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# Compelled Immunity for Defense Witnesses: Hidden Costs and Questions

James F. Flanagan\*

In 1966 Chief Justice Warren Burger, then a judge on the United States Court of Appeals for the District of Columbia, authored the opinion in *Earl v. United States*.<sup>1</sup> In that case James Earl claimed he was entitled to have the court grant immunity to a former co-defendant who had asserted his fifth amendment right not to testify at Earl's trial. The Court held the district court had no authority to grant immunity to a defense witness. In a footnote, however, Judge Burger observed that the denial of immunity to a defense witness might create significant due process problems in some cases.<sup>2</sup>

Since *Earl*, federal immunity statutes have undergone significant changes. A constitutional right to present a defense has begun to emerge. Some commentators<sup>3</sup> and courts<sup>4</sup> now maintain that this constitutional right requires courts to exercise the power to immunize witnesses to obtain exculpatory testimony. These developments suggest that Chief Justice Burger and the Supreme Court of the United States may soon face the difficult problems deferred in *Earl*.

This article examines whether courts should compel use immunity for defense witnesses. Previously, courts have refused to consider immunization either because of separation of powers concerns, or because of fear that such immunity could extend beyond its intended bounds and create an "immunity bath." Although it has been argued that use immunity alleviates these concerns, the validity of this argument has not been examined nor has any consideration been given to the type of judicial review required if defense witness immunity were adopted.

Moreover, the rationale for defense witness immunity applies to other government investigatory powers. The argument raises fundamental issues concern-

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1 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

2 361 F.2d at 534 n.1.

3 Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Westen, *Compulsory Process II*, 74 MICH. L. REV. 192 (1975); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967); Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977); Note, *"The Public has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978); Note, *Selective Use of the Executive Immunity Power: A Denial of Due Process?* 8 FORDHAM URB. L.J. 879 (1980); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978).

4 See *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978) (dictum), *cert. denied*, 441 U.S. 913 (1979); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *United States v. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979), *rev'd and remanded sub nom. United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981). Most courts that have considered the issue have rejected the claim for various reasons. See *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981); *United States v. Klaubner*, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980).

ing the balance of investigatory devices available to the prosecution and defense. This article concludes that strong separation of powers and "immunity bath" consequences exist even with use immunity, and that neither the compulsory process clause, the sixth amendment right to a defense, nor due process compel adopting court ordered immunity for defense witnesses.

## I. Transactional Immunity, Use Immunity and the Reemergence of the Compulsory Process Clause

### A. *Development of the Federal Law of Immunity*

When *Earl* was decided, the federal immunity statutes<sup>5</sup> provided only for transactional immunity. If a witness was compelled to testify over his objection, prosecution for any criminal transaction mentioned in the compelled testimony was prohibited. This broad immunity was thought to be mandated by the Supreme Court's decision in *Counselman v. Hitchcock*<sup>6</sup> which had overturned an early federal immunity statute. That statute had prohibited using the compelled testimony itself in a subsequent trial, but "afford[ed] no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime and the sources of information which may supply other means of convicting the witness or party."<sup>7</sup> Congress responded immediately to *Counselman* and enacted legislation providing that "[n]o person shall be prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify. . . ."<sup>8</sup> The Supreme Court upheld transactional immunity in *Brown v. Walker*<sup>9</sup> and sixty years later reaffirmed its decision in *Ullman v. United States*.<sup>10</sup>

Transactional immunity was granted infrequently and only after serious deliberation by the prosecutor had ensured that the information sought justified the immunity.<sup>11</sup> While transactional immunity was required, there was no substantial argument for providing it to defense witnesses. It precluded any subsequent

5 For a discussion of immunity acts in general see Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 797-806 (1978); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 333-67 (1966); Rogge, *Compelling the Testimony of Political Deviants* (pt. 2), 55 MICH. L. REV. 375, 378-85 (1957); Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447 (1955); Note, *Federal Witness Immunity Problems and Practices under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275 (1976).

This article will consider the issue under the federal statutes. Different approaches are possible under state law and in some jurisdictions they may permit the court to order immunity. See *State v. Broady*, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974); OHIO REV. CODE ANN. §§ 2944-45 (Page Supp. 1977). Cf. *Daly v. Superior Court*, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977). The state immunity acts can be found in 8 WIGMORE, EVIDENCE § 2281, n.11 (McNaughton Rev. 1961).

6 142 U.S. 547 (1892).

7 *Id.* at 586. Interestingly, eighteen years before *Counselman*, the Virginia Supreme Court, construing an immunity statute aimed at obtaining the testimony of observers at a duel, found it deficient for the same reasons. *Cullen v. Commonwealth*, 24 Gratt. 624, 65 Va. Rpt. Ann. 218 (1873).

8 Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (repealed 49 U.S.C. § 46).

9 161 U.S. 591 (1896). A discussion of the *Brown* decision is contained in Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 344-47 (1966).

10 350 U.S. 422 (1956). See text accompanying notes 154-66 *infra*.

11 Even so, the results of immunity were often disappointing. Ullmann, after losing in the Supreme Court, appeared before a grand jury to answer the questions previously posed about his alleged communist connections. The grand jury was so disappointed with the answers that they wanted the previous contempt citation to remain but the district court held that an indictment for perjury was the only alternative. Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 375, 409-10 (1957).

prosecution of the witness, and court-ordered immunity would have a severe impact on the administration of justice. Judge Burger apparently referred to such considerations in *Earl*:

Whatever the merits of the arguments in favor of [compelling transactional immunity for defense witnesses], it is obvious that it would require safeguards to prevent abuses; the complexity and difficulty of evaluating the impact of that course suggest at once the inadequacy of the facilities available to the judiciary to make the assessment. We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power.<sup>12</sup>

Additionally, immunity statutes often benefited the guilty. The first federal immunity act was so broad that federal clerks who had embezzled bonds appeared before a congressional committee, confessed, and were thus exempt from prosecution.<sup>13</sup> Abuses of this sort emphasized the risk of placing the immunity power in the hands of defendants who might attempt to absolve their co-conspirators. Thus, when only transactional immunity was available, the twin problems of the separation of powers doctrine and the consequences of permitting the defendant to immunize others combined to defeat defendants' claims for access to the potentially exculpatory evidence through immunized testimony.<sup>14</sup>

The Supreme Court first suggested that transactional immunity might not be constitutionally required by the fifth amendment in *Murphy v. Waterfront Commission of New York Harbor*.<sup>15</sup> In *Murphy* the Court considered the impact of a state's grant of transactional immunity upon a potential federal prosecution. Noting that state granted immunity may not require total immunity from federal prosecution, the Court held that in order to accommodate

the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of the compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.<sup>16</sup>

*Murphy* could have been limited to the situation where the immunizing and prosecuting sovereigns were different, and unique federalism considerations were present. In his concurring opinion, however, Justice White argued that the fifth amendment would be satisfied even after a grant of federal immunity, if the federal government used evidence independent of the immunized testimony.<sup>17</sup> Congress subsequently adopted the concept of "use" immunity described in *Murphy* in the Organized Crime Control Act of 1970.<sup>18</sup> The new federal immunity statute provided:

12 361 F.2d at 534 (footnote omitted). The Chief Justice argued that immunity was a power conferred by Congress and not inherent in the Executive. In so doing he overlooked the President's power to pardon. U.S. CONST. art. II, § 2. The Supreme Court rejected the claim that the immunity power was exclusively the Executive's in *Brown v. Walker*, 161 U.S. at 601. Presidential pardon is discussed in Decker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

13 CONG. GLOBE, 37th Cong., 2d Sess. 428 (1862). Other examples of inadvertent immunization during an interview are reported in Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1592 n.113 (1963) and *United States v. Armour & Co.*, 142 F. 808 (N.D. Ill. 1906).

14 See, e.g., *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973).

15 378 U.S. 52 (1964).

16 *Id.* at 79 (footnote omitted).

17 *Id.* at 106.

18 18 U.S.C. §§ 6001-05 (1970). Part of the purpose of the Act was to provide a single mechanism for

[N]o 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.<sup>19</sup>

The Supreme Court upheld the statute's constitutionality in *Kastigar v. United States*.<sup>20</sup> The majority held that a prohibition of the use or derivative use<sup>21</sup> of information obtained through the grant of immunity satisfied the privilege against self-incrimination. Thus the government could prosecute a witness after a grant of immunity if it could establish it had not used his immunized testimony and it had obtained its evidence from an independent source.

Commentators<sup>22</sup> and some judges recognized immediately the significance of the change in the scope of immunity. Chief Judge Bazelon of the District of Columbia Circuit noted that the change from transactional to use immunity meant correspondingly less invasion of executive prerogatives. Judge Bazelon also argued that use immunity for defense witnesses comported with the language of the immunity statute and that compelled defense witness immunity was constitutionally supported by due process considerations and the sixth amendment right to compulsory process.<sup>23</sup>

### B. *The Constitutional Argument for Defense Witness Immunity*

Until 1967, the compulsory process clause of the sixth amendment was rarely relied upon.<sup>24</sup> In *Washington v. Texas*<sup>25</sup> the Supreme Court resurrected the clause, applied it to the states through the fourteenth amendment, and equated compulsory process with the accused's right to present a defense. The Court held a Texas law prohibiting co-defendant or accomplice testimony at the defendant's trial violative of compulsory process since the statute arbitrarily denied the defendant the "right to put on the stand a witness who was physically and mentally

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granting immunity by the federal government. All other federal immunity acts were repealed except for 21 U.S.C. § 884 (1970) which applied to drug cases. Besides adopting the use immunity suggested by *Murphy*, the Act centralized the procedure in the Attorney General and provided that the privilege must be asserted before immunity was granted. The proposed changes in the immunity acts and their justifications are contained in II WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1405-06 (1970) [hereinafter cited as II WORKING PAPERS].

<sup>19</sup> 18 U.S.C. § 6002 (1976).

<sup>20</sup> 406 U.S. 441 (1972).

