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Comments

CURRENT CONTROVERSIES CONCERNING WITNESS IMMUNITY IN THE FEDERAL COURTS

I. INTRODUCTION

Despite the fifth amendment privilege against self-incrimination,¹ an individual may be compelled to testify when provided with immunity from the use in any subsequent prosecution of the compelled testimony or its fruits.² Grants of immunity may result from the operation of a statute³ or from agreements between the prosecutor and the prospective witness.⁴ The ability of the government to compel

1. See U.S. CONST. amend. V. The fifth amendment provides in pertinent part: "No person shall be . . . compelled in a criminal case to be a witness against himself" *Id.* For an analysis of the fifth amendment privilege against self-incrimination, see 8 J. WIGMORE, EVIDENCE §§ 2250-2284 (J. McNaughton rev. 1961).

2. See *Kastigar v. United States*, 406 U.S. 441 (1972). Title II of the Organized Crime Control Act of 1970 authorizes district courts to compel the testimony of witnesses who claim the fifth amendment privilege against self-incrimination. 18 U.S.C. §§ 6001-6005 (1976). Title II prohibits use of compelled testimony in any subsequent prosecution of the witness. *Id.* § 6002. According to *Kastigar*, this prohibition gives rise to an affirmative duty on the part of the government to prove that evidence used in a subsequent prosecution of the witness is derived from completely independent sources. 406 U.S. at 460. For a discussion of *Kastigar* and the Supreme Court's position prior to that decision, see notes 42-51 *infra*.

3. See 18 U.S.C. §§ 6001-6005 (1976). For the text of § 6002, the general immunity provision, see note 44 *infra*. Title II superseded over fifty separate federal immunity statutes. See *Kastigar v. United States*, 406 U.S. 441, 447 (1972). The constitutionality of Title II was upheld in *Kastigar*. See *id.* at 453. Through immunity statutes, the state and federal legislatures accommodate the government's need for information with the individual's privilege against compelled self-incrimination. See *id.* at 443-47; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571-74 (1963).

4. See *United States v. Quatermain*, 613 F.2d 38 (3d Cir.), *cert. denied*, 100 S. Ct. 2946 (1980). The dissent in *Quatermain* characterizes the use of informal immunity agreements, also known as "letter" immunity and "hip-pocket" immunity, as widespread. See *id.* at 45 (Aldisert, J., dissenting). Prosecutorial grants of informal immunity are a product of the broad discretion vested in prosecutors and are more precisely described as agreements not to prosecute. *Id.* For a discussion of informal immunity, see notes 94-111 and accompanying text *infra*. For critical analysis of the breadth of prosecutorial discretion, see Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

incriminating testimony has been recognized almost since the origin of the privilege against self-incrimination⁵ and is seen as necessary to the administration of criminal justice.⁶

This comment will explore current problems in the judicial treatment of cases involving grants of immunity from prosecution, focusing first on the minimum standards of constitutionality in immunity grants,⁷ next on the analysis of a witness's claim of unlawful derivative use,⁸ and finally, on the nature of informally negotiated witness immunity agreements.⁹ The controversy presented by *United States v. Quatermain*¹⁰ will be offered as a basis for discussion of these issues. This comment will also examine an aspect of witness immunity which is currently a subject of controversy in the federal courts of appeals—the right, if any, of a defendant to obtain immunization of defense witnesses who would otherwise refuse to testify.¹¹ The discussion of defense witness immunity will focus on conflicting case law from the United States Courts of Appeals for the Second and Third Circuits.¹²

5. See *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 495 n.43 (1968). Professor Levy observes that while the privilege against self-incrimination was firmly established in England by 1680, "its rationales changed from time to time as its meaning and application expanded." *Id.* In England, an immunity statute was enacted in 1710. See 9 Anne, c. 14, §§ 3-4 (1710), cited in *Kastigar v. United States*, 406 U.S. 441, 445 n.13 (1972). Colonial Pennsylvania and New York enacted immunity statutes in the 18th century. See *Kastigar v. United States*, 406 U.S.

441, 445 n.13 (1972).

6. See *Kastigar v. United States*, 406 U.S. 441 (1972). The *Kastigar* Court maintained that the immunity statutes

seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.

The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.

Id. at 446.

Note that the accused's right to confront witnesses against him implies a general government power of compulsory process. *Id.* at 443. The fifth amendment is seen as an exception to that power. *Id.* at 444.

7. See notes 13-55 and accompanying text *infra*.

8. See notes 56-93 and accompanying text *infra*.

9. See notes 94-113 and accompanying text *infra*.

10. 613 F.2d 38 (3d Cir.), *cert. denied*, 100 S. Ct. 2946 (1980).

11. See notes 114-63 *infra*.

12. See, e.g., *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980) (rejecting the existence of a defendant's constitutional right to immunization of defense witnesses); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) (recognizing constitutional bases for judicial immunization of defense witnesses). *Turkish* and *Herman* are discussed in Part IV of this comment.

II. BACKGROUND OF WITNESS IMMUNITY LAW

The fifth amendment privilege against compulsory self-incrimination¹³ is an exception to the general rule that the government can compel testimony.¹⁴ Where the testimony sought could not possibly be the basis of, or an aid to, a subsequent prosecution of the witness, the privilege will not sanction a witness's silence¹⁵—that is, when the possibility of incrimination is taken away, the privilege ceases to apply.¹⁶ The gravamen of the constitutional privilege against self-incrimination is that the government may not use compulsion to elicit self-incriminating statements,¹⁷ and that the government may not use compelled, self-incriminating statements in a criminal case.¹⁸ By focusing on this sec-

13. See U.S. CONST. amend. V. See note 1 *supra*.

14. See *United States v. Burr*, 25 F. Cas. 38 (1807) (No. 14,693). The Court in *Burr* observed: "It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice." *Id.* at 39. For a discussion of the history of the basic duty of the citizenry to testify in the courts, see *Kastigar v. United States*, 406 U.S. 441, 443-47 (1972). For the history of the privilege against self-incrimination, see L. LEVY, *supra* note 5. See generally Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103.

15. See *Hale v. Henkel*, 201 U.S. 43 (1906). The *Hale* Court observed that the "interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge." *Id.* at 67. The witness asserting his fifth amendment privilege must make some showing of the propriety of the assertion. *In re Grand Jury Empanelled*, Feb. 14, 1978, 603 F.2d 469 (3d Cir. 1979) (witness found obligated to comply with subpoena duces tecum absent some showing that production of documents or acknowledgment of their possession would be an incriminating admission). Where a witness has been immunized or otherwise found not entitled to assert the privilege against self-incrimination, continued refusal to testify will result in civil and/or criminal contempt sanctions. *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976). See also *Piccirillo v. New York*, 400 U.S. 548 (1971) (contempt sanction for refusal to testify is proper when witness is immune but improper when immunity is constitutionally inadequate).

16. See *Hale v. Henkel*, 201 U.S. 43 (1906). Note that while the fifth amendment protects only compulsory self-incrimination, the first amendment may otherwise support a witness's silence. *Watkins v. United States*, 354 U.S. 178 (1957) (compulsion of testimony revealing acts or associations which expose witness to public scorn unconstitutionally chills witness's first amendment rights).

17. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (object of privilege against self-incrimination is to insure that an individual acting as a witness will not be compelled to incriminate himself). See also *Fisher v. United States*, 425 U.S. 391 (1976) (fifth amendment prohibits physical or moral compulsion by the government); *Piccirillo v. New York*, 400 U.S. 548 (1971) (fifth amendment prohibits not prosecution or conviction, but compulsion).

18. See *Brown v. Walker*, 161 U.S. 591 (1896). The object of the provision against self-incrimination is to protect the witness against prosecution. *Id.* at 595. The privilege against self-incrimination is not a right to absolute silence; it must be balanced against societal interest in the administration of criminal justice. *Id.* at 596.

ond, more functional aspect¹⁹—that the privilege protects a witness from uses of the statement—courts have found a basis for upholding immunity statutes.²⁰ The United States Supreme Court has noted that the constitutionality of an immunity statute is a function of the scope of protection provided to the witness by the statute.²¹

Generally, immunity statutes have provided either transactional,²² mere use, or derivative use immunity.²³ Transactional immunity is

19. See *Brown v. Walker*, 161 U.S. 591 (1896). The *Brown* Court viewed the self-incrimination clause as designed to "effect a practical and beneficent purpose." *Id.* at 596. But see *United States v. Burr*, 25 F. Cas. 38 (1807) (No. 14,693) (courts can never compel a witness to disclose a fact tending to incriminate him). Note that Justice Marshall's broad reading of the privilege against self-incrimination in *Burr* followed the prosecutor's observation that "[t]he doctrine is most pernicious and contrary to the public good." *Id.* at 39.

20. See *Brown v. Walker*, 161 U.S. 591 (1896). *Brown* was the first case to hold an immunity statute constitutional. *Id.* at 610. The statute in question afforded absolute immunity from prosecution relating to any transaction, matter, or occurrence about which the witness testified. See Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. The Act of 1893 was passed by Congress in order to meet the requisites for constitutionality announced by the Supreme Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See *Hale v. Henkel*, 201 U.S. 43 (1906). The *Counselman* Court held that immunity statutes used to compel testimony must provide absolute immunity against future prosecution in order to withstand a constitutional challenge. 142 U.S. at 586.

21. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892); note 20 *supra*. The Court stated: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." 142 U.S. at 585. The Court also maintained: "Legislation cannot detract from the privilege afforded by the Constitution . . . a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso." *Id.* at 564-65. More recently, the Court clarified the constitutional standard. See *Kastigar v. United States*, 406 U.S. 441 (1972). The *Kastigar* Court stated that "a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege unless the scope of the grant of immunity is coextensive with the scope of the privilege." *Id.* at 450.

Where an immunity statute does not require that the witness claim the constitutional privilege before receiving immunity, the protection of statutory immunity has been held to be automatic. See *United States v. Monia*, 317 U.S. 424 (1943). The general federal immunity statute currently in force has not been held to confer automatic immunity, and the witness's extant or prospective refusal to testify is essential. See 18 U.S.C. § 6002 (1976). For a discussion of the current general federal immunity statute, see notes 42-44 and accompanying text *infra*. Though the witness's refusal to testify is significant under § 6002, a witness who testifies against interest without immunity or with inadequate immunity will not be presumed to have waived his constitutional privilege. See *United States v. Moss*, 562 F.2d 155 (2d Cir. 1977), *cert. denied*, 425 U.S. 914 (1978), citing *Johnson v. Zerbst*, 304 U.S. 458 (1938). The privilege against self-incrimination can be intelligently, knowingly, and voluntarily waived. *In re Investigation Before April 1975 Grand Jury*, 403 F. Supp. 1176 (D.D.C. 1975), *vacated on other grounds*, 531 F.2d 600 (D.C. Cir. 1976).

22. See Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. The Act provides that "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." *Id.*

23. See 18 U.S.C. § 6002 (1976). For the relevant text of § 6002, see note 44 *infra*. Note that mere, or simple, use immunity differs from derivative use

broad; it prohibits a subsequent prosecution of the immune witness which is based upon a transaction, matter, or occurrence about which he testified or produced evidence.²⁴ Mere use and derivative use immunity are less comprehensive; they protect the immune witness from use of his compelled testimony as evidence in a subsequent prosecution.²⁵ Transactional immunity prevents prosecution; derivative and mere use immunity prevent use of the testimony.²⁶

At the time of the Supreme Court's decision in *Counselman v. Hitchcock*,²⁷ it was generally accepted that transactional immunity was the constitutional minimum.²⁸ Only transactional immunity was con-

immunity in that mere use immunity prohibits only the direct introduction of the witness's testimony in evidence against him in a subsequent prosecution. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892). For a recent case involving mere use immunity, see *United States v. Dornau*, 491 F.2d 473 (2d Cir. 1974) (a statute providing mere use immunity cannot be used to compel testimony but may serve as the basis for an agreement to testify).

