34 and accompanying text.

10. *See* Patrick v. United States, 524 F.2d 1109, 1118-19 (7th Cir. 1975); United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974); United States v. Kates, 419 F. Supp. 846, 857-58 (E.D. Pa. 1976). This limited protection makes sense since a witness cannot invoke a fifth amendment privilege on the grounds that his testimony might subject him to civil liability.

11. Concurrent civil liability for criminal acts arises in crimes such as income tax evasion or price fixing. *See* Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975); KAMISAR, *supra* note 8, at 745.

12. United States v. Kuehn, 562 F.2d 427, 430 (7th Cir. 1977). *Kuehn* held that the immunized witness who voluntarily repeats his testimony cannot use prior immunization to protect the subsequent revelation. In effect, the *Kuehn* decision puts the immunized witness on an equal footing with the witness who offers self-incriminating testimony without the benefit of immunization. Regardless of the conditions surrounding the original testimony, any witness who is asked to repeat his statements either must invoke the fifth amendment privilege or waive it. A prior grant of immunity does not bar the possibility of a subsequent waiver any more than a prior waiver bars invocation of the fifth amendment privilege at a later proceeding. *See generally* Comment, *Requiring Witnesses to Repeat Themselves*, 47 TEX. L. REV. 266 (1969).

he has no power to confer a second grant of immunity upon the witness. Further, the presiding court cannot initiate an immunity grant since the statute expressly reserves that right for the federal prosecutor.[13] Therefore, unless the court determines that other circumstances exist which eliminate the possibility that the witness will subject himself to criminal prosecution by repeating his testimony,[14] the witness may invoke his privilege against self-incrimination and refuse to be deposed or to testify.[15] In those instances in which the witness' invocation of the privilege effectively blocks all means of valuable discovery in civil litigation, the plaintiff may seek a release of the witness' grand jury testimony. Although the effectiveness of the grand jury proceeding as an investigative tool depends largely upon its secrecy, courts do have the authority to disclose grand jury material for use in a judicial action if the requesting parties demonstrate a particularized need for the materials that outweighs the secrecy interest.[16]

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13. 18 U.S.C. § 6003 (1976). The federal government's immunity granting power constitutes a valuable discovery device. In many instances a prosecutor may have a choice whether to proceed against a defendant civilly or criminally. In United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), the prosecutor pursued a civil remedy against a defendant charged with a gambling offense and sought a court order granting the defendant use immunity in order to expedite civil discovery. *Id.* at 1354-55. This device is unavailable to private litigants because they have no authority to grant immunity.

14. *See, e.g., In re* Folding Carton Antitrust Litig., 465 F. Supp. 618 (N.D. Ill.), *rev'd*, 609 F.2d 867 (7th Cir. 1979). In *Folding Carton* the district court ruled that the immunized witness had no fifth amendment claim to invoke in a civil trial because the prospect of future prosecution was unlikely. The court of appeals reversed on grounds that the applicable standard was whether more than a "fanciful" possibility of prosecution existed. *Id.*

15. In Hoffman v. United States, 341 U.S. 479 (1951), the Supreme Court established general guidelines for courts to use in assessing the validity of a witness' claim of a fifth amendment privilege against self-incrimination. The Court stated,

> The privilege afforded not only extends to answers that would in tbemselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the cbain of evidence needed to prosecute the claimant for a . . . crime. . . . But this protection must be confined to instances where the witness has reasonable cause to apprebend danger from a direct answer. . . . The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require bim to answer if "it clearly appears to the court that he is mistaken." . . . However, if the witness . . . were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Id. at 486-87 (citations omitted).

16. FED. R. CRIM. P. 6(e).

Judicial release of nonimmunized grand jury testimony for use in a civil context does not invalidate a recalcitrant witness' valid fifth amendment claim because disclosure by itself does not remove the risk of future criminal prosecution. Recent federal decisions, however, suggest that when courts have granted civil plaintiffs access to *immunized* grand jury testimony and the plaintiff intends to base all questioning of the witness on the immunized testimony, the witness' claim of privilege may be nullified.[17] The Second and Eighth Circuits have held that the use of immunized testimony as a source of questioning abrogates the privilege because it taints the witness' responses to the extent that no prosecutor could use the testimony in a subsequent criminal proceeding against the witness. Because the witness no longer runs the risk of self-incrimination, he may not assert the privilege and instead must testify. The Fifth and Seventh Circuits, in contrast, have held that prospectively determining the taint of a witness' testimony is improper in the evaluation of a claim of fifth amendment privilege against self-incrimination and results in a de facto grant of immunity that exceeds the scope of judicial authority.

This Recent Development examines the current conflict among the circuits. This study first explores the rationales underlying use immunity and contrasts them with the guidelines formulated by the Supreme Court for controlling judicial disclosure of grand jury testimony. Second, this Recent Development examines the analyses used by the federal courts in determining whether to release immunized grand jury testimony for civil use[18] and the effect of disclosure on a witness' claim of fifth amendment privilege. This study submits that in their effort to promote civil discovery, several courts have misconstrued the scope and effect of the disclosure power and have usurped the prosecutor's exclusive right under the federal statute to grant immunity. This Recent Develop-

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17. *See In re* Corrugated Container Antitrust Litig., Appeal of Fleischacker, 644 F.2d 70 (2d Cir. 1981); *In re* Starkey, 600 F.2d 1043 (8th Cir. 1979). *But see In re* Corrugated Container Antitrust Litig., Appeal of Conboy, 661 F.2d 1145, *rev'g* 655 F.2d 748 (7th Cir. 1981), *cert. granted sub nom.* Pillsbury v. Conboy, 102 S. Ct. 998 (1982); *In re* Corrugated Container Antitrust Litig., Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). This study also examines the Eighth Circuit's recent holding in Little Rock School Dist. v. Borden, Inc., 632 F.2d 700 (8th Cir. 1980), in which no disclosure occurred but the court nevertheless made a prospective taint determination and overruled witnesses' otherwise valid fifth amendment objections.

18. This study focuses on disclosure decisions made in *In re* Starkey, 600 F.2d 1043, 1045 (8th Cir. 1979); *In re* Corrugated Container Antitrust Litig., 1980-1 Trade Cas. (CCH) ¶ 63,192 (S.D. Tex. 1980); Little Rock School Dist. v. Borden, Inc., 1979-2 Trade Cas. (CCH) ¶ 62,809 (E.D. Ark. 1979).

ment suggests alternative guidelines that courts might use in determining whether to release immunized grand jury testimony and the effect that disclosure should have on a court's evaluation of a witness' fifth amendment claim. The study concludes that courts should not allow disclosure and private litigants' use of immunized testimony to override a witness' otherwise valid assertion of the right against self-incrimination.

II. IMMUNITY AND DISCLOSURE

A. *Use Immunity and the Coextensiveness Requirement*

In 1892 the Supreme Court in *Counselman v. Hitchcock*[19] articulated a standard for measuring the constitutionality of a federal immunity statute. The Court declared that "legislation cannot abridge a constitutional privilege, and . . . it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."[20] The *Counselman* decision indicated that only a statute granting a recalcitrant witness absolute protection from future prosecution for crimes about which the government compelled him to testify would be fully coextensive with the fifth amendment privilege.[21] Conferral of this absolute "transactional"[22] immunity required the federal government to forfeit its right to prosecute the witness even when the government could prove that it obtained its evidence against the witness from a source independent of the compelled testimony.[23]

The Supreme Court's recognition in 1964 that the fifth

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19. 142 U.S. 547 (1892).

20. *Id.* at 585.

21. Justice Blatchford, speaking for the Court, said, "We are clearly of [the] 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." *Id.* at 585.

22. Transactional immunity is the term usually applied to statutory protection affording the witness freedom from prosecution "for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . ." *See* Brown v. Walker, 161 U.S. 591, 594 (1896) (upholding constitutionality of federal immunity statute affording transactional protection); KAMISAR, *supra* note 8, at 763.

23. Limits exist to the protections granted under transactional immunity. First, transactional immunity does not protect a witness from a perjury prosecution based on his immunized remarks. Second, transactional protection extends only to the offenses about which the grantee is questioned. Thus, immunization does not protect unresponsive answers which reveal incriminating evidence not sought originally by the questioner. KAMISAR, *supra* note 8, at 763. Both these limitations apply to use immunity as well as to transactional immunity. *See* 18 U.S.C. § 6002 (1976); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972) (New Jersey use immunity statute imposing responsiveness requirement upheld).

amendment applied to the states[24] necessitated a determination of the protections that state and federal grants of immunity afforded a witness. In *Murphy v. Waterfront Commission*[25] the Court declared that the fifth amendment privilege (and thus a coextensive grant of immunity) would protect a federal witness against incrimination under state as well as federal law and, correspondingly, would protect a state witness against incrimination under both federal and state law.[26] The Court's characterization of the scope of interjurisdictional protection, however, was not of the absolute transactional nature envisioned by the *Counselman* Court. In *Murphy* the Court held that a prosecutor from one jurisdiction could not use testimony or the "fruits" of testimony immunized by another jurisdiction against the witness in a criminal prosecution. The Court, however, did not specifically forbid subsequent prosecution of the witness.[27] By characterizing this interjurisdictional protection as coextensive with the fifth amendment privilege, the *Murphy* decision implied that a statute conferring something less than absolute "transactional" immunity nevertheless could qualify as constitutional. In *Kastigar v. United States*[28] the Court confirmed the implication explicitly.

Kastigar concerned the immunity provisions that were part of the Organized Crime Control Act of 1970.[29] These provisions,

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24. Malloy v. Hogan, 378 U.S. 1 (1964).
25. 378 U.S. 52 (1964).
26. *Id.* at 77-78.
27. *Id.* at 79-80.
28. 406 U.S. 441 (1972).
29. 18 U.S.C. §§ 6002-6003 (1976). Section 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before 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, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Section 6003 provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance

which currently apply, protect an immunized witness by providing that the government may use neither the compelled testimony nor information derived directly or indirectly therefrom against the witness in any criminal case. The government, however, still may prosecute the witness if it meets the "affirmative" duty of proving that the evidence it intends to use derives from a "legitimate source wholly independent of the compelled testimony."[30] Petitioners in *Kastigar* challenged the constitutionality of statutory use immunity, asserting that because it offered less than absolute protection from future prosecution, use immunity was not coextensive with the privilege against self-incrimination and thus could not supplant it.[31] The Court rejected petitioners' claim, declaring that since a witness' invocation of the privilege against self-incrimination does not bar subsequent prosecution, transactional immunity actually offers a broader protection than does the fifth amendment.[32] Quoting *Murphy*, the Court stated that statutory use immunity " 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege.' "[33] The Court supported its conclusion with an analogy to the fifth amendment protection against coerced confessions, noting that while these confessions are inadmissible in a criminal trial, their existence does not negate the government's right to prosecute.[34]

B. Governmental Rights and Limitations

One could construe the Supreme Court's ruling in *Kastigar*, which constitutionally validated statutory use immunity, as a sig-

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with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

30. Kastigar v. United States, 406 U.S. 441, 460 (1972).

31. *Id.* at 448-51.