<sup>21</sup> What constitutes derivative use prohibited by *Kastigar* is somewhat unclear. The use of immunized testimony as direct evidence or as leads to such evidence is forbidden. 406 U.S. at 460. One commentator has argued that derivative use includes not only evidentiary use but any resort to the immunized testimony to make decisions in instituting charges, trial preparation or strategy. Strachan, *Self-Incrimination, Immunity and Watergate*, 56 TEX. L. REV. 791 (1978). At least one court has agreed with this position. *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973). For an example of how problems of derivative use arise see *New Jersey v. Portash*, 440 U.S. 450, 468-70 n.1 (1979) (Blackmun, J., dissenting) (knowledge of immunized testimony permits framing questions which either compel incriminatory answers or permit impeachment with immunized testimony).

<sup>22</sup> Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972). See generally note 3 *supra*.

<sup>23</sup> *United States v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part).

<sup>24</sup> Professor Westen, the author of the most comprehensive study of the confrontation clause, states that until 1967 the clause was mentioned in only five Supreme Court opinions and in two of those it was dictum. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 108 (1974).

<sup>25</sup> 388 U.S. 14 (1967).

capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."<sup>26</sup>

Although it has not articulated a comprehensive theory of the right to present a defense, the Court has used due process and the sixth amendment guarantees of confrontation and compulsory process to expand the rights of the accused to present exculpatory evidence. Thus in *Chambers v. Mississippi*,<sup>27</sup> the right to present a defense formed the basis for the Court's invalidating strict application of state evidentiary rules which prevented the defendant from eliciting favorable evidence from a defense witness who had confessed to the murder for which the defendant was being tried. *Washington* and *Chambers* are somewhat unique because in both cases the exculpatory evidence proffered was absolutely crucial to the defense, independent evidence<sup>28</sup> to establish its credibility existed, and the interests allegedly served by excluding the evidence were relatively slight.

Even when the interest served by an exclusionary rule has been legitimate, the Supreme Court has favored the defendant's right to introduce the evidence. In *Roviaro v. United States*,<sup>29</sup> the Court held that the defendant was entitled to know the identity of an informer present during the crime despite the government's need to preserve the informer's anonymity. In *Davis v. Alaska*,<sup>30</sup> the Court found that the defendant's right to confrontation required the defendant be allowed to cross-examine the state's juvenile witness about his criminal record even though its disclosure was barred by statute. The Court concluded that the defendant's interest in impeaching the witness for bias outweighed the state's and the juvenile's interest in keeping secret the juvenile's past.<sup>31</sup>

*United States v. Nixon*<sup>32</sup> suggests that defendants' rights prevail even if the countervailing privilege is constitutionally based. In *Nixon*, the President sought to quash a subpoena issued by the special prosecutor seeking tapes and documents of conversations between the President and others. Recognizing that executive privilege is based upon the doctrine of separation of powers, the unanimous Court nonetheless held that a President's generalized assertion of the need for confidentiality did not prevail over a demonstrated and specific need for evidence in a criminal trial.<sup>33</sup> The Court referred specifically to the defendant's right to compulsory process to obtain evidence.<sup>34</sup>

From these cases, commentators have argued that a defendant has a right to exculpatory evidence, including evidence possessed by a witness who asserts his

<sup>26</sup> *Id.* at 23 (footnote omitted).

<sup>27</sup> 410 U.S. 284 (1973). Chambers called as his witness one McDonald who on three separate occasions had confessed to different friends that he had shot the decedent and executed a sworn statement to that effect for Chambers' attorney. McDonald, however, repudiated the confessions before the police. *Id.* at 287-88, 291-93. Chambers was prevented from impeaching McDonald by the Mississippi voucher rule, since McDonald was technically Chambers's witness, and was prevented by the hearsay rule from introducing the out-of-court confessions to show McDonald's part in the murder. *Id.* at 294.

<sup>28</sup> In *Washington*, the evidence showed that the gun was provided by the co-defendant Fuller and that immediately after the shooting Fuller was carrying the gun when they returned to the car. 388 U.S. at 15-16. In *Chambers*, McDonald confessed to a friend within hours of the killing and twice more on widely-spaced occasions to other acquaintances. 410 U.S. at 291-93. He owned the type of gun used as the murder weapon and bought a similar one after the shooting. *Id.* at 293 n.2.

<sup>29</sup> 353 U.S. 53 (1957).

<sup>30</sup> 415 U.S. 308 (1974).

<sup>31</sup> *Id.* at 319.

<sup>32</sup> 418 U.S. 683 (1974).

<sup>33</sup> *Id.* at 713.

<sup>34</sup> *Id.* at 711.

fifth amendment privilege. In such a case, it is argued that defendants should have the right to have their witnesses immunized.<sup>35</sup>

Despite the argument's appeal, until recently judges have been reluctant to consider immunity for defense witnesses,<sup>36</sup> only three courts have done so.<sup>37</sup> Analytically, the cases allowing immunity fall into two categories. The first includes those cases permitting a contingent right to defense witness immunity in the event of either prosecutorial misconduct or use of immunity by the government in its case. In the second category government actions are disregarded and, absent a compelling reason for withholding it, immunity is made available to the defense if necessary to obtain exculpatory evidence.

The courts in *United States v. Morrison*<sup>38</sup> and *Virgin Islands v. Smith*<sup>39</sup> found prosecutorial misconduct requiring immunization of defense witnesses. The situations are similar. In each the defendants sought testimony from a witness involved in the defendants' criminal activity but whom the government had little or no interest in prosecuting. In *Morrison* charges were dismissed when it was learned the witness was a juvenile.<sup>40</sup> The federal prosecutor in *Smith* could not bring charges because the witness was within the exclusive jurisdiction of the Virgin Islands government.<sup>41</sup> In each case the trial court denied immunity for the witness,<sup>42</sup> and the prosecutor engaged in affirmative acts preventing the witness from testifying. In *Morrison* the prosecutor repeatedly threatened to re-indict the witness if she testified, and caused her to assert her fifth amendment privilege during her testimony.<sup>43</sup> In *Smith*, although the witness was within the control of the Attorney General of the Virgin Islands,<sup>44</sup> federal officials denied the defense access to the witness, and persuaded the Attorney General of the Virgin Islands

35 See note 3 *supra*.

36 *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980); *United States v. Davis*, 623 F.2d 188, 192-93 (1st Cir. 1980); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981); *United States v. Praetorius*, 622 F.2d 1054, 1064 (2d Cir. 1980), *cert. denied*, 444 U.S. 869 (1980); *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1092-95 (5th Cir. 1980); *United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980); *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *United States v. Lang*, 589 F.2d 92, 96 (2d Cir. 1978); *United States v. Wright*, 588 F.2d 31, 35-37 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978); *United States v. Housand*, 550 F.2d 818, 823-24 (2d Cir. 1977), *cert. denied*, 431 U.S. 970 (1978); *In re Daley*, 549 F.2d 469, 478-79 (7th Cir. 1977); *United States v. Graham*, 548 F.2d 1802 (8th Cir. 1977); *United States v. Smith*, 542 F.2d 711, 713 (7th Cir. 1976); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); *United States v. Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1975); *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied*, 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. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974); *United States v. Ramsey*, 503 F.2d 524, 532 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *Cerda v. United States*, 488 F.2d 720, 723 (9th Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061, 1063-64 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

37 *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. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979), *rev'd sub nom. United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981).

Although ultimately reversed, the rationale of the district court in *DePalma* assists in the analysis of the problem of defense witness immunity.

38 535 F.2d at 227.

39 615 F.2d at 969.

40 535 F.2d at 225.

41 615 F.2d at 967; 18 U.S.C. § 5001(d) (1976).

42 The trial court denied the request in *Morrison*, 535 F.2d at 225. In *Smith* the trial court apparently did not attempt to compel the government to agree to the immunization by the Government of the Virgin Islands. 615 F.2d at 967.

43 535 F.2d at 226.

44 615 F.2d at 967.

to withhold the grant of immunity.<sup>45</sup> Also, the prosecutor's tactical motivations were obvious in each case. In *Morrison*, the witness had the only important testimony supporting the defendant.<sup>46</sup> In *Smith* the defense witness's testimony would have substantially undercut the testimony of the prosecution's chief witness.<sup>47</sup>

*United States v. DePalma*<sup>48</sup> represents another type of case within the contingent right category. Although finding no prosecutorial misconduct, the court noted that the government had obtained testimony by granting broad immunity to witnesses.<sup>49</sup> Moreover, the reliability of the testimony was questionable because of the nature of the incentives provided.<sup>50</sup> The court's rationale rested on the disparity in the investigatory powers of the parties:

Central to the issue here presented is the question of what obligation is placed upon the government in connection with the search for truth in a criminal proceeding. While the government need not in every circumstance grant immunity to potential defense witnesses, here, where the foundation of the government's case against Horwitz was built by means of a far-reaching immunity grant, and where the evidence sought by the defense is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial.<sup>51</sup>

An attempt to bring the parties' investigatory powers into balance is evident in the court's remedy which required the government to grant immunity to the defense witness or forgo the testimony procured by transactional immunity.<sup>52</sup>

The second category is represented by the alternate ground for decision in *Virgin Islands v. Smith*.<sup>53</sup> In part II of *Smith* the court held that prosecutorial misconduct compelled the immunization of the defense witness. In part III, on independent grounds, the court ruled that the defendant had a due process right to compel immunization. The court based its rationale on *Chambers v. Mississippi*,<sup>54</sup> and on the defendant's right to obtain exculpatory evidence established in *Brady v. Maryland*.<sup>55</sup> The court found authority to order immunity in *Simmons v. United States*<sup>56</sup> and in other cases mandating a judicially created use immunity when needed to permit a defendant to assert a specific constitutional right.<sup>57</sup> The *Smith* court ruled that immunity must be granted if a critical witness's testimony is unavailable because of the valid assertion of the fifth amendment privilege, even though the immunizing jurisdiction cannot itself prosecute the witness. Thus, immunity was ordered by the federal court despite the federal government's lack of jurisdiction over the juvenile witness.<sup>58</sup> Under *Murphy v. Waterfront*

45 *Id.* at 967 & n.3.

46 535 F.2d at 225, 229.

