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# NOTE

## Witness for the Defense: A Right to Immunity

### I. INTRODUCTION

The government's power to compel testimony has ancient origins. As early as 1562 the courts of England were authorized by statute<sup>1</sup> to compel testimony from unwilling witnesses. In 1612 the King's Bench quoted a speech by Sir Francis Bacon in which he remarked that "all subjects, without distinction of degrees, owe to the king tribute and service, not only by their deed and hand, but of their knowledge and discovery."<sup>2</sup> While it is unclear when grand juries began to use compulsory process to ensure the attendance and testimony of witnesses, the principle that "the public has a claim to every man's evidence"<sup>3</sup> was firmly established by 1742. The Framers of the United States Constitution recognized the government's power to compel testimony and the citizen's duty to testify in the requirements of the sixth amendment.<sup>4</sup> The first Congress also acknowledged the testimonial duty when it provided for compulsory attendance of witnesses in federal courts in the Judiciary Act of 1789.<sup>5</sup> More recently Justice White noted that "[a]mong the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning

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1. An Act for Punishment of such as shall procure or commit any wilful Perjury, 1562, 5 Eliz. 1, c. 9, § 12. The statute authorized a penalty and civil action against anyone who refused to testify after service of process and payment of expenses.

2. Speech of Sir Francis Bacon, *quoted in* Countess of Shrewsbury's Case, 2 How. State Tr. 770, 778 (K.B. 1612).

3. This old English maxim was cited in 1742 on the floor of the House of Lords by Lord Chancellor Hardwicke during a debate on the Bill to Indemnify Evidence, an early immunity law. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961). The United States Supreme Court has frequently cited the maxim with the substitution of "right" for "claim." See, e.g., *United States v. Nixon*, 418 U.S. 683, 709 (1974); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

4. U.S. CONST. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . . [and] have compulsory process for obtaining witnesses in his favor . . ."

5. Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 73.

of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies."<sup>6</sup> He concluded that "[s]uch testimony constitutes one of the Government's primary sources of information."<sup>7</sup>

The government's power to compel testimony, however, is not unlimited. The most notable exception to the testimonial duty is the fifth amendment privilege against compelled self-incrimination,<sup>8</sup> which also has its roots in early English legal history.<sup>9</sup> One commentator has characterized the privilege as "one of the great landmarks in man's struggle to make himself civilized."<sup>10</sup> Evidence of the importance of the fifth amendment privilege is indicated by its historical development and expansion into a broader protection than that initially perceived by a literal reading of the fifth amendment. Although the fifth amendment privilege is unavailable to non-natural persons such as labor unions<sup>11</sup> and corporations,<sup>12</sup> there are few restrictions on the privilege. It is a "personal" privilege<sup>13</sup> because it must be claimed by the witness only for his own protection. The scope of the privilege extends beyond defendants in criminal proceedings to protect any witness in any proceeding—civil or criminal, administrative or judicial, investigatory or adjudicatory<sup>14</sup>—from all disclosures that the witness reasonably

6. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964) (White, J., concurring).

7. *Id.* at 94.

8. U.S. CONST. amend. V provides, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

9. The whipping of a defendant in a proceeding before the Star Chamber for failing to respond to the oath *ex officio nro*, which imposed on a witness the duty to testify, *Lilburn Trial*, 3 How. State Tr. 1315 (1637), created a public outcry that caused Parliament to abandon both the oath and the Star Chamber.

10. E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955). Justice Goldberg noted that the fifth amendment

reflects 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 sense of fair play which dictates "a fair state-individual balance 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."

*Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (citations omitted).

11. *United States v. White*, 322 U.S. 694 (1944).

12. *Hale v. Henkel*, 201 U.S. 43 (1906).

13. *See, e.g., Rogers v. United States*, 340 U.S. 367 (1951) (privilege cannot be claimed to protect another).

14. *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceed-

believes could be used in a criminal prosecution or could lead to other evidence that might be so used.<sup>15</sup> The fifth amendment privilege against self-incrimination applied only to federal government proceedings until the 1964 landmark decision of *Malloy v. Hogan*,<sup>16</sup> in which the Supreme Court applied the privilege to the states by means of the fourteenth amendment.

Because of its broad scope, the fifth amendment privilege is often an effective barrier to the government's efforts to obtain information. Concomitant with the expansion of the privilege, two methods developed to alleviate the government's problem of obtaining privileged information: Executive pardons and immunity statutes. Justice Brown observed in *Brown v. Walker*<sup>17</sup> that both executive pardons and immunity statutes are "based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule [against self-incrimination] ceases to apply."<sup>18</sup>

The executive pardon, used as an instrument of clemency in England by the eighteenth century, was considered a method of law enforcement at the time of the 1787 American Constitutional Convention.<sup>19</sup> During the 1807 treason trial of Aaron Burr,<sup>20</sup> President Jefferson attempted to give an executive pardon to Dr. Bollman, one of the witnesses against Burr.<sup>21</sup> Dr. Bollman, however, refused to accept the pardon, originally planning to rely instead on his fifth amendment privilege.<sup>22</sup> His refusal raised the question whether a pardon must be accepted in order to be operative. The question became moot in the *Burr* trial because Bollman subsequently testified without either accepting the pardon or claiming the privilege.<sup>23</sup> The question, however, that arose out of the *Burr*

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ings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.

*Id.* at 40.

15. *Hoffman v. United States*, 341 U.S. 479 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87.

16. 378 U.S. 1 (1964).

17. 161 U.S. 591 (1896).

18. *Id.* at 597.

19. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 159 (4th rev. ed. 1957).

20. *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

21. *Id.* at 63.

22. *Id.* at 63-64.

23. *Id.*

trial—whether a witness may refuse an executive pardon—has never been satisfactorily resolved by the Supreme Court.<sup>24</sup> The resulting uncertainty partially explains the infrequent use of the executive pardon because if a witness can refuse an executive pardon, then he may freely assert his fifth amendment privilege and foreclose the government from obtaining the desired information. The “acceptance doctrine,” pronounced by Chief Justice Marshall in 1833, is the only Supreme Court statement that provides any answer to the question whether an executive pardon may be refused.

A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.<sup>25</sup>

Despite case law that has modified the acceptance doctrine,<sup>26</sup> it is generally acknowledged that an executive pardon may be refused. Unless the Supreme Court reexamines the acceptance doctrine and adopts a rule that requires a witness to accept an executive pardon, the pardoning power will probably remain unused as a means of compelling testimony in federal proceedings.

Immunity statutes,<sup>27</sup> on the other hand, have been widely used as a method of information acquisition to overcome claims of privilege.<sup>28</sup> Since the enactment of the first federal immunity statute in 1857,<sup>29</sup> prosecutors have had statutory authority to grant immunity to witnesses resorting to a fifth amendment claim of privilege. Justice Frankfurter observed that since 1857 Congress has approved immunity statutes with such consistency that these statutes have “become part of our constitutional fabric.”<sup>30</sup> Immunity statutes have undergone a variety of changes that involved the courts and commentators in a vigorous and ongoing debate focusing not on their validity, but on their constitutionally required scope.<sup>31</sup> The

24. See E. CORWIN, *supra* note 19, at 413 n.123.

25. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833).

26. *Biddle v. Perovich*, 274 U.S. 480 (1927); *Chapman v. Scott*, 10 F.2d 156 (D. Conn. 1925).

27. The informal immunity offered by law enforcement agents and the unwritten and noncourt approved agreement of the prosecutor not to prosecute are beyond the scope of this Note. For a recent discussion of judicial supervision of these nonstatutory forms of immunity, see 65 J. CRIM. L. & CRIMINOLOGY 334 (1974).

28. See text accompanying notes 153-56 *infra*.

29. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155; see text accompanying notes 44-55 *infra*.

30. *Ullmann v. United States*, 350 U.S. 422, 438 (1956).

31. See, e.g., Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of “Use Immunity”*, 51 B.U.L. REV. 616 (1971); Note, *Immunity Statutes and*

scope of the protection afforded a witness depends primarily on whether the statute grants transactional or use immunity. Transactional immunity completely immunizes a witness from prosecution for any transaction mentioned in the compelled testimony. Use immunity, on the other hand, only prevents the government from later utilizing the witness' testimony to develop or try a case against him. The debate over the proper scope of immunity statutes has subsided since the Supreme Court's 1972 ruling that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."<sup>32</sup>

An issue corresponding in importance to the type of immunity granted, and which has been largely ignored except by a few commentators<sup>33</sup> and judges<sup>34</sup> in recent years, is whether defendants should also have the right to immunize witnesses. In 1966 the District of Columbia Circuit held in *Earl v. United States*<sup>35</sup> that a defendant has no constitutional right to immunize a witness. Then Circuit Judge Warren Burger based his majority opinion on a separation of powers analysis and concluded that permitting the defense to immunize witnesses would constitute an invasion of the prosecutorial discretion of the executive branch.<sup>36</sup> Despite a change in the scope of statutory immunity since the *Earl* decision,<sup>37</sup> virtually all state and federal cases acknowledging the defense witness immunity issue have firmly adhered not only to *Earl's* holding but

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*the Constitution*, 68 COLUM. L. REV. 959 (1968); Comment, *The Federal Witness Immunity Acts In Theory and Practice: Teading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

32. *Kastigar v. United States*, 406 U.S. 441, 453 (1972); see text accompanying notes 145-50 *infra*.

33. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 79 (1972); 67 COLUM. L. REV. 953, 977 (1967).

34. See, e.g., *United States v. Gaither*, 539 F.2d 753, 753-55 (D.C. Cir.) (per curiam) (separate statement of Bazelon, C.J., on denial of motion for rehearing en banc) (issue is "vital to the fair administration of criminal justice"), *cert. denied*, 429 U.S. 961 (1976); *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976); *United States v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part); *United States v. Jones*, 476 F.2d 885, 888 (D.C. Cir. 1973) (Bazelon, C.J., dissenting from denial of motion for release pending appeal).

35. 361 F.2d 531 (D.C. Cir.), *rehearing denied*, 364 F.2d 666 (D.C. Cir. 1966) (en banc) (per curiam), *cert. denied*, 388 U.S. 921 (1967).

36. *Id.* at 534-35.

37. In 1970 a statute changed the type of immunity offered at the federal level from "transactional" to "use" immunity. See notes 139-40 & 142-43 *infra* and accompanying text.

also to its separation of powers analysis.<sup>38</sup> Accordingly, the federal courts, including the Supreme Court, have routinely rejected appeals based on the denial of immunity for defense witnesses.<sup>39</sup>

Contrary to *Earl* and its progeny, however, the Third Circuit recently held in *Virgin Islands v. Smith*<sup>40</sup> that under certain circumstances due process requires a judicial grant of immunity for a defense witness.<sup>41</sup> *Smith* has been soundly rejected by other courts.<sup>42</sup> Nevertheless, this Note focuses on the proper implementation of the current federal witness immunity statute<sup>43</sup> and concludes that the *Smith* approach is not only practicable but also constitutionally required. This Note first traces the evolution of immunity statutes and examines the multiple analytical approaches recently invoked by the courts in reaching their divergent opinions. The Note then evaluates the various constitutional bases for defense witness immunity and the conflicting interests at stake.

## II. HISTORICAL DEVELOPMENT OF IMMUNITY LEGISLATION

### A. *The Immunity Act of 1857*

The first American<sup>44</sup> immunity statute,<sup>45</sup> passed by Congress

38. The exceptions are *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *United States v. Shober*, 489 F. Supp. 412 (E.D. Pa. 1980). For a list of cases that follow *Earl* even after the change in the immunity statute, see note 39 *infra*.

39. See, e.g., *In re Daly*, 549 F.2d 469 (7th Cir. 1977); *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *Thompson v. Garrison*, 516 F.2d 986 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); *United States v. Bautista*, 509 F.2d 675 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974) (*per curiam*), *cert. denied*, 421 U.S. 999 (1975); *United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *Cerda v. United States*, 488 F.2d 720 (9th Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *United States v. Oliver*, 410 F. Supp. 739 (E.D. Pa.), *aff'd mem.*, 546 F.2d 420 (3d Cir. 1976), *cert. denied*, 430 U.S. 947 (1978); *United States ex rel Tatman v. Anderson*, 391 F. Supp. 68 (D. Del. 1975); *United States v. Ahmad*, 347 F. Supp. 912 (M.D. Pa. 1972), *aff'd in relevant part sub nom. United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973).

40. 615 F.2d 964 (3d Cir. 1980).

41. *Id.* at 974. See text accompanying notes 196-223 *infra*.

42. *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *United States v. Davis*, 623 F.2d 188 (1st Cir. 1980); *United States v. McMichael*, 492 F. Supp. 205 (D. Colo. 1980).

43. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 926 (codified at 18 U.S.C. §§ 6001-6005 (1976)); see text accompanying notes 132-56 *infra*.

44. Parliament passed the first immunity act in England in 1710. Intended to proscribe gambling, the act provided that a loser could sue a winner to recover his losses, and that the winner could be compelled to answer the loser's charges. Following the winner's

in 1857, initiated a precedent followed by many of the early immunity acts: it was a broad rule written in reaction to a disturbing political situation. In January 1857 the Washington correspondent for the *New York Times* reported that he had been solicited by members of the House of Representatives to act as an intermediary in a vote selling scheme.<sup>46</sup> The correspondent, however, refused to reveal the identity of those involved in the scheme to a House investigating committee.<sup>47</sup> The committee responded by requesting that the House pass a bill to compel the reporter to testify.<sup>48</sup> Although Congress passed<sup>49</sup> the 1857 Act<sup>50</sup> specifically to force the recalcitrant reporter to testify, the statute extended immunity

response and the return of the loser's money, however, the winner was "acquitted, indemnified and discharged from any further or other Punishment, Forfeiture or Penalty." An Act for the better preventing of excessive and deceitful Gaming, 1710, 9 Anne, c. 14, § 4 (repealed by An Act to amend the Law concerning Games and Wagers, 1845, 8 & 9 Vict., c. 109, § 15). Although not adopted by any American legislature, the gambler's immunity act was held to be in effect in this country. *United States v. Dixon*, 25 F. Cas. 872, 873 (C.C.D.C. 1830) (No. 14,970).

45. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155.

46. CONG. GLOBE, 34th Cong., 3d Sess. 403-13 (1857).

47. *Id.*

48. *Id.* at 404. Congressman Orr of South Carolina introduced the proposed bill for the committee.

49. Congress passed the Act two days after its introduction despite concern over the necessity of this type of legislation and questions about its constitutional validity. The debate focused on the investigation then in progress and the relationship of the bill to that investigation. *Id.* at 426-27 (remarks of Reps. Grow and Davis). Some congressmen sought to defeat or slow the passage of the bill by consigning it to another committee, but their motion was defeated by a vote of 132 to 71. *Id.* at 432-33. The bill was then passed by a vote of 183 to 12. *Id.* at 433. The Senate, notably the Committee on the Judiciary which discussed it for a mere ten minutes, gave the bill only cursory consideration. *Id.* at 436 (remarks of Sen. Hale). The Senate approved the bill by a vote of 46 to 3. *Id.* at 445.

50. The Act provides in pertinent part,

Sec. 2. *And be it further enacted*, than [sic] no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House as to which he shall have testified whether before or after the date of this act, and that no statement made or paper produced by any witness before either House of Congress or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness in any court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.

Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155.



from criminal sanctions to all witnesses before all congressional committees concerning any matter about which they testified.<sup>51</sup>

In its effort to create an effective method of compelling testimony, Congress worded the 1857 Act so broadly that it was easily abused. Because the statute granted immunity for all criminal acts about which a congressional witness testified, many persons whom Congress hoped to investigate were eager to testify. These witnesses skillfully provoked a line of inquiry that allowed them to establish a complete record of their crimes and thus secure broad immunity. The most notable case of an abuse of the 1857 Act concerned two clerks accused of embezzling two million dollars in Indian trust bonds from the Department of the Interior.<sup>52</sup> The clerks managed to testify about the charge before a House investigatory committee. When the Government then attempted to prosecute them, the court dismissed the case on the ground that the clerks had obtained immunity.<sup>53</sup> Many congressmen reacted to this abuse of the immunity statute in the embezzlement scandal<sup>54</sup> by initiating a movement in Congress to modify the 1857 Act.<sup>55</sup>

### B. *The Immunity Act of 1862*

In direct response to the Indian trust bond scandal, Congress designed the 1862 Act<sup>56</sup> to eliminate the excesses encouraged by the imprecise wording of the 1857 Act. By altering the language<sup>57</sup>

51. Significantly, the statute not only forbade the use of testimony, but it also immunized "any fact or act" about which the witness testified. *Id.*

52. See CONG. GLOBE, 37th Cong., 2d Sess. 3156, 3157 (1862).

53. See *id.*

54. For example, Senator Trumbull complained,

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

*Id.* at 428 (remarks of Sen. Trumbull).