24. See *Brown v. Walker*, 161 U.S. 591 (1896). The *Brown* Court stated: It is not that he shall not be prosecuted for or on account of any crime concerning which he may testify, . . . but the immunity extends to any transaction, matter or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution be had.

Id. at 608 (emphasis in original).

25. See *Kastigar v. United States*, 406 U.S. 441 (1972). Derivative use immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* at 453 (emphasis in original). For a discussion of judicial constructions of derivative use, see notes 52-55 and accompanying text *infra*. A witness possessed of derivative use immunity is subject to subsequent prosecution relating to the contents of his testimony if the government shows that the subsequent prosecution is in no way a result of the government's use of his testimony. See *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

Mere use immunity prevents direct use of the immunized testimony but does not protect the witness from "future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Ullmann v. United States*, 350 U.S. 422, 437 (1956). Mere use immunity is constitutionally inadequate to compel testimony. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

26. See notes 24-25 and accompanying text *supra*. Transactional immunity has been found to presuppose derivative use immunity. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (state transactional immunity makes derivative use of compelled testimony by the federal government a violation of the witness's privilege against self-incrimination). Note that derivative use immunity tends, in practice, to result in transactional immunity. This is because the government's heavy burden in a subsequent prosecution to disprove derivative use of the immunized testimony frequently functions to protect the witness from prosecution relating to any matter about which he testifies. For a discussion of the government's burden to disprove derivative use, see notes 48-49 and accompanying text *infra*.

27. 142 U.S. 547 (1892).

28. See Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155. The first federal immunity statute provided broad transactional immunity. See *id.*; *cf.* Immunity Act of 1868, ch. 13, § 1, 15 Stat. 37 (mere use immunity statute).

sidered broad enough to encompass the constitutional privilege against self-incrimination.²⁹ In *Counselman*, a unanimous Court struck down a federal statute which provided mere use immunity,³⁰ largely because it did not prohibit derivative use,³¹ but the Court did observe elsewhere in its opinion that only transactional immunity could override a witness's assertion of the fifth amendment privilege against self-incrimination.³² Four years later, in *Brown v. Walker*, a divided Court upheld the constitutionality of a federal statute which provided that self-incriminating testimony could be compelled under a grant of transactional immunity.³³

A spate of confusion followed *Brown*, beginning with *Murphy v. Waterfront Commission*³⁴ and concluding with *Kastigar v. United*

29. See *State v. Nowell*, 58 N.H. 314 (1878). The *Nowell* court stated: The legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent.

Id. at 315.

30. See 142 U.S. at 586. *Counselman* was called to testify before the grand jury and asserted his privilege against self-incrimination despite the protection of statutory use immunity and was found in contempt of court. *Id.* at 552. It was the government's position that the privilege could be invoked only where the witness was on trial himself in a criminal case, and thus could not be invoked before the grand jury. *Id.* at 553-54. The Supreme Court disagreed, stating: "The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. . . . [T]he privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury." *Id.* at 562-63.

31. See *id.* at 564, 586. After finding that *Counselman* had properly invoked his privilege against self-incrimination, the Court found that the statutory use immunity provided was inadequate. *Id.* The Court noted specifically that the statute did not prevent the use of the testimony "which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *Id.* at 586.

32. *Id.* at 586. The *Counselman* Court stated: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* The language in *Counselman* amounts to a requirement that both transactional and derivative use immunity be provided by immunity statutes in order that they comport with the strictures of the fifth amendment. *Id.*

33. 161 U.S. 591 (1896). The petitioner in *Brown* was adjudged in contempt of court after he asserted the privilege against self-incrimination and refused to testify under statutory immunity. *Id.* at 592-93. The Court observed that the fifth amendment prohibition against compelled self-incrimination could be interpreted to prohibit compulsion of testimony or to prohibit prosecution after the compulsion of testimony. *Id.* at 595. Adopting the latter interpretation, the Court upheld the constitutionality of a transactional immunity statute. *Id.* at 596, 610.

34. 378 U.S. 52 (1964).

States.³⁵ In *Murphy*, the Court held that the fifth amendment privilege against self-incrimination prohibits the derivative use of state immunized testimony in a subsequent federal prosecution of the witness.³⁶ Recognizing that a state immunity statute could not bind the federal government,³⁷ the *Murphy* Court construed the fifth amendment itself as an exclusionary rule³⁸ prohibiting federal use of state-immunized testimony.³⁹ The *Murphy* Court's proscription of federal derivative use of state immunized testimony was taken as an indication that the Supreme Court's position had shifted⁴⁰ and that the Court would find constitutional a statute providing derivative use, rather than full transactional immunity.⁴¹

35. 406 U.S. 441 (1972).

36. 378 U.S. at 79. The Court held "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." *Id.* In so holding, the Court found state transactional immunity statutes to imply federal derivative use immunity. *Id.*

37. *See* 378 U.S. at 71. On the same day *Murphy* was decided, the Court held that the fifth amendment privilege against self-incrimination is fully applicable to the states through the fourteenth amendment. *See* *Malloy v. Hogan*, 378 U.S. 1 (1964).

38. 378 U.S. at 79. The Court relied on *Adams v. Maryland*, 347 U.S. 179 (1954). The *Adams* Court had observed that "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Id.* at 181.

39. 378 U.S. at 75. The Court's broad holding was that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.* at 77-78.

40. *See* H.R. REP. NO. 91-1549, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4089. Note that *Murphy* did not explicitly overrule *Counselman* or *Brown*, cases which had indicated that transactional immunity was the constitutional minimum. *See* 378 U.S. at 75. *See also* *Kastigar v. United States*, 406 U.S. at 463 (Douglas, J., dissenting). Justice Douglas opined: "*Murphy* overruled not *Counselman*, but *Feldman v. United States*, 322 U.S. 487 (1944), which held 'that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.'" *See* 406 U.S. at 463, quoting *Murphy v. Waterfront Comm'n*, 387 U.S. at 77.

41. For a discussion of Congress's apparent impression of *Murphy* as establishing derivative use immunity as the constitutional minimum, *see* note 43 *infra*; *see also* *Kastigar v. United States*, 406 U.S. at 458. In discussing *Murphy*, the *Kastigar* Court stated that "the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege." *Id.* Note that Justice Douglas, dissenting in *Kastigar*, described the problem confronting the *Murphy* Court as one of federalism. *See id.* at 464 (Douglas, J., dissenting). According to Justice Douglas, the issue before the *Murphy* Court was simply the constitutionality of restrictions on state or federal prosecutorial power resulting from interjurisdictional effects of immunity grants. *Id.* at 463-64.

Eight years after *Murphy*, in *Kastigar*, the Court upheld the constitutionality of Title II of the Organized Crime Control Act of 1970 (Title II).⁴² Title II is a general federal immunity statute currently used to provide use and derivative use immunity to witnesses in proceedings before or ancillary to grand juries, courts, or agencies of the United States, or before either House of Congress.⁴³ According to section 6002 of Title II, a witness may not assert the constitutional privilege against self-incrimination once the person presiding over the proceeding communicates an order compelling his testimony.⁴⁴ The *Kastigar* Court agreed with the petitioner's argument that in order to supplant the fifth amendment privilege against self-incrimination an immunity

42. 406 U.S. at 462. See 18 U.S.C. §§ 6001-6005 (1976). For the text of § 6002 of Title II, see note 44 *infra*.

43. See 18 U.S.C. § 6002 (1976). The general federal immunity statute previously in effect afforded full transactional immunity. See Compulsory Testimony Act of 1893, 27 Stat. 443, repealed by Organized Crime Control Act of 1970, Title II, 18 U.S.C. §§ 6001-6005 (1976). For a discussion of transactional immunity, as opposed to use and derivative use immunity, see notes 22-26 and accompanying text *supra*. The legislative adoption of use and derivative use immunity in Title II may have been "premised on the views of some attorneys and legal scholars that *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (which set the requirement at absolute immunity) has been overruled by *Murphy v. Waterfront Comm'n*, 378 U.S. 52." H.R. REP. NO. 91-1549, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4089 (other citations omitted). For a discussion of *Murphy*, see notes 34-41 and accompanying text *supra*.

44. See 18 U.S.C. § 6002 (1976). Section 6002 provides in pertinent part: [T]he 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.

Id. In court and grand jury proceedings, immunity orders are issued by the United States district court for the judicial district in which the proceedings take place, upon request of the district's United States attorney. See *id.* § 6003. For the procedures employed in issuing immunity orders in administrative and congressional proceedings, see *id.* §§ 6003-6004. The United States attorney, before seeking a court order, must be satisfied that the testimony is needed in the public interest and that the witness has refused or will refuse to testify. See *id.* § 6003. Title II delegates to the United States attorney authority to balance the public interests. See *id.*; *In re Daley*, 549 F.2d 469 (7th Cir.), cert. denied, 434 U.S. 829 (1977). In addition, a United States attorney seeking an immunity order must obtain the approval of the Attorney General or his designee. See 18 U.S.C. § 6003(b) (1976). Acting or assistant United States attorneys and acting or assistant Attorneys General have authority pursuant to § 6003. See *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977); *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977). The court's duties in granting the immunity order are ministerial; when an order is properly requested, a judge has no discretion to deny it. See *United States v. Hollinger*, 553 F.2d 535 (7th Cir. 1977). Nor can the court provide immunity *sua sponte*. *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978). The court's role is merely to find the facts alleged to substantiate the need to compel the witness's testimony. See *Ryan v. Commissioner*, 568 F.2d at 540. There is no need for an adversary hearing in order for a court to issue an immunity order. *Id.*

statute must be coextensive with the scope of the privilege.⁴⁵ According to the Court, however, transactional immunity affords protection broader than that of the privilege itself,⁴⁶ and the Court held the use and derivative use immunity provided by Title II constitutionally sufficient.⁴⁷

The *Kastigar* Court's satisfaction with the derivative use immunity of Title II is inextricably linked to the heavy burden the Court imposed on the government to prove an independent source of evidence in a subsequent prosecution of an immune witness.⁴⁸ This burden amounts to an affirmative duty on the prosecution to prove a legitimate source of evidence wholly independent of compelled testimony when an immunized witness is subsequently prosecuted.⁴⁹ To date, the Supreme

45. 406 U.S. at 453. The petitioners in *Kastigar* appealed from a contempt order issued when they refused to testify before a federal grand jury despite § 6002 immunity. *Id.* at 442.

46. *Id.* at 453. The *Kastigar* Court stated: "Transactional immunity, which affords 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 privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." *Id.* The Court further noted that the Supreme Court had never held that transactional immunity was constitutional and that derivative use immunity was not. *Id.* at 457. *But cf.* *Piccirillo v. New York*, 400 U.S. 548 (1971) (certiorari dismissed as improvidently granted) (Brennan, J., dissenting). Writing the dissent in *Piccirillo*, Justice Brennan stated: "[T]his Court's decisions in the course of the past century have consistently read the Constitution as requiring no more, but no less, than transactional immunity." *Id.* at 563 (Brennan, J., dissenting). The *Piccirillo* dissenters, in discussing whether mere use immunity was sufficient to compel testimony before a state grand jury, observed that the fifth amendment requires a grant of *absolute* immunity from prosecution for any transaction revealed in compelled testimony. *Id.* at 562 (Brennan, J., dissenting). Citing *Murphy*, Justice Brennan noted that transactional immunity presupposes use immunity. *Id.* at 562 n.6 (Brennan, J., dissenting). The *Piccirillo* dissenters also maintained that immunity "which protects the individual only against the actual use of his compelled testimony and its fruits, satisfies neither the language of the Constitution itself nor the values, purposes, and policies that the privilege was historically designed to serve and that it must serve in a free country." *Id.* at 563 (Brennan, J., dissenting).

