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Constitutional Law - Fifth Amendment - Compelled Testimony - Use and Derivative Use Immunity

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trial, available to persons civilly committed, it does not follow that he should be judged on the same substantive standards as persons civilly committed when it is being determined whether he should be committed at all. This is because of the inherent substantive differences between the test for incompetency to stand trial and the test for mental illness.

In light of the additional confusion over the different substantive tests for commitment generated by the equal protection holding and the Court's use of questionable precedent as a basis for that holding, and because the Court's objective could have been accomplished without it, it is this writer's opinion that the due process grounds should have been the sole basis for the Court's decision in *Jackson*.

Paul M. Puskar

CONSTITUTIONAL LAW—FIFTH AMENDMENT—COMPELLED TESTIMONY—USE AND DERIVATIVE USE IMMUNITY—The United States Supreme Court has held that use and derivative use immunity is coextensive with the privilege against self-incrimination and is therefore sufficient to compel testimony over a claim of the privilege:

Kastigar v. United States, 406 U.S. 441, rehearing denied, 408 U.S. 931 (1972).

The petitioners were subpoenaed to appear before the United States grand jury in the central district of California. Anticipating the petitioners' unwillingness to testify, the Government applied to the district court for an order pursuant to Title 18 of the United States Code, sections 6002 and 6003,¹ which compels a witness to respond to the

1. § 6002. Immunity generally

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

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

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination: but no testimony or other information

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questions of the grand jury in return for a grant of immunity. The district court granted this order over opposition from the petitioners.² At the grand jury hearing the petitioners refused to answer questions and were found to be in contempt of the district court. The Court of Appeals for the Ninth Circuit affirmed³ the lower court's decision. The Supreme Court granted certiorari⁴ to decide whether the use and derivative use immunity in sections 6002 and 6003 is coextensive with the scope of the fifth amendment privilege against compulsory self-incrimination.

The Court first looked at the petitioners' contention that no immunity statute is sufficient to compel a person to incriminate himself. This proposition was dismissed by the Court's reaffirming sixty years of precedent to the contrary.⁵

Petitioners' second contention was that the immunity granted in sections 6002 and 6003 was not sufficient to supplant the constitutional privilege against compulsory self-incrimination. The Court considered this question the crucial issue of the case and found that the immunity which was granted under the statute was sufficient because the effect of the statute's immunity provision is to leave the witness in exactly the same position as if he had exercised the privilege against compulsory

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.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

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

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

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

18 U.S.C. §§ 6002-03 (1970).

2. *Stewart v. United States*, 440 F.2d 954, 955 (9th Cir. 1971), *aff'd sub nom.* *Kastigar v. United States*, 406 U.S. 441 (1972).

3. *Id.*

4. *Kastigar v. United States*, 402 U.S. 971 (1971).

5. See *Ullmann v. United States*, 350 U.S. 422 (1956); *Shapiro v. United States*, 335 U.S. 1 (1948); *Heike v. United States*, 227 U.S. 131 (1913); *Brown v. Walker*, 161 U.S. 591 (1896).

testimony.⁶ In finding that the immunity granted these petitioners was adequate, the Court decided that the petitioners were not justified in refusing to answer the grand jury's questions after having received the immunity.

The Court demonstrated that statutory and case law interacted historically, resulting in numerous transactional⁷ federal immunity statutes until 1970 when Congress enacted sections 6002 and 6003.⁸ The new statute was held⁹ in *Kastigar* to be coextensive with the fifth amendment's privilege against compulsory self-incrimination in its grant of use and derivative use¹⁰ immunity.

