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RECONCILING EFFECTIVE FEDERAL PROSECUTION AND THE FIFTH AMENDMENT: "CRIMINAL CODDLING," "THE NEW TORTURE" OR "A RATIONAL ACCOMMODATION?"

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Few concepts designed to aid the investigation and prosecution of criminal cases have been so misunderstood and unjustly maligned as those embodied in the so-called "use immunity" statute[1] passed by Congress as part of the Organized Crime Control Act of 1970. It has been variously asserted that in the process of obtaining testimony under this statute (1) prosecutors are unduly harsh in bringing cruel pressures to bear on persons to force them to testify; or (2) they are too lenient in exercising their discretion to "immunize" potential witnesses; or (3) they somehow commit both errors simultaneously.[2] The author's view is that much of the concern expressed in both camps of critics misses the real point of the procedures utilized, *i.e.*, that they are simply means of compelling the testimony of persons in criminal prosecutions, a vital component of an effective criminal justice process and one that has been an integral part of our system of laws since 1789.[3] The discussion which follows will consider, first, the provisions of the "use immunity" statute which permit a prosecutor to compel testimony and, second, defense-prosecution agreements which involve a defendant's promise to provide information or testimony, with or without "immunity."

COMPELLING TESTIMONY UNDER 18 U.S.C. §§ 6002–03

The Nature of the "Immunity" of 18 U.S.C. §§ 6002–03

At the outset, it must be recognized that the proceedings authorized under the 1970 Act grant no immunity from prosecution, per se. In fact, as of December 14, 1974, when the repeal of 18 U.S.C. § 2514 (1968) became effective, there ceased to be *any* statutory basis for granting a witness immunity from prosecution. In place of the former statute, sections 6002–03 authorize government prosecutors to obtain a court order to compel a person to give testimony without a grant of immunity.[4] As the constitutional

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[1] 18 U.S.C. §§ 6001–05 (1970) [hereinafter referred to as "'use immunity' statute"].

[2] *See, e.g.*, Safire, *The New Torture*, N.Y. Times, Dec. 20, 1973, at 39, col. 7. It is interesting to note that Mr. Safire in his criticism never indicates what "limited immunity," as he calls it, actually entails. Most of the confusion, and all of Mr. Safire's hand-wringing, would most likely be dissipated by a reading of 18 U.S.C. § 6002 (1970) (Text at note 4 *infra*). *See also Putting Witnesses on the Rack*, Los Angeles Times, Dec. 16, 1975, at 6 (editorial) and Harris, *Annals of Law—Taking the Fifth*, THE NEW YORKER., Apr. 5, 1976, at 44, Apr. 12, 1976, at 43, Apr. 19, 1976, at 42.

[3] For a discussion of the historical roots of the federal government's power to "immunize" witnesses from prosecution see Kastigar v. United States, 406 U.S. 441, 443–47 (1972), and the authorities cited therein.

[4] 18 U.S.C. § 6002 (1970) provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003 (1970) provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such dis-

quid pro quo for imposing this obligation to testify, section 6002 provides that such compelled testimony cannot be used against the witness "in any criminal case" (with an exception noted later).[5] Under this arrangement both the witness and the government remain in substantially the same position vis-á-vis one another after the testimony as before.[6]

This statutory scheme has distinct advantages to both prosecutors and society over the former so-called "transactional" immunity statutes. First, it eliminates the possible conferring of wastefully broad immunity from prosecution and substitutes only the protection from *use* of compelled testimony which is all that the Constitution requires.[7] It also removes the incentive for a witness to give wide-ranging but shallow testimony which, under a grant of transactional immunity, would provide absolution for every offense touched upon, while failing to encourage complete candor, specificity and detail. The compulsion of testimony under section 6003, in contrast, encourages the witness to disclose as many details as possible since the use restriction imposed by the statute is only as broad as the facts revealed during the compelled testimony.[8] Third, unlike a grant of transactional immunity, compelled testimony under the narrow "use immunity" statute does not create the risk that a witness, whom prosecutors subsequently and independently find to be far more deserving of prosecution than anticipated, will be immune from prosecution despite the existence of such independent evidence.

Importantly, then, under the "use immunity" statute, the *content* of the defendant's prior immunized testimony does not affect the prosecutor's ability to prosecute, even for crimes that the witness mentions in his testimony, as long as the evidence used to prosecute those crimes is entirely independent of the compelled statements.[9] Consequently, a witness compelled to testify under the 1970 statute does not have "immunity" from prosecution. If that term is at all applicable to section 6002, it is in the sense that the witness is "immune" from having the compelled testimony used against him in a subsequent prosecution, an "immunity" no different from that provided by the fifth amendment in the first

trict, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

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

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

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

[5] The "criminal case" limitation tracks the pertinent provision of the fifth amendment to the Constitution. This means, of course, that the witness' testimony is subject to use against him in a non-criminal proceeding. *See, e.g.*, Patrick v. United States, 524 F.2d 1109, 1120–21 (7th Cir. 1975). Contrary to the implication in Judge Wolfson's article appearing in this symposium, there is no impropriety in such use of evidence by the government.

[6] In Kastigar v. United States, 406 U.S. 441, 462 (1972), the Supreme Court stated:

> We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in 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.

Accord, Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973).

[7] Kastigar v. United States, 406 U.S. 441, 453 (1972).

[8] This may occur in those cases where the government has difficulty in affirmatively proving that its independent evidence is in fact untainted by the detailed testimony given. *See* text accompanying notes 41–66 *infra*.

[9] Nothing in the statute hinders subsequent prosecution of a witness, but in practice the affirmative burden on the prosecutor to *show* that he has not used the compelled testimony may be difficult and, in some cases, impossible to meet. *See* text accompanying notes 41–66 *infra*. But the existence of this difficulty requires some special attention in the present discussion of the nature of the "immunity" of 18 U.S.C. §§ 6002–03 (1970). In those cases where proof of non-use of compelled testimony would be difficult, an order under 18 U.S.C. § 6003 (1970) might provide a certain degree of protection from a subsequent prosecution. There are methods by which prosecutors can reduce and possibly overcome altogether obstacles to subsequent prosecution, such as strict control of transcripts of compelled testimony and prosecution before rather than after testimony is compelled. But to the extent that the possibility of such obstacles cannot be effectively eliminated, the prosecutor does "give up" something which the witness "gets" upon an order under the statute.