47. 406 U.S. at 453. The *Kastigar* Court ruled "that such 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." *Id.*

48. *Id.* at 460-61. The *Kastigar* Court did not elaborate on the meaning of "heavy burden." *Id.* The prosecution is charged with proving that "all" of its evidence is derived from "legitimate independent sources." *Id.* at 461-62. The Court elsewhere in its opinion indicated that compelled testimony can not be used to commence an investigation of the witness, or to focus an investigation on the witness. *Id.* at 460. Since *Kastigar*, the government's heavy burden has been judged according to the "beyond a reasonable doubt" standard. *See United States v. Henderson*, 406 F. Supp. 417 (D. Del. 1975). The government's burden has also been judged according to the "preponderance of the evidence" standard. *See United States v. Seiffert*, 501 F.2d 974 (5th Cir. 1974).

49. 406 U.S. at 460. The Court's interpretation of § 6002 as implying this heavy burden draws support from *Murphy*. *See* 378 U.S. at 79 n.18. The *Murphy* Court stated: "Once a defendant demonstrates that he has testified,

Court has not departed from its position in *Kastigar*;⁵⁰ currently, derivative use immunity is the minimal protection necessary to constitutionally compel testimony.⁵¹

In the lower courts, derivative use is often described as the direct or indirect use of the fruits of compelled testimony.⁵² Even non-evidentiary⁵³ derivative use has generally been found to be proscribed by section 6002.⁵⁴ Thus, where information revealed in compelled testi-

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.*

The *Kastigar* Court analogized the relatively lighter burden imposed on the government when the use of an allegedly coerced confession, rather than compelled testimony, is claimed to violate an individual's privilege against self-incrimination. See 406 U.S. at 461. In the former instance, a voluntariness hearing precedes, and can obviate, the government's need to prove a wholly independent source. See *id.* at 462, citing *Jackson v. Denno*, 378 U.S. 368 (1964) (due process demands a hearing on the issue of voluntariness when a defendant objects to the admission in evidence of a confession). Where a defendant asserts that improper use of his compelled testimony has been made, he need only show that he testified under a grant of immunity, and the government must prove a wholly independent source for all its evidence. See 406 U.S. at 461-62. Voluntariness is not relevant where the alleged use of compelled testimony is at issue. *Id.*

50. See *United States v. Apfelbaum*, 445 U.S. 115 (1980) (in a prosecution for perjury, truthful portions of immunized testimony, as well as false portions, are admissible against the witness; *Kastigar* upheld in dictum).

51. See 406 U.S. at 462. Note that while mere use immunity cannot be used to compel testimony, it may serve as the basis for an agreement to testify. *United States v. Dornau*, 491 F.2d 473 (2d Cir. 1974).

52. See, e.g., *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973) (derivative use immunity prohibits use of compelled testimony and its fruits in any connection with a criminal prosecution of the witness); *In re Korman*, 449 F.2d 32 (7th Cir.), *rev'd on other grounds*, 406 U.S. 952 (1972) (Title II requires suppression of compelled testimony and its fruits in criminal proceedings).

53. Non-evidentiary use is use which does not directly or indirectly produce evidence. See Sugar, *Witness Immunity Act*, 14 AM. CRIM. L. REV. 275, 285 (1976). It has been observed that "[s]uch use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).

54. See, e.g., *United States v. Anzalone*, 555 F.2d 317 (2d Cir. 1977) (where the same grand jury that heard a witness's immunized testimony subsequently indicts the witness, the immunized testimony must be deemed to have been used, despite a lapse in time between the testimony and the indictment); *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976) (testimony of witness against whom defendant previously testified under a grant of immunity may be derivative use of defendant's immunized testimony; witness's subjective motivation to testify is relevant on the issue of derivative use); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973) (where prosecutor accidentally read transcripts of defendant's immunized testimony prior to indictment of defendant, impermissible use was made of the testimony despite the fact that such use did not result in the presentation of any specific evidence at trial); *United States v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974) (trial prosecutor's exposure to defendant's im-

mony inspires a prosecutor to begin or continue prosecution, or where it motivates an individual to testify against an immune witness, courts have found an impermissible derivative use.⁵⁵

III. UNITED STATES V. QUATERMAIN—A CASE IN POINT

Illustrative of some of the more troublesome problems encountered in witness immunity cases is *United States v. Quatermain*.⁵⁶ In 1977, the defendant Quatermain testified under a grant of immunity in aid of a federal prosecution of one Fairorth for the illegal manufacture of methamphetamine.⁵⁷ Fairorth was convicted and, while on bond pending appeal, became a government informant against Quatermain.⁵⁸ Information supplied to the government by Fairorth led to the indictment of Quatermain for the illegal manufacture of a silencer.⁵⁹ Quater-

munized testimony before trial creates an almost irrebuttable presumption of some use). See generally Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171 (1972); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 181 (1972).

55. See cases cited in note 54 *supra*. Note that because questions of non-evidentiary use call into issue the subjective reaction of the prosecutor to the testimony, the government's already heavy, affirmative burden to disprove derivative use is almost impossible to sustain. See *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976); *United States v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974).

56. 613 F.2d 38 (3d Cir.), *cert. denied*, 100 S. Ct. 2946 (1980).

57. *Id.* at 39. Quatermain agreed to assist the government in its investigation of Fairorth and received an informal immunity agreement. *Id.* The district court treated the informal immunity grant as derivative-use immunity largely because Quatermain accepted the immunity without the advice of counsel and did not appear to have knowingly and intelligently waived his constitutional privilege against self-incrimination. 467 F. Supp. 782, 788 (E.D. Pa. 1979). The Third Circuit assumed, without deciding, the correctness of requiring minimum constitutional immunity in an informal immunity agreement. 613 F.2d at 41. For a discussion of the applicability of § 6002 to informal immunity agreements, see notes 94-113 and accompanying text *infra*.

58. 613 F.2d at 39.

59. *Id.* In the course of his conduct as an informant, Fairorth was supplied with government funds to buy materials needed to make a silencer; Fairorth then sold them to Quatermain. *Id.* The government conceded that Quatermain's testimony motivated Fairorth's activities as an informant, but claimed that Quatermain was only immune from prosecution for the manufacture of methamphetamine. *Id.* at 40. Quatermain had, by a letter agreement, received "immunity from prosecution" for his involvement with Fairorth "relating to the manufacture of methamphetamine." *Id.* at 39, quoting the United States attorney's letter to Quatermain. For the text of this letter, see 613 F.2d at 44 n.1 (Aldisert, J., dissenting). The government characterized the immunity given Quatermain as an amalgam of transactional and derivative use immunity. *Id.* at 40. The letter itself specifies neither transactional nor derivative-use immunity. 467 F. Supp. 782, 789 (E.D. Pa. 1979). In its memorandum of law, and at oral argument, the government described the immunity as derivative-use. *Id.* But the government at all times insisted that Quatermain's immunity was limited to immunity from prosecution for the manufacture of methamphetamine. *Id.* The scope of the immunity granted to Quatermain was found by the district court to be derivative-use immunity. See *id.* at 788. The Third Circuit found that Quatermain possessed minimal constitu-

main claimed that because his own testimony against Fairorth motivated Fairorth to inform against Quatermain, unlawful derivative use was made of his immunized testimony.⁶⁰ The Third Circuit's opinion in *Quatermain* touches upon three problematic areas of witness immunity law: 1) minimal constitutional immunity; 2) the analysis of a witness's claim of unlawful derivative use; and 3) the nature of informal immunity.⁶¹

A. Minimal Constitutional Immunity

The Third Circuit's opinion in *Quatermain* appears to rely on *Kastigar* as authority for the proposition that derivative use immunity may exceed the minimum immunity required by the constitutional privilege against self-incrimination.⁶² It is suggested, however, that an examination of the language of *Kastigar* and the holding in *Murphy*

tional immunity. 613 F.2d at 41. It is submitted that minimal constitutional immunity is derivative use immunity. See notes 69-73 and accompanying text *infra*.

60. 613 F.2d at 40. Quatermain filed a motion to dismiss the indictment, which the lower court treated as a motion to exclude Fairorth's testimony and evidence derived therefrom. *Id.* The motion to exclude Fairorth's testimony and its fruits was sustained. *Id.* On the government's admission that all the evidence presented to the grand jury to secure the indictment of Quatermain was linked to Fairorth, the lower court dismissed the indictment. 467 F. Supp. 782, 790 (E.D. Pa. 1979). For a discussion of cases dealing with motivation as derivative use, see notes 54-55 and accompanying text *supra*. The United States Court of Appeals for the Third Circuit reversed the district court's exclusion of Fairorth's testimony. 613 F.2d at 43.

61. Note that *Quatermain* has simply been chosen as a case in point; it is presented here to function as a hypothetical case or a vehicle for discussion. The analysis that commences here is not aimed at the *Quatermain* case as a whole. The court's theories and reasoning relating to: 1) minimal constitutional immunity; 2) the analysis of claimed unlawful derivative use, and 3) the nature of informal immunity will be discussed separately, and no attempt will be made to reconcile any inconsistencies in the *Quatermain* court's position on these three issues.

62. 613 F.2d at 41. At the outset, it is submitted that the Third Circuit's analysis in *Quatermain* is seriously flawed. The court did not decide whether the testimony at issue was compelled or voluntary. *Id.* Nor did the court decide the precise source of the defendant's immunity. While the court sporadically referred to the agreement not to prosecute, its terms were not discussed. *Id.* at 41, 43. Cases construing § 6002 were relied on throughout the opinion. See *id.* at 41-43. The court assumed, without deciding, that the agreement conferred the minimum immunity required by the Constitution. *Id.* at 41. The *Quatermain* court's suggestion that such immunity may be less than derivative-use immunity can be found in the following language:

We are not presented in this case with the question whether a grant of use and derivative-use immunity can afford a witness protection against self-incrimination that is broader than the protection provided by the constitutional privilege because here the district court construed the parties' agreement to confer the minimum immunity required by the Constitution.

Id. It is submitted that implicit in this language is the proposition that derivative use immunity is more than what the Constitution requires.

disproves the notion that anything less than derivative use immunity is constitutionally sufficient.

The Court in *Kastigar* held that immunity from use and derivative use is "coextensive" with the scope of the fifth amendment privilege against self-incrimination.⁶³ It is submitted that the *Kastigar* Court's holding fixes derivative use immunity as the constitutional minimum because "coextensive" means "equal."⁶⁴ Furthermore, *Kastigar* represents a conceptual departure from a long line of cases requiring a grant of absolute, or transactional, immunity in order to compel self-incriminating testimony.⁶⁵ Because the *Kastigar* Court reduced the minimum constitutional immunity standards, most of the Court's reasoning compares the newly adopted standard to the broader, transactional immunity previously required.⁶⁶ Thus, the Court's finding that

63. See 406 U.S. at 453, 462.

64. See THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY VOL. I, at 589 (1971). "Coextensive" is defined as "[e]xtending over the same space or time; of equal extension; coinciding in limits . . . (b) Logic. Having the same logical extension . . . 'Reciprocating, Convertible or Coextensive Concepts are those which have precisely the same Extension.'" *Id.* (emphasis added) (citation omitted).

65. See Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633 (1979). Mykkeltvedt notes that the dissenting Justices in *Kastigar* and

constitutional scholars such as Professors David Fellman and Leonard Levy, among others, have assailed Justice Powell's opinion for the Court in *Kastigar* as a sharp departure from a well-established body of case law holding that nothing less than transactional immunity suffices to supplant the Fifth Amendment's prohibition against compelled testimony.

Id. at 634.

