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Comments: A Right to Testimony of Immunized Defense Witnesses

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A RIGHT TO TESTIMONY OF IMMUNIZED DEFENSE WITNESSES

In 1980, the court of appeals for the Third Circuit, in Government of Virgin Islands v. Smith, *held that a defendant's right to evidence in a criminal trial included a right to immunity for his witnesses. Since that time, the district court of Maryland has similarly upheld, in* United States v. Lyon, *a defendant's right to testimony even though the witness may require immunity. This article discusses the competing interests weighing for and against defense witness immunity and suggests that once it is determined that a defendant has a right to certain testimony, it is proper to burden the government with a choice of alternatives to ensure the defendant that right.*

I. INTRODUCTION

In criminal prosecutions, the state may frequently resort to the immunized testimony of a third party to inculpate the defendants.[1] Defendants, as yet, have no power to grant immunity to similarly situated witnesses who might be willing to testify for them. Thus, defendants may be denied material and exculpatory testimony because defense witnesses, fearing criminal prosecution based on their testimony, assert their fifth amendment right not to testify.

However, defendants may be able to compel the government to choose among several burdensome alternatives, including granting immunity to a defense witness or having the prosecution postponed or dismissed. Recent decisions in the federal courts have upheld a right to the testimony of immunized defense witnesses, based on the defendant's due process rights to material and exculpatory evidence.[2]

This comment explores cases precluding review of the prosecutor's decision to withold immunity from defense witnesses under the separation of powers doctrine, except upon a showing of prosecutorial bad faith. It then examines the cases that suggest that in certain situations the defendant may have a right to the testimony of immunized witnesses. The separation of powers doctrine is then juxtaposed with the defendant's right to evidence. In conclusion, this comment suggests that courts may be obligated to impose substantial burdens on the government to vindicate a defendant's due process right to evidence.

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1. Witnesses cannot be compelled to proffer self-incriminating testimony. U.S. CONST. amend. V. The fifth amendment is applicable to both state and federal governments. Murphy v. Waterfront Comm., 378 U.S. 53, 53 (1964). The State, however, can compel testimony over a fifth amendment claim through a grant of immunity. *See, e.g.,* Kastigar v. United States, 406 U.S. 441 (1972); Ullman v. United States, 350 U.S. 422 (1956); *see also* 18 U.S.C. §§ 6001-6005 (1976).
2. Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); United States v. Lyon, No. J-81-0118 (D. Md. Sept. 21, 1981) (unpublished order).

II. BACKGROUND

The majority of federal and state courts deny defendants' requests for defense witness immunity.[3] A few federal courts have carved a narrow exception to this rule, compelling the state to grant immunity upon a showing of prosecutorial misconduct or bad faith.[4] One recent decision, however, has unconditionally upheld a defendant's right to material and exculpatory testimony elicited through witness immunity.[5]

A. Decisions Denying Requests for Defense Witness Immunity

Most federal courts which have addressed defense witness immunity have routinely rejected motions to review a prosecutor's decision to deny it.[6] These decisions state that the separation of powers doctrine either commits the decision of whether to grant witness immunity solely to the prosecutor,[7] or precludes defense witness immunity in the absence of a legislative enactment.[8]

In a comprehensive opinion invoking the separation of powers

3. *See, e.g.,* United States v. Turkish, 623 F.2d 769, 778 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); United States v. Klauber, 611 F.2d 512, 519 (4th Cir. 1979); United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978), *cert. denied sub. nom.* La Duca v. United States, 440 U.S. 972 (1979); United States v. Lang, 589 F.2d 92, 96 (2d Cir. 1978); United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied,* 439 U.S. 1005 (1978); United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978); United States v. Benueniste, 564 F.2d 335, 339 n.4 (9th Cir. 1977); *In re* Daley, 549 F.2d. 469, 478-79 (7th Cir.), *cert. denied sub nom.* Daley v. Attorney Registration and Disciplinary Comm., 434 U.S. 829 (1977); United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976); United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied sub nom.* Hoff v. United States, 429 U.S. 819 (1976); Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.), *cert. denied,* 423 U.S. 933 (1975); United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), *cert. denied,* 421 U.S. 976 (1975); United States v. Allstate Mortgage Corp., 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975); Cerda v. United States, 488 F.2d 720, 723 (9th Cir. 1973); *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973); United States v. Berrigan, 482 F.2d 171, 190 (9th Cir. 1972); United States v. Jenkins, 470 F.2d 1061, 1063-64 (9th Cir. 1972), *cert. denied,* 411 U.S. 920 (1973); United States v. Lyon, 397 F.2d 505, 512-13 (7th Cir.), *cert. denied sub nom.* Lyscyk v. United States, 393 U.S. 846 (1968); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir.), *rehearing denied en banc,* 364 F.2d 666 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

   There are few reported state cases that deal with defense witness immunity, probably because most litigants attempting to vindicate a constitutional right seek out a federal forum. When applied for, it is normally denied on motion at the lower court level without opinion. In contrast to state courts, federal district courts publish most of their decisions.

4. Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976).
5. Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980).
6. *See* sources cited *supra* note 3.
7. United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978), *cert denied sub. nom.* La Duca v. United States, 440 U.S. 972 (1979).
8. United States v. Herman, 589 F.2d 1191, 1201 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979). To date, no statute empowers a defendant to immunize his own witnesses for the purpose of obtaining material and exculpatory evidence.

doctrine to preclude review of the prosecutor's decision to withold defense witness immunity, the court of appeals for the Second Circuit, in *United States v. Turkish,*[9] propounded numerous public concerns which it believed precluded wresting the immunity decision from the prosecutor. These public concerns convinced the court that discretion over whether to grant immunity should rest with branches of government more accountable to the public than the judiciary.[10]

Primarily, the court's opinion expressed concern that the grant of use immunity[11] to a defense witness placed a "heavy burden" upon the government in any later prosecution of the witness.[12] While use immunity theoretically puts the government and the witness in the same position as though the witness had never testified,[13] the government bears the burden of proving that the testimony given by the witness is essentially separate from evidence that may later be introduced to prosecute the witness. This burden is not easily met and oftentimes shields the witness from prosecution when the witness' testimony is a tempting and fertile source of "leads"[14] or appears to focus an investigation on the witness.[15] In addition, when the witness under immunity confesses, the prosecution may have difficulty proving that the evidence of the witness' criminal conduct is separate in source from the witness' testimony. Consequently, when the prosecution indicts an innocent party who produces the wrongdoer to testify under immunity, the criminal conduct at issue is likely to go unpunished.