When, or if, this particular situation occurs one must consider the issue of whether a prosecutor is ever justified in giving up or reducing his ability to prosecute a person in exchange for testimony or information. This issue of defense-prosecution agreements is considered in the text accompanying notes 67–69, *infra*. To the limited extent that that issue is raised under the operation of the statute the discussion in that section may be taken to apply here.

It is pertinent that the subsequent prosecution of a compelled witness is subject to close scrutiny by the Department of Justice. Indeed, it requires the personal approval of the Attorney General. *See* U.S. Dep't of Justice, Memo. No. 595, Supp. 1, p. 5, Supp. 2, p. 2–3. (Sept. 2, 1971).

place![10] This somewhat strained use of the word indicates how current usage is more a product of historical development than linguistic accuracy. Both as an aid to understanding, and as a means of de-emotionalizing consideration of the present statute, it would probably be productive to discard the terms "immunity" and "grant of immunity" and speak solely in terms of "compelled testimony." However, because of the impracticability of attempting to redefine a term of such widespread acceptance, the discussion which follows will refer to compelled testimony under sections 6001 *et seq.* as prompted by a grant of "use" immunity.

What then is the status of the witness who testifies under "use" immunity? How far does his "immunity" extend? Just as the government neither loses nor gains anything with regard to his subsequent prosecution, neither does the witness lose or gain anything. The prohibition against using any of the compelled testimony, at least in a domestic prosecution, is absolute.[11] It provides a "comprehensive safeguard, barring use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing the investigation on a witness as a result of his compelled disclosure."[12]

It can thus be seen that claims that prosecutors put cruel pressure upon witnesses to force them to testify—"the new torture" —can be discarded immediately and completely. To compel testimony the prosecutor need only obtain a court order;[13] extralegal pressure on the prospective witness is unnecessary. In the same way, claims that prosecutors can and do compel witnesses under section 6002 to lie under oath and against their will can be attributed to ignorance of the provisions of that statute. What a witness receives under the statute—prohibition of the use of the testimony—is assured before the testimony is given, and is not affected by the content of the testimony, with one important exception. A person who testifies falsely when compelled by the statute can have his false testimony used against him in a subsequent prosecution for perjury or making a false statement.[14] This is hardly a provision by which prosecutors can generate false testimony. The statute gives the witness nothing to gain by lying and everything to lose. If he testifies truthfully, neither he nor the government loses or gains with respect to any subsequent prosecution.

Moreover, the shift from "transactional" to "use" immunity makes the witness' testimony more credible. While the witness with transactional immunity might be considered suspect for having "made a deal" with the prosecution, the witness with testimonial use immunity, being compelled to testify, gains nothing by his testimony. Not only does he lack a motivation to lie, and indeed has much to risk if he does, his more independent position is known to jurors and can make his testimony more credible.[15]

The only losers under the 1970 statute are those criminals who have been convicted by the use of compelled testimony. Federal prosecutors, utilizing the statute, have employed the use immunity procedure to compel testimony from "little fish" to convict the "big fish" in scores of cases involving members of organized crime and racketeering syndicates, as well as corrupt politicians, and masterminds of white collar fraud.[16] Those persons, though they often assert it, of course, possess no

[10] *See* cases cited note 6 *supra*.

[11] *See In re* Tierney, 465 F.2d 806, 811–12 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973), and cases cited therein which note that the issue whether the fifth amendment privilege protects against a foreign prosecution so as to require that steps be taken to limit the access of a foreign country to the testimony has not yet been resolved. *See also* 8 J. WIGMORE, EVIDENCE § 2258 (J. McNaughton rev. ed. 1961). The court in *Tierney* held that grand jury secrecy was sufficient to guard against a "substantial risk" of foreign prosecution based on the use of the compelled testimony, even if the fifth amendment privilege were assumed to extend that far. *But see In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

[12] Kastigar v. United States, 406 U.S. 441, 460 (1972).

[13] As discussed subsequently, the courts have no discretion to refuse to issue an order under the statute, provided the application is in proper form. *See* text accompanying notes 24 and 25 *infra*.

[14] *See, e.g., In re* Grand Jury Proceedings, 509 F.2d 1349, 1351 (5th Cir. 1975); United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973).

[15] *But cf.* United States v. Demopoulos, 506 F.2d 1171, 1179–80 (7th Cir. 1974), where the court upheld the trial court's refusal to give an instruction that testimony of a compelled witness "should be received with suspicion and considered and scrutinized with the very greatest of care and caution," but approved the giving of a milder cautionary instruction that the testimony of a compelled witness "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness."

[16] *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 445–47 (1971); PRESIDENTIAL MESSAGE TO CONGRESS ON ORGANIZED CRIME, H. R. DOC. NO. 105, 91st Cong., 1st Sess. 5 (1969); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 140–41 (1967). *See also* Murphy v. Waterfront Comm'n, 378 U.S. 52, 92–94 (1964) (concerning the need for immunity statutes generally); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 135–59 (1975) (statement of usefulness of immunity to state prosecutors).

"right against incrimination" by others. In this sense, the biggest gain in the use of the statute is to society which benefits from more effective criminal prosecution. The usefulness of the statute in law enforcement is not only heralded by observers and the courts,[17] but has been repeatedly demonstrated in its continued use by federal prosecutors.