47 615 F.2d 969 n.6.

48 476 F. Supp. 775 (S.D.N.Y. 1979), *rev'd sub nom.* *United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981).

49 476 F. Supp. at 777 n.6, 779.

50 *Id.* at 779.

51 *Id.* at 781.

52 *Id.* at 782.

53 615 F.2d at 969-74.

54 410 U.S. 284 (1973).

55 373 U.S. 83 (1963). *See* note 277 *infra*.

56 390 U.S. 377 (1968).

57 *See* notes 245-58 *infra* and accompanying text.

58 *Virgin Islands v. Smith*, 615 F.2d at 964.



*Commission*,<sup>59</sup> however, federal immunity will result in use immunity in the local jurisdiction.<sup>60</sup>

These cases highlight the major issues in defense witness immunity, but further analysis is necessary to find the key questions. The prosecutorial misconduct cases do not involve an independent right to defense witness immunity but instead use immunity as a remedy for the misconduct.<sup>61</sup> The courts do not suggest that the defendant is entitled to immunity absent prosecutorial misconduct. The *Morrison* court upheld the trial judge's denial of immunity,<sup>62</sup> and *Smith* involved a refusal to accede to the decision of the Virgin Islands government to grant immunity. Moreover, had immunity not been raised, the misconduct itself furnished adequate grounds for reversal.<sup>63</sup> *Morrison* and part II of *Smith* merely hold that if misconduct causes a witness to assert his fifth amendment privilege, the government can cure that particular misconduct by granting immunity on retrial. In such a case, immunization is a government option and not an affirmative obligation.

However, identifying those cases in which prosecutorial misconduct rather than legitimate government action has resulted in the loss of a defense witness through the assertion of a fifth amendment privilege raises a difficult judicial problem. The facts in *United States v. Herman*<sup>64</sup> are illustrative. Although there was no claim of prosecutorial misconduct in *Herman*, the facts suggested it. The government had indicted Herman's potential defense witnesses with him but dismissed them on the day of Herman's trial.<sup>65</sup> The indictment suggests that the government had sufficient information to seek a trial without the need for continuing investigation. If tried with Herman, the witnesses might have testified on their own behalf and permitted Herman to introduce his exculpatory information through cross-examination. Instead, the dismissal without prejudice ensured that the witnesses would, to the prosecution's advantage, exercise their constitutional rights not to testify. Although this maneuver may be considered an attempt to gain a tactical advantage, its purpose is not as blatant as the conduct in *Morrison* or *Smith*. Furthermore, the prosecutor's purpose could not be uncovered without a thorough review of his motive.<sup>66</sup> The *Smith* court perceived this problem and remanded the case to determine whether the prosecutor's acts were undertaken with an intent to disrupt the fact finding process.<sup>67</sup> The court's ability to review the basis for prosecutorial decisions poses the central problem of defense witness immunity.

The *DePalma* court's approach, which makes the defendant's right to immu-

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59 378 U.S. 52 (1964).

60 *Id.* at 53 n.1, 79.

61 *United States v. Turkish*, 623 F.2d at 773; *United States v. Klauber*, 611 F.2d 512, 517-18 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1835 (1980).

62 535 F.2d 223 (government must request immunity).

63 The court felt that *Morrison* was clearly governed by *Webb v. Texas*, 409 U.S. 95 (1972) (harsh warning by judge about the penalties of perjury driving defense witness from the stand violates due process). In *Smith*, the federal prosecutors deprived the defense of access to the witness although the witness was not within their jurisdiction and gave no reason for refusing to accede to the decision of the local jurisdiction to grant immunity to the witness. 615 F.2d at 967 & n.3.

64 589 F.2d 1191 (3d Cir. 1978).

65 *Id.* at 1199.

66 *See United States v. Falk*, 479 F.2d 616, 628-34 (7th Cir. 1977) (dissent) (motive of prosecutor is impossible to determine and is irrelevant).

67 615 F.2d at 969, 974.

nity contingent on the government's using immunity to procure testimony in its case, is not helpful and must be abandoned. Although this approach is appealing in its symmetry, the defendant's rights depend on how the government obtains its witnesses.<sup>68</sup> Those defendants facing non-immunized accusers are abandoned. Moreover, the government's using immunity does not create the need for defense witness immunity; the need is created by the assertion of fifth amendment privilege by witnesses with exculpatory evidence.

Adoption of the independent right to use immunity articulated in part III of *Smith* does not necessarily eliminate the difficult questions of judicial review posed by defense witness immunity. The government may still argue that such action will adversely affect its legitimate interests, thus requiring the court to identify the government's interests and weigh them against the defendant's. Although the defendant's interests are obvious, the government's are difficult to identify. Conceivably, the government has an interest in preventing the testimony of a witness the government believes will testify falsely and possibly exculpate a guilty defendant. In *Washington v. Texas*<sup>69</sup> the Court eliminated this as a valid consideration and left credibility to the jury. The government, by objections at trial, evidentiary rules, or arbitrary application of those rules, cannot prevent admission of relevant and exculpatory material.<sup>70</sup> The only other governmental interest affected by defense witness immunity is its potential to frustrate the prosecution of the immunized witness in the future. Recognizing this interest, the *Smith* court ordered the district court on remand to determine whether any countervailing government interests warranted a denial of immunity. The *Smith* court clearly believed no such interests existed in that case because the Attorney General of the Virgin Islands had disavowed any intention of prosecuting the witness.<sup>71</sup>

No one questions the government's interest in retaining its ability to prosecute a witness implicated in a crime. Under transactional immunity, if a choice were required between the defendant's need for the testimony and the government's interest in prosecuting a potential defense witness, certainly the latter would have prevailed.<sup>72</sup> Defense witness immunity was not even proposed before *Murphy*<sup>73</sup> suggested the constitutionality of use immunity and removed the automatic and total immunity required by transactional immunity. Proponents of defense witness immunity argue that use immunity makes defense witness immunity feasible because of its limited impact on future prosecution of defense witnesses.<sup>74</sup> Despite its enormous implications, this premise has not been scrutinized. If use immunity for defense witnesses actually amounts to transactional immunity, defense witness immunity cannot be justified.

Thus two central issues emerge from analyzing the cases and their ratio-

68 Note, *Selective Use of the Executive Immunity Power: A Denial of Due Process?*, 8 *FORDHAM U. L.J.* 879, 904 (1980).

69 388 U.S. 14 (1967).

70 *Id.* at 21-22; *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Davis v. Alaska*, 415 U.S. 302 (1974).

71 615 F.2d at 974.

72 The issue never arose in that form. Judicial concern about the immunity bath, however, makes that result inevitable.

73 378 U.S. 52 (1964).

74 Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 *HARV. L. REV.* 567, 584 n.43 (1978); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 *HARV. J. LEGIS.* 74, 81, 87 (1972).

nales. First, is the premise of defense witness immunity valid? Can the defendant immunize his witnesses and still permit the government to prosecute them later? Or, will defense witness immunity create an "immunity bath" for accomplices and co-conspirators? Second, if defense witness immunity will occasionally act as transactional immunity, can courts identify those instances before immunity is granted? The second question resembles the question posed by the prosecutorial misconduct cases: can courts separate the cases of prosecutorial misconduct from those of legitimate government action when both ultimately result in the assertion of a fifth amendment privilege and the loss of a defense witness? Ultimately, the question becomes whether the courts are competent to determine the issues that will arise in cases involving defense witness immunity. These two issues are considered in turn.

## II. Has Use Immunity Drained the "Immunity Bath"?

### A. *Defense Witness Use Immunity in Practice*

If defense witness immunity is available the witness's decision to testify will rest in the defendant's hands. Once compelled to testify, however, the witness will take advantage of use immunity's peculiar characteristics. Use immunity's value to the witness increases with the scope of the testimony he provides under the grant of immunity. The broader the immunized testimony, the more potential leads are foreclosed.<sup>75</sup> He has an interest in testifying broadly. Every fact, conversation, meeting, letter, thought or action the witness mentions cannot be used to form a link in the chain of evidence in a later prosecution.<sup>76</sup> The facts mentioned need not be incriminating in themselves. They are immunized if they are mentioned pursuant to a grant of immunity and were unknown to the government. A witness testifying under immunity can also create a legal problem at little cost to himself that might hinder or prevent his prosecution. Testifying under a grant of use immunity, the witness can foreclose an ongoing but incomplete investigation by simply mentioning as many facts as possible and forcing the government to prove its evidence was not derived from his testimony.<sup>77</sup> If the government has charged the witness and presumably has sufficient evidence to prosecute, the witness by testifying gains the issue of derivative use and a preview of the prosecutor's case. The more seriously a witness is implicated in a criminal scheme, the more use immunity offers him.

The defendant calling an implicated witness also has an interest in securing extensive testimony. The witness is essential to the defense because he has knowledge or testimony unavailable to other witnesses. If the witness is to be a credible witness, his background, relationship with the defendant, and knowledge of events must be thoroughly developed. In complex fraud, organized crime or political corruption cases, the testimony must be particularly extensive to explain the events, meetings, conversations and transactions involved. Moreover, defense counsel will recognize that calling the witness may create problems for the government in a subsequent prosecution, and the "cost" of the present prosecution

<sup>75</sup> U.S. Attorney General Guidelines on the Use of Federal Immunity Statutes, Ch. 11.400. UNITED STATES ATTORNEY'S MANUAL (January 14, 1977) [hereinafter cited as Federal Immunity Guidelines].

<sup>76</sup> *Kastigar v. United States*, 406 U.S. at 459-61.

<sup>77</sup> *See United States v. Turkish*, 623 F.2d at 775.

will increase. This cost will be particularly high in cases where the defendant is the only person capable of implicating the witness so the defendant's successful prosecution will be essential to prosecuting the witness.<sup>78</sup> Some defendants will attempt to exploit this to gain an advantage in their trial. A defense promise of an exhaustive direct examination might secure the witness's fullest cooperation.

