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## Title II - General Immunity

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## TITLE II—GENERAL IMMUNITY

### I. INTRODUCTION

This title repeals or conforms the over fifty existing federal immunity statutes<sup>1</sup> and establishes a uniform federal immunity statute<sup>2</sup> to apply to proceedings before or ancillary to a court, grand jury, or agency of the United States, either house of Congress, or its joint committees, committees or subcommittees.<sup>3</sup> The scope of immunity granted protects a witness from the use of his testimony or its fruits in a future criminal prosecution, but does not protect him from prosecution itself.<sup>4</sup> This reflects a positive decision by Congress that the fifth amendment self-incrimination clause only requires a grant of what has been referred to as “use” or “testimonial” immunity rather than “transactional” immunity.<sup>5</sup>

Originally, this provision was promulgated to strengthen the evidence gathering process against organized crime:<sup>6</sup> it applied only to court and grand jury proceedings.<sup>7</sup> Subsequently, the recommendations of the National Commission on Reform of Federal Criminal Laws were adopted establishing a general federal immunity statute that applied to legislative and administrative proceedings as well as judicial proceedings.<sup>8</sup>

### II. PROVISIONS

The statute requires a witness to claim affirmatively his privilege against self-incrimination before he can obtain immunity.<sup>9</sup> This requirement has been included to avoid a broad grant of immunity that would operate automatically upon a witness's testi-

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<sup>1</sup> See amendment to table of parts, §§ 202-59, Organized Crime Control Act of 1970 [hereinafter cited as O.C.C.A.] § 201(b).

<sup>2</sup> See S. REP. NO. 91-617, 91st Cong., 1st Sess. 55 (1969) [hereinafter cited as SENATE REPORT].

<sup>3</sup> 18 U.S.C.A. § 6002 (Supp. 1971).

<sup>4</sup> *Id.* See also SENATE REPORT 32.

<sup>5</sup> See H. R. REP. NO. 91-1549, 91st Cong., 2d Sess. 42 (1970) [hereinafter cited as HOUSE REPORT]; SENATE REPORT 145, 51-56; *In re* Grand Jury Testimony of Kinoy, No. M-11-188, at 12 (S.D.N.Y. Jan. 29, 1971).

<sup>6</sup> *Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 282 (1969) [hereinafter cited as *Senate Hearings*].

<sup>7</sup> See SENATE REPORT 55.

<sup>8</sup> *Id.*

<sup>9</sup> 18 U.S.C.A. § 6002 (Supp. 1971).

mony<sup>10</sup> under subpoena.<sup>11</sup> Requiring this assertion of the fifth amendment right serves as a warning to the prosecutor that the line of questioning might incriminate the witness; the prosecutor must then decide whether to terminate the line of questioning or seek a grant of immunity.<sup>12</sup> Thus, grants of immunity are intentional and under the control of the Government.<sup>13</sup>

### A. Prospective Grants of Immunity

In the interests of administrative efficiency,<sup>14</sup> the statute authorizes the issuance of a prospective grant of immunity<sup>15</sup> so that an order may be issued directing a witness to testify on a particular subject in advance of his appearance before the questioning body.<sup>16</sup> An order of this nature would be conditional, however, with the immunity not taking effect until the witness actually refused to answer questions on the basis of his privilege and was then ordered to do so by the presiding official.<sup>17</sup> It is reasoned that

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<sup>10</sup> Although throughout this section reference is made to a witness's "testimony," the statute specifically refers to testimony or "other information," 18 U.S.C.A. §§ 6002-05 (Supp. 1971), which is defined to include "any book, paper, document, record, recording or other material." 18 U.S.C.A. § 6001 (Supp. 1971). The explicit inclusion of these items within the statute precludes any potential problems regarding which documents are within the privilege against self-incrimination. See *Shapiro v. United States*, 335 U.S. 1 (1948).

<sup>11</sup> See SENATE REPORT 145; HOUSE REPORT 42.

