A Witness Against Himself: Use and Derivative Use Immunity and Prosecutorial Discretion

JOHN B. PLIMPTON, Mr., University of Utah
A WITNESS AGAINST HIMSELF: USE AND DERIVATIVE USE IMMUNITY AND PROSECUTORIAL DISCRETION

John B. Plimpton

Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>1</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>2</td>
</tr>
<tr>
<td>I. A BRIEF HISTORY OF USE AND DERIVATIVE USE IMMUNITY</td>
<td>6</td>
</tr>
<tr>
<td>II. INTERPRETING USE AND DERIVATIVE USE IMMUNITY</td>
<td>16</td>
</tr>
<tr>
<td>A. THE LANGUAGE OF THE SUPREME COURT AND USE AND DERIVATIVE USE IMMUNITY</td>
<td>18</td>
</tr>
<tr>
<td>B. POLICY AND USE AND DERIVATIVE USE IMMUNITY</td>
<td>26</td>
</tr>
<tr>
<td>1. Any Use Immunity</td>
<td>27</td>
</tr>
<tr>
<td>2. Evidentiary Use Immunity</td>
<td>33</td>
</tr>
<tr>
<td>3. Substantially Same Position Immunity</td>
<td>40</td>
</tr>
<tr>
<td>C. CONCLUSION: SUBSTANTIALLY SAME POSITION IMMUNITY IS BEST</td>
<td>42</td>
</tr>
<tr>
<td>III. PROSECUTORIAL DISCRETION AND SUBSTANTIALLY SAME POSITION IMMUNITY</td>
<td>44</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>47</td>
</tr>
</tbody>
</table>

Abstract

In Kastigar v. United States, the Supreme Court held that in order to compel testimony containing self-incriminating information from a witness (1) who is not a criminal defendant and (2) has invoked the privilege against self-incrimination, the government must grant the witness immunity from “use and derivative use” of the testimony in a subsequent criminal proceeding against him. The federal circuits are split on the scope of protection afforded by this type of immunity. Some circuits construe use and derivative use immunity to prohibit any and all uses the government may make of his immunized testimony. Other circuits maintain that the immunity bans only evidentiary uses, and therefore permit all nonevidentiary uses. In the 2011 case
United States v. Slough, the D.C. Circuit joined the latter group and held that a prosecutor may use compelled testimony as the basis of her decision to prosecute the witness who gave it. The court reasoned that to hold otherwise would unduly infringe on prosecutorial discretion.

This paper proposes a novel interpretation of use and derivative use immunity that falls in between both sides of the circuit split. Based on the language of Kastigar and policy considerations, the protection afforded by use and derivative use immunity is substantially equivalent to the protection a witness would receive if he had been able to exercise the right to remain silent. It follows that an immunized witness should be protected from any harmful use of his testimony by the government. Using a witness’s testimony to decide to prosecute him constitutes a harmful use. Additionally, while prosecutorial discretion is broad, a defendant may not be prosecuted based on the exercise of his constitutional or statutory rights. Giving compelled testimony requires constitutional protection commensurate with exercising the right to remain silent. So prosecuting an immunized witness based on his compelled testimony is equivalent to prosecuting him for exercising his right to remain silent. This the government may not do. Therefore, Slough was wrongly decided.

INTRODUCTION

The constitutional privilege against self-incrimination, contained in the Fifth Amendment of the Constitution, declares that “No person . . . shall be compelled in any criminal case to be a
witness against himself.”¹ This privilege accords the accused in a criminal proceeding the right to remain completely silent.² The accused may decline to take the stand in his defense, or he may take the stand, but refuse to give any answers he believes might incriminate him.³

The privilege also extends to any witness that is not a criminal defendant, including any witness in any “civil, criminal, administrative, legislative, investigatory, or adjudicative” proceeding, and “protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”⁴ However, the privilege does not give a witness who is not a criminal defendant an absolute right to remain silent.⁵ Once the witness asserts the privilege, the government can compel testimony that would be self-incriminating, but in doing so, the government must grant the witness immunity from using his testimony, and evidence derived from his testimony, in subsequent criminal

³ Strachan, supra note 2, at 794.
⁴ Kastigar, 406 U.S. at 444–45; Strachan, supra note 2, at 795.
⁵ Strachan, supra note 2, at 795.
proceedings against him, thereby protecting the witness from self-incrimination. This type of immunity is known as “use and derivative use” immunity. Trial courts enforce this standard through “Kastigar hearings,” where the government bears the burden of proving, by a preponderance of the evidence, that “it obtained all of the evidence it proposes to use from sources independent of the compelled testimony.” Generally, if the government uses tainted evidence in obtaining an indictment, the indictment will be dismissed. Likewise, introducing tainted evidence at trial warrants a new trial.

The Federal Circuit Courts of Appeals are split on the extent of the protection supplied by use and derivative use immunity. The split traces the distinction between evidentiary and nonevidentiary use. All circuits agree that the evidentiary use of immunized testimony against the witness is prohibited. In other words, the immunized testimony itself, and evidence derived

7 See Kastigar, 406 U.S. at 449.
8 United States v. North, 910 F.2d 843, 854 (D.C. Cir.) (per curiam) (explaining Kastigar hearings), opinion partially withdrawn and superseded in part on reh’g by 920 F.2d 940 (D.C. Cir. 1990) (per curiam).
9 Id.
10 Id.
11 See generally North, 910 F.2d at 857 (discussing the circuit split on whether nonevidentiary use of immunized testimony is permitted).
12 Compare United States v. Byrd, 765 F.2d 1524, 1531 (11th Cir. 1985) (stating that the privilege against self-incrimination is concerned with “direct and indirect evidentiary uses of compelled testimony, and not” other uses), with United States v. McDaniel, 482 F.2d 305, 311
therefrom, cannot be used as evidence against the witness in a subsequent criminal proceeding against him. For some circuits, the protection ends there. These circuits permit the nonevidentiary use of an immunized witness’s testimony against him.\textsuperscript{13} Other circuits prohibit any and all uses, evidentiary or not, of the immunized testimony against the witness.\textsuperscript{14}

The D.C. Circuit is among those which permit the nonevidentiary use of immunized testimony.\textsuperscript{15} In the recent case of \textit{United States v. Slough}, it held that that a prosecutor could decide to prosecute an immunized witness based on his compelled testimony.\textsuperscript{16} The court

\begin{quote}
(8th Cir. 1973) (stating that the privilege provides “a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom”).
\end{quote}

\textsuperscript{13} \textit{See} United States v. Bolton, 977 F.2d 1196, 1199 (7th Cir. 1992); United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989); United States v. Mariani, 851 F.2d 595, 600–01 (2d Cir. 1988), \textit{cert. denied}, 490 U.S. 1011, 109 S.Ct. 1654, 104 L.Ed.2d 168 (1989); United States v. Crowson, 828 F.2d 1427, 1431–32 (9th Cir. 1987), \textit{cert. denied}, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); \textit{Byrd}, 765 F.2d at 1531.


\textsuperscript{15} United States v. Slough, 641 F.3d 544, 553–54 (D.C. Cir. 2011).

\textsuperscript{16} \textit{Id.}
reasoned that using the testimony to decide whether to prosecute was a nonevidentiary use, and that holding otherwise would unduly impinge prosecutorial discretion. ¹⁷

This paper argues that Slough was wrongly decided. The first section provides some background on the constitutional requirement that the government grant immunity to a witness in order to compel testimony from him. The second section argues that the proper test for permissible use of compelled testimony against the witness who gave it is not whether the use is evidentiary or nonevidentiary. Rather, it is whether the use “leaves the witness and the prosecutorial authorities [vis-á-vis the witness] in substantially the same position as if the witness had claimed the privilege in the absence of a grant of immunity [and remained silent].”¹⁸

There is no plausible way to argue that a decision to prosecute a witness based on the witness’s compelled testimony leaves the witness and the prosecutorial authorities in substantially the same position. The third section argues that prohibiting the prosecution of a witness based on his compelled testimony would not unduly invade the province of prosecutorial discretion.

I. A BRIEF HISTORY OF USE AND DERIVATIVE USE IMMUNITY

While the privilege against self-incrimination gives criminal defendants the right to avoid self-incrimination by remaining silent, it does not extend this right to witnesses that are not criminal defendants. ¹⁹ It is firmly established that governments have the power to “compel persons to testify in court or before grand juries and other governmental agencies.”²⁰

¹⁷ *Id.*


¹⁹ *See supra* note 5 and accompanying text.

principle behind this rule is that “the public has a right to everyman’s evidence.”