The prosecution necessarily will also broaden the scope of the immunized testimony during cross-examination. It will be lengthy because the immunized witness is critical, and the questioning must cover what the government has learned through its investigation of the witness. The cross-examination will mirror or expand upon each of the areas covered in direct examination. Limiting cross-examination will only enhance the witness's testimony in the present trial, increase the possibility of acquittal, and prevent a subsequent prosecution of the witness.

Limiting the scope of the immunized witness's testimony to prevent irrelevant testimony and excessive immunization will not work. First, defense witness immunity will be requested most often in complex cases where there are multiple participants.<sup>79</sup> Inevitably, charges and defenses will be broad. The sole standard for examination will be relevancy to the broad subject matter at trial. If the direct examination meets this standard, the questions will be appropriate, and the responses will be permitted regardless of the detail required. Artificial limitations on the direct examination of the witness, even assuming that the danger areas can be identified beforehand, will pose the same problems as would a denial of the witness.

Second and more importantly, assessing the impact of a witness's testimony upon a pending investigation or a later prosecution will be impossible at the time of trial. The testimony's effect can be determined only at a later trial when the government attempts to establish the independent source of the evidence justifying the witness's prosecution. Thus, the testimony and the resulting defense witness immunization will be extensive, and immunity will be granted without anyone knowing its consequences on a subsequent prosecution. At the least, defense witness immunity will give the witness a substantial issue—that the government's case is derived from improper use of immunized testimony.

### B. *Proving Independent Source*

The government may still establish that its evidence was derived independently of immunized testimony even after a protracted examination. The case law on proof of independent source, however, demonstrates the difficulty of that task. The government may prosecute only if it can sustain its heavy burden of proving that all its evidence was derived from legitimate independent sources.<sup>80</sup> The Supreme Court has emphasized that the government's burden "is not limited to a negation of taint; rather it imposes on the prosecution the affirmative duty to show that the evidence it proposes to use is derived from a legitimate

<sup>78</sup> See note 117 *infra*.

<sup>79</sup> See, e.g., *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981) (co-defendants sought immunization for seventeen defense witnesses); *United States v. Praetorius*, 622 F.2d 1054 (2d Cir. 1980) (multiple defendant conspiracy trial for importing heroin from Thailand).

<sup>80</sup> *Kastigar v. United States*, 406 U.S. at 460-61.

source wholly independent of the compelled testimony.<sup>81</sup> An affidavit by the prosecutor denying use of the immunized testimony is insufficient.<sup>82</sup> Although the Supreme Court has not ruled on the issue, the lower courts generally hold that the government satisfies its burden by establishing independent source by a preponderance of the evidence.<sup>83</sup>

The proof of independent source cases generally involve immunized testimony before grand juries followed by prosecutions. Many involve a state grand jury and a federal prosecution.<sup>84</sup> The limited examination before the grand jury, the secrecy of its proceedings, and the separate sovereigns involved make proving independent source easier than doing so when immunity is granted at trial.<sup>85</sup> Despite these advantages, establishing independent source after grand jury testimony has not always been successful.

Independent source can be established three ways. First, prior to the grant of immunity the government can show the source of its evidence by filing a summary of its evidence and leads with the court.<sup>86</sup> Second, without proving the source of its evidence, the prosecution can establish that because it lacked access to the immunized materials, its investigation was untainted.<sup>87</sup> Third, the government can show how it developed each piece of evidence.<sup>88</sup> A combination has also been used.<sup>89</sup> However, close examination reveals substantial problems with each method when immunity is extended a defense witness at trial.

Ostensibly, independent source is most easily established by the government's filing a memorandum of its known evidence and investigative leads prior to the witness's testifying. This is the generally suggested mechanism for defense witness immunity.<sup>90</sup> Of course, this method is available only if the government has completed its investigation and knows the source of its evidence. If the government needs to continue its investigation or has yet to establish sufficient proof of a critical element or to foreclose a particular defense, this method is unsatisfactory. Filing such memoranda does not prevent a hearing on derivative use or foreclose possible impermissible use of immunized testimony. The detail of the

81 *Id.* at 460.

82 *United States v. Nemes*, 555 F.2d 51, 53 (2d Cir. 1977).

83 *United States v. Romano*, 583 F.2d 1, 7 (1st Cir. 1978); *United States v. McDonnell*, 550 F.2d 1010, 1012 (5th Cir.), *cert. denied*, 434 U.S. 835 (1977); *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974). *But see United States v. Henderson*, 406 F. Supp. 417, 423 n.8 (D. Del. 1975).

84 *E.g.*, *United States v. Bianco*, 534 F.2d 501, 509 (2d Cir. 1976); *United States v. First Western State Bank*, 491 F.2d 780, 784 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).

85 *See United States v. Jones*, 542 F.2d 186, 200 n.26 (4th Cir. 1976); *cf. Piccirillo v. New York*, 400 U.S. 548, 568 (1970) (Brennan, J., dissenting) (transactional immunity required where state that immunized also prosecutes due to difficulty in establishing taint).

86 *See Goldberg v. United States*, 472 F.2d 513, 516 n.5 (2d Cir. 1973).

87 *See United States v. Bianco*, 534 F.2d 501 (2d Cir. 1976); *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976); *United States v. First Western State Bank*, 491 F.2d 780 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974). This proof has to involve more than a mere denial of use. *See United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977).

88 *In re North Am. Inv. Co.*, 559 F.2d 464, 466 (7th Cir. 1977).

89 *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978); *United States v. Bianco*, 542 F.2d 501 (1976).

90 Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 169-70 (1974); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 96 (1972); Note, *Federal Witness Immunity Problems and Practice*, 18 U.S.C. §§ 6002-6003, 14 AM. CRIM. L. REV. 275, 284 (1976). *See also* Federal Immunity Guidelines, 11.330; Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 YALE L.J. 171 (1972).

information filed is crucial. The Watergate trials provided a celebrated instance of this technique when the prosecution filed only a list of grand jury proceedings and a list of names of persons to be interviewed.<sup>91</sup> Such an incomplete memo does not establish independent source, and is merely evidence that the government might have developed its proof from its prior investigation. Moreover, the government's burden is not limited to demonstrating it developed its case by means other than the immunized testimony. In practice, the prosecutor must rebut the inference of derivative use which arises if the immunized testimony suggests possible leads,<sup>92</sup> identifies critical witnesses,<sup>93</sup> or leads to effective cross-examination.<sup>94</sup> If the defense argues that the immunized testimony assisted the government directly or indirectly, the government must negate the charge to establish its independent source. The Watergate prosecutor's experience is instructive. Gordon Strachan was the only defendant to assert impermissible use of immunized testimony and his prosecution was eventually dropped because of the difficulty of establishing independent source.<sup>95</sup> Given the massive investigation, the special prosecutor's unlimited resources and the number of individuals eventually cooperating with the government, the prosecutor's failure to seek to establish independent source suggests that uncontrolled immunity can easily prevent subsequent prosecution. Filing evidence is apparently useful only in special cases in which the government can go to trial against the witness and the defendant at the same time. In such a case the prosecutor would be unconcerned about a later investigation and could establish independent source before trial. In all other cases, a substantial problem of proving independent source would be created.

The second method of proving independent source involves showing lack of access to the immunized materials. This method avoids the greater proof problems involved in showing the source of all the evidence. Courts have accepted as proof evidence that grand jury testimony was kept under lock and key, that limitations were placed on the dissemination of the materials, and that the prosecutors maintained no contact with the grand jury.<sup>96</sup> However, this method is unavailable with defense witness immunity because the government has knowledge of and access to the immunized testimony because the trial at which the witness testifies will be public.<sup>97</sup> Further, the defendant and the witness are allegedly involved together in a criminal scheme and have been investigated by the same officials. Also, the two prosecutions likely will be conducted by the same office (if not by the same prosecutor) in the same court system.<sup>98</sup> Because they

91 Strachan, *Self-Incrimination, Immunity and Watergate*, 56 TEX. L. REV. 791, 814 n.107 (1978).

92 *Kastigar v. United States*, 406 U.S. at 460.

93 *United States v. Kurzer*, 534 F.2d 511, 517 (2d Cir. 1976); *United States v. Pellon*, 475 F. Supp. 467, 479 n.9 (S.D.N.Y. 1979); *United States v. Quatermain*, 467 F. Supp. 782, 786-89 (E.D. Pa. 1979).

94 *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973).

95 See note 91 *supra*. The case is referred to in *United States v. DeDiego*, 511 F.2d 818, 825 n.9 (D.C. Cir. 1975).

96 *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978); *United States v. Bianco*, 534 F.2d 501 (2d Cir. 1976).

97 For an example of the problems that arise when the prosecution is aware of testimony given immunity see *United States v. DeDiego*, 511 F.2d at 826-29 (McGowan, J., dissenting). See also Strachan, *supra* note 91, at 815-19, for a discussion of the problems in a highly publicized case.

98 Justice Brennan foresaw these problems in his dissent in *Piccirillo v. New York*, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting). The next year, the dissent in *Kastigar* repeated the theme. 406 U.S. at 464 (Douglas, J., dissenting). The problem of the same prosecutor hearing immunized testimony and later prosecuting the witness is not rare. See *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir. 1974).

are viewed as a legal unit, federal prosecutors will find it difficult to establish that knowledge about the witness gained from investigation and trial preparation is independent of the immunized testimony.<sup>99</sup>

The third method of proving independent source requires the prosecutor to establish the source of the evidence. Although this is possible technically, it occurs only in the easiest of cases. In some cases, where the immunized witness testified before the grand jury, the court concluded from the questions' specificity and the answers' vagueness or unresponsiveness that the government had the evidence prior to immunization.<sup>100</sup> But when the direct and cross-examination of the immunized witness is extensive, the government must undertake the laborious task of proving how it obtained possession of each fact. The defendant has no obligation to specify what evidence has been wrongfully obtained. The government incurs the heavy *Kastigar* burden once the defendant establishes he has testified under a grant of immunity.<sup>101</sup> A hearing on independent source will be lengthy, and may last as long as the trial itself.<sup>102</sup> Length alone poses unusual problems. If held before the trial, the hearing reveals the government's case and exposes its witnesses to potential harm.<sup>103</sup> If held during the trial, the hearing may double the trial's length and create delays for the jury. If held after the trial, the defendant suffers the financial burden of two proceedings before determining whether his rights have been violated.<sup>104</sup>

The government must carry a heavy if not insurmountable burden of proof on the issues of independent source.<sup>105</sup> Traditionally, defendants' fifth amendment claims have been accorded unusual deference, reflecting the long struggle for the right against self-incrimination. Such deference is essential in evaluating use immunity since *Kastigar* required that there be no adverse use of the immunized testimony.<sup>106</sup> Immunized testimony is compelled within the meaning of the fifth amendment<sup>107</sup> and subject to a *per se* exclusionary rule.<sup>108</sup> Finally, courts do not measure the extent of the taint. Once impermissible use is established, or more precisely, once the government fails to establish an independent source on any issue, courts find a violation of the fifth amendment.<sup>109</sup> The ex-

99 Giglio v. United States, 405 U.S. 150 (1972).

100 United States v. Jones, 542 F.2d 186, 201 (4th Cir. 1976); United States v. Catalano, 491 F.2d at 272; United States v. Thanasouras, 368 F. Supp. 534, 536-37 (N.D. Ill. 1973).