To summarize, the compelling of testimony and the absolute prohibition against its subsequent use, under section 6002, is neither "criminal coddling" nor a "new torture." Rather, in the words of the Supreme Court, it is "a rational accommodation between the imperatives of the [fifth amendment] privilege and the legitimate demands of government to compel citizens to testify."[18]

The Process of Obtaining an Order to Compel Testimony

Section 6003 provides that only the United States Attorney for the district may request an order to compel testimony or information in a proceeding before or ancillary to a court or grand jury of the United States in that district. Further, before making such a request he must obtain the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General. The Assistant Attorney General in charge of the Division to which the subject matter of the case relates has the authority to grant this approval provided, however, that the Criminal Division does not object to the grant of such approval.[19] This review procedure by officials of the Department of Justice has a dual purpose: first, to assure that all orders are in "the public interest" [as required by section 6003(b)(1)] from a national perspective, and second, to minimize the danger of inadvertent interference by one district with ongoing investigations or prosecutions in another district.[20]

To implement the requirements of the statute, the Department of Justice has set up detailed procedures for obtaining a compulsion order. A request initiated by an Assistant United States Attorney or other government attorney[21] must be submitted to the United States Attorney, or in his absence his Chief Assistant, before submission to the Department. Requests, submitted on a departmental form requiring all pertinent information for a knowledgeable review of the request, are sent to the division having authority over the subject matter of the case, or if the choice of the appropriate division is not clear, to the Immunity and Records Unit of the Criminal Division which forwards the request to the appropriate division.[22]

The prerequisites a United States Attorney must satisfy in deciding to apply for an order are set out in the statute. Section 6003(b) requires that he have concluded that "the testimony or other information . . . may be necessary to the public interest" and that the witness "has refused or is likely to refuse to testify or provide information on the basis of his privilege against self-incrimination." Obviously, the most difficult issue for both the United States Attorney requesting the order and the Department of Justice officials authorizing the request is whether such an order would be in "the public interest." Many factors are pertinent to making this decision, including the seriousness of the crime with respect to which the witness will testify, the involvement and culpability, if any, of the witness in the crime, and the ability of the prosecutor to prosecute the case without the testimony of the witness concerned. Additional factors include the ability of the prosecutor to prosecute the witness for his criminal activity independent of the testimony for which he is immunized, the likelihood that the witness will refuse to testify even if ordered to do so by the court, and whether, if a witness does refuse to testify, there will be an effective sanction against such contemptuous conduct. A consideration of whether the witness' compelled testimony might lead to unfortunate collateral consequences, such as physical reprisals by a putative defendant, the likelihood that the witness

[17] See authorities cited at note 16 *supra*.

[18] Kastigar v. United States, 406 U.S. 441, 446 (1971).

[19] 28 C.F.R. § 0.175 (1975).

[20] The need for such a role by Department of Justice officials has been judicially noted:

> If there be fear that an United States Attorney may unreasonably bargain away the Government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants.

United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972). While the *Carter* case concerned a promise not to prosecute, rather than compulsion and testimonial immunity under 18 U.S.C. § 6003 (1970), the observation is equally appropriate to the latter. For illustrations of why orders under the statute require Departmental coordination see the text accompanying notes 29–31 *infra*.

[21] These are usually Criminal Division or Antitrust Division attorneys. A proposal now under consideration by the Department would permit such department attorneys to initially submit an application to the Department without prior approval, although the United States Attorney would still need to approve the application before submission to the court.

[22] The Immunity and Records Unit of the Criminal Division also coordinates the further distribution of requests concerning the Division to each of the sections within the Division according to the subject matter of the case involved.

will commit perjury, and the question of whether the prosecutor could bring a prosecution against him if he did are also elements of this determination. The value of the case at hand in achieving an effective program of enforcing pertinent criminal laws is a final important part of this "public interest" inquiry.

If the application receives the approval of the appropriate division head, and the Assistant Attorney General in charge of the Criminal Division has no objection, a letter of authorization is sent by the division head to the United States Attorney, who then attaches the letter to a motion for an order compelling testimony under the statute.[23]

The normal processing of an authorization for an application under section 6003 can take as long as two weeks from the time the Department receives a request to the time it mails the authorization letter if approved. While conscientious case preparation normally makes this a sufficient response time, situations inevitably arise where an important witness unexpectedly refuses to testify, asserting his privilege against self-incrimination. On such occasions the necessary application can be made to the Department by teletype and the review process is accelerated.

When a properly drafted motion requesting an order under the statute is presented to a court, it must be granted. Section 6003 provides: "the United States district court . . . *shall issue* . . . upon the request of the United States attorney . . . an order requiring such individual to give testimony or provide further information . . . " (emphasis added). The statute mandates the order if the prerequisites are satisfied; *i.e.,* that the witness is unlikely to refuse to testify based on his privilege against self-incrimination, and the testimony may be necessary to the public interest, both *in the judgment of the United States Attorney.* The legislative history is clear on this point. Both the Senate and House reports on the Organized Crime Control Act state: "The court's role in granting the order is merely to find the facts on which the order is predicated. The statutory language is shall."[24] Court decisions have likewise accepted this view.[25]

Finally, it should be noted that the granting of the

[23] Judge Wolfson notes in his article that in response to a letter to the Attorney General asking whether the Department made any "meaningful review" of immunity requests, he was told, among other things, that: "The standards for approving requests are being reviewed and modified at present." Judge Wolfson concluded: "I take this to mean that . . . [t]he Justice Department has been virtually without standards for approval of the requests." This conclusion (as the quoted statement plainly implies) is inaccurate. Wolfson, *Immunity—How It Works in Real Life,* 67 J. CRIM. L. & C. 167, 167-68 (1976) [hereinafter cited as Wolfson].

In implementing the statutory standards of 18 U.S.C. §§ 6001-05 (1970), the Department issued a memorandum on the subject of immunity on September 2, 1971. U.S. Dep't of Justice, Memo. No. 595. This memorandum was supplemented with other formal directives on June 9, 1972, October 30, 1973, and November 6, 1973. A memorandum concerning informal immunity was issued on October 4, 1972. Indeed, the Department published in the Federal Register on December 23, 1970, Order No. 445-70 which described the Department's procedures for reviewing immunity requests. 35 Fed. Reg. 19397 (1970). This was amended by Order No. 541-73 which was published in the Federal Register on October 2, 1973. 38 Fed. Reg. 27285 (1973). The Department's procedures as amended now appear in 28 C.F.R. §§ 0.175-.178 (1975). Judge Wolfson thus need not have written the Attorney General to ascertain that the Department makes a "meaningful review" of immunity requests. It has provided and continues to provide such review. The seriousness with which it regards its review role is evident from the formation of the task force for review of the Department's policies and procedures in the area—the enterprise which Judge Wolfson "take[s] to mean that . . . the Justice Department has been virtually without" meaningful review.