Indeed, “the Sixth Amendment requirements that an accused be confronted with the witnesses against him and have compulsory process for obtaining witnesses in his favor” necessarily give courts the power to compel testimony. Justice White described the power as “[a]mong the necessary and most important powers of [the state and federal governments] to assure the effective functioning of the government in an ordered society” because “[s]uch testimony constitutes one of the Government’s primary sources of information.”

Nevertheless, there are limitations to the government’s ability to compel testimony, the “most important” of which is the privilege against self-incrimination. The Supreme Court has recognized the privilege as “an important advance in the development of our liberty – ‘one of the great landmarks in man’s struggle to make himself civilized.’” It is founded on “many of our fundamental values and most noble aspirations”:

our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will


22 Id. at 443–44.


24 Kastigar, 406 U.S. at 444.


26 Id.
be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load”; our respect for the inviolability of the human personality and of the right of each individual “to a private enclave where he may lead a private life”; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”

The Court has expressed its commitment to protecting these values.\textsuperscript{28}

It used to be that the form of immunity needed to compel testimony was far more protective than the “use and derivative use” immunity needed today. In the 1892 case of \textit{Counselman v. Hitchcock}, Charles Counselman was subpoenaed to testify at a grand jury hearing where the government sought to indict a railroad company.\textsuperscript{29} When he repeatedly refused to answer certain questions on the ground that they tend to incriminate him, he was held in contempt, fined, jailed.\textsuperscript{30} After granting Counselman’s petition for a writ of habeas corpus, the circuit court held that the immunity statute in place at the time, which merely prohibited the use of compelled testimony as evidence against the witness in a subsequent criminal prosecution, was coextensive with the constitutional privilege against self-incrimination.\textsuperscript{31} Since the immunity statute provided sufficient protection, the circuit court held that Counselman “was

\textsuperscript{27} Id. (citations omitted).

\textsuperscript{28} \textit{Kastigar}, 406 U.S. at 445 (“This Court has been zealous to safeguard the values which underlie the privilege.”)

\textsuperscript{29} Counselman v. Hitchcock, 142 U.S. 547, 548 (1892).

\textsuperscript{30} Id. at 548–52.

\textsuperscript{31} Id. at 559–60.
entitled to no privilege under the [C]onstitution.”

Thus, the circuit court found that the district court was in its power to hold Counselman in contempt and the government was in its power to compel the testimony.

Reversing the circuit court, the Supreme Court held that the immunity statute was not coextensive with the Constitution, that the privilege against self-incrimination applies to any witness testifying in any criminal case regardless of any immunity statute, and that the government was required to provide “absolute immunity against future prosecution for the offense to which the question relates” in order to compel testimony from a non-defendant witness. In other words, not only could a prosecutor not use the testimony or any evidence derived therefrom against the witness in a subsequent prosecution for matters discussed during testimony, but the witness could not be prosecuted at all for criminal behavior about which the witness testified. This type of immunity is termed “transactional” immunity, for it completely protects the witness from prosecution for “any transaction . . . concerning which he may testify.”

---

32 Id. at 560.

33 Id. at 559.

34 Id. at 564–65.

35 Id. at 562, 564–65.

36 Id. at 586 (“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.”).

One general policy motivating transactional immunity was interpreting the Bill of Rights broadly in order to ensure that its provisions had proper effect.\textsuperscript{38} The broadest interpretation of the privilege against self-incrimination would entail that once a witness invokes the privilege, his compelled testimony could not possibly be self-incriminating. The only way to guarantee against self-incrimination is to “remov[e] the criminality,”\textsuperscript{39} giving a grant of immunity the effect of a “complete pardon for the offense.”\textsuperscript{40}

Other policies furthered by transactional immunity were certainty in the law and judicial economy. Transactional immunity drew clear, easily enforceable lines. As Justice Brennan wrote in his dissent in \textit{Piccirillo}: “No question arises of tracing the use or non-use of information gleaned from the witness’ compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand.”\textsuperscript{41} This certainty engenders “[r]espect for law.”\textsuperscript{42}

\textsuperscript{38} \textit{Counselman}, 142 U.S. at 562 (“[The privilege against self-incrimination] must have a broad construction in favor of the right which it was intended to secure.”); see also \textit{Kastigar v. United States}, 406 U.S. 441, 465 (1972) (Douglas, J., dissenting) (stating sarcastically that the Bill of Rights does not “contain[] only ‘counsels of moderation’ from which courts and legislatures [can] deviate according to their conscience or discretion”).


\textsuperscript{40} \textit{See Brown v. Walker}, 161 U.S. 591, 595 (1896).

\textsuperscript{41} \textit{Piccirillo}, 400 U.S. at 567 (Brennan, J., dissenting).

\textsuperscript{42} \textit{Id.}
Naturally, transactional immunity is the preferred form of immunity for a compelled witness. It was so preferred, in fact, that witnesses granted transactional immunity would abuse the protection through what were called “immunity baths” – during questioning, they would disclose as much of their criminal activity as they could.\(^{43}\) Regarding the administration of justice, however, transactional immunity was something of a double-edged sword. Of course, transactional immunity sometimes forces a prosecutor to choose between prosecuting a suspected criminal and compelling testimony from him. As a result, a prosecutor working under the regime of transactional immunity would need to be very judicious in deciding when to compel testimony. Additionally, there is the problem of the aforementioned immunity baths. On the other hand, transactional immunity assures that a prosecutor is likelier to receive more detailed and reliable information from a compelled witness than if the witness fears his testimony could, surreptitiously or not, be used against him. Additionally, a prosecutor would never have the burden of proving that the evidence she proposes to use was obtained “from a legitimate source wholly independent of the compelled testimony.”\(^{44}\) The need to meet this burden can result in significant waste, since a prosecutor might invest substantial time and resources in preparing a case against an immunized witness, only to have the charges dismissed for failure to meet the burden.

In *Kastigar*, the court abandoned transactional immunity and, in its place, adopted use and derivative use immunity.\(^{45}\) John Kastigar and Michael Stewart, the petitioners, had been subpoenaed to testify before a federal grand jury under a grant of immunity providing them

\(^{43}\) *See* Strachan, *supra* note 2, at 797–98.

\(^{44}\) *See* Kastigar, 406 U.S. at 460.

\(^{45}\) *See Id.* at 453.
protection pursuant to the federal immunity statute.\textsuperscript{46} The statute provides that a compelled witness

may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.\textsuperscript{47}

Despite the grant of “use and derivative use” immunity pursuant to the statute, Kastigar and Stewart refused to answer questions, and were held in contempt.\textsuperscript{48}

On appeal to the Supreme Court, Kastigar and Stewart argued that the federal immunity statute is unconstitutional because the constitutional privilege against self-incrimination “deprives Congress of power to enact laws that compel self-incrimination.”\textsuperscript{49} The Court quickly rejected this argument.\textsuperscript{50} In the alternative, Kastigar and Stewart argued that the privilege requires transactional immunity in exchange for compelled testimony, and thus that the statute confers less protection than the constitution demands.\textsuperscript{51}

In response, the Court held that the protection, provided by the statute, from use and derivative use of the immunized testimony is “coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the

\textsuperscript{46} \textit{Id.} at 442.


\textsuperscript{48} \textit{Kastigar}, 406 U.S. at 442.

\textsuperscript{49} \textit{Id.} at 448.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.}
privilege." In other words, the protection provided by the statute is identical to that provided by the privilege, no broader, no narrower. Transactional immunity supplies protection that is "considerably broader" than the privilege requires. Dismissing its own construal of the privilege in Counselman as dicta, the Court declared that "[t]he privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." Thus, Kastigar makes two things clear: (1) any witness compelled to testify may be subsequently prosecuted for crimes to which his compelled testimony relates, and (2) such a witness must, at a minimum, be granted use and derivative use immunity in exchange for his compelled testimony.

As the aforementioned circuit split demonstrates, the Court’s description of use and derivative use immunity in Kastigar is subject to more than one interpretation. Some circuits interpret use and derivative use immunity to prohibit only evidentiary uses of the compelled testimony against the immunized witness. These circuits hold that nonevidentiary uses fall

52 Id. at 453.

53 Id.

54 Id. at 454–55; see Counselman v. Hitchcock, 142 U.S. 547, 585–86 (1892) ("[N]o 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.").