101 *Kastigar* v. United States, 406 U.S. at 461-62. It is rare that defendants allege that specific evidence is derived from immunized testimony. Compare United States v. Jones, 542 F.2d at 201, with United States v. Romano, 583 F.2d at 7 (defendant claims prosecution did not establish a lack of taint evidence).

102 United States v. DeDiego, 511 F.2d 818, 831-32 (D.C. Cir. 1975) (McGowan, J., dissenting).

103 United States v. Jones, 542 F.2d at 198.

104 Strachan, *supra* note 91, at 818.

105 Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 161-64 (1976).

106 Use immunity is constitutional only because any use of the testimony is prohibited. The majority believed that *Kastigar's* heavy burden of proof was sufficient to prevent use of immunized testimony but the dissent believed that it would be impossible to show impermissible use since all of the evidence was in the possession of the government and thus the defendant's rights ultimately depended upon the good faith of the prosecutor. 406 U.S. at 469 (Marshall, J., dissenting). Justice Douglas foresaw the same problem in *Ullmann v. United States*, 350 U.S. 422, 444 (Douglas, J., dissenting).

107 *New Jersey v. Portash*, 440 U.S. 450 (1979).

108 *Id.*

109 United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir. 1974), *cert. denied*, 419 U.S. 872 (1974). See United States v. DeDiego, 511 F.2d at 821 (prosecution has a "dim" chance of establishing independent source). Commentators have argued for a strict *per se* rule on derivative use. See Kaplan & Zimmet,

isting cases suggest that courts are particularly solicitous of claims of impermissible use when the government has access to the immunized testimony, and are willing to assume the government will be unable to establish it did not use the testimony in preparing its case.<sup>110</sup>

### C. *Consequences of Defense Witness Use Immunity*

This bleak analysis of the effect of use immunity on a subsequent prosecution of an immunized witness is confirmed by the experience of federal prosecutors since 1970. Use immunity is now granted much more frequently than transactional immunity. Although use immunity was intended to preserve the prosecutor's ability to institute later charges against the witness, subsequent prosecutions are rare. Examining Justice Department statistics, one commentator concluded that from 1970 to 1977 there was only one prosecution after a grant of immunity although there were more than ten thousand immunity grants.<sup>111</sup> This figure can only be explained if in fact, use immunity functions as transactional immunity.

The Justice Department's immunity guidelines reflect this fact:

Although the person may still be prosecuted on the basis of independent evidence for any offense about which he testifies, in practice, the government's burden of proving the independent nature of its evidence is so great that successful prosecution usually would be extremely difficult. Consequently, under the circumstances of many cases, use of the statute will effectively preclude prosecution to which his testimony relates.<sup>112</sup>

Thus, prosecutions are difficult when use immunity is granted during grand jury proceedings conducted by the government. If use immunity is provided defense

*Criminal Law*, 1973-74 ANN. SURVEY OF AM. L. 343; *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 188 (1972).

110 The federal bankruptcy law, 11 U.S.C. § 344 (1979), provides immunity for a bankrupt during bankruptcy proceedings, and such immunity has not prevented subsequent prosecutions for fraud. *See, e.g.*, *United States v. McDonnell*, 550 F.2d 1010 (5th Cir. 1977); *United States v. First Western State Bank*, 491 F.2d 780 (8th Cir. 1974). This might suggest that the derivative use problem is overstated. However, bankruptcy cases differ in significant respects from typical criminal cases. First, the immunized testimony is before the trustee and not before law enforcement officials so it is more like the separate jurisdiction cases since the prosecutor must make an affirmative effort to obtain the transcript. Second, the criminal cases arise out of commercial transactions in which there are a substantial amount of documentation and in which there are often creditors who are witnesses to the event. In such cases, the necessity for the testimony or help of an implicated witness is substantially less than in the more typical cases involving political corruption or narcotics.

The experience of prosecutors during the Watergate conspiracy might also suggest that the derivative use problem is manageable, since the cases were concluded successfully even though the major participants had received immunity for testifying before congressional subcommittees. Again there are distinctions, the principal one being that the defense of derivative use was ultimately successful in the only instance in which it was raised. *See Strachan, Self-Incrimination, Immunity and Watergate*, 56 TEX. L. REV. 791 (1978). Also, most of the defendants plead guilty after John Dean, who was at the center of the conspiracy, had agreed to cooperate with the government, so in effect the government already had its crucial witness.

111 Mykkeltvedt, *To Subplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633, 655-56 (1979); *See also Note, Federal Witness Immunity Problems and Practices under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 282 n.46 (1976). *But see Note, The Sixth Amendment Right to have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1275 n.61 (1978) (arguing that the prosecutor is unlikely to indict witnesses in order to encourage more cooperation with the government).

112 Federal Immunity Guideline, 1-11.212. Subsequent prosecution requires the approval of the Attorney General, *id.* at 1-11.400, a memorandum detailing how claims of derivative use will be rebutted, and the unusual circumstances justifying the prosecution. *Id.*



witnesses in a trial where relevance is the only limit to the extent of the testimony, subsequent prosecutions of immunized witnesses will be almost impossible.

The defense witness immunity issue arises in any case involving multiple potential defendants where participants are the only witnesses. Political corruption cases are one important example.<sup>113</sup> The cases arising thus far involve allegations of corruption<sup>114</sup> and criminal fraud.<sup>115</sup> Organized crime and narcotics cases<sup>116</sup> are also typical. These cases are unusually significant because of their numerous victims and grave social consequences.

Applying defense witness immunity in such cases may be catastrophic since it deprives the state of one of its main sources of evidence. In multi-defendant, multi-tiered criminal conspiracies evidence against higher levels often can be obtained only by convicting lower level individuals and using their testimony to reach successive levels.<sup>117</sup>

The courts have held that if the government uses an immunized witness to help convict a defendant, the defendant cannot testify in the witness's subsequent prosecution, because the testimony will have been derived from the witness's immunized testimony.<sup>118</sup> Moreover, if the witness is called by the defendant, and his immunized testimony contributes to the defendant's conviction or to his decision to testify against the witness (because he was impeached, or additional facts harmful to the defendant emerged, or the witness failed to give exculpatory testimony to the extent the defense expected) then the defendant's testimony will be obtained, in part, from the witness's immunized testimony. Use of the convicted defendant's testimony would then violate the witness's right against self-incrimination.<sup>119</sup> Thus, an astute witness who is the only person who can connect a defendant with the crime might promise the defendant exculpatory testimony, but find it in his ultimate interest to ensure the defendant's conviction. This

113 406 U.S. at 445 n.13. Justice Powell was citing the history of immunity statutes. The same circumstances generate the need for testimony for defendants.

114 *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). The first federal immunity act was passed in two days to assist in investigating a vote selling scheme involving a reporter as an intermediary. See Note, *The Federal Witness Immunity Acts on Theory and Process: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571 (1963).

115 *United States v. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3482 (Jan. 13, 1981); *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979).

116 *United States v. Praetorius*, 622 F.2d 1054 (2d Cir.), *cert. denied*, 444 U.S. 869 (1979); *United States v. Pellon*, 475 F. Supp. 467 (S.D.N.Y. 1979).

117 The use of convictions of lower level perpetrators to reach higher level planners is illustrated by the prosecutions for the murder of Jake Yablonski, a candidate for the presidency of the United Mine Workers (U.M.W.). Yablonski, his wife and daughter were killed on December 31, 1969 by Gilly, Vealy, and Martin, who were quickly arrested. Prosecutors obtained the cooperation of Paul Gilly who testified against Vealy and Martin. These convictions led to pleas of guilty and cooperation by Silous Huddleson, President of a U.M.W. local in Tennessee who had arranged for the murders. Huddleson and his daughter, Gilly's wife, also pled guilty. Huddleson testified against William Praeter, a U.M.W. District 19 organizer. After being convicted Praeter testified at the trial of Albert Pass, Secretary-Treasurer of District 19 of the U.M.W. and a member of the union's international board who was also convicted. Gilly, Huddleson, Praeter as well as William Turnblazer, the president of District 19, all testified at the successful prosecution of Tony Boyle who had defeated Yablonski for the presidency of the union and ordered his murder when Yablonski challenged the election. See generally A LEWIS, *MURDER BY CONTRACT* (1975).

118 *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976); *United States v. Pellon*, 475 F. Supp. at 479 n.9; *United States v. Quatermain*, 467 F. Supp. 782, 786-89 (E.D. Pa. 1979).

119 See generally Note, *Selective Use of the Executive Immunity Power: A Denial of Due Process?*, 8 FORDHAM URB. L.J. 879, 906-08 (1980).

situation is not far-fetched. Any bribery case where the bribor and the recipient were the only ones present possesses such potential.

In summary, independent source can be established only in the simplest of cases, or if the investigation of the witness is completed before the witness testifies in the defendant's trial. In all other cases, particularly complex multi-defendant, multi-tiered cases, defense witness immunity creates a substantial, if not insurmountable, burden for the government. The case law and experience with use immunity before grand juries demonstrate that the government will have great difficulty in carrying its burden of proving independent source in any disputed case.