[24] SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 145 (1969); HOUSE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1970, H.R. REP. NO. 1549, 91st Cong., 2d Sess. 43 (1970).

After noting the fact that the court has no authority to deny a properly framed compulsion request, Judge Wolfson says in his article: "There is no other area in the law where a judge is told he must do so much to a person without pausing to determine if he should." Wolfson, *supra* note 23, at 168. Contrary to Judge Wolfson's belief, the issuance of an order compelling testimony is not unique in the respect that it denies judges discretion. Federal law in other areas requires judges to take serious actions involving individuals—even actions involving a loss of liberty—based upon the exercise of judgment by a prosecutor. FED. R. CRIM. P. 4(a), for example, requires the court to issue a summons instead of an arrest warrant upon the "request of the attorney for the government" (conversely, an arrest warrant must issue if the prosecutor does not elect to use a summons; *see Ex parte* United States, 287 U.S. 241 (1932)). In this class of cases, as under 18 U.S.C. §§ 6001 *et seq.* (1970), the Congress has previously made the constitutionally conclusive determination, which judges must honor, that the prosecutor rather than the court is in the best position to make the decision whether (or what manner of) legal process shall issue. *Cf. Ex parte* United States, 242 U.S. 27 (1916), holding that Congress may divest federal courts of discretion as to the type of sentence to be imposed upon conviction for a federal offense.

[25] *See, e.g., In re* Lochiatto, 497 F.2d 803, 804-05, n.2 (1st Cir. 1974) and cases cited therein. For a discussion of the corollary issue of whether a judge can issue such a compulsion and testimonial immunity order sua sponte, or on motion of defense counsel see text accompanying notes 59-64 *infra.*

motion and the issuance of the order does not make the order effective to compel testimony and provide testimonial immunity. The order becomes effective only after the witness refuses to answer questions based upon an assertion of his privilege against self-incrimination, and after the order is then communicated to him by the person presiding over the proceeding.[26] At a trial the judge would communicate the order; before a grand jury the foreman would do so. Any testimony given after this communication cannot be used directly or indirectly in a subsequent criminal prosecution of the witness (save in a false statement or perjury prosecution as discussed earlier).[27] The threat of his self-incriminating statements being used against him in a criminal proceeding thus removed, the witness is obliged to answer all questions put to him. A witness who continues to refuse to testify may be cited for contempt.[28]

Practical Problems for the Department of Justice Under the Immunized Testimony Statute: Proving That Immunized Testimony Was Not "Used" in a Subsequent Prosecution

Several problems have arisen under the compelled testimony statute which are of concern to the Department of Justice. For example, the Department has the responsibility to coordinate applications to compel immunized testimony so that their use will not unnecessarily hamper prosecution efforts in other jurisdictions, state as well as federal;[29] yet, recently-enacted laws and current proposals[30] may limit the development of information retrieval systems necessary to effectively execute this supervisory role. An information system which readily provides information on persons subject to criminal investigation or prosecution by state or federal authorities is required, due to the structure of the law regarding immunity. Such information is necessary for use by federal authorities not only in evaluating applications by United States Attorneys but also for responding to inquiries by state authorities who are considering grants of immunity.

Another matter of concern to the Department is that its supervisory responsibilities under section 6003 require it to infringe to some degree upon the traditional independence of a local United States Attorney in handling his cases. This tradition of autonomy reinforces sensible and practical policies which recognize that, as prosecutor, the United States Attorney is in a unique position to make strategy and value judgments which depend upon intimate knowledge of the facts of the particular case. The Department's role, however, is no less essential. It must coordinate applications for use of the statute to avoid unnecessary interference among districts, and indeed sovereigns;[31] it also must assure that each application for use of the statute is in "the public interest" from a national as well as from a local perspective. In devising its system for review of applications for compulsion orders the Department must and does attempt to accommodate both of these legitimate interests.

One significant difficulty that can arise when using the 1970 statute is meeting the affirmative burden now placed upon the government to show that the evidence introduced in a criminal proceeding, against a person previously compelled to testify, has been derived from a wholly independent source.

Historical Background of Prosecutor's Burden of Proving No Taint. Under grants of transactional immunity the issue of the use of immunized testimony never arose since subsequent prosecution was barred completely. Such was the typical form of immunity for the eighty years or so between the enactment of the Compulsory Testimony Act of 1893[32] and the 1970 Act.

Before this period, however, federal statutes such as the Immunity Act of 1868[33] permitted the compulsion of testimony but barred its direct use in a subsequent prosecution. However, the Supreme Court's 1892 decision in *Counselman v. Hitchcock*[34] held that this practice did not provide full fifth

[26] 18 U.S.C. § 6002 (1970).

[27] Even here stringent limitations obtain. *See* United States v. Hockenberry, 474 F.2d 247, 249–50 (3rd Cir. 1973), a case tried and argued by the author while serving as United States Attorney for Western Pennsylvania, holding that *truthful* testimony, given in the same proceeding for which the defendant is on trial upon a charge of having made a false statement, cannot be later used by the government to impeach the defendant.

[28] Under the provisions of 28 U.S.C. § 1826 (1970), a witness refusing "without just cause" to comply with a court order to testify may be summarily ordered to be confined until he is willing to comply, such period not to exceed the life of the court proceeding or the term of the grand jury in question. *See also* 18 U.S.C. § 401 (1970); FED.R.CRIM.P. 42.

[29] For a discussion of the ability of state immunity grants to affect federal prosecution, see text accompanying notes 50–52 *infra*.

[30] *E.g.*, The Privacy Act of 1974, 5 U.S.C. § 552(a) (Supp. IV, 1974); H.R. 8227; S. 2008, 94th Cong., 2d Sess. (1975).

[31] This refers to sovereign states, not countries. *See* note 11 *supra*.

[32] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, *as amended*, 49 U.S.C. § 46 (1970).

[33] Feb. 25, 1868, ch. 13, 15 Stat. 37 (repealed 1910).