55 Kastigar, 406 U.S. at 453.

56 See supra note 13 and accompanying text.
outside the scope of use and derivative use immunity.\textsuperscript{57} Because the distinction between evidentiary and nonevidentiary use is difficult (if not impossible) to articulate, courts have defined the distinction by example.\textsuperscript{58} Generally, nonevidentiary uses include “assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.”\textsuperscript{59} Other circuits interpret use and derivative use immunity to prohibit all uses, including nonevidentiary uses, of compelled testimony against the witness who gave it.\textsuperscript{60} Wary of the possibility of insidious and even subconscious uses of compelled testimony, these circuits generally require the government to prove that the prosecutor on the case has not been exposed to it.\textsuperscript{61}

\textit{United States v. Slough} concerned an incident involving Blackwater Worldwide, a contracted security service, in Iraq.\textsuperscript{62} When a bomb exploded near the location of a U.S. diplomat who was conferring with Iraqi officials, a Blackwater team, Raven 3, was ordered to

\begin{footnotesize}
\textsuperscript{57} See \textit{supra} note 13 and accompanying text.
\textsuperscript{59} \textit{United States v. McDaniel}, 482 F.2d 305, 311 (8th Cir. 1973).
\textsuperscript{60} See \textit{supra} note 14 and accompanying text.
\textsuperscript{61} \textit{See} United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973) (holding that, due to the immeasurable subjective effect of the prosecutor’s” reading of the compelled testimony, the government could not discharge its burden of proof under \textit{Kastigar}); see also United States v. Pantone, 634 F.2d 716, 723 (1980) (recognizing that it is “critical that prosecutors be held to a high standard in proving that their actions are untainted by exposure to prior compelled testimony”).
\textsuperscript{62} \textit{United States v. Slough}, 641 F.3d 544, 547 (D.C. Cir. 2011).
\end{footnotesize}
secure the area for the evacuation of the diplomat.\textsuperscript{63} Gunfire erupted, and it was unclear who fired first.\textsuperscript{64} When the dust settled, fourteen Iraqi civilians were dead and twenty were wounded.\textsuperscript{65} Two days after the incident, the State Department compelled written statements from all of the members of Raven 23.\textsuperscript{66} The incident attracted significant media attention, and the statements were leaked and published.\textsuperscript{67} The government sought and obtained indictments for voluntary manslaughter and weapons violations against five of the Raven 3 members.\textsuperscript{68} The district court granted the defendants’ motion to dismiss the indictments on the grounds that, inter alia, the prosecutor’s decision to seek the indictment was motivated by the prosecutor’s exposure to the immunized testimony.\textsuperscript{69}

On appeal, the D.C. Circuit vacated the trial court’s ruling.\textsuperscript{70} The court held that a prosecutor may use compelled testimony to decide to prosecute the immunized witness who gave it.\textsuperscript{71} The court based its holding on two seemingly independent rationales. First, it reasoned that use and derivative use immunity permits nonevidentiary uses of compelled testimony, and that

\textsuperscript{63} \textit{Id.} at 547–48.
\textsuperscript{64} \textit{Id.} at 548.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 548–49.
\textsuperscript{68} \textit{Id.} at 549.
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.} at 554–55.
\textsuperscript{71} See \textit{Id.} at 553–554.
using the testimony to decide to prosecute the witness is a nonevidentiary use. Second, it reasoned that a contrary holding would unduly infringe on the doctrinally broad purview of prosecutorial discretion. This paper does not dispute that using compelled testimony to decide to prosecute is a nonevidentiary use. However, the following two sections, respectively, dispute both of the D.C. Circuit’s conclusions that use and derivative use immunity permits nonevidentiary uses of compelled testimony, and that prohibiting the use of compelled testimony in decisions to prosecute would unduly infringe on prosecutorial discretion.

II. INTERPRETING USE AND DERIVATIVE USE IMMUNITY

The language in *Kastigar* allows for more than one interpretation of use and derivative use immunity. Because courts seize on the language that justifies their respective interpretations, it is perhaps useful to classify the varying language by interpretation. The first two interpretations reflect the circuit split discussed in the last section. The first interpretation, “any use” immunity, is that such immunity prohibits any and all “use of compelled testimony, as well as any evidence derived directly and indirectly therefrom” against the immunized witness. The second interpretation, “evidentiary use” immunity, prohibits all evidentiary uses, direct and indirect, of the testimony, but permits all nonevidentiary uses.

This section argues for a third interpretation of use and derivative use immunity, and one that courts have thus far overlooked. The “substantially same position” interpretation is that use

---

72 *Id.*

73 *Id.* at 554.

74 For circuits adhering to this interpretation, see supra note 14.

75 For circuits adhering to this interpretation, see supra note 13.
and derivative use immunity prohibits all and only those uses of compelled testimony and
evidence derived therefrom that would leave the immunized witness in a substantially different
position than if he had remained silent.\textsuperscript{76} In other words, a use of compelled testimony is
permissible only if it would leave the witness in substantially the same position as if he had
never given the testimony. Under this interpretation, only uses that would be harmless to the
witness are permissible. Typically, this would pertain to the issue of whether a prosecutor’s
exposure to the compelled testimony constitutes an impermissible use. If exposure of the
prosecutor to the testimony is harmless because the exposure was of a sufficiently low amount
(e.g., the prosecutor read a portion of the testimony that does not relate to the crimes charged) or
a sufficiently harmless kind (e.g., the prosecutor is aware of the fact that the defendant has given
potentially self-incriminating testimony, but is not aware of the content of the testimony), then
the court must find that the prosecutor has not violated the witness-defendant’s use and
derivative use immunity.

\textsuperscript{76} Some circuit opinions have, without deciding the issue, hinted that this might be the correct
approach. \textit{See} United States v. Serrano, 870 F.2d 1, 17–18 (1st Cir. 1989) (“While we need not
decide whether certain nonevidentiary uses of immunized testimony may so prejudice the
defendant as to warrant dismissal of the indictment, we agree with the Second Circuit that a
prosecution is not foreclosed merely because the ‘immunized testimony might have tangentially
influenced the prosecutor’s thought processes in preparing the indictment and preparing for
trial.’”); United States v. Montoya, 45 F.3d 1286, 1296 (9th Cir. 1995) (assuming that “some
non-evidentiary uses could come with within the ban of the [federal immunity] statute”).
Subsection A of this section discusses the various language the Supreme Court has used in *Kastigar* and subsequent cases to explicate use and derivative use immunity. Subsection B considers the proper interpretation of use and derivative use immunity from a policy perspective. Subsection C concludes that, based on the language of the Court and policy considerations, substantially same position immunity is the best interpretation of use and derivative use immunity.

**A. The Language of the Supreme Court and Use and Derivative Use Immunity**

*Kastigar* contains substantial language supporting the “any use” interpretation (i.e., that any use, evidentiary or nonevidentiary, is prohibited) of use and derivative use immunity. The Court described use and derivative use immunity as “prohibit[ing] the prosecutorial authorities from using the compelled testimony in any respect,”’’77 “a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom,”’’78 and a “total prohibition on use.”’’79 Additionally, The Court quoted *Murphy v. Waterfront Comm’n* with approval: “[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.”’’80

The “evidentiary use” interpretation (i.e., that all evidentiary use is prohibited and all nonevidentiary use is permitted) has relatively little textual support in *Kastigar*. Indeed, the Court never explicitly makes a distinction between evidentiary and nonevidentiary use. The only


78 *Id.* at 460.

79 *Id.*

80 *Id.* at 457 (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 79 (1964)) (emphasis added).
support comes from a single passage, in which the Court instructs that once a defendant demonstrates he has given immunized testimony on matters relating to his prosecution, “it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”

Professor Gary Humble, in an influential law review article, interprets other language in *Kastigar* as supporting a distinction between evidentiary and nonevidentiary use. But a close examination of the language he cites actually supports the opposite interpretation. For example, the Court wrote that “immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the Fifth Amendment privilege.” In quoting this excerpt, Humble adds emphasis to the word “evidence,” and interprets it to indicate that the Court only had evidentiary uses in mind. However, the word “evidence” is in the second conjunct of a conjunction, the first conjunct of which contains the word “use” without any adjective modifying it. Thus, at face value, the quote really means that not only is the use of

---

81 Id. at 460.

82 Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 Tex. L. Rev. 351 (1987). The D.C. Circuit cited the article in *United States v. North*, 910 F.2d 843, 857 (1990), discussing the issue of whether *Kastigar* prevents the nonevidentiary use of compelled testimony. *Id. North* ultimately did not need to decide the issue. See *id.* at 360 (concluding that the use of compelled testimony in dispute, to refresh the memory of witnesses, is an indirect evidentiary, rather than nonevidentiary, use).

