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# Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards

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# NOTES

## Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards

### I. INTRODUCTION

The issue of the degree of immunity from prosecution that must be afforded a witness in order to supplant temporarily his fifth amendment privilege against self-incrimination and thus justify compelling him to testify concerning his own criminal activity has become the subject of no little judicial controversy.

A primary focus of any inquiry into the immunity question must necessarily be upon the unresolved conflict between the testimonial and transactional immunity approaches. Transactional immunity, on one hand, affords a witness absolute immunity from prosecution for the offense to which the testimony relates, but testimonial immunity, on the other hand, provides protection only from the use of the testimony itself or any evidence derived directly or indirectly from it—use and fruits immunity. Until the Supreme Court's recent decision in *United States v. Kastigar*,[1] conflict over the immunity concept was best manifested by the attempts to formulate an appropriate characterization of the relationship between *Counselman v. Hitchcock*,[2] which represents the transactional immunity approach, and *Murphy v. Waterfront Commissioner of New York Harbor*,[3] representing a departure from the transactional immunity standard toward a testimonial immunity approach. The Supreme Court in *Kastigar* attempted to reconcile the apparent disparity between *Counselman* and *Murphy* by restricting the more expansive *Counselman* standard. This Note will explore initially the scope and purpose of the privilege against self-incrimination, attempt to define the concept of immunity in order to discuss the manifold problems surrounding its operation in relation to the fifth amendment, and analyze the interrelationship of the *Counselman* and *Murphy* decisions as well as the Supreme Court's recent decision in *United States v. Kastigar*.

### II. PURPOSE OF THE FIFTH AMENDMENT AND OPERATION OF IMMUNITY LEGISLATION

#### *A. Immunity Defined in Relation to the Fifth Amendment*

The fifth amendment guarantees that no citizen shall be forced to

1. 406 U.S. 441 (1972).
2. 142 U.S. 547 (1892).
3. 378 U.S. 52 (1964).

offer proof of his own guilt.[4] Although a burden upon the administration of criminal law, the fifth amendment prohibition against self-incrimination constitutes an effective safeguard against many potential abuses of the criminal justice system. The primary purpose of the clause is to forestall implementation of an inquisitorial form of justice that would sanction the sort of reprehensible acts that occurred in England during the period of the long struggle between Parliament and the throne. The character of the privilege against self-incrimination is best illustrated by its corollary principles that no witness can be compelled to utter self-incriminating statements, and that an accused may refuse to testify altogether.[5] Confronted with this categorical limitation upon its investigatory power, society may be effectively foreclosed from obtaining testimony essential to the prosecution of a criminal defendant and any of his accomplices. Under a grant of immunity, however, because the witness is not subject to criminal liability, he cannot invoke the fifth amendment privilege against self-incrimination and his testimony therefore may be compelled under penalty of contempt. The granting of immunity thus contemplates a balancing process in which the need for the witness's testimony is weighed against the relative danger to societal interests that can be expected to result from allowing a criminal to go free.

Though clearly broad, the scope of the fifth amendment privilege is not without some limitations. The privilege can be claimed in criminal, civil, administrative or judicial investigations, and in judicial or administrative adjudicatory proceedings.[6] Only the witness himself may claim the privilege and then only for his own protection.[7] The privilege belongs only to natural persons; thus corporations and other abstract

4. "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

5. For a comprehensive discussion of the scope and limitations of the fifth amendment see E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); 8 J. WIGMORE, EVIDENCE §§ 2250-84 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); Sobel, *The Privilege Against Self-Incrimination "Federalized"*, 31 BROOKLYN L. REV. 1 (1964).

6. The applicability of the privilege does not depend upon the nature of the proceeding in which testimony is sought. The privilege applies both in civil and criminal proceedings, whenever the answer might tend to subject the person claiming it to criminal responsibility. The privilege extends to a mere witness as well as to one who is a party defendant. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

7. The privilege must be affirmatively asserted by the witness and will be deemed waived if it is not in some manner brought to the attention of the tribunal that must pass on it. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113 (1927). Moreover, the privilege cannot be asserted to protect another. Rogers v. United States, 340 U.S. 367 (1951); Hale v. Henkel, 201 U.S. 43, 69-70 (1906); 8 WIGMORE, *supra* note 5, §§ 2259, 2270.

legal entities cannot invoke its protection.[8] It can be asserted only if the danger of criminal liability exists. Hence, it is within the discretion of the trial judge to overrule a claim of privilege when there is no reasonable possibility that the testimony will furnish a link in the chain of evidence required to convict the witness of a crime.[9] If the danger of criminal liability ceases, the availability of the privilege against self-incrimination to the witness expires also. The danger of criminal liability may terminate for any of the following reasons: running of the applicable statute of limitations, acquittal, executive pardon, or a grant of immunity.[10] Furthermore, the fifth amendment has not been interpreted to create a right to silence under the first amendment, despite the persuasive argument that the privilege deserves recognition in order to ensure the ability of the people to express unpopular opinions and to maintain the secrecy of their views.[11]

The fifth amendment shields the compulsion of real evidence as well as parol evidence. One problem that the rule engenders is that books and records of an individual are protected but those of the corporation are not;[12] it is sometimes difficult to distinguish between the

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8. *See* notes 12 & 13 *infra*.

9. "It is the province of the court to judge, whether any direct answer to the question, which may be proposed, will furnish evidence against the witness.

"If such answer *may* disclose a fact, which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not found to answer it so as to furnish matter for that conviction.

"In such a case, the witness must himself judge, what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer." I *Burr's Trial* 245 (1808).

The trial court has the discretionary power to determine whether the witness is legitimately relying upon the privilege. If it should ascertain that he is not, then it may compel him to answer, and the court's decision will be overruled only upon a showing of manifest error. Mason v. United States, 244 U.S. 362 (1917). *But cf.* Hoffman v. United States, 341 U.S. 479 (1951).

10. *See, e.g.*, Burdick v. United States, 236 U.S. 79, 94 (1915).

11. The argument propounded is that under immunity grants the government is able to secure private information concerning the beliefs and associations of its citizens and that such activity violates the associational rights of the first amendment.

The courts have rejected this reasoning because the grant of immunity and consequent investigation can be used only against criminally motivated associations. *See* Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Yates v. United States, 354 U.S. 298 (1957). *See also* McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L.C. & P.S. 138, 146 (1960); Comment, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A.L. REV. 561, 566 (1965). *But cf.* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

12. United States v. White, 322 U.S. 694 (1944) (books and papers of labor unions are public papers that are without the safeguard of the fifth amendment); Hale v. Henkel, 201 U.S. 43 (1906) (corporate books are public papers that are without the protection of the fifth amendment). *See also* United States v. Maine Lobstermen's Ass'n, 160 F. Supp. 115 (D. Me. 1957); United States v. Greater Kansas City Retail Coal Merchants' Ass'n, 85 F. Supp. 503 (W.D. Mo. 1949); United States v. Consumers Ice Co., 84 F. Supp. 46 (W.D. La. 1949).

two.[13] Records kept specifically by and in the name of a corporation, however, are outside the aegis of the fifth amendment, and hence do not merit the immunity privilege when produced under direction, although they may incriminate the corporation itself or an individual who is associated with it. Partnership documents usually are held to be within the safeguard of the fifth amendment on the theory that a subpoena duces tecum is merely a strategic maneuver undertaken to circumvent the necessity of subpoenaing all of the partners and thereby to avoid granting them each immunity.[14]

Whether the privilege against self-incrimination can be asserted in the face of a particular sanction depends upon whether the sanction is denominated as "penal" or "remedial" in nature.[15] If the witness is subject to "penal" liability, then the privilege applies; if, however, he is subject only to a "remedial" sanction, it does not.[16] The most difficult aspect of applying the penal-remedial test is clearly one of differentiating between the two classes. A number of guidelines have been enunciated to aid courts in drawing the distinction. The guidelines that have been suggested encompass such factors as whether the loss of certain rights accompanies specific sanctions,[17] the character of the offense charged,[18] the legislative purpose behind a particular sanction,[19] and the

13. *See, e.g.*, Curcio v. United States, 354 U.S. 118 (1957).

14. *See* United States v. Linen Serv. Council, 141 F. Supp. 511 (D.N.J. 1956); United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y. 1953); *In re* Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948). *Contra*, United States v. Onassis, 133 F. Supp. 327 (S.D.N.Y. 1955).

15. Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1583 (1963). This distinction has developed under the language of most immunity acts, which provide that "no person shall be prosecuted or subjected to any penalty or forfeiture." *See, e.g.*, Act of Sept. 26, 1914, ch. 311, § 9, 38 Stat. 722.

16. The distinction between penal and remedial sanctions has been used conventionally to determine whether criminal procedural safeguards must be available in trials. *See, e.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.13 (1958) (discussion of the due process delimitation of penal and remedial).