The court also feared that defense witness immunity would subvert the guilt-determining process.[16] Specifically, the court expressed concern that an immunized witness-cohort would falsely confess to the crime in question at the defendant's trial. At the subsequent trial of the witness-cohort, the original (and now acquitted) defendant would then confess for the witness-cohort. While either or both parties risk prose-

9. 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

10. 623 F.2d at 775-76.

11. A grant of use immunity keeps the state from using the witness' testimony either as evidence or to obtain leads in a later prosecution of that witness. In the later prosecution, the state must prove that their incriminating evidence was obtained from a separate source. Transactional immunity, on the other hand, keeps the state from later prosecuting the witness for any crime relating to the transaction on which he testified. Kastigar v. United States, 406 U.S. 441 (1972); *see also* 18 U.S.C. § 6002 (1976) (Federal Use Immunity Act).

12. United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

13. Kastigar v. United States, 406 U.S. 441, 462 (1972); *see, e.g.,* Recent Developments, *Constitutional Law: Application of Immunity Statute to Related Testimony Compelled During Pendency of Appeal,* 66 Colum. L. Rev. 178, 181 (1966).

14. Kastigar v. United States, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting).

15. Comment, *Self-Incrimination and the States: Restricting the Balance,* 73 Yale L.J. 1491, 1495 (1964).

16. United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

cution for perjury,[17] co-defendants might not hesitate to falsely confess under immunity if the perjured testimony assures acquittal on a more serious charge. Thus, to the extent that a defense witness' immunized testimony is inherently perjured, it impairs the reliability of the fact-finding process.

A third concern of the court is that it did not want to add a new defense right to the "procedural imbalance in favor of the defendant" at trial.[18] Judge Lombard's concurrence elaborated on this point, noting that every claim for defense witness immunity could require a preliminary hearing on whether the right is applicable.[19] Defendants may reap unwarranted benefit from such procedural delays and abuse the defense witness immunity right by protracted preliminary hearings.[20] Such delaying tactics might dangerously tip the "balance of power" at trial to the defendant, and consequently impair the fact-finding process.

A fourth concern the court recognized was the possibility that a defense witness might seek to cloak himself from subsequent prosecution by blurting out irrelevant, self-incriminating statements while testifying under immunity.[21] The court, however, dismissed this "immunity bath" dilemma as inconsequential given that irrelevant or irresponsive answers by prosecution witnesses are technically not protected under an immunity grant.[22] However, other courts have used this "immunity bath" dilemma to argue against defense witness immunity.[23]

Two other policy concerns weighing against defense witness immunity were not raised by the *Turkish* court. However, the prominence these concerns are given by other courts merit their examination. One of the concerns was discussed by Chief Justice Burger, then a circuit judge, in *Earl v. United States*.[24] In *Earl,* Justice Burger stated that the overuse of defense witness immunity might invade legitimate privacy

17. The court noted that the threat of a perjury conviction would not deter false swearing when the substantive crime carried penalties far in excess of those for a perjury conviction. *Id.; see also* 18 U.S.C. § 1621 (1976).

18. United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

19. 623 F.2d at 779-80 (Lombard, J., concurring).

20. Note, *The Public Has a Claim to Every Man's Evidence: The Defendant's Constitutional Right to Witness Immunity,* 30 Stan. L. Rev. 1211, 1234 (1977-78).

21. United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

22. 623 F.2d at 775.

23. *See, e.g.,* United States v. Lang, 589 F.2d 92, 96 (2d Cir. 1978). *But cf.* Comment, *The Fifth Amendment Testimonial Privilege as an Impediment to the Defense When Invoked by a Potential Exculpatory Witness,* 42 Alb. L. Rev. 482 (1978). The fifth amendment privilege "may be invoked properly only when a witness has reasonable cause to apprehend danger from a direct answer." *Id.* at 485. The privilege can be restricted to preclude its collision with the defendant's evidentiary rights by an *in camera* examination of the witness. *Id.* at 488.

24. 361 F.2d 531 (D.C. Cir.), *rehearing denied en banc* 364 F.2d 666 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

interests of potential witnesses.[25] When a witness objects to testifying despite a grant of immunity, privacy rights, often accorded constitutional stature,[26] arguably outweigh a defendant's right to evidence.[27]

A more general policy concern weighing against defense witness immunity is that immunity is a judicially disfavored mechanism for obtaining testimony at trial.[28] Any defense right granting the power to immunize witnesses would accord the immunity doctrine more judicial stature than it deserves. Implying the above, the court in *Morrison v. United States*[29] asserted that the defendant's failure to produce an otherwise available witness was not reasonably equated with the government's refusal to immunize the witness.[30] In other words, the court believed that immunity was too insignificant in our criminal justice system to realistically include the government's immunity power among the arsenal of government-employed weapons for gathering evidence. Thus, the *Morrison* court believed that the government's immunity powers should not be considered when courts contemplate how best to vindicate a defendant's right to evidence.[31]

In sum, the public policy concerns raised by *Turkish, Earl,* and *Morrison* weigh against removing the immunity decision from the prosecutor.[32] In support of this position, the Federal Witness Immunity Act requires that the prosecutor grant witness immunity only when in the "public interest."[33] Courts ruling against defense witness immunity have noted that it is generally improper for the judicial branch to weigh the public interest.[34]