55. *Id.* at 364 (remarks of Rep. Wilson).

56. Act of Jan. 24, 1862, ch. 11, § 1, 12 Stat. 333.

57. The 1862 Act provides in pertinent part,

That the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness in any court of justice: *Provided, however,* That no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect

of the immunity statute Congress achieved two goals. First, the scope of the immunity was narrowed to cover only the witness' oral testimony to the committee. Illegal transactions revealed during this testimony and papers and records produced by the witness were no longer protected. Second, while the immune testimony could not be used as the basis for prosecution, it could be used to obtain additional evidence upon which prosecution could be based. Thus, the immunity provision signed by President Lincoln<sup>58</sup> five years after the first statute became law changed the full transactional immunity to a much more limited use immunity. In the words of Senator Benjamin F. Wade, this level of protection was "all that a rascal ought to have at the hands of justice, even more than he ought to have."<sup>59</sup>

### C. *The Immunity Act of 1868*

Another political incident in 1868 provoked Congress to enact an immunity act<sup>60</sup> that amended the 1862 statute in one significant respect. *United States v. McRae*<sup>61</sup> was a suit filed in England by the United States to confiscate assets of the defunct Confederacy located in English banks. In order to prevail in its case, the Government needed the testimony of persons who had acted as Confederate agents.<sup>62</sup> One agent refused to testify on the grounds that it would require him to forfeit property he owned in the United States.<sup>63</sup> In response to this refusal Senator Frelinghuysen introduced a bill<sup>64</sup> modeled after the 1862 statute, but which broadened the scope of the protection by immunizing court-given testimony.<sup>65</sup> Congress evidently deemed the *McRae* case<sup>66</sup> sufficient justification

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such witness from any criminal proceeding as aforesaid . . . .

*Id.*

58. See CONG. GLOBE, 37th Cong., 2d Sess. 506 (1862).

59. *Id.* at 429.

60. Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37.

61. L.R. 3 Ch. 79 (App. 1867).

62. CONG. GLOBE, 40th Cong., 2d Sess. 1334 (1868) (remarks of Rep. Williams).

63. *Id.*

64. *Id.* at 845.

65. The bill, as enacted, provides in pertinent part that no answer or pleading of any party and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture . . . .

Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37 (emphasis added).

66. Congressional reaction to *McRae* explains the otherwise inexplicable extension of

for the bill because it passed in both the House and the Senate<sup>67</sup> following only minimal debate.<sup>68</sup>

Witnesses challenged the adequacy of the 1868 statute in the lower federal courts as early as 1869. The case of *In re Phillips*<sup>69</sup> concerned a witness who had refused to respond to questions about tax returns from tobacco manufacturers because of possible self-incrimination. The court held that use immunity granted under the authority of the 1868 statute provided sufficient protection and, therefore, the court compelled the witness to testify.<sup>70</sup> The witness asserted that he was inadequately immunized because his testimony could be used by the prosecution to discover new evidence against him.<sup>71</sup> The court responded to the witness' contention by adopting the following language from a New York case, *People v. Kelly*:<sup>72</sup>

[N]either the law nor the [C]onstitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transaction should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law.<sup>73</sup>

Three more federal courts examined the 1868 Act between 1871 and 1883.<sup>74</sup> In each case the court concluded that use immunity afforded appropriate protection and upheld the statute based on the principle of *cessat ratio, cessat lex*—where the reason of a law or rule ceases, the law or rule itself ceases. For example, the Court in *United States v. Williams* stated,

If the testimony or admission cannot be used by giving it directly in evidence to the jury as an admission, or if it cannot, in any manner, be used against

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statutory immunity to testimony given in judicial proceedings "in this or any foreign country." *Id.*

67. CONG. GLOBE, 40th Cong., 2d Sess. 1334 (1868).

68. In support of the proposal, Representative Williams of Pennsylvania stated, "This testimony is important, and this bill is to put the party [the Confederate agent] in such position that he shall be relieved from the liability to which he is now subject." *Id.* (remarks of Rep. Williams).

69. 19 F. Cas. 506 (D. Va. 1869) (No. 11,097).

70. *Id.* at 507.

71. *Id.*

72. 24 N.Y. 74 (1861). *Kelly* concerned the constitutional adequacy of a state immunity statute in a contempt action against a witness who refused to testify before a grand jury investigating alleged bribery of New York city councilmen.

73. *In re Phillips*, 19 F. Cas. at 507 (quoting *People v. Kelly*, 24 N.Y. 74, 83 (1861)).

74. *United States v. Williams*, 28 F. Cas. 670 (C.C.S.D. Ohio 1872) (No. 16,717); *United States v. Farrington*, 5 F. 343 (N.D.N.Y. 1881); *United States v. Brown*, 24 F. Cas. 1273 (D.C.D. Or. 1871) (No. 14,671).

the party, then it seems . . . the great reason upon which the protection of the witness rests has ceased to exist; and it is a well established principle, too old to be combatted or denied, that where the reason of a law or rule ceases, the law or rule itself ceases.<sup>75</sup>

The passage of the Interstate Commerce Act<sup>76</sup> in 1887 precipitated Supreme Court review of the 1868 immunity statute. When Congress created the Interstate Commerce Act, it vested the Interstate Commerce Commission with the authority to investigate and eliminate discriminatory practices and excessive rates that prevailed in interstate and foreign commerce. The Commission used grants of immunity in its investigations to compel testimony concerning corporate procedures and to compel production of relevant business records. Authority for the Commission's use of immunity came from the 1868 immunity statute and section 12<sup>77</sup> of the Interstate Commerce Act. Invariably, witnesses before the Commission invoked the fifth amendment and refused to testify. Despite an award of immunity, Charles Counselman, an interstate grain shipper under investigation for accepting rate kickbacks in violation of the Interstate Commerce Act, refused to testify and was convicted of contempt.<sup>78</sup> Counselman petitioned for a writ of habeas corpus on the ground that the contempt proceeding was illegal. Following the denial of his petition, Counselman appealed to the Supreme Court claiming that the 1868 immunity statute violated the fifth amendment.<sup>79</sup> *Counselman v. Hitchcock* is significant not only because it was the first Supreme Court case to consider an immunity statute, but also because it was only the second time that the Court closely scrutinized the scope of the fifth amendment privilege against self-incrimination.<sup>80</sup>

Before examining the validity of the 1868 immunity act, the Court, speaking through Justice Blatchford, rejected the Government's claim that Counselman could not assert the fifth amend-

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75. 28 F. Cas. 670, 671 (C.C.S.D. Ohio 1872) (No. 16,717).

76. Act of Feb. 4, 1887, ch. 104, § 1, 24 Stat. 379.

77. Section 12 provided, "The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." *Id.* § 12, 24 Stat. at 383.

78. *In re Counselman*, 44 F. 268 (C.C.N.D. Ill. 1890).

79. *Counselman v. Hitchcock*, 142 U.S. 547, 547-52 (1892).

80. The first Supreme Court ruling on the scope of the fifth amendment privilege occurred in *Boyd v. United States*, 116 U.S. 616 (1886), which invalidated § 5 of the Revenue Act of 1874. Aaron Burr's treason trial, in which then Circuit Judge John Marshall approved a witness' refusal to testify, was brought in the Circuit Court for the District of Virginia. See text accompanying notes 20-23 *supra*.

ment privilege before a grand jury because the privilege applied only to criminal trials.<sup>81</sup> Instead, the Court noted, "The object [of the privilege] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."<sup>82</sup> The Court determined that while "[t]he privilege is limited to criminal matters, . . . it is as broad as the mischief against which it seeks to guard."<sup>83</sup> Upon examination of the 1868 immunity provision, the Court concluded that although it proscribed the use of a witness' testimony for purposes of conviction, the act did not provide adequate protection from self-incrimination because the prosecution could use the testimony to search for new evidence with which to prosecute the witness.<sup>84</sup> In finding the scope of the 1868 Act insufficient in relation to the privilege, the Court framed the constitutional standard by which future federal immunity statutes would be judged: "The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of [the 1868 statute] is not *coextensive* with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution."<sup>85</sup> Although the Court declared the 1868 Act invalid, it did not adopt the extreme view that the fifth amendment privilege cannot be abridged in any respect by legislation such as an immunity act. Rather, the Court suggested the opposite conclusion in an allusive bit of dicta<sup>86</sup> which indicated that a properly worded immunity act would be upheld.

#### D. *The Immunity Act of 1893*

### The invalidation of the 1868 immunity act by the Supreme

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81. *Counselman v. Hitchcock*, 142 U.S. at 555-57.

82. *Id.* at 562.

83. *Id.*

84. Justice Blatchford stated,

It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

*Id.* at 564.

85. *Id.* at 564-65 (emphasis added).

86. "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to the which the question relates." *Id.* at 586.

Court significantly curtailed the investigative and enforcement activities of the Interstate Commerce Commission. Congress reacted to the *Counselman* decision only sixteen days after it was announced when Senator Cullom, a staunch advocate of effective federal regulation of commerce, introduced a new immunity bill.<sup>87</sup> In response to an objection that the bill would violate rights protected by the Constitution, the Senator explained that he had closely adhered to the Supreme Court's language in *Counselman* when drafting the proposed legislation.<sup>88</sup> Because of pressure to aid the Interstate Commerce Commission in its investigations, Congress passed the bill and it was ready for President Benjamin Harrison's signature on February 11, 1893.<sup>89</sup> The 1893 Act<sup>90</sup> adopted a radically different approach to immunity. Unlike the general immunity statute of 1868, which granted immunity in *any* judicial proceeding, the 1893 Act only immunized evidence presented before the Interstate Commerce Commission or in proceedings brought under the Interstate Commerce Act.<sup>91</sup> Thus, with the 1893 Act, Congress abandoned its practice of enacting general immunity legislation and undertook a new policy, followed in subsequent immunity provisions, of confining the immunity protection to actions brought pursuant to a particular statute.

The 1893 Act underwent its first court test within one year of

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87. *Counselman* was announced on January 11, 1892 and the new bill was introduced on January 27, 1892. 23 CONG. REC. 573 (1892).

88. *Id.* at 6333. During the Senate debate Senator Cullom defended his bill by stating, "Unless some such bill can be passed both the Interstate Commerce Commission and the courts will be entirely unable to enforce the law upon the statute book in reference to interstate commerce." *Id.* (remarks of Sen. Cullom).

89. 24 CONG. REC. 1157-58, 1181, 1565 (1893).

90. Act of Feb. 11, 1893, ch. 83, § 1, 27 Stat. 443.

91. The relevant portions of the 1893 Act provide,

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

its passage. In *United States v. James*<sup>92</sup> two witnesses, James G. James and Gordon McLeod, were cited for their refusal to testify in a federal grand jury investigation brought pursuant to the Interstate Commerce Act. In bringing the contempt action, the Government contended that the defendants could not assert the fifth amendment privilege since they had immunity under the statute.<sup>93</sup> Before reaching the question whether the 1893 immunity statute was coextensive with the fifth amendment, the court examined the history of the privilege<sup>94</sup> and determined that the Framers of the Constitution contemplated a right to "silence against the accusation of the federal government,—silence against the right of the federal government to seek out data for an accusation."<sup>95</sup> The court expressed concern that after testifying a witness could be exposed to public disgrace and social retribution in addition to criminal prosecution<sup>96</sup> and concluded that "the privilege of silence, against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequences of disclosure."<sup>97</sup> The court reasoned that since the 1893 Act could not protect witnesses from public embarrassment, it did not meet the coextensive test established by the Supreme Court in *Counselman* and was therefore invalid.<sup>98</sup>

In 1896 the Supreme Court addressed the 1893 immunity act in *Brown v. Walker*,<sup>99</sup> in which a witness<sup>100</sup> who had refused to testify during a grand jury investigation of possible violations of the Interstate Commerce Act was convicted of contempt. On ap-

92. 60 F. 257 (N.D. Ill. 1894).

93. *Id.*

94. *Id.* at 263.

95. *Id.* at 264.

96. The court observed,

The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by prevailing views, . . . or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender?

*Id.*

97. *Id.* at 265.

98. *Id.* Alternatively, the court compared the act to a pardon and concluded that even if the act were unconstitutional the witness had a right to refuse the immunity just as he could refuse a pardon under the Marshall acceptance doctrine. See text accompanying notes 25-26 *supra*. The court's decision was not appealed.

99. 161 U.S. 591 (1896).

100. *Brown*, an accountant for a railroad company, refused to answer questions about rebates on the ground of possible self-incrimination despite a grant of immunity under the 1893 Act. *Id.* at 592.

peal Brown contended that his testimony would subject him to public humiliation and disgrace. The Supreme Court rejected his argument and the district court's reasoning in *United States v. James* and held that the Framers did not intend the fifth amendment privilege to protect a witness' reputation and that the privilege was unavailable to witnesses not subject to potential criminal liability.<sup>101</sup> Brown also argued that the 1893 immunity act did not meet *Counselman's* coextensive test since it immunized him from prosecution at the federal level but exposed him to prosecution in the state courts.<sup>102</sup> The Court, however, stated that "[t]he act in question contains no suggestion that it is to be applied only to the Federal courts."<sup>103</sup> Moreover, the Court observed that even if the immunity did not adequately protect against state prosecution, the possibility of such an occurrence was "'a danger of an imaginary and unsubstantial character'"<sup>104</sup> that did not invalidate the statute. Despite the constitutional arguments advanced by the Court, pragmatic considerations such as the need for legislation to facilitate the enforcement of the Interstate Commerce Act may well have motivated the Court to uphold the 1893 immunity act. Indeed, the majority observed in conclusion that "[i]f . . . witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible . . . ."<sup>105</sup>

101. The Court stated,

[T]he fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. . . . The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good.

*Id.* at 605-06.

102. *Id.* at 606.

103. *Id.* at 607. The Court described the scope of the 1893 Act in the following terms: "[T]he immunity extends to any *transaction, matter or thing* concerning which [a witness] may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had." *Id.* at 608 (emphasis in original).

104. *Id.* (quoting *Queen v. Boyes*, 121 Eng. Rep. 730, 730 (Q.B. 1861)).

105. *Id.* at 610. The dissenters opposed the majority's reliance on this argument:

Much stress was laid in the argument on the supposed importance of this provision in enabling the commission and the courts to enforce the salutary provisions of the Interstate Commerce Act. This, at the best, is a dangerous argument, and should not



*E. The Immunity Acts of 1903 and 1906*

Following *Brown*, Congress continued its piecemeal approach of adopting immunity legislation as part of other federal regulatory statutes and passed three new immunity provisions in 1903.<sup>106</sup> In 1906 the Supreme Court upheld one of these acts<sup>107</sup> in *Hale v. Henkel*<sup>108</sup> in which a witness refused to testify before a grand jury investigating antitrust violations. While the Court reaffirmed the *Brown* analysis, it also considered the practical effects of immunity legislation on law enforcement.<sup>109</sup> After the Court upheld the act, problems with its application arose in the celebrated "beef trust case," *United States v. Armour & Co.*<sup>110</sup> The Justice Department indicted the nation's leading meat packers for allegedly conspiring to restrain and monopolize trade.<sup>111</sup> The packers, however, claimed immunity<sup>112</sup> as a result of informal discussions with the Commissioner of Corporations who had conducted a contemporaneous investigation of the same activities of the companies. In response the Government contended, first, that the requisite formalities of subpoena and oath had not been followed<sup>113</sup> and, second, that since

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be listened to by a court, to the detriment of the constitutional rights of the citizen.

*Id.* at 627 (Shiras, J., dissenting).

106. Act of Feb. 25, 1903, ch. 755, § 1, 32 Stat. 854, 904 (making appropriations for the legislative, executive, and judicial expenses of the government); Act of Feb. 19, 1903, ch. 708, § 3, 32 Stat. 847, 848-49 (further regulating commerce with foreign nations and among the states); Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 825, 828 (establishing the Department of Commerce and Labor).

107. Act of Feb. 25, 1903, ch. 755, 32 Stat. 854, 903-04. This Act authorized \$500,000 for special counsel and agents in the office of the Attorney General to enforce certain commerce and antitrust laws. The Act provided,

That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury . . . .

*Id.* at 904.

108. 201 U.S. 43 (1906).

109. The Court observed,

As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by testimony of parties thereto, in the person of their agents or employes the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?

*Id.* at 70.

110. 142 F. 808 (N.D. Ill. 1906).

111. *Id.* at 817.

