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In the

Supreme Court of the United States

CHARLES JOSEPH KASTIGAR et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

No. 70-117

Washington, D. C.
January 11, 1972

Pages 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES JOSEPH KASTIGAR ET AL., Petitioners,	:	
v.	:	No. 70-117
UNITED STATES, Respondent	:	

Washington, D. C.

Tuesday, January 11, 1972

The above-entitled matter came on for argument at 11:52 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

HUGH R. MANES, ESQ., 6331 Hollywood Boulevard, Suite 1112, Hollywood, California 90028, for the Petitioners

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the Respondent

INDEX

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-117, Kastigar against the United States.

Mr. Manes, you may proceed whenever you are ready.

ORAL ARGUMENT OF HUGH R. MANES

ON BEHALF OF THE PETITIONERS

MR. MANES: Mr. Chief Justice, and may it please the Court:

This case involves the constitutionality of the Federal Use-Immunity Statute, Title 18, Sections 6002 and 6003.

The question presented in this case is whether Federal Use-Immunity as conferred by Section 6002 is co-extensive with the Fifth Amendment Privilege against self-incrimination.

This case arises from the imprisonment for civil contempt of the Petitioners, both of them, by the Federal District Court for the Central District of California for refusing to answer questions put to them by the -- before the Grand Jury for violations or alleged violations of the Selective Service Laws. The Petitioners were accorded use-immunity by the United States Attorney and ordered to answer by the United States District Court pursuant to that immunity, which was conferred under Section 6002, and they declined to answer the questions in any event, invoking their privilege

on the theory that the immunity offered by 6002 was incomplete.

The Petitioners contend here that only transactional immunity will satisfy the Fifth Amendment Privilege. We take that position for several reasons.

First, the history and development of the privilege and the logic compel absolute immunity be granted, and nothing less.

Secondly, we argue that the so-called "tainted evidence" rules required for the administration and control and supervision of the use-immunity statute are inadequate. They cannot guarantee the absolute immunity which the Fifth Amendment demands and requires.

Thirdly, we take the position that the statutory language of 6003 so limits the court power as to prevent a fair and reasonable application of use-immunity and, particularly, to prevent adequate court supervision of the use of that particular immunity.

And finally, we argue that use-immunity conferred by 6002, coupled with existing statutes, for example, the Jenks Act, Rule 16 and other provisions, is such as to deprive the witness of due process and abridge his rights guaranteed him by the Fourth and Fifth Amendments and, particularly, to render these immunity statutes at bar unfair as against the subject witness who may become an accused person.

Before I proceed with that argument, I would like to

point out something about this particular statute that we're dealing with which is in response to questions put to prior counsel. This, I would respectfully submit, is a use-immunity statute that has no limitations. Indeed, it is called a "general immunity law."

It is not limited in its application to simply multi-defendant cases, nor is it limited in any way to any particular kind of offense. It permits immunity to be granted and the witness to be compelled to answer in virtually most, if not all, offenses and certainly as -- whether the person is an individual and charged or suspected of only an individual crime as well as, of course, the multiple-defendant type of situation.

And we submit that where you have a statute that is as broad as the statute at bar, from a prosecution point of view, if it's there, it's going to be used, and --

Q It's limited in its use. It has to be approved by somebody here in Washington, at least as high as the Assistant Attorney General level.

MR. MANES: Well, it has to be -- yes, sir, it has to be the authority for giving immunity must be approved either by the Attorney General or his authorized representative. But I would submit, Your Honor, that under Section --

Q Well, isn't it the Attorney General, the Deputy, or one of the Assistants here in Washington? Do I

read the statute correctly?

MR. MANES: Yes, sir.

Q And is that true also with respect to subsection III of 6002 when it involves questions before a committee of one of the Houses of Congress?

MR. MANES: Well, Your Honor, I would assume so, but I'm not addressing myself to the question of scope as --

Q Well, I'm just inquiring as to the scope.

MR. MANES: I would assume, Your Honor, that that would be true in both cases, but I cannot represent as to its effect with regard to the House or Congress. I certainly can confirm that that would be true as regards immunity before a Grand Jury, and I would add to that, if the Court please, that the representation may be made to the court as mere conclusions, as they were below, with regard not only to the authority, and I would further point out that all that the United States Attorney need show is a conclusionary statement that it's in the public interest for the government to grant immunity and to inquire compulsorily of the witness. He may not -- he is not required to show, and the court cannot demand that he show reasonable cause for intruding on the privacy, and I think this is a very important thing when we are talking about a secret proceeding such as the Grand Jury, as in this case.

In any event, what I wanted to --

Q What does the record in this case show, if anything, as to the authority under the -- who did authorize this and why?

MR. MANES: All the record shows, Your Honor, and that will appear in the Appendix at pages 54 and 60 of the Appendix -- actually, it is 54 through 60.

Q Right.