17. Most levies, imposed following an adjudication of liability, can easily be categorized as penal or remedial, but it is the relatively few marginal sanctions that cause the uncertainty and difficulty. Disfranchisement has been thought to warrant classification of the sanction as penal. *See* Note, *supra* note 15, at 1586.

18. The character of the act for which defendant may be found liable is also an accurate indicium. If, for example, revocation of a license is imposed for mere incompetence, the levy is remedial. On the other hand, if a license is revoked for wanton or wilful negligent conduct, the levy is penal. *Cf.* Lee v. CAB, 225 F.2d 950 (D.C. Cir. 1955) (dissenting opinion).

19. An additional factor, upon which the courts have relied, is the legislative purpose of the remedy. If the intended purpose of the remedy is to achieve retribution, then it should be denominated penal. By the same token, when the levy is merely compensatory—proportionate to the amount of injury suffered, not to the degree of malevolence displayed—it is clearly remedial in nature. Some courts have considered these guidelines of foremost importance in distinguishing penal from remedial sanctions. *See, e.g.*, Shapiro v. United States, 335 U.S. 1, 7 (1948); Helvering v. Mitchell, 303 U.S. 391 (1938).

relative severity of the sanction itself.[20] It should be noted that the penal-remedial characterization is based only upon sanctions that are specifically authorized by law. The many nonlegal consequences resulting from loss of societal favor—such as infamy, ridicule, and other public opprobrium—generally are not considered to be penal in nature for the purposes of the fifth amendment privilege against self-incrimination.[21] When multiple offenses are involved, questions may arise about the specific crimes that should come within the grant of immunity. Immunity generally covers only crimes to which the witness's testimony "relates," rather than all crimes of which he may have been guilty at the time of testifying.[22] Moreover, before the witness's testimony can be denominated "related" to his commission of a crime, it must be established that his testimonial utterances are substantially connected to the

20. The magnitude and severity of the sanction itself would seem to indicate whether it is penal or remedial, though the categorization as harsh or lenient is subject to the same arbitrariness and uncertainty as penal or remedial.

It is important to examine some exemplary forms of relief under these judicially delineated criteria. Injunctive relief has been held remedial because its purpose is to prevent or terminate harm to the injured party, rather than to punish the defendant according to the degree of villainy of his act. Bowles v. Misle, 64 F. Supp. 835 (D. Neb. 1946). In like manner, a libel in rem to condemn food has been denominated remedial. United States v. 935 Cases More or Less, Each Containing 6 No. 10 Cans Tomato Puree, 136 F.2d 523 (6th Cir.), *cert. denied*, 320 U.S. 778 (1943). A suit for enforcement of an FTC cease-and-desist order is also remedial. Drath v. FTC, 239 F.2d 452 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917 (1957).

Moreover, civil damages and even treble damages that are admittedly punitive have been labelled remedial because the purpose of the measure is not merely to punish the violator but to deter other violators and thereby protect the public. Solomon v. United States, 276 F.2d 669, 673 (6th Cir.), *cert. denied*, 364 U.S. 890 (1960) (double damages authorized by statute for conspiracy to obtain surplus property are remedial); Amato v. Porter, 157 F.2d 719, 722 (10th Cir. 1946), *cert. denied*, 329 U.S. 812 (1947) (treble damages for overcharges under Emergency Price Control Act of 1942 are remedial); Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747, 756 (S.D.N.Y. 1953) (treble damages under Clayton Act are remedial); Perkins Oil Well Cementing Co. v. Owen, 293 F. 759, 761 (S.D. Cal. 1923) (treble damages for patent infringement are remedial).

21. "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secures legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good." Brown v. Walker, 161 U.S. 591, 605-06 (1896).

The reasoning of the Court in *Brown*, however, fails to recognize that infamy is just as likely to result from a refusal to answer the question as from testimony under immunity. It has been suggested that even if protection of a witness from public opprobrium were one of the purposes, it could not be accomplished by recognizing a witness' right to be silent when granted immunity. The reasoning for this, in brief, is that some public stigma is unavoidable because the silent witness receives the same scorn as the immunized one. *See* S. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 119-20 (1957); Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 375 (1957).

22. *See* Himmelfarb v. United States, 175 F.2d 924, 935-36 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

crime itself.[23] In this context, the elusive meaning of "substantial" has, uncharacteristically, produced little difficulty. For example, testimony about one of the events of a crime or testimony that would aid the state in procuring evidence to prove a crime probably would be immunized. Thus, the meaning of "substantial" for this purpose is broad indeed, because immunity is granted even when the event described is an entirely lawful one that would supply a link in the chain of evidence necessary to establish the commission of a crime.[24]

An award of immunity is not revocable. If the testimony of the witness proves unfruitful, or relates merely to lawful events, or if immunity is improvidently granted to a despicable criminal, the grant must nevertheless continue in force. Additionally, immunity cannot be revoked even if the witness falsifies testimony under oath; the witness is, however, subject to criminal prosecution for perjury. Finally, it should be noted that immunity is irrevocable only for past crimes; it therefore does not insulate a witness from punishment for crimes that may occur in the future.[25]

### *B. Considerations Involved in a Decision to Grant Immunity*

1. *Balancing: Need for the Testimony Against Need to Prosecute the Witness-Criminal.*—The most important consideration to be weighed in deciding whether to grant immunity is the effective protection of society. Pursuit of this policy objective necessarily implies that the government must weigh the need for the testimony of the witness against the possible danger to the public if the witness-criminal is permitted to go free. The factors affecting this balancing process are complex and will be examined in more detail.

One of the most important factors to be evaluated is the likelihood that the witness will provide useful, detailed testimony.[26] Clearly, the witness must possess some knowledge of the criminal activity in issue; there otherwise would be no justification for considering him for a grant of immunity. A second and equally important factor is whether the

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23. Heike v. United States, 227 U.S. 131 (1913).

24. *Id. See also* United States v. Lumber Prods. Ass'n, 42 F. Supp. 910 (N.D. Cal. 1942), *rev'd as to immunity*, 144 F.2d 546 (9th Cir. 1944). On appeal the Ninth Circuit stated:

"Where an individual is required to answer whether he participated in the negotiations of a contract a clause of which is subsequently set forth in an indictment found against him . . . it cannot be said that his testimony had no substantial bearing on a transaction . . . . Proof of this portion of the contract was treated by the government as one of the vital links in the chain of evidence summing up the existence of a conspiracy to restrain trade . . . ." 144 F.2d at 553.

25. United States v. Swift, 186 F. 1002 (N.D. Ill. 1911).

26. For a discussion of the type of situation in which the Antitrust Division of the Department of Justice believes that a witness will testify extensively see Note, *supra* note 15, at 1600.

witness will prove to be cooperative and communicative under a grant of immunity or whether he will limit his testimony solely to matters about which the authorities are able to question him under the grant of immunity. As a practical matter, when a witness who is both knowledgeable and communicative is needed, those primarily responsible for committing an offense should not be shielded from prosecution when those who are only incidentally culpable are available for testimony and can be afforded immunity, since the subordinate actors are likely to be more communicative than their less innocent fellows.[27] In any event, regardless of the witness's knowledgeability, volubility, or relative guilt, the ultimate question for determination is whether the witness's crime is so heinous that his freedom will pose a serious threat to the safety of the innocent public. If the crime with which the witness is charged is merely an offense against the prevailing social and moral conventions of the community and presents little danger to public safety or private property, the witness should receive immunity more readily than if he had committed an offense involving bodily injury.[28]

2. *When A Grant of Immunity Becomes Effective.*—To determine when an immunity grant becomes effective, it is essential to examine the two fundamentally different types of immunity statutes—claim acts and automatic acts. Under a claim act, the witness must affirmatively assert his privilege against self-incrimination and he then must be specifically instructed to testify further before immunity is deemed to have been granted.[29] Claim acts are much less difficult to apply than automatic acts because the assertion of the privilege and the grant of immunity are usually express and unambiguous events that occur in sequence. It is only when there is some equivocation in the interposition of the claim or in the grant of immunity, or when there is a subsequent waiver of immunity that problems arise. Because claim acts are designed to avoid inadvertent or unintended gifts of immunity, and be-

27. A paradigm situation for immunizing those subordinately responsible in order to convict the primary actors is when one party to a conspiracy is induced to enlist and is therefore less guilty, relatively speaking, than the other active members of the conspiracy. In such circumstances it also seems likely that the less guilty party would be more loquacious than one of his comrades. *Id.* at 1602.