66. See 406 U.S. at 449-58. Justice Powell, writing for the majority in *Kastigar*, noted that the Court had not previously directly addressed the issue of the constitutional sufficiency of derivative use immunity, largely because prior statutes had provided comprehensive transactional immunity or constitutionally inadequate mere use immunity. *Id.* at 458. The *Kastigar* Court found transactional immunity to be broader than the Constitution requires. *Id.* at 453. See Mykkeltvedt, *supra* note 65, at 650. Mykkeltvedt has commented:

Powell's opinion [in *Kastigar*] has been savagely attacked as unmitigated sophistry by critics within and outside the Court. Certainly his conclusion that the decision was at once consistent with the conceptual bases of the *Counselman-Brown* and *Murphy* rules appears to rest on rather specious logic. Powell, however, correctly observed that in *Counselman* and *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the Court had invalidated limited use immunity statutes on the ground that they were not coextensive with the fifth amendment right. In *Brown* and *Ullman v. United States*, 350 U.S. 422 (1956) the Court had upheld transactional immunity statutes, finding that they were sufficient to displace the fifth amendment guarantee against compulsory self-incrimination. In each of these leading immunity cases, the Court's opinion contained dicta which suggested the view that transactional immunity was essential to justify compelled testimony Thus while the "conceptual basis" of the leading

derivative use immunity is coextensive with the privilege is somewhat summarily stated,⁶⁷ supported fundamentally by the observation that derivative use immunity leaves a witness in substantially the same position as he would have occupied had he claimed the privilege.⁶⁸ It is suggested that implicit in the language and reasoning of the *Kastigar* Court is the notion that derivative-use immunity affords precisely the same protection as the fifth amendment privilege against self-incrimination and provides the minimum constitutional standard for immunity statutes.⁶⁹

The above-stated conclusion is buttressed by the Court's decision in *Murphy*.⁷⁰ In that case, the fifth amendment itself was found to function as an exclusionary rule.⁷¹ The *Murphy* Court held that the fifth amendment prohibits derivative use of state immunized testimony in subsequent federal prosecutions.⁷² An explicit recognition that the fifth amendment's demand is satisfied by derivative use immunity, arguably lacking in *Kastigar*, is offered in *Murphy*.⁷³

federal immunity cases appeared to be that transactional immunity was essential to displace the guarantee against compulsory self-incrimination, the Court had never specifically issued a ruling to this effect.

Id.

67. See 406 U.S. at 453. Because immunity from derivative use is "coextensive" with the privilege, Title II was held to be constitutional. *Id.* But just why the fifth amendment's scope could be identified with derivative use immunity is not precisely articulated by the *Kastigar* Court. See *id.*

68. See *id.* at 462. The Court concluded its opinion with the observation that Title II "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." *Id.* This language is not illuminating of the Court's view of the nature and scope of the fifth amendment privilege. It says no more than that the operation of either derivative use immunity or the fifth amendment privilege produces the same result. See *id.*

69. See notes 65-68 and accompanying text *supra*.

70. For a discussion of *Murphy*, see notes 36-41 and accompanying text *supra*.

71. See 378 U.S. at 79. The *Murphy* Court held "the constitutional rule to be" that the federal government could not make use of state-immunized testimony. *Id.* (emphasis added). Note that the dissenting opinions in *Murphy* preferred a "supervisory rule of exclusion" to a constitutional rule. *Id.* at 81 (Harlan, J., dissenting). See also *id.* at 92-93 (White, J., dissenting).

72. See *id.* at 79.

73. See *id.* The constitutional exclusionary rule recognized in *Murphy* finds support in *Adams v. Maryland*, 347 U.S. 179 (1954). In *Adams*, an individual who had been summoned to testify before a United States Senate committee was found by a lower court to be susceptible to prosecution because he had testified without immunity and without invoking the fifth amendment privilege. *Id.* at 180. The Supreme Court found sufficient compulsion in the summons and stated that "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Id.* at 181.

B. *The Kastigar Analysis and the Identification of Derivative Use*

Whenever an immunized witness is subsequently prosecuted for conduct related to his immunized testimony,⁷⁴ the government bears the heavy burden of proving a wholly independent source for its evidence.⁷⁵ Under *Kastigar*, once the witness makes a showing of a nexus between his immunized testimony and the subject matter of the subsequent prosecution,⁷⁶ the government must come forward with affirmative proof that there is no link between that testimony and the subsequent prosecution.⁷⁷ According to the *Kastigar* Court, the constitutional adequacy of derivative use immunity depends on the complete proscription of any use of the compelled testimony;⁷⁸ an individual could not be constitutionally compelled to testify if his testimony were to be used to incriminate him.⁷⁹

The scope of the fifth amendment privilege, and its relation to future criminality, are not controlling in a *Kastigar* analysis.⁸⁰ Controversies concerning the fifth amendment privilege against self-incrimination involve either an individual who has been held in contempt for refusal to testify, or an individual whose immune testimony is alleged to have been used against him.⁸¹ It is in the former situation that the

74. The subjective motivation of a witness against whom the defendant previously testified may provide a nexus between immunized testimony and subsequent prosecution. See *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976). In *Quatermain*, then, Fairorth's testimony may have provided a colorable link between Quatermain's immunized testimony and the subsequent prosecution.

75. See *Kastigar v. United States*, 406 U.S. at 460. For a discussion of *Kastigar*, see notes 42-51 and accompanying text *supra*.

76. See 406 U.S. at 460. Note that where a defendant's allegations of derivative use have no foundation in law and fact, a motion to exclude testimony or to dismiss the indictment will be dismissed by the district court. See *FED. R. CRIM. P.* 47 (motions must have bases in fact and law).

77. See 406 U.S. at 460. For a discussion of the government's burden of disproving derivative use, see notes 48-55 *supra*.

78. See *United States v. Moss*, 562 F.2d 155 (2d Cir. 1977), *cert. denied*, 425 U.S. 914 (1978). The *Moss* court stated: "The constitutional validity of use immunity as distinguished from transactional immunity depends upon a fair adherence to the integrity of the process." 562 F.2d at 164. Note that the *Kastigar* Court justified its finding that derivative use immunity is constitutional by broadly proscribing any subsequent incriminating use of immunized testimony. 406 U.S. at 460. For a discussion of the notion of derivative use immunity as the minimum protection sufficient to displace the fifth amendment privilege against self-incrimination, see notes 72-73 and accompanying text *supra*.

79. See 406 U.S. at 453. A grant of immunity must afford protection coterminous with the fifth amendment privilege against self-incrimination. *Id.*

80. See notes 81-85 and accompanying text *infra*. It is submitted that *Kastigar* is authority for the proposition that whenever a previously immunized witness is prosecuted for a matter relating to his immunized testimony, the court's analysis must focus on the existence, if any, of derivative use.

81. See *Piccirillo v. New York*, 400 U.S. 548 (1971). Where a witness refuses to testify despite a grant of immunity, the issue before the court is whether the statutory grant of immunity is coextensive with the scope of the

scope of the privilege controls—that is, any refusal to testify is justifiable only by a substantial risk of self-incrimination.⁸² In the latter situation, however, where an individual claims that impermissible derivative use of his testimony has been made, the court's inquiry should focus on derivative use.⁸³ Whether or not the individual could have originally

fifth amendment privilege against self-incrimination. *Id.* at 556 (Brennan, J., dissenting). Where an individual given immunity is objecting to a subsequent prosecution, the issue before the court is whether the prosecution, given the substance of the compelled testimony, has violated the immunity statute. *Id.* at 557 (Brennan, J., dissenting). This two faceted approach to fifth amendment self-incrimination analysis can be compared to the dual aspects of the fifth amendment privilege identified in *Brown v. Walker*, 161 U.S. 591 (1896). The *Brown* Court stated:

The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, . . . the practical result would be, that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision is to secure the witness against a criminal prosecution, . . . a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.

Id. at 595 (citations omitted). It is submitted that this reasoning in *Brown* supports the theory that while the constitutionality of an immunity statute is decided by an inquiry into the scope of the fifth amendment privilege, the interposition of a constitutionally competent statute will restrict subsequent inquiry to the terms of the statute.

82. See *United States v. Apfelbaum*, 445 U.S. 115 (1980), citing *Brown v. Walker*, 161 U.S. at 605-06; see also *Smith v. United States*, 337 U.S. 137, 147 (1949). Note that the fifth amendment privilege against self-incrimination is an exception to the basic duty to testify. See text accompanying note 14 *supra*. Generally the privilege cannot be invoked when the risk of incrimination is based on crimes not yet committed. See *Marchetti v. United States*, 390 U.S. 39 (1968). The *Marchetti* Court stated:

The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not mere trifling or imaginary, hazards of incrimination [A]lthough prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true We conclude that it is not mere time to which the law must look, but the substantiality of the risks of incrimination.

Id. at 53-54 (citations omitted).

83. See *Piccirillo v. New York*, 400 U.S. 548 (1971). For a discussion of *Piccirillo*, see notes 46 & 81 *supra*. See also *Kastigar v. United States*, 406 U.S. at 461. The *Kastigar* Court noted:

The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute [§ 6002], which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties.

Id. While the *Kastigar* Court did not explicitly proscribe the application of a scope of the privilege analysis to alleged derivative use controversies, the Court's emphasis on absolute proscription of derivative use cannot be gainsaid. See *id.* at 461-62. Cf. *United States v. Smith*, 206 F.2d 905 (3d Cir. 1953) (defendant prosecuted for tax evasion alleged improper derivative use of his previously

invoked the privilege not to testify is a moot question for, once the government has been permitted to compel testimony, it is submitted that the demands of the Constitution are different.⁸⁴ The Constitution then rules out any incriminating derivative use of the compelled testimony.⁸⁵

It is submitted that central to the controversy in *Quatermain* is the scope of derivative use immunity.⁸⁶ However, the Third Circuit did not discuss the scope of derivative use, but instead focused its analysis in *Quatermain* on the protection afforded an immunized witness by a grant of derivative-use immunity from future prosecution for crimes not yet committed.⁸⁷ The *Quatermain* court appears to require that the defendant show that 1) the subsequent prosecution related to his prior immune testimony, and 2) when immunity was originally granted, his fifth amendment privilege against self-incrimination could have been asserted based on the criminality alleged in the subsequent prosecution.⁸⁸ Because *Quatermain* could not meet the second requirement, the court did not consider the issue of derivative use, holding that *Quatermain's* immunity did not protect him in the subsequent prose-

immunized testimony at an investigatory hearing before the Office of Price Administration). The Third Circuit reasoned in *Smith* that a "witness becomes immune only if he could have properly refused to testify because his answers would tend to incriminate him." *Id.* at 908. The court continued: "We fail to see how any answer could tend to incriminate when the crime presently involved was not committed or perhaps even contemplated when the answer was given." *Id.* But see *Marchetti v. United States*, 390 U.S. 39 (1968) (discussed at note 82 *supra*). The *Marchetti* Court pointed out that where an individual claims that unlawful derivative-use has been made of his immunized testimony, and where the challenged use pertains to a prosecution for a crime which postdates the grant of immunity, "the question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted." *Id.* at 51. But cf. *United States v. Apfelbaum*, 445 U.S. 115 (1980).

84. See note 83 *supra*.

85. See 406 U.S. at 461-62.

86. See 613 F.2d at 41. The district court had found impermissible derivative-use of the immunized testimony, relying on *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976). 467 F. Supp. 782, 788-89 (E.D. Pa. 1979). The Third Circuit did not directly address the issue of derivative use. See 613 F.2d at 41.

87. See 613 F.2d at 41. The *Quatermain* court found the protection of the defendant's immunity to be limited by the scope of the underlying fifth amendment privilege against self-incrimination. *Id.* For purposes of analysis concerning the meaning of derivative use, the *Quatermain* controversy will be assumed to be based on a grant of derivative use immunity. Note, however, that the Third Circuit, in deciding *Quatermain*, did not articulate the source of the defendant's immunity. See *id.* The court appears to have relied solely on cases construing § 6002 despite the fact that the controversy concerned an informal immunity agreement; § 6002, however, was not directly discussed in the court's opinion. See *id.* at 41-43.