MR. MANES: It simply shows that the United States Attorney represented that there was a public interest in having the Petitioners appear before the Grand Jury with use-immunity, that they would invoke the Fifth or, indeed, had done so in the case of Kastigar, and that the privilege was made in good faith with the approval of the Attorney General of the United States. That -- that is all the showing that was required, and I want to reiterate that the showing that is made there is without any detail as to in what respect there is a reasonable cause. It's just a conclusionary statement on the part of the counsel.

Now, I wanted to urge upon this Court why we take -- why it's important to us, at least, that transactional immunity be regarded as the very limit for the Fifth Amendment as a grant of any kind of immunity, and I would urge upon this Court that it is the government that wants immunity when we -- when we talk, you know, of giving "immunity baths," I would urge this Court to consider that

it is the government that is seeking to force a person to testify against himself, and they are seeking that immunity, they are seeking that testimony to compel him to testify against himself because they want some information, and it is a convenient method for doing that.

MR. CHIEF JUSTICE BURGER: We will suspend for an hour.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION 1:00 p.m.

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Manes.

MR. MANES: Mr. Chief Justice, and may it please the Court:

It has been said and argued that the Fifth --

Q Do you want -- I gather you want us first to overrule the Ullmann case?

MR. MANES: The, which case, please?

Q Ullmann.

MR. MANES: Ullmann? Well, I would --

Q A crown case.

MR. MANES: -- I would like that, but I try to be realistic, Your Honor, and assumed that that --

Q The first part of your brief deals with that problem.

MR. MANES: Yes, sir, it does and -- because we believe that the Court has never answered the question as to whether the Fifth Amendment and its history doesn't enjoin compulsion and, on that thesis, Your Honor.

Q Well, I addressed myself to that in the dissenting opinion --

MR. MANES: Yes, sir.

Q -- as you may remember.

MR. MANES: Yes, Your Honor, I do.

Q But nobody except Justice Black agreed with me.

MR. MANES: I know that, Your Honor, and so I'm taking it from there.

But if the Court please, I -- there is an argument that is being made that the Fifth Amendment protects only use of compelled testimony and I want to address myself to that, just for a moment and point out that the Fifth

Amendment has been held by this Court in Ullmann not to be "interpreted in a hostile or niggardly spirit," and that it is to be construed liberally to effectuate its intent and purposes, and that was the holding, of course, in Spevac v. Klein, as well as many other cases. And so I would note that there is not just one purpose. As this Court has observed in Murphy, at page 55, and as it observed as long ago as Boyd v. United States, the Fifth Amendment has many purposes that have to be considered when you are evaluating the question of whether use-immunity is sufficient.

For one thing, the Fifth Amendment was designed and came into our Constitution to prevent disclosures by torture and, while I submit that maybe some may feel that that's kind of remote, now, we're in a modern age, I would remind this Court that it was only 30 years ago when this Court was forced to deal with the problems of the third and Brown v. Mississippi, Chambers v. Florida and a whole series of cases and only a few years ago when this Court had to hold in Miranda that it was necessary for an accused to be given a warning about the effect of his testimony.

So we are concerned with the scope of that protection as applied to coercion. But in addition to that, if the Court please, I would submit that the Fifth Amendment also has a policy consideration which has long been the concern of this Court, and that is the distrust that we have of

coerced testimony, the distrust we have of it. I would submit that in Bram v. the United States, which was decided only a year after Walker v. Brown, this Court made a very important observation. It recognized -- at page 547, 168 U.S., "The human mind, under the pressure of calamity, is easily seduced and is liable, under the alarm of danger, to acknowledge indiscriminately a falsehood or a truth as different agitations may prevail." And why I think that particular quotation is apt here is because the Petitioners here are put in the position of avoiding jail, not simply because they've been granted immunity or be held in contempt but that they are compelled to avoid jail by giving information which they think the government may want to hear in order to avoid prosecution. Now, that is a tendency, I would respectfully submit, that is inherent in any use-immunity statute and certainly in the one at bar.

But there is another policy consideration here, too, if the Court please, and that is, that it's to avoid not simply a trilemma but a quatrilemma, if the Court please, of self-accusation, perjury and contempt and the possibility of prosecution.

We submit that Brown v. Walker deals with that dilemma or that quatrilemma, as I prefer to call it, very succinctly and poignantly, and remember this was in 1896 when the Court there is talking about the policies which gave

rise to the Fifth Amendment, and it observed that if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the question is put to him may assume an Inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, push him into a corner and to entrap him -- to entrap him into fatal contradictions, which is so painfully evident in many of the early state trials, made the system so odious as to give rise to a demand for its total abolition.

In the context of this case, I would respectfully submit in response to a question that was posed to Counsel before me that the accused here does not hold exclusively the keys to his jail door. On the contrary, it's like anyone who has money and has a safety deposit box, he shares it with the bank and so here the accused shares the keys with the government, for while it is true that he can talk and thus open the door of contempt, that has confined him in contempt, the government holds the key as to whether his talking may lead to a desire to prosecute him and therefore, I submit that when we are talking about quatrilemmal -- when we are talking about the policy underlying the privilege, we have to consider this possibility as well. We have to consider what was said by this Court in Garrity and other cases, the choice here that the accused has between the rock and

the whirlpool, multiplied.