[34] 142 U.S. 547, 585 (1892).

amendment protection to witnesses. It concluded that the statute, a version of the 1868 Act, "could not, and would not, prevent the use of [the witness'] testimony to search out other testimony to be used in evidence against him,"[35] and that such use would violate the witness' right against self-incrimination.[36] This was the first Supreme Court prohibition of the "derivative" use of compelled testimony. Congress, of course, adopted a transactional immunity statute in the wake of *Counselman*. It was not until 80 years or so later, following the adoption of the current use and derivative use testimonial immunity statute, that the Supreme Court, in *Kastigar v. United States,*[37] concluded that immunity of the testimony from such derivative use as well as direct use was constitutionally sufficient protection.

While *Counselman* first set out the prohibition against derivative use, it was the Court's 1963 decision in *Murphy v. Waterfront Commission*[38] which first suggested that implementation of this prohibition would require that prosecutors have the burden of proving that evidence introduced in a subsequent prosecution was not "tainted" by the compelled testimony. *Murphy* involved the situation in which a state sought to, but could not, compel a witness to testify despite his subsequent lack of immunity from federal prosecution. But the Court stated:[39]

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

Kastigar reaffirmed and elaborated upon this obligation of the government, calling it at one point "the heavy burden"[40] of proving that all evidence is derived from a legitimate source wholly independent of the compelled testimony.

Post-Kastigar Development of the Prosecutor's "Heavy Burden." Kastigar, however, did not elaborate upon the nature and standard of proof of non-taint required of the government upon the subsequent prosecution of a compelled witness, a point which, as others have noted, may seriously alter the apparent holding in *Kastigar.*[41] To the extent that this "heavy burden" on the government becomes impossible to overcome, the testimonial immunity adopted by Congress and approved by *Kastigar* will approach, in practice, the transactional immunity which Congress specifically rejected when it repealed 18 U.S.C. § 2514 (1968).

While the Supreme Court in *Kastigar* clearly did not call for such a result, subsequent lower court decisions have suggested the development of what might be styled an "impossible burden" standard. For example, several courts have held that if a prosecutor was exposed to a transcript of immunized testimony, it was legally impossible for the government to meet the standard of proof of non-taint.[42] The same conclusion has been reached where sufficient evidence to support the conviction was available and admittedly untainted, and even if the prosecutor did not know,[43] or could not have known,[44] that the transcript he read was of immunized testimony. This rule prevents the government from even attempting to prove that the exposure was so remote or so minimal as to be of no consequence that neither it nor its fruits were "used" in the criminal proceeding, a point the government can often, if given the opportunity, persuasively demonstrate.[45] Further, the result in these cases has not been the exclusion of evidence

[35] *Id.* at 564.

[36] *Id.* at 564–565.
The Court later continued:
> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute under consideration] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. *Id.* at 585–586.

It is this language that Congress relied on in enacting a new form of immunity statute, providing transactional immunity, to replace the unconstitutional one. The new statute was introduced as a bill on January 27, 1892, only sixteen days after the *Counselman* decision. 23 CONG. REC. 573 (1892).

[37] 406 U.S. 441 (1972). The immunity statute interpreted was 18 U.S.C. §§ 6001 *et seq.* (1970).

[38] 378 U.S. 52 (1964).

[39] *Id.* at 79 n.18.

[40] 406 U.S. at 461.

[41] Comment, *The Supreme Court, 1971 Term—Self-Incrimination,* 86 HARV. L. REV. 1, 181 (1972); Note, *Standards for Exclusion in Immunity Cases after* Kastigar *and* Zicarelli, 82 YALE L.J. 171 (1972).

[42] United States v. Rivera, 23 U.S.C.M.A 430, 50 C.M.R. 389 (1975).

[43] United States v. Dornau, 359 F.Supp. 684, 687 (S.D.N.Y. 1973).

[44] United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973).

[45] *See, e.g.,* United States v. Meyers, 339 F. Supp. 1154 (E.D. Pa. 1972) (federal immunity from use or derivative use, deriving from a state grant of transactional immunity,

directly or indirectly tainted, as required by *Kastigar*,[46] but complete dismissal. Thus the "impossible burden" standard not only deprives the government of an opportunity to meet its "heavy burden," but also provides de facto transactional immunity to the defendant. It is not clear whether these positions reflect simply a judicial time lag in which certain judges have not yet adjusted to the congressional substitution of use immunity for transactional immunity and, therefore, can be viewed as merely transitional; or, whether such decisions represent a positive trend toward judicial frustration of congressional intent through a type of collateral attack, especially frustrating now that the *Kastigar* decision has settled the constitutional validity of the federal "use immunity" statute.

Some commentators seem to echo these courts resistance to the prosecutorial tool of "use" immunity. Especially notable is a proposal in the *Yale Law Journal* which suggests that prosecutors be required to have a court certify all evidence against a witness before he is compelled to provide testimony, that in a subsequent prosecution the government be restricted to using only such previously certified evidence, and that prosecutors be required to swear that they have not had access to the immunized testimony or any information derived from it.[47]

The first two features of this proposal are not particularly objectionable. Prior certification of evidence may in fact be an effective tool for prosecutors themselves to utilize as a means of proving that their evidence is independent of the immunized testimony. And while it seems unnecessary to require that a prosecutor swear that, to the best of his knowledge, he has not directly or indirectly used immunized testimony, this idea is not inherently objectionable.[48]

The remaining and central aspect of the *Yale Law Journal's* proposal is more troubling. A requirement that the government, in any subsequent prosecution that touches upon the compelled testimony, use only evidence certified *prior* to the compelled testimony amounts to a requirement that the investigation of the witness for any related offenses cease upon his compulsion. Protecting a witness from all evidence obtained after such compulsion, even if from entirely independent sources, is similar in effect to transactional immunity. Not only does this requirement destroy the primary advantage of the use immunity statute, which is the ability to use evidence subsequently and independently developed, it resurrects the primary disadvantage of the transactional immunity statute in that witnesses could shield themselves from subsequent prosecution simply by mentioning past criminal activity in the course of their immunized testimony, provided it was pertinent to the inquiry at hand. Indeed, a prosecutor might not even know about the creation of such immunity until at a subsequent prosecution for an apparently unrelated offense, the defendant is able to show that during his previous immunized testimony he had in fact mentioned activities which are related to the pending prosecution. The clear absence of use or derivative use of such immunized testimony would not prevent the prosecutor from being restricted to previously certified evidence, despite the fact that prosecution in such a situation was explicitly provided by Congress and approved as constitutional by the Supreme Court.