32. *Id.* at 453.

33. *Id.* at 458-59 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964)).

34. 406 U.S. at 461.

nificant victory for prosecutors. The Court's decision explicitly condones the process by which a prosecutor uses his immunity-granting power to compel needed testimony and at the same time maintains the government's right to prosecute the witness subsequently. This executive power, however, is subject to inherent limitations.[35] One limitation is the practical problem of preserving a case against an immunized witness when the witness testifies against another criminal target. As the witness reveals more information during his testimony, the burden on the government increases to show that the evidence it uses against the witness in a subsequent proceeding derives from a source independent of the witness' immunized statements. The prosecutor must edit his questions to elicit only the needed information without allowing the witness to incriminate himself beyond the point at which the government's criminal case against him will fail for lack of provably untainted evidence. Recognizing that witnesses intentionally will reveal information not sought by the prosecution in order to broaden their immunized status, the Supreme Court has held constitutional a use immunity statute that protects only those answers that are "responsive" to the questions posed by the prosecutor.[36]

A second limitation on the government's control of immunized materials stems from a court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to permit disclosure of immunized testimony for use in a civil proceeding. Under certain circumstances, if a witness *voluntarily* repeats his immunized testimony, a prosecutor can use that testimony against the witness in a criminal proceeding, having satisfied the *Kastigar* independent source requirement.[37] In *United States v. Kuehn*[38] the Seventh Circuit held that a federally immunized witness who voluntarily repeated his grand jury testimony[39] to a reporter created an independent source of incriminating evidence that the prosecution

35. For a detailed analysis of the prosecutorial problems posed by use immunity, see Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978) [hereinafter cited as Strachan].

36. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972) (New Jersey use immunity statute). The New Jersey Supreme Court explained that the purpose of the statutory responsiveness requirement was " 'to prevent a witness from seeking undue protection by volunteering what the state already knows or will likely come upon without the witness' aid. Fairly construed, the Statute protects the witness against answers and evidence he in good faith believed were demanded.' " *Id.* at 476 (quoting Zicarelli v. New Jersey State Comm'n of Investigation, 55 N.J. 249, 270-71, 261 A.2d 129, 140 (1970)).

37. *See supra* note 12.

38. 562 F.2d 427 (7th Cir. 1977).

39. In his testimony the witness admitted to bribing a judge. *Id.* at 430-32.

could use against him in a subsequent criminal case without infringing upon the witness' federal use immunity protections.[40] *Kuehn* suggests that a witness who is asked to repeat his testimony for use in a civil case should refuse to do so on grounds of self-incrimination. Otherwise the government could use his voluntary remarks later as an independent source of evidence against him in a criminal trial. To avoid losing valuable evidence, the civil litigant probably will move for disclosure of the recalcitrant witness' immunized testimony. The interests of the civil litigant may conflict with those of the prosecutor who has gathered additional evidence against the witness for use in a future criminal proceeding, since disclosure of the immunized testimony likely will increase the government's burden of proving that its new evidence is untainted.[41] Although the federal prosecutor rather than the court has the authority pursuant to the statute to initiate a grant of immunity to a grand jury witness,[42] a court subsequently may release the immunized testimony for use in a judicial proceeding. As a result, while the prosecutor has standing in federal court to object to a civil litigant's motion for the release of grand jury materials,[43] Rule 6(e) of

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40. *Id.*

41. *See* Strachan, *supra* note 35, at 822.

42. *See supra* note 29. The statute permits a court to compel a witness' testimony only upon request of the federal prosecutor when he discerns that the testimony is necessary to the public interest and that the witness has or will refuse to testify on the basis of his privilege against self-incrimination.

As interpreted by the federal courts, the judicial role in the immunization process is solely ministerial, consisting of ascertaining whether the government's request complies with the procedural and jurisdictional requirements set forth in the statute. As the Seventh Circuit stated:

> [T]he decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony . . . against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law. Therefore, the relative importance of particular testimony to federal law enforcement interests is a judgmental rather than a legal determination, one remaining wholly within the competence of appropriate executive officials. . . . Under no circumstances . . . may a federal court prescribe immunity on its own initiative, or determine whether application for an immunity order . . . is necessary, advisable, or reflective of the public interest, for the federal judiciary may not arrogate a prerogative specifically withheld by Congress.

In re Daley, 549 F.2d 469, 478-79 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).

43. *See* State v. Sarbaugh, 552 F.2d 768, 777 n.14 (7th Cir.), *cert. denied sub nom.* J.S. Simmons Co. v. Illinois, 434 U.S. 889 (1977); United States v. Armco Steel Corp., 458 F. Supp. 784, 788 (W.D. Mo. 1978) ("[T]he proper procedure . . . is to commence an independent civil action for disclosure of grand jury materials pursuant to Rule 6(e) . . . . The government should be made a party so that it may express its views and the criminal defendants should be served and permitted to intervene").

the Federal Rules of Criminal Procedure[44] delegates to the courts the ultimate decisionmaking power regarding disclosure. This judicial power constitutes a significant check on the prosecutor's control of immunized materials and subsequent ability to prosecute.

The Supreme Court's decision in *Douglas Oil Co. v. Petrol Stops Northwest*[45] illustrates both the breadth and the limits of judicial discretion permitted in the disclosure decision. In *Douglas* the Supreme Court addressed two issues regarding the release of immunized testimony pursuant to rule 6(e). First, the Court set forth judicial guidelines for determining whether disclosure should be made. Noting that public policy favors secrecy in grand jury matters, the Court stated:

> [I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, wit-

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44. FED. R. CRIM. P. 6(e) provides in part:

(1) Recording of proceedings. —All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. . . .

(2) General Rule of Secrecy. —A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(A) (ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided in these rules. . . .

(3) Exceptions

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the voto of any grand juror, may be made to —

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A) (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has heen made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

45. 441 U.S. 211 (1979).

> nesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.[46]

The Court outlined the requirements that a civil litigant must meet in requesting the release of grand jury testimony. The Court ruled that first the litigant must limit the request to the specific material needed for the civil suit. Second, the civil litigant must show that without disclosure, injustice might ensue in the civil proceeding. Last, the litigant must show that the "particularized need" for disclosure outweighs the need for secrecy.[47] In a footnote the Court cited situations in which a litigant intends to use a grand jury transcript at trial to impeach the witness, to refresh the witness' recollection, or to test the witness' credibility as examples of particularized needs that could outweigh the secrecy interest and thus justify judicial release of the transcripts.[48] The Court noted that as the need for secrecy declines, the burden on the litigant to justify release also diminishes.[49] Furthermore, the Court declared that a judge, in exercising the "substantial discretion"[50] required to make the decision whether to disclose, should consider not only the effect the disclosure will have on the particular case, but also the potential effect the decision will have upon the future functioning of grand juries.[51]

The second issue the *Douglas* Court addressed was whether the district court in charge of the civil litigation or the district court that held the grand jury materials in custody should rule on a civil litigant's motion for disclosure. The *Douglas* Court held that as a general rule the court that supervised the grand jury proceedings should determine disclosure since that court would be better qualified to evaluate the need for secrecy.[52] The *Douglas* opinion suggested, however, that courts should modify the rule when a litigant requests disclosure of grand jury material for use in a civil

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46. *Id.* at 219. The Court in this quotation paraphrased its earlier holding in United States v. Procter & Gamble Co., 356 U.S. 677 (1958). *See* 441 U.S. at 219 n.10.

47. 441 U.S. at 222.

48. *Id.* at 222 n.12. Again, the Court referred to its earlier holding in United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

49. 441 U.S. at 223.

50. *Id.*

51. *Id.* at 222.

52. *Id.* at 224-26.

case that will be tried in a different district since the court that had custody of the transcripts would not have access to first hand information by which to evaluate the need for the transcripts in the pending litigation.[53] *Douglas* proposed that, in this instance, the court with custody should make only an initial determination, based on the limited information available, whether disclosure might be appropriate in light of the need for secrecy.[54] If the circumstances might warrant disclosure, the *Douglas* Court suggested that the grand jury materials should be sent to the court conducting the civil litigation. The litigation court, having specific knowledge of the issues in the civil suit, would be able to balance the litigant's need for disclosure against the custody court's evaluation of the need for continued secrecy of grand jury materials and reach a final decision.[55] The *Douglas* decision does not address the particular problems associated with the release of immunized as opposed to nonimmunized grand jury testimony. Moreover, by delegating responsibility for the final disclosure decision to the court in charge of civil litigation, the *Douglas* decision creates a dangerous situation in which a single decisionmaker may both disclose immunized materials and evaluate the effect of this disclosure on a recalcitrant civil witness' claim of fifth amendment privilege.

The interplay among the *Kastigar, Douglas,* and *Kuehn* decisions predictably has fostered much confusion. While *Kastigar* warns the government against prosecuting an immunized witness with evidence derived from the witness' immunized testimony, *Kuehn* suggests that later voluntary repetition by the witness of his immunized remarks may dissipate any taint and thereby permit the government to use the repeated statements against the witness in a criminal proceeding. When a plaintiff sues a criminally prosecuted defendant on a related civil matter, the *Kuehn* holding operates to block meaningful discovery since a witness who testified against the defendant under a grant of immunity will want to preserve his right to refuse to repeat voluntarily his statements for civil use. Although *Douglas* allows a court to release a witness' immunized testimony upon a civil plaintiff's request, if the material is grand jury testimony it has not been subject to cross-examination, which hinders its introduction as substantive evidence. Typically, the civil plaintiff will attempt to depose the recalcitrant wit-

53. *Id.* at 226.
54. *Id.* at 230.
55. *Id.* at 230-31.

ness, using the released immunized materials as a source of questions. The plaintiff argues that under *Kastigar* the witness' responses will derive from an immunized source and hence will be inadmissible in a subsequent criminal proceeding against the witness. The witness, citing *Kuehn,* argues that if his responses are voluntary rather than coerced, his testimony will constitute a new, independent source of evidence that may be used against him in a criminal trial. The federal courts, seeking to resolve the dilemma, instead have clouded the issues, as the next part of this Recent Development shows.