112. *Id.*

113. *Id.* at 823-24.

the disclosures had been essentially voluntary, they acted as a waiver of both the privilege and immunity.<sup>114</sup> The district court found no immunity for the corporation,<sup>115</sup> but upheld the immunity of the individual defendants.<sup>116</sup> The *Armour* decision provoked a special Presidential message to Congress in which President Theodore Roosevelt charged that the decision weakened the antitrust law and urged Congress to clarify the limited scope of the immunity statute.<sup>117</sup> Congress responded<sup>118</sup> with the 1906 Act, which confined protection under the 1893 and the three 1903 immunity statutes to natural persons who, under oath, testified or produced documentary or other evidence in compliance with a subpoena.<sup>119</sup>

#### F. *The Immunity Act of 1954*

Congress did not fully reexamine the immunity statutes until 1954 when the issue arose in response to the political climate of the McCarthy hearings on alleged Communist Party activities and the Kefauver Committee hearings on organized crime. Confronted with scores of witnesses<sup>120</sup> asserting the fifth amendment,<sup>121</sup> several congressmen began to agitate for a method of preventing what they viewed as abuse of the privilege. In May 1951 Senator McCarron proposed a bill amending the 1862 immunity act,<sup>122</sup> the only extant immunity statute applicable to congressional investigations in 1951.<sup>123</sup> Following three years of debate,<sup>124</sup> Senator McCarron's

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114. *Id.*

115. *Id.* at 817.

116. *Id.* at 827. The court recognized that a finding of testimonial compulsion was a prerequisite to a grant of immunity, but it found such compulsion despite the lack of subpoena or oath. *Id.* at 822-25.

117. PRESIDENT'S MESSAGE TO CONGRESS, APRIL 18, 1906, H.R. DOC. NO. 706, 59TH CONG., 1ST SESS. (1906).

118. 40 CONG. REC. 7657-58 (1906) (remarks of Sen. Knox supporting the new bill). Other senators argued that the greatest benefit might be obtained by repealing all immunity acts. *See, e.g., id.* (remarks of Sen. Daniel).

119. Act of June 30, 1906, ch. 3920, § 1, 34 Stat. 798.

120. The fifth amendment privilege was asserted by 317 witnesses before congressional committees in 1953 alone. D. FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* 329 (1976).

121. Cases such as *Blau v. United States*, 340 U.S. 159 (1950), and *Hoffman v. United States*, 341 U.S. 479 (1951), affirmed the right of witnesses to claim the fifth amendment privilege in various governmental inquiries, including congressional investigations.

122. Originally enacted as Act of Jan. 24, 1862, ch. 11, § 1, 12 Stat. 333.

123. 97 CONG. REC. 5972 (1951).

124. Several opponents of the bill believed it allowed Congress to take over the law enforcement function of the executive branch. 99 CONG. REC. 8342-43 (1953) (remarks of Sen. Lehman). Even the bill's supporters recommended that strong procedural safeguards

argument that his bill would combat the threat of "the Communist conspiracy"<sup>126</sup> triumphed, and both the House and the Senate passed the bill by overwhelming majorities.<sup>128</sup> The 1954 Act gave authority to immunize witnesses to congressional committees, grand juries, and courts, but it applied only to investigations of internal security threats and required express approval of the Attorney General and a United States District Court as a condition precedent to the grant of immunity.<sup>127</sup>

In 1956 the new immunity provision received its first court test in *Ullmann v. United States*,<sup>128</sup> a case concerning a grand jury witness who had refused to testify regarding his knowledge of an alleged wartime spying ring and his membership in the Communist Party. Ullmann appealed his contempt conviction alleging that the 1954 Act was distinguishable from the immunity statute upheld in *Brown v. Walker*.<sup>129</sup> He attacked the constitutionality of the Act on the ground that "the impact of the disabilities imposed by federal and state authorities and the public in general—such as loss of jobs, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium—is so oppressive that the statute does not give . . . true immunity."<sup>130</sup> Speaking through Justice Frankfurter, the Court quickly rejected Ullmann's disability argument, reaffirmed *Brown v. Walker*, and upheld the 1954 Act.<sup>131</sup>

be incorporated into it. *Id.* at 4738 (remarks of Sen. Kefauver). One Senator argued that "[w]hen for reasons of expediency or emergency, we weaken . . . individual rights and give inordinate powers or emergency powers to any branch of our Government, it is the record of history that at last that power will be used wrongfully, will be used unwisely, or against innocent individuals." *Id.* at 8349-50 (remarks of Sen. Cooper).

125. The following is an excerpt from Senator McCarron's defense of his proposal on May 6, 1953:

[L]egislation of this nature is urgently needed, especially in connection with investigations conducted by the Senate Internal Security Subcommittee, dealing with national security and the threat of the Communist conspiracy. If this bill becomes law, it will go a long way . . . to help expose the Communist conspiracy in this country.

*Id.* at 4737 (remarks of Sen. McCarron).

126. 100 CONG. REC. 13333, 13997 (1954).

127. Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745 (codified at 18 U.S.C. § 3486 (1976)).

128. 350 U.S. 422 (1956).

129. *Id.* at 430.

130. *Id.*

131. *Id.* at 430-31, 432-34, 439. The Court observed that "the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege." *Id.* at 431.

### G. *The Current Immunity Act*

The origin of the present immunity provision lies in *Murphy v. Waterfront Commission*,<sup>132</sup> which posed the problem of interjurisdictional immunity and caused the Supreme Court to reconsider its position that only transactional immunity met the co-extensive test. The defendants in *Murphy* had refused to testify at a hearing conducted by the Waterfront Commission of New York Harbor concerning waterfront work stoppages<sup>133</sup> despite grants of immunity from prosecution in both New York and New Jersey<sup>134</sup> because they feared incrimination under federal law. According to the Court, the case raised the issue "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction."<sup>135</sup> The *Murphy* holding on this issue is quite noteworthy: "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."<sup>136</sup> In contrast to the absolute transactional immunity required by *Counselman*, *Murphy* narrowed the scope of required protection so that witnesses were not totally immunized.

Because of rapidly expanding organized crime activities throughout the country during the 1960s,<sup>137</sup> the National Commis-

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132. 378 U.S. 52 (1964).

133. *Id.* at 53.

134. The Commission was a bi-state body established under an interstate agreement approved by Congress. *Id.* at 53 n.2.

135. *Id.* at 53. The Court observed in a footnote that "[s]ince the privilege is not fully applicable to the State and to the Federal Government, the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government." *Id.* at 53 n.1.

136. *Id.* at 79 (emphasis added). The Court further elaborated on its new exclusionary rule in a footnote by stating that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79 n.18.

137. Congressmen and other public officials expressed their concern to congressional committees investigating possible courses of action to fight the crime wave. As Attorney General John N. Mitchell observed, "Over the last four decades, a criminal minority has put together in the United States an organization which is both an illicit cartel and a nationwide confederation, operating with comparative immunity from our criminal laws, and in derogation of our traditional concepts of free enterprise." *Hearings on S. 30 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., ser. 27, at 152 (1970).

sion on Reform of Federal Criminal Laws proposed a general immunity law to aid the Government in assembling evidence against organized crime.<sup>138</sup> Congress quickly followed the Commission's recommendation and enacted a comprehensive organized crime control act, which included the present immunity statute.<sup>139</sup> Before the passage of the current immunity act, federal immunity provisions were scattered throughout fifty-seven separate statutes<sup>140</sup> and

138. The Commission included an exhaustive study of federal witness immunity law in its proposal for a general reorganization of federal criminal law and submitted to Congress a tentative immunity provision that served as a model for the legislation eventually adopted. Report of the National Commission on Reform of Federal Criminal Laws (2d Interim Report, Mar. 19, 1969), in *Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess., ser. 14, at 36 (1969).

139. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 926 (codified at 18 U.S.C. §§ 6001-6005 (1976)). This Note focuses on §§ 6002 and 6003, which read as follows:

§ 6002. Immunity generally

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

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

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

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

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

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

Section 6001 contains definitions of terms used in the act, § 6004 authorizes grants of immunity to witnesses in certain administrative proceedings, and § 6005 authorizes grants of immunity to individuals who testify in congressional hearings.

140. For an index of the 57 federal immunity statutes amended or repealed by the 1970 Act, see Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 202-260, 84 Stat.

they usually granted limited authority to specific federal agencies. Designed to consolidate the immunity statutes into a single law and prevent the problem of "immunity baths,"<sup>141</sup> the 1970 Act repealed all federal transactional immunity statutes<sup>142</sup> and established "use and derivative use" immunity<sup>143</sup> as the new standard of protection granted at the federal level.

Although a number of lower federal courts found that the new use immunity provided inadequate witness protection,<sup>144</sup> in 1972 the Supreme Court upheld the statute against constitutional attack in *Kastigar v. United States*.<sup>145</sup> The Court based its decision on two arguments. First, it concluded that both the "reasoning" and "result" of *Murphy* overruled *Counselman*.<sup>146</sup> Second, it found that use immunity adequately protects a witness by shifting to the

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922, 928-32 (1970) (prior to amendment).

141. The term "immunity bath" refers to the situation that resulted when witnesses testifying under transactional immunity statutes obtained absolute immunity for themselves and their confederates. The legislative history of § 6002 contained in H.R. REP. NO. 1549, 91st Cong., 2d Sess. 32 (1970), reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4017, specifically states, "The proposal is not an immunity bath." Thus, it is clear that Congress intended to limit the extent of immunity. The legislative history continues,

Title II is a general Federal immunity statute that will afford "use" immunity rather than "transaction" immunity when a witness before a court, grand jury, Federal agency, either House of Congress, or a congressional committee or subcommittee, asserts his privilege against self-incrimination. It is contemplated that the title will enable effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege; that is, protection against the use of compelled testimony directly or indirectly against the witness in a criminal proceeding.

*Id.*

142. The repeal of all statutory authority for transactional immunity grants was not complete until December 15, 1974, the effective date for the repeal of Act of June 19, 1968, Pub. L. No. 90-351, § 802, 82 Stat. 216, a frequently used transactional immunity provision.

143. Derivative use immunity is "use-plus-fruits" immunity, which prevents the use of compelled testimony to develop or try a case against a previously immunized witness. This Note will employ the term "use" immunity to include "use and derivative use" immunity.

144. *E.g.*, *United States v. Cropper*, 454 F.2d 215 (5th Cir. 1971) (use immunity statutes are inadequate bases for compelling a witness to testify over a claim of privilege); *United States v. McDaniel*, 449 F.2d 832 (8th Cir. 1971) (federal government cannot obtain grand jury testimony of witness who pleaded the fifth amendment before a state grand jury and was compelled to testify unless it grants the witness transactional immunity); *United States ex rel. Catena v. Elias*, 449 F.2d 40 (3d Cir. 1971) (New Jersey statute that fails to grant transactional immunity is an inadequate basis for compelling unwilling witness to incriminate himself); *In re Korman*, 449 F.2d 32 (7th Cir. 1971) (language of fifth amendment requires grant of full transactional immunity and Congress is powerless under Constitution to circumvent that requirement by legislation).

145. 406 U.S. 441 (1972). In a companion case to *Kastigar*, *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972), the Court upheld a state statute providing for use immunity. Since *Zicarelli*, a substantial number of states have changed from transactional to use immunity.

146. *Kastigar v. United States*, 406 U.S. at 458.

government the "heavy burden" of proving not only that any subsequent prosecution is untainted by the immunized testimony, but also that the evidence it intends to use is derived from legitimate sources independent of the compelled testimony.<sup>147</sup> Writing for the majority, Justice Powell stated,

[S]uch immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. . . . The broad language in *Counselman* . . . was unnecessary to the Court's decision, and cannot be considered binding authority.<sup>148</sup>

Only Justices Douglas and Marshall believed the statute impermissibly limited the scope of immunity.<sup>149</sup> Even though the composition of the Court has changed since the *Kastigar* decision, only two current justices are on record against use immunity.<sup>150</sup> Given the conservative leaning of the present Court, it appears unlikely that the Court will reverse its position on use immunity in the near future.

Executive pardons<sup>151</sup> and transactional immunity grants<sup>152</sup> were infrequently used as means of compelling testimony. In contrast, since the passage of the 1970 Act and its affirmation in *Kastigar*, use immunity has become one of the most valuable and widely utilized investigatory tools available to the prosecution. Indeed, a recent Justice Department survey revealed that from December 14, 1970, the effective date of the current immunity statute, through fiscal year 1978, federal prosecutors submitted 10,246 requests to immunize a total of 24,344 witnesses.<sup>153</sup> Only rarely

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147. *Id.* at 460-61.

148. *Id.* at 453-55.

149. *Id.* at 462 (Douglas, J., dissenting); *Id.* at 467 (Marshall, J., dissenting).

150. Only Justices Douglas and Marshall dissented in *Kastigar*. Justices Brennan and Rehnquist took no part in the consideration or decision of the case. Justice Brennan, however, had previously opposed use immunity in *Piccirillo v. New York*, 400 U.S. 548, 552 (1971) (Brennan, J., dissenting).

151. See text accompanying notes 19-26 *supra*.

152. According to a 1974 publication, more witnesses were immunized during the first 10 months after the 1970 act became effective than during the preceding 50 years, when transactional immunity was the only form of witness immunity available. NATIONAL LAWYER'S GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES: A MANUAL FOR ATTORNEYS ch. 13, at 52 (1974).

153. Mykkeltvedt, *United States v. Alessio—Due Process of Law and Federal Grants of Witness Immunity for Defense Witnesses*, 31 MERCER L. REV. 689, 692 (1980).

during this period did the Attorney General or the appropriate assistant attorney general deny requests for compulsion orders.<sup>154</sup> Although only approximately one-half of the witnesses that government prosecutors sought to immunize were compelled to testify under a grant of immunity,<sup>155</sup> undoubtedly the unused authorizations were helpful to the prosecution.<sup>156</sup> Thus, the Justice Department survey presents clear evidence that the 1970 immunity statute and the *Kastigar* decision have greatly aided federal prosecutors in investigating criminal activity.

### III. DIVERGENT APPROACHES OF LOWER FEDERAL COURTS

The impact of grants of statutory immunity on the federal criminal justice system is evidenced by the dramatic increase in immunity requests since the Supreme Court held in *Kastigar* that use immunity is coextensive with the fifth amendment. The executive branch's discretionary power to grant immunity highlights the conflicting roles of the Government as prosecutor. First, the prosecutor is an advocate with the responsibility to obtain a conviction against the defendant. Second, the prosecutor is a guardian of justice with the responsibility to seek the truth and to secure the "correct" decision—whether that decision be guilt or innocence. As the Government has increased its reliance on immunity as a prosecutorial tool, defense attorneys have challenged the unfettered discretion of the prosecutor and have asserted that the defendant must be accorded the means to secure immunity for his witnesses when the prosecutor refuses to honor requests to immunize these witnesses. Because the Supreme Court has not yet specifically ruled on the question of federal grants of immunity for defense witnesses,<sup>157</sup> lower federal courts have employed inconsis-

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154. *Id.* Only 104 requests for orders compelling a total of 201 witnesses to testify were denied from December 14, 1970, to April 30, 1977. *Id.* at 692 n.19. Approximately 8,500 requests to immunize over 21,000 witnesses were submitted during this period. *Id.*

155. *Id.* at 692.

156. Conceivably, a defendant might agree to plea bargain when he learns that one of his comrades, whose testimony would be particularly revealing, is about to receive immunity.

157. Recently the Court denied a petition for a writ of certiorari in another case dealing with the defense witness immunity issue. *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). This case is discussed in text accompanying notes 251-68 *infra*.

While the Supreme Court has not announced a firm decision on this question, an interesting dictum in *United States v. Nixon*, 418 U.S. 683 (1974), provides encouragement that the Court may well support immunity for defense witnesses. The Court stated,

The need to develop all relevant facts in the adversary system is both fundamental and



tent analyses and have reached conflicting results when considering this issue.

### A. *The Expansive Approach*

In *Earl v. United States*<sup>158</sup> the Government charged James Earl with narcotics violations based on an identification of Earl by Frank Scott. When Earl attempted to call Scott as a defense witness, seeking his testimony that he had never known Earl and had confused him with another man, Scott asserted his fifth amendment privilege. Defendant then requested that either the prosecuting attorney or the federal district court grant Scott immunity under the statute<sup>159</sup> then in effect, but both rejected his motion. Following his conviction, Earl contended on appeal that the court's refusal to grant immunity to his witness violated his due process rights.<sup>160</sup> Judge Burger's brief opinion stated that only the legislative branch could create immunity laws and, therefore, the courts did not have the power to satisfy his request.<sup>161</sup> An equally divided circuit court denied per curiam Earl's petition for rehearing en banc.<sup>162</sup> In a separate statement, however, Judge Leventhal argued that the court's holding that it was powerless to create a defense witness immunity procedure did not respond to Earl's claim of an unfair trial.<sup>163</sup> Because the court had made no finding that immunizing Scott would result in actual harm to prosecutorial interests,<sup>164</sup> Judge Leventhal concluded that the questions of due process and judicial power in the context of immunity grants were "likely to recur" and thus, deserved further consideration.<sup>165</sup>

Judge Leventhal's opinion that *Earl* had not resolved the de-

comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

*Id.* at 709 (emphasis added).