B. Prosecutorial Bad Faith

The prosecutor's decision to deny immunity to a defense witness

25. 361 F.2d at 534.
26. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).
27. A grant of use immunity under 18 U.S.C. § 6002 (1976) can only be made by the prosecutor, who must weigh the public interest in obtaining the witness' testimony over the witness' privacy rights. United States v. Davis, 623 F.2d 188, 192-93 (10th Cir. 1980). A fundamental right is thus denied only upon a showing of compelling governmental interest. J. NOWAK, CONSTITUTIONAL LAW § III-19, at 384 (1977). When a defendant seeks witness immunity, such compelling *governmental* interest is arguably absent.
28. Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966).
29. 365 F.2d 521 (D.C. Cir. 1966)
30. *Id.* at 524.
31. The strength of this assertion comes into question when one considers that witness immunity has long been considered part of our "constitutional fabric." Ullman v. United States, 350 U.S. 422, 438 (1956).
32. United States v. Turkish, 623 F.2d 769, 776 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).
33. 18 U.S.C. §§ 6001-6005 (1976); *see also* United States v. Herman, 589 F.2d 1191, 1200-01 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); *In re* Kilgo, 484 F.2d 1215, 1219 (4th Cir. 1973).
34. United States v. Herman, 589 F.2d 1191, 1200 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

has not always been considered beyond judicial review, even by courts that generally considered immunity power within the sole discretion of the executive branch. The refusal to grant immunity, when coupled with some example of prosecutorial bad faith, has in some cases triggered review of an otherwise discretionary executive decision despite the separation of powers doctrine.

In *Government of Virgin Islands v. Smith*[35] the prosecutor misused his discretionary authority in witholding defense witness immunity. In that case, authorities charged with prosecuting the witness[36] agreed to grant use immunity to him. However, the authorities conditioned the immunity grant on the United States Attorney's formal consent. Without articulating a reason, the United States Attorney witheld his consent to the immunity grant.[37] Judge Garth, writing for the Third Circuit, held that the actions of the United States Attorney were taken with the deliberate intention of distorting the fact-finding process. Therefore, the district court, on remand, was ordered to dismiss the indictments unless statutory use immunity was granted to the witness for his testimony.[38] In sum, the prosecutor misused his discretionary authority by groundlessly witholding immunity from the defense witness.[39]

In addition, when the prosecutor's refusal to grant immunity is clearly intended to impede the defendant's attempt to make an effective defense, the prosecutor has abused his discretionary power. In *United States v. Morrison,*[40] the Third Circuit reviewed the decision of the prosecutor to deny immunity to a defense witness. After denying the defendant's request for witness immunity,[41] the prosecutor called the witness into his office to threaten her with prosecution if she testified for the defendant.[42] The court found the prosecutor's action completely unnecessary and highly intimidating.[43] These actions, which practically precluded the witness from volunteering testimony, amounted to prosecutorial misconduct denying the defendant due process of law.[44] Such an abuse of discretion entitled the defendant to

35. 615 F.2d 964 (3d Cir. 1980).
36. The witness was a minor who came under the exclusive jurisdiction of juvenile authorities. *Id.* at 967.
37. *Id.* at 969.
38. *Id.*
39. *Id.* The court surmised that the United States Attorney's decision to deny immunity was based on litigation strategy.
40. 535 F.2d 223 (3d Cir. 1976).
41. *Id.* at 227.
42. *Id.* at 225-26.
43. *Id.* at 228.
44. *Id.* at 229. The court quoted at length from the Supreme Court's opinion in Webb v. Texas, 409 U.S. 95 (1972). In *Webb,* the trial judge intimidated a witness from testifying, in anticipation that the defense's sole witness was about to commit perjury. The Court found the witness intimidation to be a denial of due process. *Id.* at 98.

judicial review of the prosecutor's act and to compel immunity for the defense witness.[45]

C. Due Process Right to Defense Witness Immunity

As mentioned earlier, the position adopted by most federal courts today is that the separation of powers doctrine precludes judicial review of the prosecutor's decision to deny defense witness immunity. A narrow exception to this rule permits judicial review upon a showing of prosecutorial misconduct. Nevertheless, a few cases suggest that defendants may have a much broader due process right to witness immunity in certain circumstances.

1. Equal Powers Analysis

Several cases suggest that defendants may have a due process right to witness immunity only when the government grants immunity to one of their witnesses.[46] Ostensibly, the prosecutor and the defendant both have equal immunity powers in any given trial. However, the prosecution would still decide if immunity is available at all in any given case.[47] Notably, no case has yet to actually confer immunity to a defense witness because no prosecutor immunized any of his own witnesses.

In *United States v. Earl,*[48] then Judge Burger for the District of Columbia court of appeals found no violation of due process when the defendant's motion to compel witness immunity of a co-defendant was denied. The court, in a footnote, posited that defense witness immunity may be required when the government itself immunized a prosecution witness.[49] The court believed that should a prosecutor also fail to immunize a defense witness, the Federal Witness Immunity Act, "as applied" to a defendant in a particular case, might result in a denial of due process.[50]

In *United States v. Turkish,*[51] however, the Second Circuit not only raised policy considerations precluding review of the prosecutor in his decision over witness immunity, but also explicitly rejected the proposi-

45. United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976).
46. This proposition was first raised by a footnote in Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir.); *rehearing denied en banc,* 364 F.2d 666 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967); *accord* United States v. Bautista, 509 F.2d 675 (9th Cir.), *cert. denied,* 421 U.S. 976 (1975); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975); United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974), *cert. denied,* 420 U.S. 932 (1975).
47. In each instance, the proposition seemed to be considered as an afterthought; no court looked with favor upon defense witness immunity under any theory. *See* sources cited *surpa* note 46.
48. 361 F.2d 531 (D.C. Cir.), *rehearing denied en banc,* 364 F.2d 666 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).
49. 361 F.2d at 534 n.1.
50. *Id.*
51. 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).

tion that the due process clause mandated equal powers for the defendant and prosecution at trial.[52] The court noted that due process did not mandate the defendant's access to a state's police and investigatory powers.[53] Consequently, denying the defendant equal access with the state to witness immunity did not violate the due process clause.

2. The Right to Testimony

Two recent decisions have applied a defendant's due process right to material and exculpatory testimony at trial to uphold a defendant's right to testimony elicited through an immunized witness. Unlike the equal powers approach, the defendant would have this right regardless of whether the prosecution uses immunized testimony to prosecute the defendant.