III. THE FEDERAL DECISIONS

A. *Disclosure and Compulsion: The Eighth Circuit Holdings*

In re Starkey[56] was one of the first cases to suggest that judicial disclosure of grand jury transcripts could extend immunity to a recalcitrant witness in the civil context and thus abrogate his right to invoke the fifth amendment privilege.[57] In a federal grand jury investigation of antitrust violations in Arkansas' dairy industry, Starkey, an employee of one of the targeted defendants, testified under a grant of statutory use immunity.[58] All defendants

56. 600 F.2d 1043 (8th Cir. 1979).

57. *See also* United States v. Borden, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,177 (D. Ariz. 1976). In *Borden* the federal government immunized 14 grand jury witnesses who then testified against corporate and individual violators of federal antitrust laws, which govern the marketing of dairy products in Arizona. After the federal criminal proceeding terminated, private plaintiffs instituted a cause of action naming the State of Arizona as a party. The plaintiffs sought to depose the nonparty witnesses but the witnesses refused to repeat their grand jury testimony voluntarily, asserting their fifth amendment privilege. The private plaintiffs next tried to persuade the witnesses to testify by seeking waivers of prosecution from both the state and federal governments. The federal government cooperated but the state refused. Plaintiffs then moved to compel deposition testimony, but the district court, no doubt cognizant of Arizona's refusal to grant a waiver of prosecution, denied the motion. Private plaintiffs then sought release of the grand jury transcripts, arguing that such disclosure "would, in fact, extend the use immunity granted to the grand jury witnesses by the federal government, affording the witnesses more immunity from prosecution than originally intended." *Id.* at 70,341. The district court found that plaintiffs had shown a particularized need for disclosure and ordered the production of the transcripts. The court's decision did not elahorate upon the nature and degree of plaintiffs' particularized need, leaving one to infer that the potential blocking of civil discovery constituted a sufficient reason for disclosure. The court was unclear about how plaintiffs would use the transcripts in their civil suit. The court did specify that the transcripts could not be used for criminal prosecution of any witnesses and further charged that only the state attorney in charge of the civil suit could have access to them. The *Borden* court never stated explicitly that tbe release of immunized testimony would *negate* a witness' claim of privilege, although plaintiffs' characterization of disclosure as an extension of use immunity implied it.

58. 600 F.2d at 1045. Starkey was a sales manager for Dean Milk.

pleaded nolo contendere and either were fined or, in the case of individual violators, received jail sentences.[59] Subsequently, the State of Arkansas brought a civil suit against some of the indicted defendants. Starkey declined to repeat his grand jury statements at civil deposition on fifth amendment grounds.[60] The district court, Judge Eisele presiding, previously had granted Arkansas access to Starkey's grand jury testimony[61] and the attorney for Arkansas admitted that he based all deposition questions on that testimony.[62]The district court held that it could compel Starkey to answer despite his claim of privilege. Citing *Kastigar,* Judge Eisele stated, "Mr. Starkey's grand jury testimony 'permeates' the deposition questions. Therefore, the deposition testimony . . . would be . . . 'derived' from his grand jury testimony and cannot constitute an independent source upon which a criminal prosecution should be based."[63] On appeal the Eighth Circuit stated that Starkey did not have a right to invoke his fifth amendment privilege at a civil deposition unless by testifying he would be subjecting himself to criminal prosecution.[64] The court, however, did not find it necessary to assess the probability that the government later would bring a criminal proceeding against Starkey because the deposition testimony itself would be immunized.[65] Restating the district court's reasoning, the Eighth Circuit ruled that since the deposition questions obviously were dependent upon Starkey's immunized grand jury statements, the deposition testimony would be "tainted" and would not constitute an independent source of evidence for subsequent prosecution.[66] Although the court recognized that the federal prosecutor, not a party to the civil suit, could not confer a second grant of immunity upon the witness, and that the state had not waived future criminal prosecution, the court determined nevertheless that Starkey's tainted deposition would protect

59. *Id.*

60. *Id.*

61. The United States District Court for the Eastern District of Arkansas served as forum for both the criminal and civil proceedings. Judge Oren Harris presided over the criminal proceedings while Judge Eisele heard the civil suit and made the initial disclosure decision. *See* Little Rock School Dist. v. Borden, Inc., 1978-1 Trade Cas. (CCH) ¶ 62,020 (E.D. Ark. 1978).

62. 600 F.2d at 1046.

63. Little Rock School Dist. v. Borden, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,471, at 76,760 (E.D. Ark. 1979).

64. 600 F.2d at 1045.

65. *Id.* at 1046.

66. *Id.*

him.[67] Starkey argued that by compelling his testimony, the trial court in effect was granting him immunity and thus usurping the prosecutor's role. The Eighth Circuit denied Starkey's allegation, stating that the district court merely had made a proper judicial finding of what constituted a derived use of immunized testimony.[68] Starkey also argued that under *Kuehn,* his repeated testimony constituted a voluntary disclosure of immunized statements and thus could be used against him. The court distinguished *Kuehn* on grounds that the witness in *Kuehn* repeated his testimony *voluntarily*, whereas Starkey was compelled to repeat his statements and did so *involuntarily.*[69] The Eighth Circuit modified the district court's holding by requiring Starkey to answer only those questions that fell within the "same time, geographical and substantive framework as the grand jury testimony."[70] Although the Eighth Circuit did not address the merits of the district court's disclosure decision, it did note that Judge Eisele released immunized material because a breach of secrecy already had occurred through inadvertent disclosure of a federal government memorandum containing excerpts of the material, and through release of Starkey's immunized testimony to his defendant-employer.[71] In fact, in *Starkey* civil plaintiffs requested, and the district court released the witness' testimony to civil plaintiffs for impeachment/refreshment purposes *before* any fifth amendment objection became known.[72] Circumstances differed in *Little Rock School District v. Borden, Inc.,*[73] which addressed the same antitrust matter as *Starkey.*

In *Little Rock* the State of Arkansas, again acting as civil plaintiff, sought to depose several previously indicted witnesses[74] who had testified under a grant of federal use immunity during a second grand jury investigation[75] of price fixing in Arkansas' dairy

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67. *Id.*

68. *Id.* at 1047-48.

69. *Id.* at 1048.

70. *Id.*

71. *Id.* at 1045.

72. Little Rock School Dist. v. Borden, Inc., 1979-1 Trade Cas. (CCH) ¶ 62,471 at 76,760 n.1 (E.D. Ark. 1979) (referring to earlier disclosure decision, 1978-1 Trade Cas. (CCH) ¶ 62,020 (E.D. Ark. 1978).

73. 1979-2 Trade Cas. (CCH) ¶ 62,809 (E.D. Ark. 1979).

74. The witnesses were Simeon W. Lynn and Eugene F. Proctor.

75. Proctor, Lynn, and corporate defendants Borden, Inc., Coleman Dairy, Inc., and Dean Foods Products Co., pleaded nolo contendere to the first grand jury indictment and were convicted on December 27, 1977. 1979-2 Trade Cas. (CCH) ¶ 62,809, at 78,716.

industry.[76] The witnesses refused to respond to deposition questions, invoking their fifth amendment privilege. Plaintiff sought judicial disclosure of the witnesses' immunized testimony, asserting three reasons for a particularized need.[77] First, plaintiff argued that by asserting their fifth amendment claims, the witnesses had rendered themselves "unavailable" and thus, under Rule 804(b)(5) of the Federal Rules of Evidence, the grand jury transcripts were admissible as evidence in the civil suit. Second, plaintiff argued that by invoking the privilege, the witnesses had blocked all discovery and, therefore, disclosure was necessary to further the civil suit. Last, the State of Arkansas, relying on *Starkey,* contended that disclosure of the immunized materials was a prerequisite to an order compelling live deposition testimony, since a "*de facto* extension of use immunity . . . [occurs] when immunized grand jury testimony is disclosed for purposes of civil discovery [and] is itself a sufficient need for disclosure in the first place."[78]

Judge Eisele found that a secrecy interest did exist with respect to the witnesses' testimony, because no one had prior access to the grand jury transcripts.[79] He weighed plaintiff's three reasons for disclosure against this secrecy interest. The court reserved for trial the question of the use of the grand jury transcripts as substantive evidence. Judge Eisele found that the existence of the hearsay rule was not sufficient to justify granting access since admissibility alone did not constitute a showing of particularized need.[80] Judge Eisele responded to plaintiff's assertion that the witnesses were blocking all meaningful discovery by stating that the court found no evidence that plaintiffs would have to discontinue the civil case without disclosure.[81] Judge Eisele characterized plaintiff's third argument, that disclosure was necessary to compel live testimony, as "a fine example of circular reasoning."[82] Judge Eisele distinguished *Starkey* from the case at bar, noting that he based the disclosure decision in *Starkey* on "traditional reasons for breaching grand jury secrecy" and not on any attempt to compel deposition testimony. Furthermore, he stated:

> A de facto extension of a use immunity before the grand jury, by way of the

76. *Id.*
77. *Id.* at 78,716-17.
78. *Id.*
79. *Id.* at 78,717.
80. *Id.* at 78,718.
81. *Id.*
82. *Id.*

disclosure of immunized grand jury testimony, may be a consequence of otherwise proper disclosure for impeachment purposes in a civil case, with the further result that a deponent's fifth amendment objection is overcome, but the desire for such a de facto extension cannot of itself serve as a legitimate reason for the breach of the grand jury secrecy in the first place. . . .