88. See 613 F.2d at 41. The court maintained that if "*Quatermain* could not have invoked the privilege when he testified against Fairorth on the ground that Fairorth might testify against him concerning crimes that might be committed in the future, then the immunity granted here does not preclude use of Fairorth's testimony against *Quatermain*." *Id.*

cution.⁸⁹ Since the court did not directly consider the issue of whether there had been derivative use of Quatermain's immunized testimony, the government was permitted to prosecute an immunized witness,⁹⁰ for conduct admittedly connected to his immune testimony,⁹¹ without satisfying the burden imposed by *Kastigar* of proving a wholly independent source of evidence.⁹² The justification for treating derivative use immunity as constitutionally adequate is the heavy burden imposed on the government to disprove derivative use;⁹³ thus, it is suggested that the lessening of the government's burden of proof in *Quatermain* directly undermines the constitutionality of derivative use immunity.

C. The Nature of Informal Immunity

A third problematic issue in the area of witness immunity law evidenced by the *Quatermain* decision is the judicial treatment of informal, or non-statutory, immunity. Section 6002 immunity must be approved by the office of the United States Attorney General and is court ordered.⁹⁴ Quatermain did not have section 6002 immunity; his immunity took the form of a letter from the United States Attorney's office, the language of which was essentially a promise not to prosecute.⁹⁵ The *Quatermain* court, to some extent, analyzed the immunity controversy according to section 6002⁹⁶—an approach supported by prior cases.⁹⁷

89. *See id.*

90. *See id.* at 43. The Third Circuit reversed the lower court's pretrial order excluding Fairorth's testimony and indicated that the government should revive the indictment against Quatermain. *Id.*

91. *See id.* at 39. The government conceded that Quatermain's immunized testimony served to motivate Fairorth's testimony. *Id.* For a discussion of motivation as non-evidentiary derivative use, *see* notes 54-55 and accompanying text *supra*.

92. *See* 406 U.S. at 461.

93. *See id.* at 461-62.

94. *See* 18 U.S.C. § 6003 (1976). The United States attorney requests the court to issue an order granting § 6002 immunity. *Id.* For a discussion of the role of the United States attorney and the courts in granting § 6002 immunity, *see* note 44 *supra*.

95. *See* 613 F.2d at 44 (Aldisert, J., dissenting). Judge Aldisert observed: "Stripped to its essence, this case is an odd mix of civil contract and estoppel law thrust into the context of a criminal prosecution. . . . I view the bargain between the government and Quatermain as an agreement not to prosecute, not as one conferring immunity." *Id.* (emphasis in original) (footnote omitted). Cf. *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979) (informal immunity is an agreement not to prosecute). The *Pellon* court noted that "courts have recognized that a promise not to prosecute, in return for cooperation, and testimony, is not the equivalent of the broad immunity required constitutionally to compel a person to testify over a claim of privilege." *Id.* at 480, *citing* *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

96. 613 F.2d at 39-42. For a discussion of the majority opinion's lack of clarity as to the role of § 6002 in the *Quatermain* controversy, *see* notes 62 & 87 *supra*.

97. *See* *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976), *supra* note 54. The *Kurzer* court found that formal and informal immunity are judged ac-

The dissent in *Quatermain* clearly favored a contractual analysis of informal immunity.⁹⁸ According to the dissent, informal immunity is made possible not by section 6002, but by the broad discretionary power vested in the United States Attorney.⁹⁹ The dissent took the position that informal immunity is essentially an agreement not to prosecute;¹⁰⁰ where the terms of the agreement are ambiguous or where the witness is not represented by counsel, the agreement should be construed strictly against the government.¹⁰¹

It is suggested that informal immunity is fundamentally different from section 6002 immunity and should be treated differently by the courts. Informal immunity is made possible because the United States Attorney has broad discretion in choosing whom to prosecute.¹⁰² Formal immunity is made possible by statutes designed to supplant the fifth amendment privilege against self-incrimination.¹⁰³

ording to § 6002. See 534 F.2d at 515. See also *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979). The *Pellon* court stated that if an informal agreement explicitly promised use immunity, § 6002 analysis would control. *Id.* at 480. The court found that generally "a promise not to prosecute" is not the equivalent of statutory immunity. *Id.* But cf. *United States v. Wright*, 588 F.2d 31 (2d Cir. 1978) (prosecutor's refusal to immunize defense witness is not a violation of due process, absent a showing of prejudice; informal immunity is governed by § 6002). The *Wright* court stated: "Letter immunity [informal immunity] consists of a promise by the particular United States attorney not to prosecute the witness for his participation in the transaction about which he testifies. The government now contends that this promise would have been enforceable against United States attorneys in other districts as well." *Id.* at 36 n.5. In *Wright*, the contractual aspects of informal immunity were emphasized. *Id.*

98. See 613 F.2d at 44 (Aldisert, J., dissenting).

99. See *id.* at 45 (Aldisert, J., dissenting).

100. See *id.* at 44 (Aldisert, J., dissenting).

101. See *id.* at 47 (Aldisert, J., dissenting); cf. *Santobello v. New York*, 404 U.S. 257 (1971) (prosecutor may be held to specific performance of a plea bargain agreement). In *Santobello*, the defendant pled guilty to gambling charges pursuant to a plea bargaining arrangement whereby an assistant district attorney agreed to make no sentencing recommendations to the court. *Id.* at 258. At sentencing, a district attorney newly appointed to the case recommended the maximum sentence. *Id.* The Supreme Court observed that the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Id.* at 260. The Court concluded that the "circumstances will vary, but a constant factor [in the process of criminal justice] is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

102. See 613 F.2d at 45 (Aldisert, J., dissenting). Judge Aldisert noted that the "authority to enter these agreements stems not from a specific federal immunity statute but from the power vested in the United States attorneys giving them extensive discretionary authority to prosecute or not to prosecute a given case." *Id.*

103. See 18 U.S.C. §§ 6001-6005 (1976). For a discussion of Title II, see notes 42-44 and accompanying text *supra*. For a discussion of the constitutionality of § 6002, see *Kastigar v. United States*, 401 U.S. at 459-62. For a discussion of *Kastigar*, see notes 45-49 and accompanying text *supra*. Note that

Informal immunity may be preferable in some instances to formal, statutory immunity because it is more flexible. It can import aspects of transactional immunity;¹⁰⁴ it can condition immunity not only on truthful testimony,¹⁰⁵ but also on the witness's continued willingness to testify.¹⁰⁶ Informal immunity can also apply to out of court testimony, such as informal discussions with the United States Attorney.¹⁰⁷

informal immunity agreements need not supplant the fifth amendment privilege against self-incrimination; the fifth amendment privilege does not apply where testimony is voluntary rather than compelled. For a discussion of informal immunity and compulsion, see note 106 *infra*.

104. See 613 F.2d at 40. In *Quatermain*, the government characterized the immunity as transactional in part, construing the immunity to prohibit derivative use of Quatermain's testimony but only as regards prosecution for transactions, matters, or occurrences relating to the manufacture of methamphetamine. *Id.* Informal immunity agreements may be general or specific. *Id.* at 46-47 (Aldisert, J., dissenting). The courts encourage specificity of terms. See *id.* See also *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979). The *Pellon* court noted that "while one would expect better draftsmanship in important prosecutorial agreements, and more prosecutorial prudence before 'striking a bargain with the devil,' the shortcomings of the prosecutors do not warrant letting the wrongdoers go free." *Id.* at 481.

105. See 18 U.S.C. § 6002 (1976). The statute protects only truthful testimony; its prohibition against derivative use of immunized testimony does not apply in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." *Id.*

106. See 613 F.2d at 44 n.1 (Aldisert, J., dissenting). Note that the informal immunity received by Quatermain required truthful testimony and cooperation "in any court proceeding relating to these matters." *Id.* Informal immunity, viewed as a contract, could conceivably condition immunity on the witness's performance of every condition of the agreement. *But cf.* *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979) (substantive and remedial contract law principles govern the practice of plea bargaining). The *Cooper* court found the "constitutional right to 'fairness' to be wider in scope than that defined by the law of contract." *Id.* at 16-17 (emphasis added). The court further observed that while contract principles apply to plea bargaining, more than contract rights may be necessary to protect defendants in some cases. *Id.* at 17. Note that, on its face, an informal immunity agreement is voluntary; it does not involve compulsion. However, with an adequate showing of compulsion, a defendant can assert his fifth amendment privilege to prevent any use of his testimony, since the fifth amendment itself operates as an exclusionary rule. See *Murphy v. Waterfront Comm'n*, 378 U.S. at 79. The presence or absence of compulsion in informal immunity agreements will be liberally construed. See *Garner v. United States*, 501 F.2d 228 (9th Cir. 1972), *rehearing en banc*, 501 F.2d 236 (9th Cir. 1974) *rev'd*, 424 U.S. 648 (1976) (information in federal income tax returns is compelled for purposes of the Fifth Amendment). See also *Boyd v. United States*, 116 U.S. 16 (1866). The *Boyd* Court noted that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance." *Id.* at 35. *But cf.* *Fisher v. United States*, 425 U.S. 391 (1976). Note that waiver of the fifth amendment privilege must be knowing and intelligent. See note 21 *supra*.

107. It should be noted that § 6002 immunity is limited to grand jury, legislative, and judicial proceedings. 18 U.S.C. § 6002 (1976). See *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978) (defense attorney's proffer of defendant's cooperation is outside the immunity scope; immunity does not extend to information informally given to the United States attorney prior to testimony).

Risks posed by the use of informal immunity are evidenced by the *Quatermain* case.¹⁰⁸ Unlike plea bargain agreements, informal immunity agreements are likely to be negotiated by witnesses without counsel¹⁰⁹ and their language may be ambiguous.¹¹⁰ It is suggested that controversies arising from informal immunity agreements should be analyzed first according to the terms of the agreement.¹¹¹ As was suggested by the *Quatermain* dissent, the terms of the agreement should be construed against the prosecutor, especially where the agreement was negotiated by a witness without counsel.¹¹² In interpreting the agreement, decisional law construing immunity statutes may be of help in defining terms like "derivative use," "transaction," and "immunity."¹¹³

108. Note that the district court found *Quatermain* to have received the equivalent of § 6002 immunity essentially because the informal immunity was inadequate. 467 F. Supp. 782, 788 (E.D. Pa. 1979). The district court was most troubled by the fact that *Quatermain* had been unrepresented by counsel and by the fact that the letter granting immunity was ambiguous on its face. *Id.*

109. See FED. R. CRIM. P. 11(e)(1), (2). Plea bargaining is generally negotiated by counsel, unless a defendant is acting pro se. *Id.* The terms of the plea bargain are discussed in open court and can be rejected by the court. *Id.* 11(e)(4). Under § 6002, however, the duties of the court are ministerial. See note 44 *supra*.

110. See 613 F.2d at 44 n.1 (Aldisert, J., dissenting). The *Quatermain* agreement provided the defendant with "immunity from prosecution for [his] participation and involvement with Zelman A. Fairorth and others relating to the manufacture of methamphetamine." *Id.* This phrase, according to the government, conferred limited transactional and derivative-use immunity. *Id.* at 40. The district court found the phrase to be ambiguous on its face. 467 F. Supp. 782, 788 (E.D. Pa. 1979).

111. See 613 F.2d at 45 (Aldisert, J., dissenting). See also *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979). The defendants in *Pellon*, recipients of informal immunity, were seen by the court as having bargained for and received "a simple agreement not to prosecute certain known violations in return for their cooperation." *Id.* at 480. In refusing to consider the defendants' immunity as controlled by § 6002, the *Pellon* court noted that to do so "would elevate every simple nonprosecution agreement to the level of a full grant of testimonial immunity. Such a conclusion would be unprecedented and untenable." *Id.* at 480-81. See also *Santobello v. New York*, 404 U.S. 257 (1971). For a discussion of *Santobello*, see note 101 *supra*.

