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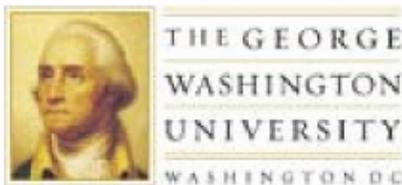
Kastigar v. United States

406 U.S. 441 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



3

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1972

No. 70-117 -- Kastigar v. United States

Dear Lewis:

Please join me.

Regards,

WRB

Mr. Justice Powell

Copies to Conference

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Chas. Thayer

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Powell
Mr. Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-117

From : Douglas, J.

Calculate: _____

5/12/72

Charles Joseph Kastigar and
Michael Gorean Stewart,
Petitioners,
v.
United States. } On Writ of Certiorari to
the United States Court
of Appeals for the
Ninth Circuit.

[May 15, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The Self-Incrimination Clause says "No person . . . shall be compelled in any criminal case to be a witness against himself." I see no answer to the proposition that he is such a witness when only "use" immunity is granted.

My views on the question of the scope of immunity that is necessary to force a witness to give up his guarantee against self-incrimination contained in the Fifth Amendment are so well known, see *Ullman v. United States*, 350 U. S. 422, 440 (dissenting), and *Piccirillo v. New York*, 400 U. S. 548, 549 (dissenting), that I need not write at length.

In *Counselman v. Hitchcock*, 142 U. S. 547, 586, the Court adopted the transactional immunity test: "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." *Id.*, at 586. In *Brown v. Walker*, 161 U. S. 591, a case involving another federal prosecution, the immunity statute provided that the witness would be protected "on account of any transaction . . . concerning which he may testify." *Id.*, at 594. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to

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B
Chas J. Kastigar
Thurgood

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-117

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Recirculated: 5/1/72

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[May —, 1972]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 10, 1972

70-117, Kastigar v. U. S.

Dear Lewis,

I am glad to join your excellent opinion
for the Court in this case.

Sincerely yours,

P.S.
1.8.

Mr. Justice Powell

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94

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 11, 1972

Re: No. 70-117 - Kastigar v. U. S.

Dear Lewis:

This is an excellent opinion,
and I join it.

Sincerely,

Byron

Mr. Justice Powell

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U.S. SUPREME COURT MANUSCRIPTS

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Brennan
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.
SUPREME COURT OF THE UNITED STATES

Circulated: 4/2/72

No. 70-117

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[April —, 1972]

MR. JUSTICE MARSHALL, dissenting.

Today the Court holds that the United States may compel a witness to give incriminating testimony, and subsequently prosecute him for crimes to which that testimony relates. I cannot believe the Fifth Amendment permits that result. See *Piccirillo v. New York*, 400 U. S. 548, 552 (1971) (BRENNAN, J., dissenting from dismissal of certiorari).

The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him. A grant of immunity may strip the witness of the right to refuse to testify, but only if it is broad enough to eliminate all possibility that the testimony will in fact operate to incriminate him. It must put him in precisely the same position, *vis-à-vis* the government that has compelled his testimony,* as he would have been in had he remained silent in reliance on the privilege. *Ullmann v. United States*, 350 U. S. 422 (1956); *McCarthy v. Arndstein*, 266 U. S. 34 (1924); *Hale v. Henkel*, 201 U. S. 43 (1906); *Brown*

*This case does not, of course, involve the special considerations that come into play when the prosecuting government is different from the government that has compelled the testimony. See *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964).

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-117

Charles Joseph Kastigar and
Michael Gorean Stewart,
Petitioners,
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United States.

On Writ of Certiorari to
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M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 12, 1972

Re: No. 70-117 - Kastigar v. United States

Dear Lewis:

Please join me in your painstaking and fine
opinion.

Sincerely,

H. A. B.

Mr. Justice Powell

cc: The Conference

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES Circulated: APR 8 1972

No. 70-117

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Petitioners,
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United States. } On Writ of Certiorari to
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of Appeals for the
Ninth Circuit.

[April —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government can compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U. S. C. § 6002-03. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity authorized by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony over

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B
16, 21
Stylistic Changes Throughout.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Rehnquist

3rd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

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No. 70-117

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