Were the Court to hold [otherwise] then the Court would indeed be engaged in the direct creation of immunity, an improper function. The Court's position is, rather, that when immunized grand jury testimony is ordered disclosed on traditional grounds of compelling, particularized need (which does not, in any event, include general discovery purposes), the witness' fifth amendment privilege on deposition necessarily is abrogated as to those questions flowing directly from the prior, immunized grand jury testimony, which questions so framed are the inevitable concomitant of access to grand jury testimony for meaningful impeachment and refreshment of recollection purposes.[83]

The district court denied plaintiff's motion for disclosure of the immunized materials but found an independent basis on which to compel the witnesses' deposition testimony. Referring to a letter from the Department of Justice wbich stated that the federal government had no plans to prosecute the witnesses for any activities about which they had testified before the grand jury, the court saw no possibility that the witnesses would be subject to future prosecution. Judge Eisele characterized the letter as a "solemn promise" that operated as a de facto grant of transactional immunity binding the state as well as the federal government. Thus, he determined that the recalcitrant witnesses had no legitimate fifth amendment claims to assert and ordered them to testify at deposition.[84]

On appeal the Eighth Circuit[85] framed the issue as whether the witnesses would subject themselves to a danger of future criminal prosecution by testifying in the civil case.[86] Reviewing the Justice Department's letter, the court did not find that the federal government had made any promise not to prosecute. Rather, the court characterized the letter as a statement of intent made to the

83. *Id.*

84. *Id.* at 78,721-24. The district court's reasoning is arguably unsound. The Department of Justice, in its letter, expressly refused to confer a second grant of immunity upon the witnesses in the civil suit because this grant would promote private rather than governmental interests. Even if the federal government did *informally* confer transactional protection upon the witnesses, a state prosecutor nevertheless could use their civil testimony unless the witnesses received the informal grant specifically for civil proceeding purposes. A general grant of transactional immunity would not, under *Murphy*, protect tbe witnesses from use of deposition testimony in a state proceeding if the state prosecutor proved that tbe civil proceedings were a source of evidence independent of the grand jury statements to which the federal transactional protection attached.

85. Little Rock School Dist. v. Borden, Inc., 632 F.2d 700 (8th Cir. 1980).

86. *Id.* at 703.

lower court, not to the witnesses.[87] The Eighth Circuit, however, sustained on other grounds the district court's order compelling the witnesses' deposition testimony. Although no civil litigant had access to the witnesses' grand jury statements, the appellate court ruled that the witnesses' responses to deposition questions would cover matters contained in their immunized testimony. The witnesses' answers necessarily would derive from those remarks, and thus would be immunized.[88] The court incorporated the *Kuehn* decision into its analysis by declaring that if the witnesses responded *voluntarily* to the deposition questions, their answers would not derive from their prior immunized remarks. Since a court order would *compel* the witnesses to testify to matters covered in the grand jury proceedings, however, the repeated testimony would derive from the grand jury statements, which would taint it for future use in a criminal action.[89] Comparing *Little Rock* with *Starkey,* the Eighth Circuit ruled that a court can only compel the witnesses to answer questions within the "same time, geographical and substantive frame work" as the witnesses' immunized testimony. Further, the Eighth Circuit stated that if plaintiff, who was without access to the immunized materials, could not limit readily its questioning as directed, then the district court would resolve any disputes by an in camera examination of the transcripts.[90] In response to the hypothetical charge that its decision condoned judicial grants of immunity, the Eighth Circuit stated, "We . . . do no more than is done by the courts when they release previously secret grand jury proceedings, a function admittedly within our power."[91]

B. The Corrugated Container Cases

In re Corrugated Container Antitrust Litigation[92] differed from both *Starkey* and *Little Rock* in that civil plaintiffs in *Corrugated* were private rather than governmental parties. The *Corrugated* litigation has prompted much debate in the federal courts over the effect judicial disclosure of immunized testimony and the subsequent use of this testimony in a deposition should have on a

87. *Id.* at 704.
88. *Id.* at 705.
89. *Id.*
90. *Id.*
91. *Id.* at 706.
92. *In re* Corrugated Container Grand Jury and Corrugated Container Antitrust Criminal and Civil Litig., 1981-2 Trade Cas. (CCH) ¶ 64,339 (5th Cir. 1981).

witness' valid fifth amendment claim. The *Corrugated* litigation followed a federal grand jury investigation conducted in Texas of antitrust violations in the corrugated container industry.[93] The grand jury returned two indictments, charging both corporate and individual defendants with violations of the Sherman Act. Some defendants pleaded nolo contendere while others went to trial and were acquitted.[94] Many of the witness-employees who testified before the grand jury did so under a grant of federal use immunity. When private civil plaintiffs sought later to depose these witnesses, the witnesses invoked their fifth amendment privilege. Civil plaintiffs petitioned the District Court for the Southern District of Texas, Judge Singleton presiding,[95] to disclose the transcripts for discovery purposes.[96] Citing *Douglas*, Judge Singleton addressed the secrecy interests at stake and noted that many witnesses had voluntarily granted their employers access to their immunized statements during the criminal prosecution.[97] The court weighed this circumstance against civil plaintiffs' arguments for disclosure,[98] and without addressing whether the witnesses in fact had valid fifth amendment claims, concluded that, with respect to the transcripts to which defendants already had access, the need for disclosure outweighed the need for secrecy.[99] The court ruled that plaintiffs could use the transcripts at depositions and at trial to impeach, refresh the memory, and test the credibility of the witnesses. Judge Singleton, however, reserved for a later ruling the question of the transcripts' admissibility as substantive evidence.[100]

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93. *Id.* at 74,573.

94. *Id.* at 74,573-74.

95. Judge Singleton presided over the federal grand jury investigation of the corrugated container industry, the subsequent criminal trial of the corrugated container manufacturers, and the civil antitrust class actions and opt-out cases. *See In re* Corrugated Container Antitrust Litig., Appeal of Culy, 1981-2 Trade Cas. (CCH) ¶ 64,272, at 74,176 (D.C. Cir. 1981); *In re* Corrugated Container Antitrust Litig., Appeal of Conboy, 655 F.2d 748, 750 n.1, *rev'd en banc*, 661 F.2d 1145 (7th Cir. 1981).

96. *In re* Corrugated Container Antitrust Litig., 1980-1 Trade Cas. (CCH) ¶ 63,192 (S.D. Tex. 1980), *appeals dismissed, In re* Corrugated Container Grand Jury and Corrugated Container Antitrust Criminal and Civil Litig., 1981-2 Trade Cas. (CCH) ¶ 64,339 (5th Cir. 1981).

97. 1980-1 Trade Cas. (CCH) ¶ 63,192, at 77,921.

98. The plaintiffs asserted the following reasons for seeking disclosure: to reach a fair result in the civil suit; to provide plaintiffs and defendants with equal access to transcripts; and to counter the witnesses' "unjustified and wholesale invocation of their Fifth Amendment privilege against self-incrimination." 1980-1 Trade Cas. (CCH) ¶ 63,192, at 77,922.

99. *Id.*

100. *Id.*

Although upon release of the transcripts civil plaintiffs based all their civil deposition questions on the immunized materials, several witnesses again invoked their privilege and refused to answer. Judge Singleton found one recalcitrant witness, Phillip Fleischacker,[101] in civil contempt[102] when he refused to testify even after the Judge ruled that since the deposition questions derived from an immunized source, all responses were derivative and hence tainted for future criminal prosecution purposes.[103]

Fleischacker appealed the contempt order to the Second Circuit. Because Fleischacker did not challenge on appeal the propriety of the district court's initial disclosure of the immunized material, the appellate court did not rule on that issue.[104] In addressing Fleischacker's fifth amendment claim, the Second Circuit stated that the standard for determining the applicability of a privilege is whether "the claimant is confronted by substantial and real, . . . not merely trifling or imaginary, hazards of incrimination."[105] The court examined only whether a prosecutor could use Fleischacker's answers at deposition (and presumably at civil trial) against him in a subsequent criminal trial, finding it unnecessary to resolve the broader question of whether the government could prosecute the witness in the future for acts admitted to during his civil testimony.[106] Recalling *Kastigar,* the court recognized that in a criminal proceeding instituted after the defendant has received use immunity, the burden is on the government to show that all evidence originates from a source independent of the compelled testimony. The Second Circuit acknowledged that if a *prosecutor* uses immunized testimony to collect evidence against a defendant, the evidence clearly is tainted and cannot be used in the criminal case. The unresolved issue was whether at a subsequent criminal trial a prosecutor may use evidence that a *civil* litigant obtains from immunized materials against the witness.[107] Referring to the *Starkey*

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101. *In re* Corrugated Container Antitrust Litig., Appeal of Fleischacker, 644 F.2d 70 (2d Cir. 1981).

102. The court stayed the contempt order pending the outcome of Fleischacker's appeal. *Id.* at 73.

103. *Id.*

104. *Id.* at 73 n.3. The Fifth Circuit considered the propriety of the district court's disclosure decision. The appellate court dismissed the case, ruling that protective orders against further dissemination of the grand jury records mooted all appeals. *See In re* Corrugated Container Grand Jury and Corrugated Container Antitrust Criminal and Civil Litig., 1981-2 Trade Cas. (CCH) ¶ 64,339 (5th Cir. 1981).

105. 644 F.2d at 74.

106. *Id.* at 75.

107. *Id.* at 76.

decision, the Second Circuit found that the witness' responses to questions derived from immunized material are not available for criminal prosecutorial purposes.[108] Consequently, the witness may not invoke the fifth amendment privilege and refuse to answer deposition questions. In an interesting footnote the court explained more fully the basis of its holding, terming it unquestionable that in cases in which the questioning party has not actually had access to prior immunized testimony, courts cannot characterize that testimony as a source of questions and thereby find the witness' responses tainted. If the witness voluntarily responds to the questions, his answers *could* be used against him in a subsequent criminal trial. The Second Circuit declared, however, that if a questioning party does have access to prior immunized testimony, and the witness *voluntarily* responds, then despite the witness' failure to assert a privilege, courts should rule against admissibility of the response if the questions concerned the same subject matter as the immunized testimony.[109] Consistent with this analysis, the court, in another footnote, distinguished *Kuehn* from *Fleischacker* on two grounds. First, while the questioning reporter in *Kuehn* did not have access to the witness' prior immunized remarks, civil plaintiffs in *Fleischacker* did have prior access. Second, the *Kuehn* witness voluntarily answered the reporter's questions, whereas the court was compelling Fleischacker, over his fifth amendment objection, to respond to civil plaintiffs' questions. Thus, the Second Circuit concluded that if plaintiffs deposed Fleischacker, his remarks would be protected.[110]

In an effort to rebut the argument that the court itself was granting immunity, the Second Circuit characterized its holding as merely an assessment of the correctness of a witness' invocation of privilege.[111] In contrast, the court noted that de facto immunity does inhere in the rule which provides that if a district court errs in its finding on the existence of a privilege, an after-the-fact exclusionary rule operates to prohibit use of the wrongfully com-

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108. *Id.* at 77.