And then there is another consideration, too, if the Court please, and that is the basic respect which this society has for the inviolability of the person and his privacy, as the Court noted in Malloy v. Hogan, as it noted in Miranda v. Arizona and as it certainly noted long ago and, again, the Boyd case, when it observed that any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of a crime or to forfeit his property certainly is a principle that merges into the Fourth and the Fifth Amendment.

And another point, we have here, in our society, a preference for the prosecutorial system, for the accusatorial system which places the burden entirely on the government and not for the inquisitorial process which, I would respectfully submit, certainly in the context of this case, it takes place in the Grand Jury room where the accused is without a lawyer, where he has no protection whatsoever, but where he is faced with a lawyer and I would respectfully submit that, given the secrecy which attends all Grand Jury proceedings, and the secrecy which prevails thereafter, as the decisions of this Court have made quite apparent in many cases, that it will be extremely -- that the accused will be extremely hard put not to feel a sense of entrapment by the

circumstances which attend the use-immunity situation.

But there is one additional consideration which I think underscores the Fifth Amendment, as I read the cases of this Court and that is the notion of a sense offair play which requires the government to let the individual alone unless it has reasonable cause to justify intruding upon him.

Now, as I pointed out earlier in my comments, this statute gives the accused no opportunity whatsoever, nor, indeed, the Court, to inquire whether there was reasonable cause to peruse his privacy or, indeed, his defenses and allows the government to ransack his defenses as the accused is not permitted to do with respect to government files.

Now, I would respectfully submit that there are some other considerations, that, for example, the protection of the innocent even though some guilty may benefit incidentally. That is a choice. That is a choice which government makes in the context, at least, of this kind of a statute, and it is a choice which is made upon the circumstance that if the accused has something that it wants to have badly, then the government should be put to the choice as it was put to the choice in Rosario as it was put to the choice in Andolschek and in Coplan and in a number of other cases. It's got to choose.

If it wants to have information, let it have the information but avoid prosecution. But if it wants to

prosecute, then prosecute and let the Privilege remain the sanctuary of the individual who is presumed to be innocent. Thank you.

Q Do you have any figures, is there any empirical data that has been assembled by anyone in any significant way to show how many persons who have been granted immunity in exchange for testimony have thereafter been prosecuted and had these problems that you are discussing?

MR. MANES: No, sir. I mean, that is, I'm not aware of any empirical data and as a matter of fact, I suspect one reason may be because use-immunity is still somewhat new. This statute was only passed last fall.

Q Well, I was thinking of immunity generally.

MR. MANES: I'm not aware of any, Mr. Chief Justice, but I would say that there are some cases which show the difficulties that courts have had, even -- even with transactional immunity, although the difficulties are now going to compound with use-immunity. But I don't know of any empirical data.

Finally, I want to submit one other additional consideration to this Court for policy consideration in line with the Fifth, and that is, the respect for law and the orderly process of administration that comes with the idea that a man cannot be compelled to accuse himself and which

will be undermined when there is even the suspicion that an accused has been given -- that there may be some evidence that is being used to taint his trial that has come from his own mouth.

I remember reading somewhere -- I think it was in Moore v. Dempsey, where Mr. Justice Holmes once said that it "is not only important to give justice, or to do justice, but to give the appearance of justice." And I think that this is an important consideration.

Now, I'm not going to here debate the question of whether Counselman ought to -- is dicta or not. I've taken the position that it's not dicta but, obviously, this Court is concerned to reevaluate the problem that Counselman addressed itself to and I would, however, point out to this Court that there have been -- although the Ninth Circuit affirmed the use-immunity statute here, that has not been true in the Seventh Circuit, that has not been true in the Third Circuit. Citation to the Catena case, Catena v. Elias being in the 449 F2d, page 40 and more recently, just recently, the Eighth Circuit also took the view that the Ninth Circuit was in error and viewed the underlying policy considerations of Counselman as prevailing and I refer here to United States v. McDaniel 449 F2d 832 at page 838. That case, incidentally, is kind of interesting because it addresses itself to one of the questions that was put to

Counsel early this morning when Counsel was asked about whether he was "overzealous," whether Prosecutor was going to be "overzealous." In that particular case, I would point out that Counsel there was the federal prosecutor who, because he was informed by his administrative agencies that there was a suspicion that a bank president was defalcating and embezzling money, turned the matter over to a state, to the State of North or South Dakota, and the state then held an immunity grand jury proceedings, granted immunity and then, at the request of the United States Attorney, turned that transcript over to the United States Attorney for prosecution and indictment followed.

I would say that the court there held that that was a prima facie evidence of the use of fruits, but I would also point out that it demonstrates, as does, of course, the Berger in 295 U.S. and a number of other cases, demonstrates that prosecutors can be, at times, overzealous and, particularly when conferred with such extensive power as appears to be the case here.