83 See generally Humble, *supra* note 82, at 360–63.


immunized testimony against the witness banned (i.e., all direct use), but so is the use of all
evidence derived from that testimony (i.e., all indirect use). The excerpt does not indicate any
distinction between evidentiary and nonevidentiary uses. Humble makes the same mistake in
interpreting three other similar sentences of Kastigar.86

Furthermore, there is textual evidence in Kastigar that the Court expressly intended to
ban at least some nonevidentiary uses. Recounting its rationale in Counselman for invalidating
an immunity statute that granted only immunity from direct use, but not indirect use, of
compelled testimony, the Court pointed out one reason that the use-only immunity statute did not
pass constitutional muster: it “afford[ed] no protection against that use of compelled testimony
which consists in gaining therefrom a knowledge of the details of a crime, and of sources of

86 Humble makes the mistake in the following sentences, in all of which he added the emphasis:
“The fifth amendment ‘protects against any disclosures that the witness reasonably believes
could be used in a criminal prosecution or could lead to other evidence that might be so used.’”
Humble, supra note 82, at 361 (quoting Kastigar, 406 U.S. at 445). “First, the Court formed the
issue as ‘whether testimony may be compelled by granting immunity from the use of compelled
testimony and evidence derived therefrom . . . .’” Id. at 362 (quoting Kastigar, 406 U.S. at 443).
“Finally, the Court’s dictum that the statute precludes use of compelled testimony ‘in any
respect’ must be read in context with the preceding sentence: ‘Immunity from use of compelled
testimony, as well as evidence derived directly and indirectly therefrom, affords sufficient
protection.’” Id. at 363 (quoting Kastigar, 406 U.S. at 453). Unlike Humble, the Court does not
place emphasis on the word “evidence.” The syntax of the sentences as they are in Kastigar
makes it clear that the Court is equally concerned with the use of the immunized testimony and
also the use of evidence derived from that testimony.
information which may supply other means of convicting the witness . . . .” 87 Immediately thereafter, the Court quoted with approval a similar passage in Ullman v. United States, stating that the use-only immunity statute at issue in Counselman provided insufficient protection “because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony.” 88 Both of these passages suggest that immunity for compelled testimony must protect against the use of knowledge a prosecutor obtains from exposure to compelled testimony, for example, to prepare a case against an immunized witness, or to decide to prosecute him. Moreover, the second passage expressly entails that immunity must protect against prosecution based on knowledge obtained from the compelled testimony, a point that has particular significance for the holding of Slough. 89 Each of these uses of knowledge (to prepare a case or to decide to prosecute) obtained from compelled testimony is typically considered nonevidentiary. 90

The substantially same position interpretation (i.e., that use and derivative use bans all and only those uses, direct and indirect, which would put the witness and the government in a substantially different position than if the witness had remained silent) perhaps garners the

87 Kastigar, 406 U.S. at 454 (quoting Counselman v. Hitchcock, 142 U.S. 547, 586 (1892)).

88 Id. (quoting Ullmann v. United States, 350 U.S. 422, 437 (1956)) (emphasis in original).

89 See United States v. Slough, 641 F.3d 544, 553–54 (D.C. Cir. 2011) (holding that decision to indict witness may be based on compelled testimony).

90 See United States v. North, 910 F.2d 843, 857 (D.C. Cir. 1990); United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); Strachan, supra note 2, at 807–10.
strongest support from the text of Kastigar. This approach focuses on the effects of a particular use of the testimony on the witness and the government. It bans all governmental uses of the testimony and evidence derived therefrom that are potentially harmful to the witness in a criminal proceeding against him. Presumably, substantially same position immunity would ban all evidentiary uses, since any evidentiary use could lead to criminal penalties against the witness. Additionally, substantially same position immunity would prohibit harmful nonevidentiary uses, but would permit harmless nonevidentiary uses. The Court wrote that the “sole concern” of the privilege is “to afford protection against being forced to give testimony leading . . . to the infliction of criminal penalties against the witness.”\(^91\) The Court assured that use and derivative use immunity “affords the same protection” to a compelled witness as if he had “remain[ed] silent.”\(^92\) If an immunized witness had remained silent, of course, his compelled testimony would never have happened, and so it could not harm him. The Court repeatedly emphasized the requirement that immunity “leaves the witness and the prosecutorial authorities in \textit{substantially the same position} as if the witness had claimed the Fifth Amendment privilege [and remained silent].”\(^93\) Most significantly, the Court expressly based its holding that the federal immunity statute is coextensive with the privilege on a determination that the statute meets this requirement.\(^94\)

\(^{91}\) \textit{Id.} at 453.

\(^{92}\) \textit{Id.} at 461.

\(^{93}\) \textit{Id.} at 457, 458–59, 462 (emphasis added).

\(^{94}\) \textit{Id.} at 462.
Supreme Court cases subsequent to *Kastigar* have used some language to suggest that at least some nonevidentiary uses are prohibited. For example, a year after *Kastigar*, the Court declared that it

has always broadly construed [the privilege’s] protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. . . . The protection does not merely encompass evidence which may lead to criminal *conviction*, but includes information which would furnish a link in the chain of evidence that could lead to *prosecution*, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.95

Here the Court clearly urges a broad interpretation of use and derivative use immunity. A broad interpretation would cover at least some nonevidentiary uses of compelled testimony. The Court also draws an important distinction between uses that could lead to conviction and uses that could lead merely to prosecution, and states that use and derivative use immunity guards against both. Using compelled testimony in deciding whether to prosecute the immunized witness is obviously a use that could lead to prosecution. Thus, it appears that the Court intended to proscribe this kind of use.

In a much more recent case, the Court stated that “[t]he only condition on the government when it decides to offer immunity in place of the privilege to stay silent is the requirement to provide an immunity as broad as the privilege itself.”96 If immunized testimony must be treated identically to the silence which the privilege normally provides, then a prosecutor, at a minimum, could not use it in a way that harms the witness. Furthermore, the Court implied that immunity must create “no fear of criminal penalty.”97 It stands to reason that if a compelled witness knows


97 *Id.* at 692.
the government might make certain nonevidentiary use of his testimony, such as in a decision to prosecute, he might reasonably fear that it could lead to criminal penalties against him. Nevertheless, all of this is dicta, for *Balsys* addressed the issue of whether the privilege against self-incrimination applies to a compelled witness who fears the use of his compelled statements against him in a foreign jurisdiction, and the Court held that it does not.\(^98\)

In the still more recent case of *United States v. Hubbell*, Independent Counsel used documents gained through a subpoena of Webster Hubbell in an unrelated proceeding as an investigatory lead that ultimately led to his indictment for tax evasion and fraud.\(^99\) Unable to claim the privilege for the content of the documents,\(^100\) Hubbell asserted the privilege against self-incrimination relating to the act of turning over the documents,\(^101\) since doing so was functionally equivalent to admitting that he knew and was in possession of documents containing incriminating information, an admission which would have been, in itself, incriminating.\(^102\) In return, he was granted immunity for the act.\(^103\) The district court dismissed the indictment on the ground that the evidence used against Hubbell before the grand jury was derived from immunized testimony – the act of handing over the documents.\(^104\) On appeal to the Supreme Court, the government argued that surrendering the documents was not sufficiently testimonial in

---

\(^{98}\) *Id.* at 673–74.


\(^{100}\) *Id.*

\(^{101}\) *Id.*

\(^{102}\) See *Id.* at 36–37.

\(^{103}\) *Id.* at 31.

\(^{104}\) *Id.* at 31–32.
nature to warrant immunity against derivative use.\textsuperscript{105} The Court rejected this argument,\textsuperscript{106} and concluded that Independent Counsel had “already made ‘derivative use’ of the testimonial aspect of [the act of turning over the documents] in obtaining the indictment against [Hubbell] and in preparing its case for trial.”\textsuperscript{107} In reaching this conclusion, the Court relied on \textit{Kastigar}’s emphasis on “the critical importance of protection against a future prosecution ‘based on knowledge and sources of information obtained from the compelled testimony.’”\textsuperscript{108} This language of \textit{Hubbel} supports the view that any use of compelled testimony, evidentiary or not, which leads to an indictment or, in other ways, to criminal penalties is banned by use and derivative use immunity.