<sup>12</sup> See Statement of Robert G. Dixon, Jr., for the National Commission on Reform of Federal Criminal Laws [hereinafter cited as Comm. Ref. Crim. L.], *Senate Hearings* 290, at 298. It is submitted that this warning to the prosecutor may not be necessary when immunity is reduced from transactional to use immunity. When transactional immunity is available, under "automatic" statutes the prosecutor is unaware of which of his questions will result in statements that would preclude future prosecution. But when only use immunity is available, future prosecution is not precluded; only the use of the testimony is prohibited. Therefore, regardless of whether answers incriminating the witness are given, the prosecutor is theoretically in the same position with respect to future prosecution of the witness. Thus, with use immunity, the fear of an immunity bath may be unfounded; however, requiring the witness to claim his privilege to obtain immunity "may well be a trap for the witness." *United States v. Monia*, 317 U.S. 424, 430 (1943). This may be especially so when an unwary witness is informed that a court has issued an immunity order which can now be issued prospectively before the witness has begun testifying. (18 U.S.C.A. §§ 6003, 6004, 6005 (Supp. 1971)). He may very well be "trapped" into incriminating himself unless the prosecutor explains that the order is not effective until the witness claims his privilege.

<sup>13</sup> See Comm. Ref. Crim. L., *Senate Hearings* 298.

<sup>14</sup> *Id.* 317.

<sup>15</sup> 18 U.S.C.A. § 6003 (Supp. 1971); SENATE REPORT 145; HOUSE REPORT 42-43.

<sup>16</sup> Compare with Immunity Act of 1954, 18 U.S.C. § 3486(a) (1964), repealed by § 228(a), O.C.C.A. construed in *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957) (statute did not authorize prospective immunity grant). See also *In re Bart*, 304 F.2d 631, 637 n.17 (D.C. Cir. 1962).

The constitutionality of the portion of the statute authorizing prospective immunity grants has been challenged as not presenting a "case or controversy" as required by U.S. CONST. art III. *In re Grand Jury Testimony of Kinoy*, No. M-11-188, at 5-7 (S.D.N.Y., Jan. 29, 1971). The question was not decided, however, because the immunity grant in question was not wholly prospective and presented an actual controversy. *Id.* at 7.

<sup>17</sup> See 18 U.S.C. §§ 6002, 6003, 6004, 6005; See also Comm. Ref. Crim. L., letter to the President, March 17, 1969, *Senate Hearings* 287, at 288; Comm. Ref. Crim. L., *Senate Hearings* 317-18.

the questioning body will sometimes be forewarned that a witness is likely to invoke his fifth amendment privilege. Consequently, this provision enables the procedural requirements for obtaining an immunity grant to be met in advance without having to interrupt the proceeding once it has begun.<sup>18</sup>

It should be noted that the statute does not provide for notice to a defendant when a prospective immunity grant is sought, nor does it provide for the defendant's participation in such proceeding. This omission reflects a conscious desire on the part of the draftsmen to allow orders to be obtained *ex parte*.<sup>19</sup> However, the draftsmen recognize that this omission of notice may not be valid,<sup>20</sup> and that a judicially imposed notice requirement would not materially affect the statutory scheme.<sup>21</sup>

### B. Court and Grand Jury Proceedings

Although the statute enables the same type of immunity to be conferred for administrative, congressional and judicial proceedings, it sets up separate procedural requirements for obtaining such grants. In court and grand jury proceedings, the United States attorney may apply to the district court for an immunity order if he has obtained the approval of the Attorney General, believes that the testimony sought is necessary to the public interest, and such witness has refused or is likely to refuse to testify on the basis of his privilege against self-incrimination.<sup>22</sup> It is the United States attorney who must be satisfied that the testimony is in the national interest, or that the witness is likely to refuse to testify.<sup>23</sup> The district court may not review the prosecutor's discretion, its only role being to ascertain whether the procedural requirements have been met. Upon an affirmative de-

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<sup>18</sup> *Id.*

<sup>19</sup> Comm. Ref. Crim. L., *Senate Hearings* 318.