Thus, although the intent of the certification proposal is to insure that the government's "heavy burden" under *Kastigar* is actually met, certification ultimately imposes a "crushing burden" on the operation of use immunity by subtly incorporating the most objectionable feature of transactional immunity.

Aggravation of the "Heavy Burden": Imposition by States, Courts, Defendants, and Others and by Operation of Law. The federal prosecutor's problems with proving that his evidence in a subsequent prosecution is untainted are aggravated by the fact that such a burden can be imposed on him without his approval and even without his knowledge about it. Unauthorized imposition by another federal prosecutor, in another district, has been held enforceable,[49] but because of the coordination potential of the Department of Justice, should not present insurmountable difficulties. There are a number of other situations, however, in which federal prosecutors may have the burden imposed without their

gave rise to a government burden to prove no taint in a federal prosecution which was successfully met even though the prosecutor had seen a newspaper article paraphrasing the immunized testimony); United States v. Henderson, 406 F. Supp. 417 (D. Del. 1975).

[46] 406 U.S. at 461–62. Dismissal with prejudice rather than exclusion at trial has also been applied to indictments brought by grand juries that had been exposed to immunized testimony. Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973).

[47] Note, *Standards for Exclusion in Immunity Cases after* Kastigar *and* Zicarelli, 82 YALE L.J. 171, 182–183 (1972).

[48] Such swearing, however, may not be sufficient under the current law to meet the "heavy burden," since proof of non-use is required; and, moreover, to conform to *Kastigar*, the thrust of the oath must be that such testimony or its fruits have not been used, not that the prosecution has never had access to them.

[49] United States v. Carter, 454 F.2d 426 (4th Cir. 1972).

knowledge and approval, and indeed against their wishes and against the public interest.

Courts have held that a discretionary grant of testimonial "use" immunity by state prosecutors is binding on federal prosecutors.[50] Consequently, United States Attorneys must depend upon the voluntary cooperation of state authorities to eliminate or minimize possible interference. Federal authorities may often be unaware of a state grant of immunity and the compulsion of testimony.[51] Nevertheless, the burden of proving an independent source is raised simply by the defendant's assertion that he has previously made an immunized statement which is in some way related to matters pertinent to the current prosecution.[52]

Testimonial immunity from use and the prosecutor's corresponding burden to prove no taint have also been made available without the approval or knowledge of federal prosecutors by the courts in a growing number of situations other than criminal prosecutions. Without statutory authority, courts have granted testimonial use immunity to inmates testifying before prison disciplinary proceedings,[53] to public employees before disciplinary hearings,[54] and to defendants at deferred sentence hearings.[55] Presumably, wherever the courts create such an immunity from use or derivative use, they also create a prosecutorial burden to affirmatively prove non-use.

Perhaps most alarming is the fact that the court-initiated immunity has not been viewed as a discretionary action of the body receiving the testimony, but is deemed to be an automatic result, provided by operation of law, for any self-incriminating testimony given.[56] Consequently, while the protection of testimonial immunity, as authorized by sections 6003 and 6004, has been transplanted to a variety of situations, its attendant limitations—of a prior assertion of a valid fifth amendment claim by the defendant and of prior determination by the Attorney General that the public interest is served—have not. In effect, courts have created an "automatic immunity" despite the fact that, with minor exception, Congress has specifically repealed all federal automatic immunity statutes.[57] At the very least, these non-statutory immunity authorities should be limited by a provision similar to that which Congress imposed upon its *own* authority to grant testimonial use immunity in section 6005—that prior notice be given to the Attorney General to allow him to voice his objections and, if necessary, to take steps to minimize the burden that the immunity would impose on the Department.

Others have proposed still further enlargement of the non-prosecutor group which is authorized to cause testimonial use immunity to attach, and thereby raise the burden of proving no taint, to include judges and defense counsel.[58] It should be noted initially that this would not only lack a proper statutory basis, but would be clearly contrary to those provisions of the 1970 Act which specifically limit compulsion and hence testimonial immunity authority to the Attorney General[59] or Congress, for use in carrying on its proceedings.[60] Perhaps for these reasons the courts have so far uniformly refrained from creating such new authority in themselves or in defendants.[61]

[50] United States v. First W. State Bank of Minot, North Dakota, 491 F.2d 780, 782 (8th Cir. 1974), *citing* Murphy v. Waterfront Comm'n, 378 U.S. at 79 (1964), and United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973). The federal government may be able to impose a grant of *transactional* immunity upon the state. It did so under the now repealed federal transactional immunity provisions of the Act of June 19, 1968, Pub. L. No. 90-351, § 802, 82 Stat. 216 (repealed by 18 U.S.C. §§ 6001 *et seq.* (1970), repeal effective four years after the effective date of the later act, *i.e.*, Dec. 14, 1974). Yet it is not clear that a grant of transactional immunity by a federal prosecutor in the form of informal or equitable immunity, rather than statutory, would also be applied to the states as transactional rather than as use immunity. On the other hand, it has been held that a grant of transactional immunity by a state will only impose a *use immunity* obligation upon the federal government. United States v. First W. State Bank of Minot, North Dakota, *supra* at 786.

[51] United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973).

[52] *See e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964).

[53] Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973); Shimabku v. Britton, 503 F.2d 38 (10th Cir. 1974).

[54] United States v. Deritt, 499 F.2d 135 (7th Cir. 1974).

[55] Flint v. Mullen, 372 F. Supp. 213 (D.R.I. 1974); but compare California v. Byers, 402 U.S. 424 (1971). The Supreme Court only recently affirmed the en banc reversal of a Ninth Circuit panel which had ruled that incriminating information required by income tax returns be given immunity from use in a criminal proceeding. Garner v. United States, 501 F.2d 228 (9th Cir. 1974), *aff'd*, 96 S. Ct. 1178 (1976).

[56] *See* SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 52 (1969) (discussing the dissatisfaction with the operation of the automatic immunity statute of 1857 and its repeal); WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1416-17 (1970).

[57] 11 U.S.C. § 25(a) (10) (1970) (providing automatic testimonial use immunity for the bankrupt at the first meeting of the creditors).