But when I first spoke, I suggested that there were other compelling reasons why I believe use-immunity should not prevail, and one of the most important of those reasons, of course, is that it is inadequate that the rules that are designed to enforce and administer the use-immunity concept are just simply unable to effectively displace the

Fifth Amendment.

In short, what I contend, what we contended in our Briefs, is that -- that the rules that are designed to protect the Fourth and Fifth Amendment in seizure cases and in the forced confession cases are simply not adequate to protect or to at least define the limits of the Fifth Amendment. In short, what's happening here, what is being argued for here, is the use of essentially procedural rules to define the substantive rights of the witness, and I submit that that can't be done without creating some terrible problems for an accused who is questioning whether the evidence used against him in a subsequent prosecution isn't tainted.

Let me suggest some concrete examples of what I am referring to in this concept. First of all, California -- the California Supreme Court decided in People v. Ditson 57 Cal. 2nd, at page 415 -- that was a forced confession case and it held there that the fruits of a forced confession were not admissible. But it went on to hold that the fruits of a forced confession may not be admissible but that the -- that if the evidence was discoverable -- was discoverable by law enforcement that therefore, that under those circumstances, there was an attenuation and that evidence would be admissible and that same theory that was used in the Ditson case and subsequent California Supreme Court cases -- cases of

like nature -- has also been applied by the District of Columbia Court of Appeals, in Wayne v. United States, 318 F. 2d and it was applied most recently by the Ninth Circuit in a case United States v. Jackson, 448 F. 2d at page 970 where the court, and I'm quoting, said: "It would be speculative to conclude that before such information the police would not have identified defendants or learned their place of residence."

I would like to reserve some time for reply.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF THE SOLICITOR GENERAL,

ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

The facts of this case are simple and not in dispute. The Respondent here was ordered to testify under-- pursuant to Section 6002 of Title 18 of the United States Code. He refused to do so. The question is whether his sentence for contempt for failing to comply with that order can be sustained consistently with the Fifth Amendment.

Of course, the language of the Fifth Amendment is familiar to all of us. It is one of the shortest and simplest

clauses in the Constitution, but I think it's worthwhile to get back to the language. I don't suggest for a moment that it should be construed literally. On the other hand, I don't think that it should be regarded as a take-off point for a vast expansion, which has sometimes occurred.

But the language is that:

> "No person shall be compelled in any criminal case to be a witness against himself."

And the language of Section 6002, which is Section 201-A of the Organized Crime Control Act of 1970 is that though the witness is required to testify under that statute:

> "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."

The problem arises because of the language in Counselman v. Hitchcock of 80 years ago. The case, it seems to me, is a sort of jurisprudential case, an example of the process by which the law grows and develops. In this case, after rather extended delay.

We now know that there are at least three measures or varieties of immunity and not two, as we long assumed and supposed. There is use-immunity, which was involved in

Counselman and Hitchcock and was held to be inadequate and invalid. There is extended use-immunity, immunity not only to the use of the testimony but to its fruits, which is what is involved here. And, finally, there is transactional immunity, giving you amnesty or pardon with respect to any offense covered by the testimony, and that was held to be sufficient in Brown and Walker.

There is complete agreement as to the invalidity of use-immunity alone and as to the validity of transactional immunity. The problem arises and is presented here with respect to the validity under the full Amendment -- under the Fifth Amendment -- of full, extended, use-immunity applicable not only to the evidence given but also to the fruits of such evidence. The situation, it seems to me, comes within the examples with which the common law is filled which are dealt with in -- by Dean Pound in his work on jurisprudence, Volume III, page 564, where he says, "We must distinguish subsequent judicial rejection of the reasoning by which the result was reached in a prior case and substitution of different reasoning leading to the same result from a changed course of decision." And he concludes, "It cannot be insisted upon too often that the common law of technique does not make the language authoritative, much less a binding authority. It is the result which passes into law."

No one saw the distinction between use-immunity

and what I would call "extended" or "complete" use-immunity for almost 75 years after Counselman against Hitchcock was decided. I thought a lot about the privilege against self-incriminations some 17 years ago, but I didn't see the distinction. Mr. Mayers, in his thought-provoking book, called, "Should the Fifth Amendment Be Amended?" published in 1959, did not see it. Judge Freedley, in his lectures on "Reconsideration of the Fifth Amendment" published several years ago, did not refer to it.

Q The distinction to which you are now referring is the distinction between what? Use and use plus fruits?

MR. GRISWOLD: Use-immunity alone, such as was held invalid in Counselman v. Hitchcock.

Q Right

MR. GRISWOLD: And immunity against the use of the evidence and all of its fruits, construed as broadly as the Court feels it should be construed.

The fact was that, for ordinary purposes, the question was concealed because immediately after Counselman and Hitchcock was decided, Congress picked up the sweeping language which Mr. Justice Blatchford has used in a part of his Opinion there; the statute which Congress enacted was introduced into Congress 12 days after Counselman against Hitchcock was decided and Congress provided full transactional immunity in nearly every case where it required the testimony

be given. In one case where it gave only the narrow use-immunity, the Court held that that was invalid. Congress did this because it thought it had to do so. It was only many years later when the Court found, for the first time, that the Fifth Amendment applied in terms to the states. In 1964, seven and a half years ago, the question rose to the surface. It came in through the side-door, so to speak, because Congress, by its statutory language, had left no room for it to come before the Court directly in a federal criminal case.