The Court reasoned that an immunity statute must grant, to a party who is compelled to testify, protection which is as broad as the privilege against compelled testimony. The Court relied heavily on *Murphy v. Waterfront Commission*¹¹ which held that a state witness could not be compelled to give testimony which might be incriminating under federal law unless the compelled testimony and its fruits could not be used in any manner by federal officials in connection with a criminal prosecution against him.¹² Sections 6002 and 6003 were shown by the *Kastigar* Court to have the object of putting the witness in the same position as if he had claimed the privilege under the fifth amendment.¹³ Therefore, the Court reasoned, transactional immunity was unduly broad and wasteful since the lesser quantum of immunity, use and derivative use, was sufficiently coextensive with the privilege against compulsory self-incrimination. By adopting sections 6002 and 6003 as the proper immunity to be granted, the Court did not specifically overrule the transactional statutes and case law but merely narrowed this area of the law to the point where use and derivative use statutes are adequate.¹⁴

The first federal immunity statute in the United States was enacted in 1857.¹⁵ This statute granted an overly broad immunity for any fact

6. *Kastigar v. United States*, 406 U.S. 441, 458-59, *rehearing denied*, 408 U.S. 931 (1972).

7. Transactional immunity is absolute immunity from future prosecution for the crime to which the testimony relates.

8. 406 U.S. at 449-52.

9. *Id.* at 453.

10. Use and derivative use immunity means that the particular testimony and evidence obtained therefrom cannot be utilized to prosecute the witness in a future criminal proceeding.

11. 378 U.S. 52 (1964).

12. *Id.* at 79.

13. 406 U.S. at 458-59.

14. *Id.* at 453.

15. Act of Jan. 24, 1857, ch. XIX, 11 Stat. 155. The entire origin of the fifth amendment

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or any act testified to before a congressional committee, not merely for the offence being referred to by the questioning body.¹⁶ The Immunity Act of 1862¹⁷ amended the Act of 1857 by replacing the earlier act's broad grant of immunity with a species of use immunity which was much narrower than the 1857 immunity. The reason for the 1862 statute was to protect against the abuses of the 1857 statute under which witnesses were being called before congressional committees and wallowing in the statute's immunity bath by testifying to all crimes committed by them to protect themselves from future prosecution.¹⁸ In 1868, another statute extended the use immunity of the 1862 statute to cover any testimony given in a judicial proceeding.¹⁹ Another federal immunity statute was passed in 1887 which pertained to interstate commerce and this statute simply restated the immunity principle of the 1868 statute.²⁰ In *Counselman v. Hitchcock*²¹ the Court stated that the use-type immunity granted in the 1868 statute was an abridgement of the constitutional privilege against compulsory self-incrimination.²² The use immunity granted under this statute was held not to be sufficient to supplant the privilege against compelled testimony because it did not prevent the use of this testimony to search out other evidence to be used against the party who was compelled to testify.²³ The Court in *Counselman* stated that no statute leaving the party subject to prosecution after he answers the incriminating questions can have the effect of adequately replacing the constitutional privilege.²⁴

In response to the *Counselman* decision of 1892 the Congress passed a new statute the following year²⁵ which was the first transactional immunity statute.²⁶ The case of *Brown v. Walker*²⁷ upheld the 1893

privilege is far beyond the scope of this note. For a detailed account of this subject see L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968).

16. Act of Jan. 24, 1857, ch. XIX, 11 Stat. 155.

17. Act of Jan. 24, 1862, ch. XI, 12 Stat. 333.

18. Comment, *Compulsory Immunity Legislation: Title II of the Organized Crime Control Act of 1970*, 1971 U. ILL. L.F. 91, 95.

19. Act of Feb. 25, 1868, ch. XIII, 15 Stat. 37.

20. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

21. 142 U.S. 547 (1892).

22. *Id.* at 585.

23. *Id.* at 564.

24. *Id.* at 585.

25. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

26. 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

Id.