Furthermore, the impact of defense witness immunity will not be limited to the subsequent prosecution. A decision must be made when the witness is called to testify in the first trial whether to dismiss the case against that defendant to preserve the option of prosecuting the witness or to continue the prosecution and later shoulder the burden of proving independent source. Consequently, some subsequent prosecutions will be precluded, and some existing prosecutions aborted because of the threats posed by defense witness immunity. Defense witness immunity's impact will be greatest in complex cases where the societal interest in the prosecutions will be greatest since such prosecutions involve political corruption, fraud, and organized crime. Use immunity has not drained the "immunity bath."

### III. The Competency of the Courts and Separation of Powers

Since an "immunity bath" is likely in the most important cases in which defense witness immunity will be requested, courts will be asked to determine the validity of the government's claim that granting defense witness immunity will prevent the subsequent prosecution of the proposed defense witness. A similar question emerges in the prosecutorial misconduct cases: did the government's misconduct lead to the witness's asserting his fifth amendment privilege and the defense's consequent loss of the witness? Although these two questions focus on slightly different factual issues, they both raise the problem of the court's competence to review prosecutorial discretion. The issue is most acute when the court must review a claim that defense witness immunity will prevent the witness's future prosecution.

#### A. *Judicial Determination of the Impact of Immunity upon Subsequent Prosecution*

Immunity is one of the tools necessary to the Executive's enforcement of the criminal laws.<sup>120</sup> The need for immunity was recognized at the Constitutional Convention, when the power to pardon was given the Executive partly because prosecuting some crimes will require granting a pardon to obtain testimony from an accomplice.<sup>121</sup> Recognizing each branch of the government's right to inde-

<sup>120</sup> *Kastigar v. United States*, 406 U.S. 441, 444-47 (1972). Immunity statutes are a direct consequence of the acceptance of the privilege against self-incrimination.

<sup>121</sup> 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, in 480 (J. Elliot ed. 1845). The convention rejected a proposal that the Congress have the pardon power. *Id.* at 480, 549. For a history of the pardon power see Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS, 1787-1957* (4th ed. 1957).

pendence within its own sphere, the courts have traditionally accorded the Executive virtually unlimited discretion in bringing charges,<sup>122</sup> refusing to indict,<sup>123</sup> selecting whom to charge<sup>124</sup> as well as the charge,<sup>125</sup> plea bargaining as it chooses,<sup>126</sup> or dismissing the case.<sup>127</sup> Likewise, immunizing witnesses is an executive function, and has been held almost uniformly within the prosecutor's discretion and beyond the court's power to order.<sup>128</sup> Despite the apparently well-settled case law, judicial review of prosecutorial decisions is not foreclosed. Over similar separation of powers objections, the Supreme Court has reviewed other branches' actions.<sup>129</sup> Also, the prosecutorial function is shared with the judiciary to the extent the courts are used to find guilt or innocence.<sup>130</sup> The concept of separation of powers also is intended partly to prevent an accumulation of power in one branch, and implies judicial review.<sup>131</sup> There are constitutional limitations on prosecutors,<sup>132</sup> but in practice these limitations have been applied only in cases involving gross abuse of discretion.

However, judicial reluctance to review the prosecutor's discretionary acts cannot be lightly disregarded. The separation of powers doctrine involves a restriction in the role one branch of a tripartite government plays in the affairs of another, and demands recognition of the special competence and limitations of each branch especially when the judiciary is the encroaching branch. The competence of the judiciary is limited by restricted manpower, the constitutional "case and controversy" requirement, and the limitations of legal reasoning. Chief Justice Warren referred to this in *Flast v. Cohen*:<sup>133</sup>

Embodied in the words "cases" and "controversies" are two complementary but some what different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. . . . Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers *and* which are traditionally thought to be capable of resolution through the judicial process.<sup>134</sup>

122 *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *United States v. Mann*, 517 F.2d 259, 271 (5th Cir. 1975); *United States v. De Diego*, 511 F.2d 818, 824-25 (D.C. Cir. 1975).

123 *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-82 (2d Cir. 1973); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir.), *cert. denied*, 384 U.S. 906 (1965); *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

124 *United States v. Mann*, 517 F.2d at 259.

125 *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979); *Oyler v. Boles*, 368 U.S. 448 (1962).

126 *United States v. Ammidown*, 497 F.2d 615, 621-23 (D.C. Cir. 1973); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967).

127 *Confiscation Cases*, 74 U.S. (7 Wall.) at 454; *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975); *Epperson v. United States*, 371 F.2d 956 (D.C. Cir. 1967).

128 *See* note 36 *supra*.

129 *United States v. Nixon*, 418 U.S. at 683; *Powell v. McCormack*, 395 U.S. 486 (1969); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

130 *See generally* *Cox, Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 397-403 (1976).

131 Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51, 61 (1977).

132 *United States v. Falk*, 479 F.2d 616, 623-24 (7th Cir. 1973) (defendant prosecuted for exercise of first amendment rights); *Dixon v. District of Columbia*, 394 F.2d 966, 968-70 (D.C. Cir. 1968) (prosecution of defendant after he refused to drop civil suit against police, dismissed); *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969) (indictment dismissed after prosecution refused to honor plea bargain).

133 392 U.S. 83 (1968).

134 *Id.* at 94-95, 97 (emphasis added).

Close examination reveals that judicial review of defense witness immunity not only interferes with the Executive's affairs, but, more seriously, poses issues in a non-adversarial setting. No discernable legal standards exist to resolve problems that arise in defense witness immunity. In short, the central issues in defense witness immunity are not justiciable because "they are not capable of resolution through the judicial process."<sup>135</sup>

Justiciability refers to the inherent institutional limitations that make certain issues inappropriate for judicial resolution. Two issues recognized as nonjusticiable by the courts are "political questions"<sup>136</sup> and administrative decisions committed to agency discretion.<sup>137</sup> In both instances courts realize that a lack of appropriate legal standards,<sup>138</sup> limited access to information needed to resolve the issues,<sup>139</sup> or the need for policy judgments or managerial decisions, unlike the questions of law and fact traditionally decided by courts would render judicial intervention inappropriate.<sup>140</sup> Like the issues involved in other non-justiciable situations, the issues courts would face if defense witness immunity were requested would require decision in a non-judicial proceeding by non-judicial means.

Since defense witness immunity has the potential to preclude a later prosecution of the immunized witness,<sup>141</sup> any court considering immunity will have to review the government's claim. Such review will require resolving two issues—the strength of the existing case against the witness and the testimony's impact on a future prosecution of the witness. The review proceedings will have to be *ex parte* and in secret. Otherwise, to establish the relevance of the projected testimony, the defendant will be required to reveal his defense, strategy and tactics before trial, without the benefit of any corresponding government disclosure. Such pre-trial disclosure and the constitutional issues it would present would be best avoided by allowing an *ex parte* application by the defendant.<sup>142</sup>

From the government's viewpoint, the central issue would be the future witness's prosecution rather than the prosecution of the defendant. The government's arguments and supporting facts would relate to another individual, another investigation, and another trial. For the government to outline its case against the witness and point out weak points would violate the traditional secrecy of the grand jury and the prosecutor's and police files.<sup>143</sup> Damage to the

135 *Id.*

136 *Baker v. Carr*, 369 U.S. 186 (1962).

137 *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969) (en banc).

138 *Baker v. Carr*, 369 U.S. at 217.

139 Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567-73 (1966).

140 *Baker v. Carr*, 369 U.S. 186 (1962); Saferstein, *Nonreviewability: A Functional Analysis of "Committed To Agency Discretion"*, 82 HARV. L. REV. 367, 382-87 (1968).

141 See notes 75-119 and accompanying text.

142 It has been held that there is no violation of the fifth amendment by forcing a disclosure before trial of a position that will be advanced at trial. *Williams v. Florida*, 399 U.S. 78 (1970). But that was in the context of the notice of an alibi defense ten days before trial, and in a state where there was liberal discovery of the prosecution's case. If only the government obtained discovery would it be invalid. *Wardius v. Oregon*, 412 U.S. 470 (1973). Since this hearing would occur at any time during trial preparation, and would have to reveal the defense, severe constitutional problems remain. See Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. L. LEGIS. 74, 94-95 (1972).

143 FED. R. CRIM. P. 6(e)(2); 5 U.S.C. § 552(b)(7) (1976) (exception to Freedom of Information Act for investigative files); *Moore v. Illinois*, 408 U.S. 786, 795 (1972). Cf. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1979) (no constitutional right to discovery).

reputation of the then-unindicted witness would be inevitable.

A second way a review of a request for immunizing a defense witness differs from normal judicial proceedings follows from the fact that the central issue in dispute in such a proceeding is the prosecution of the witness in a future trial. Having established the relevance of the projected testimony, it is hard to conceive the defendant has any further role. Traditionally the defendant has no standing to contest the grant of immunity to a witness.<sup>144</sup> Nor is the defendant an appropriate advocate for the witness. The defendant's interests may be antagonistic to those of the witness who, having asserted his fifth amendment privilege, obviously prefers not to testify. To meaningfully contest the government's claim, the defendant would need access to the government's entire prosecution file on the witness and all material on that investigation. Since the defendant is not granted such access in his own case, it makes no sense to allow him access in another's.

The arguments against providing the witness access to the prosecution file are the same. Additionally, permitting the witness a role in his immunity grant conflicts with present practice. The sole remedy for an alleged violation of immunity lies in moving to suppress the evidence improperly derived from the immunized testimony.<sup>145</sup> It also puts the witness in the anomalous position of arguing that the government is correct and his immunized testimony will prevent his future prosecution, or that the government is wrong and sufficient evidence to convict him presently exists.