Now, the case to which I refer is, of course, Murphy against the Waterfront Commission, where the immunity was granted by a bistate organization. It was held that the state had no power to grant immunity, transactional immunity, against a federal prosecution, but the Court sustained the statute by holding that under its supervisory power or in some other way, it isn't entirely clear, the testimony obtained in the bistate proceeding could not be used nor could its fruits be used in a federal prosecution and that that complied with the Fifth Amendment.

The issue was implicit and Mr. Justice Goldberg's opinion for the Court in that case, for example, 378 U.S. at page 78 and 79, Justice Goldberg's statement of Counselman against Hitchcock refers several times and only to use and its fruits. It was explicit in Mr. Justice White's

concurring Opinion, and in the Court's Opinion, the Opinion of Justice Goldberg, the conclusion was that the testimony "could not be compelled unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with the criminal prosecution against him," and then he repeated the conclusion that the federal authorities would not be allowed to use the evidence or its fruits and said, "This exclusionary rule, while permitting the states to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed this privilege in the absence of a state grant of immunity," and the distinction was explicit in the opinion of Mr. Justice White concurring in that case and it was that opinion, I think, which brought it all out into the open and got a lot of people to thinking and resulted in the work by Professor Dixon of George Washington University. Incidentally, he has filed a Brief in the Zicarelli case on behalf of the National District Attorneys Association which seems to me is an excellent brief and which I hope will be considered in connection with this case.

Since then, the Court has several times given intimations that extended use-immunity is sufficient. In Gardner v. Broderick, for example in 392 U.S. the Court said, "Answers may be compelled regardless of the privilege,

if there is immunity from federal and state use of the compelled testimony or its fruits in connection with the criminal prosecution against the person testifying."

And more recently, last term, in the United States against Freed, the Court upheld the latest version of the Firearms Statute under a situation which I think analysis will show can be supported only if extended use-immunity is adequate.

Q What about Spevack, Mr. Solicitor General?

MR. GRISWOLD: Spevack is the case of the lawyer -- how far that is affected by the -- by Gardner and Broderick, I am not sure. Gardner and Broderick says that --

Q Well, Spevack has never been really overruled, has it?

MR. GRISWOLD: Spevack --

Q Against Klein.

MR. GRISWOLD: Has what?

Q Not been overruled.

MR. GRISWOLD: I don't believe it's been overruled except that Mr. Justice Harlan who dissented in Spevack against Klein felt it possible to concur in Gardner and Broderick because he thought that it had, in effect, removed the substance of Spevack against Klein, and I think it is true that a lawyer cannot be disbarred or a policeman removed because he claims the Fifth Amendment, but it apparently is

true that both things can be done, because the lawyer declines to answer questions, and that seems to me to be a fairly thin line.

Thus, it seems to us that the Court has at least twice decided that extended use-immunity meets the requirements of the Fifth Amendment. Murphy is not affected by the fact that two jurisdictions were involved there. There were two jurisdictions but there is only one Fifth Amendment and it is now equally applicable throughout the United States in all tribunals, federal and state. If extended protection against use of evidence and its fruits is sufficient to sustain the validity of a state statute, it is sufficient under the same constitutional provision to sustain the validity of a federal statute and on this, I would like to call the Court's attention to the dissenting opinion of Judge Van Dusen in the Catena C-a-t-e-n-a case to which reference has been made, 449 U.S. 40, Judge Van Dusen's opinion begins on page 46 and he considers it in some detail, the question of the --

Q What is that citation?

MR. GRISWOLD: 449 U.S.

Q U.S.?

MR. GRISWOLD: Oops, I'm sorry, Federal 2d. 449 U.S. is a little ahead in history.

Q Yes.

MR. GRISWOLD: 449 Federal 2d, page 40, and

Judge Van Dusen's opinion begins on page 46.

The Court could not have decided Murphy as it did unless extended use-immunity meets the requirements of the Fifth Amendment, nor could it have decided Freed as it did; unless extended use-immunity meets the requirements of the Fifth Amendment, those cases should be controlling here.

Now, contrary to one of the Counsel who appeared this morning, I believe that Counselman against Hitchcock was rightly decided. We do not ask that it be overruled but some of its language is now seen to have been too sweeping and this is one of the ways in which the law develops and the time has come for this development here.

Q Well, Mr. Solicitor General, do you think we have to have one rule about use of immunity in all situations? It seems to me the interest may differ in various contexts. For example, the difference between Spevack v. Klein and Garrity.

MR. GRISWOLD: I'm not at all sure, Mr. Justice, that we need to have it in all situations. I do feel fairly sure that the same rules, whatever they are, should be applicable both with respect to the application of the immunity in federal courts and in state courts.