In *United States v. Lyon,*[54] the district court of Maryland, in an unpublished order by Judge Jones, directed the government to respect the defendant's due process right to testimony by either granting his witness immunity, trying the witness first, or dismissing the indictment.[55] The defendant, Campbell, persuaded the court to sever his trial from that of his co-defendants so as to make available to him, at trial, prior testimony given by the co-defendants under immunity.[56] However, Campbell's own defense also required his co-defendants' live testimony as well.[57] Thus, he simultaneously filed a motion requesting either defense witness immunity or trial of the co-defendants preceeding his own. Granting either motion would free the co-defendants to offer live exculpatory testimony for Campbell. The court granted both motions as to one co-defendant, leaving the prosecution with the option of immunizing the defense witness or trying the witnesses first.[58]

The *Lyons* court never addressed the separation of powers issue in considering witness immunity for Campbell, perhaps because the court did not have to confront witness immunity as the sole alternative to dismissing Campbell's indictment.[59] Instead, the court confined its inquiry to whether the defendant had a due process right to the type of

52. 623 F.2d at 774.
53. *Id.*
54. No. J-81-0118 (D. Md. Sept. 21, 1981) (unpublished order).
55. *Id.* at 19.
56. *Id.* at 18.
57. *Id.* at 12.
58. *Id.* at 19.
59. The witness in *Lyon* never requested witness immunity for defendant Campbell. Had he requested such testimony, and had Campbell's testimony been found to be material and exculpatory to the co-defendant/witness' trial, the court may have been confronted with an "immunity bind." Unable to try either defendant first, the court might then have been forced to decide on the right to defense witness testimony where immunity and indictment dismissal were the only available alternatives. Confronting the prosecutor with such a burdensome choice might well have intruded into the prosecutor's discretionary power over immunity.

testimony requested.[60] Once the court found the co-defendant's testimony necessary for Campbell's trial, it refused to allow the trial to proceed without it.[61]

In a similar application of the due process clause, the court in *Government of Virgin Islands v. Smith*[62] compelled the public prosecutor to either grant defense witness immunity or dismiss the indictment. In *Smith,* the Third Circuit ruled that when witness testimony is material and exculpatory a court may fashion immunity for a defense witness, absent strong governmental interests that countervail the immunity grant.[63] For example, when the witness is also a key co-defendant whose immunization would frustrate the witness' own prosecution, a grant of immunity may be so costly to the state that the prosecution would rather dismiss the indictment than have the witness immunized. The court's holding, briefly addressing this hypothetical dilemma,[64] balks at dismissing the indictment. Under these circumstances, the government's interest in not granting immunity might outweigh the defendant's right to testimony.[65] Nevertheless, the opinion stated that absent strong countervailing governmental interest, when the testimony required is both material and exculpatory due process mandates the defense witness' immunization.[66]

Smith may be questionable authority to assert the existence of a due process right to defense witness immunity because the case also involved a misuse of prosecutorial discretion.[67] Thus, the latter half of the opinion addressing defense witness immunity generally might be considered unnecessary to the court's holding. Yet, while perhaps dictum, most of Judge Garth's opinion in *Smith* gives defense witness immunity its most expansive judicial expression to date.

III. ANALYSIS

Many courts have denied a defendant's request for witness immunity based on the separation of powers doctrine, consequently entrusting the decision to the discretion of the prosecutor in the absence of a legislative enactment.[68] Essentially, the strength of this separation of powers rationale lies in strong public policy concerns surrounding the immunity decision suggesting that the authority to immunize witnesses

60. *Id.*
61. *Id.*
62. 615 F.2d 964 (3d Cir. 1980).
63. *Id.* at 973-74.
64. *Id.* at 973.
65. *Id.*
66. *Id.* at 974.
67. *Id.*
68. United States v. Turkish, 623 F.2d 769, 779 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); United States v. Herman, 589 F.2d 1191, 1201 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978), *cert. denied sub nom.* La Duca v. United States, 440 U.S. 972 (1979).

should be left with the public prosecutor.[69] The proposition, well-stated in *United States v. Herman*,[70] is that "public interest" review would necessarily require the court to weigh, if only in limited circumstances, considerations that are traditionally associated with the decision to prosecute.[71] Thus, any judicial review of the immunity decision must necessarily trench seriously upon the authority of the executive branch.[72]

However, decisions such as *United States v. Lyon*[73] and *Government of Virgin Islands v. Smith*[74] uphold a general due process right to testimony of immunized defense witnesses, irrespective of separation of powers concerns that have traditionally precluded judicial review. While these decisions do not directly address the issue, they seemingly challenge the validity of employing the separation of powers doctrine to deny a defendant's motion for immunized witness testimony. In these cases the courts were more concerned with vindicating constitutional rights[75] and protecting their own process from abuse[76] than protecting the executive branch's prerogative over immunity. In *Lyon*, the court did not assert inherent power to confer "judicial" immunity, but still ordered the defendant's access to material and exculpatory evidence by requiring the indictment's dismissal unless the government decided to make material evidence available.[77] In this manner, the technical decision over immunity was still the government's, but the court enforced the defendant's constitutional right to evidence.[78]

Ultimately, there is a significant distinction between compelling a prosecutor to choose among several burdensome alternatives and usurping the prosecutor by judicially ordering witness immunity. Logically, as long as the prosecutor can still choose to withhold witness immunity executive prerogative is not technically invaded.[79] Unlike the

69. United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).
70. 589 F.2d 1191 (3d Cir.), *cert. denied,* 441 U.S. 913 (1979).
71. 589 F.2d at 1203-04.
72. *Id.*
73. No. J-81-0118 (D. Md. Sept. 21, 1981) (unpublished order).
74. 615 F.2d 964 (3d Cir. 1980).
75. The Court has time and again reaffirmed the principle that constitutional rights should not go unremedied. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
76. United States v. United Fruit Co., 410 F.2d 553, 556 (5th Cir.), *cert. denied sub nom.* Standard Fruit and Steamship Co. v. United States, 396 U.S. 820 (1969) (despite federal act precluding disclosure of depositions and hearings from public, district court possessed inherent equitable power to enforce protective order prohibiting disclosure of divestiture plans and to so protect judicial processes from abuse); *accord In re* Daley, 549 F.2d 469, 479 (7th Cir. 1977).
77. This alternative was considered and rejected in Morrison v. United States, 365 F.2d 521, 524 (D.C. Cir. 1966).
78. United States v. Lyon, No. J-81-0118 (D. Md. Sept. 21, 1981) (unpublished order); *see also* Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976).
79. It is generally well acknowledged that the prosecutor should be given much dis-

judicial usurpation of a prosecutorial decision,[80] courts frequently impose burdensome alternatives on the prosecution to vindicate a defendant's right to evidence.[81] Thus, provided a defendant has a constitutional right to present the kind of evidence often elicited by a defense witness under immunity, it seems logical that courts may impose a choice of burdens, including immunity, upon the prosecution to vindicate that right. The remainder of this article will discuss the defendant's right to the kind of evidence elicited under immunity and the imposition of burdensome alternatives to secure its availability to the defendant.