109. *Id.* at 79 n.14.

110. *Id.* at 76 n.11.

111. *Id.* at 78. The court stated:

> We are satisfied that compelling a witness to answer questions a second time that were previously answered under a grant of immunity does not result in an expansion of the original grant of immunity. Rather, such responses would come within the original statutory immunity grant because, by necessity, they would derive from the original immunized testimony. Thus, no *de facto* grant of immunity will have occurred.

Id.

pelled testimony against the witness. The Second Circuit specified that this rule is remedial in nature and cannot be used to support a finding that otherwise would violate a witness' fifth amendment right.[112]

The Second Circuit did concede that by compelling a witnesss to answer questions broader in scope than those originally asked during the grand jury proceedings, a court might jeopardize the government's future ability to prosecute the immunized witness.[113] In order to limit potential interference with prosecutorial objectives, the Second Circuit narrowed the district court's holding to compel Fleischacker to respond only to questions concerning "specific topics that actually were touched upon" by the questions asked during the witness' original immunized testimony.[114]

Starkey and *Fleischacker* notwithstanding, two circuits have refused to permit judicial disclosure and civil use of immunized materials to abrogate an otherwise valid fifth amendment claim. Consider the case of Charles J. Franey. Prior to the *Corrugated* criminal trial, Franey, an employee of one of the corporate defendants,[115] agreed to an interview with the Department of Justice, relying upon a letter from the Department promising that it would not use any information revealed by Franey against him in a criminal prosecution.[116] The government used a transcription of Franey's interview as evidence in the grand jury investigation of the corrugated container industry. Franey later testified during the criminal trial under a formal grant of statutory use immunity. In the civil suit plaintiffs based deposition questions on both immunized sources but Franey refused to respond, invoking his privilege against self-incrimination.[117] Judge Singleton held Franey in civil contempt, declaring that by compelling him to testify the court was not extending Franey's prior immunity grants but, rather, was merely making a judicial determination that his refusal to answer

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112. *Id.* at 78 n.13. In Adams v. Maryland, 347 U.S. 179, 181 (1954), Justice Black identified the constitutional source for the remedial rule. Speaking for the Court, he stated, "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute."

113. 644 F.2d at 79.

114. *Id.*

115. Franey was an employee of Mead Corporation.

116. *See In re* Corrugated Container Anti-trust Litig., Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980), *cert. denied,* 449 U.S. 1102 (1981).

117. 620 F.2d at 1088-89.

questions based on his fear of future prosecution was invalid.[118] Judge Singleton ruled that since all deposition questions either were verbatim remarks taken from the immunized material or were so closely related in subject matter that they clearly derived therefrom, Franey's responses would be inadmissible against him in any future prosecution. Moreover, the court noted:

> In the extremely unlikely event that Mr. Franey is ever prosecuted by any sovereignty for matters raised by his answers to these questions, the prosecutor will have the heavy burden of proving that his case was derived wholly from independent evidence, and that burden could not be met as to this deposition testimony.[119]

Unlike the witness in *Kuehn,* Franey's repetition of immunized testimony would not constitute a waiver of immunity because Franey had *asserted* his privilege. Thus, any testimony he gave thereafter would be pursuant to court order and hence, involuntary.[120]

The Fifth Circuit in *In re Corrugated Container Anti-trust Litigation, Appeal of Franey*[121] vacated the district court's order that held Franey in civil contempt. Like Fleischacker, Franey did not challenge the propriety of Judge Singleton's disclosure decision, so the Fifth Circuit did not address that issue.[122] The appellate court used a traditional mode of analysis that consisted of a two-part test to assess the validity of Franey's claim of privilege. The court first had to determine whether the witness' responses might tend to reveal his engagement in criminal activities. If no such incrimination were possible, the court would compel Franey to answer the deposition questions. If, however, the witness' answers might be incriminating, the court had to decide whether a risk (even a remote one) of criminal prosecution existed for acts that the witness admitted during the course of the testimony.[123] The court found that Franey's claim satisfied both prongs of the test since his responses to the deposition questions might reveal

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118. *In re* Corrugated Container Antitrust Litig., 1980-1 Trade Cas. (CCH) ¶ 63,279, at 78,430 (S.D. Tex. 1980).

119. *Id.*

120. *Id.*

121. 620 F.2d 1086 (5th Cir. 1980), *cert. denied,* 449 U.S. 1102 (1981).

122. *Id.* at 1089 n.2.

123. *Id.* at 1091-92. The Fifth Circuit developed this two-part test in reliance upon Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979), and *In re* Folding Carton Antitrust Litig., 609 F.2d 867 (7th Cir. 1979). Both cases articulated standards for district courts to use in assessing the validity of a witness' claim of privilege. The cases relied in part on the Supreme Court's decision in Hoffman v. United States, 341 U.S. 479 (1951).

his violation of both federal and state criminal antitrust laws, and no showing had been made that all applicable statutes of limitation had run.[124] The Fifth Circuit noted that a court could compel a witness to answer despite a valid fifth amendment claim only if a party to the civil action had authority to and did confer a separate grant of immunity upon the witness. Since neither the federal nor the state government was a party to the civil suit, this option was not available.[125] The Fifth Circuit found that the district court had misconstrued its role with respect to the federal immunity statute. The appellate court stated that, in addressing Franey's fifth amendment claim, Judge Singleton should have limited inquiries to whether the witness' responses would incriminate him and subject him to possible future prosecution. Prior grants of immunity, according to the Fifth Circuit, were not relevant to this question.[126] Concerning the district court's determination that Franey's responses necessarily would be inadmissible in a criminal prosecution, the Fifth Circuit ruled that a district court should make this ruling only when the witness has been indicted and a prosecutor seeks to use evidence against him in a criminal proceeding. Citing *Kastigar,* the court stated that since the government bears the burden of showing an absence of taint, a court should not decide the admissibility issue unless the prosecution is a party to the action before the court.[127]

The Fifth Circuit criticized the district court's holding on general policy grounds, noting that once a witness testifies under a grant of use immunity, the district court's rationale would permit innumerable subsequent abrogations of the witness' claim of privilege. The Fifth Circuit viewed with disfavor the foreseeable consequences of continued denial of a witness' fifth amendment claim.

> A court's role . . . would be to probe the mind of the questioner to ascertain that he is familiar with the substance of the immunized testimony. Even if the questioner were ignorant of the prior testimony, the court could ensure "taint," and thus compel the witness to answer, by seeing to it—*as the court did here*—that the questioner had a transcript of the immunized testimony on which to "base" his questions.[128]

The Fifth Circuit further warned that even if a district court's determination of taint clearly is incorrect, a court order compelling

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124. 620 F.2d at 1092.
125. *Id.* at 1092 & n.5.
126. *Id.* at 1093.
127. *Id.; see supra* text accompanying notes 29-30.
128. 620 F.2d at 1093 (emphasis added).

the witness to respond would immunize his testimony automatically because of the after-the-fact exclusionary rule, which prevents use of wrongly compelled testimony against a witness.[129] The Fifth Circuit foresaw a proliferation of tainted testimony that effectively would preclude the government from ever meeting its heavy burden of proving that the evidence it presented in a subsequent criminal prosecution of the witness derived from an independent source. The court concluded that the district court improperly had undermined the policies of the federal statute by usurping the prosecutor's power thereunder to initiate a grant of immunity.[130]

Judge Singleton's actions in the case of John Conboy prompted an equally condemning response from the Seventh Circuit. Like Phillip Fleischacker, Conboy testified before the federal grand jury investigating the corrugated container industry, pursuant to a grant of statutory use immunity.[131] Conboy refused to repeat his testimony during a civil deposition, even though plaintiffs were basing their questions on the witness' released immunized grand jury statements. Judge Singleton ordered Conboy to cooperate and upon his refusal held him in contempt of court.[132]

On appeal to the Seventh Circuit, the three judges who were sitting[133] affirmed the district court's ruling.[134] On rehearing en banc, however, the Seventh Circuit reversed the district court's holding.[135] Speaking for the majority, Judge Sprecher identified two fundamental issues. First, the court had to determine whether Conboy still was subject to prosecution for engaging in criminal

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129. *Id. See supra* notes 111-12 and accompanying text.

130. 620 F.2d at 1094-95.

131. *See In re* Corrugated Container Antitrust Litig., Appeal of Conboy, 655 F.2d 748, 749-50, *rev'd en banc*, 661 F.2d 1145 (7th Cir. 1981), *cert. granted sub nom.* Pillsbury Co. v. Conboy, 102 S. Ct. 998 (1982). Conboy was a former employee of Weyerhaeuser Company.

132. 655 F.2d at 750. The court stayed the contempt order pending appeal.

133. The three judges who heard the case were Chief Judge Cummings, Senior Circuit Judge Swygert, and Circuit Judge Sprecher. Judge Sprecher's lengthy dissent became the majority opinion in the case upon rehearing en banc.

134. Citing *Fleischacker*, *Starkey*, and *Little Rock*, the court held that Conboy's responses to questions derived from his immunized testimony could not be used against him in any criminal proceeding, and thus Conboy could not properly invoke his fifth amendment privilege. Refuting the notion that its holding constituted a judicial grant of de facto immunity, the court declared that it merely interpreted the scope of Conboy's previous grant of immunity. In a footnoto the court distinguished *Kuehn* from the instant case by stressing that the witness in *Kuehn* repeated testimony *voluntarily*, whereas the court sought to compel Conboy to do so. *Id.* at 749-54.