28. All criminal activity is forbidden. As a practical matter, though, some crimes are more reprehensible than others and the rank of a certain crime on the relative scale will become an influential factor in determining whether immunity should be afforded the actor. Crimes that involve bodily injury are clearly less desirable than those that do not. On the other hand, an offense that is purely statutory and forbids acts that only offend prudish morals or that involve no threat to the safety of the people should receive immunity readily. Whatever the crime, the ultimate goal is to protect the innocent in the most effective way.

29. *See, e.g.*, Act of May 27, 1933, ch. 38, § 22, 48 Stat. 87.

cause the government controls the proceedings, courts generally construe doubtful statements in favor of a grant of immunity.[30]

Under an automatic act, the witness is granted immunity simply by testifying under oath in response to a subpoena.[31] Because of the manner in which immunity is conferred, automatic acts give rise to troublesome factual issues that are usually resolved in favor of the witness. For example, a witness who is testifying only about lawful acts in response to cautiously framed questions may unexpectedly utter additional incriminating testimony either through inadvertence or through a deliberate attempt to gain immunity automatically for his crimes.[32] Only if the investigating official retains firm control over the proceedings and interrupts the testimony to inform the witness that any further incriminating statements will be construed as a waiver of the fifth amendment can the government prevent this sort of abuse.

In addition to problems that arise under either claim acts or automatic acts, difficult problems are encountered when both types of acts apply to a single testimonial event. When the matters related by the witness are concerned with more than one area of criminal activity and,

30. *See, e.g.*, Smith v. United States, 337 U.S. 137 (1949). In that case, an OPA investigator erroneously informed Smith that he could not be compelled to testify, but Smith nevertheless asserted his privilege. After answering several questions, the following was recorded:

Q. "This is a voluntary statement. You do not claim immunity with respect to that statement?"

A. "No."

Subsequently Smith was indicted and convicted of violating the Emergency Price Control Act despite a plea of immunity. On appeal to the Supreme Court, the government contended that Smith had waived his privilege because the "No," referred to the second sentence by the investigator. Smith argued that it had been in answer to the first part of the question. The Court conceded that the privilege, once claimed, could be subsequently waived, but a waiver of a constitutional right, after that right had been validly asserted, could not be inferred from vague and uncertain evidence.

31. *See, e.g.*, Act of Sept. 26, 1914, ch. 311, § 9, 38 Stat. 723. Prior to 1943, some of the lower federal courts gave automatic and claim acts identical treatment by requiring a claim of privilege before immunity would be deemed granted under either act. *See* Johnson v. United States, 5 F.2d 471, 477-78 (4th Cir.), *cert. denied*, 269 U.S. 574 (1925); United States v. Greater N.Y. Live Poultry Chamber of Commerce, 33 F.2d 1005, 1006 (S.D.N.Y. 1929), *cert. denied*, 283 U.S. 837 (1931); United States v. Lay Fish Co., 13 F.2d 136, 137 (S.D.N.Y. 1926). *Contra*, United States v. Ward, 295 F. 576 (W.D. Wash. 1924); United States v. Pardue, 294 F. 543 (S.D. Tex. 1923).

In 1943, however, the Supreme Court held that under an automatic act immunity is granted irrespective of whether the witness had claimed his privilege. United States v. Monia, 317 U.S. 424 (1943).

32. A smilar problem may arise under an automatic act when a witness, who is required to identify records compelled by a subpoena duces tecum, inadvertently or consciously testifies beyond the bounds of mere identification to matters that would invoke an automatic grant of immunity. *See, e.g.*, United States v. Maine Lobstermen's Ass'n, 160 F. Supp. 115 (D. Me. 1957); United States v. Detroit Sheet Metal and Roofing Contractor's Ass'n, 116 F. Supp. 81 (E.D. Mich. 1953).

thus, may be governed by more than one type of immunity act, the relative scope of each act must be defined to determine which act has primary jurisdiction.[33] A situation in which a witness clearly meets the requirements of a claim act may present little difficulty, because if the witness has fulfilled the strictures of a claim act, he has clearly complied with the less stringent demands of an automatic act. On the other hand, it is possible for a witness to satisfy the criteria for receiving immunity under an automatic act and at the same time fail to qualify under a claim act. In order to determine whether an automatic or a claim act controls in such a situation, it is probably necessary to look to the nature of the subject matter of the investigation. If the subject matter of the proceedings is substantially related to a violation covered by a statute that confers automatic immunity, then the witness should be granted immunity. This standard affords the same judicial latitude, and in view of a judicial tendency to declare that immunity has been afforded in all marginal cases,[34] the standard seems well-conceived and just.

## III. THE TRANSACTIONAL VERSUS TESTIMONIAL IMMUNITY DICHOTOMY

### *A. Evolution of the Transactional-Testimonial Dispute*

1. *Development of the Transactional Immunity Standard.*—The original federal immunity statute—the Immunity Act of 1857[35]—was enacted in reaction to widespread rumors of congressional corruption.[36]

33. In United States v. Niarchos, 125 F. Supp. 214 (D.D.C. 1954), defendant Casey entered a plea of immunity based upon testimony compelled before a grand jury investigating violations of the Shipping Act, an automatic act. The government countered that the grand jury was only investigating violations of 2 other statutes, which were claim acts. The grand jury indictments were for alleged conspiracy and false claims made to avoid certain provisions of the Shipping Act. The court found that the subject matter of the investigation grew out of the Shipping Act, and concluded that the witness had received automatic immunity.

The *Niarchos* court attempted to articulate a manageable test: "The test clearly cannot be that the indictment must be brought under . . . whatever act contains an immunity provision. The result of a special grand jury investigation often indicates violations of different or additional laws than those on which the proceeding was initially 'based'. The words 'growing out of' must be given their common sense meaning . . . . [T]he proper test for determining the nature of the proceeding for the purposes of an immunity provision is the nature of its subject matter." 125 F. Supp. at 220. *See also*, Marcus v. United States, 310 F.2d 143, (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963).

34. The *Marcus* and *Niarchos* courts demonstrated a proclivity for resolving any equivocation in favor of the witness, because governmental authorities are in charge of the proceedings and should bear the responsibility for mistakes or ambiguity. Thus, if the government were to prevail in these circumstances, any attempt to construe an equivocal statement or situation against the witness would permit trickery and subterfuge to become a regular part of such proceedings.

35. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

36. CONG. GLOBE, 34th Cong., 3d Sess. 274 (1857).

Hastily and haphazardly constructed, the statute was designed to provide an immediate means of exposing the illicit conduct of certain congressmen. The Act, employing somewhat imprecise wording, granted immunity to the witness "for any fact or act touching which he shall be required to testify."[37] Ironically, the broad statutory language provided many of the witnesses whom the Act was intended ultimately to convict with effective insulation from criminal liability.[38]

In reaction to the unintended generosity of the Act of 1857, Congress enacted the Immunity Act of 1862[39] in order to limit the broad scope of the 1857 Act. The 1862 Act narrowed the potential range of the grant by providing immunity only from use of the testimony itself—less than full testimonial immunity. Under the 1862 Act, law enforcement officials had been free to use the fruits of testimony in their investigations. This meant that the witness could be prosecuted in a subsequent proceeding based on evidence discovered as an indirect result of the testimony offered at another proceeding. The expansive sweep of the Act of 1857 was thus markedly restricted by the enactment of the 1862 Act.

The Immunity Act of 1868[40] amended the Immunity Act of 1862 in one significant respect. The 1862 Act's provision for immunity grants in congressional hearings was broadened to make immunity available in "any judicial proceeding" as well. The degree of immunity permitted, however, was left unchanged. Thus under the 1862 and 1868 Acts the "immunity baths"[41] that had been accorded the herds of witnesses that flocked to congressional committee rooms to offer testimony—and obtain protection from criminal liability—were ended. From the application of the statutes, however, arose the serious question whether the 1862 and 1868 Acts conferred immunity in sufficient degree to avoid

37. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156.

38. Many of the nefarious characters who were intended to be convicted for their crimes rushed to the congressional committee rooms to receive general absolution. The irony of such developments was soon recognized by Senator Trumbull:

"The Statute of 1857 was passed hastily; we all recollect that it grew out of a particular matter, and was known to be imperfect when it was passed. It has operated so as to discharge from prosecution and punishment persons who were brought before these committees and testified touching matters that they might have been prosecuted for. In fact this holds out an inducement for the worst criminals to appear before our investigating committees. Here is a man who stole two million in bonds, if you please, out of the Interior Department. What does he do? He gets himself called as a witness before one of the investigating committees and testifies something in relation to that matter, and then he cannot be indicted." CONG. GLOBE, 37th Cong., 2d Sess. 428 (1862).

39. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

40. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

41. *See* note 40 *supra*.

invalidation under the fifth amendment self-incrimination clause. The first federal cases to consider the issue held that "use" of immunity satisfies the requirements of the fifth amendment. *In re Phillips*[42] held that a witness who had declined to answer questions regarding tax returns from tobacco manufacturers could be compelled to testify under a grant of use immunity. Between 1871 and 1883, three more federal cases in which the courts confronted the issue produced similar holdings.[43]

In 1892, *Counselman v. Hitchcock*[44] presented the Supreme Court with the question whether the Act of 1868 was unconstitutional because it provided only use immunity. The issue arose because the Act of 1868 had been applied by the courts in the developing area of interstate commerce regulation, and thus had generated many cases in which witnesses before the Interstate Commerce Commission asserted the protection of the fifth amendment despite a grant of immunity in accordance with the statute. The defendant in *Counselman*, an interstate shipper of grain, invoked the fifth amendment by refusing to testify about a violation of the Interstate Commerce Act, and was consequently convicted of contempt. On final appeal, the Supreme Court rejected the government's contention that use immunity fully protects a witness in any criminal case from being compelled to testify against himself. The Court reasoned that use immunity alone could not prevent prosecutors from employing a witness's testimony to discover other evidence, which could be used against the witness to secure an otherwise unobtainable conviction.[45] After formulating the broad constitutional proposition that a grant of immunity must be "coextensive" with the fifth amendment, the Supreme Court stated more specifically that, in order to satisfy the "coextensive" test, the provision "must afford absolute immunity

42. 19 F. Cas. 506 (No. 11,097) (D. Va. 1869).

43. United States v. Farrington, 5 F. 343 (N.D.N.Y. 1881); United States v. Williams, 28 F. Cas. 670 (No. 16,717) (C.C.S.D. Ohio 1872); United States v. Brown, 24 F. Cas. 1273 (No. 14,671) (D. Ore. 1871). A representative statement was that of the court in United States v. Williams: "If the testimony or admission cannot be used by giving it directly in evidence to the jury as an admission, or if it cannot, in any manner, be used against the party, then it seems to me the great reason upon which the protection of the witness rests has ceased to exist; and it is a well settled principle, too old to be combated [sic] or denied, that where the reason of a law or rule has ceased, the law or rule itself ceases also." 28 F. Cas. at 671.

44. 142 U.S. 547 (1892).

45. Justice Blatchford, speaking for the majority, observed about use immunity: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding [in any United States] court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." *Id.* at 564.

against future prosecution for the offence to which the question relates."[46]

Although the Court's holding in *Counselman* was viewed as the final constitutional word on the immunity issue, until at least the 1960's,[47] the Court's pronouncements were to some extent superfluous, since the only question requiring resolution in that case was whether use immunity was sufficient to avert condemnation under the fifth amendment. The *Counselman* holding thus clearly established that a bare standard of use immunity violates the fifth amendment; its "absolute immunity" language, however, was apparently set out as the Court's view of a constitutionally satisfactory standard for legislative drafting.[48] Adopting terminology suggested by the Supreme Court in *Counselman*, Congress enacted the requirement that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify," into the Immunity Act of 1893.[49]

The 1893 Act was subsequently declared invalid by a federal district court because the Act failed to provide immunity from public odium and other seeming "penalties" of testifying.[50] In 1896, however, in *Brown v. Walker*,[51] the Supreme Court rejected the reasoning of the district court and held that the transactional immunity afforded by the 1893 Act was coextensive with the privilege against self-incrimination. Endorsing the transactional immunity standard of the Act, the Court

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46. *Id.* at 586.

47. *See* notes 62-76 *infra* and accompanying text.

48. "[A] statutory enactment, to be valid, must afford absolute immunity . . . ." 142 U.S. at 586.

49. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. Congressional response to *Counselman* was immediate and accommodating. The relevant portions of the Act provide: "[N]o person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any statement thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any case or proceeding . . . ."

50. United States v. James, 61 F. 257 (N.D. Ill. 1894). In this case, Judge Grosscup said of immunity: "The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or socieities that might be governed by the prevailing views, . . . or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender?" *Id.* at 264.

51. 161 U.S. 591 (1896).

held that the grant must extend to any transaction; the state courts as well as the federal were therefore foreclosed from subsequently prosecuting the recipient of immunity.[52] Four Justices dissented from the majority opinion, not because they thought something less than transactional immunity would satisfy the coextensive requirement, but rather because the 1893 Act did not afford, according to their view, a sufficient degree of immunity under the *Counselman* mandate, as the district court had already held.[53] Thus, the transactional standard unquestionably reflected the position of the entire Court. The rule announced in *Counselman* and thereafter buttressed in *Brown v. Walker* was reiterated frequently during the first half of the twentieth century.[54]

2. *Erosion of the Transactional Immunity Standard.*—Although transactional immunity remained the prevailing standard following the *Counselman* decision,[55] application of the broad requirements of the transactional rule created jurisdictional difficulties. First, because the fifth amendment had not then been made applicable to the states, there was doubt about whether the standard pronounced in *Counselman* also compelled the states to afford transactional immunity to testifying witnesses. More recently, *Malloy v. Hogan*[56] has unequivocably resolved that question by extending the fifth amendment self-incrimination clause to the states.[57] Secondly, it was uncertain whether the federal government could immunize a witness against state prosecution, and

52. The Court stated in this regard: "[T]he immunity extends to any *transaction, matter or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had." *Id.* at 608. The Court's statements were not binding, however, and the question whether the transactional immunity standard is applicable to the states and whether one jurisdiction can guarantee immunity in the other's boundaries still haunts the Supreme Court. *See also* notes 58-60 *infra* and accompanying text.

53. The dissenting opinions endorsed the lower court's finding that the fifth amendment is at least partially intended to guard against forcing a witness to suffer public disgrace by compelling him to testify under immunity. 161 U.S. at 621-28 (Shiras, Gray & White, JJ., dissenting); *id.* at 630-33 (Field, J., dissenting). *See also* Ullmann v. United States, 350 U.S. 422, 443-55 (1956) (Douglas, J., dissenting).

54. *See, e.g.*, Heike v. United States, 227 U.S. 131, 144 (1913); Hale v. Henkel, 201 U.S. 43, 67 (1906).

55. *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956). Defendant refused to answer before a federal grand jury investigating threats to national security. The district attorney asked the district court to order Ullmann to answer under the Immunity Act of 1954. Ullmann contended that because the immunity provided does not protect against state prosecution, the grant violates the fifth amendment. The Supreme Court on appeal rejected Ullmann's argument, reaffirmed *Brown v. Walker*, and upheld the transactional immunity provision of the Immunity Act of 1954.

56. 378 U.S. 1 (1964). For a summary of the *Malloy* holding see notes 59-62 *infra* and accompanying text.

57. The Court, however, had held otherwise before *Malloy* in such cases as Knapp v. Schweitzer, 357 U.S. 371, 379-80 (1958), and Feldman v. United States, 322 U.S. 487 (1944).

conversely, whether the state could immunize a witness from federal prosecution if required to do so.

Though often ambiguously so, the Supreme Court has held repeatedly that the jurisdictional division of federal and state governments was inviolable by either body. The most lucid articulation of the Court's position appeared in *United States v. Murdock*,[58] in which the Court noted initially the inapplicability of the fifth amendment to the states and secondly the sacrosanct separation of federal and state government, holding that a federal witness could not refuse to testify on the basis that his testimony could be used against him under state law.[59] The dual standard propounded by the Court in *Murdock*, the "two-sovereignties rule," although intended as a remedy for uncertainty, produced problems of its own. A witness who had been granted full transactional immunity from federal prosecution could nevertheless be convicted in state court for the same offense. Conversely, a state witness who had been granted transactional immunity within state boundaries could be prosecuted by federal authorities for the same criminal activity. The witness therefore would be confronted with a Hobson's choice between possible prosecution in another jurisdiction and a contempt citation for refusing to testify.[60] Furthermore, the manifest purpose of the fifth amendment is undermined when a witness who is forced to testify under immunity in one jurisdiction can, through the collaboration of law enforcement agencies, be compelled to prove his own guilt in another jurisdiction on the basis of testimony elicited at another trial under threat of contempt citation. Despite the many difficulties associated with the two-sovereignties rule,[61] it remained the governing precept until 1964. In *Malloy v. Hogan*[62] and *Murphy v. Waterfront Commission of New York Harbor*,[63] however, the Court set out to remedy some of the

58. 284 U.S. 141 (1931).

59. *But cf.* Adams v. Maryland, 347 U.S. 179 (1954). There the Court ruled upon whether Congress could extend immunity to state proceedings: "Little need be said about the contention that Congress lacks power to bar state courts from convicting a person for crime on the basis of evidence he has given to help the national legislative bodies carry on their governmental functions. Congress has power to summon witnesses before either House or before their committees." *Id.* at 183.