158. 361 F.2d 531 (D.C. Cir.), *rehearing denied*, 364 F.2d 666 (D.C. Cir. 1966) (en banc) (per curiam), *cert. denied*, 388 U.S. 921 (1967).

159. Act of July 18, 1956, ch. 629, tit. II, § 201, 70 Stat. 574 (repealed 1970).

160. *Earl v. United States*, 361 F.2d at 534.

161. *Id.*

162. *Earl v. United States*, 364 F.2d 666 (D.C. Cir. 1966) (en banc) (per curiam).

163. *Id.* (Leventhal, J., joined by Bazelon, C.J., Fahy & Wright, JJ., dissenting from denial of petition for rehearing en banc).

164. *Id.*

165. *Id.* at 667.

fense witness immunity issue was quite accurate. Perhaps without fully appreciating its potential impact, Judge Burger had included a footnote in his opinion that stated in part,

We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.<sup>166</sup>

Judge Burger's footnote served to encourage defense attorneys in later cases to move for grants of immunity for their witnesses. For example, in three cases arising in the Ninth Circuit, the defense attorneys cited the *Earl* footnote as authority for the view that the prosecution must grant immunity to defense witnesses in order to meet due process requirements.<sup>167</sup> Even though no government witnesses testified under immunity, since the government *could* have used immunity grants to support its position, the defense attorneys argued that they should have the same option. The Ninth Circuit rejected this contention and uniformly held that the *Earl* footnote applied only, if at all, when the prosecution itself used immunity to compel testimony.<sup>168</sup> Furthermore, in each case the court reaffirmed Judge Burger's separation of powers analysis of the issue.

*United States v. Alessio*<sup>169</sup> ultimately presented the Ninth Circuit with the fact situation raised hypothetically in the *Earl* footnote. In *Alessio* the prosecution obtained immunity for one of its witnesses, but refused to immunize three defense witnesses who subsequently declined to testify on fifth amendment grounds. On appeal the defendant alleged that the failure to grant immunity to his witnesses denied him due process under the fifth amendment and compulsory process under the sixth amendment.<sup>170</sup> The court agreed that under certain circumstances the prosecution's refusal to immunize defense witnesses could violate due process, but it

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166. *Earl v. United States*, 361 F.2d at 534 n.1 (emphasis in original).

167. *United States v. Bautista*, 509 F.2d 675 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); *Cerda v. United States*, 488 F.2d 720 (9th Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

168. *United States v. Bautista*, 509 F.2d 675, 677-78 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); *Cerda v. United States*, 488 F.2d 720, 723 (9th Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061, 1063-64 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

169. 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976).

170. *Id.* at 1081.

held that because the evidence Alessio sought from his three witnesses was cumulative in nature, the absence of their additional testimony did not deprive him of a fair trial.<sup>171</sup> After only cursory consideration of Alessio's sixth amendment claim, the court rejected it on separation of powers grounds. The court observed, "The right to compulsory process . . . must be exercised consistent with the government's power to determine which cases will be prosecuted."<sup>172</sup> Thus, while the Ninth Circuit hastily dismissed the compulsory process argument, it approved the proposition that denial of defense witness immunity could result in unfairness if (1) the government immunized its own witnesses in order to obtain their testimony, and (2) the government refused to immunize a reluctant defense witness whose potential testimony the court thought essential to an effective defense.

In contrast to the Ninth Circuit, which merely acknowledged the right of defendants to immunize their witnesses, in a series of cases, the Third Circuit not only rejected the *Earl* analysis but also voiced strong support for defense witness immunity. Beginning in 1976 with a case concerning prosecutorial misconduct, the court indicated a willingness to reverse a conviction when the state refused to grant immunity to a defense witness. In *United States v. Morrison*<sup>173</sup> a defense witness planned to testify that she, rather than the defendant, had been involved in a conspiracy to sell hashish. The witness apparently believed that she could not be prosecuted for her role in the conspiracy because the Government had dropped the federal charges against her when it learned that she was under eighteen years old when the alleged offense occurred.<sup>174</sup> When the trial began the district court stated that it would warn the witness prior to her testimony against an unknowing waiver of her right against self-incrimination. The prosecutor, however, apparently

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171. *Id.* at 1082.

172. *Id.* at 1081-82. The court further noted,

To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions. Of course, whatever the power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment. The footnote in *Earl v. United States* . . . on which appellant relies heavily says no more than this. The key question, then, is whether appellant was denied a fair trial because of the government's refusal to seek immunity for defense witnesses.

*Id.* at 1082.

173. 535 F.2d 223 (3d Cir. 1976).

174. *Id.* at 225.

felt that the warning would not provide adequate notice and, therefore, he sent her three messages warning that she could still be charged as a juvenile in state court, that her testimony could be used as evidence against her, and that she could be charged with perjury on the federal level since she was now eighteen.<sup>175</sup> In addition to these indirect threats, the prosecutor subpoenaed the witness, and in his office, under highly intimidating circumstances,<sup>176</sup> again warned her of the potential dangers of testifying. As a result, when called at trial the witness refused to answer a number of questions<sup>177</sup> and the defendant was convicted.

On appeal the Third Circuit noted that the prosecutor's actions were completely unnecessary because the district court had promised to advise the witness of her rights and, in fact, did warn her at the appropriate time.<sup>178</sup> Consequently, the overzealous actions of the prosecutor interfered with the witness' voluntary decision to testify and impaired the defendant's constitutional rights to have the witness give evidence in his favor.<sup>179</sup> The court next questioned whether the availability of use immunity would enable the Government to cure the sixth amendment violation it had committed. The court found that certain circumstances may require the Government to request use immunity for a defense witness, and that the prosecutorial misconduct in the instant case had created such a situation.<sup>180</sup> The court, therefore, remanded the case with instructions that the Government either grant the witness use immunity or suffer a judgment of acquittal.<sup>181</sup>

The *Morrison* court, however, did not specify the burden a defendant must meet in order to obtain such drastic relief. The scope of the defendant's burden in this respect was not established until *United States v. Herman*.<sup>182</sup> Herman, an elected Pennsylvania magistrate, was convicted of accepting kickbacks on bail bond premiums in violation of the Racketeer Influenced and Corrupt

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175. *Id.*

176. In the prosecutor's office the witness was surrounded by three police officers who had served as undercover agents in the case and whose testimony she would allegedly undermine in court. *Id.* at 226.

177. *Id.*

178. *Id.* at 228. The Third Circuit noted that although as a general rule there is no duty to advise a witness of his right not to incriminate himself, it is nevertheless proper for a court in its discretion to issue such warnings. *Id.*

179. *Id.*

180. *Id.* at 229.

181. *Id.*

182. 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

Organizations statute.<sup>183</sup> Although Herman subpoenaed six of his constables to testify in his favor,<sup>184</sup> four indicated they would refuse to testify on fifth amendment grounds. The prosecution and district court subsequently denied Herman's request for immunity for his witnesses.<sup>185</sup> The Government, however, immunized two prosecution witnesses, a former bailbondsman and a secretary at the bond agency, who testified that Herman had received the kickbacks.<sup>186</sup>

On appeal the Third Circuit reviewed Herman's immunity claim and concluded that his constitutional rights were not violated. The court specifically noted "our governmental system's strong tradition of deference to prosecutorial discretion" in the context of immunity grants.<sup>187</sup> The court also acknowledged the "tendency of the executive branch to exercise that discretion in ways that make it more likely that defendants will be convicted."<sup>188</sup> Nevertheless, the *Herman* court recognized that a due process violation may require dismissal in certain circumstances when the prosecutor refuses to grant immunity. The court outlined the dimensions of the defendant's burden: "[W]e think that the evidentiary showing required to justify reversal on that ground must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process."<sup>189</sup> Thus, with complete recognition that a court seriously invades the province of the executive when it orders the government to grant statutory immunity to a defense witness, *Herman* nonetheless affirmed the availability of the immunity-or-dismissal remedy. The majority, however, established a narrow test and conditioned the grant of this remedy on a substantial showing of prosecutorial misconduct by the defendant. Accordingly, absent prosecutorial misconduct a defendant is foreclosed from insisting on immunity for his witnesses under the *Herman* rationale. In *Herman* the court

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183. 18 U.S.C. §§ 1961-1968 (1976).

184. Herman relied on prior admissions made by the constables to the FBI and the grand jury and represented to the court that their testimony would establish that they had received kickbacks, but had not shared the money with him or informed him of their illegal activity. *United States v. Herman*, 589 F.2d at 1199.

185. *Id.*

186. *Id.* at 1195.

187. *Id.* at 1203.

188. *Id.* at 1204.

189. *Id.*

found no evidence of "distortion" or prosecutorial misconduct,<sup>190</sup> and, therefore, did not invoke the remedy of immunity or dismissal.

In addition to the statutory immunity discussed above, *Herman* suggested the availability of still another form of immunity derived from a court's inherent power. The court observed,

[W]hile we think that the court has no power to order a remedial grant of statutory immunity to a defense witness absent a showing of unconstitutional abuse, a case might be made that the court has inherent authority to effectuate the defendant's compulsory process right by conferring a *judicially fashioned immunity* upon a witness whose testimony is essential to an effective defense.<sup>191</sup>

Judicial immunity differs from statutory immunity in two respects. First, judicial immunity is necessitated not because of prosecutorial misconduct or intentional distortion of the trial process, but because the defendant is prevented from presenting exculpatory evidence vital to his case. Second, the court decrees immunity rather than issuing an order requiring the prosecution to provide statutory immunity. While the *Herman* court recognized that problems could arise if courts decreed immunity,<sup>192</sup> it justified such use of judicial power on the basis of the "due process right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing systemic interest that justifies its exclusion."<sup>193</sup> The majority, however, merely recognized the availability of judicial immunity without invoking it in the instant case because the issue was neither raised in the district court nor discussed in the briefs or at oral argument on appeal.<sup>194</sup> The court explicitly left the issue to be decided by future cases and observed that "[i]f such inherent power is to be recognized and standards formulated for its exercise, that task should be performed in a case where the issue was presented by the defendant, and perhaps by the court sitting in [*sic*] banc."<sup>195</sup>

The Third Circuit did not wait long before *Virgin Islands v.*

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190. The court found that the prosecutor's decision to immunize the two government witnesses was unrelated to the decisions to prosecute and, later, to drop the charges against the constables. *Id.*

191. *Id.* (emphasis added).

192. The court noted that the "existence *vel non* of such immunity power, and the standards which should govern its invocation and exercise, raise a host of difficult issues. It may be, for example, that such grants of immunity would on some occasions unduly interfere with important interests of the prosecution." *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1204-05.

*Smith*<sup>196</sup> presented it with an appropriate case for resolution of the judicial immunity issue in its jurisdiction. *Smith* concerned four juvenile defendants charged with robbery. In a statement to the police, Ernesto Sanchez incriminated defendant Smith and implicitly exculpated the other three defendants.<sup>197</sup> These three codefendants called Sanchez as a defense witness with the expectation that his testimony would parallel his earlier statement to the police.<sup>198</sup> Sanchez, however, asserted his fifth amendment privilege and refused to testify. After they failed in their attempt to admit his prior police statement into evidence,<sup>199</sup> the codefendants sought to have the witness immunized. The Virgin Islands Attorney General, who had exclusive jurisdiction to prosecute both the defendants and the witness, agreed to grant immunity, but he conditioned the grant as a matter of "prosecutorial courtesy" on approval by the United States attorney, who inexplicably failed to consent.<sup>200</sup> Without the benefit of Sanchez' testimony, all four defendants were convicted of robbery. Speaking through Judge Garth,<sup>201</sup> the Third Circuit reversed the convictions<sup>202</sup> and remanded the case for a determination of whether immunity should have been conferred under standards explained in its opinion.

The court first considered its power to order the prosecution to grant statutory immunity to a defense witness. Relying on the prosecutorial misconduct standard previously articulated in *Herman*, the court held that statutory immunity is available to a defense witness with relevant testimony<sup>203</sup> when the defendant can

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196. 615 F.2d 964 (3d Cir. 1980).

197. *Id.* at 966-67.

198. *Id.* at 967.

199. The codefendants asserted an exception to the hearsay rule and claimed that Sanchez had become an unavailable witness. The Government opposed the introduction of the earlier statement made to the police on the ground that it would be unable to cross-examine the hearsay declarant, Sanchez. The trial court sustained the Government's objection. *Id.*

200. *Id.*

201. Judge Garth filed a separate opinion in *United States v. Herman*, 589 F.2d 1191, 1205 (3d Cir. 1978) (Garth, J., concurring in part and dissenting in part), *cert. denied*, 441 U.S. 913 (1979).

202. The court affirmed defendant Smith's conviction because he could not have benefited from Sanchez' testimony. *Virgin Islands v. Smith*, 615 F.2d at 967-68.

203. The court observed in a footnote that the witness' testimony need not be "clearly exculpatory or otherwise essential to the defendant's case" in order for the court to order statutory immunity. *Id.* at 969 n.7. The court then quoted *Morrison* for the view that "where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error is harmless." *Id.* (quoting *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir.

demonstrate that the prosecution opposed the immunity grant "with the deliberate intention of distorting the factfinding process."<sup>204</sup> The court observed that the United States attorney's failure to consent to Sanchez' grant of immunity was "apparently intimately involved" with the prosecution's trial strategy.<sup>205</sup> The court attached great significance to the United States attorney's failure to give any justification for his refusal to consent to the immunity grant despite his lack of jurisdiction over Sanchez. According to the court, this action suggested that the Government "deliberately intended to keep this highly relevant, and possibly exculpatory, evidence from the jury."<sup>206</sup>

The Third Circuit then considered the judicial immunity issue left unresolved in *Herman*. Unlike the defendants in *Herman*, the defendants in *Smith* had properly presented the issue<sup>207</sup> and the circuit court eagerly addressed it. The court held that under certain circumstances a defendant's due process right to present exculpatory evidence may require a judicial grant of immunity for a defense witness. The court found support for this holding in *Chambers v. Mississippi*.<sup>208</sup> The Supreme Court in *Chambers* held that the state prosecutor's strict adherence to the state rules of evidence prevented the defendant from introducing exculpatory evidence, violated his due process right to present an effective defense, and therefore required a new trial.<sup>209</sup> Based on the record in *Smith*, the Third Circuit concluded that the exclusion of Sanchez' exculpatory testimony did not differ substantially from the due process violation in *Chambers*.<sup>210</sup> The court noted that the basic constitutional doctrine of the right to present an effective defense

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1976)). The court concluded that the trial court must find that the witness' testimony would be relevant to the defendant's case. *Id.*

204. *Id.* at 969.

205. *Id.* First, the court noted that the prosecution realized its case was inherently weak because it depended on the robbery victim's testimony. The court observed in a footnote that the victim was mentally retarded and also had physical ailments. *Id.* at 969 n.6. Consequently, his trial testimony was often confusing and difficult to comprehend. *Id.* Furthermore, Sanchez' testimony would severely damage the prosecution's case against three of the defendants. Second, the court remarked that the refusal of consent to the immunity grant not only prevented Sanchez from testifying, but also supported the Government's objection to the admission of his prior police statement. The Government based its objection on its inability to cross-examine the hearsay declarant about his prior statement. *Id.* at 969.

206. *Id.*

207. The court sua sponte directed all parties to file supplemental briefs addressed specifically to this issue before the oral argument. *Id.* at 970 n.8.

208. 410 U.S. 284 (1973).

209. *Id.* at 302.

210. *Virgin Islands v. Smith*, 615 F.2d at 970.



was not new in *Chambers*, but had been acknowledged by the Supreme Court on several other occasions.<sup>211</sup> Thus, according to the court, it was "not concerned with a new or unique constitutional right, but rather with the prescription of a new remedy to protect an established right."<sup>212</sup> The court recognized that while a new trial provided adequate relief in *Chambers*, a retrial in *Smith* would be meaningless unless Sanchez could be compelled to testify under immunity. The court then cited a series of cases in which both the Supreme Court and the Third Circuit had previously found an inherent judicial power to grant witness immunity in order to vindicate constitutional rights.<sup>213</sup> To further support the concept of judicial immunity the court quoted *Herman*, and its reference to *Simmons v. United States*, for the proposition that "'a case in which clearly exculpatory testimony would be excluded because of a witness's assertion of the fifth amendment privilege would present an even more compelling justification for such a grant [of judicial immunity] than that accepted in *Simmons* itself.'"<sup>214</sup>

Having thus concluded that it possessed the power, unaided by statute, to order immunity for a defense witness, the court then proceeded to outline the requisite conditions of a judicial grant of immunity. The court modeled its conditions after those established in *Chambers*<sup>215</sup> and found justification for their imposition in the "unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers."<sup>216</sup> Accordingly, the *Smith* court delineated the following requirements for judicial

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211. *Id.* at 971. The court cited *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutor's suppression of exculpatory evidence known to him, but not known to defendant, violates due process right to present an effective defense); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (due process requires that sixth amendment right to counsel be imposed on the states); and *Roviaro v. United States*, 353 U.S. 53 (1957) (Government's informers privilege must give way when disclosure of informer's identity, or contents of his communication, is relevant and helpful to defense, or is essential to fair determination of case).