112. See 613 F.2d at 46-47 (Aldisert, J., dissenting). The dissent stated: "Especially when, as here, the informant is not represented by counsel, the burden of proving the limitations of the no-prosecution provisions of the agreement should be on the government and ambiguities resolved against it, as they would be against the drafter of any written instrument." *Id.*

113. See *id.* at 44 (Aldisert, J., dissenting). The dissent maintained that "decisions interpreting [§ 6002], e.g., *Kastigar v. United States*, 406 U.S. 441 (1972), while tangentially relevant, are not controlling. Stripped to its essence, this case is an odd mix of civil contract and estoppel law thrust into the context of a criminal prosecution." 613 F.2d at 44 (Aldisert, J., dissenting). (emphasis added). It is suggested that the tangential relevance of § 6002 cases to informal immunity is important because prosecutors are likely to include terms like "derivative use" and "transaction" in informal immunity agreements. It is submitted that use of these terms in informal immunity agreements should be assumed to be in keeping with their common legal meaning as seen in § 6002 cases.

IV. DEFENSE WITNESS IMMUNITY

Currently a subject of controversy in the federal courts of appeals, the concept of defense witness immunity concerns the rights of criminal defendants to demand immunization of those witnesses for the defense who would otherwise find it necessary to assert their fifth amendment privilege against self-incrimination.¹¹⁴ Judicial opinion regarding defendants' constitutional rights to immunization of defense witnesses is unsettled, with the United States Courts of Appeals for the Second and Third Circuits recently emerging as prolific sources of caselaw on the subject.¹¹⁵ In this section, emphasis will be placed on the recent decisions from these two Circuits and critical analysis will attempt a reconciliation of their seemingly conflicting positions.

Claims for defense witness immunity have been generally rejected by almost all the circuits,¹¹⁶ since the United States Court of Appeals for the District of Columbia Circuit observed that judicial intrusion into decisions of witness immunization offends the prosecutorial discretion of the executive branch and violates the principle of separation of powers.¹¹⁷ But congressional enactment of the derivative-use immunity statute,¹¹⁸ subsequently held constitutional in *Kastigar*,¹¹⁹

114. For a general introduction to the concept of defense witness immunity, see Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73 (1974); Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972).

115. See, e.g., *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980); *United States v. Praetorius*, 622 F.2d 1054 (2d Cir. 1980); *Government of the 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). These cases are discussed in detail in the following subsection, entitled "Conflicting Caselaw From the United States Courts of Appeals for the Second and Third Circuits." See notes 126-46 and accompanying text *infra*.

116. See *United States v. Turkish*, 623 F.2d 769, 772 (2d Cir. 1980). The United States Courts of Appeals for the District of Columbia and the Second, Fourth, Sixth, Seventh, and Ninth Circuits generally agree that a defendant has no constitutional right to defense witness immunity. See *id*; *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967). But cf. *Government of the 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) (due process may require court-ordered statutory immunity or judicially fashioned immunity for defense witness). *Smith* and *Herman* are discussed in detail in notes 134-46 and accompanying text *infra*.

117. See *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921-2 (1967). The *Earl* court applied a separation of powers analysis to defendant's claim for defense witness immunity, finding that the power to confer immunity was a legislative power delegated by Congress to the Executive. 361 F.2d at 534. The judiciary was held to be without the inherent authority to immunize defense witnesses. *Id*.

118. See 18 U.S.C. §§ 6001-6005 (1976), discussed in detail in Part I *supra*. While § 6003(a) applies to "any individual who has been or may be called to testify," neither the legislative history nor the statute's language provides for defense witness immunity. See Note, *A Re-Examination of Defense Witness Immunity*, *supra* note 114 at 75 n.8.

119. For a discussion of *Kastigar*, see Part I *supra*, at notes 42-49 and accompanying text. For an analysis of the courts' role in defense witness immunity in light of *Kastigar*, see notes 120 & 121 and accompanying text *infra*.

weakened the claim that the judiciary had no role in defense witness immunization¹²⁰ and heightened interest in the concept of defense witness immunity.¹²¹

The sixth amendment guarantees a criminal defendant the right to "compulsory process for obtaining witnesses in his favor."¹²² Implicit in the due process requirement of the fifth and fourteenth amendments is the right to compel the attendance of witnesses, to offer their testimony and generally to introduce material, exculpatory evidence.¹²³

120. See *United States v. Rocco*, 587 F.2d 144, 147 n.9 (3d Cir. 1978). Prior to *Kastigar* and the enactment of the derivative use immunity statute, judicial conferral of defense witness immunity would have been a serious intrusion into prosecutorial discretion, since full transactional immunity was then the constitutional minimum, and, once judicially immunized, witnesses would have been immune from any subsequent prosecution. See *id.* A grant of use and derivative use immunity does not foreclose subsequent prosecution of the witness, and therefore arguably protects the Executive's prosecutorial autonomy as well as the defendant's interest in presenting exculpatory evidence. See *id.* See also Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953, 963-66 (1967); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978) [hereinafter cited as Note, *The Sixth Amendment*]. But see *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (defense witness immunity is not a constitutional entitlement; enactment of use immunity statute does not make defense witness immunity possible except as authorized by the prosecution).

121. See *United States v. Turkish*, 623 F.2d at 772, 774 n.2 (2d Cir. 1980) (defense witness immunity has been regarded as "plausible" only since passage of the use immunity statute).

122. U.S. CONST. amend. VI. Many courts have read the sixth amendment, standing alone, to impose no specific, affirmative duty on a prosecutor to grant defense witness immunity. See note 128 *infra*. But see *Washington v. Texas*, 388 U.S. 14 (1967). The *Washington* Court held violative of the sixth amendment state laws prohibiting a defendant's accomplices from testifying in his behalf but permitting the prosecution's use of accomplice testimony in its case-in-chief. *Id.* at 23. According to the *Washington* Court, the sixth amendment requires that the state make its subpoena power available to defendants in criminal cases, and also prevents the state from interfering in the defendant's right to present the testimony of a witness. *Id.* at 18-19. Commentators have taken the position that the sixth amendment imposes an obligation on the government to immunize defense witnesses. See Westen, *supra* note 114, at 167-68; Note, *The Sixth Amendment*, *supra* note 120, at 1263. The courts, however, have emphasized due process analysis in decisions on defense witness immunity. See *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). For a discussion of *Turkish*, see notes 126-30 and accompanying text *infra*. For a discussion of *Herman*, see notes 135-42 and accompanying text *infra*.

123. See *Washington v. Texas*, 388 U.S. 14, 19 (1967). For a discussion of *Washington*, see note 122 *supra*. The right to introduce exculpatory evidence is an implied element of due process. 388 U.S. at 19. Note that the sixth amendment has been expressly incorporated into the fourteenth amendment's due process clause. See *id.* at 18-19 (compulsory process); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (confrontation). See also *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (the right to present an effective defense inheres in the due process guarantee of a fair trial); *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) (discussed at notes 143-46 and accompanying text *infra*). The *Smith* court described *Chambers* as a recognition "that the

Whether these constitutional rights entitle a defendant to defense witness immunity is fundamentally a question of due process¹²⁴ and, as such, must be decided in light of the countervailing interests of the public and prosecution.¹²⁵

A. *Conflicting Caselaw from the United States Courts of Appeal for the Second and Third Circuits*

A recent articulation of the position taken on defense witness immunity by the United States Court of Appeals for the Second Circuit is found in *United States v. Turkish*.¹²⁶ The *Turkish* court first rejected the sixth amendment compulsory process clause as a basis for asserting a claim to defense witness immunity;¹²⁷ the court found

essential task of a criminal trial is to search for truth, and that this search is not furthered by rules which turn the trial into a mere 'poker game' to be won by the most skilled tactician." 615 F.2d at 971, quoting *Williams v. Florida*, 399 U.S. 78, 82 (1970).

124. See note 122 *supra*. The courts generally analyze defense witness immunity in terms of due process. *Id.* Some commentators have favored strict sixth amendment analysis. *Id.*

125. See *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). See notes 145-46 *infra*. Remedial judicial immunity must be "clearly limited," and decided in light of countervailing governmental interests. 615 F.2d at 972. *But cf.* *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980) (when a defense witness for whom immunity is sought is an actual or potential target of prosecution, the defendant has no right to defense witness immunity). The court, while admitting the judiciary's constitutional responsibility to maintain the fairness of trials, found the courts "in no position to weigh the public interest," and concluded that the risks to other prosecutions posed by defense witness immunity are "matters normally better assessed by prosecutors than by judges." See *id.* at 776.

126. 623 F.2d 769 (2d Cir. 1980). The defendant in *Turkish*, who was convicted of evading income taxes, filing false returns, and conspiring to defraud the United States, argued unsuccessfully at trial for immunization of 17 prospective defense witnesses. See *id.* at 770-71.

127. See *id.* at 773-74. The court stated that "the Sixth Amendment's Compulsory Process Clause . . . does nor [*sic*] carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination." *Id.* at 774. See note 128 *infra*. *But cf.* *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) (due process may require court-ordered statutory immunity, or judicially fashioned immunity, for defense witnesses); *United States v. La Duca*, 447 F. Supp. 779 (D.N.J.), *aff'd sub nom.* *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978). *Herman* is discussed generally at notes 135-42 and accompanying text *infra*; *La Duca* is discussed at note 146 *infra*. The *Herman* court found that, while no general sixth amendment right to defense witness immunity exists, prosecutorial wrongdoing violative of a defendant's right to compulsory process may be remedied by a grant of immunity from the government. See 589 F.2d at 1199-1200. The *La Duca* court did not expressly recognize that the sixth amendment creates an affirmative prosecutorial duty to immunize defense witnesses. See 447 F. Supp. at 787. However, the *La Duca* court took the position that there are circumstances where considerations of fairness, and therefore due process, require that the government request use immunity for a defendant's witness or be barred from prosecuting the defendant. *Id.* The commentators are generally in accord with the *Herman* court's position. See Westin, *supra* note 114, at 167-68; Note, *The Sixth Amendment, supra* note 120, at 1266; Note, *'The Public Has a Claim to Every Man's Evidence': The Defendant's*

nothing in the sixth amendment itself which gives rise to an affirmative prosecutorial or judicial duty to replace a witness's properly asserted privilege against self-incrimination with a grant of use immunity.¹²⁸ The court then, reserving the possibility that unusual cases could arise, rejected the due process clause as a general requirement that defense witness immunity must be ordered to guarantee the defendant a fair trial.¹²⁹ The *Turkish* court concluded that claims for defense witness immunity should be summarily rejected, without an evidentiary hearing, where the witness for whom immunity is sought is a target of prosecution.¹³⁰

Less than one month before *Turkish* was decided, a different panel of the United States Court of Appeals for the Second Circuit decided *United States v. Praetorius*.¹³¹ While it rejected the defendant's claim for defense witness immunity, the *Praetorius* court did so on the ground that the defendant had not proved the "extraordinary circumstances"

Constitutional Right to Witness Immunity, 30 STAN. L. REV. 1211 (1978). Cf. *Taylor v. United States*, 329 F.2d 384, 386 (5th Cir. 1964) (sixth amendment is the source of the government's affirmative obligation under FED. R. CRIM. P. 17 to pay for the trial expenses and fees of witnesses for indigent defendants).

128. See 623 F.2d at 774. The courts have generally agreed that, absent special circumstances, the sixth amendment imposes no affirmative duty on the government to immunize defense witnesses. See *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States v. Lacouture*, 495 F.2d 1237 (5th Cir.), cert. denied, 419 U.S. 1053 (1974); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), cert. denied, 411 U.S. 920 (1973). The sixth amendment's guarantee of compulsory process is generally read to ensure the defendant of no more than the physical presence of witnesses. See *United States v. La Duca*, 447 F. Supp. 779, 787 n.3 (D.N.J.), aff'd sub nom. *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978).