[58] *See* the arguments of the defendants in cases cited at note 61 *infra; see also* Letter, note 62 *infra.*

[59] 18 U.S.C. §§ 6003-04 (1970).

[60] 18 U.S.C. § 6005 (1970).

[61] *E.g.*, United States v. Allstate Mortgage Corp., 507

Nor is there a valid constitutional basis for establishing such authority. The right to confront witnesses[62] is not applicable because it applies only to a "witness against [the defendant]." Although the right of the defendant to compulsory process is applicable, it does not, and could not in any workable system of criminal justice, be taken to outweigh the right against self-incrimination of the witness, or alternatively, to be sufficient basis for allowing a defendant to impose the burden on the prosecution of proving no taint as to a witness. Only the "*public* interest," as required by section 6003, and "the *public's*] right to every man's evidence"[63] are sufficient to justify such compulsion and such a burden.

On the issue of whether the "public interest" would be served, a judgment made by a defendant is, of course, wholly inappropriate. Judgment by a court would also necessarily lack the information needed accurately to decide such a question.[64] This precise issue was considered and answered by Congress in the current testimonial compulsion statute.

The Department's Efforts to Deal with Its Increasingly "Heavy Burden." While the burden on federal prosecutors is heavy, it is, in the view of the Department of Justice, not a wholly unhealthy one. Such a prosecutorial burden is generally necessary for the protection of the fifth amendment rights of the compelled witness. The Department's response to these problems has not been, and will not be, to attempt to avoid the burden, but rather to meet it through more efficient and energetic federal prosecution.

Most importantly, the prosecutor dealing with the burden must be aware of it when he applies for a compulsion order and should plan ahead accordingly. He can reduce the situations in which such a burden of proving no taint would arise by prosecuting beforehand, if possible, any person whose testimony he needs to compel. Second, he can reduce the possibility of taint in several ways, including; insuring strict control of secret grand jury transcripts of compelled testimony; segregating all compelled testimony transcripts and limiting access to them to a need-to-know basis; assuring that all who read such transcripts have prior notice of their nature and the taint problem; and requesting, when appropriate, limitations on the disclosure of compelled testimony given at trial.[65] Finally, he can increase his ability to prove that no taint has occurred by developing a system to document the people who have read the transcripts or copies of them, and the people to whom information contained in the transcripts has been passed.[66]

The device of compelled testimony under the 1970 Act is so useful to effective prosecution that efforts to insure its continued viability will be undertaken, however burdensome they might seem. Federal prosecutors are determined to use these important provisions in such a way that there will be no justification for additional legislative or judicial restrictions upon them.

Defense-Prosecution Agreements Involving a Defendant's Promise to Provide Information or Testimony.

A discussion of "immunity" would not be complete without referring to alternative non-statutory modes by which defendants have provided self-incriminating information or testimony to federal prosecutors as an element of a defense-prosecution agreement. Such an agreement may be a simple plea agreement

F.2d 492 (7th Cir. 1974); *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973); Cerda v. United States, 488 F.2d 720, 723 (9th Cir. 1973); United States v. Durham Concrete Products, Inc., 475 F.2d 1241 (5th Cir. 1973); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967); Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966); United States v. Sangano Construction Co., Crim. No. 74-5 (S.D. Ill. May 1975). No court seems to have dealt with the situation reserved in Earl v. United States, *supra*, at 534 n.1, where the government relies on critical testimony from "immunized" witnesses but refuses to confer immunity on a seemingly crucial witness sought to be called by the defendant. It seems clear, however, that even assuming that due process would be violated in such an instance, the remedy would not lie in the courts' bestowing "immunity" on the defense witness —an action which would "unacceptably alter the historic role of the Executive Branch in criminal prosecutions" (United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir. 1976))—but rather in the imposition of some other sanction. *Cf.* United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976) (government ordered on retrial to grant immunity to a defense witness if called, or to suffer entry of a judgment of acquittal).

[62] Letter from J. Crim. L. & C. to John C. Keeney, Acting Assistant Attorney General, Apr. 28, 1975.

[63] *See* 8 Wigmore § 2192 (J. McNaughton rev. ed. 1961).

[64] *See* Earl v. United States, 361 F.2d at 534 (D.C. Cir. 1966).

[65] Arguably even the constitutional right to a public trial may be made to yield to a substantial interest in limiting disclosure of particular testimony. *See generally* Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 540 (2d Cir. 1974).

[66] Similar accounting procedures are required by the Privacy Act of 1974, 5 U.S.C. § 52(a) (Supp. IV, 1974), but disclosures between Department of Justice personnel, including United States Attorney's Offices, are exempted from such accounting requirements.

in which promised information or testimony is a relatively tangential and minor part, or an agreement the central term of which is the information or testimony in question.

The prosecutor's consideration for such agreements may be a promise to move for dismissal of certain charges, a promise to make or not make certain recommendations at sentencing, a promise of true "immunity" from prosecution for all matters relating to certain transactions, a promise not to use the compelled testimony or information against the defendant, or perhaps a combination of any or all of these. If the defendant upholds his part, these agreements are judicially enforceable against the prosecutor, even if the prosecutor has acted beyond his authority.[67]

Such agreements fall into three distinct groups: (1) those that are primarily plea agreements where the defendant's promise to testify is, by virtue of the accompanying plea agreement, no additional concession; (2) those that are simultaneously a plea agreement and an agreement to provide testimony or information where the defendant's promise to provide testimony and information goes beyond what he could normally be compelled to provide without some kind of immunity; and (3) those that are solely agreements to provide information or testimony, not involving any plea of guilty by the defendant.

The first group does not appropriately belong under the heading of non-statutory agreements to provide testimony and is not covered by Department of Justice policies regarding such "informal immunity," although testimony or information may result. A plea agreement in which a defendant pleads guilty to one or more charges, or a lesser charge, in exchange for a prosecution promise to move for dismissal of the other charges, makes the defendant's privilege against self-incrimination inapplicable both as to the charges admitted and the charges dropped. Assuming that the defendant fulfills the plea agreement, he cannot be prosecuted for the former because of the double jeopardy bar, or for the latter because of the enforceability of the plea agreement.[68] Since the defendant is truly "immune" from prosecution, his privilege against self-incrimination becomes inapplicable; he can therefore be compelled to testify without receiving any additional statutory or informal testimonial immunity protection. His de facto immunity stems not from any promise the prosecutor might have made, but rather from the prosecutor's inability to prosecute because of the plea agreement. A prosecutor's promise not to prosecute in such a plea agreement provides no additional legal protection.