In sum, as evidenced by the circuit split, the language of \textit{Kastigar} and its progeny has failed to definitively resolve the question of whether nonevidentiary use of compelled testimony is allowed in a subsequent prosecution of the witness who gave it. Nevertheless, close inspection of the textual evidence strongly supports the conclusion that the Court intended to prohibit at least some nonevidentiary use, such as using the testimony to decide to prosecute and to prepare for trial.\textsuperscript{109} Therefore, based purely on language, it appears likely that either the any use

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} at 43.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.} at 41.
\item \textsuperscript{108} \textit{Id.} at 39.
\item \textsuperscript{109} Using compelled testimony to prepare for trial, for example, in making decisions about which evidence to emphasize or which witnesses to call, is generally considered nonevidentiary. \textit{See supra} note 90 and accompanying text.
\end{itemize}
interpretation or the substantially same position interpretation of use and derivative use immunity is correct.

B. POLICY AND USE AND DERIVATIVE USE IMMUNITY

Since the language of *Kastigar* and its progeny is not regarded as conclusive, it is helpful to examine and compare various policy considerations as they relate to the three interpretations of use and derivative use immunity in order to come to a reasoned conclusion about which interpretation should be adopted. Broadly speaking, there are three relevant policies.

The first is the protection of a compelled witness against self-incrimination. It goes without saying that any compelled witness has a very strong interest in this protection, but given the protection flows from a constitutional right, courts also have a powerful interest in enforcing it.110

The second relevant policy is the ability of prosecutorial authorities to administer the law. Regarding this policy, prosecutors have two interests: (1) acquiring valuable evidence through compelled testimony in proceedings other than a prosecution of the witness, and (2) prosecuting immunized witnesses for criminal activity regardless of their immunization.111 The first interest is highly important because it is the very purpose behind allowing the compulsion of testimony despite the privilege against self-incrimination.112 The importance of the latter, however, is

110 *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) (stating that “courts sit . . . to enforce the constitutional rights of all ‘persons’”).

111 These interests are actually in competition. Immunized witnesses are more likely to provide valuable testimony if they have more protection, but more protection also makes it harder to prosecute them.

112 *See supra* notes 21–23 and accompanying text.
relatively minor. As the Supreme Court has articulated, a purpose of requiring use and derivative use immunity in exchange for compelled testimony is “to limit the use of immunity to those cases in which the [prosecutorial authorities] determine that gaining the witness’s testimony outweighs the loss of the opportunity for criminal prosecution of that witness.”\textsuperscript{113} This purpose of the privilege attenuates the prosecutorial interest in prosecuting immunized witnesses.

The third policy consideration is the ability of the judiciary to enforce any one of the standards if it is adopted. Standards that draw clearer lines and are more easily enforceable not only facilitate judicial administration, but they promote “respect for the law.”\textsuperscript{114}

1. \textit{Any Use Immunity}

Of the three interpretations of use and derivative use immunity, the any use interpretation provides the most comprehensive protection of an immunized witness’s privilege against self-incrimination. Other than transactional immunity, the “any use” approach provides the greatest “margin of protection . . . in order to provide a reliable guarantee that the witness is in exactly the same position as if he had not testified.”\textsuperscript{115} Under this approach, an immunized witness may be prosecuted only if the prosecutor has made no use, evidentiary or otherwise, of the witness’s compelled testimony. Typically, this requires a showing by the government that the prosecutor

\textsuperscript{113} Pillsbury Co. v. Conboy, 459 U.S. 248, 260–61 (1983). It is perhaps significant that the Court articulated this policy after \textit{Kastigar}, when use and derivative use immunity was the standard. This implies strong protection for immunized witnesses.

\textsuperscript{114} See supra note 41–42 and accompanying text.

on the case has not been exposed to the content of the compelled testimony.\textsuperscript{116} This is because courts that have adopted this standard are vigilant for even subconscious uses that a prosecutor may make of it.\textsuperscript{117}

The “any use” interpretation also gives prosecutorial authorities the greatest ability to acquire valuable evidence through compelled testimony. Generally, the more protection a witness believes he has from the use of his compelled testimony against him, the more forthright his testimony will be. As Justice Douglas wrote in dissent in \textit{Kastigar}, less protective immunity might actually have an adverse impact on the administration of justice . . . . A witness might believe . . . that his “immunized” testimony will inevitably lead to a felony conviction. Under such circumstances, rather than testify and aid the investigation, the witness might decide he would be better off remaining silent even if he is jailed for contempt.\textsuperscript{118}

In addition to Justice Douglas’ observation, a less-protected witness would likely be more willing to commit perjury, give misleading yet literally true information,\textsuperscript{119} claim ignorance or

\textsuperscript{116} See United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973) (holding that, due to the immeasurable subjective effect of the prosecutor’s” reading of the compelled testimony, the government could not discharge its burden of proof under \textit{Kastigar}); see also United States v. Pantone, 634 F.2d 716, 723 (1980) (recognizing that it is “critical that prosecutors be held to a high standard in proving that their actions are untainted by exposure to prior compelled testimony”).

\textsuperscript{117} See \textit{McDaniel}, 482 F.2d at 312 (“[W]e cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor’s mind in his preparation and trial of the case.”)

\textsuperscript{118} \textit{Kastigar} v. United States, 406 U.S. 441, 467 n.2 (1972) (Douglas, J., dissenting).

\textsuperscript{119} A misleading but literally true statement cannot be the basis for a perjury prosecution.

\textbf{Bronston v. United States, 409 U.S. 352, 358–59 (1973).}
memory loss,\textsuperscript{120} exploit ambiguities in questions,\textsuperscript{121} or employ other evasive tactics in order to avoid giving potentially self-damaging testimony. There is a positive correlation between the quality of compelled testimony and the protection accorded the witness who gives it. Therefore, since the “any use” interpretation is the most protective of the three interpretations of use and derivative use immunity, it will yield the best compelled testimony.

On the other side of the administration of justice coin, there is a negative correlation between the degree of protection accorded an immunized witness and the ability to prosecute him for crimes to which his compelled testimony relates. In other words, the more protection an immunized witness has, the harder it is to prosecute him. Because the “any use” approach provides an immunized witness the most protection of the three approaches, it does the least to further the government’s interest in being able to prosecute a law-breaking witness despite immunization. Of course, any use immunity does not make it impossible to prosecute an immunized witness. It only places a large hurdle to prosecution, since once a witness-defendant shows that he has immunity, the government must prove, by a preponderance of the evidence,

\begin{itemize}
  \item \textsuperscript{120} Claims of ignorance and memory loss are difficult to prosecute for perjury, since a prosecutor must prove that the witness was deliberately ignorant or willfully blind to the fact that the statement was false. \textit{See} United States v. Fawley, 137 F.3d 458, 466–67 (7th Cir. 1998); United States v. Reveron Martinez, 836 F.2d 684, 689 (1st Cir. 1988); \textit{cf.}, United States v. Dunnigan, 507 U.S. 87, 94 (1993).
  \item \textsuperscript{121} It is difficult to prove perjury for a false answer to an ambiguous question because a prosecutor must show that the witness understood the question despite its ambiguity. \textit{See} United States v. Richardson, 421 F.3d 17, 33 (1st Cir. 2005); United States v. DeZarn, 157 F.3d 1042, 1049 (6th Cir. 1998).
\end{itemize}
that it has not and will not use the compelled testimony in any way to advance the prosecution.\textsuperscript{122} As mentioned before, in most cases this will require a showing that the prosecutor on the case has not been exposed to the compelled testimony.\textsuperscript{123}

Nevertheless, some courts reject the “any use” approach because, they say, it functionally amounts to transactional immunity.\textsuperscript{124} Since \textit{Kastigar} explicitly denied that the privilege against self-incrimination requires transactional immunity for compelled testimony, the argument goes, the “any use” approach affords more protection than the privilege.\textsuperscript{125}