60. Although the transactional immunity standard was a necessary and commendable step toward insuring the integrity of the fifth amendment, the implementation of the standard through the irrational two-sovereignties rule served only to substitute one problem for another. Under the rule a witness could either testify under quasi-immunity and run the risk of being prosecuted and convicted in the other jurisdiction, or he could simply refuse to answer and incur a penalty for contempt. Such a predicament is alarmingly similar to an attempt to force him to prove his own guilt.

61. *See* text accompanying note 60 *supra.*

62. 378 U.S. 1 (1964).

63. 378 U.S. 52 (1964).

untoward implications of two-sovereignties rule. *Malloy* opened a new and confusing era in the development of immunity jurisprudence. The Court in *Malloy* extended the fifth amendment privilege against self-incrimination to state proceedings by incorporating that clause into the fourteenth amendment due process clause.[64] Although *Malloy* effectively overruled *Murdock* and the view that the fifth amendment is inapplicable to the states, the decision did not acceptably resolve two-sovereignties problems because the questions whether the federal government could grant immunity from state prosecution and whether the state could bestow immunity from federal action were not raised. The Court, however, did express an opinion about the two-sovereignties question: "It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."[65] The stage, thus, had been set for a wholesale rejection of the two-sovereignties principle.

Recognizing that it had not fully resolved the two-sovereignties issue, the Supreme Court, on the same day it decided *Malloy*, attempted to resolve the jurisdictional dispute in *Murphy v. Waterfront Commission of New York Harbor*.[66] The *Murphy* Court acknowledged the constitutional power of the federal government to immunize a witness against state prosecution under the concept of federalism.[67] On this basis, the Court found that the federal government is required by the fifth amendment to grant immunity from state as well as federal prosecution. The Court conceded, however, that unique considerations, such as those confronting the Court in the *Murphy* case, must be evaluated in deciding whether the state is compelled to confer transactional immunity from federal prosecution. In *Murphy*, witnesses had refused to testify under the fifth amendment before the state-enabled Waterfront Commission of New York Harbor, which was investigating waterfront work stoppages. The Commission granted the witnesses immunity from prosecution in New York and New Jersey, but they again declined to

64. In words portentous to immunity legislation Justice Brennan, for the majority, said:

"The State urges, however, that the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. . . . The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights' . . . ." 378 U.S. at 10-11.

65. 378 U.S. at 11.

66. 378 U.S. 52 (1964).

67. *See* note 76 *infra*.

testify on the ground that the testimony could be used to incriminate them in a federal court because, under the two-sovereignties rule, the state could not grant immunity from federal prosecution. The Court formulated the issue before it in the following terms: "[W]hether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another jurisdiction."[68] Explaining that the unique consideration of federalism arises when the state attempts to immunize a witness from prosecution, the Court declared:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and *accomodate the interests of the State and Federal Governments* in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This *exclusionary rule*, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.[69]

The Court's holding in *Murphy* apparently demands a grant of transactional immunity by the federal government that will transcend jurisdictional boundaries to proscribe state as well as federal prosecution. The rule enunciated by the Court does not have the same effect in the context of state immunity grants. In sustaining a state statute providing testimonial immunity, the Court held by implication that a state must grant a witness transactional immunity within its own jurisdiction, but, in deference to principles of federalism, the state cannot grant more than testimonial immunity from federal prosecution. Mr. Justice Goldberg, speaking for the majority in *Murphy*, found that withholding the use of the state testimony and its fruits from federal exploitation would provide a standard "coextensive" with the fifth amendment privilege.[70]

Several fundamentally incorrect propositions appear to underlie the *Murphy* exclusionary rule. First, the *Murphy* standard overlooks the view expressed by the Court in *Malloy* that "it would be incongruous to have different standards determine the validity" of a grant of immunity, "depending on whether the claim was asserted in a state or federal court."[71] Clearly, under the *Murphy* exclusionary rule the immunity

68. 378 U.S. at 53.
69. 378 U.S. at 79 (emphasis supplied) (footnote omitted).
70. 478 U.S. at 79 n.18.
71. *See* note 64 *supra*.

standard applicable to federal proceedings is at variance with that applicable at the state level.

Secondly, that portion of the *Murphy* rule governing state immunity provisions does not comport with the *Counselman* guideline of transactional immunity, because only testimonial immunity is offered by the state from federal prosecution. Mr. Justice Goldberg extracted from *Counselman* language to the effect that it would be possible under the Constitution to permit only use and fruits immunity if it could be assured that any evidence subsequently used to prosecute the witness arose from an independent legitimate source.[72] He ignored, however, the *Counselman* Court's finding that the risk of abuse inherent in such a loosely formulated standard warrants a more protective rule.[73] He also failed to take account of the *Counselman* holding that "no statute which leaves the party or witness subject to prosecution" effectively supplants the fifth amendment privilege.[74]

Thirdly, the *Murphy* exclusionary rule presupposes that testimonial immunity will be sufficient to protect the witness once he has made incriminating statements, which seems to overlook the possibility that the testimony could be used to discover other evidence that would not come within the scope of testimonial immunity. If that possibility did not exist, the *Murphy* exclusionary rule would be equivalent to the *Counselman* transactional standard. The *Counselman* Court, however, found that it was not.[75] Fourthly, the concept of federalism, which prompted the exclusionary rule in the first place, contemplates that the states will have no power to compel or prevent federal action. If this concept is to be followed to its logical end, the states should not even be able to prevent federal use of the testimony or its fruits.[76] The

72. Mr. Justice Goldberg ruled that to meet the *Counselman* test the state must immunize the testimony only, with the further limitation on both state and federal governments that each could prosecute the witness only by "showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79 n.18.

73. The *Counselman* Court considered the risk of abuse of testimonial immunity and found the risk to be of such magnitude as to render testimonial immunity inadequate under the fifth amendment. *See* note 45 *supra*.

74. Considering the identical question whether testimonial immunity could avoid the censorship of the fifth amendment the *Counselman* Court had held:

"We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." 142 U.S. at 585-86.

75. *Id.*

76. Federalism is rooted in the basic concept of government found throughout the Constitution. It does not have its foundation in any one specific grant of authority, though the supremacy clause is notably similar to such a grant. The formula simply states that the federal government

*Murphy* exclusionary rule, however, represents a compromise of constitutional principles to permit the states some freedom of investigative action. The rule carries the implication that federalism is not in reality as compelling a consideration as was stated in *Murphy*, since a strict application of that concept would forbid the states from granting any degree of immunity from federal prosecution.

3. *Murphy's Effect on the Transactional Standard: The Divergent Theories.*—Since the *Murphy* decision, various theories have been propounded that purportedly define or explain the impact of the *Murphy* decision on the *Counselman* holding. First, one might argue that *Murphy* had no effect at all upon the vitality of the *Counselman* rule. Two significant cases appear superficially to sustain this first position. One year after the Supreme Court decided *Murphy*, the Court reaffirmed the *Counselman* test in *Albertson v. Subversive Activities Control Board (SACB).*[77] In that case, a federal witness had refused to register under the Subversive Activities Control Act of 1950.[78] In upholding the witness's right to refuse to answer, the Court relied upon its holding in *Counselman* to conclude that immunity under the Subversive Activities Control Act "is not complete." The *Albertson* case, however, does not really lend support to the proposition that *Murphy* had no effect on *Counselman*, because the immunity grant in *Albertson* was to a federal witness and the problem of federalism, which produced the *Murphy* exclusionary rule, did not arise. One year after *Albertson* was decided, in *Stevens v. Marks*,[79] the Supreme Court again invoked the *Counselman* standard by implication, but, as in *Albertson*, the issue of whether the state must afford transactional or testimonial immunity was not before the Court.[80] Therefore, it should be reemphasized that the

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cannot be forced to act or forbear to act by a state or local government unless the federal government consents to be. Federalism in its purest form would forestall state action to grant any degree of immunity from federal prosecution. For a general discussion see Beth, *The Supreme Court and American Federalism*, 10 ST. LOUIS U.L.J. 376 (1966).

77. 382 U.S. 70 (1965).

78. Act of Sept. 23, 1950, ch. 1024, 64 Stat. 987.

79. 383 U.S. 234 (1966).

80. The witness, a member of the N.Y. City Police Department, was summarily discharged. He was then subpoenaed before a New York County grand jury. Before entering the grand jury room, an assistant district attorney advised him to sign a waiver of immunity, otherwise he would be subject to removal from public office. The witness signed the waiver. In a later proceeding before a different grand jury, the witness refused to waive his immunity. As a consequence, he was discharged as a police officer. Though the question of whether transactional immunity is required was not at issue, the Court stated peripherally:

"We need not stop to determine whether the immunity said to be conferred here . . . constitutes that 'absolute immunity against further prosecution' about which the Court spoke in *Counselman v. Hitchcock* [citation omitted], and which the Court said was necessary if the privilege were to be constitutionally supplanted. . . . For . . . he was led to believe . . . that *no* immunity provisions were applicable to his case." 383 U.S. at 244-45.