<sup>20</sup> *Id.* See *In re McElrath*, 248 F.2d 612, 616-17 (D.C. Cir. 1957) (en banc); *In re Bart*, 304 F.2d 631, 637 (D.C. Cir. 1962). In *McElrath*, nine judges believed that upon application for an order of immunity, the defendant should be notified and had a right to intervene. Four judges concurred in an opinion basing this right on Rule 24(a) of the Federal Rules of Civil Procedure. The remaining five concurred in an opinion by the now Chief Justice Burger, stating: "We go beyond the companion opinion and hold that the witness should be given reasonable notice of the application, be allowed to appear in the proceeding and be heard . . ." 248 F.2d at 617. The draftsmen have attempted to distinguish this language, but concede that it might be based on a due process notion. Comm. Ref. Crim. L., *Senate Hearings* 318. In *In re Grand Jury Testimony of Kinoy*, No. M-11-188, at 3 (S.D.N.Y., Jan. 29, 1971), the issue of whether an immunity order under this statute could be obtained *ex parte* was raised but not decided, as the Government subsequently served the defendant. Although a ruling on this issue was not made, the court expressed its opinion that notice was required.

<sup>21</sup> See Comm. Ref. Crim. L., *Senate Hearings* 319.

<sup>22</sup> 18 U.S.C.A. § 6003 (Supp. 1971).

<sup>23</sup> *Id.*; HOUSE REPORT 43; SENATE REPORT 145.

termination that such provisions have been satisfied, the court must issue the requested order<sup>24</sup> without evaluating the merits of such grant.<sup>25</sup> However, the statute does not appear to restrict a court's inherent power to require a "good faith" petition by the prosecutor and to refuse to grant such petitions based on improper motives.<sup>26</sup>

### C. Administrative Proceedings

The procedure for immunity in administrative proceedings is similar to that discussed above. However, the agency itself is empowered to grant the immunity;<sup>27</sup> an order from a district court is not necessary. Still, there are the similar requirements that the agency believe the testimony is in the national interest and that the witness has refused or is likely to refuse to testify.<sup>28</sup> The approval of the Attorney General is also necessary.<sup>29</sup>

This latter requirement represents a departure from previous practice where the agencies were empowered to grant immunity and could do so without informing the Attorney General.<sup>30</sup> However, since these agencies were not in a position to be aware of other investigations that may have been undertaken, their grants of immunity under the old law might have inadvertently frustrated these other inquiries. Therefore, the National Commission on Reform of Federal Criminal Laws<sup>31</sup> proposed that the Attorney General should serve as a centralized clearing house for these grants, weigh the impediment to other investigations, and decide which grants were in the greatest national interest.<sup>32</sup> The Commission felt that this purpose would be accomplished without giving the Attorney General a veto power.<sup>33</sup> By granting this power to the Attorney General, Congress may have infringed upon the traditional independence of our regulatory commis-

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<sup>24</sup> SENATE REPORT 145; HOUSE REPORT 43.

<sup>25</sup> Authorizing a court to make such an evaluation might raise "separation of powers" questions. *Ulmann v. United States*, 350 U.S. 422, 433-34 (1956).

<sup>26</sup> See Comm. Ref. Crim. L., *Senate Hearings* 112-13.

<sup>27</sup> 18 U.S.C.A. § 6004 (Supp. 1971).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Comm. Ref. Crim. L., *Senate Hearings* 314.

<sup>31</sup> See Proposed Immunity Provisions, Comm. Ref. Crim. L., *Senate Hearings* 289-90. See HOUSE REPORT 43.

<sup>32</sup> Comm. Ref. Crim. L., *Senate Hearings* 315.