212. *Virgin Islands v. Smith*, 615 F.2d at 971.

213. *Id.* The court cited the following cases: *Simmons v. United States*, 390 U.S. 377 (1968) (testimony at fourth amendment suppression hearing); *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) (testimony predicate to Speech and Debate Clause defense); *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1978) (testimony predicate to double jeopardy defense).

214. *Virgin Islands v. Smith*, 615 F.2d at 971 (quoting *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

215. The court observed in a footnote that there were two central considerations in the *Chambers* analysis: The clearly exculpatory nature of the excluded evidence and the state's lack of interest in rigid enforcement of its evidence rules. *Id.* at 972 n.10.

216. *Id.* at 971.

immunity: (1) The immunity must be properly sought in the district court; (2) the defense witness must be available to testify; (3) the proposed testimony must be clearly exculpatory; (4) the testimony must be essential to defendant's case; and (5) there must be no strong countervailing governmental interests.<sup>217</sup> The court observed that its standard took into account objections to judicial immunity recently raised in other circuit court opinions.<sup>218</sup> Furthermore, the court found that, in light of the stringent standard it imposed in *Smith*, earlier cases in its own circuit did not preclude this form of judicial immunity.<sup>219</sup>

After discussing the defendant's burden, the court carefully considered the possible countervailing state interests. The court acknowledged that unlike the mere evidentiary ruling in *Chambers*, an affirmative grant of relief in the form of immunity was "traditionally an exercise of the executive's power," and thus it was even more important that the court "recognize, and be solicitous towards, legitimate state interests."<sup>220</sup> While recognizing that judicial immunity most directly affects the government's decision to prosecute and its manner of prosecution, the court believed it

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217. *Id.* at 972.

218. The court noted that in *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979), the Fourth Circuit refused to grant immunity to a defense witness because the witness had not appeared in court, the defendant had not shown that the witness would be able to claim the fifth amendment privilege, and the defendant had not revealed either the content of the proposed testimony or its exculpatory nature. Moreover, the court observed that in *United States v. Wright*, 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979), the Second Circuit rejected a claim of defense witness immunity because the defendant failed to demonstrate that the witness would not testify without immunity or that the failure to grant immunity prejudiced his case. The Third Circuit concluded that these cases were not inconsistent with the result reached in *Smith* because of the conditions that it had imposed before judicial immunity could be granted. *Virgin Islands v. Smith*, 615 F.2d at 972 n.13.

219. *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973), held that a court had no blanket power to grant immunity to "any defense witnesses who might refuse to give testimony on grounds of self-incrimination." *Id.* at 190 (emphasis added). Since under the *Smith* standard immunity is denied if the proposed testimony is ambiguous, not clearly exculpatory, or cumulative, or if it relates only to the credibility of the government's witnesses, the court found that *Smith* and *Berrigan* were not inconsistent. The court then cited *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979), and *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978), and found that these cases did not relate to the *Smith* holding since neither case discussed the subject of judicially fashioned immunity for essential defense witnesses. Furthermore, to the extent that these opinions discussed statutory immunity, neither case concerned prosecutorial misconduct or deliberate distortion of the trial process by the government. Thus, according to the court, the cases were of limited precedential value for immunity issues and did not detract from the court's statutory immunity or judicial immunity analysis in *Smith*. *Virgin Islands v. Smith*, 615 F.2d at 972 n.11.

220. *Id.* at 973.

possible to reconcile the government's interests as prosecutor with the defendant's constitutional right to present an effective defense. The court found that use immunity is often virtually costless to the government, and it listed three situations in which any government interest in withholding immunity would be "purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity."<sup>221</sup> When, however, the government rebuts the defendant's showing of need, demonstrates that a grant of immunity to a defense witness would detrimentally affect the public interest, or establishes that a grant would impose significant societal costs, the court acknowledged that an immunity application would be properly denied.<sup>222</sup> The *Smith* court cautioned the district courts that when they review immunity applications, whether they grant or deny the requests, they "should be careful to explain the basis of [their] ruling."<sup>223</sup>

On March 12, 1980, District Judge Troutman of the Eastern District of Pennsylvania conducted the first known pretrial evidentiary hearing pursuant to *Virgin Islands v. Smith*. The hearing occurred in the case of *United States v. Shober*<sup>224</sup> in which the defense filed motions to grant either statutory or judicial immunity to former Congressman Daniel Flood and Edward Dixon, brother of one of the defendants. The court rejected the Government's initial argument<sup>225</sup> that a hearing and ruling on a *Smith* motion

221. *Id.* The court listed the following three situations in which the government's interest would not outweigh the defendant's due process rights: (1) The government may have already assembled all the evidence necessary to prosecute the witness independent of the witness' testimony; (2) the government may be able to separate the immunized witness' testimony and so isolate it from any future testimony of the witness that it would not invade the witness' constitutional rights if he were subsequently prosecuted; and (3) the government may seek a postponement of the defendant's trial so that it may complete its investigation of the defense witness who is the subject of an immunity application. *Id.*

222. *Id.*

223. *Id.* In *United States v. Lowell*, 490 F. Supp. 897 (D.N.J. 1980), a case decided only three months after *Smith*, the New Jersey federal district court adhered to the *Smith* guidelines for statutory immunity and judicially conferred immunity. Although it found both forms of immunity inapplicable under the facts of that case, the court followed the Third Circuit's instructions and carefully outlined the reasons for its decision.

224. 489 F. Supp. 412 (E.D. Pa. 1980).

225. In a memorandum, one of the assistant United States attorneys representing the Government in *Shober* noted,

The [c]ourt's position on the timing of the hearing was affected at least in part by the fact that everyone had already been assembled in Reading [Pennsylvania] to have a hearing and by the fact that the jury will probably be sequestered and the [c]ourt wants to avoid as many midtrial delays as possible.

Memorandum from Frank H. Sherman to All Criminal and Special Prosecution Division Attorneys (March 14, 1980) (copy on file at the Vanderbilt Law Review) [hereinafter cited

should be deferred until the conclusion of the Government's case at trial.<sup>226</sup> The Government contended that only after its proof had been presented could it be determined with any degree of certainty that (1) the defense still intends to call the witness; (2) the witness is available; (3) he will assert his privilege against self-incrimination; (4) his testimony will be clearly exculpatory; and (5) his testimony is essential to the defendant's case.<sup>227</sup> The court denied with prejudice the defense motion for statutory immunity because it failed to find prosecutorial misconduct designed to distort the judicial factfinding process in the Government's refusal to voluntarily immunize the prospective witnesses.<sup>228</sup> In support of its motion for judicial immunity, the defense offered testimony of counsel for one witness and a letter from counsel for another witness that the witnesses had certain described testimony to offer that would allegedly exculpate the defendants.<sup>229</sup> Without ruling on the sufficiency of the substance of the proffered exculpatory testimony, Judge Troutman denied the motion without prejudice<sup>230</sup> and held that third-party evidence is not sufficient to carry the movant's burden<sup>231</sup> and that "either direct testimony or a signed statement from the prospective witness must be offered to make the necessary showing."<sup>232</sup>

Immediately following the announcement of the court's ruling, counsel for defendants requested another hearing, which was set for March 18, 1980.<sup>233</sup> In the bench opinion issued at the close of

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as Memorandum].

226. *United States v. Shober*, 489 F. Supp. at 414.

227. These are among the standards that the Third Circuit had outlined in *Smith*. See text accompanying note 217 *supra*.

228. 489 F. Supp. at 415.

229. *Id.* at 414.

230. *Id.* at 415. The court denied the motion *without* prejudice because it recognized the defense's opportunity "to make a proper showing as late as the conclusion of the Government's case at trial, as contended by the Government." *Id.*

231. *Id.*

232. Memorandum, *supra* note 225. At a later hearing, the court appeared to retreat somewhat from its position concerning a signed statement. The court noted that at the March 12 hearing, it erroneously stated that *Smith* dealt with the signed statement of the witness, but, in fact, it concerned his statement to the police that might have been unsigned. *United States v. Shober*, 489 F. Supp. at 416-17. The court, however, observed that the witness' statement was important because it was "his statement, as opposed to counsel's interpretation of such statement, inhibited and circumscribed by counsel's obligation to his client and the existence of the attorney-client privilege." *Id.* at 417 (emphasis added). Moreover, in contrast to the attorneys' statements at the March 12 hearing, the witness' statement in *Smith* was "clearly, if not admittedly, exculpatory." *Id.*

233. At the March 18 hearing, the court noted that defendant's burden in the context of requests for immunity need not be met by any prescribed standards, "such as beyond a

that hearing, Judge Troutman acknowledged that the Government's argument that the *Smith* standards cannot be met until the close of the Government's case at trial was "not without merit" since the availability of the defense witness "can only be literally determined when he, in fact and in body, appears at trial."<sup>234</sup> Similarly, whether the witness' testimony is clearly exculpatory and essential to defendant's case or merely cumulative can only be ascertained after the Government has, in fact, proven what it charged in the indictment.<sup>235</sup> Although it found the Government's arguments persuasive, the court noted that its "proper concern has broader dimensions," including the defendant's due process rights.<sup>236</sup> Thus, the court concluded that immunity should be available when the defendant can still "marshal his resources to make the right actually, not just theoretically, a useful one."<sup>237</sup> Accordingly, the court found that when a defendant can make a "convincing showing" before trial that the proposed witness' testimony complies with the *Smith* standards, the court need not wait until the end of the Government's case to immunize the witness.<sup>238</sup> Since the court's finding conflicted with its March 12 decision to deny with prejudice defendant's motion for statutory immunity, it amended the March 12 order and denied defendant's motions without prejudice.<sup>239</sup> In support of its ruling, the court stated that avoidance of a mechanical rule which required that the immunity decision be made either before or during trial "allows sufficient flexibility to accommodate the myriad complex of situations which may arise in the future and to balance the competing needs and interests of the witness,

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reasonable doubt, by a preponderance of the evidence, or even by establishing that what they seek is more likely so than not so." *Id.* at 416. Rather, *Smith* referred alternatively to a "prima facie showing" or a "convincing showing" sufficient to satisfy the court that the proffered testimony would be both clearly exculpatory and essential to the defendant's case. *Id.* Furthermore, the court noted that the Third Circuit failed to give any guidance concerning what would be sufficient to constitute such a showing. *Id.*

234. *Id.* at 417.

235. *Id.*

236. *Id.*

237. *Id.* The court further observed,

To hold as a matter of law that the accused never has a right to conferral of immunity upon a witness until the close of the Government's case may reduce Due Process to an ethereal and theoretical principle with only rhetorical vitality. Access to an immunized witness prior to trial allows the accused an opportunity for sober reflection and careful preparation, which may be unavailable if the right is animated in mid-trial.

*Id.*

238. *Id.* at 417-18.

239. *Id.*

the Government and the accused."<sup>240</sup>

### B. *The Restrictive Approach*

In contrast to the expansive view advocated by the Third Circuit, several courts have adopted a narrower approach and have rejected the concept of judicial immunity for defense witnesses. These courts rely on a separation of powers analysis and emphasize that a court has no authority to grant immunity since that power rests solely with the executive branch of government. For example, in *United States v. McMichael*<sup>241</sup> the court accepted the first prong of *Smith*, which allows a court to order dismissal unless the prosecution grants statutory immunity, but it rejected the second prong of *Smith*, which authorizes grants of judicial immunity. The court criticized the Third Circuit for seeking support for judicial immunity in cases "not directly in point."<sup>242</sup> The court found that the great weight of authority does not recognize judicial immunity and suggested that "the Third Circuit's opinion doesn't face up to the mischief which can result from an exercise of this heretofore unknown power of a judge."<sup>243</sup> In addition, the court stated that while use immunity may appear virtually costless to the government, it should not be left to the trial judge, who generally lacks a complete knowledge of the case, to determine the price the government must pay for the immunity grant.<sup>244</sup> The court also criticized judicial immunity because, in its view, trial judges cannot remain impartial if they become involved in the type of inquiry necessary to determine whether immunity should be granted.<sup>245</sup> In conclusion, the court observed that if a federal district judge can grant immunity, "so can a Bankruptcy Judge or an Administrative Law Judge or a . . . non-lawyer county or municipal judge or an Indian Tribal Judge."<sup>246</sup>

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240. *Id.* For example, the court noted that "circumstances may justify conferral of judicial immunity to one prospective witness prior to trial and deferring final decision concerning another witness until the close of the Government's case." *Id.* The court then denied the defense motions for judicial immunity, again without prejudice. *Id.* at 419.

241. 492 F. Supp. 205 (D. Colo. 1980).

242. *Id.* at 208. See note 211 *supra* and accompanying text.

243. *United States v. McMichael*, 492 F. Supp. at 210.

244. *Id.* at 211. According to the court, "[F]acts which the prosecution does not want to disclose and which it should not be required to disclose may inflate the cost to monumental proportions if all facts were disclosed." *Id.*

245. *Id.*

246. *Id.*

Similarly, in *United States v. Davis*<sup>247</sup> the First Circuit held that the trial court does not have the authority either to grant immunity to a witness whose testimony the defendant may wish to offer or to force the prosecution to grant the witness immunity. The court failed to address the question whether, as in *Morrison*, a court could order dismissal if the prosecution refused to grant immunity because the defense made no allegation of prosecutorial misconduct.<sup>248</sup> Furthermore, the court did not consider the problem raised hypothetically in the *Earl* footnote, since the prosecution had not immunized any government witnesses.<sup>249</sup> Instead, the court's relatively brief discussion of the immunity issue focused on a separation of powers analysis. According to the First Circuit, the court's role in the immunity context remains largely ministerial: "The court may scrutinize the record to ascertain that a request for immunity is, under the statute, jurisdictionally and procedurally well-founded and accompanied by the approval of the Attorney General."<sup>250</sup>

*United States v. Turkish*,<sup>251</sup> perhaps the most prominent circuit court decision to consider defense witness immunity, included an extensive critique of the Third Circuit's opinion in *Smith*. *Turkish* concerned a defendant convicted of evading income taxes, filing false income tax returns, and conspiring to defraud the United States.<sup>252</sup> On appeal, defendant claimed that the prosecution and trial judge improperly denied his motion, made at the conclusion of the Government's case at trial, to immunize seventeen prospective defense witnesses.<sup>253</sup> While it found no support

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247. 623 F.2d 188 (1st Cir. 1980).

248. *Id.* at 193.

249. *Id.*

250. *Id.* at 192-93 (quoting *In re Daley*, 549 F.2d 469, 479 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977)).

251. 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

252. *Id.* at 770.

253. *Id.* at 771. Although the Government considered the motion, it decided not to grant immunity. Judge Broderick reserved decision on the motion until after the trial. At the trial's conclusion, he denied the defendant's motion for a new trial or acquittal. In a subsequent unreported opinion, he set forth his analysis of the issues and his reasons for denying the motion. According to Judge Broderick, the sixth amendment compulsory process clause does not afford defendants the right to require witness immunity, but such a right is "probably" contained in the fifth amendment due process clause. The judge, however, denied defendant benefit of this "probable" fifth amendment right to defense witness immunity for two reasons. First, he found the motion untimely, since it should have been made at the beginning of the trial. Second, he concluded that defense witness immunity should be available only for material and exculpatory testimony and that the defendants in the instant case had not shown that the proffered testimony would be either material or

for a claim of defense witness immunity in the sixth amendment, the Second Circuit conceded that the concept has a "more plausible basis" in the fifth amendment due process requirement of basic fairness.<sup>254</sup>

The court discussed two arguments that defendants have advanced in support of a fifth amendment claim. The court found the first argument, based on equalizing the powers of the prosecution and the defense, thoroughly unpersuasive.<sup>255</sup> Although it found the second argument, based on the need to pursue the truth, somewhat more attractive, the court rejected this argument because of the various public interests affected by a claim for defense witness immunity.<sup>256</sup> Seeking to determine whether the balancing of these public interests with the defendant's interest in obtaining truthful exculpatory testimony through defense witness immunity is a proper judicial function, the court acknowledged the Third Circuit's conclusion in *Smith* that a court may grant immunity without invading the realm of either the legislative or the executive

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exculpatory. *Id.* at 771-72.