*Albertson* and *Stevens* cases constitute extremely shallow authority for the view that *Murphy* had no effect on *Counselman.*

The *Albertson* and *Stevens* decisions also seem to undermine the persuasiveness of a second theory about the effect of *Murphy* on *Counselman*—a view that holds that *Murphy* sub silentio overruled *Counselman.*[81] This position is subject to challenge on two bases. First, *Albertson* and *Stevens* were both decided after *Murphy* and in each the Court reiterated the applicability of the transactional immunity standard in those instances in which the federal government is the immunizing body. Thus, *Counselman* could hardly have been overruled by the *Murphy* decision or the Supreme Court would not have relied upon the *Counselman* holding in cases that succeeded *Murphy.* Secondly, the majority opinion in *Murphy* clearly acknowledged the vitality of the *Counselman* rule in relation to federal grants of immunity, but the Court also recognized that the rule had been compromised for state grants in order to preserve the sanctity of federalism.[82] Therefore, the *Murphy* Court formulated, at most, an exception to the still-reigning *Counselman* test. In 1968, however, the Supreme Court handed down five decisions that have subsequently been cited as authority for the proposition that *Murphy* sub silentio overruled *Counselman.* In *Gardner v. Broderick,*[84] a case involving a state investigatory proceeding, the Court, citing both *Counselman* and *Murphy* as authority and employing imprecise language, concluded in dictum that a witness may be compelled to testify if "there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."[85] The witness in *Gardner* was not granted immunity in any degree. Thus, the Court was not forced to decide the two-sovereignties issue presented in *Murphy*, but rather the simpler question whether the fifth amendment, under the circumstances, required that any form of immunity be granted.[86] In *Marchetti v. United States,*[87] a federal witness had refused to report his gambling activity income to the Internal Revenue Service. As in *Gardner*, the witness was

81. *See* note 93 *infra.*

82. *See* note 69 *supra* and accompanying text.

83. Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

84. 392 U.S. 273 (1968).

85. 392 U.S. at 276.

86. When immunity is refused altogether, the tribunal has only to determine whether the fifth amendment requires that the witness be afforded immunity. The court is not compelled to determine what degree of immunity must be granted.

87. 390 U.S. 39 (1968).

not granted immunity; the Court, therefore, had only to determine whether the witness could be compelled to register. Nevertheless, the Court included in its opinion an unnecessary reference to *Murphy*, which, of course, involved a state immunity statute.[88] *Gardner* and *Marchetti* are representative examples of the five 1968 cases in which immunity was not granted to any of the witnesses, and in which the question whether testimonial or transactional immunity is required was not even raised. Therefore, despite the language of the cases, they clearly do not support the proposition that *Murphy* sub silentio overruled *Counselman*.

A third view that has been formulated to explain the impact of *Murphy* on *Counselman* is that the Supreme Court's statements in *Counselman* were precatory, rather than mandatory in nature. Section 201 of the Organized Crime Control Act of 1970[89] was enacted as the result of partial reliance upon this theory. Congress, impressed by a mounting wave of criminal activity in the late 1960's, decided that reform of the existing federal immunity structure was an appropriate remedial reaction.[90] Prior to the enactment of section 201, federal immunity provisions had been contained in 57 disparate statutes,[91] each usually consisting of a specific grant of power to a particular federal agency. One of the purposes of section 201 was to harmonize all 57

88. 390 U.S. at 58.

89. 18 U.S.C. § 6002 (1970) 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 hasis 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." (emphasis supplied).

90. During the 1960's, despite at least token attempts to arrest the trend, organized crime expanded its operations at an alarming rate. Many members of Congress and other public figures vocalized their distress over the problem to congressional committees that were sitting to determine the appropriate course of action to combat this crime wave. One of their actions was to rewrite federal immunity legislation. *See Hearings on S. 30 Before Subcomm. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 81 (1970). (statement of John L. McClellan).

Attorney General John N. Mitchell said of the problem: "Over the last four decades, a criminal minority has put together in the United States an organization whieh is both an illicit cartel and a nationwide confederation, operating with comparative immunity from our criminal laws, and in derogation of our traditional concepts of free enterprise." *Id.* at 152. For a detailed factual report on organized crime in society see S. REP. No. 617, 91st Cong., 1st Sess. 36 (1969).

91. For a catalogue of the 57 federal immunity statutes repealed by § 201 see the listing following Organized Crime Control Bill of 1970, § 201, 18 U.S.C.A. § 6002 (Supp. 1971).

statutes and centralize them into a single law.[92] Section 201 essentially provides that a witness who has interposed his privilege against self-incrimination may be forced to testify, but that no "testimony or other information" compelled under the order or "any information directly or indirectly derived from such testimony" may be used against the witness. Important among the factors that motivated Congress to pass section 201 were reports by several authorities that *Counselman* had been sub silentio overruled by *Murphy* and that the *Counselman* rule was mere dicta.[93] The courts have unanimously rejected this argument on two grounds. First, the Supreme Court in *Counselman*, though not faced with the question whether transactional immunity is required, apparently thought that the practical difficulties of legislative drafting necessitated a statement defining the degree of immunity that would satisfy the requirements of the fifth amendment. Later decisions have characterized the *Counselman* language as mandatory authority. Secondly, even if the *Counselman* statements were precatory in nature when issued, they have become binding authority through subsequent Supreme Court cases. In *Brown v. Walker* the Court, relying on *Counselman*, clearly held that transactional immunity is imperative under the fifth amendment.[94] In several other cases decided after *Walker*, most notably in *Ullmann v. United States*,[95] the Supreme Court reaffirmed the standard promulgated in *Counselman*. Congress adopted section 201 in the mistaken belief that the *Counselman* test constituted no more than dicta and that *Murphy* had sub silentio overruled *Counselman*. It failed to observe that the *Murphy* holding that

92. *Id.*

93. It is clear that Congress intended § 201 to embody the *Murphy* standard, though they failed to accurately discern what that standard is: "Refusal to testify following communication of the immunity order warrants contempt proceedings. No oral testimony or other information secured from a witness can be used against him in a criminal proceeding. This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination [citation omitted]. It is designed to reflect the use-restriction immunity concept of *Murphy v. Waterfront Commission* [citation omitted] rather [than] the transaction immunity concept of *Counselman v. Hitchcock* [citation omitted]. The witness is also protected against the use of evidence derivatively obtained." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 42 (1970).

One reason for the use of this distorted version of the *Murphy* rule was the belief that *Murphy* had sub silentio overruled *Counselman*. S. REP. NO. 617, 91st Cong., 1st Sess. 53 (1969); *accord*, DEP'T OF JUSTICE COMMENTS ON S. 30, S. REP. NO. 617, 91st Cong., 1st Sess. 107 (1969).

Moreover, the view that *Counselman*'s statements on transactional immunity were dicta has received some small following in the Congress. *See, e.g., Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 56 (1969). *See also In re* Korman, 449 F.2d 32 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972); Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), *cert. denied*, 402 U.S. 971 (1971); *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971), *rev'd*, 406 U.S. 952 (1972) (government's contentions); note 100 *infra*.

94. 161 U.S. at 594.

95. 350 U.S. 422 (1956).

testimonial immunity will suffice was issued in the context of evaluating the effect of a state statute on the degree of immunity available in federal jurisdictions. Section 201 manifested an attempt by Congress to use the *Murphy* rationale as a justification for authorizing federal grants of use and fruits immunity that were not dictated by considerations of federalism. Some authorities, including federal administrative agencies, vigorously objected to section 201 because of its ill-founded reliance upon *Murphy*[96] and because continued adherence to section 201 would severely restrict the investigative power of the federal government;[97] these authorities, however, were largely disregarded.

A fourth theory that explains the *Murphy* impact on *Counselman*[98] presents the decisions as requiring transactional immunity when the federal government is the original grantor of immunity. Conversely, the state must afford transactional immunity within its own jurisdiction; the state cannot, however, because of the demands of federalism, grant

96. Vociferous critics of § 201 attacked the premise of proponents of the measure on the basis that *Counselman* was clearly not dicta and that the *Murphy* rule was merely a concession to facilitate federalism. Minority Views of Hon. William F. Ryan on H.R. 1157, H.R. REP. No. 1188, 91st Cong., 2d Sess. 40-41 (1970); *accord*, 116 CONG. REC. 853 (1970) (letter from the American Civil Liberties Union to each member of the Senate).

Beyond the merely legal arguments, the opponents of § 201 examined the practical inadequacies of testimonial immunity: "The Bill fails to take any cognizance of the fact that it is virtually impossible to establish tainted evidence—that is, evidence that has been developed from leads which appeared from the compelled testimony or information of the immunized witness. Very simply, to elevate use immunity to general law is to declare a moratorium on the effectiveness of the fifth amendment and to leave it moribund. It is not difficult to mask evidence so that it appears to have been developed independently of the immunized witness' testimony or information.