<sup>33</sup> *Id.* The National Commission on Reform of Federal Criminal Laws, proposed only that the Attorney General be given ten days' notice of the desired grant of immunity, during which he could informally object. He was not given an ultimate veto power. See SENATE REPORT 145-46 (commenting on version reflecting the wording of the Comm. Ref. Crim. L. that was adopted by the Senate, but subsequently amended in the House).

sions.<sup>34</sup> It is not clear that the sacrifice of this independence is justifiable on the basis of gains derived from having the ultimate power to approve immunity grants in a central body. Although this goal may be desirable when an improvident immunity grant of an agency could foreclose a criminal prosecution that was being independently prepared by another government department, such is not the case where only use immunity is conferred.<sup>35</sup> In such a situation, each agency still would be able to pursue its investigations and prosecutions unaffected by the immunity grants of another.

#### *D. Congressional Proceedings*

The requirements for seeking an immunity grant in congressional proceedings, however, do not provide for a veto power in the Attorney General.<sup>36</sup> He must be notified ten days before a grant is sought, and he can defer the issuance of such a grant for twenty days.<sup>37</sup> This delay will provide him with enough time to consult Congress and express any possible misgivings.<sup>38</sup> The Attorney General was not given a veto power in an effort to avert "separation of powers" questions.<sup>39</sup> Moreover, the Attorney General himself could be the subject of a congressional inquiry.<sup>40</sup>

An order for immunity in a congressional proceeding must be issued by the district court.<sup>41</sup> Once again, the court's role is to determine if the statutory prerequisites are met.<sup>42</sup> These requirements include a majority vote of the members present to confer immunity if the proceeding is before either house of Congress or, if before a committee, two-thirds vote of the members of the full committee. In addition, the proper notice must be given to the Attorney General.<sup>43</sup> Although, again, the court is not to review the merits of such a grant, it may be able to review the constitutional jurisdiction of Congress over the area of inquiry, the statutory jurisdiction of the agency of Congress over the particular inquiry, and the relevance of the information sought to the inquiry in question.<sup>44</sup>

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<sup>34</sup> Comm. Ref. Crim. L., *Senate Hearings* 315.

<sup>35</sup> See Comm. Ref. Crim. L., *Senate Hearings* 315.

<sup>36</sup> See HOUSE REPORT 43; SENATE REPORT 146.

<sup>37</sup> 18 U.S.C.A. § 6005 (Supp. 1971); HOUSE REPORT 43; SENATE REPORT 146.

<sup>38</sup> See Comm. Ref. Crim. L., *Senate Hearings* 315.

<sup>39</sup> *Id.* 292, 294, 316.

<sup>40</sup> *Id.* 316.

<sup>41</sup> 18 U.S.C.A. § 6005 (Supp. 1971).

<sup>42</sup> See 18 U.S.C.A. § 6005 (Supp. 1971); HOUSE REPORT 43; SENATE REPORT 146.

<sup>43</sup> 18 U.S.C.A. § 6005 (Supp. 1971).

<sup>44</sup> Comm. Ref. Crim. L., *Senate Hearings* 316.

### III. USE V. TRANSACTIONAL IMMUNITY

#### A. Constitutionality

The constitutionality of substituting use immunity for transactional immunity was foremost in the discussion of title II in both Senate and House Hearings on the Organized Crime Control Act of 1970. Prior to the enactment of this statute, most immunity statutes protected the witness from any future prosecution for crimes revealed as a result of testimony under compulsion.<sup>45</sup> These statutes were enacted in the belief that transactional immunity was constitutionally required by the fifth amendment privilege against self-incrimination.<sup>46</sup> This view was espoused by the Supreme Court in *Counselman v. Hitchcock*,<sup>47</sup> and affirmed in *Brown v. Walker*.<sup>48</sup> In *Counselman*, the Court considered the extent of immunity constitutionally required to displace the privilege:

It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect . . . .

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes 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.<sup>49</sup>

The present congressional belief that use immunity is now constitutionally sufficient is founded on the Court's decision in *Murphy v. Waterfront Commission*,<sup>50</sup> where the Court discussed the effect of its decision in *Malloy v. Hogan*<sup>51</sup> (holding the fifth amendment privilege applicable to the states) on federal-state relations in the area of immunity. In *Murphy*, the Court held that the fifth amendment protected a state witness from incrimination under federal law, and that the federal government may not make

<sup>45</sup> See *Hearings on S. 30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., ser. 27, at 161 (1970)* [hereinafter cited as *House Hearings*] (Dep't of Justice Comments).

<sup>46</sup> *Id.*

<sup>47</sup> 142 U.S. 547 (1892).

<sup>48</sup> 161 U.S. 591 (1896).

<sup>49</sup> 142 U.S. at 585-86.

<sup>50</sup> 378 U.S. 52 (1964).

<sup>51</sup> 378 U.S. 1 (1964).

any use of the testimony of such witness obtained under compulsion by a state immunity grant. However, the Court did not overrule *Counselman*, nor rule on the extent of immunity that was required to be extended by a single jurisdiction in order to displace effectively the fifth amendment privilege. The Court has recently granted certiorari to decide this very question in the context of single state jurisdictions and state investigating commissions.<sup>52</sup> In a previous case where the Court had granted certiorari to settle this problem,<sup>53</sup> the writ was subsequently dismissed as improvidently granted.<sup>54</sup> Five justices voted to dismiss the writ because of an intervening state court decision, while three justices, dissenting, did reach the merits and reiterated the transactional immunity standard.<sup>55</sup>

The use immunity provision in title II of the Organized Crime Control Act of 1970 was held unconstitutional on January 29, 1971, by a United States District Court for the Southern District of New York.<sup>56</sup> Writing an extensive opinion reviewing the constitutional precedent since *Counselman*, the District Judge ruled that *Counselman* has not been eroded by the more recent decisions, and that "transactional immunity is constitutionally required as between the questioning sovereign and the witness . . . ."<sup>57</sup>

Thus, it is apparent that serious doubts presently exist concerning the constitutionality of title II. If it is ultimately held unconstitutional by the Supreme Court, the federal government will be without the benefit of any formal immunity statute, since all prior immunity statutes were amended or repealed.<sup>58</sup> However, if this were to occur, the statute could be conformed to require transactional immunity by altering one clause. Furthermore, there was discussion in the Senate Hearings to indicate that such a

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<sup>52</sup> *Zicarelli v. New Jersey Comm'n of Investigation*, No. 91; *Sarno v. Illinois Crime Investigating Comm'n* No. 565; 39 U.S.L.W. 1132 (March 2, 1971).

<sup>53</sup> *Piccirillo v. New York*, 397 U.S. 933 (1970).

<sup>54</sup> *Piccirillo v. New York*, 91 S.Ct. 520 (Jan. 25, 1971).

<sup>55</sup> See dissenting opinions of Mr. Justice Brennan and Mr. Justice Douglas with Mr. Justice Marshall concurring in each.

<sup>56</sup> See *In re Grand Jury Testimony of Kinoy*, No. M-11-188, at 13 (S.D.N.Y., Jan. 29, 1970) (Motley, J.). But see *Stewart v. United States*, No. 71-1212 (9th Cir., March 29, 1971) (per curiam) (court upheld constitutionality of use immunity provisions of the Act).

<sup>57</sup> *In re Grand Jury Testimony of Kinoy*, No. M-11-188, at 13 (S.D.N.Y., Jan. 29, 1970). In light of the extensiveness of this opinion and the other material written in the area, a thorough evaluation of the precedent and constitutionality of the present act will not be undertaken. For other comprehensive analyses of the problem, see *Piccirillo v. New York*, 91 S.Ct. 520 (Jan. 25, 1971) (dissenting opinion of Brennan, J.); minority views of Representative William F. Ryan on H.R. 11157, H.R. REP. NO. 91-1188, 91st Cong., 2d Sess. 39 (1970), also at 116 CONG. REC. H9665 (daily ed. Oct. 6, 1970). But see *Comm. Ref. Crim. L., Senate Hearings* 304.