135. 661 F.2d 1145 (7th Cir. 1981), *cert. granted sub nom.* Pillsbury Co. v. Conboy, 102 S. Ct. 998 (1982).

activities to which his immunized testimony referred. Second, if Conboy was subject to criminal proceedings, the court had to decide whether Conboy's fifth amendment privilege could be abrogated upon a judicial determination that his answers at deposition would derive from an immunized source and, therefore, would not be usable against him in a criminal case.[136] Addressing the first issue, the Seventh Circuit found that although the federal statute of limitations for antitrust violations had run, Conboy still was subject to both a federal conspiracy charge and a state antitrust charge. Thus, irrespective of his previous immunity grant, Conboy did have a valid fifth amendment claim to assert.[137] The court began its discussion of the second issue by distinguishing between statutory use immunity and the remedial rule that allows exclusion after-the-fact of evidence that a court has compelled in violation of the fifth amendment. Judge Sprecher accused the district court of confusing the two concepts.[138] Referring to *Kastigar* and *Kuehn,* the Seventh Circuit declared that use immunity protects the source, not the substance of information. Thus, the witness who receives immunity in one proceeding cannot repeat the testimony elsewhere without incriminating himself and simultaneously creating an independent source of information that the government can use against him in a criminal prosecution.[139] The after-the-fact exclusionary rule, on the other hand, merely allows a court to declare retroactively that an erroneous ruling was made on a witness' fifth amendment claim and, consequently, that the prosecution cannot use the wrongfully compelled testimony against the witness in a criminal case. Criticizing *Fleischacker,* the court warned against improperly imputing taint to deposition responses when only deposition questions derive from immunized testimony. According to Judge Sprecher, John Conboy's deposition answers would derive from his own "*current,* independent memory of events" rather than from his prior testimony and would constitute a new, untainted source of evidence.[140] After attacking the district court, Judge Sprecher accused the Second Circuit of engaging in the practice of granting de facto immunity. Judge Sprecher argued that regardless of the correctness of the Second Circuit's determi-

136. *Id.* at 1149. Like the *Fleischacker* and *Franey* decisions, the propriety of the district court's initial disclosure decision was neither challenged nor discussed.

137. *Id.* at 1151-53.

138. *Id.* at 1154.

139. *Id.* at 1154-55.

140. *Id.* at 1155 (emphasis by the court).

nation of Fleischacker's privilege, the government could never use Fleischacker's compelled testimony against him in a criminal case. Although the Second Circuit *believed* its decision about taint was correct, Judge Sprecher argued that in reality the Second Circuit relied on its own remedial exclusionary power to evaluate the validity of Fleischacker's claim of privilege;[141] hence, the correctness of its determination of taint was irrelevant. The Second Circuit's *Fleischacker* decision was a " '*self-fulfilling prophecy that in substance can only be viewed as a grant of immunity. . . . outside the scope of judicial authority.*' "[142]

Judge Sprecher elaborated upon what he considered to be the fundamental error in the *Fleischacker* and *Conboy* holdings. The courts in these decisions premised the order compelling the witness' testimony on a judicial prediction that if future criminal prosecution ensued, the presiding court would find the witness' testimony from the civil suit tainted and hence inadmissible. Judge Sprecher declared that since no governmental prosecutor was party to the civil suit, no one could guarantee the future exclusion of the witness' deposition testimony. Judge Sprecher pointed out that if this judicial prediction did not bind all courts, then the witness would not receive the coextensive protection required to supplant the fifth amendment privilege. Conversely, if the prospective determination of taint was binding on all courts, then both the district court and the Second Circuit improperly transformed statutory use immunity into de facto judicial transactional immunity.[143] Judge Sprecher concluded that the district court's ruling relied on too

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141. *Id.* at 1156.

142. *Id.* (quoting Ellis v. United States, 416 F.2d 791, 796 (D.C. Cir. 1969)) (emphasis by the Seventh Circuit). In *Ellis* the district court did use the remedial rule as before-the-fact justification for overruling a recalcitrant witness' otherwise valid claim of privilege. The District of Columbia Circuit stated:

> We are not here concerned with a case where a judge has made a mistake in applying legal rules, like a case where he erroneously rules that a witness has waived his privilege. In the case before us the judge did not purport to deny that the witness had correctly presented a claim of privilege. He merely asserted that the witness would nevertheless be protected . . . against prosecution based on his testimony.

416 F.2d at 796.

143. 661 F.2d at 1157. Judge Sprecher also remarked on the impractical aspects of the district court's holding in *Conboy*, pointing out that if Conboy's responses upon deposition varied even slightly from his original immunized answers, he would face a possible waiver problem which in turn could provide leads to incriminating facts not touched upon in his original grand jury statements. In final remarks Judge Sprecher opined that compulsion of Conboy's testimony probably was unnecessary since Conboy had rendered himself "unavailable" by asserting his privilege and thus, Rule 804 of the Federal Rules of Evidence would operate to permit introduction of the grand jury transcript itself at trial. *Id.* at 1158.

many uncertainties concerning Conboy's risk of future criminal prosecution and subsequent use of civil deposition testimony against him. Consequently, the court reversed the lower court's decision.[144]

IV. ANALYSIS

A. Disclosure Considerations

Judge Eisele in *Little Rock* warned that courts should not disclose immunized materials to civil litigants as a means of overriding a witness' otherwise valid claim of fifth amendment privilege.[145] Judge Eisele correctly contended that when a civil plaintiff seeks immunized materials, courts must consider the merit of a witness' asserted claim before making a disclosure decision. In the *Corrugated* cases witnesses' invocations of privilege were the *motivating factor* behind the civil litigants' motion for release; yet, Judge Singleton, following the guidelines articulated by the Supreme Court in *Douglas*, made a disclosure decision without considering either that the materials to be released were immmized rather than nonimmunized, or the possible effect that disclosure might have on the witnesses' claim of privilege.[146] The court did not address the effect of disclosure upon a fifth amendment claim until after it had decided to release the immunized materials and a witness persisted in claiming a privilege.[147] This approach resulted in an unjustified bifurcation of what should be a single-stage process.

Certainly, a court should consider the secrecy interests outlined in the *Douglas* decision before it makes *any* disclosure decision. A decision like *Corrugated,* however, is nonsensical when it relies solely upon a plaintiff's showing, under *Douglas* criteria, of a "particularized need." Under *Douglas* a civil litigant's need for disclosure would outweigh the need for secrecy if the civil litigant could show that he required the grand jury testimony to impeach or to refresh the recollection of a witness.[148] If a witness, however, chooses to remain silent, a court cannot release his testimony for impeachment or refreshment purposes unless it determines first that he has asserted invalidly his claim of fifth amendment

144. *Id.* at 1159.

145. *See supra* text accompanying notes 81-83.

146. *See supra* notes 92-100 and accompanying text.

147. *See supra* text accompanying notes 101-03, 115-20, & 131-32.

148. Indeed, the district court released the transcripts in the *Corrugated* case for this specific purpose. *See supra* text accompanying notes 47-48.

privilege.[149]

Analysis of the problem from a prosecutorial perspective is instructive. If the recalcitrant witness is subject to possible future prosecution, a prosecutor necessarily maintains the right to institute criminal proceedings against him. The preservation of this right depends directly upon the extent to which others may use the witness' immunized testimony.[150] Indeed, as the federal courts have suggested, release of immunized materials to a civil litigant always raises a potential *Kastigar* issue of whether derivation from a protected source of certain evidence in the civil case taints that evidence for subsequent prosecutorial purposes. If a potential for taint exists, then a prosecutor seeking to preserve a criminal case against a witness has an interest in preventing judicial disclosure of the witness' immunized testimony for use in civil litigation. This Recent Development submits that when a witness' claim of privilege against self-incrimination prompts a civil plaintiff to move for disclosure of the witness' immunized grand jury testimony, the court, in addition to evaluating the traditional secrecy interests outlined in *Douglas,* must weigh the prosecutorial interest in continued secrecy of immunized materials[151] against the civil litigant's need for their release. This balancing necessarily requires that the court determine whether the recalcitrant witness has asserted validly a privilege, that is, whether the witness is subject to prosecution for criminal acts about which the civil plaintiffs wish him to testify.[152] If the witness' fifth amendment claim is valid, then the government possesses an interest in the continued secrecy of the immunized testimony. The court next must evaluate whether disclosure to civil plaintiffs necessarily will interfere with that prosecutorial interest by increasing substantially the government's

149. Disclosure of nonimmunized grand jury testimony for impeachment/refreshment purposes despite a witness' fifth amendment assertion appears equally nonsensical. The practical consequences, however, would be less serious since a court subsequently would not be able to use the fact of disclosure or the fact of the civil litigant's use of the grand jury testimony to justify overruling the witness' claim.

150. *See* Strachan, *supra* note 35, at 822.

> [I]n any case in which immunized disclosures are made in the course of a public proceeding or otherwise made public, perhaps through grand jury "leaks," it will be difficult to convince courts that all persons charged with building the case and prosecuting the witness have managed to avoid knowledge of or access to the immunized testimony.

Id. (citations omitted).

151. The author contends that the prosecutor's secrecy interest in *immunized* grand jury materials is separate and distinct from the other secrecy interests outlined in the *Douglas* opinion. *See supra* text accompanying notes 45-46.

152. *See supra* notes 15 & 122-23 and accompanying text.

burden of proving in a future criminal prosecution of the witness that all evidence derives from an independent source. A court should avoid disclosure when interference is inevitable.

As the Supreme Court noted in *Douglas*, a plaintiff's burden of justifying the release of the immunized grand jury testimony diminishes as the need for secrecy declines.[153] For example, if a state or federal attorney is a party to a civil suit and moves for disclosure, the secrecy interest is reduced, since by seeking to make use of a protected source of evidence, the government consents in effect to any tainting of the evidence in the civil suit.[154] This may operate as a second grant of use immunity, albeit informal, binding upon other jurisdictions. Therefore, given facts similar to those in *Starkey* and *Little Rock*, and absent any other secrecy interests,[155] a court justifiably might discount a witness' fifth amendment claim and release his immunized testimony for impeachment/refreshment purposes in response to a government attorney's motion for disclosure. A court, however, should base that decision on the government's identity as the civil movant rather than on any judicial predictions of taint.

Prior disclosure of immunized statements may diminish the

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153. *See supra* text accompanying notes 48-49.

154. This notion derives from the Seventh Circuit's holding in Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975). On the basis of Patrick's immunized grand jury testimony, the government brought suit against him for unpaid taxes on his gambling receipts. Patrick argued that by forcing him to institute a refund suit to challenge the government's action against him, the government was infringing upon his fifth amendment privilege. The court rejected this argument, stating:

> [O]n the facts alleged by Patrick, such later testimony would be elicited only because the government could use the grand jury testimony as a basis for the assessment. Thus, any testimony elicited in the tax proceeding would be "information . . . indirectly derived from . . . testimony" compelled under the original immunity grant and thus could not be used against Patrick in any criminal proceeding. Such derivative use immunity, of course, would also prevent state prosecuting authorities from using the testimony.