A. The Due Process Right to Evidence

Generally, a defendant's best claim for witness immunity rests with the due process clause of the fifth or fourteenth amendments.[82] Due process is not susceptible to literal and limiting interpretations[83] given other guarantees such as the sixth amendment.[84] Rather, due

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cretion in determining whether immunizing a witness for his testimony is in the public interest. *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973).

80. If the court mandated witness immunity for a defense witness, the prosecutor would have absolutely no discretion over the immunity decision.

81. Courts have invaded, if not usurped, areas of prosecutorial power. In the so-called "informant" cases, prosecutors were forced by the courts to either reveal their sources and forgo later investigations, or dismiss the indictment at hand. Oftentimes, such "invasions" are couched in language that infers a "balancing" of the public interest (protected by the government) against the individual's right to prepare his defense (protected by courts). Roviaro v. United States, 353 U.S. 53, 62 (1957). In such cases, the government may still uphold the public interest, and refuse to comply with the act vindicating the defendant's right to evidence, but "only at the price of letting the defendant go free." Jencks v. United States, 353 U.S. 657, 671 (1957).

82. U.S. CONST. amends. V, XIV § 1.

83. Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 109 (1974-75).

84. U.S. CONST. amend. VI. Some writers believe that defense witness immunity "falls squarely within the language and purpose of the compulsory process clause." Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 168 (1974-75). This belief is, to a large degree, premised upon the Supreme Court's interpretation of the sixth amendment in Washington v. Texas, 388 U.S. 14 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is, in plain terms the right to present a defense, the right to present the defendant's *version of the facts* as well as the prosecution's to the jury so it may decide where the truth lies . . . . This right is a fundamental element of due process of law.

Id. at 19 (emphasis added). The above-quoted language has been used to suggest that the compulsory process clause includes a right to "evidence." Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 150 (1974-75). Since compulsory process by definition places an affirmative burden on the prosecution to produce a witness, *id.* at 123, it is argued that the state must bring forth all evidence under its control. *Id.* at 168. Furthermore, "[t]he government's peculiar control over potentially exculpatory witnesses imposes a constitutional obligation on it to immunize the witnesses to obtain evidence in the defendant's favor." *Id.* at 167; *see also,* Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses,* 67 COLUM. L. REV. 952 (1967); Note, *A Re-examination of Defense Wit-*

process rights are arrived at by "a general process of inclusion or exclusion,"[85] or resorting to "logical deduction,"[86] premising each expansion of the right upon other similar expansions or applications. Aside from a case-by-case analysis, due process rights have in the past been expansively defined as those which are essential to a "scheme of ordered liberty,"[87] or entail "fundamental [principles of] liberty and justice."[88] Cases authoritatively interpreting the due process clause have upheld defense evidentiary rights which are analogous, if not identical in scope, to testimony of immunized defense witnesses. Given that new due process rights are most often logical extensions of older due process rights, these cases strongly support the defendant's due process right to testimony of immunized defense witnesses.

In *Chambers v. Mississippi,*[89] the Supreme Court addressed a defendant's due process right to testimonial evidence. In that case the defendant, Chambers, was shot twice by a fatally wounded policeman who apparently took deliberate aim at the fleeing defendant. The prosecution introduced the evidence of the dying policeman's final shots as substantive proof of the criminal agency of the defendant. At trial, Chambers asserted that McDonald shot the officer and attempted to introduce four separate hearsay confessions of McDonald who was dismissed from prosecution on the same charge.[90]

At trial, McDonald's repudiated confessions were not admitted

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ness Immunity: A New Use for Kastigar, 10 HARV. J. ON LEGIS. 74 (1972); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 HARV. L. REV. 1266 (1978).

However, the facts of *Washington* suggest a much narrower interpretation. In the case, the Texas statute which the Court struck down precluded the testimony of a co-defendant at the trial of the accused, after the co-defendant had himself been convicted. No grant of immunity was required, as the co-defendant could no longer be subject to criminal prosecution. Thus, the sixth amendment only compelled the witness' presence, not testimony. "[T]he right exists only to the extent that witnesses may otherwise be compelled to attend and to testify . . . . [But], there is no right (under the sixth amendment) to compel testimony over a claim of recognized privilege. . . ." People v. Sapia, 41 N.Y.2d 160, 359 N.E.2d 688, 691, 391 N.Y.S.2d 93, 96 (N.Y. 1976), *cert. denied,* 434 U.S. 823 (1977); *accord* United States v. Turkish, 623 F.2d 769, 773-74 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); United States v. Lacoutine, 495 F.2d 1237 (5th Cir.), *cert. denied,* 419 U.S. 1053 (1974). In sum, given that the sixth amendment contains very "specific" rights, its very specificity makes it less subject to liberal, nonliteral interpretation. Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 108-09, 127 (1974-75). Westen argues for application of the sixth amendment to defense witness immunity situations, stating that its specificity has greater precedential sway. *Id.* at 130. However, Westen fails to recognize that by its very specificity, the amendment may not be applicable.

85. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).
86. Kadish, *Methodology and Criteria in Due Process Adjudication-A Survey and Criticism,* 66 YALE L.J. 319, 333 (1957).
87. Palko v. Connecticut, 302 U.S. 319 (1937).
88. Snyder v. Massachusetts, 291 U.S. 97 (1934).
89. 410 U.S. 284 (1973).
90. *Id.* at 289.

into evidence because of the hearsay rule.[91] When Chambers attempted to call McDonald as an adverse witness, he was precluded by the trial court on the basis of Mississippi's "voucher rule."[92]

The Supreme Court ordered both the live testimony of the adverse witness and his hearsay confessions to be admitted into trial. The Court noted that, generally, hearsay testimony would be excluded to prevent the admission of evidence with a high degree of untrustworthiness.[93] In this case, however, the Court found the out-of-court confessions inherently reliable, for the same confession was made on numerous occasions.[94] In addition, the confessions were statements against the witness' penal interest which are uniformly recognized as a hearsay rule exception.[95]

With regard to the calling of McDonald as an adverse witness, the Court held that:

> The right of cross examination is a more desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the accuracy of the truth determining process . . . . [Its] denial calls into question the . . . integrity of the fact-finding process . . . . [C]ompeting interests must be closely examined.[96]

Thus, the Court suggested that evidence material to the defendant's guilt or innocence and inherently trustworthy must be admitted into evidence, without regard to mechanistic state rules to the contrary.[97]

The *Chambers* holding is similar to the issue of a defendant's right to immunized exculpatory testimony in several major respects. First, *Chambers* generally upholds a defendant's due process right to testimonial evidence.[98] Second, the Court upheld the defendant's due process right to call a defense witness who would probably exculpate the defendant by confessing his own criminal conduct.[99] Third, the adverse witness' testimony was admissible, despite the fact of an earlier dismissal of charges against him.[100] This, coupled with the apparent absence of any "lead" incriminating the adverse witness and the overall staleness of any evidence to the shooting,[101] probably rendered the witness

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91. *Id.* at 293.
92. *Id.* In this case, "the defendant's request to examine McDonald, the adverse witness, was denied on the basis of [the voucher] rule that a party may not impeach his own witness . . . . [A] party who calls a witness 'vouches for his credibility.' " *Id.* at 295 (citing 3A J. WIGMORE, EVIDENCE § 896, at 658-60).
93. Chambers v. Mississippi, 410 U.S. 284, 298 (1973).
94. *Id.* at 300.
95. *Id.* at 299.
96. *Id.* at 295.
97. *Id.* at 302.
98. *Id.*
99. "To the extent that McDonald's sworn confession tended to incriminate him, it intended also to exculpate Chambers." *Id.* at 297.
100. *Id.* at 288.
101. The shooting occurred in 1969. *Id.* at 285. McDonald was arraigned before a

"immune" from prosecution for the crime.[102] Thus, *Chambers* seems to address and discount the concern raised by courts that a witness' immunity from prosecution enhances the risk that his confession to the criminal act is perjured.[103] In sum, *Chambers* offers some support for the contention that a defendant has a due process right to present evidence similar to that which would be elicited in the defense witness immunity situation. Judge Garth in *Smith,*[104] citing *Chambers* at length, held that a defendant's due process right to "exculpatory evidence"[105] and "to present an effective defense"[106] includes evidence that would be elicited under immunity. The court found the denial to the defendant of the use of exculpatory evidence in *Smith* no different in substance from the denial found in *Chambers.*[107]

The due process right to testimony asserted in *Chambers,* however, is not precisely applicable to the defense witness immunity situation. In *Chambers,* the witness was adverse; he would not freely confess and have the defendant acquitted. Rather, the defendant wanted to impeach the adverse witness with out-of-court confessions.[108] When a defense witness with immunity testifies, however, it is more likely that he will confess to exculpate the defendant. The court in *Chambers* found the witness' disinterest in exculpating Chambers[109] and the inherent credibility of repeated out-of-court confessions[110] material to the defendant's due process right to evidence. Thus, the witness' impaired credibility in the defense witness immunity situation might cut against a defendant's right to testimony.

However, a witness' impaired credibility may not be relevant to the defendant's due process right to testimonial evidence. Justice Harlan's brief concurrence in *Washington v. Texas,*[111] which addressed the defendant's due process right to testimonial evidence, held that a

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justice of the peace soon after giving a sworn confession. Released shortly thereafter, his role in the murder would never be investigated to any degree. *Id.* at 288.

102. Aside from McDonald's repudiated confession, there was no evidence of any involvement on his part in the shooting. Authorities clearly lacked sufficient evidence to bring McDonald to trial. Additionally, McDonald's testimony would not shed any light on his role in the homicide. Rather, Chambers wanted McDonald called to repudiate the sworn confession, so that the confession could be used to impeach McDonald's credibility and lend credence to Chambers' story that McDonald had perpetrated the crime. Because no new evidence would surface by way of McDonald's testimony, McDonald would remain virtually "immune" from prosecution for the crime, or at least beyond the government's reach due to lack of sufficient evidence. *Id.* at 291-92.
103. *See* United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981).
104. Government of Virgin Islands v. Smith, 615 F.2d 964, 970 (3d Cir. 1980).
105. *Id.* at 971.
106. *Id.*
107. *Id.* at 970.
108. Chambers v. Mississippi, 410 U.S. 284, 292 (1973).
109. *Id.* at 297-98.
110. *Id.* at 300-01.
111. 388 U.S. 14, 23 (1967) (Harlan, J., concurring).

witness' unreliability had no bearing on the defendant's due process right to the witness' testimony. In *Washington,* a defendant wanted his co-defendant to testify. The co-defendant had already been convicted and was serving a sentence. Two Texas statutes[112] precluded the defendant from calling his convicted co-defendant as a witness due to credibility reasons. The Court struck down the Texas statute as violating the defendant's sixth amendment right to compulsory process.[113] Justice Harlan did not join the majority in applying the sixth amendment to the States under the fourteenth amendment. Rather, his concurrence focused upon the fourteenth amendment's due process clause.[114] Justice Harlan stated that when the state did not bar convicted co-defendants as prosecution witnesses, it could not assert credibility reasons to bar them as defense witnesses.[115]

Justice Harlan's interpretation of the due process clause is relevant to the defense witness immunity situation. The prosecution makes use of an immunized witness when his testimony is material to the defendant's guilt.[116] Consequently, the arbitrary exclusion of immunized witness testimony on reliability grounds when it aids the defendant would be a violation of due process.