<sup>58</sup> See note 1 *supra* and accompanying text.



course would be expeditiously pursued in that eventuality.<sup>59</sup> Thus it appears that regardless of the scope of immunity that will be constitutionally required, the remaining statutory structure discussed above will be a continuing part of the federal law. However, if the scope is restricted to transactional immunity, the present procedural requirements will assume a more functional role and added purposiveness.

### *B. Transactional Immunity as a Prosecutor's Tool*

Throughout the consideration of title II it appears to have been uniformly assumed that use immunity would be a greatly beneficial tool for law enforcement officials, "particularly for the purpose of securing testimony in cases involving official corruption and organized crime."<sup>60</sup> Since the prosecutor can still prosecute a witness who has been granted immunity if evidence is derived from an independent source, it has been reasoned that the prosecutor is in a better position.<sup>61</sup> Most criticism has been focused upon the effect this change has on the constitutional rights of the witness. However, there are instances where transactional immunity may serve as an important prosecutorial tool, and, accordingly, its replacement with use immunity might serve to burden the prosecutor, particularly in the same area of "official corruption and organized crime."

Of course, one of the avowed purposes of this Act is to strengthen the evidence gathering process.<sup>62</sup> A recurring problem in the gathering of evidence to prosecute organized criminals is securing and retaining the cooperation of witnesses so that they will testify at trial.<sup>63</sup> Because of the threat of reprisals,<sup>64</sup> many potential witnesses refuse to cooperate.

Congress has recognized the need to protect the physical security of the witness and his testimony, by passing provisions providing protected housing facilities for government witnesses,<sup>65</sup> and securing their testimony by pretrial deposition.<sup>66</sup> However, after the passage of this Act, the federal government cannot offer transactional immunity to protect a witness from local prosecution by corrupt local officials. Organized crime's ability to corrupt

<sup>59</sup> See *Senate Hearings* 284 (statement of Representative Poff).

<sup>60</sup> *House Hearings* 160 (Dep't of Justice Comments).

<sup>61</sup> See, e.g., SENATE REPORT 55.

<sup>62</sup> See Statement of Findings and Purpose, O.C.C.A.

<sup>63</sup> See generally THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 198 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

<sup>64</sup> See SENATE REPORT 59-60.

<sup>65</sup> Tit. V, O.C.C.A.

<sup>66</sup> Tit. VI, O.C.C.A., 18 U.S.C.A. § 3503 (Supp. 1971).

local officials has been noted in the *Report of the President's Commission on Law Enforcement and Administration of Justice*.<sup>67</sup> Even though a witness is offered physical protection, he may not be willing to cooperate if the same people against whom he is testifying can subsequently prosecute him for his participation in the unlawful conduct.<sup>68</sup> Although use immunity will prevent local officials from using the witness's testimony or its fruits, they can nevertheless prosecute on the basis of the independent testimony of the former defendants in the federal prosecution.<sup>69</sup> The United States attorney is now helpless to protect his witness from a vendetta prosecution of this nature.

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<sup>67</sup> PRESIDENT'S COMMISSION 191.

<sup>68</sup> See generally PRESIDENT'S COMMISSION 191.

<sup>69</sup> An example of an instance where the Government would probably have been hindered if transactional immunity were not available at the time is presented in *United States v. Addonizio*, Crim. No. 548-69 (D. N.J. 1970). There, the former mayor of Newark, New Jersey, was convicted of extortion, chiefly on the testimony of a government witness who had been granted transactional immunity. In the course of the testimony the witness revealed his role in contributing kickbacks to members of the city government. He would have been loathe to testify if he had to risk local prosecution based on the testimony of the mayor himself. The compulsory process and a use immunity grant would probably not have been effective in compelling this testimony, especially if the Government were not previously aware of this witness's role.