129. 623 F.2d at 777. The *Turkish* court's due process analysis explored two premises: 1) that unfairness violative of due process could result when the government's grants of use immunity to its own witnesses afford it an advantage over the defendant; and 2) that denial of defense witness immunity may violate due process by offending the concept of a trial as a search for truth. See *id.* at 774-75. The first premise was found "entirely unpersuasive" in view of the already existing "procedural imbalance in favor of the defendant" in criminal trials. *Id.* at 774. The second premise was given more lengthy consideration but was also rejected. See *id.* at 777. The court found that the fifth amendment creates no general prosecutorial obligation to grant immunity, but simply protects defendants from prosecutorial overreaching and prejudice. See *id.*

130. See *id.* at 778. For critical analysis of this aspect of *Turkish*, see notes 161-63 and accompanying text *infra*. The *Turkish* court did not elaborate on the proper course to be taken by a trial court faced with a claim for immunization of a defense witness not a target of prosecution. See 623 F.2d at 778-79.

131. 622 F.2d 1054 (2d Cir. 1979). The *Turkish* opinion was delivered by Judge Newman. Judge Mansfield joined the opinion of the court; Judge Lumbard wrote a separate opinion, concurring in part and dissenting in part. See 623 F.2d at 770, 779. The case was decided May 27, 1980. *Id.* at 769. *Praetorius* was decided by Judges Meskill, Kelleher, and Holden. See 622 F.2d at 1057. The court's opinion was announced, as modified on denial of rehearing, May 7, 1980. *Id.* at 1054.

which may compel government immunization of defense witnesses.¹³² The *Turkish* court implicitly rejected the reasoning in *Praetorius* when it expressed "fundamental disagreement" with cases employing the extraordinary circumstances standard to grant defense witness immunity.¹³³

In the Third Circuit, defense witness immunity is given more credence.¹³⁴ In 1978, in *United States v. Herman*, the Third Circuit rejected the defendant's claim for defense witness immunity but recognized two bases for granting such immunity.¹³⁵ First, the *Herman* court noted that, in cases where the government's denial of defense witness immunity is undertaken with the "deliberate intention of distorting the judicial fact finding process", the court has the remedial power to require a grant of defense witness immunity as an alternative

132. See 622 F.2d at 1064. Note that the *Turkish* court described *Praetorius* as a rejection of a claim for defense witness immunity. See 623 F.2d at 772. Defendants in *Praetorius* were convicted under an indictment charging conspiracy to violate and violation of narcotics laws, in connection with a large conspiracy to import heroin from Thailand to the United States. 622 F.2d at 1057. On appeal, one of the defendants assigned as error the trial court's denial of his claim for defense witness immunity. *Id.* at 1064. The witness sought to be immunized was to be used only to attack the credibility of government witnesses. *Id.* The appellate court rejected the defendant's claim, stating:

An important factor in the determination of the presence of "extraordinary circumstances" compelling the government to provide statutory use immunity for a defense witness is the materiality of the testimony sought from the witness. The issue of witness credibility . . . is a collateral matter and does not rise to the kind of "extraordinary circumstance" which would compel government immunization of a defense witness.

Id.

133. See 623 F.2d at 777. For an example of "extraordinary circumstances" analysis of claims for defense witness immunity, see *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979) (discussed at notes 134-42 and accompanying text *infra*). The *Turkish* court, finding that the judiciary is charged with maintaining constitutional fairness at trial, preferred an interest analysis, balancing the defendant's interest in obtaining evidence against the prosecutor's interest in the orderly administration of justice and freedom from interference in prosecutorial discretion. See 623 F.2d at 777. For critical analysis of this aspect of *Turkish*, see notes 147-56 and accompanying text *infra*.

134. See, e.g., *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469 (3d Cir. 1979); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

135. See *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). In *Herman*, two former state court magistrates appealed from judgments of sentence following their conviction for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1970). 589 F.2d at 1194. Defendant Herman contended that he was denied a fair trial and deprived of his sixth amendment right to compulsory process when the government declined to immunize defense witnesses. *Id.* at 1199. At trial, prosecution witnesses testified against Herman under grants of immunity. *Id.* at 1203.

to a judgment of acquittal or a dismissal of the indictment.¹³⁶ Second, the court found that where a defense witness's testimony is "essential to an effective defense," the courts have inherent authority to protect the defendant's compulsory process right by conferring judicial immunity upon the defense witness.¹³⁷ The first *Herman* proposition (*Herman I*) was supported by prior case law and amounts to a recognition that under certain somewhat extraordinary circumstances, due process may require that the government grant immunity to defense witnesses.¹³⁸ *Herman I* cases involve some degree of prosecutorial wrongdoing found violative of due process—distortion of fact finding,

136. See 589 F.2d at 1204. In order for the court to exercise its remedial authority and order defense witness immunity or dismissal, the defendant must make a "substantial" showing of unconstitutional abuse, *i.e.*, that the prosecution exercised its discretion concerning defense witness immunity in a manner violative of due process. *Id.* at 1204. Citing the strong tradition of deference to prosecutorial discretion, and the assumed tendency of prosecutors to exercise that discretion in aid of conviction, the *Herman* court concluded that the defendant's showing must amount to proof that "the government's decisions were made with the deliberate intention of distorting the judicial fact finding process." *Id.* at 1203-04.

137. See *id.* at 1204. Judicially created immunity has been recognized in analogous cases. See, *e.g.*, *Simmons v. United States*, 390 U.S. 377 (1968) (defendant's testimony at suppression hearing judicially immunized); *In re Grand Jury Empanelled*, Feb. 14, 1978, 603 F.2d 469 (3d Cir. 1979) (judicial immunity may protect testimony made in connection with a pretrial assertion of privilege under the speech or debate clause); *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1977) (judicial immunity may protect defendant's testimony at a pretrial double jeopardy hearing).

In recognizing an inherent judicial authority to immunize defense witnesses, the *Herman* court relied on the general judicial power to grant immunity recognized by the Supreme Court in *Simmons*, as well as on defendant's due process right to have clearly exculpatory evidence presented to the jury. See 589 F.2d at 1204 and n.13, *citing Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process prohibits mechanical application of state rules of evidence to exclude critical exculpatory testimony in criminal trials). For a critical analysis of this aspect of *Herman*, see notes 157-60 and accompanying text *infra*.

138. See 589 F.2d at 1203-04. See also *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 968 (3d Cir. 1980) (*Herman* applied and expanded). For discussion of *Smith*, see notes 143-46 and accompanying text *infra*. Prior to the court's decision in *Herman*, a different panel of the United States Court of Appeals for the Third Circuit had decided *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), *cert. denied sub nom. Boscia v. United States*, 429 U.S. 1102 (1977). The *Morrison* court found that the sixth amendment and the fourteenth amendment due process clause guarantee to a defendant the right to subpoena witnesses and have them available to testify freely. 535 F.2d at 228. The court held that prosecutorial threats and intimidation which caused the defendant's principal witness to withhold testimony by asserting her fifth amendment privilege against self incrimination violated the defendant's constitutional rights and was remediable by court-ordered government immunization of the witness, or by the entry of a judgment of acquittal. *Id.* at 229, *citing United States v. Leonard*, 494 F.2d 955, 985 n.79 (1974) (Bazelon, C.J., concurring in part and dissenting in part); *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921-22 (1967).

or threats toward, or intimidation of, defense witnesses.¹³⁹ The second *Herman* proposition (*Herman II*) finds no direct support in prior case law¹⁴⁰ and suggests the existence of an inherent judicial power to grant use immunity.¹⁴¹ *Herman II* cases are marked by a judicial response to protect a defendant's sixth amendment right to compulsory process and his due process right to have clearly exculpatory evidence presented to the jury.¹⁴²

A more recent decision of the Third Circuit clarifies and extends *Herman*. In *Government of the Virgin Islands v. Smith*,¹⁴³ the court found that in a *Herman I* case, the defendant must prove that the witness to be immunized will provide relevant evidence and that an unconstitutional prosecutorial abuse of discretion has occurred.¹⁴⁴ The

139. See, e.g., *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 969 (3d Cir. 1980) (U.S. attorney, without jurisdiction over a juvenile defense witness, refused to consent to immunization for "strategy" reasons only); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), cert. denied sub nom. *Boscia v. United States*, 429 U.S. 1102 (1977) (prosecutor intimidated and threatened defendant's principal witness). Cf. *United States v. Praetorius*, 622 F.2d 1054, 1064 (2d Cir. 1980) (government refusal to immunize defense witnesses whose testimony will relate to credibility of other witnesses is not crucial to defense and not a due process violation); *United States v. Herman*, 589 F.2d at 1204 (government immunization of its own witnesses, where unrelated to its decision not to immunize defense witnesses, does not violate due process).

140. See 589 F.2d at 1204. The *Herman* court stated: "No case has been called to our attention where judicially fashioned use immunity has been granted to a witness . . ." *Id.* For analogous cases which recognize a judicial power to grant immunity, see note 137 *supra*.

141. See 589 F.2d at 1204. The *Herman* court simply concluded that "a case might be made that the court has inherent authority" to immunize defense witnesses. *Id.* Because this issue had not been raised in the district court, and the parties had not discussed it in their briefs or arguments on appeal, the court was "reluctant" to address it. *Id.* The court did not hold that there is power in the judiciary to grant witness immunity. *Id.*

142. See *id.* at 1204. Although not entirely clear, it appears from the language in *Herman* that the courts' exercise of inherent judicial authority to immunize defense witnesses does not require a showing of unconstitutional abuse of prosecutorial discretion. *Id.* The *Herman* court seems to require only that the defendant prove that the witness's testimony "is essential to an effective defense." *Id.* In *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), these aspects of the *Herman* decision were expanded and clarified. See *id.* at 969-73. For a discussion of *Smith*, see notes 143-46 and accompanying text *infra*.

143. 615 F.2d 964 (3d Cir. 1980). The defense witness to be immunized in *Smith* was a juvenile under the exclusive jurisdiction of the juvenile authorities in the Virgin Islands Attorney General's office. See *id.* at 967. The Attorney General agreed to the witness' testifying in federal court under a grant of use immunity; however, the United States attorney refused to consent. *Id.*

144. See *id.* at 969 & n.7. Note that the *Herman* court did not expressly require that the defendant prove the relevance of the proposed witness's testimony. See 589 F.2d at 1203-04.

Smith court also clearly identified the elements of a *Herman II* case: the defense witness to be immunized must be available and capable of providing clearly exculpatory and essential testimony.¹⁴⁵ In addition, countervailing governmental interests against a grant of judicial immunity must be considered by the court.¹⁴⁶

B. *An Accommodation of Turkish and Smith:*
The Best of Both Circuits

If due process analysis of a claim to defense witness immunity implicates the interests of the defendant, the prosecutor, and the public,

145. See 615 F.2d at 972. The court stated that use of judicial immunity power must be "clearly limited." *Id.* "[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." *Id.* (footnotes omitted). Judicial immunity is inappropriate where the proffered testimony is "ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses." *Id.* If the defendant satisfies his burden, the government may attempt to rebut the defendant's showing, or to prove such countervailing governmental and/or public interests as would make defense witness immunity inappropriate. *Id.* at 973.

146. See *id.* at 973. The *Smith* court recognized that the government may have "a legitimate interest in prosecuting the very witness whom the defendant seeks to immunize." *Id.* However, the court noted that a judicial grant of use immunity to defense witnesses may be "virtually costless to the government" if it exercises certain "options," some of which were listed by the court. See *id.* Those options include: 1) "sterilizing" the witness's testimony by isolating it from any use in subsequent prosecution; 2) having previously assembled all evidence needed for future prosecution of the witness; or 3) postponing the defendant's trial and completing the investigation of the defense witness who is the subject of the immunity application. See *id.* The *Smith* court deemphasized the role of government interests in the court's decisions whether or not to directly immunize defense witnesses, concluding that "if any of these options are available to the government, then it would appear to us that the government would have no significant interests which countervail the defendant's due process rights." See *id.* Cf. *United States v. La Duca*, 447 F. Supp. 779 (D.N.J.), *aff'd sub nom.* *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978) (claims for defense witness immunity must be raised at trial). The *La Duca* court emphasized that use immunity, unlike transactional immunity, does not operate to foreclose future prosecution. 447 F. Supp. at 786. The *La Duca* court also observed:

Even assuming . . . that the grant of use immunity renders more difficult future prosecution of an immunized witness who has not yet been convicted, that may be the price [the government] has to pay to prosecute the defendant. Where a potential witness, who is also a potential defendant, has evidence which a court finds could exculpate another . . . his continued silence could cost the accused everything.