Both Justice Harlan's concurrence and the Court's opinion in *Washington* offer additional persuasive support for the defendant's right to the kind of evidence elicited from immunized defense witnesses. In *Washington*, the convicted co-defendant was willing to confess and exculpate Washington.[117] Additionally, the co-defendant would be, for practical purposes, immune from prosecution for his confession by virtue of his prior conviction. Disregarding risks of perjury "inherent" in the confessions of co-defendants insulated from later prosecution, both the majority opinion[118] and Harlan's concurrence[119] expressly found the co-defendant's testimony competent. Therefore, the defendant in *Washington* had a due process right to the same kind of evidence that would likely be elicited from immunized defense witnesses.

B. Imposing Burdens

Once it has been determined that a defendant has a constitutional

112. *See id.* at 16 n.4.
113. *Id.* at 23.
114. *Id.* at 24-25 (Harlan, J., concurring).
115. *Id.* at 25.
116. "Immunity statutes are, of course, ordinarily for the benefit of the government, designed to effectively serve the compelling needs of the criminal justice system by preventing a substantial avoidance of prosecution and penalty." United States v. Dunn, 577 F.2d 119, 126 (10th Cir. 1978), *rev'd on other grounds,* 442 U.S. 100 (1979); *see* 18 U.S.C. § 6002 (1976).
117. Washington v. Texas, 388 U.S. 14, 16 (1967).
118. *Id.* at 19-23.
119. *Id.* at 24-25 (Harlan, J., concurring).

right to certain witness testimony, a judicial obligation arises to protect that right. One means of enforcing that right would be to compel the prosecutor to grant immunity.[120] Such an order would be a judicial usurpation of what is normally the executive branch's prerogative.[121] Courts have often avoided the "usurpation" issue by asking the prosecutor to select among a number of unfavorable alternatives,[122] any one of which would protect the defendant's constitutional right. Possibly, a court could "burden" the state with a witness immunity alternative when enforcing the defendant's due process right to testimony.

In *Brady v. Maryland*,[123] the Supreme Court compelled the prosecution to choose among several unfavorable alternatives, illustrating the judicial imposition of alternative burdens to protect constitutional rights. The *Brady* Court placed affirmative burdens upon the government to assist the defendant in procuring evidence for trial. The defendant requested that he be allowed to examine the extra-judicial statements of the co-defendant in the murder trial then in the possession of the prosecutor. One statement by a co-defendant, admitting to the homicide, was withheld by the prosecutor and not revealed to the defendant's counsel until after conviction and sentencing. The evidence suppressed was held to be material to both guilt and sentencing.[124]

The Court held that the prosecutor violated the defendant's due process right by withholding evidence favorable to the defendant, "irrespective of the good faith or bad faith of the prosecution."[125] *Brady* suggests that it is incumbent upon a court to impose the burden on the state to turn over evidence within its control when the evidence is material and exculpatory. The state's statutory authority over immunity similarly puts a defendant's exculpatory testimony under the prosecutor's control. Once the state is made aware of a witness' exculpatory testimony, and when that witness asserts his fifth amendment privilege, the state should similarly be burdened to "turn over" this evidence with a grant of immunity.

Both the *Brady* holding and the granting of defense witness immunity burdens the state by compelling the surrender of evidence that may help the defendant at trial. In an immunity case the prosecution may be compelled to forgo the additional prerogative of prosecuting the witness.[126] Yet, other Supreme Court precedent upholds the de-

120. Such an order is appropriately entitled "judicial immunity." *See* Government of Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980).
121. United States v. Herman, 589 F.2d 1191, 1200 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).
122. *See* Jencks v. United States, 353 U.S. 657 (1957); Roviaro v. United States, 353 U.S. 53 (1957).
123. 373 U.S. 83 (1963).
124. *Id.* at 87.
125. *Id.*
126. Kastigar v. United States, 406 U.S. 441, 459-62 (1972). An immunized witness to

fendant's right to evidence, even at the expense of later criminal investigations and prosecutions.[127] For example, in *Jencks v. United States,*[128] the defendant sought an order to inspect witness reports given to the F.B.I. These reports were used to apprehend the defendant for violating the National Labor Relations Act and were highly material to the defendant's case.[129] The government, invoking its privilege against source disclosure, attempted to withold the witness reports from the defendant. However, the Court found that the defendant could not be tried without access to these material, and perhaps exculpatory, reports and ordered the indictments dismissed unless the government relinquished its privilege against disclosure,[130] thereby risking the loss of these anonymous sources to aid with later prosecutions. As a necessary incident to the defendant's due process right, the prosecutor was compelled to choose between two difficult and burdensome alternatives.

In another "informer's privilege" case, *Roviaro v. United States,*[131] the Court held that the informer's privilege must again "give way" when disclosure of either the informer's identity or the contents of his communication is relevant and helpful to the accused.[132] The prosecution would either have to disclose the information or dismiss the action.[133]

Roviaro suggests that affirmative burdens of disclosure which jeopardize later investigations do not outweigh a due process right to relevant and material evidence. Never does the Court suggest that a due process right may be limited or witheld because of burdens or costs to the state.

Two recent defense witness immunity cases, discussed earlier, imposed substantial burdens on the state in enforcing the defendant's right to material and exculpatory evidence. In *United States v. Lyon,*[134] the Maryland district court ordered the government to either grant witness immunity, try the witness first, or dismiss the indictment pursuant to the defendant's due process right to material and exculpatory testimony. The government was not burdened to the extent that immunity or dismissal was compelled. The witness, who did not request the defendant's testimony at his trial, could be tried first.[135] Nonetheless, the

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a criminal prosecution cannot later be tried for the same crime unless the prosecution demonstrates "legitimate independant sources" for the incriminating information. *Id.* at 462.