254. *Id.* at 773-74. The court observed in a footnote that defense witness immunity cannot qualify as a due process right on the theory that it is part of the "compelling traditions of the legal profession," *Rochin v. California*, 342 U.S. 165, 171 (1952), since the concept only developed in the 1960s and has only been regarded as plausible since the passage of the use immunity statute. *United States v. Turkish*, 623 F.2d at 774 n.2.

255. The court noted that the administration of the criminal law system involves a procedural imbalance in favor of the defendant. The prosecution must prove defendant's guilt beyond a reasonable doubt to the satisfaction of the entire jury. Furthermore, it may not obtain defendant's testimony, suppress exculpatory evidence, or re-try defendant after acquittal, despite the occurrence of errors prejudicial to the Government. The defendant, on the other hand, may prevail without offering any proof whatsoever, need not disclose any inculpatory evidence he discovers, may avoid conviction by persuading one juror that reasonable doubt exists, and may challenge a conviction by direct appeal and subsequent collateral attack. *United States v. Turkish*, 623 F.2d at 774. The system also provides the Government with law enforcement powers unavailable to the defense. The court noted that unlike the defense, the Government may arrest suspects, search private premises, wiretap telephones, and take advantage of the investigative resources of large public agencies. *Id.* The court concluded that while equal availability of use immunity for prosecution and defense witnesses may be appealing on the surface, "[f]ew would seriously argue" that granting defendants all the Government's powers or equalizing the procedural burdens of prosecution and defense at trial would serve the public interest. *Id.*

256. *Id.* at 775. First, the court noted that while the Government remains free under *Kastigar* to prosecute an immunized witness, it must prove that it did not obtain its evidence against the witness as a result of his immunized testimony. Second, the obstacles to a successful prosecution of an immunized witness may force the Government to curtail its cross-examination of the witness in the case on trial in order to narrow the scope of the testimony that the witness can later claim tainted his subsequent prosecution. Last, the court noted that defense witness immunity could invite cooperative perjury among defendants and their associates. In the court's opinion, the threat of a perjury conviction, with penalties frequently far below substantive offenses, would not prevent such tactics. *Id.*



branch. The court examined the two-part inquiry required by *Smith*—whether the prosecution opposed immunity because of a deliberate intention to distort the judicial factfinding process,<sup>257</sup> and whether strong countervailing state interests outweighed defendant's need for clearly exculpatory evidence<sup>258</sup>—and found that both inquiries force the trial court to overstep the bounds of its authority. First, the court observed that an inquiry into the prosecutor's intent will often lead to exploration and premature disclosure of the pending status of an investigation against the witness.<sup>259</sup> Second, the court found that in most cases an examination of the countervailing interests will reveal that some legitimate state interests do indeed exist and further, that constitutional fairness is not a satisfactory standard by which to analyze such interests.<sup>260</sup>

The *Turkish* court narrowly construed *Smith* and confined the Third Circuit's analysis to the specific facts of that case. The court emphasized that *Smith* did not require balancing the public interest in withholding immunity against the defense need for it, since the Virgin Islands prosecutor had agreed to grant immunity.<sup>261</sup> Instead, the court characterized *Smith* as simply a case of a prosecutor who, without jurisdiction over the witness and for no apparent reason, interfered and suppressed evidence that would otherwise have become available to the defense. Indeed, the Second Circuit had "no dispute with the holding in *Smith*," although it disagreed with the standards announced in that decision.<sup>262</sup> After its lengthy analysis of the issue, the court determined that the fifth amendment due process clause does not require defense witness immunity "whenever it seems fair to grant it."<sup>263</sup> On the contrary, while the essential fairness required by the fifth amendment "guards the defendant against overreaching by the prosecutor . . . and insulates him against the prejudice," it does not oblige either prosecu-

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257. See text accompanying notes 203-04 *supra*.

258. See text accompanying notes 217 & 220-22 *supra*.

259. *United States v. Turkish*, 623 F.2d at 777. The court further observed that a prosecutor without enough evidence to indict a witness may legitimately prefer to maintain his option to prosecute once he obtains additional information. The court argued that the mere absence of a present intention to prosecute cannot fairly be characterized as evidence of an intention to distort the factfinding process. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

tors or courts to secure privileged evidence for the defense.<sup>264</sup> The court then stated its reason for examining the issue at such length: "[W]e [do not] wish to see criminal trials regularly interrupted by wide-ranging inquiries concerning the specific pros and cons of defense witness immunity in a particular case."<sup>265</sup>

The *Turkish* court concluded its opinion by outlining the proper procedure to be followed by a court faced with a claim for defense witness immunity. According to the court, trial judges should summarily reject claims for defense witness immunity whenever the witness is "an actual or potential target of prosecution."<sup>266</sup> Furthermore, a hearing need not be held to establish the witness' status.<sup>267</sup> Under the court's suggested procedure, the prosecutor need only show that the witness has been indicted or "present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity."<sup>268</sup>

#### IV. ANALYSIS OF THE CONSTITUTIONAL BASES FOR DEFENSE WITNESS IMMUNITY

In light of the conflicting state of the case law, further consideration of the constitutional bases for defense witness immunity is warranted. Such an examination is particularly advisable since the Supreme Court has declined to grant certiorari in any case dealing with the question of immunity for defense witnesses.<sup>269</sup> Until the Court resolves the issue, criminal defendants will continue to request immunity for their witnesses. This Note next reviews various constitutional arguments that can be advanced by the defense attorney in support of an application for defense witness immunity. Before the defendant resorts to arguments based on constitutional considerations, however, he should carefully review the state's reasons for refusing to immunize the defense witness. If the defendant can demonstrate that the prosecutor opposed the immunity grant "with the deliberate intention of distorting the judicial factfinding

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264. *Id.*

265. *Id.* at 778.

266. *Id.*

267. *Id.*

268. *Id.* The court noted that the prosecutor is under no duty to prosecute the witness. Rather, he simply has an option to rely on the witness' status as an actual or potential target of prosecution in order to prevent any inquiry concerning immunity for that witness. *Id.*

269. See notes 39 & 157 *supra* and accompanying text.

process,"<sup>270</sup> recourse to the constitutional arguments discussed below may be unnecessary.

### A. *The Separation of Powers Analysis*

The Constitution separates the powers of the federal government into three distinct areas: The legislature makes the laws,<sup>271</sup> the executive executes the laws,<sup>272</sup> and the judiciary hears and decides cases.<sup>273</sup> When examining the extent of prosecutorial discretion, courts have traditionally applied a strict interpretation of the separation of powers doctrine. Accordingly, they have acknowledged that the prosecution enjoys broad discretion when deciding whether to charge a defendant,<sup>274</sup> *nolle prosequi* a case,<sup>275</sup> or plea bargain.<sup>276</sup> Thus, most courts have concluded that, absent bad faith, the Constitution proscribes judicial review of these discretionary prosecutorial decisions.<sup>277</sup> Courts that adopt this restrictive

270. *Virgin Islands v. Smith*, 615 F.2d 964, 969 (3d Cir. 1980).

271. U.S. CONST. art. I, § 1.

272. *Id.* art. II, § 1.

273. *Id.* art. III, § 2.

274. See *United States v. Thompson*, 251 U.S. 407, 413-15 (1920) (prosecution need not ask leave of court to introduce before grand jury criminal counts that prior grand jury had rejected); *Inmates of Attica v. Rockefeller*, 477 F.2d 375, 380-81 (2d Cir. 1973) (judicial review of prosecutor's decision not to prosecute is unwise and beyond court's capacity); *Powell v. Katzenbach*, 359 F.2d 234, 234 (D.C. Cir. 1965) (per curiam) (mandamus will not lie to control exercise of Attorney General's discretion to prosecute bank conspiracy), *cert. denied*, 384 U.S. 906 (1966); *Moses v. Katzenbach*, 342 F.2d 931, 931 (D.C. Cir. 1965) (per curiam) (court may not compel prosecution to bring action against civil rights violators because that decision is committed to executive branch); *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir.) (en banc) (court may not order United States attorney to prepare and sign indictment), *cert. denied*, 381 U.S. 935 (1965); *District of Columbia v. Buckley*, 128 F.2d 17, 20 (D.C. Cir.) (decision to prosecute for more than one offense arising from same transaction is policy matter for the prosecution), *cert. denied*, 317 U.S. 658 (1942); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) (federal courts are powerless to interfere with prosecutor's decision not to initiate action against state officials).

275. See *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868) (discretionary power of prosecution includes absolute power to enter *nolle prosequi* before jury is empanelled); *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (prosecution is best judge of whether a pending case should be terminated), *cert. denied*, 425 U.S. 971 (1976); *United States v. Brokaw*, 60 F. Supp. 100, 102-03 (S.D. Ill. 1945) (prosecutor's power to enter *nolle prosequi* may not be reviewed by court unless abuse of discretion shown).

276. See *Newman v. United States*, 382 F.2d 479, 481-82 (D.C. Cir. 1967) (United States attorney possesses discretion to accept plea bargain from one codefendant and not the other and judiciary is ill suited to review such decision).

277. *Inmates of Attica v. Rockefeller*, 477 F.2d 375, 379-80 (2d Cir. 1973). In *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965), the Fifth Circuit held,

Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government and it is as an officer

approach have tended to minimize the importance of other constitutional guarantees, particularly those found in the fifth and sixth amendments. For example, in *Earl v. United States* the District of Columbia Circuit relied on a literal interpretation of the separation of powers doctrine and refused to require a federal prosecutor to grant immunity to a defense witness despite the defendant's claim that refusal to do so violated his fifth amendment due process rights.<sup>278</sup> *Earl* demonstrates that an extension of the restrictive view of the separation of powers doctrine to the question of defense witness immunity may prevent the defendant from obtaining valuable testimony of reluctant witnesses and thus deny him the opportunity to present a meaningful defense. This result directly conflicts with Supreme Court decisions that support the defendant's right to call witnesses on his behalf.<sup>279</sup>

In contrast to the *Earl* court and other courts that have followed its restrictive approach, the Framers of the Constitution had a much less exacting view of the separation of powers doctrine. The doctrine was not intended to keep the branches totally isolated from one another. On the contrary, in order to maintain a proper balance of powers, the various branches must interact while remaining separate.<sup>280</sup> Perhaps the most famous statement of the

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of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

*Id.* at 171. Commentators have also suggested that the separation of powers doctrine requires each branch to act completely independent of the other two. See, e.g., Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 535 (1974) (many present-day commentators view mandatory collaboration among the branches as the "very antithesis" of the idea of separation of powers); Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 394-95 (1976) (majority view is that separation of powers doctrine prevents judicial review of prosecutorial discretion).

278. See text accompanying notes 158-61 *supra*.

279. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (right to call witness on one's own behalf long recognized as essential to due process); *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (due process requires that parolee have opportunity to present witnesses and documentary evidence at parole revocation hearing); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compel attendance of witnesses and to offer their testimony is fundamental element of due process).

280. See *Buckley v. Valeo*, 424 U.S. 1, 120-22 (1975) (per curiam) (Constitution recognizes that sealing off the three branches of government would preclude establishment of effective national government; total separation of the three branches not contemplated by Framers). Several commentators have also noted that in order to be workable the Constitution requires overlapping powers. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.09 (1958) (within framework of the Constitution the idea that judicial, legislative, and executive power

flexible view of the separation of powers doctrine is found in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*:<sup>281</sup>

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.<sup>282</sup>

Courts have been increasingly willing to apply a flexible view of the separation of powers doctrine in areas other than prosecutorial discretion in criminal cases. For example, courts have narrowly defined "political question" and thus have expanded the range of issues subject to judicial review.<sup>283</sup> Moreover, in administrative law, courts have reviewed discretionary decisions of both cabinet heads and regulatory agencies.<sup>284</sup> Because the judicial branch has been willing to intervene in matters relegated to a co-equal branch when

should not be blended is unworkable); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-30 (abr. ed. 1965) (separation of powers is "the expression of a general attitude rather than inexorable table of organization"; complete exclusiveness between powers is impossible); Cox, *supra* note 277, at 397 (emerging minority view is that separation of powers gives only limited discretion to the prosecutor and does not bar judicial review; court and prosecution have overlapping responsibilities; judicial review of discretionary powers more consistent with original intent of separation of powers doctrine).

281. 343 U.S. 579 (1952).

282. *Id.* at 635 (Jackson, J., concurring).

283. See *Powell v. McCormack*, 395 U.S. 486, 548-59 (1969) (decision by House of Representatives to exclude a member not a political question); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (constitutionality of state statute apportioning legislative districts not a political question); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1106-07 (8th Cir. 1973) (Secretary of Transportation's decision to withhold previously apportioned highway funds not a political question). The court in each of these cases found the issue justiciable despite the political overtones of the problems.

284. See *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 673-76 (D.C. Cir. 1970) (SEC's decision not to demand the inclusion in corporation's proxy statement of a resolution requiring the company to discontinue production of napalm held reviewable; limited review of agency determination necessary to ensure that it is within statute granting power to the agency), *cert. dismissed*, 404 U.S. 503 (1972); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (discretionary decision of Secretary of Agriculture to take no action on request for suspension of registration of products containing DDT reviewable; clear showing of legislative intent necessary to preclude judicial review); *Safir v. Gibson*, 417 F.2d 972, 978 (2d Cir. 1969) (Federal Maritime Commission's decision not to seek recovery of subsidies paid to shipping conference that had engaged in anticompetitive tactics reviewable; court may review to determine whether agency has properly exercised its discretion under applicable statute), *cert. denied*, 400 U.S. 850 (1970); *DeVito v. Schultz*, 300 F. Supp. 381, 383 (D.D.C. 1969) (mem.) (Secretary of Labor's decision not to initiate proceedings to set aside results of contested election reviewable; courts have duty to ensure that wishes of Congress not frustrated).

necessary to prevent abuses of authority or violations of constitutional rights, the courts should show a similar willingness to act when faced with appropriate claims for defense witness immunity.

The Supreme Court decision in *United States v. Nixon*<sup>285</sup> indicates that at least in regard to judicial refusal to review acts of prosecutorial discretion, the strict interpretation of the separation of powers doctrine may be losing its vitality. In *Nixon*, perhaps the most prominent separation of powers case, the Supreme Court unanimously<sup>286</sup> rejected President Nixon's claim of an absolute executive privilege and his motion to quash a subpoena duces tecum for tape recordings sought for use in a criminal trial.<sup>287</sup> While the Court recognized that the separation of powers doctrine ensures the efficient functioning of government, it noted that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."<sup>288</sup> The Court took an unrestrictive view of the separation of powers doctrine and observed that "[i]n designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."<sup>289</sup> *United States v. Nixon* not only presents strong evidence that the Court may have begun to accept a less rigorous view of the separation of powers doctrine,<sup>290</sup> but also implicitly weakens the continuing validity of *Earl*. Under *Nixon*'s flexible separation of powers analysis, once a defendant shows a legitimate need for testimony from an unwilling witness, the court must balance his need against the state's interest in withholding immunity from the particular witness. Since *Nixon*, courts have gradually begun to adopt a flexible approach to separation of powers and have manifested an increased willingness to review acts of prosecutorial discretion.<sup>291</sup>

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285. 418 U.S. 683 (1974).

286. Justice Rehnquist did not participate in the opinion.

287. 418 U.S. at 687-88, 706.

288. *Id.* at 706.

289. *Id.* at 707.

290. In *Nixon* the Court further stated, "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." *Id.*

291. See *United States v. Cowan*, 524 F.2d 504, 512-13 (5th Cir. 1975), *cert. denied*,

Although the flexible separation of powers analysis employed in *Nixon*, in contrast with the restrictive view, supports the defense attorney's application for defense witness immunity, it fails to provide a satisfactory vehicle with which to balance the competing interests. Instead, the balancing test suggested in *Nixon* severely limits the right to defense witness immunity. For example, although it may benefit some defendants, the *Nixon* balancing test may not result in immunity when the defense witness is charged with a particularly serious offense because the court could reasonably conclude that the state's specific interest in a successful prosecution of the witness outweighs the defendant's interest in potentially exculpatory testimony. Such a result, while authorized by the *Nixon* analysis, nonetheless seems inequitable. The seriousness of the charge against a defense witness should not be the determining factor in the decision whether to grant immunity and uphold the defendant's right to present potentially exculpatory evidence. Because the flexible separation of powers approach may not protect defendants who seek immunity for a witness charged with a serious crime, the defense attorney may be forced to resort to other constitutional arguments in support of an application for defense witness immunity.