It is simply not true that “any use” immunity \textit{simpliciter} is functionally equivalent to transactional immunity. Under transactional immunity, an immunized witness categorically may not be prosecuted for matters relating to his compelled statements. Under “any use” immunity, an immunized witness may be prosecuted so long as his immunized testimony is not used against him in any way. If the prosecuting attorney has not been exposed to immunized testimony and will not use evidence derived in any way from the testimony, then there is no conceivable way that she will use the witness-defendant’s testimony against him. This is not impossible to prove. Prosecutorial authorities can, and do, take prophylactic measures to ensure that the prosecutor

\textsuperscript{123} See \textit{supra} note 116 and accompanying text.
\textsuperscript{124} United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989); United States v. Byrd, 765 F.2d 1524, 1530–31 (11th Cir. 1985). \textit{But see} United States v. Slough, 641 F.3d 544, 554 (D.C. Cir. 2011) ("[Claiming that any use immunity is equivalent to transactional immunity] is a bit of an overstatement; after all, prosecutors could, by construction of firewalls (along with the associated incremental personnel costs), assure that such decisions were made without risk of taint.").
\textsuperscript{125} \textit{Serrano}, 870 F.2d at 17; \textit{Byrd}, 765 F.2d at 1530–31.
responsible for the prosecution of an immunized witness has not been exposed to the witness’s compelled testimony. For example, the United States Attorneys’ Manual provides steps to ensure that compelled testimony does not “taint” the prosecution of an immunized witness, including documenting the evidence obtained before and after the compelled testimony is given, and ensuring “that the witness’s immunized testimony is recorded verbatim and thereafter maintained in a secure location to which access is documented.”\textsuperscript{126} These measures allow a prosecutor, insulated from exposure to the compelled testimony, to still have access to the untainted evidence necessary to successfully prosecute. Additionally, the government has been able to meet its burden to prove it made no use of compelled testimony by proving that it successfully erected a firewall between the compelled testimony and the prosecutors on the case.\textsuperscript{127} Thus, the hypothesis that “any use” immunity provides protection equal to transactional immunity has been discredited.

Furthermore, to enforce the privilege against self-incrimination, the requirement of immunity is designed to prevent the government from having its cake and eating it, too.\textsuperscript{128} The onus is on the government to make the difficult decision between granting immunity to compel


\textsuperscript{128} See supra note 113 and accompanying text.
testimony from a potential compelled witness and prosecuting him. The government should make the decision to compel testimony only when it determines that the information that it would obtain from compelling the testimony outweighs the opportunity to prosecute the witness. Notwithstanding this general admonishment, if the government makes no use of the testimony, then it still might be able to both acquire the desired information via compelled testimony and successfully prosecute the target witness. Nevertheless, the purpose behind the immunity requirement entails that the government should not aspire to doing both. Thus, the fact that the “any use” standard makes prosecution of an immunized witness more difficult actually furthers a purpose of the requirement of immunity.

The “any use” standard promotes the policy of judicial enforcement by drawing relatively straightforward conceptual and practical lines. To ensure that a prosecutor has not made any use of the compelled testimony, a court must be satisfied that the prosecutor was either not exposed to the testimony, or whatever exposure she had to it did not factor into her preparation or decision-making regarding the case.

A somewhat persuasive argument against any use immunity is that it goes too far by including even harmless uses of compelled testimony. Despite procedural safeguards, keeping prosecutors completely free from exposure to immunized testimony might prove to be a daunting task. After all, oftentimes the attorney prosecuting an immunized witness and the attorney who elicited the compelled testimony work in the same office. Certain incidental exposure, such as overhearing a brief discussion about the testimony, might be unavoidable. It seems unfair to penalize the government and thwart the execution of the law by precluding prosecution of the

129 Id.
130 Id.
witness based on a prosecutor’s incidental exposure to the testimony. Furthermore, the rationale on which Kastigar was explicitly based, that the federal immunity statute “leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege,” suggests that the Court did not intend to extend use and derivative use immunity to harmless uses.131

2. Evidentiary Use Immunity

The “evidentiary use” interpretation of use and derivative use immunity, which prohibits evidentiary use but permits nonevidentiary use, provides immunized witnesses the least protection against self-incrimination. Essentially, the approach keeps open certain paths to self-incrimination. Some non-evidentiary uses of compelled testimony may clearly “lead to the infliction of criminal penalties” against the witness. It is widely accepted that nonevidentiary uses include using the compelled testimony to decide to initiate prosecution, to prepare trial strategy, and to prepare opening and closing arguments.132 If, for example, a prosecutor bases her decision to prosecute an immunized witness on his compelled testimony and he is later convicted, then his compelled testimony bears a direct causal relationship to the infliction of criminal penalties against him – because the witness would not have been convicted but for his compelled testimony, his testimony led to his conviction. A similar situation is when a prosecutor plans a more effective trial strategy against an immunized witness than she would have without the compelled testimony. If she obtains a conviction where she would not have but for her use of the testimony, then the testimony is self-incriminating.


132 See United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).
Moreover, some nonevidentiary uses of compelled testimony may be even more harmful to a witness-defendant than some evidentiary uses. Consider a situation in which a prosecutor decides to prosecute an immunized witness based on his compelled testimony, and uses that testimony as a lead to acquire a rather miniscule piece of evidence against the witness.\textsuperscript{133} All of the other evidence is from independent, legitimate sources. The witness-defendant is later convicted, but the evidence derived from the testimony contributed negligibly. In this case, the nonevidentiary use of the testimony, as the basis for a decision to prosecute, was far more incriminating than the evidentiary use. Therefore, by allowing some forms of self-incrimination via compelled testimony, “evidentiary use” immunity supplies meager protection to an immunized witness.

There is also a plausible argument that construing use and derivative use immunity as evidentiary use immunity simply narrows the protection of the privilege against self-incrimination too much. Evidentiary use immunity is the narrowest feasible interpretation of use and derivative use immunity. If the privilege ought to be construed broadly, and the Supreme Court has directed it should,\textsuperscript{134} then the evidentiary use interpretation cannot be correct.

Of the three interpretations of use and derivative use immunity, “evidentiary use” immunity does the most to undermine the government’s ability to obtain useful information through compelled testimony. If compelled witnesses fear that their “immunized” statements could nevertheless incriminate them, they are more likely to accept punishment for contempt or perjury, or to employ other evasive tactics to avoid providing the government with self-

\textsuperscript{133} For this hypothetical, we must assume that court was persuaded that the evidence was derived from an independent source.

\textsuperscript{134} See supra note 95 and accompanying text.
incriminating information.\textsuperscript{135} Thus, “evidentiary use” immunity compromises the very reason for allowing compelled testimony despite the privilege against self-incrimination.

On the other hand, “evidentiary use” immunity does the most to facilitate the prosecution of immunized witnesses. It sets the lowest bar to clear during \textit{Kastigar} hearings, thereby reducing the probability that a court will dismiss the indictment based on prohibited use of the immunized testimony. The government need never prove that the prosecutor on the case was insulated from exposure to the immunized testimony.\textsuperscript{136} It only needs to satisfy the court that the evidence it plans to introduce at trial was in no way derived from the immunized testimony.

Far from forcing a difficult decision between granting immunity to and prosecuting a potential compelled witness, “evidentiary use” immunity actually encourages the government to do both. Even though it may not make any evidentiary use of the compelled testimony, there are other perfectly helpful uses that the government can make to bolster its chances of obtaining a conviction. For example, if the government has lots of evidence pertaining to a white-collar or organized crime syndicate, but is unsure precisely how a particular player fits into it, it may compel his testimony (in a proceeding against his coconspirators) with the purpose of coming to a better understanding of the evidence it already has. The government can subsequently use the testimony to interpret evidence, decide whether to prosecute the previously mysterious target

\textsuperscript{135} \textit{See supra} notes 118–121 and accompanying text.

\textsuperscript{136} However, even courts applying the “evidentiary use” standard still \textit{recommend} a firewall between the immunized testimony and the prosecuting attorneys, since it would go a long way to ensuring that no evidentiary use occurred or will occur. \textit{See}, \textit{e.g.}, United States v. Hampton, 775 F.2d 1479, 1490 (11th Cir. 1985).
witness, and plan trial strategy against him. Thus, “evidentiary use” immunity incentivizes the government to compel testimony from potential criminal defendants.

“Evidentiary use” immunity poses two significant, and related, problems to the policy of facilitating judicial administration. The first is that there is no clear line between evidentiary and nonevidentiary use.137 Because of the difficulties in formulating a comprehensive rule, courts and commentators have tended to define the distinction by example.138 Generally, nonevidentiary uses include “assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.”139 It is questionable whether a few of these uses are truly nonevidentiary. For example, interpreting evidence certainly relates to evidence. Furthermore, using immunized testimony to plan cross-examination and trial strategy influences the testimonial evidence the prosecutor elicits during trial, so it directly affects the evidence before the jury. Planning trial strategy also involves what evidence, including testimony, the prosecutor presents and how she presents it.