Id. at 788. For a discussion of the government's burden of proof when it seeks to prosecute an individual who has testified under a grant of statutory immunity, see *Kastigar v. United States*, discussed in Part I, notes 42-51 and accompanying text *supra*. For critical analysis of the *Smith* and *La Duca* courts' treatments of the issues discussed in this Comment, see notes 147-53 and accompanying text *infra*.

then a clear definition of these respective interests is critical to a court's decision.¹⁴⁷

Defense witness immunity limits the prosecutor's ability to maintain complete control over the decisions of whether and when to prosecute a witness called by the defendant.¹⁴⁸ In a subsequent prosecution of an immunized defense witness, the prosecutor must meet the *Kastigar* burden of proving a legitimate source of evidence, wholly independent of the compelled testimony.¹⁴⁹ Where the government has, at the time of the defendant's trial, assembled its evidence against the defense witness, it can certify the evidence and obviate any objections to subsequent prosecution.¹⁵⁰ Where the prosecutor is without sufficient evidence against the witness, the possibility of postponing the defendant's trial in order to conclude investigation of the witness, or the feasibility of "isolating" or "sterilizing" the witness's testimony, should be explored.¹⁵¹ It is submitted that since a prosecutor need only prove an independent source of evidence,¹⁵² a prosecutor required to grant

147. For a discussion of due process as an interest balancing analysis, see note 125 and accompanying text *supra*.

It is submitted that the *Turkish* court gave short shrift to the defendant's interests in defense witness immunity. See 623 F.2d at 774-75. The court ultimately dismissed defendant's claim as untimely and noted that none of the witnesses sought to be immunized would provide material, exculpatory evidence. See *id.* at 777-78. However, the court stated elsewhere in its opinion that a general exploration of the concept of defense witness immunity was necessary to its decision. See *id.* at 772. The only general defense interests considered were 1) the defendant's interest in equalization of the advantages given the prosecution and the defense, and 2) the defendant's interest in the pursuit of truth. *Id.* at 774-75. Note that the public interest is not decisive in this analysis as it is simply an amalgam of the defendant's and the prosecutor's interests. The public is interested in the prosecution of criminals. *Id.* at 776. The public is equally interested in the preservation of trials as a search for truth. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 971, citing *Williams v. Florida*, 399 U.S. 78, 82 (1970).

148. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 973.

149. For discussion of the prosecutor's burden under *Kastigar*, see notes 48-55 and accompanying text *supra*.

150. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 973; Note, *supra* note 120, at 1274 citing *United States v. Bianco*, 534 F.2d 501, 509-11 (2d Cir.), cert. denied, 429 U.S. 822 (1976). In *Bianco*, a defendant appealed from a conviction of federal tax evasion on the ground that unlawful derivative-use had been made of testimony given by him in a state grand jury proceeding under a grant of immunity. 534 F.2d at 508. The district court rejected the defendant's claim of unlawful derivative use, after examining the entire government file, in camera. *Id.* at 509 n.11. The government's assembling of all its evidence for the court's determination that the evidence is wholly independent of a defendant's immunized testimony is described as "certification" in Note, *supra* note 120, at 1274.

151. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 973. *But cf.* notes 53-54 and accompanying text *supra* (non-evidentiary use of immunized testimony bars subsequent prosecution).

152. See notes 48-55 and accompanying text *supra*.

defense witness immunity is left in essentially the same position as he would occupy had the witness been permitted to exercise his fifth amendment privilege.¹⁵³

A defendant's due process right to effective presentation of material, exculpatory evidence defines the defendant's interest in defense witness immunization.¹⁵⁴ Additionally, the defendant's due process right to be free from prosecutorial misconduct and overreaching may be at issue in some cases.¹⁵⁵ It is submitted that on a showing of unconstitutional prosecutorial misconduct or overreaching, or the existence of essential, clearly exculpatory evidence in the testimony of a defense witness, defense witness immunity should be granted in order to protect the defendant's due process right to have exculpatory evidence presented to the trier of fact.¹⁵⁶

When a court is presented with a claim for defense witness immunity, it cannot ignore the fact that the power to confer immunity is peculiarly prosecutorial, and any judicial incursion into immunization raises separation of powers concerns.¹⁵⁷ The courts' constitutional responsibility to ensure the fairness of trials justifies a court order requesting government immunization of defense witnesses or, in the

153. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 973; note 146 *supra*. Where the government's ability to prosecute the defense witness is not compromised, "[a]ny interest the government would have in withholding immunity . . . would be purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity." 615 F.2d at 973 (footnote omitted). See also *United States v. Turkish*, 623 F.2d at 775. The *Turkish* court stated that "unlike transactional immunity, use immunity does not improve the legal position of the holder of the privilege; it leaves his legal rights precisely as they were before he testified." *Id.*

154. See notes 123-46 and accompanying text *supra*.

155. See *United States v. Herman*, 589 F.2d at 1203-04 (discussed at notes 134-42 *supra*).

156. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 970-74. This conclusion is, to some extent, a rejection of *Turkish*. See 623 F.2d at 777. The *Turkish* court did reserve the possibility that some circumstances could require defense witness immunity to guarantee due process but in the case at bar the court was faced with an untimely claim for immunization of a defense witness whose testimony was insignificant. See *id.* at 777-78. The *Turkish* court concluded broadly that the due process clause "does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges." *Id.* at 777. In view of the Supreme Court's position as stated in *Chambers v. Mississippi*, 410 U.S. 284 (1973) (discussed at note 123 *supra*), and *Washington v. Texas*, 388 U.S. 14 (1967) (discussed at note 122 *supra*), it is submitted that considerations of due process require defense witness immunization when necessary to facilitate the presentation of essential, clearly exculpatory evidence or to remedy prosecutorial wrongdoing. See *United States v. Herman*, 589 F.2d at 1203-04. To the extent that the court's opinion in *Turkish* conflicts with this conclusion, it is submitted that the court has overlooked *Chambers* and *Washington*.

157. See *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921-22 (1967). See note 117 *supra*.

alternative, requiring dismissal of the indictment.¹⁵⁸ It is submitted, however, that direct judicial conferral of immunity as seen in *Herman* is unnecessary¹⁵⁹ and violative of the principle of separation of powers.¹⁶⁰

Considerations of defense witness immunization, it is suggested, should be made at the trial level, and where possible, during the pre-trial phase of the prosecution.¹⁶¹ Upon the defendant's showing of the availability of the witness and the essential and clearly exculpatory

158. See *United States v. Turkish*, 623 F.2d at 776; *Government of the Virgin Islands v. Smith*, 615 F.2d at 971. The judiciary has a constitutional duty to maintain the fairness of trials and has inherent authority to fashion remedies for unconstitutional restrictions of defendant's access to and presentation of evidence. *Id.* The *Herman* court recommended that when a trial court concludes that due process requires defense witness immunity, it should request that the prosecution immunize the witness and inform the prosecution that, absent a grant of immunity, the indictment will be dismissed. See 589 F.2d at 1204. *Accord*, *United States v. La Duca*, 447 F. Supp. 779, 787 (D.N.J.), *aff'd sub nom. United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978).

159. See note 125 *supra*. It is submitted that a request for governmental immunity, coupled with the express intention to dismiss the indictment in the absence of compliance with the request, is no less effective a remedy than direct judicial witness immunization. See *id.* Furthermore, it is suggested that, since a prosecutor can drop the charges against the defendant in order to avoid immunizing a particular witness, dismissal of the indictment can result absent significant judicial intervention.

160. See *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) (discussed at note 117 *supra*). It is submitted that the "inherent judicial power" to grant immunity discussed in *Herman* and recognized in *Smith* violates the principles of separation of powers. See *id.* It is also submitted that the courts improperly relied, in *Herman* and *Smith*, on *Simmons v. United States*, 390 U.S. 377 (1968). See *United States v. Turkish*, 623 F.2d at 776. *Simmons* is authority for limited judicially created immunity, used to immunize the defendant's own testimony at a suppression hearing before the court. See 390 U.S. at 394. Since the court's immunization in *Simmons* in no way conflicted with the exercise of prosecutorial discretion, it is submitted that it was different from and does not justify, judicial immunization of defense witnesses.

161. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 974. The *Smith* court charged the trial courts with the responsibility of deciding defense witness immunity. See *id.* When necessary, evidentiary hearings should be held. *Id.* It is submitted that, in the interests of judicial economy, and in view of the fact that a claim of defense witness immunity may result in dismissal or dropping of the charges, the claim should be litigated pretrial, when possible.

The *Turkish* court recommended that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." See 623 F.2d at 778. It is submitted that this directive removes from the trial courts consideration of any contested claim for defense witness immunity since, unless a witness is an "actual or potential target", the prosecution would have no interest in refusing immunity. *Id.* It is further submitted that this directive is potentially harmful to the public's and the defendant's interest in the speedy and efficient administration of criminal justice, and should be rejected in favor of the *Smith* court's commission of the issue to litigation at trial.

nature of the proffered testimony, the court should then consider the government's interests.¹⁶² If the prosecutor rebuts the defendant's proof or convinces the court of substantial countervailing prosecutorial and/or public interests, no order requesting immunization should issue.¹⁶³

V. CONCLUSION

Grants of immunity, formal and informal, are powerful tools wielded daily by federal prosecutors.¹⁶⁴ Clarification of the scope of the fifth amendment privilege as it relates to immunity is essential in order that federal defendants can intelligently consider offers of immunization.¹⁶⁵ Specific standards should be formulated by the office of the United States Attorney General governing the handling of defense requests for defense witness immunity.¹⁶⁶ Finally, courts should adopt a supervisory role in the area of witness immunity,¹⁶⁷ strictly enforcing informal immunity agreements,¹⁶⁸ and dismissing indictments when the prosecutor's refusal to immunize defense witnesses amounts to a denial of due process.¹⁶⁹

Jane Duffy *

162. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 972-74. See also notes 145-46 and accompanying text *supra*.

163. See *Government of the Virgin Islands v. Smith*, 615 F.2d at 973.

164. See *United States v. Quatermain*, 613 F.2d at 45 (Aldisert, J., dissenting); note 4 *supra*.

165. See notes 62-73 *supra* for discussion of the scope of the fifth amendment privilege against self-incrimination. The constitutionality of procuring testimony through immunization is well settled. See *United States v. Kastigar*, 406 U.S. at 453; notes 42-49 *supra*. However, whether derivative use immunity is more than the minimum immunity required to supplant the fifth amendment privilege against self-incrimination has been questioned, and thus seems unsettled. See *United States v. Quatermain*, 613 F.2d at 41; note 62 *supra*. For critical analysis of judicial treatment of claims of unlawful derivative use of testimony given pursuant to immunization, see notes 74-93 *supra*.

166. For the Justice Department's guidelines on informal immunity, see 27 CRIM. L. REP. (BNA) 3287. See note 44 *supra* for discussion of the prosecutor's role in witness immunization. For critical treatment of the breadth of prosecutorial discretion, see Vorenberg, *supra* note 4. It is submitted that absent the United States Attorney General's adoption of standards for the exercise of prosecutorial discretion in the area of witness immunity, the courts will take an active role in immunization of defense witnesses. See *United States v. Herman*, 589 F.2d at 1204; note 137 *supra*. It is suggested that judicial grants of immunity violate the principles of separation of powers. See note 157 *supra*.

167. See note 44 *supra*. Under § 6003, the courts' role in statutory immunity proceedings is ministerial. See note 45 *supra*. Additionally, it is submitted that direct judicial grants of immunity violate the principles of separation of powers. See note 157 *supra*.

168. See *United States v. Quatermain*, 613 F.2d at 44 (Aldisert, J., dissenting). See also notes 102-13 *supra*.

169. See notes 157-63 *supra*.

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