Id. at 1120 (citations omitted) (quoting Kastigar v. United States, 406 U.S. 441, 448-49 (1972)). The Fifth Circuit in *Franey* made a similar observation when it noted that although it disagreed with the Eighth Circuit's rationale in *Starkey*, the result in *Starkey* might be correct because the civil plaintiff was a state attorney who admitted that the compelled testimony would be inadmissible against the witness in a future criminal prosecution. The *Franey* court, however, did point out that the state was Starkey's only potential prosecutor. Assuming that threats to other secrecy interests do not exist, this author would condone allowing state attorney access to federal grand jury material even if the possibility of federal prosecution of the witness still exists, since a state could formally extend immunity to a witness in exchange for his civil testimony. *See* 620 F.2d at 1092-93.

155. Naturally, a governmental entity's motion for disclosure does not in itself justify release if release might threaten the general secrecy interests outlined in *Douglas*. *See supra* text accompanying note 46.

government's secrecy interest. As *Starkey* and *Corrugated* illustrate,[156] a corporate defendant occasionally will have had access, through court order or otherwise, to the immunized grand jury testimony of an employee-witness during the criminal prosecution of a case. Conceivably, if this corporate defendant is later sued on the related civil matter, a court may impute knowledge of the substance of the witness' grand jury testimony to the defendant. This could taint the civil proceeding as a source of evidence usable against the witness in a criminal trial. Disclosure in this instance, therefore, would be permissible, even if the civil litigant is a private party, because any potential interference with a prosecutor's rights against the immunized witness already has occurred. Thus, judicial release of the witness' immunized statements to private civil plaintiffs would not necessarily increase the government's burden in a subsequent criminal prosecution of the witness. A substantial difference exists, however, between releasing immunized testimony to private civil plaintiffs for discovery purposes in order to equalize access between the parties, and releasing it for the *specific* purposes of impeaching and refreshing a witness' memory as Judge Singleton did, despite the witness' assertion of a claim of privilege. The former results in the mere possibility of tainted evidence in the civil suit, whereas the latter contemplates inevitable taint by nullification of the witness' privilege and results in conferral of a second grant of immunity.

In the former case, assuming that a court does not order the witness to testify in the civil case and that all parties in the suit have had access to the witness' immunized statements, if a prosecutor attempts to introduce evidence from the civil suit in a later criminal proceeding against the witness, then the criminal court *might* find the evidence tainted, and thus inadmissible. In that situation, until the prosecutor proceeds against the witness and the

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156. *See supra* text accompanying notes 71-72 & 95-97. In *Starkey* the court granted the defendant corporation access pursuant to Rule 16 of the Federal Rules of Criminal Procedure, which provides in part:

> Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

FED. R. CRIM. P. 16(a)(1)(A). *See* Little Rock School Dist. v. Borden, 1978-1 Trade Cas. (CCH) ¶ 62,020, at 74,375 (E.D. Ark. 1978).

criminal court rules on the issue, only a possibility exists that judicial release of the immunized testimony will create tainted evidence in the criminal suit. When, however, the court in charge of the civil suit *compels* the witness to respond and bases the decision on a prediction of the future inadmissibility of that testimony in a criminal proceeding, the civil court usurps the criminal court's role. Because of the after-the-fact exclusionary rule, the civil court's ruling on the witness' privilege, regardless of its correctness, protects the witness from use of the judicially compelled testimony against him in a later criminal proceeding. In this situation, the certainty of taint, and hence immunity, *accrues during the civil suit.*

Perhaps in the *Corrugated* cases Judge Singleton believed that defendants' prior access to the testimony served to taint all evidence in the civil proceeding, thereby negating the witnesses' fifth amendment claims even before the plaintiffs moved for disclosure. To equate litigant access to immunized testimony with automatic taint, however, encourages judicial abuse of the disclosure power since a court can always provide access through disclosure and thus extend immunity whenever circumstances in the civil proceeding require it. Furthermore, the *Kuehn* decision, which held that the voluntariness of a witness' responses can dissipate taint, belies the notion that access alone guarantees immunity.

A court may disclose immunized materials to private litigants for the limited purpose of equalizing access to testimony. Policy and logic, however, require that if impeachment and/or refreshment of memory are the *only* purposes for which a private civil litigant seeks disclosure,[157] then, a witness' valid assertion of a

157. In most cases in which judicial disclosure of grand jury materials is made, the articulated purposes are impeachment and/or refreshment of a witness' memory. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Dennis v. United States, 384 U.S. 855 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); State v. Sarbaugh, 552 F.2d 768 (7th Cir.), *cert. denied sub nom.* J.L. Simmons Co. v. Illinois, 434 U.S. 889 (1977); Little Rock School Dist. v. Borden, Inc., 1978-1 Trade Cas. (CCH) ¶ 62,020 (E.D. Ark. 1978). An exception is Judge Singleton's most recent disclosure decision in *In re* Corrugated Container Antitrust Litig., 1981-2 Trade Cas. (CCH) ¶ 64,287 (S.D. Tex. 1981). In that case the corporate defendant in the civil suit was MacMillan Bloedel, a company that was never criminally indicted. Several of its employees did testify before the grand jury under a grant of immunity and two employees later testified at the criminal trial of *Corrugated* defendants. At a subsequent civil deposition MacMillan Bloedel's employees refused to answer any questions by invoking their fifth amendment privilege. Even though MacMillan Bloedel never had access to the grand jury transcripts of its employees, Judge Singleton found that the civil plaintiffs had shown a "compelling need" for the transcripts that outweighed any secrecy interests. The court stated, "the Fifth Amendment wall makes it impossible to develop facts of the case either through MacMillan Bloedel's own employees or through other members of the

privilege, made prior to a court's ruling on the disclosure motion, must preclude judicial release of the witness' testimony regardless of earlier disclosure to other parties in the civil litigation.

B. *Prospective Taint Determinations*

Circumstances may require a court to evaluate a witness' claim of privilege *after* disclosure of his immunized testimony already has occurred.[158] In *Little Rock* Judge Eisele argued that while abrogation of the fifth amendment privilege could not serve as before-the-fact justification for civil disclosure, a judicial finding of abrogation might be justified if disclosure were a *fait accompli.*[159] The court's distinction has proved to be without merit since the potential for judicial abuse is the same in both situations. An analysis of the Second Circuit's holding in *Fleischacker* and the Eighth Circuit's holding in *Starkey*[160] supports this conclusion.

The Second Circuit noted in *Fleischacker* that the voluntary repetition of immunized testimony does not preclude necessarily the testimony's subsequent exclusion on grounds of taint if the questioning party has had prior access to the witness' remarks. In that event, however, since the witness does not assert his privilege, the court presiding over the civil case has no occasion to rule on the question of taint. Only if and when the government seeks to introduce evidence from the civil suit in a later criminal prosecution of the witness, will a court have an opportunity to decide the taint issue. Until then, litigant access to a witness' immunized statements creates only a likelihood that the evidence will be inadmissible against the witness in criminal court.[161] When, however, the witness *does* assert his privilege in the civil suit, the courts have found it proper to address the issue of taint at that time. Moreover, the Second[162] and Eighth[163] Circuits have construed

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industry who may have had dealings with MacMillan Bloedel." *Id.* at 74,301; *see also* Sugar Antitrust Litig., 1977-2 Trade Cas. (CCH) ¶ 61,808 (N.D. Cal. 1977); United States v. Borden, Inc., 1976-2 Trade Cas. (CCH) ¶ 61,177 (D. Ariz. 1976).

158. *See supra* text accompanying notes 71-72.

159. *See supra* text accompanying note 83.

160. As stated previously, the results in the Eighth Circuit's *Starkey* and *Little Rock* decisions are justifiable on the ground that the civil plaintiff was a governmental entity rather than a private litigant. *See supra* note 154 and accompanying text. This Recent Development, however, focuses on the Eighth Circuit's reasoning in both cases and attempts to assess the broader implications of these holdings. Certainly, the *Fleischacker* decision illustrates that the Eighth Circuit rationale is being applied in civil suits even when a government attorney is not a party.

161. *See supra* text accompanying note 109.

162. *See supra* text accompanying note 110.

163. *See supra* text accompanying notes 69 & 89.

Kuehn to enable them to predict taint with what they believe is certainty. As a result, they have abandoned as unnecessary any consideration of otherwise valid claims of privilege. This Recent Development views the new approach as an invalid substitute for traditional fifth amendment analysis.

Under ordinary circumstances, a witness who refuses to answer on grounds of self-incrimination triggers judicial consideration of the validity of his claim. A court determines whether the witness' statements would be incriminating and whether the act of testifying would subject the witness to a danger of future prosecution.[164] The outcome of the court's examination is dependent only on its findings with respect to those two issues. If the court's ruling on the witness' privilege is incorrect, the witness' initial refusal will protect him against incriminating use of his compelled testimony by triggering the remedial exclusionary rule.[165]

By contrast, once a court has granted civil litigants access to immunized grand jury testimony and a witness invokes his privilege, the judicial practice, as articulated by the Second and Eighth Circuits, is to ignore the two standard fifth amendment issues.[166] Instead, courts employ the following reasoning: in questioning the witness civil plaintiffs intend to use immunized material that *may* or *may not* taint the evidence for future prosecutorial purposes, depending to a large extent upon whether the witness' responses are compelled or voluntary. Since the witness in *Kuehn* created an independent source of evidence by voluntarily repeating the substance of his immunized testimony to a person without access to that testimony, if the court *compels* the witness to respond to questions posed by a party *with* access to his immunized testimony, the presumption of taint is unquestionable, rendering the civil testimony unusable against the witness in any criminal proceeding. According to *Kastigar,* use immunity offers protection coextensive with a fifth amendment claim; therefore, the court can override the recalcitrant witness' claim of privilege and compel him to testify without violating his fifth amendment rights.[167]

The inherent fallacy in this analytical process goes beyond the possibility, suggested by Judge Sprecher of the Seventh Circuit,

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164. *See supra* notes 15 & 123 and accompanying text.
165. *See supra* text accompanying notes 111-12.
166. *See supra* text accompanying notes 64-65 & 105-06.
167. *See supra* text accompanying notes 66-69, 107-08, & 110.

that the judicial prediction could be wrong.[168] A court is always subject to error in ruling on the existence of a privilege. For this reason, the remedial exclusionary rule exists to protect a witness who invokes the fifth amendment. The courts are doing more, however, than making predictions. If a court were to rule that a witness' responses to questions derived from his own immunized testimony would *always* be tainted and, therefore, the witness could not claim a privilege, then the court would be making an error in judgment about what constitutes derivative use.[169] When, however, a court tells a witness that his responses necessarily will be tainted *because* the court will compel them over the witness' objection, the court is conditioning the nullification of the witness' right on its own judicial act. In short, an abuse of judicial power occurs that is of no less magnitude than when a court *discloses* immunized testimony in order to create tainted evidence.