Q Yes, but what --

MR. GRISWOLD: I don't find any distinction on the two-state basis.

Q But what if the rule -- would you suggest that you were varying the rule if you said that there may be state interests or federal interests, say, such as in Murphy against Waterfront, which might justify taking a risk of incrimination that in another context would not be justified?

MR. GRISWOLD: Mr. Justice, I certainly would not contend for a rigid, fixed rule of any kind. I don't think that there is any distinction on that basis between Waterfront and this case. There may well be other cases such as the discipline of lawyers and the discharge of policemen which would present different factors. I haven't given great thought to them and -- and don't now see any particular distinction, but there may well be. I do think that this situation involving the seeking of the evidence of a witness for use in connection with criminal matters is not distinguishable on grounds of special situations from Murphy against the Waterfront.

Q The hazards of state interests you say here within a jurisdiction are the same hazards that Counsel --

MR. GRISWOLD: It seems to me to be exactly the same. Now, we have parallels in other fields where the Court has made sweeping decisions which were right and has later qualified the language. The one that first occurred to me had to do with the taxation of stock dividends where

in Eisener v. MacCumber said the stock dividends aren't income and can't constitutionally be taxed. Congress then immediately stepped in and passed a statute saying stock dividends are not taxable and it was not possible to raise any further question under that statute. It was only through the side-door, when somebody was ingenious enough to raise a questi m with respect to the basis of stock dividends that the Court intimated that well, maybe some stock dividends are taxable and in the Kochman case it was decided that some stock dividends are taxable and Congress has now passed a statute, much as it did here, providing that certain stock dividends are taxable.

We have a longstanding constitutional problem in this country as to the applicability of the nondiscriminatory tax on the income from state and municipal bonds. Now, that can't be raised directly before this Court for the time being because Congress has enacted that such interest is not taxable but perhaps it may come up some day and the Court may find reasons to qualify some of its earlier positions. It may come up some day, for example, if Congress extends the tax on tax preference income.

Now, the Court may well be concerned about the practical effect of a decision along the lines I've indicated. We don't want to whittle away on the basic Fifth Amendment guarantees, impairing it in its important function. But that

does not mean that we should not perfect our understanding of it and apply it now in a way which leaves its essential guarantees in full effect, wholly unimpaired, while defining its limits in such a way as to preserve other values which are consistent with or are indeed required by the Constitution.

Now, let me suggest the following considerations:

As to evidence first discovered after immunity has been granted, there should be a heavy burden on the government to show that any such evidence is not the fruit of a lead or clue resulting from or uncovered by the compelled testimony. This should not be a conclusive presumption because there can be cases where the government can demonstrate that such evidence was independently derived. It comes in the mail, for example, the day after the testimony was given and it had been postmarked in France a week before.

The government can show there that the evidence it has was not a result of the compelled testimony.

Q You talked about a presumption, and I missed the presumption, that you just told us now should not be conclusive.

MR. GRISWOLD: I simply say that -- I said burden, there should be a heavy burden on the government to show that it -- its evidence was not derived directly or indirectly from the compelled evidence, but I said I thought it should not be a conclusive presumption. The government ought to

be free to show, if it can, that it derived it independently.

Q We were cited by your brother on the other side to -- a California case or two where the court said it was find it all, it was find it all by the prosecution, extraneous to this testimony. Do you think that would be enough for the government to show?

MR. GRISWOLD: If it -- I'm sorry, Mr. --

Q I'm not -- well, I'm not quoting it, but it was susceptible of being discovered independently of the --

MR. GRISWOLD: No, I think the government ought to show that it did discover it independently and that it was not led into it or induced to it by --

Q I don't have the case in mind, but he referred to some California cases --

MR. GRISWOLD: Neither do I. It will be more rare, I think, that the government will want to use or should be able to use evidence which first came to its attention after testimony was compelled and extended-use immunity was granted.

Q Well, Mr. Solicitor General, what about the situation that one Counsel in one of the previous cases indicated, where the government does compel a testimony and the testimony is given and this induces the prosecutor not to use the testimony except to launch an investigation and by independent means, wholly unrelated to the testimony except by the fact that it was given, search out, independently --

MR. GRISWOLD: That is a hard question, but I think if it does appear that the investigation was the consequence of the evidence being given, that then the evidence is something which was indirectly derived as a result of the testimony given.

Q Would you --

MR. GRISWOLD: I would construe directly and indirectly quite broadly and I would put the burden on the government with respect to evidence derived after the testimony is given.

Q So "but for," you put on a "but for" test in the sense that except for the testimony the government would never have had it?

MR. GRISWOLD: Almost, Mr. Justice. On the other hand, I hate very much to give conclusions about purely hypothetical cases, knowing full well the practical situations that can arise which will make it look differently, but I'm perfectly free to say that I think there should be a heavy burden on the government to show that the evidence it wants to use was not directly or indirectly derived from the testimony.

Q Mr. Solicitor General, would you agree that as a practical matter sometimes the government, state or federal, will initiate an investigation simply because a particular witness answers a particular question before a

grand jury by claiming Fifth Amendment amenities?