The most rational procedure that seems to emerge would allow the defendant, *ex parte*, to explain why the witness's testimony is exculpatory and necessary. The government would then present its investigative files *ex parte* and explain why it believes that the witness's testimony may prevent his later prosecution. The court would then review the government's materials, including grand jury testimony, police reports, prosecutor's notes, and other hearsay materials contained in the file. Framing the issues as typical legal questions would be difficult. Although the substance of the witness's testimony would be known, its scope and detail would not be. The court would first determine what crimes could appropriately be charged in the prosecution of the witness. Although the government would make some suggestions, and the pending case would doubtless narrow the choices, the question would remain inherently open-ended. Assuming the charges could be selected, the court would have to determine whether evidence exists to establish each element of the case. Even if such evidence exists, the further question of how substantial the evidence should be before the risk of precluding a subsequent trial is acceptable would remain. Is the evidence sufficient if there is a *prima facie* case? If so, the government's case might be limited to very weak or perhaps insufficient evidence at a later trial if the court miscalculates. Or should the court apply a "beyond a reasonable doubt" standard of proof? If

144 *United States v. Ellis*, 595 F.2d 154, 163 (3d Cir. 1979); *United States v. Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978), *aff'd*, 445 U.S. 40 (1980); *United States v. Hathaway*, 534 F.2d 386, 402 (1st Cir. 1974).

145 *In re North Am. Inv. Co.*, 559 F.2d 464 (7th Cir. 1977); *Block v. Consino*, 535 F.2d 1165 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *In re Inzirillo*, 542 F.2d 90 (1st Cir. 1976); *United States v. Weiner*, 418 F. Supp. 941 (M.D. Pa.), *aff'd mem.*, 546 F.2d 421 (3d Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977). *See also In re Yuch*, 437 F. Supp. 775, 776 (E.D. Pa. 1977); *In re Grand Jury Investigation*, 424 F. Supp. 802, 806 (E.D. Pa. 1976), *aff'd per curiam*, 576 F.2d 1071 (3d Cir.), *cert. denied*, 439 U.S. 953 (1978).

so, how will the court consider what reasonable doubt may be raised by cross-examination or by affirmative defense evidence, both of which are unknown at the time? Even if they are known, they will be difficult to evaluate. Another unknown factor is the credibility of the government's witnesses. Perhaps the court should use a standard of overwhelming evidence of guilt to take into account these issues. Although only the elements of the crime have been considered, the same questions will have to be resolved in considering the need for corroborating evidence, evidence to rebut obvious defense claims, or affirmative defenses.

The problem will become even more complicated in the more likely case that the government lacks sufficient evidence for one or more elements of the crime but expects to develop such evidence through subsequent investigation. The court then will have to weigh the likelihood that the government will find the evidence to support the charge, the possibility that the examination in the present case will touch upon evidence leading to that information, and the government's ability to sustain its heavy burden of proving independent source. The equation will be unsolvable because it will contain only unknowns. No one will know the evidence to be gathered in the future, whether leads to that evidence will be covered in the questioning of the witness, or how the court ultimately will rule on the issue of independent source. Even if these factors are known, the additional problem of choosing a standard for decision will remain. Should immunity be granted if it is more likely than not that independent source could be established, or should the standard be a clear preponderance of the evidence or proof beyond a reasonable doubt?

These are not traditional legal questions. Instead, they involve fine discriminations about the impact of certain evidence on a jury. The Supreme Court has recognized that judges may not be the appropriate individuals to make such decisions, especially *ex parte*.<sup>146</sup> Nor are there discernable legal standards to guide the court. While the court does measure the sufficiency of the government's case at various points from arrest warrant to post-trial motion, all of these determinations are made with an existing and fixed record. Information not in the record is irrelevant. Standards used are minimally designed to ensure the government is justified in continuing the criminal justice process. In the case of defense witness immunity, there is no fixed record to evaluate. Assessing the government's claims of adverse effects of defense witness immunity involves a prediction of how the government's case will be affected by its ability or inability to prove independent source for the evidence produced at a later trial. This prediction must be made

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<sup>146</sup> *Alderman v. United States*, 394 U.S. 165 (1969). In this spy case, the government conceded that the defendant's conversations were illegally intercepted, but argued that all of the transcripts should not be made available to the defense counsel because of danger to witnesses and because it involved matters of national security. The government suggested that the judge review the transcripts alone and reveal those portions which might be relevant to the defense. The Supreme Court was concerned about the inability of the judge to identify information helpful to the defense. "Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the government's case." *Id.* at 182 (footnote omitted). The problem of review is greater in defense witness immunity cases because the judge does not know the extent of the immunized testimony at the time he has to make his decision. Nor can he turn the problem over to defense counsel as in *Alderman* since that would require a wholesale rummage through the files of the Justice Department. *Id.* at 185.

without knowing the scope of the immunized testimony, the leads that will be foreclosed, or the course of the continuing investigation.

The review process will have to be *ex parte* and secret. It will involve the review, not of admissible evidence, but of secret grand jury testimony, police reports, witness's statements, speculation and hearsay. Appeal will be difficult,<sup>147</sup> and will infringe upon the defendant's speedy trial rights. Assuming such an evaluation can be accomplished, the court must then conclude that its prediction of the resulting quantum of admissible evidence will discharge the executive's obligation to see that the laws are enforced and society's interest protected. Plainly, this process differs significantly from the adversarial, case-by-case approach of traditional judicial proceedings. It requires policy decisions inappropriate for judicial determination.<sup>148</sup>

The history of immunity legislation, and the Supreme Court's decision in *Ullmann v. United States*,<sup>149</sup> demonstrate the court's limited role in immunity grants. Historically, immunity grants have been the exclusive prerogative of the executive branch. Between 1857 and 1954, Congress enacted over fifty immunity statutes.<sup>150</sup> Almost all these immunity acts applied to the executive branch or administrative agencies.<sup>151</sup> None required courts to undertake any action to effectuate a grant of immunity.<sup>152</sup> Immunity was conferred automatically upon testimony or after the witness asserted his privilege and was compelled to answer. The judiciary became involved only when the privilege was asserted as a bar to subsequent prosecution.<sup>153</sup>

In 1954, Congress sought to remedy its lack of immunity power to facilitate its investigation of communism. The Department of Justice objected that random grants of immunity by Congress in the sensitive area of national and internal security would severely hamper any potential prosecution, especially since *Counselman* required transactional immunity.<sup>154</sup> To resolve the competing interests of the executive and legislative branches, Congress enacted legislation invoc-

147 The United States can appeal the dismissal of an indictment or the suppression of evidence. 18 U.S.C. § 3731 (Supp. 1980). An order compelling immunity for defense witnesses does not suppress evidence but rather has the opposite effect in the case in which it is granted. Only if the order is considered to suppress evidence in the then unscheduled trial of the witness would it fall within the words of the statute. If the order requires the alternatives of immunity or the dismissal of the indictment, appealability is enhanced. Again, the argument on appeal would concern the effect of the immunization in a future trial and not in the present case. The Second Circuit found such an order appealable in *United States v. Horwitz*, 622 F.2d at 1104-05.

148 See *Inmates of Attica Correction Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973), in which the court considered the difficulties of reviewing a prosecutor's decision not to bring charges and concluded that they were beyond the power of the court. The review of a prosecutor's decision to bring charges and his ability to sustain them would be much more difficult.

149 350 U.S. 422 (1956).

150 See Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163, 164-170 (1956) for a brief history of federal immunity statutes then in force.

151 Although statutes authorizing immunity by Congress were still on the books, they were unconstitutional under the *Counselman* decision. See Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 ST. LOUIS L.J. 327, 348 (1966).

152 See Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 507-08 (1955). See II WORKING PAPERS, Appendix A, at 1444, for a list of immunity statutes in force in 1970.

153 See *Brown v. Walker*, 161 U.S. 591, 621 (1896) (Shiras, J., dissenting).

154 See Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163, 163-70 (1956); Comment, *Immunitization of Congressional Witnesses Under the Compulsory Testimony Act: Constitutionality of the Function of District Courts*, 22 U. CHI. L. REV. 657 (1955).

ing the powers of the court to decide the issue.<sup>155</sup> Sections (a) and (b) of the Act provided that upon the assertion of the fifth amendment privilege before either house of Congress or subcommittees thereof, a vote would be taken by that house or subcommittee on whether immunity should be sought. Upon a two-thirds affirmative vote, a representative of the Congress would apply to the district court for an order compelling the testimony, which order the court *may* issue.<sup>156</sup> The Attorney General would be notified and would be heard "prior to the entrance into the record of the order of the District Court." Section (c) covered immunity requests that arose before grand juries or at trial and provided:

Whenever in the judgment of the United States attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving [treason, sabotage, espionage and certain other acts] is necessary to the public interest, he, upon approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . and upon order of the court such witness shall not be excused from testifying . . .<sup>157</sup>

The immunity statute was first challenged when the government sought to obtain immunity for William Ullmann to secure his testimony before a grand jury pursuant to section (c) of the Act. Among other claims, Ullmann asserted that the statute required the court to perform a non-judicial function.<sup>158</sup> Carefully limiting his decision to section (c), District Judge Weinfeld held that the language of that section did not give the court any discretionary power to overrule the judgment of the prosecutors that the testimony would be in the public interest.<sup>159</sup> The section merely required the court to determine whether the statutory conditions for immunity had been satisfied. The court would ensure that the investigation related to the specified offenses for which immunity could be granted, that the Attorney General had certified that the testimony was in the public interest and had approved the application of the United States Attorney, and that no other *legal* objection existed to the immunity grant.<sup>160</sup> The court held that all of these matters were traditional judicial activities that did not involve any review of the executive's decision to seek immunity.

Contrasting section (c) with sections (a) and (b), Judge Weinfeld observed that "the language in these sections of the act *purports* to vest discretion in the courts and specifically requires its approval of any grant of immunity."<sup>161</sup> The judge's analysis and its careful distinction of section (c) from sections (a) and (b) required him, in effect, to abandon the congressional immunity provisions in order to save section (c). The judge did not directly discuss the constitutional problems of sections (a) and (b) but his rationale for upholding section (c) strongly suggested that sections (a) and (b) were constitutionally infirm. The court's hearing the Attorney General's arguments (presumably against the grant

155 18 U.S.C. § 3486 (1965) (repealed 1970).