A possible counterargument to this attempt to blur the distinction between evidentiary and nonevidentiary use could be that the distinction turns on how the evidence to be used is obtained, not simply whether the use bears any relation to the evidence. In other words, “evidentiary use” immunity prohibits the introduction of certain evidence at a grand jury hearing and at trial if, and only if, the acquisition of the evidence depends on the defendant’s compelled testimony. Interpreting evidence, for example, has nothing to do with acquiring evidence. It only

138 Id.
139 United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).
involves interpreting evidence that has been obtained independently from the compelled testimony. Therefore, the distinction is simple enough and not all that difficult to apply.

This counterargument might be persuasive when it comes to interpreting evidence, but it is substantially weaker when it comes to uses such as planning cross-examination and trial strategy. The reason is that these uses do relate to the acquisition of evidence. Testimonial evidence is evidence obtained at trial, in the presence of the jury. If a prosecutor uses compelled testimony to determine what questions to ask at trial, she uses it to obtain evidence that she also presents to the jury. Hence, if the test for evidentiary use is whether the acquisition of the evidence formally introduced depends on compelled testimony, planning cross-examination and trial strategy qualify as evidentiary uses. Therefore, it remains conceptually challenging, if not impossible, to distinguish between evidentiary and nonevidentiary uses.

The second problem relating to judicial administration is that permitting evidentiary use of immunized testimony makes it extraordinarily difficult to enforce the prohibition against nonevidentiary use. Prosecutors could feasibly abuse the standard by using immunized testimony to obtain evidentiary leads and then fabricating explanations for how they obtained the evidence.

As Justice Marshall dissented in Kastigar:

[T]he information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the burden of proof [is] on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence.\(^\text{140}\)

\(^\text{140}\) Kastigar v. United States, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting). Justice Marshall’s words concerned use and derivative use immunity, as he believed it was a mistake to
Moreover, the fact that “evidentiary use” immunity lends itself to easy abuse hampers the constitutional interest in protecting against self-incrimination. It leaves an immunized witness “dependant for the preservation of his rights upon the integrity and good faith of the prosecuting authorities,”141 which the Kastigar Court expressly assured use and derivative use immunity would not allow.142 Thus, it strongly appears that the only interest that “evidentiary use” immunity furthers is facilitating the prosecution of immunized witnesses while maintaining a semblance of protection from self-incrimination.

There is a final argument for evidentiary use immunity that bears mentioning. Any greater protection than evidentiary use immunity creates an incongruity in the law because no court has prohibited the nonevidentiary use of confessions unconstitutionally coerced by law enforcement. Moreover, in Kastigar, the Court analogized the protection provided by use and derivative use immunity to the protection accorded a defendant from use of his unconstitutionally coerced statements.143 Therefore, the argument goes, evidentiary use immunity is the appropriate level of protection for immunized witnesses.144

There are several weaknesses to this argument. The first is that the Court most likely intended its analogy in Kastigar to be merely illustrative and not perfect. In any event, it was abandon transactional immunity. See id. However, they seem even better suited as an argument against “evidentiary use” immunity.

141 Id. at 469 (Marshall, J., dissenting).
142 Id. at 460.
143 Id. at 461–62.
144 This argument was made by the First Circuit in United States v. Serrano, 870 F.2d 1, 18 (1st Cir. 1989). See also Humble, supra note 82, at 375 n.154.
dicta. The second is that, though no court has held that nonevidentiary uses of coerced confessions are prohibited, no court has expressly held that they are permitted, either.\textsuperscript{145} It is simply an issue that has not been litigated. It is fallacious to infer that nonevidentiary use of coerced confessions is permitted solely on the ground that no court has determined whether it is or not.

Third, even if nonevidentiary uses of coerced confessions are permissible, there are important distinctions between formally compelled statements and confessions coerced by law enforcement. Compelling testimony is constitutionally sanctioned government conduct, but coercing confessions is not.\textsuperscript{146} Therefore, a compelled witness may not seek a remedy for being compelled to testify, but civil or criminal redress may be available against police officers that have coerced a confession.\textsuperscript{147} Furthermore, granting immunity occurs before the compelled testimony occurs, whereas excluding coerced confessions from evidence occurs after the confession occurs.\textsuperscript{148} In the former instance a lawyer, well trained in constitutional rights, makes a calculated decision whether to compel the testimony at the cost of making a subsequent prosecution of the witness more difficult.\textsuperscript{149} In the latter instance the constitutional violation is usually the result of a poor decision made by a non-lawyer under pressure and in the absence of

\begin{itemize}
\item \textsuperscript{145} See Humble, supra note 82, at 375 n.154 (failing to cite to any positive authority supporting the proposition, and instead citing to a law review article “expressing surprise at the lack of judicial and scholarly discussion of nonevidentiary uses of coerced confessions”).
\item \textsuperscript{146} See Kastigar, 406 U.S. at 470–71 (Marshall, J., dissenting).
\item \textsuperscript{147} See id.
\item \textsuperscript{148} See id.
\item \textsuperscript{149} See id.
\end{itemize}
calm deliberation.\textsuperscript{150} Thus, unlike coerced confessions, providing broad protection from compelled testimony would not risk “imperiling large numbers of otherwise valid convictions.”\textsuperscript{151}

3. \textit{Substantially Same Position Immunity}

The “substantially same position” interpretation of use and derivative use immunity, which permits only those uses of compelled testimony that leave the witness and the government in substantially the same position, strikes a balance between the “any use” and the “evidentiary use” interpretations. Essentially, “substantially same position” immunity bars any use that could harm the immunized witness. Only harmful uses require protection. Therefore, in theory, “substantially same position” immunity provides the exact same protection against self-incrimination as “any use” immunity. However, since it gives the prosecution slightly more leeway regarding the use of compelled testimony, in practice “substantially same position” immunity might, in rare situations, provide slightly less protection than “any use” immunity. This would only occur where a court wrongly finds a harmful use harmless.

“Substantially same position” immunity also furthers the government’s interest in obtaining evidence through compelled testimony to nearly the same degree as “any use” immunity. If a witness believes that his testimony cannot subsequently harm him, the he is likely to be just as forthright as if he believed the government could not use his testimony at all. Of course, some witnesses may be reticent due to skepticism that the government will actually not use their testimony to harm them, but this difficulty is inherent to all non-transactional forms of

\textsuperscript{150} See id.

\textsuperscript{151} See id.
immunity. In contrast, under “evidentiary use” immunity, a witness could reasonably and truly believe that the government can use his testimony to harm him.

Additionally, “substantially same position” immunity makes it easier to prosecute immunized witnesses than “any use” immunity. While establishing a firewall between testimony and prosecutor is still the most effective method of preventing harmful uses, incidental exposure, which sometimes might be completely accidental, would likely not preclude prosecution. For example, the attorney prosecuting an immunized witness might overhear other attorneys in the same office discussing the testimony. Such accidental exposure would likely be harmless, and should not be the basis for a dismissal of the charges against the witness. Although “substantially same position” immunity makes prosecution substantially more difficult than “evidentiary use” immunity, it finds a far better balance in relation to the other pertinent interests. Furthermore, unlike “evidentiary use,” the “substantially same position” standard is high enough to discourage prosecutors from compelling testimony in order to surreptitiously further the prosecution of the witness.