### B. *The Due Process Analysis*

A second constitutional argument the defense attorney should assert in support of an application for defense witness immunity is the defendant's fifth amendment right to due process of law.<sup>292</sup> A procedural due process inquiry does not involve a systematic analysis, but rather consists of the application of general principles of fundamental fairness or "ordered liberty"<sup>293</sup> to the particular facts of each case. In the context of immunity grants for defense witnesses, the substance of the due process challenge argues that the court's failure to review prosecutorial decisions denying defense witness immunity deprives the defendant of a fair trial because the failure to provide immunity prevents him from presenting a com-

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425 U.S. 971 (1976) (court may review prosecutor's decision to dismiss charges); *Nader v. Saxbe*, 497 F.2d 676, 679-80, 679 n.18 (D.C. Cir. 1974) (dictum) (court may review decision not to prosecute in order to determine whether prosecution exceeded constitutional or statutory limits of discretion).

292. U.S. CONST. amend. V provides in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law."

293. *Rochin v. California*, 342 U.S. 165, 169 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

plete defense and permits a determination of guilt based on incomplete evidence. Naturally, a defendant's need to immunize his witnesses as an element of due process cannot be examined in a vacuum. The court must assess the various interests at stake in an attempt to discover the relevance of each to the defendant's right to a fair trial. If the requested immunity will sufficiently protect the relevant countervailing interests and privileges, then the defense motion for immunity must prevail.

### 1. The Defendant's Interest

While the Constitution does not guarantee the defendant an error-free trial, it does guarantee him a fair one. A defendant's need for witness immunity often arises because his associates are the only knowledgeable witnesses, and concomitantly the witnesses most likely to assert the fifth amendment privilege.<sup>294</sup> Immunity statutes, in fact, originated because prosecutors often must resort to coparticipants for testimony.<sup>295</sup> In other factual situations as well, the defendant stands to lose potentially exculpatory testimony if a witness pleads the fifth amendment but does not receive immunity.<sup>296</sup> In each situation, since the jury may never hear highly material testimony on the issue of guilt or innocence, the defendant's due process rights may be violated. By refusing to grant immunity to an exculpatory defense witness, the prosecutor effectively eliminates the witness and greatly affects the fairness of the trial. Failure to immunize a prosecution witness, however, will not render the trial unfair to the defendant, although it may affect the trial's result since the state must always prove guilt beyond a reasonable doubt.

In a line of cases ending with *Brady v. Maryland*,<sup>297</sup> the Supreme Court repeatedly emphasized the importance of the defen-

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294. In *Kastigar* the Court observed that "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar v. United States*, 406 U.S. 441, 446 (1972).

295. *Id.* at 446-47, 447 n.15.

296. Examples of such situations include cases in which the witness whom the defendant intends to call is actually guilty of the crime with which the defendant is charged; the witness would testify that a third person committed the crime, but fears incrimination by some act related to his presence at the scene of the crime; the witness fears that when he corroborates the defendant's alibi he will implicate himself in another crime; the witness is awaiting sentencing on a charge unrelated to the defendant's case and fears arousing the resentment of the prosecutor if he fails to cooperate; or the witness could testify on behalf of the defendant's affirmative defense, but fears prosecution on charges unrelated to the defendant's charge.

297. 373 U.S. 83 (1963).



dant's right to due process. In *Brady* the Court reversed the defendant's conviction because the prosecutor withheld material evidence relevant to the defense.<sup>298</sup> While earlier cases emphasized the presence of prosecutorial misconduct,<sup>299</sup> *Brady* held that the failure to disclose favorable material information, regardless of the prosecutor's good faith, violated due process.<sup>300</sup> In the suppression cases, the Supreme Court upheld the defendant's need for access to information over the prosecution's impermissible desire to conceal evidence and thus prevent the defendant's acquittal. Similarly, in other areas courts have concluded that the defendant's need for access exceeds governmental interests. For example, in *Roviaro v. United States*<sup>301</sup> the Supreme Court held that the state interest in concealing the identity of informants in order to encourage citizens to cooperate with the police must yield to the defendant's due process right "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."<sup>302</sup> The *Roviaro* Court balanced the public's interest in protecting the flow of information necessary to effective law enforcement against the defendant's right to prepare his defense<sup>303</sup> and concluded that if the privileged information was important to the defense, the trial court could require the prosecution to choose between disclosure or dismissal.<sup>304</sup>

*Brady* and *Roviaro* indicate that courts now accord great

298. Defendant, along with a codefendant, was charged with first degree murder. Defense counsel asked to examine the codefendant's out-of-court statements. The prosecutor made certain of these statements available, but not the one in which the codefendant admitted that he committed the homicide. The defense did not learn of the existence of this statement until after defendant's conviction. *Id.* at 84.

299. See, e.g., *Napue v. Illinois*, 360 U.S. 264 (1959) (the state may not knowingly use false testimony even when the testimony goes only to the witness' credibility); *Alcorta v. Texas*, 355 U.S. 28 (1957) (conviction overturned when the prosecutor failed to correct false testimony of witness); *White v. Ragen*, 324 U.S. 760 (1945) (conviction obtained through the knowing use of false and perjured testimony not permitted to stand); *Pyle v. Kansas*, 317 U.S. 213 (1942) (defendant denied due process when conviction resulted from use of testimony, known by prosecutor to be perjured, and from prosecutor's deliberate suppression of evidence favorable to defendant); *Mooney v. Holohan*, 294 U.S. 103 (1935) (due process requirement is not satisfied when a conviction is obtained by presentation of testimony known to prosecutor to be perjured).

300. *Brady v. Maryland*, 373 U.S. at 87; accord, *United States v. Agurs*, 427 U.S. 97, 104-07 (1976).

301. 353 U.S. 53 (1957).

302. *Id.* at 60-61.

303. *Id.* at 62.

304. *Id.* at 61.

weight to the defendant's need for information. The holdings of the suppression cases and the informer's privilege cases seem particularly applicable to the defense witness immunity problem. In light of these cases holding that a defendant is denied a fair trial when he does not know of exculpatory evidence that the prosecutor possesses but does not reveal, it is incongruous to find that a defendant is *not* denied a fair trial when he knows of evidence but cannot present it because of the prosecutor's failure to cooperate. In the absence of a strong countervailing interest, courts should not allow the prosecutor to deny access to information, just as they do not allow him to withhold the information itself. If the prosecutor who withholds information violates due process, then so does the prosecutor who, even though acting in good faith, denies the defendant the opportunity to obtain and present information from a third party. The prosecutor's affirmative duty to provide access to information implies a duty to immunize defense witnesses whose testimony is material to the defense.

This due process analysis recognizes that the state possesses significant advantages over the defense in obtaining evidence and presenting its case in court. Generally, the prosecution has greater financial and human resources with which to investigate its case and, unlike the defense, has access to police informants, search warrants, and grand juries. The accused's ability to present an effective defense diminishes whenever the state gains a power to obtain evidence, such as the power to immunize witnesses, that the accused does not share. Thus, the defendant requires protection in order to maintain some degree of equality between the investigatory facilities of defense and prosecution.<sup>305</sup>

In *Wardius v. Oregon*<sup>306</sup> the Supreme Court held that due process mandates reciprocal discovery rights for defense and prosecution, even though reciprocal discovery may enable the defendant to

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305. Judge William J. Bauer of the Seventh Circuit recently stated a contrary view on the balance of forces between defense and prosecution. In his opinion,

There is an aspect of inequality in the criminal process. But it is the government who generally suffers from the inequality. It is the government which must come forward with the evidence . . . bear the burden of proving the defendant guilty beyond a reasonable doubt . . . [and] overcome the defendant's presumption of innocence. The criminal system was designed to protect those charged with crimes from unwarranted charges. Thus, it is appropriate that the system favor the defendant. But the fact that the defense lacks immunity power does not change a system of justice in which the defendant always has the benefit of the doubt.

Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. CRIM. L. & CRIMINOLOGY 143, 152 (1976).

306. 412 U.S. 470 (1973).

obtain evidence to which he had no independent constitutional right. In *Wardius* the Court examined a state statute that required a defendant to file a pretrial notice of his intention to present alibi evidence and a list of his alibi witnesses.<sup>307</sup> While the notice requirement alone did not violate due process, the Court found that because the statute did not require the Government to reveal its rebuttal witnesses, it violated the defendant's fifth amendment rights.<sup>308</sup> Justice Marshall observed that "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor."<sup>309</sup> Thus, in the absence of a strong state interest to justify the imbalance of discovery rights, the state must make discovery a "two-way" street.<sup>310</sup>

The *Wardius* rationale arguably applies with equal force in the context of defense witness immunity. Since the power to immunize witnesses constitutes such a valuable aid to the prosecution,<sup>311</sup> the denial of defense witness immunity tips "the balance of forces between the accused and the accuser"<sup>312</sup> in favor of the state. Unless the prosecution can present some strong state interests to the contrary, the doctrine of reciprocal discovery requires that since the state can immunize important prosecution witnesses, the defendant's interest in immunity for his witnesses should also be recognized. This analysis highlights the flaw in the logic of Judge Burger's famous footnote in *Earl v. United States* in which he speculated that had the prosecution immunized one of its witnesses, the defense might then have had a strong constitutional claim to immunity for its witness.<sup>313</sup> The defendant's need for testimony from one witness may be totally unrelated to the state's desire for testimony from another witness. Furthermore, the prosecution may not need immunity to compel testimony from *any* of its witnesses. The right to defense witness immunity should not be accorded only to those defendants fortunate enough to have state witnesses immunized at their trials. Such an arrangement would violate the fundamental fairness required by the fifth amendment

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307. *Id.* at 475.

308. *Id.*

309. *Id.* at 475 n.9.

310. *Id.* at 475; *accord*, *United States v. Ash*, 413 U.S. 300, 314 (1973) (defendant has right to counsel during lineup to "counter balance" prosecutorial advantage).

311. See text accompanying notes 153-56 *supra*.

312. *Wardius v. Oregon*, 412 U.S. at 474.

313. *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966); see text accompanying note 166 *supra*.

due process clause.

## 2. The Prosecutor's Interest

Traditionally, the government's major argument against defense witness immunity has been its compelling interest in prosecuting the guilty coupled with its concern that "[a] person suspected of crime should not be empowered to give his confederates an immunity bath."<sup>314</sup> The burden that defense witness immunity places on these interests depends to a large degree on the scope of immunity. The government may have had a legitimate concern with "immunity baths" under the former transactional immunity statutes, which, according to Judge Burger in *Earl*, conferred "formal and binding absolution."<sup>315</sup> The 1970 federal witness immunity statute,<sup>316</sup> however, does not grant such sweeping immunity and thus, enhances the criminal defendant's argument that denial of immunity violates due process. The Supreme Court's holding in *Kastigar* that use immunity is coextensive with the scope of the fifth amendment privilege<sup>317</sup> significantly deemphasized the weight accorded the interests of the prosecutor. Since *Kastigar*, immunity only denies the prosecutor the use or derivative use of the witness' compelled testimony. Thus, the Government can prosecute the immunized witness after the trial based on independently derived evidence. The *Kastigar* rationale applies equally well in connection with defense witness immunity. The Court noted that a grant of use immunity "leaves the witness and the prosecutorial authorities in substantially the same position"<sup>318</sup> as if the witness had not testified. The prosecutor remains in the same position because the witness' statements, which the prosecutor cannot use against him, are ones that he would not have made without immunity. Thus, the limited scope of use immunity minimizes the potential interference of defense witness immunity with the prosecutor's discretion.<sup>319</sup>

The state's second reason for seeking to retain control over

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314. *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973).

315. *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966).

316. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 926 (codified at 18 U.S.C. §§ 6001-6005 (1976)); see text accompanying notes 132-56 *supra*.

317. *Kastigar v. United States*, 406 U.S. 441, 453-55 (1972); see text accompanying note 148 *supra*.

318. *Kastigar v. United States*, 406 U.S. at 462.

319. Naturally, this analysis does not apply to those states that continue to provide for transactional immunity grants. See, e.g., CAL. PENAL CODE § 1324 (West Supp. 1978).

witness immunity grants has been its concern that the defense would abuse the power and employ immunity to stall for time and thus increase the government's costs of prosecuting the defendant.<sup>320</sup> Furthermore, the state argues that defense witnesses will have a greater incentive than prosecution witnesses to commit perjury, particularly codefendants who could use immunity to swear to each other's innocence.<sup>321</sup> The perjury argument, however, rests on very weak grounds. Why should an immunized defense witness be more willing to risk a perjury prosecution than an immunized government witness? As Chief Justice Warren once observed, "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."<sup>322</sup> An additional flaw in the state's argument arises because even if defense witnesses tend to commit perjury to a greater extent than prosecution witnesses, the Supreme Court has held statutes designed to prevent perjury unconstitutional if they discourage the defendant's exercise of his fifth amendment privilege against self-incrimination<sup>323</sup> or his sixth amendment right to the material testimony of witnesses.<sup>324</sup>

A third reason that the government has advanced against defense witness immunity is its belief that the prosecutor will face added time-expenditure and nuisance when he subsequently attempts to prosecute an immunized defense witness based on independently acquired evidence. Such inconvenience, however, is unlikely to occur because in many instances the state will have already prosecuted the witness for crimes about which he will testify, or he may have plea bargained with the prosecutor and pleaded guilty to one count. In these situations, the government probably has little or no interest in bringing further charges

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320. Defendants would not always attempt to use immunity to stall for time. For example, defendants who cannot afford bail have very little incentive to delay their trials.

321. One critic of immunity for defense witnesses observed that "[i]f the power to grant immunity were given to defendants, what would prevent them from showering their co-defendants with immunity grants in order to 'beat the rap'?" See Bauer, *supra* note 305, at 152.

322. *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

323. See *Brooks v. Tennessee*, 406 U.S. 605 (1972) (statute that guards against perjury with requirement that defendant who wishes to testify must do so before other defense witnesses held unconstitutional under fourteenth amendment; operation of statute may conflict with defendant's right to remain silent and to benefit from advice of counsel).

324. See *Washington v. Texas*, 388 U.S. 14 (1967) (statute designed to prevent perjury by prohibiting participant accused of a crime from testifying for a coparticipant violates defendant's sixth amendment right to compulsory process).

against the witness. Furthermore, when the government has not yet prosecuted the witness, it may already have amassed enough evidence with which to do so. While the burden on the prosecutor of later proving that his evidence was not tainted by the immunized testimony may occasionally be heavy, it is not unrealistic and it may be sufficiently minimized by proper precautionary measures so that subsequent state prosecution will not be barred. For example, the government can simply seal all its evidence against the witness prior to the witness' testimony. The sealing of evidence is particularly appropriate when the defendant calls a codefendant to testify. An immunity grant to a codefendant costs the state nothing since the prosecutor must prepare his case against all codefendants before trial and, thus, before the defendant requests immunity. Furthermore, subsequent prosecution of the witness by a jurisdiction other than the one in which the witness received immunity will not be barred as long as that jurisdiction does not acquire access to the compelled testimony.<sup>325</sup> Thus, the only burden will be the exercise of increased discretion during an exchange of information between the prosecutors.<sup>326</sup> Although the possibility always exists that precautionary procedures could break down, presumably prosecutors would be especially careful when dealing with immunized defense witnesses to protect the confidentiality of their testimony. As a further possibility, the court could grant the prosecution a continuance to collect additional evidence before the witness testifies. Since the trial would be unfair without the witness' testimony, and since the defendant would have the choice of delaying his trial or not presenting the witness' testimony, the continuance would not inhibit the defendant's right to a speedy

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325. See *Piccirillo v. New York*, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting) (danger of taint, while "substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony").

326. One author suggested special procedures for handling such a situation, including insuring strict control of secret grand jury transcripts of compelled testimony; segregating all compelled testimony transcripts and limiting access to them to a need-to-know basis; assuring that all who read such transcripts have prior notice of their nature and the taint problem; . . . requesting, when appropriate, limitations on the disclosure of compelled testimony given at trial . . . [and] developing a system to document the people who have read the transcripts or copies of them, and the people to whom information contained in the transcripts has been passed.

Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 164 (1976).

trial.<sup>327</sup> Thus, in each of the above situations, defense witness immunity places only a negligible burden or no burden whatsoever on the prosecutor, and a refusal to grant immunity must be considered unreasonable under the circumstances.