MR. GRISWOLD: Yes --

Q That and nothing more --

MR. GRISWOLD: Yes, Mr. Chief Justice, I have no doubt that that may start people to thinking, well, why is that? and let's look up this and see what we can find and then, surprisingly enough, they do find something --

Q That prosecution isn't barred, I would think.

MR. GRISWOLD: That prosecution is perfectly valid. On the other hand, once you have given immunity under a statute which says that the evidence shall not be used directly or indirectly in the prosecution of the defendant, I think there is a heavy burden on the government, but I want to point out --

Q Let me carry it one step further. Sometimes an investigation by a collateral prosecutorial agency is triggered by the mere fact that someone is subpoenaed to come before a grand jury, before he ever asks a question, isn't that true?

MR. GRISWOLD: Yes, that could be.

Q So that there are many circumstances which trigger or set off investigations by law enforcement agencies?

MR. GRISWOLD: There are many circumstances. On the other hand, here we have a statute which says that evidence compelled shall not be used directly or indirectly

against the accused, and I think, in a proper construction of the Fifth Amendment that that should be given a broad interpretation.

But in many cases of the evidence, the government has ample evidence before the extended use-immunity is granted. The government's need and objective is not to get evidence against this defendant but rather to get his testimony against another and usually more important defendant. Let me take the example of a man who is arrested red-handed driving a truck filled with stolen televisions. They've got fingerprints; they've got eyewitnesses who saw every stage of it; they've got his signature on a receipt that he signed for the goods. There isn't any question about their having sufficient evidence to prosecute him. Proposal is made that he should plead guilty and testify against his principals and hope that he'll get a lighter sentence, but he refuses. Still, they want to get testimony against the big operators. His testimony may be essential if the ringleaders are to be brought to justice.

As things were before 1970, his testimony could be had only at the price of giving him complete amnesty, although the government already has plenty of evidence against him. Indeed, why in the world should he plead guilty and hope for a light sentence when if he just sits back and knows that he will get transactional immunity? He couldn't testify

against the big operator without disclosing his own guilt and thus he could sit back and demand complete immunity.

Another aspect of it --

Q Well, taking your hypothetical case, what on earth are you giving this fellow when you give him this kind of immunity? You are giving him nothing at all.

MR. GRISWOLD: You are giving him immunity against the use of the evidence which he gives and its fruits.

Q But by your hypothesis --

MR. GRISWOLD: By my hypothesis, that will not -- but that's all the Constitution requires is that he not be required to testify against himself, and you're not going to use any of this testimony. Incidentally, if you are required to give him transactional immunity, he can simply go in and testify and say, "Yes, I saw a murder committed. I was standing there." And refuse to say anything more. He now has complete immunity against prosecution for any part of the murder because that was a transaction as to which he testified.

With respect to use-immunity, he will get immunity only with respect to what he does testify and thus he will testify much more widely and freely under use-immunity than under transactional immunity. Giving him extended use-immunity leaves him no worse than he was before. It does not require that he be put in a better position and none of his testimony or its fruits can be used against him, but the

evidence already available and demonstrative wholly independent of the testimony he gives remains available and can be used so that this clearly guilty man will not go scot free.

Let me put the same thing in another way, because this has a relation to the Sixth Amendment and its constitutionally-guaranteed right that the defendant shall have compulsory process of witnesses. Now, suppose you were prosecuting A and B, and B says -- comes to the District Attorney and says, "I'm going to use A as a witness in my behalf," and A says, "Nothing doing, I can't testify without showing I was there and that will incriminate me." B says to the District Attorney, "Well, give him immunity." And the District Attorney says, "Nothing doing. I can only give him transactional immunity and I'm not going to let him off. We know well he is guilty."

But if the District Attorney can give him use-immunity, then B can get the benefit of A's testimony, such as it is, without A having to be given a pardon or amnesty, and thus there seems to me that, somewhat as in the Simmons case, where the Fifth and the Fourth Amendments were pressed together, we have here a way in which the allowance of use-immunity under the Fifth Amendment will help to support the compulsory process which is given by the Sixth Amendment.

Q You are not proposing the defense counsel be

empowered to give a witness --

MR. GRISWOLD: No, Mr. Justice, only the --

Q -- use-immunity?

MR. GRISWOLD: Well, nobody can give immunity under the statute except with the approval of the Attorney General, the Deputy Attorney General, or a designated Assistant Attorney General.

Q At that point, Mr. Solicitor General, there is no court supervision, however, over the granting of it.

MR. GRISWOLD: There is, Mr. Justice, there is no court supervision and I don't think there should be. This is a -- this is a part of the prosecutor's judgment, but very narrowly limited. Incidentally, the other parts of the statute provide that with respect to administrative agencies, the Attorney General has an absolute veto. They can't do it unless he approves.

With respect to Congressional committees, it requires a majority of the House of Congress or two-thirds of a committee and it must be submitted to the Attorney General for at least 20 days. He does not have a veto power.