However, to the extent that the promise does provide additional legal protection, that is, to the extent that the plea agreement would not bar the defendant's valid fifth amendment claim, the agreement is something more than a plea agreement, and therefore falls into the second category. This may occur where, despite a plea agreement in one district, the defendant is subject to further prosecution for related matters from prosecutors of another federal district or a state. The defendant's privilege against self-incrimination would be applicable and his testimony could only be compelled upon a grant of at least testimonial use immunity. In such a situation an informal promise of immunity would have some actual legal effect.

Department of Justice policies regarding the use of "informal immunity" apply to this aspect of an agreement of the second group as well as to the third group of agreements. The third group of agreements are those in which the defendant makes a promise to provide testimony or information but does not plead guilty to any charge.

It should be stated that the Department generally discourages the use of the second and third groups of agreements by federal prosecutors except in certain situations. Even then, specific limitations and procedural requirements are imposed by the Department of Justice on their use. For example, whenever a defendant is to provide self-incriminatory testimony under oath, at either a grand jury hearing or trial, departmental policy specifically requires that the compelled testimony statute be used in lieu of a defense-prosecution agreement. The reasons for such a policy are clear. Nothing more than use and derivative use immunity, as provided by the statute, is constitutionally required to compel testimony under oath; no greater promise need be given by the federal prosecutor; and since the statute provides such protection, the statute is all that is needed by the federal prosecutor.[69]

The primary disadvantage to a prosecutor of such

[67] *See, e.g.*, United States v. DeSena, 490 F.2d 692 (2d Cir. 1973); United States v. Carter, 454 F.2d 426 (4th Cir. 1972) (holding promise enforceable even against federal prosecutors not involved in or aware of its being made); United States v. Levy, 153 F.2d 995 (3rd Cir. 1946); *In re* Kelly, 350 F. Supp. 1198 (E.D. Ark. 1972). *See also*, United States v. Pepe, 367 F. Supp. 1365 (D. Conn. 1973).

If the witness does not keep his part of the agreement, the government is no longer bound by the promise of immunity. United States v. Ciotti, 469 F.2d 1204 (3rd Cir. 1972).

[68] Santobello v. New York, 404 U.S. 257 (1971).

[69] There are a very few exceptional circumstances where the statute may not be adequate to compel testimony under

statutory use immunity, as compared to an informal promise of use immunity, is that it requires more paperwork and may involve some delay. But the paperwork and delay may be justified as the necessary price of abiding by the clear legislative directive expressed in the statute, and echoed by the courts, that the Department be responsible for approving and coordinating all applications to compel testimony under the protection of immunity. In addition, informal promises are increasingly being shunned by knowledgeable defense counsel since they offer no more protection than the statute and, although likely to be held enforceable by a court, do not have the obviously clear and dependable assurance of the statute. Appearances are important as well to both the government and defense counsel who, in many instances and for a variety of reasons, will wish the record to indicate the testimony in question was "compelled" by court order rather than voluntarily provided.

The Departmental preference for use of the statute rather than informal defense-prosecution agreement is necessarily limited to testimony to be given under oath, since the statute is only available for use in such situations. Even when testimony is not to be given under oath, however, prosecutors are counseled never to promise more than the use and derivative use immunity which such information would receive if compelled by the statute. There are, in addition, a number of other specific guidelines which the Department has set down to govern such situations: any agreement must be reduced to a written statement of understanding and should be signed by the defendant or his counsel; all agreements must be limited to pending or potential charges within the district; and if an agreement could reasonably be expected to indirectly affect prosecutions in other districts, prior approval must be obtained from those districts.

Conclusion

Under our system of criminal justice, federal prosecutors are invested with considerable discretion in the conduct of their duties. They are called upon daily to make decisions as to which individuals are appropriate subjects for investigation and, ultimately, prosecution on the basis of their involvement in what appears to be activity which violates the federal criminal laws. Sometimes, prosecutions are declined on the basis of policy, *e.g.*, the amount involved may be *de minimus,* the individual may be subject to effective state or local prosecution, or personal characteristics of the defendant (age, infirmity or mental condition) may militate against going forward; however, in each instance the choice must be a measured one, taking into account all the factors present.

In like manner the prosecutor must decide upon the utilization of the so-called "immunity" processes. Careful choices must be made as to what the most appropriate targets for effective prosecution may be and as to what testimony should be sought to reach the desired goal. There is nothing sinister in such action. It is legislatively sanctioned, judically approved, and has proved most effective in catching the principal figures involved in major criminal activities.

At bottom, if obliged to identify the major source of public concern as to the so-called "immunity" procedures, this author would rely on the perceptions fostered by a "street ethic" we all carry forward from childhood—that one should not "tell" on others or be a "tattle-tale"[70]—an ethic some would torture into a "right" not to incriminate others in formal proceedings designed to determine guilt or innocence.

There is no such right. Instead, the public has a greater right, "the right to every man's evidence," and if prosecutors seek this evidence under terms that are constitutionally valid, they are entitled to have it. Those refusing to furnish such evidence rightly pay the price for contempt of a valid court order. No "new torture," no "coddling of criminals," no legal legerdemain is involved in the use of the 1970 "use immunity" statute. The fifth amendment prohibition against self-incrimination remains intact and the "rational accommodation" reached between it and "the legitimate demands of government to compel citizens to testify" inures to the benefit of all who aspire to live in a peaceful and tranquil society.

oath. These might include those rare unavoidable situations where time would not permit application under the statutory procedures or where for some reason more than testimonial use immunity was needed and justifiable.

[70] *See, e.g.*, Harris, *Annals of Law—Taking the Fifth,* The New Yorker, Apr. 12, 1976, at 86:

> [I]f the Rules of Civil Society were the standard on which our criminal laws are based then no one would be forced to talk about others or go to prison, because scarcely anyone is regarded with more scorn in the ordinary world than the Judas figure—from the childish tattletale to the adult informer.