“Substantially same position” also facilitates judicial administration by setting a relatively clear standard. Courts are well-acquainted to making findings of harmfulness.152

---

152 For example, a movant for a preliminary injunction can prevail only if he has shown that, without the injunction, he is likely to suffer irreparable harm before a decision on the merits can be rendered. See, e.g., Markovitz v. Venture Info Capital, Inc., 129 F. Supp.2d 647, 655 (S.D. N.Y. 2001). District courts must also make a finding of harm when deciding whether to grant a stay pending appeal. See, e.g., United States v. $1,399,313.74 in U.S. Currency, 613 F. Supp.2d 433, 435 (S.D. N.Y. 2009). Appellate courts must frequently make findings of harm, as they are
Furthermore, the harmless-error doctrine, which normally applies only to appellate courts, provides a preexisting guide.\textsuperscript{153} Under the harmless error doctrine, an appellate court should not reverse a conviction if it finds that an error committed at trial was harmless to the defendant beyond a reasonable doubt.\textsuperscript{154} This standard easily applies to \textit{Kastigar} hearings. A court should not dismiss the charges if it finds that the prosecution used the compelled testimony in a way that is harmless beyond a reasonable doubt. In the vast majority of cases, this would be equivalent to finding that the prosecutor’s exposure to the compelled testimony was sufficiently minimal that the prosecutor could not have made harmful use of it in acquiring evidence, deciding to prosecute, or preparing for trial. In this vein, courts applying the substantially same position standard might require a good-faith effort from the government to insulate the prosecuting attorneys from exposure to the testimony. However, if a court finds that accidental or incidental exposure, despite a good-faith effort at insulation, is harmless, then it should permit the prosecution to proceed.

\textbf{C. Conclusion: Substantially Same Position Immunity Is Best}

In conclusion, “substantially same position” immunity is the best interpretation of use and derivative use immunity. The Supreme Court’s decision in \textit{Kastigar}, to uphold the federal immunity statute as being coextensive with the privilege against self-incrimination, was expressly based on the rationale that the statute “leaves the witness and the prosecutorial

\textsuperscript{153} \textit{Hasting}, 461 U.S. at 509 (1983).

\textsuperscript{154} \textit{Id.}
authorities in *substantially the same position* as if the witness had claimed the [privilege].”

The “substantially same position” approach comprehensively safeguards the “sole concern” of the privilege (“to afford protection against being forced to give testimony leading to the infliction of” criminal penalties on the witness) without providing additional, unnecessary protection. It also strikes the most equitable balance between the pertinent competing policies and interests.

If “substantially same position” immunity is the proper interpretation of use and derivative use immunity, then *Slough* was almost certainly wrongly decided. A prosecutor’s decision to prosecute an immunized witness, based on the witness’s compelled testimony, unquestionably harms the witness. By definition, a decision to prosecute that is based on compelled testimony would not have been made without that testimony. A decision to prosecute that is based on compelled testimony does not “leave[] the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity.” The witness faces criminal charges he would not otherwise have faced, and the government prosecutes a defendant it would not otherwise have prosecuted. Given the propriety of “substantially same position” immunity, *Slough* was correctly decided only if the doctrine of prosecutorial discretion trumps the protections “substantially same position” immunity bestows.157

---


156 *Id.* at 453.

157 It is worth mentioning that substantially same position immunity would not necessarily preclude prosecution in a case such as *Slough* where immunized testimony has been disseminated in the media. If prosecutorial authorities are aware of media attention and the risk of a leak, the prosecuting attorneys could take precautions to prevent exposure to the content of
III. PROSECUTORIAL DISCRETION AND SUBSTANTIALLY SAME POSITION IMMUNITY

Prosecutors have broad discretion in deciding whom to prosecute.\textsuperscript{158} If a prosecutor “has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file or bring before a grand jury, generally rests entirely in his discretion.”\textsuperscript{159} This is largely out of respect for the separation of powers,\textsuperscript{160} and because “the decision to prosecute is particularly ill-suited to judicial review.”\textsuperscript{161} Factors involved in decisions to prosecute, such as the strength of the case, the individual prosecution’s deterrence value, the government’s enforcement priorities, and the case’s relationship to the overall enforcement plan are matters outside the expertise of the courts. Furthermore, high costs that would be involved, such as the delay of criminal proceedings, the chilling of law enforcement by subjecting the prosecutor’s motive and decision-making to outside inquiry, and undermining prosecutorial effectiveness by revealing the government’s enforcement policy, support the general rule against judicial review of decisions to prosecute.\textsuperscript{162}

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
Nevertheless, there are certain constitutional limitations to decisions on whom to prosecute. One of these limitations is that “the decision to prosecute may not be deliberately based upon an unjustifiable standard such as . . . the exercise of protected statutory and constitutional rights.”\textsuperscript{163} This is because “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”\textsuperscript{164} For example, a prosecutor may not add or increase charges against a defendant at retrial based on the defendant’s exercise of his right to appeal his conviction.\textsuperscript{165} A prosecutor may also not punish a criminal defendant for refusing to testify at trial by commenting to the jury that the refusal indicates guilt.\textsuperscript{166} It follows that a prosecutor may not decide to prosecute, including adding or increasing charges against, a defendant for remaining silent in the exercise of his privilege against self-incrimination.

Use and derivative use immunity is the minimum level of immunity that must be granted in order to compel self-incriminating testimony from a target witness who has invoked his right to remain silent pursuant to the Fifth Amendment privilege. Under the “substantially same position” interpretation, this requires the same level of protection from his testimony as he would have received had he actually been able to remain silent. In other words, the compelled testimony, for purposes of criminal prosecution of the witness, must be treated as though the witness never gave it, save for harmless exposure. Therefore, in the eyes of the law, if a prosecutor bases her decision to prosecute an immunized witness on his compelled testimony, it

\textsuperscript{163} Id. at 608.


\textsuperscript{166} Griffin v. California, 380 U.S. 609, 615 (1965).
is equivalent to basing her decision on his exercise of the right to remain silent. Moreover, such a
decision to prosecute amounts to punishing the witness not merely for doing what the law
allowed him to do, but, *a fortiori*, for what the law *required* him to do – provide certain
information. Hence, this sort of decision to prosecute falls squarely into the exception to
prosecutorial discretion that a prosecutor may not decide to prosecute based on the exercise of
constitutional rights. Therefore, the *Slough* court was wrong to conclude that prosecutorial
discretion wins out over the protection supplied by use and derivative use immunity.

This result makes sense upon reexamination of the reasons for broad prosecutorial
discretion. Considerations such as the strength of the case, the individual prosecution’s
deterrence value, the government’s enforcement priorities, and the case’s relationship to the
overall enforcement plan are irrelevant when a defendant’s constitutional rights are at issue.
Additionally, the costs to law enforcement of reviewing decisions to prosecute in this narrow
range of cases are minimal. In cases where an immunized defendant is being prosecuted, a
*Kastigar* hearing already delays the criminal proceeding to inquire whether the proposed
evidence violates the defendant’s immunity. It is not excessively burdensome on law
enforcement for courts to also inquire into the prosecutor’s motives, which could be resolved by
a showing of insulation from the testimony, the same method of proof for independent evidence.
And since the only relevant inquiry, in a very limited number of cases, is whether the prosecutor
based her decision to prosecute on the defendant’s immunized testimony, there is minimal risk of
chilling law enforcement or undermining prosecutorial effectiveness by revealing the
government’s enforcement policy.

Courts already implement prophylactic policies in order to ensure pure prosecutorial
motives. Most circuits either require or strongly recommend firewalls between prosecuting
attorneys and immunized testimony.\textsuperscript{167} If a prosecutor has not been exposed to the testimony, there is no way that she could use it to decide whether to prosecute. Moreover, prosecuting authorities are already on notice that failing to insulate prosecutors from immunized testimony either eliminates or severely reduces their chances of clearing the \textit{Kastigar} bar. As previously mentioned, the United States Attorneys’ Manual requires this insulation.\textsuperscript{168} Therefore, disallowing decisions to prosecute based on immunized testimony does not significantly disturb practices already in place.

\textbf{CONCLUSION}

Based on the language of \textit{Kastigar} and its progeny, and taking into account a variety of policy considerations, the “substantially same position” interpretation is the proper interpretation of use and derivative use immunity. Thus, nonevidentiary uses of compelled testimony that would harm the witness who gave it (i.e., put him in a substantially different position than he would have been in had he been able to remain silent) violate the witness’s privilege against self-incrimination. Deciding to prosecute a witness based on his compelled testimony inarguably harms him. Furthermore, prohibiting prosecutors from using compelled testimony to decide to prosecute the witness does not unduly infringe on prosecutorial discretion because a prosecutor may not decide to prosecute someone for exercising a constitutional right. Therefore, the \textit{Slough} court was incorrect to hold that a decision to prosecute a witness may be motivated by his compelled testimony.

\textsuperscript{167} See, \textit{e.g.}, United States v. Semkiw, 712 F.2d 891, 894–95 (3d Cir. 1983); United States v. Hampton, 775 F.2d 1479, 1490 (11th Cir. 1985).

\textsuperscript{168} See \textit{supra} note 126 and accompanying text.