Courts are being disingenuous when they characterize their actions as mere evaluations of the scope of derivative use.[170] As the Fifth Circuit noted in *Franey,* proper determination of derivative use occurs only when the government is in fact bringing a criminal prosecution against the previously immunized witness.[171] The court then examines the two existing pieces of evidence and decides whether the evidence the government seeks to introduce derives from the immunized source and hence is inadmissible in the criminal case. The court neither creates evidence nor negates the witness' claimed privilege, and interference with prosecutorial interests occurs only in the exclusion of a particular piece of evidence. The judicial ruling does not extend the scope of the original immunity grant, which would increase the government's burden of proving that the next piece of evidence it introduces derives from an independent source. By contrast, the court in a civil action examines one immunized source and decides that by compelling testimony a second tainted source of evidence will result, which will negate the witness' claimed privilege. Thus the court engages directly in the *creation* of immunity, not merely in the determina-

168. *See supra* text accompanying note 143.

169. Certainly we would criticize the court for allowing a mere possibility of taint to override a witness' otherwise valid fifth amendment privilege. Judge Sprecher's criticism of the *Fleischacker* decision focused essentially on his disagreement with the Second Circuit's notion of what constitutes derivative use. *See supra* text accompanying notes 139-40.

170. *See supra* text accompanying note 68.

171. *See supra* text accompanying note 127.

tion of derivative use.[172]

In an effort to lessen interference with prosecutorial objectives, the Second and Eighth Circuits have limited the permissible substantive scope of deposition questions posed by civil litigants in order to prevent the responding witness from revealing new, incriminating facts.[173] This remedial measure, however, fails to recognize that the government's burden of proving an independent source of evidence is a function not only of the substantive content of the evidence, but also of the number of and public access to the immunized sources.[174] Thus, judicial compulsion of a witness to repeat his immunized testimony on grounds that it will be automatically tainted inevitably conflicts with an executive function. When the civil plaintiff is itself a governmental entity, as in *Starkey*, the interference with prosecutorial objectives decreases. To apply the *Starkey* analysis to cases such as *Fleischacker*, however, in which the litigants are private parties, results in the improper exercise of judicial power. If, as *Starkey* suggests, one may equate "derivative use" of immunized testimony with automatic taint, and if courts may ensure "derivative use" by exercising disclosure and compulsion powers, then a witness never will be able to assert a fifth

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172. Title 18 of the United States Code, § 6005, which permits congressional grants of immunity, recognizes that grants of immunity increase the prosecutor's burden of proving that evidence is derived legitimately. Section 6005 provides that the Attorney General must receive notice of the intent to request an order for immunization 10 days prior to the date of the actual request for an order, and upon the prosecutor's request, the district court can defer issuance of an order for 20 days. The District of Columbia Circuit has construed the purpose of this notice provision as follows:

> [T]he . . . Congress did recognize the seriousness of immunization against punishment for crime and the potential adverse effect the conferring of immunity might have on criminal law enforcement. It was with the intent of minimizing any prejudicial impact on present and future law enforcement plans that the provision requiring notice of intended immunization was adopted. It was expected that timely notice would allow the Attorney General to assess the effect of a grant of immunity on investigations or prosecutions and then, should he feel it necessary, communicate with the concerned House of Congress or committee to "lobby" for a modification of immunity plans. . . . It was also anticipated that a period of time . . . would permit the Attorney General to "insulate from the immunity grant any incriminating data already in his files prior to the witness' testimony." . . . Thus, though he is accorded no right to be heard in court in opposition to an immunity request, the Attorney General is given some protection in his role as the administrator of Federal law enforcement by the notice requirement of § 6005.

In re United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1277-78 (D.C. Cir. 1973). For examples of how prosecutors have tried to "insulate" independently derived evidence, see Strachan, *supra* note 35, at 812 n.97, 814 n.107, & 822 n.137.

173. *See supra* text accompanying notes 70, 90, & 114.

174. *See* Strachan, *supra* note 35, at 822.

amendment privilege in a civil suit. The *Fleischacker* decision encourages courts to expedite civil discovery for private plaintiffs by annihilating the government's statutorily protected interest in preserving its right to prosecute the immunized witness.

The disclosure guidelines that this Recent Development proposes would serve as a partial check on unfettered judicial discretion since consideration of asserted claims, and hence of prosecutorial secrecy interests, would precede release of immunized grand jury testimony. If courts, however, apply the Eighth Circuit's analysis in *Little Rock*[175] to purely private civil suits, then simply by compelling a witness to respond over his fifth amendment objection, courts will be able to create tainted evidence and thus extend grants of immunity even absent prior judicial disclosure. In fact, the *Little Rock* court characterized compulsion as an alternative method of accomplishing the same results obtained by judicial disclosure of immunized materials, implying that a court faced with *en masse* invocations of privilege can expedite progress of the civil suit *either* by releasing the witnesses' immunized grand jury testimony *or* by compelling witnesses to respond to questions about the substance of their immunized testimony. To permit civil plaintiffs' needs to override a witness' valid fifth amendment claim in this manner is to allow courts to usurp the executive function, contravening the letter and spirit of the federal use immunity statute.[176] This Recent Development recommends that courts abandon the practice of making prospective taint determinations and return to traditional modes of evaluating witnesses' claims of privilege. Prior disclosure of immunized materials may justify using them for substantive[177] or other purposes in the civil suit. When the civil

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175. *See supra* text accompanying notes 88-89.

176. The author recognizes that judicial grants of immunity in the criminal trial context might be justifiable on due process grounds. When a defendant seeks to compel testimony of a witness who can provide exculpatory evidence, but the witness asserts his fifth amendment privilege and the prosecutor refuses to grant the witness use immunity, the defendant's due process rights may require judicial intervention to compel the needed testimony, despite possible interference with executive functions. The author would argue, though, that the needs of a civil plaintiff seeking live testimony are not comparable to those of a defendant in a criminal case. Thus, civil litigation does not warrant judicial intervention. *See* Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); Note, *Witness for the Defense: A Right to Immunity*, 34 VAND. L. REV. 1665 (1981).

177. For a discussion of the use of immunized grand jury testimony as substantive evidence under Rule 804(b)(5) of the Federal Rules of Evidence, see United States v. Thevis, 84 F.R.D. 57 (N.D. Ga. 1979). In *Thevis* the government offered immunized grand jury testimony of a dead declarant for use as substantive evidence in a criminal trial. The court ruled that the testimony exhibited the requisite circumstantial guarantees of trustworthiness because untrutbful testimony would bave subjected the immunized declarant to per-

plaintiff is a governmental entity, plaintiff's concession of derivative use may be sufficient to override the witness' privilege and allow the immunized material to be used as an impeachment/refreshment tool. Courts, however, must not assume that the judicial power to extend access to immunized materials is equivalent to the power to extend immunity itself.

V. CONCLUSION

Commenting upon the effect that a witness' invocation of the privilege against self-incrimination has upon the civil discovery process, one judge declared:

> I find this whole defense tactic of trying to hide in a civil case behind a nonexistent threat of criminal prosecution, to be one of the most nauseous developments in antitrust and in complex litigation cases . . . . And, I don't find any derogation of the Fifth Amendment in saying that the Fifth Amendment wasn't devised to permit people to hide information in civil lawsuits.[178]

Certainly, his sentiments are understandable; yet, a court that is inconvenienced by a witness who previously has received statutory use immunity and now refuses to repeat his immunized remarks during civil deposition, should blame use immunity itself rather than the witness. By his recalcitrance the witness does not hide

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jury charges. *See supra* note 29; *see also* Strachan, *supra* note 35, at 824 (immunized testimony generally very reliable). The court next addressed the sixth amendment question and concluded that the right to confrontation would preclude introduction of the evidence unless defendants had waived their confrontation right. Because evidence existed that implicated defendants in the murder of the unavailable declarant, however, the court ruled that waiver actually had occurred and thus allowed the testimony as substantive evidence. While the sixth amendment right of confrontation does not arise in the civil context, the rules of evidence do preserve a party's right to cross-examine witnesses against him in most circumstances. When a civil defendant has pleaded nolo contendere to a criminal indictment, a court might infer that the defendant has waived the right to cross-examine the testimony offered during a grand jury investigation. Nevertheless, one can make a viable argument against the trustworthiness of immunized grand jury testimony in the civil context under certain circumstances. As previously noted, the prosecutor who questions the immunized witness before the grand jury has two purposes in mind. First, the prosecutor wants to elicit certain information against the targeted defendant, and second, the prosecutor wants to limit the witness' responses to avoid jeopardizing any future prosecution of the witness. *See supra* text accompanying notes 35-36. Thus, the prosecutor often asks leading questions and cuts off responses that go beyond the intended scope of the interrogation. These methods may lead to biased testimony, not because the witness has a motive to lie, although perjury is not unknown, but because the prosecutor has only a limited interest in presenting to the grand jury the witness' statements in their entirety. The missing interstitial details are exactly what cross-examination would elicit. In its absence, the trustworthiness of immunized grand jury testimony may not be sufficient to overcome the civil defendant's objections.

178. *In re* Corrugated Container Antitrust Litig., 1981-2 Trade Cas. (CCH) ¶ 64,287, at 74,300 (S.D. Tex. 1981) (Judge Singleton, quoting Judge Will's comments about the *Folding Carton* antitrust litigation).

behind a nonexistent privilege; rather, he seeks to preserve the limited protection afforded him by the federal statute under which the government originally compelled his immunized statements. No reason exists to expect the witness, still subject to possible future prosecution, to provide evidence voluntarily for the use of a civil litigant without benefit of a second governmentally conferred grant of immunity or its equivalent. The current judicial trend of promoting civil discovery through disclosure and compulsion signifies primarily a tacit judicial preference for the protections afforded the witness by transactional rather than use immunity. But judicial preference alone should not operate to transform one type of immunity into another.

ELIZABETH JANE SCHWARTZ