27. 161 U.S. 591 (1896).

statute²⁸ and in doing so affirmed the *Counselman* standard (immunity must be broad enough to replace the privilege against compulsory self-incrimination). This *Counselman* standard was upheld for seventy years until the Court in *Murphy v. Waterfront Commission*²⁹ held that full transactional immunity was not necessary.³⁰

In 1970 when Congress drafted sections 6002 and 6003, it intended to reflect the use immunity concept of *Murphy* rather than the transactional concept called for by *Counselman*.³¹ This statute was said to give the Government the unique ability to give the witness all that he is guaranteed under the Constitution (use and derivative use immunity) so that he will neither invoke the constitutional privilege frivolously nor shield other parties leaving the Government impotent.³² Because courts of appeals have disagreed³³ as to the constitutionality of sections 6002 and 6003 the Supreme Court granted certiorari and decided in *Kastigar* that the immunity granted in the 1970 statute is coextensive with the privilege against compulsory self-incrimination.³⁴

In upholding the statute, *Kastigar* redefined the quantum of immunity necessary to replace the witness' privilege against compulsory self-incrimination. It is clear, after *Kastigar*, that to compel a witness to testify after that witness has invoked the fifth amendment privilege, the Government need only grant use and derivative use immunity pursuant to sections 6002 and 6003.³⁵

In *Kastigar*, for the first time, the Court squarely faced the question of whether transactional immunity or use and derivative use immunity was constitutionally required. The Court earlier required only use and derivative use immunity in *Murphy*, a forerunner to *Kastigar*, but that case can be distinguished because its main thrust was to resolve the dual

28. While the constitutional privilege in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of the opinion that the witness was compellable to answer, and that the judgment of the court below must be affirmed.

Id. at 610.

29. 378 U.S. 52 (1964).

30. [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 can not be used in any manner by federal officials in connection with a criminal prosecution against him.

Id. at 79.

31. 2 U.S. CODE CONG. & AD. NEWS 4017, 4018 (1970).

32. 116 CONG. REC. 35291 (1970).

33. *In re Korman*, 449 F.2d 32 (7th Cir. 1971), stated that transactional immunity is necessary while *Stewart v. United States*, 440 F.2d 954 (9th Cir. 1971), *aff'd sub nom. Kastigar v. United States*, 406 U.S. 441 (1972), has upheld sections 6002 and 6003.

34. 406 U.S. at 453.

35. *Id.*

jurisdictional problem (*Murphy* dealt with a question of interjurisdictional immunity while *Kastigar* dealt with immunity in an intrajurisdictional situation).³⁶ In resolving the immunity question in favor of use and derivative use immunity, the Court expressed the belief that the transactional immunity statutes in effect for the past seventy years were wastefully broad.

The Court did not expressly overrule the holding of *Counselman* that the immunity granted must be coextensive with the scope of the fifth amendment privilege, but, on the contrary, expressly affirmed that principle. Because of *Kastigar*, the *Counselman* case itself, along with the other transactional statutory and case law, has been trimmed to the more essential use and derivative use immunity of *Kastigar*. The problem that is seen in the Court's limiting of the *Counselman* decision rather than expressly overruling that decision is that although the decision in *Kastigar* is "consistent with the conceptual basis of *Counselman*,"³⁷ the immunity adopted in *Kastigar* is the type of immunity that the *Counselman* case specifically found insufficient to replace the fifth amendment's privilege.

Howard B. Zavodnick

TORTS—RIGHTS OF THE HUSBAND AND WIFE TO SUE EACH OTHER FOR NEGLIGENCE OF THE OTHER—DOCTRINE OF INTERSPOUSAL IMMUNITY—The Indiana Supreme Court has held that the common law doctrine of interspousal immunity in tort actions is abrogated.

Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972).

Plaintiff sued to recover damages for injuries sustained by her on January 6, 1964, while riding as passenger in an automobile driven by the defendant. The complaint was filed on July 28, 1964. While the action was still pending plaintiff and defendant were married on June 8, 1969.¹

36. 378 U.S. at 79. The *Murphy* Court granted the petitioner only use and derivative use immunity but this was in a situation where the state witness was compelled to give testimony which might be incriminating under federal law. Since *Murphy*, there is now use and derivative use immunity with respect to the federal government. The witness is left in substantially the same position as if he had claimed the privilege while this permits the state to secure the needed information.

37. 406 U.S. at 453.

1. *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972).