Now, there are arguments about the use of testimony to impeach the fact that the evidence might conceivably have some effect on cross-examination. My time has expired but I would suggest that there are problems about waiver which come into that if the defendant has chosen to testify

he may not have as much protection under the Fifth Amendment as he might otherwise. Moreover, with respect to the use of the information by way of cross-examination, he will have counsel. His counsel can object to the question at any time and if the court finds that the question is derived indirectly by way of using the evidence which was obtained under compulsion, the court should exclude the testimony and, if necessary, it could come to this Court for review.

We think that the Court has already established that what I have called "extended use-immunity" complies with the Fifth Amendment. There are undoubtedly peripheral problems that will have to be considered over the years, but as far as this case is concerned, we think the judgments below should be affirmed.

Q Is there any question in your mind that this Statute 6002 would govern the use of any evidence or of its fruits in any kind of a state proceeding?

MR. GRISWOLD: I think as far as I'm concerned, Mr. Justice -- of course, I am representing the Federal Government and state officers might feel differently -- but I think under some decisions of this Court and the supremacy of power, if federal immunity is granted, it is binding on the states.

Q To the full extent?

MR. GRISWOLD: To the full extent. Some of the old

statutes referred to in any court, and this statute says "in any criminal case." Now, that could be construed to mean only in a federal court. I don't think it should be.

Q Well, I was wondering about, for example, about state administrative proceedings.

MR. GRISWOLD: Well, I think it only applies in any criminal case. I think it could, perhaps, be used in a state administrative proceeding --

Q Or in a federal administrative proceeding.

MR. GRISWOLD: -- or in a civil proceeding, or in a federal administrative proceeding. The statute only protects against use in criminal cases and that's all the Constitution protects against, "No person shall be compelled to testify -- be a witness against himself in any criminal case." That's all the Constitution says.

Q Well, the Court has gone a little further, as you said at the outset, from the literal words of the Amendment.

MR. CHIEF JUSTICE BURGER: Mr. Manes.

REBUTTAL ARGUMENT OF HUGH R. MANES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MANES: Mr. Chief Justice, and may it please the Court:

A few remarks in rebuttal. First, I want to state that the case that I was referring to -- the California

Supreme Court case -- was People v. Ditson, 57 Cal. 2d 415, and there were several other cases that I have referred to in my opening Brief of the same ilk at page 40 of our opening Brief.

The second point I want to make and demonstrate through the Ditson case is that, although the government here says, "We would give --" you know, "We would only rely upon the rule that the government must show that it has not discovered --" rather than use the discoverable rule. I would point out to this Court that we are talking about the rules as they now exist and are followed in the various circuits and in the states and therefore if the Court is of a mind to -- to be thinking in terms of use-immunity, it seems to me that the very minimum that is required at this point is to straighten out the rules first before use-immunity be considered, even, as within the scope of the Fifth Amendment.

The other point I want to make is that, although the government here talks about having ample evidence before -- he cites that example about the accused that has ample evidence before he is given immunity, I would say to the government, why don't they get a conviction? Then, when they've got a conviction, they can get the testimony without conferring immunity because, of course, then the reason for the rule -- for the privilege -- falls. I cannot see, as

Mr. Justice Stewart points out, I cannot see giving -- we already have use-immunity. I mean, no court is going to allow compelled testimony to come in. We have that. And in the very minimum, the government must give us something more.

Now, the other point I want to make is that the heavy burden that the government talks about is illusory. It is illusory because, although the government concedes that any testimony that aids the givernment in the prosecution would fall without the rule, I would point out that there are some very compelling examples to show that the government can and will benefit.

For example, when use-immunity is given to a witness, he will be in a grand jury proceeding. He will be asked, among other things, about his witnesses. He will be giving information.

Now, the prosecutor who examines him could very well be, as the case may turn out, the prosecutor who prosecutes him, ultimately, and will have the benefit, certainly of information on which to draw his cross-examination. But even more compelling is the fact that in this particular context we are dealing with a series of problems and rules that is, as I pointed out, "a grist," and there is no way to escape from them. We have rules, for example, that come from Wong Sun and Nardone which talk about, well,

a little bit of evidence, if it is tainted, is all right, if it's attenuated.

Now, if you're going to talk about defining what is the Fifth Amendment Privilege, whether use-immunity is as broad as the Fifth Amendment Privilege, the Fifth Amendment says nothing about allowing a little bit of tainted evidence to be compelled and used against the accused.

When we are talking here about developing rules, we have Chaplin v. the United States saying that the amount seemed a harmless error rule. Does that mean that if a court ultimately concludes that, well, tainted evidence perhaps was used from the mouth of the accused, but, after all, it's harmless in terms of the total context of the cases, haven't we then abridged the rule? And these are the rules, we respectfully submit, that are used to define the use-immunity, and use-immunity, therefore, comes to us something like Humpty-Dumpty. Once the egg is broken, it can never be put together again the same way. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Manes.

Thank you, Mr. Solicitor General.

The case is submitted.

(Whereupon, at 1:56 p.m., the case was submitted.)