### 3. The Witness' Interest

The witness' fifth amendment privilege constitutes an exception to the general principle that "the public has a claim to every man's evidence."<sup>328</sup> Naturally, the witness has an interest in maintaining the complete protection of his privilege. The Supreme Court, however, has not interpreted the fifth amendment guarantee—"[n]o person . . . shall be compelled in any criminal case to be a witness against himself"<sup>329</sup>—in a literal sense. Rather, the Court has indicated that the amendment only guarantees the witness freedom from self-incrimination if he has not received immunity. The court made clear its interpretation of the amendment when it held that the 1970 immunity statute provides protection coextensive with the fifth amendment privilege.<sup>330</sup> In *Kastigar*, when the Court diminished the weight accorded the prosecutor's interest,<sup>331</sup> it also decreased the scope of the witness' interest. After *Kastigar* the witness' interest is limited to protection from the direct or indirect use of his compelled testimony against him.

Witnesses sometimes seek to avoid testifying by asserting that the fifth amendment privilege provides broader protection than freedom from criminal penalties. The Supreme Court, however, has specifically rejected claims that the fifth amendment protects witnesses from public disgrace or embarrassment.<sup>332</sup> Following this

327. U.S. CONST. amend. VI. The continuance should occur before the jury is empaneled because a lengthy continuance after the commencement of trial might require the selection of another jury. The defendant would have to notify the prosecution before trial that he may need to immunize a witness. This procedure would not violate the defendant's fifth amendment privilege even though it would require him to reveal elements of his defense before trial. See *Williams v. Florida*, 399 U.S. 78, 80-86 (1970) (state may require defendant to give advance notice of alibi defense). Indeed, if the defendant gives the government notice before trial of his need to immunize a witness, the state may have sufficient time to gather enough evidence with which to prosecute the witness, and thus, a continuance may be avoided altogether.

328. See note 3 *supra* and accompanying text.

329. U.S. CONST. amend. V.

330. *Kastigar v. United States*, 406 U.S. 441, 453-55 (1972); see text accompanying note 148 *supra*.

331. See text accompanying notes 317-19 *supra*.

332. *Ullmann v. United States*, 350 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1896); see *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

reasoning, courts have held that the privilege does not protect the witness from injunctive relief,<sup>333</sup> loss of employment,<sup>334</sup> treble damages in a civil suit,<sup>335</sup> or public infamy.<sup>336</sup> More recently, Congress specifically included a "criminal case" limitation<sup>337</sup> in the 1970 immunity statute. *Patrick v. United States*<sup>338</sup> is perhaps the most prominent case to enforce this limitation. In this case the Seventh Circuit affirmed the Internal Revenue Service's jeopardy assessment against Patrick for unpaid gambling taxes of \$900,000, even though the IRS only became aware of the deficit after Patrick gave immunized testimony in a criminal grand jury proceeding.<sup>339</sup> Despite the grant of immunity, Patrick unquestionably was not left "in substantially the same position"<sup>340</sup> as if he had not testified. *Patrick* and similar cases have provoked extensive criticism of the immunity procedure and further arguments that the witness should have protected interests in addition to freedom from criminal liability.<sup>341</sup> While such arguments may be persuasive, they must give way in the face of the defendant's due process right to a fair trial. The defendant's need for access to exculpatory evidence outweighs the witness' interest in not testifying whenever the possible detriment to the witness does not include criminal liability.

### C. The Compulsory Process Analysis

In addition to arguments based on a separation of powers analysis and the due process clause, the defense attorney can in-

333. *Bowles v. Misle*, 64 F. Supp. 835 (D. Neb. 1946).

334. *Gardner v. Broderick*, 392 U.S. 273 (1968).

335. *Amato v. Porter*, 157 F.2d 719, 722 (10th Cir. 1946), *cert. denied*, 329 U.S. 812 (1947).

336. *Smith v. United States*, 337 U.S. 137, 147 (1949).

337. Section 6002 provides that the compelled testimony may not be "used against the witness in any criminal case." 18 U.S.C. § 6002 (1976).

338. 524 F.2d 1109 (7th Cir. 1975).

339. The court stated,

Patrick's Fifth Amendment privilege against being compelled to be a witness against himself in any criminal case does not afford him protection against giving testimony that will disclose his civil liability unless, of course, that testimony may subject him to criminal prosecution. The grant of immunity removed his only legitimate objection to giving the government an honest and complete statement, even if compelled, of the facts which may give rise to gambling tax liability. Unlike a forfeiture or the imposition of a fine, the jeopardy assessment is merely a method of enforcing a civil obligation, rather than a form of punishment.

*Id.* at 1118-19.

340. *Kastigar v. United States*, 406 U.S. at 462.

341. See Wolfson, *Immunity, Right or Wrong? Wrong!*, 20 TRIAL LAW. GUIDE 65 (1976).



voke the sixth amendment's guarantee of compulsory process<sup>342</sup> in support of a criminal defendant's application for witness immunity. The history of the judicial treatment of the clause weighs in favor of defense witness immunity. In the early case of *In re Dillon*<sup>343</sup> a California district court observed that the compulsory process clause was "intended to abrogate the harsh and tyrannical rules of the common law . . . and to place the accused in a position to make his defense and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government for establishing his guilt."<sup>344</sup> A persuasive argument can be made that the clause is impaired when the defendant is denied an investigatory tool that, although unknown at the creation of the sixth amendment, has since been developed for use by the prosecution. This equal access analysis is similar to the due process argument in *Wardius v. Oregon* that fairness requires the court to neutralize the imbalance in the investigatory powers of the defense and prosecution by allowing for reciprocal discovery.<sup>345</sup> In fact, one commentator has observed that while the Court in *Wardius* emphasized the general due process requirement of fairness, "its reasoning is more consistent with the specific fairness required by the compulsory process clause."<sup>346</sup>

The sixth amendment guarantees the defendant the means to compel witnesses to appear on his behalf. The right to compel the attendance of witnesses, however, is meaningless without the companion right to obtain their testimony. Prior to 1967 the Supreme Court had referred to the compulsory process clause only five times, twice in dictum,<sup>347</sup> and three times when the Court found it unnecessary to construe the clause.<sup>348</sup> In *Washington v. Texas*<sup>349</sup>

342. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

343. 7 F. Cas. 710 (N.D. Cal. 1854) (No. 3914).

344. *Id.* at 712.

345. See text accompanying notes 306-10 *supra*.

346. Westen, *supra* note 33, at 181.

347. *United States v. Van Duzee*, 140 U.S. 169, 172 (1891) (dictum that government need not issue free subpoenas to the defendant); *United States v. Reid*, 53 U.S. (12 How.) 360, 363-65 (1851), *overruled in* *Rosen v. United States*, 245 U.S. 467 (1918) (dictum that compulsory process clause codifies common law as it existed in 1791).

348. *Pate v. Robinson*, 383 U.S. 375, 378 n.1 (1966) (unnecessary to decide whether trial court erred in failing to grant defendant a continuance to subpoena witnesses for whom he refused to make an offer of proof); *Blackmer v. United States*, 284 U.S. 421, 442 (1932) (unnecessary to decide validity of a statute that granted extraterritorial subpoena power solely to prosecution and denied it to defense); *Ex parte Harding*, 120 U.S. 782, 784 (1887) (unnecessary to decide an unspecified compulsory process issue).

349. 388 U.S. 14 (1967).

the Court first affirmed the defendant's right to compulsory process. Initially, the Court in *Washington* broadly construed the clause as guaranteeing "the right to present a defense," which constitutes "a fundamental element of due process of law" applicable to the states through the fourteenth amendment.<sup>350</sup> Next, it denied the claim that courts can freely regulate the testimonial competence of defense witnesses. In the Court's words, "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."<sup>351</sup> Finally, the Court invalidated a state law that prohibited participants in a crime from testifying on behalf of a coparticipant. The Court used the following standard to find that the law violated the defendant's compulsory process rights: A defendant has "the right to put on the stand a witness who [is] physically and mentally capable of testifying . . . and whose testimony [is] relevant and material to the defense."<sup>352</sup>

In *Washington* the Court expressly declined to decide whether testimonial privileges can deny defendants potentially exculpatory evidence.<sup>353</sup> The Court has determined that both the witness' right to freedom from self-incrimination and the defendant's compulsory process rights are fundamental constitutional rights,<sup>354</sup> but the Constitution does not indicate which of the two rights has greater value. The Court, however, has observed that it is "intolerable that one constitutional right should have to be surrendered in order to assert another."<sup>355</sup> Nevertheless, the sixth amendment specifically places an affirmative duty on the state to ensure fairness in the trial process. Accordingly, courts after *Washington* have held that compulsory process requires more than pro forma issuance of subpoenas; rather it requires the state to apply its powers and resources under appropriate circumstances to ensure that the defendant receives a fair trial.<sup>356</sup> Thus, when the prosecutor

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350. *Id.* at 19.

351. *Id.* at 23.

352. *Id.* (footnote omitted).

353. The Court stated that "[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest." *Id.* at 23 n.21.

354. *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination).

355. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

356. *See, e.g., Johnson v. Johnson*, 375 F. Supp. 872, 875-76 (W.D. Mich. 1974).

denies the defendant the opportunity to present a witness in his defense, the sixth amendment should trigger concern for whether the Government has arbitrarily declined to use its powers to compel testimony in the defendant's behalf. When the Government possesses the statutory power to grant a defendant's application for witness immunity and when the witness is competent to give testimony that is relevant, material, and favorable to the defendant, then the Government's failure to grant immunity violates the defendant's sixth amendment right to compulsory process.

## V. CONCLUSION

Literally read, the fifth amendment language guarantees a witness an absolute right to remain silent once he asserts the privilege, not merely a right to silence unless he receives immunity.<sup>357</sup> Since the endorsement of the literal approach would necessarily abolish one of the most effective and highly utilized information gathering tools<sup>358</sup> that, through a long and tortuous history,<sup>359</sup> has indeed "become part of our constitutional fabric,"<sup>360</sup> it is unlikely that the Supreme Court will consider the adoption of a strict interpretation. The prosecution presently retains the exclusive power to immunize witnesses in all jurisdictions except the Third Circuit. The controversy over the propriety of immunity for defense witnesses began only in the relatively recent past and is the subject of continuing debate. Although one commentator recently concluded that "wholesale transplantation of prosecution witness use immunity analysis to the defense witness area is a fundamental analytic error,"<sup>361</sup> this Note has outlined various constitutional arguments that the criminal defendant can invoke in support of an application for witness immunity.

First, the Note relies on the Supreme Court's decision in *United States v. Nixon* for its argument that courts should use a flexible separation of powers approach in the context of witness immunity grants.<sup>362</sup> While the *Nixon* Court accepted the notion that separation of powers protects the decisionmaking authority of the individual branches of government from infringement by the

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357. See text accompanying notes 329-30 *supra*.

358. See text accompanying notes 153-56 *supra*.

359. See text accompanying notes 44-156 *supra*.

360. See note 30 *supra* and accompanying text.

361. Comment, *Defense Witness Immunity and the Right to a Fair Trial*, 129 U. PA. L. REV. 377, 379 (1980).

362. See text accompanying notes 285-91 *supra*.

other branches, it observed that the doctrine does not enforce an absolute executive privilege. Thus, the separation of powers doctrine need not preclude judicial review of executive discretion in all circumstances. The Court also stressed that the defendant's need to obtain all relevant evidence should outweigh a general claim of executive privilege in a criminal trial. Thus, *Nixon* is persuasive authority for the position that courts should willingly review discretionary actions of the prosecutor.

Second, this Note considers the feasibility of initiating a due process claim when the government denies a request for defense witness immunity.<sup>363</sup> The holdings of *Brady* and *Roviaro* exemplify the great weight traditionally accorded the defendant's need for evidence. The doctrine of reciprocal discovery lends further credence to the proposition that the defense should have immunity grants available to it and that such immunity should not be dependent on the government's decision to immunize one of its own witnesses. The change in the scope of protection from transactional to use immunity has significantly reduced the weight accorded the government's interests in denying immunity to a defense witness. Although the prosecutor may occasionally encounter added inconvenience when he later attempts to prosecute an immunized defense witness, the added costs may be adequately minimized so that the burden on the government is substantially reduced. Finally, the change to use immunity also reduced the weight given to the witness' interest. The immunized witness' interest is now limited to protection from use or derivative use of his compelled testimony in a subsequent criminal case. Thus, a balancing of the three interests at stake when the defense requests witness immunity indicates that the due process analysis often constitutes a convincing argument in favor of an award of immunity.

Last, the Note argues that defense counsel can advance the sixth amendment's guarantee of compulsory process as a final basis for a claim of witness immunity.<sup>364</sup> The Supreme Court's holding in *Washington v. Texas* demonstrates that the sixth amendment guarantees not only the right to compel the attendance of witnesses, but also the right to have them testify. Since the state's role includes the duty to utilize its resources to ensure a fair trial, its failure to immunize a defense witness violates the defendant's compulsory process rights whenever a competent witness could

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363. See text accompanying notes 292-341 *supra*.

364. See text accompanying notes 342-56 *supra*.

have provided relevant and material testimony favorable to the defense.

Once the constitutional basis for defense witness immunity is recognized, the proper method by which to implement it must be determined. Although the most appropriate course would be a congressional amendment to the current immunity statute, the legislative history of immunity statutes demonstrates that Congress has traditionally acted only in response to the Government's need to immunize a specific class of witnesses in a particularly disturbing situation. Congress, then, is unlikely to amend the current law in the near future. Moreover, even if Congress did take the initiative and begin work on a statutory amendment providing for defense witness immunity, long delays could occur before the amendment would be ready for passage simply because of the cumbersome nature of the legislative process. In the interim, therefore, an alternative procedure is needed to ensure that the defendant receives a fair trial and can present the testimony of reluctant witnesses in a manner similar to that available to the prosecution. In *Virgin Islands v. Smith*<sup>365</sup> the Third Circuit broke with formidable precedent and announced a creative solution to the problem: judicially granted defense witness immunity. While at least one commentator has found that the *Smith* approach has merely confused an already "agonizingly complicated"<sup>366</sup> legal question, this Note concludes that in light of the above constitutional analysis, the *Smith* proposal provides the appropriate remedy.

The key to the *Smith* decision lies in the standard the Third Circuit set for a grant of judicial immunity: "[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity."<sup>367</sup> While judicial immunity represents an expansive solution to the problem, the court imposed a strict standard. The Third Circuit willingly took an affirmative step to protect the constitutional rights of defendants, but it nonetheless recognized that the intrusion into an area traditionally reserved for the executive branch requires recognition of any legitimate state interests. Thus, the court appears to have applied the flexible separation of powers

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365. See text accompanying notes 196-223 *supra*.

366. See Comment, *supra* note 361, at 416.

367. *Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980).

approach since it was willing to invade the province of the executive, yet it was unwilling to step too far across the dividing line between the two branches of government. Despite one commentator's criticism of this aspect of the *Smith* standard,<sup>368</sup> this Note contends that the standard represents a suitable approach to the controversial defense witness immunity issue.

*United States v. Shober*<sup>369</sup> further refined the *Smith* analysis. First, the *Shober* court concluded that the court need not wait until the close of the prosecutor's case to immunize a defense witness. Second, the court held that the defendant must offer either direct testimony or a written statement from the prospective witness in order to establish that the witness' testimony complies with the *Smith* standard. The *Shober* refinements significantly increase the manageability of implementing the *Smith* approach. The first refinement aids the defendant because of the flexible time frame in which he may request witness immunity. It also aids the prosecution because the earlier the defense makes the request, the greater the prosecutor's opportunity to minimize his burden if he later decides to prosecute the witness. The second refinement imposes a high standard, namely that third-party evidence does not sufficiently satisfy the defendant's burden—a standard that should be favorably received by federal prosecutors.

Restriction of witness immunity to the prosecution is, as Justice Marshall once observed in a different context, "completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention."<sup>370</sup> The court's duty to ensure that a fair trial serves as the basis for the determination of the defendant's guilt or innocence supports an award of judicial immunity when the prosecutor fails to grant it. Moreover, the courts historically have been authorized to create judicial remedies, such as the exclusionary rule and damages, in order to vindicate constitutional rights.<sup>371</sup> If courts can invoke judicially created remedies to protect the fourth amendment right against unreasonable searches and seizures,<sup>372</sup> then the courts can appropriately take affirmative action and implement the immunity

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368. See Comment, *supra* note 361, at 407.

369. See text accompanying notes 224-40 *supra*.

370. *United States v. Agurs*, 427 U.S. 97, 117 (1976) (Marshall, J., dissenting).

371. See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971) (warrantless search and arrest without probable cause in violation of fourth amendment gives rise to federal cause of action for damages).

372. *Id.*

procedure to protect the defendant's constitutional right to a fair trial—a right that Congress has thus far deemed unworthy of protection. The *Smith* approach, together with the refinements outlined in *Shober*, provides a manageable solution to the problem of providing immunity for defense witnesses and appropriately takes account of countervailing state interests. Thus, this Note concludes that other courts should adopt the *Smith-Shober* approach when faced with a prosecutor's denial of an application for defense witness immunity.

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