127. *See* sources cited *supra* note 122.
128. 353 U.S. 657 (1957).
129. *Id.* at 667.
130. *Id.* at 671-72.
131. 353 U.S. 53 (1957).
132. *Id.* at 60-61.
133. *Id.* at 67.
134. United States v. Lyon, No. J-81-0118 (D. Md. Sept. 21, 1981) (unpublished order).
135. *Id.* at 8. In the more typical immunity situation, both co-defendants would request immunity for the other co-defendant, and so free his cohort's testimony for trial. Consequently, the state would be placed in the undesirable position of de-

defendant's right to exculpatory evidence was deemed significant enough to displace the government's interest in either deciding the order of prosecution or burdening the state with an immunity grant. At the very least, the prosecutor was still compelled to prosecute the witness first and possibly reveal valuable and exculpatory evidence to the defendant.[136] In sum, this "choice" of burdens was less severe than if the state had been compelled to elect between immunity or dismissal.

In *Government of Virgin Islands v. Smith,*[137] the Third Circuit ordered the state to either immunize the defense witness or dismiss the indictment. Despite ordering what the court called "judicial" immunity, it still provided the state with a choice of burdens, leaving the ultimate decision over immunity to the prosecutor. However, the court did not endorse "judicial" immunity in every instance when evidence denied the defendant by a silent witness is material and exculpatory. When "strong governmental interests . . . countervail against a grant of immunity"[138] or immunity to the defense witness "would entail significant costs to [the government], it would be appropriate for the immunity application to be denied."[139] The court, however, did not elaborate on what "significant costs" might prove too burdensome for the state in an immunity situation. Given that Judge Garth's holding fashioned "judicial" immunity for defense witnesses, finding "substantial costs" would probably be a matter of judicial discretion. Yet, when a court deems its proper role as only imposing a "choice of burdens," and not supplanting the prosecutor's discretion, the standard for "substantial costs" should be more narrowly defined.

Several rules should guide a court in protecting the defendant's constitutional right and preserving prosecutorial discretion. When the burden of immunizing the defense witness becomes so great that the prosecutor realistically has no choice but to dismiss the indictment the application for immunity should be denied. For example, in a case where the witness' crime is heinous and immunity would effectively shield him from prosecution, a judicial decision to impose a choice of either immunity or indictment dismissal would effectively rob the prosecution of any choice over whether or not to grant immunity: the necessity of prosecuting the witness would force the prosecutor to dismiss the defendant's indictment. The separation of powers doctrine should in this instance properly preclude a court from forcing the prosecution to choose between burdens.[140] The court might still be able to compel

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ciding which co-defendant was less culpable, and electing to prosecute the other first.

136. *Id.* at 19.

137. 615 F.2d 964 (3d Cir. 1980).

138. *Id.* at 972.

139. *Id.* at 973.

140. The Third Circuit in *Smith* favored denying a defendant's request for witness immunity under this same situation. Although Judge Garth did not see his holding as consistent with the separation of powers doctrine, in theory it may well be.

a "missing witness" instruction for the defendant,[141] but the immunity alternative should, upon preliminary review by the court, be withheld.[142]

On the other hand, unless the prosecutor can prove at a preliminary hearing that he had no choice but to dismiss the indictment, the state should be forced to choose among either the immunity grant, an indictment dismissal, or postponement of the defendant's trial so as to prosecute the witness first. As stated earlier, permitting defendants a preliminary hearing to determine whether to grant defense witness immunity, with incident procedural delays, does not necessarily outweigh vindicating a fundamental defense right.[143]

IV. CONCLUSION

The separation of powers doctrine properly precludes judicially fashioned immunity for defense witnesses, absent a prosecutor's abuse of discretion. However, entrusting the discretionary power over immunity to the prosecutor may not mitigate against a defendant's right to testimony, even when compelled through witness immunity. In most

141. *But cf.* Morrison v. United States, 365 F.2d 521, 524 (D.C. Cir. 1966). In *Morrison*, the defendant argued that the government's immunity power put the witness under the government's control. Thus, the government's failure to produce the witness should have empowered the trial judge to instruct the jury that an "adverse inference" could be drawn from the government's failure to elicit the same privileged testimony under an immunity grant. Then Judge Burger held that the government's refusal to use the immunity power could not be equated with the "failure of a litigant to produce an otherwise available witness." *Id.*

142. Weighing the state's "substantial costs" to defeat or otherwise limit the defendant's due process right to material evidence finds some support in United States v. Nixon, 418 U.S. 683 (1974). In *Nixon,* the Supreme Court addressed the issue of executive privilege when confronted with a defendant's fifth and sixth amendment rights.

When the Watergate Special Prosecutor subpoenaed certain tapes of conversations by the President to aid in the prosecution of seven Watergate co-defendants, the President asserted a claim of executive privilege and refused to produce the subpoenaed evidence. In upholding and enforcing the prosecutor's subpoena against the President, the Supreme Court considered the co-defendant's fifth and sixth amendment rights "to the production of all evidence at a criminal trial." *Id.* at 711. The Court's holding "weigh[ed] the importance of the general privilege of confidentiality of Presidential communications . . . against . . . ," in part, the fifth and sixth amendment rights of the defendants, as well as other considerations relevant to the "fair administration of criminal justice." *Id.* at 711-12.

The Court did hold, however, that upon a showing of "specific need" the defendant's rights to evidence, encompassed in the "demands of due process of law in the fair administration of criminal justice," could be defeated. *Id.* at 713. President Nixon, in this case, simply failed to make a showing of specific need. The standard of "specific need" seems somewhat analogous to the "substantial cost" standard in *Smith.* The "substantial cost" doctrine, in turn, seems to hinge on a separation of powers analysis.

143. Courts have an unremitting responsibility to vindicate constitutional rights at almost any cost, Cooper v. Aaron, 358 U.S. 1 (1958); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), and to preserve the fair and even-handed nature of the judicial process. *In re* Daley, 549 F.2d 469 (7th Cir. 1977).

instances defendants should have the right to the testimony of immunized defense witnesses, when that testimony is material and exculpatory. Applying the due process clause, some courts have upheld a defendant's right to place a choice of burdens on the state, including immunity, to obtain that evidence. Only when the burden of immunizing the witness becomes so severe that it robs the prosecutor of a realistic choice over whether to immunize the witness or not should the request for witness immunity be denied.

Howard Simon Klein