"Even though, technically, the burden is usually on the prosecution to disprove taint, as a practical matter it works the other way. Courts have both evoked doctrines and made findings in related areas which show how feeble such an alleged protection is. In many instances, courts have ruled that, where the taint is 'attenuated,' the derivative evidence is admissible. Wong Sun v. United States, 371 U.S. 471 (1963). Some courts have ruled that if the evidence could have been obtained from an independent source, it will be admitted. Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963). Some courts have ruled that the testimony of witnesses whose names have been obtained unconstitutionally is not excludable because too remote and 'attenuated.'" Minority Views of Hon. William F. Ryan on H.R. 11157, H.R. REP. No. 1188, 91st Cong., 2d Sess. 42 (1970).

97. The federal agencies that depend upon their investigatory powers to police compliance or non-compliance with their regulations were alarmed at the testimonial immunity provision of § 201. For example, in a letter to Senator James O. Eastland, the Federal Deposit Insurance Corporation expressed severe distress, because they feared the corporation would not be able to carry on its important investigative functions under the less protective and less attractive grant in § 201. *See* S. REP. No. 617, 91st Cong., 1st Sess. 132 (1969).

98. *See* Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS U.L.J. 327 (1966); Comment, *State Immunity Statutes in Constitutional Perspective;* 1968 DUKE L.J. 311; Note, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A.L. REV. 561 (1965); 24 VAND. L. REV. 815 (1971).

more than testimonial immunity within federal jurisdiction. Several factors militate in favor of the fourth view. First, although *Counselman* established the governing standard for both federal and state governments, application of the unqualified *Counselman* rule produced problems of federalism because the states are not empowered to dictate legal results to the federal government. The initial response to this problem was the two-sovereignties rule. The rule generated such prodigious difficulties of its own, however, that it was abandoned in favor of the *Murphy* standard. The Court in the *Murphy* decision simply forged an "exception" to the rigorous demands of the undiluted transactional immunity standard by permitting testimonial immunity at the federal level when the state makes the original grant. The "exception" theory, therefore, appears to offer the most logical, straightforward reconciliation of *Murphy* and the *Counselman* rule.

Aside from logical considerations, there are practical reasons for preferring the exception theory. It enunciates a standard that effectively preserves the fifth amendment right against self-incrimination. The fifth amendment was intended to protect against one of the deplorable abuses that attend the inquisitorial system of justice—a forced confession.[99] The Supreme Court expressly held that because of the risk of collaboration or misinterpretation by overly zealous governmental officials, grants of transactional immunity constituted the only sound form of protection under the Immunity Act of 1868.[100] The exception theory, because it immunizes the witness from prosecution by the federal government for a crime to which his testimony relates, offers the witness protection that is substantially coextensive with the requirements of the fifth amendment. As an incidental benefit, the exception theory affords the federal government greater bargaining power in its investigative function. A knowledgeable witness is not likely to provide extensive or useful testimony unless he receives a grant, such as that provided by the exception theory, that will protect him from any attempt to prosecute.[101] Although a witness may be forced to answer under a grant of testimonial immunity, his answer will probably contain no more information than is absolutely necessary. In other words, to be useful, a witness must not only answer, but he must answer freely.[102] The federal agencies that so vocally opposed the enactment of section 201 did so to prevent the dilution of their investigative power that the testimonial immunity standard necessarily implies.[103]

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99. *See* note 5 *supra* and accompanying text.
100. *See* note 45 *supra.*
101. *See* notes 26-28 *supra* and accompanying text.
102. *See* notes 26-27 *supra* and accompanying text.
103. *See* note 97 *supra.*

Although it constitutes the soundest explanation of the impact of *Murphy* on *Counselman* propounded thus far, the exception theory does not offer the best answer to the degree of immunity problem. A more acceptable alternative which would permit retention of the *Counselman* principle of one standard of immunity and at the same time minimize friction between state and federal governments is available. Under this formula transactional immunity must invariably be accorded to witnesses when the federal government is the immunizing body. The state is similarly required by *Counselman* and *Malloy* to afford full transactional immunity from prosecution within its own jurisdiction, but in deference to federalism the state can grant *no* immunity from federal prosecution. The fifth amendment, however, prohibits federal prosecution of a witness who has been granted transactional immunity by a state government agency, although the state cannot impose such a demand. Therefore, the witness receives immunity from prosecution irrespective of whether the state or federal government is the immunizing body. Furthermore, under this formula the concept of federalism is served to its fullest extent, because the state does not dictate a legal result in federal jurisdiction. On these bases, this formulation, rather than the exception theory, better promotes the interests of the individual, the fifth amendment under *Counselman*, and the concept of federalism.[104]

4. *Split of the Circuits Over Section 201.*—The various theories are illustrated by the opinions in several recent cases that examined the conflict between transactional and testimonial immunity in the context of situations that involved constitutional challenges to section 201. The circuit courts split over the question; the Ninth Circuit[105] sustained section 201 and the testimonial immunity standard, the Third[106] and Seventh[107] Circuits invalidated section 201 in favor of transactional immunity.

In *Stewart v. United States*,[108] appellants, after they had been granted immunity under section 201, refused to answer questions before

104. Under the proposed solution, the practical result is that the witness receives transactional immunity, or immunity from prosecution for the offense to which the testimony relates, whether he is a federal witness or a state witness. Thus, the *Counselman* rule is satisfied to the utmost extent.

Moreover, since states do not attempt to dictate a federal legal result, federalism is served to its fullest. The Constitution would foreclose federal prosecution when, under federalism, the states cannot prosecute.

105. *See* note 108 *infra* and accompanying text.

106. *See* note 113 *infra* and accompanying text.

107. *See* note 110 *infra* and accompanying text.

108. 440 F.2d 954 (9th Cir. 1971).

a federal grand jury on the ground that transactional, and not testimonial, immunity from proseuction is required of the federal government. The court explained that it had found no case holding that only transactional immunity could withstand fifth amendment scrutiny. Rather, the court quoted extensively from *Murphy* to demonstrate that the Supreme Court had sanctioned testimonial immunity and had sub silentio overruled *Counselman*. The court failed to recognize, however, that the passages it extracted from *Murphy* referred only to a situation in which the state attempts to grant immunity.[109] Relying erroneously upon the *Murphy* reasoning, which is clearly limited to one specific situation, the court upheld section 201.

More recently, *In re Korman*[110] and other lower federal court cases[111] took a contrary position, holding that section 201 is unconstitutional. *Korman* addressed the pivotal issues whether *Murphy* had sub silentio overruled *Counselman* and whether the statements in *Counselman* were mere dicta. The court found that the Supreme Court's reasoning in *Counselman* was not dicta and that even if it had been, the rule in *Counselman* had been elevated to a binding standard by *Brown v. Walker* and other subsequent cases. The court also found that *Murphy* had not overruled *Counselman*, basing this finding on the fact that the Supreme Court had cited *Counselman* as authority in *Albertson*

109. The court's reasoning reflects the argument proffered by proponents of § 201 during legislative discussion. *See* note 93 *supra*.

110. 449 F.2d 32 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972).

111. *In re* Brown, 329 F. Supp. 422 (S.D. Iowa 1971); *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971). *Kinoy* and *Brown*, 2 federal district court cases, have also assumed divergent positions on this precise issue. *Kinoy* involved a refusal to testify under a grant of immunity pursuant to § 201 of the Organized Crime Control Act of 1970. The witness contended that § 201 is invalid for failing to confer transactional immunity. The government countered predictably that *Counselman*'s statements were dicta and, in the alternative, that *Murphy* had sub silentio overruled *Counselman*. Holding § 201 unconstitutional, the court explained that *Murphy* had established an exclusionary rule and that the federal government is required to grant transactional immunity in every situation. Moreover, the court implied that § 201 might be valid if it were a state statute granting testimonial immunity within federal jurisdiction, but that § 201 as a federal statute is invalid. The court also held that the *Counselman* rule was not dicta and that *Murphy* had not sub silentio overruled *Counselman*.

*Brown* raised the same question in a unique way. There a witness refused to answer under a grant of immunity on the grounds that § 201 is applicable to his predicament because 18 U.S.C. § 259 (1970) states that when a new statute is "inconsistent" with one being replaced the old statute is automatically repealed, and that § 201 is invalid for failing to grant transactional immunity. The government uncharacteristically agreed that § 201 is invalid, but argued that the repeal of the former governing statute had been delayed so that the witness had actually received transactional immunity and must testify. The court adopted the government's argument and held that use and fruits immunity and transactional immunity were not so "inconsistent" with one another that § 201 automatically repealed the old statute. The result is that the witness received transactional immunity as required by the *Murphy* exclusionary rule.

*v. SACB*, a case that postdated *Murphy*.[112]

In *United States ex rel. Catena v. Elias*,[113] a state witness had refused to testify before the New Jersey State Commission of Investigation on the basis that the failure of the New Jersey statute to accord witnesses transactional immunity is a violation of the fifth amendment. Examining *Counselman* and *Brown v. Walker* and the impact of *Murphy* on the two-sovereignties rule, the court found that the basic premise underlying the whole line of Supreme Court cases has been that, under the fifth amendment, the immunizing body must afford the most complete protection possible. The court held that, from a pragmatic viewpoint, only full transactional immunity provides maximum insulation. Cognizant of the problem of federalism, the court expressed the view that the compelling concern to offer the optimum degree of immunity overrides the concern for federalism.[114] The result of the decision appears sound,[115] but the reasoning was probably erroneous, because the court overlooked the point that under the *Murphy* exclusionary rule considerations of federalism are more than just influential; they are absolute.

### *B. Supreme Court Resolution of the Counselman-Murphy Conflict—Kastigar v. United States*[116]

In *Kastigar v. United States*, petitioners were subpoenaed to appear before a federal grand jury in the Central District of California. Prior to their appearance, the district court, on application of the government, ordered petitioners to appear and answer the grand jury's questions under a section 201 grant of immunity, and in so doing, rejected petitioner's argument that the scope of the immunity afforded

112. The court, however, in striking down § 201, made the unnecessarily broad statement that any jurisdiction that seeks to compel a witness to testify must grant full transactional immunity. The exclusionary rule does not justify such a statement, although there are cogent reasons that militate in favor of such a standard. *See* notes 77-78 *supra* and accompanying text. The court in *In re Korman* committed the same mistake that the *Stewart* court did, although it reached a different conclusion. *Stewart* held that *Murphy* allows testimonial immunity grants by federal and state governments. That is incorrect. The exclusionary rule, in fact, requires the federal government to grant transactional immunity. *Korman* stated categorically that *Counselman* demands transactional immunity from all jurisdictions. The exclusionary rule, however, provides that the states can grant only testimonial immunity within the federal jurisdiction.

113. 449 F.2d 40 (3d Cir. 1971) (en banc), *rev'd*, 406 U.S. 952 (1972).

114. *See* text accompanying notes 68-70 *supra*.

115. Because New York failed to afford transactional immunity within its own jurisdiction it violated both the *Murphy* and *Counselman* rules. The court reached the right result, however, but unfortunately stated that it was because the state had not granted transactional immunity within federal jurisdiction.

116. 406 U.S. 441 (1972).

was not co-extensive with the fifth amendment. The Court of Appeals for the Ninth Circuit affirmed.[117] On writ of certiorari, the Supreme Court affirmed the two lower court decisions, and held that a witness can be compelled to testify under a grant of testimonial immunity.

At the outset, the Court discarded the holding of *Counselman* v. *Hitchcock* and found that transactional immunity extended protection to a witness beyond the demands of the fifth amendment.[118] The Court, surprisingly, reaffirmed its decisions in *Brown v. Walker* and *Ullmann v. United States*. Both *Brown* and *Ullmann* were substantial reiterations of the *Counselman* rule.[119] There is, therefore, some indication that the transactional immunity standard may persist despite the Court's explicit abandonment of *Counselman*. If the *Counselman* rule has in fact retained some vitality, then one of the alternative theories reconciling *Counselman* and *Murphy* discussed previously might better have served the Court's purposes. It seems clear from the entire opinion, however, that the transactional immunity standard has been supplanted by a testimonial immunity requirement.

The Court in *Kastigar* relied substantially on two arguments to justify its holding—first, that the "reasoning" and "result" of *Murphy* overruled *Counselman*; and secondly, that from a practical standpoint, placing the burden of proof upon the government to show lack of taint adequately protects a witness under the fifth amendment. The first of these arguments is unpersuasive because the *Murphy* decision was intended to relieve an inherent problem of federalism and was meant to apply only when the state is the immunizing authority.[120] The Court apparently recognized the inapplicability of *Murphy*, conceding that *Murphy* was not directly on point and that it had not explicitly overruled *Counselman*.[121] The Court, however, did find that both the "reasoning"

117. Stewart v. United States, 440 F.2d 954 (9th Cir. 1971). See notes 105 & 108 and accompanying text.

118. In rejecting the principle of *Counselman* the court stated: "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader proteetion than does the Fifth Amendment privilege." Kastigar v. United States, 406 U.S. 441, 453 (1972).

119. *See* notes 51-54 *supra* and accompanying text.

120. *See* notes 70-73 *supra* and accompanying text. Justice Douglas, in his dissent to *Kastigar*, argued that: "*Murphy* overruled not *Counselman*, but Feldman v. United States, which had held 'that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.' " Kastigar v. United States, 406 U.S. 441, 463 (1972) (Douglas, J., dissenting) (citations omitted).

121. Kastigar v. United States, 406 U.S. 441, 457-58 (1972).

and the "result" reached in *Murphy* compel the conclusion that testimonial immunity is constitutionally sufficient.[122] This argument, however, is equally unpersuasive. Initially the majority found that *Murphy* had permitted a testimonial standard, but the Court did not recognize that *Murphy* was concerned with federalism and applies only when the state is the immunizing body. The majority then reasoned that since *Malloy v. Hogan* required that the same standard govern both state and federal immunity, only use immunity need be granted by the federal government. It is abundantly clear that *Murphy* was an exception to the *Malloy* requirement and that the effect of *Malloy* was to extent federal standards to the states rather than state standards to the federal government.[123]

The second of the Court's two primary bases for its decision was that the federal government is required by *Murphy* to negative the existence of taint when a grant of immunity is shown.[124] The Court explained further that the government, to carry its burden of proof, must show more than a mere negation of taint, but must prove that the evidence proffered was obtained from a legitimate source wholly independent of the compelled testimony. Although the burden of proof imposed upon the government appears to be substantial, its effectiveness depends entirely upon the integrity and good faith of the prosecuting officials.[125] They alone have access to the facts necessary to prove taint and only they can trace the production and use of the compelled testimony. The state, therefore, can merely assert the existence of an independent source and if the defendant-witness can produce no contrary evidence, the burden will have been satisfied. Moreover, the good faith of the head prosecutor may not constitute a sufficient safeguard, because one of his remote subordinates may have used the information, and the obstacles to the defendant's discovery of this evidence are probably insurmountable. The spirit of the fifth amendment requires that the innocence or guilt of defendants not depend upon the good faith of its interrogators. Rather, the fifth amendment was intended as a safeguard against such silent abuses by the state. The Supreme Court, by its decision in *Kastigar*, has perhaps opened the door to such abuse.

Mr. Justice Powell, writing for the majority in *Kastigar*, compared the situation in that case to the exclusion of a forced confession.[126] Such an analogy is misleading, however, because an immunity statute and an

122. *Id.* at 458.
123. *See* notes 66-70 *supra* and accompanying text.
124. Kastigar v. United States, 406 U.S. 441, 460 (1972).
125. *Id.* at 469 (Marshall, J., dissenting).
126. *Id.* at 461.

exclusionary rule of evidence are fundamentally different in nature. As Mr. Justice Marshall explained in his dissent, an exclusionary rule of evidence operates after the fact without attempting to erase the mark of government impropriety. An immunity statute, on the other hand, is an implicit recognition that the Constitution permits the "impropriety" only so long as the witness is fully protected. Because an exclusionary rule of evidence operates after the fact, the only viable alternative is exclusion of the confession. Because an immunity statute must be invoked before the fact there is ample time to reflect on the consequences of conferring immunity. An ex post facto correctional measure such as an exclusionary rule of evidence is not at all comparable to a constitutionally sanctioned grant of immunity.

## III. Conclusion

The fifth amendment was conceived in abhorrence of the abuses of the inquisitorial system of justice. The immunity standard established in *Kastigar v. United States*, however, may only discourage and not prevent the abuses that motivated the amendment. Under the *Kastigar* standard, witnesses will be protected from self-incrimination only by the good faith resolve of the inquiring authority not to allege an independent source of information when one does not actually exist, since the protection offered a witness in the form of an affirmative burden of proof upon his governmental adversary is only nominal in relation to the practical difficulties of disproving an alleged independent source of information. The Court's adoption of the *Kastigar* rule implies that the Court has either rejected or pretermitted the various alternatives outlined herein that would have preserved the holdings of both *Counselman* and *Murphy* and have afforded full constitutional protection to witnesses. Instead, the inquiring government is requested to regulate its own investigatory operation to better protect the basic human right of those it questions—a situation that is not altogether salutary.

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