156 *Id.* § 3486(a)-(b).

157 *Id.* § 3486(c).

158 *In re Ullmann*, 128 F. Supp. 617, 620 (S.D.N.Y.), *aff'd sub nom.* *United States v. Ullmann*, 221 F.2d 760 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956). Ullmann also argued that the statute violated his fifth amendment rights, that the transactional immunity provided was insufficient to replace his privilege against self-incrimination, and that the application for immunity failed to set forth facts showing that the grant of immunity was in the public interest. 128 F. Supp. at 620.

159 128 F. Supp. at 624.

160 *Id.* at 625-26.

161 *Id.* at 624 (emphasis added).



of immunity), and the court's having to approve the grant, can only mean the court was to decide independently whether the executive or the legislative view of the public interest was to prevail.

Judge Weinfeld again adverted to the serious constitutional question posed by judicial review of immunity requests:

The most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires. Especially is this so where the construction contended for purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers. The Supreme Court has repeatedly warned "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Indeed, the Court has stated that words may be strained "in the candid service of avoiding serious constitutional doubt." . . . In such circumstances the court's duty is plainly to avoid the constitutional question.<sup>162</sup>

The Second Circuit affirmed in a short opinion.<sup>163</sup> The Supreme Court reaffirmed the constitutionality of transactional immunity<sup>164</sup> in its first major opinion on immunity statutes since the 1896 decision of *Brown v. Walker*.<sup>165</sup> Justice Frankfurter disposed of Ullmann's non-judicial function claim by adopting the district court's narrow construction limiting the court to a merely ministerial function. Significantly, Justice Frankfurter chose to quote in full the above-quoted language of Judge Weinfeld concerning the court's duty to avoid constitutional questions.<sup>166</sup> Perhaps because of the cautionary language of *Ullmann*, no Supreme Court decision has reviewed the constitutional merits of sections (a) and (b).

No material difference exists between judicial review of immunity applications under the 1954 Act and judicial review of a request for court ordered defense witness immunity. Both reviews require the court to balance the necessity for the testimony, as part of either the legislative or judicial process, against the Executive's obligation and desire to enforce the law in a subsequent prosecution of the witness. Both require the court to review a decision made by another government branch based on the court's perception of public policy and public interest, for which perceptions traditional legal arguments, precedents or standards for review do not exist. Although the Immunity Act of 1954 at least presented an "either/or" decision for the court, defense witness immunity poses the question of whether it is possible to reconcile both interests by concluding there could be a successful prosecution despite immunity. Requiring a prediction of the future, the determination strongly resembles an advisory opinion to the extent it projects the sufficiency and admissibility of evidence and considers the independent source issue. Moreover, a defense witness immunity request is inherently an *ex parte*, secret and non-adversary proceeding. As in *Ullmann*, the lack of traditional "case and controversy" elements, its kinship with advisory opinions

162 *Id.* at 627-28 (footnotes omitted).

163 221 F.2d at 760.

164 350 U.S. at 422.

165 161 U.S. 591 (1896).

166 350 U.S. at 433-34.

and its requiring review of a policy decision of a coordinate government branch suggest the issue should not be committed to the judiciary for resolution.

### B. *Judicial Evaluation of Prosecutorial Conduct*

The prosecutorial misconduct cases present the same problems as do "immunity bath" claims. The issue is whether the prosecutor's action with respect to the witness was intended to affect his availability as a defense witness. Thus, resolution involves reviewing the file and the decisions in another case. Again, once the defendant asserts the misconduct, there seems to be no further role for him to play. The defendant has no access to the witness's file, nor is the defendant an appropriate advocate to argue the government should have handled the witness's case so as to maximize the witness's availability to testify for the defendant. Although from the defendant's point of view there may be no reason for secrecy, it is necessary to preserve the vital interests of the witness and the government. Once again, the review inevitably will be *ex parte* and secret.<sup>167</sup>

The problem of the lack of appropriate legal standards also exists in judicial evaluation of prosecutorial misconduct. Except in the very rare case such as *Virgin Islands v. Smith*,<sup>168</sup> the prosecutor almost certainly can assert some legitimate justification for his action,<sup>169</sup> and the court will be called upon to determine the prosecutor's motive. Motive, however, is not a relevant consideration in reviewing an otherwise permissible law. The Supreme Court has stated:

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose caused the power to be exerted."<sup>170</sup>

There is no reason to believe a court has any greater power or ability to review the motive of an executive department when an otherwise legitimate justification for its actions has been advanced. Although discriminatory intent is an element of an equal protection violation,<sup>171</sup> the cases demonstrate that the examination of motive is primarily a review of objective evidence rather than a search for subjective intent.<sup>172</sup> Examination of motive is a recognition that judicial deference to the stated justifications of official bodies is not unlimited, and that courts need not ignore objective evidence of an obvious and paramount intent to discriminate on racial grounds. The same considerations explain *Morrison* and *Smith*.<sup>173</sup> In blatant cases like *Morrison*, where the prosecutor's desire was to "protect" a witness already warned by the court, or in *Smith*, where there was no justification, the court can properly conclude that improper motives are present. As the Court in *Village of Arlington Heights* made clear, the presence of an improper motive is not necessarily fatal if the official action can be justified on other independent

167 See notes 141-48 *supra* and accompanying text.

168 615 F.2d 964 (3d Cir. 1980).

169 *United States v. Falk*, 479 F.2d 616, 630 (7th Cir. 1973) (en banc) (dissent).

170 *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (citation omitted).

171 *Village of Arlington Hts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

172 429 U.S. at 266-68; 426 U.S. at 253 (Stevens, J., concurring).

173 See notes 38-46 *supra*.

and legitimate grounds.<sup>174</sup> This exception is limited and applicable in a particular type of case, and does not authorize a wholesale review of prosecutorial decisions.

The difficulty of the review can be seen by considering what might be asserted in a typical case. Assume that in *United States v. Herman*,<sup>175</sup> the government claims it dismissed the charges against the constables, despite sufficient evidence of their guilt, because (1) they were peripheral defendants and as subordinates of the Magistrate Herman were subject to pressure from him to become involved in the scheme, and (2) they have suffered substantial financial loss commensurate with any potential fine or imprisonment. Who would the court interrogate and how would the interests be measured against the defendant's claim that the government wanted to deprive him of a critical witness? Any review would simply substitute the trial judge's judgment for the prosecutor's. The arguments advanced against judicial review of the "immunity bath" claim are equally valid in reviewing an allegation of prosecutorial misconduct. The issues arising in defense witness immunity are not justiciable.

#### IV. Purported Authority for Defense Witness Immunity

Despite the adoption of use immunity, the possibility of an "immunity bath" persists, and judicial review of such issues creates substantial separation of powers problems. These conclusions, however, do not resolve every case. When the government completes its investigation of the witness, immunizing him does not affect his future trial. For example, this occurs in any case with co-defendants when the government has announced it is ready for trial. In such cases the lack of governmental interest in refusing immunity is plain. No review of the prosecutor's motives is required, and thus no separation of powers problem exists. The difficulty of the issues, the ease with which they may be raised, and the problems of dealing with the future all indicate that a court should hesitate to intervene even in the most obvious of cases. But undoubtedly, situations will arise where the usual arguments are unpersuasive. Examining the arguments for court-ordered defense witness immunity helps determine whether it should be provided in these situations, or whether other fundamental reasons require it be withheld.

##### A. *The Compulsory Process Clause*

The compulsory process clause has been suggested as legal authority for compelled defense witness immunity. Unfortunately, the history of the compulsory process clause provides little direct guidance. Prior to the adoption of the United States Constitution in 1789, state constitutions generally contained some reference to the defendant's right to obtain evidence for his defense. The first formulation, Virginia's, stated: "That in all capital or criminal prosecutions a man hath a right . . . to call for evidence in his favour." This language was subsequently adopted by Pennsylvania and Vermont.<sup>176</sup> This language was in-

174 429 U.S. at 270 n.21.

175 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

176 See 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235 (1971) (hereinafter cited as 1 SCHWARTZ). The Virginia provision was in § VIII of the Virginia Declaration of Rights. *Id.* at

tended to preserve common law rights, not to create new rights. Edmund Randolph, present at the language's adoption by Virginia and prominent throughout the revolutionary and early federal period, wrote that the language "reenacts in substance, modes for defense, for accused persons, similar to those under the English law."<sup>177</sup> Other enactments varied from references to the subpoena power to a more general right to all evidence. No particular approach prevailed. The Massachusetts Declaration of Rights adopted later provided that "every subject shall have a right to produce all proofs, that may be favorable to him."<sup>178</sup> Maryland entitled the defendant to "have process for his witness."<sup>179</sup> North Carolina allowed defendants to "confront accusers and witnesses with other testimony"<sup>180</sup> and Delaware permitted him "to examine evidence on oath."<sup>181</sup> New Jersey accorded defendants "the same privileges of witnesses and counsel as their prosecutors are, or shall be entitled to."<sup>182</sup> Connecticut, Georgia, New York, South Carolina and Rhode Island had no comparable provisions.

The absence of a Bill of Rights in the proposed federal Constitution fueled opposition to its ratification. Several state conventions called upon to ratify the Constitution proposed amendments. Only four mentioned compulsory process. Virginia, North Carolina and Pennsylvania proposed language that entitled the defendant to call for evidence in his favor.<sup>183</sup> New York suggested the defendant have the means of producing witnesses.<sup>184</sup>

When the matter was considered by the first Congress, Madison drafted what was to become the sixth amendment to include the language of the compulsory process clause. He did not adopt Virginia's language providing for a right to call for evidence in his favor, but instead proposed that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." The language's source is obscure.<sup>185</sup>

The compulsory process clause is notable for the lack of controversy it generated during the lengthy debates accompanying Congress's adoption of the Bill of Rights. The clause was referred to during the Congressional debates only when an amendment was proposed to enable the defendant to obtain a continuance if a subpoena for a material witness had been issued but not served.<sup>186</sup> The proposal was withdrawn after it was noted that such matters were within the discretion of the trial judge. Although the fifth amendment was considered at the same time, the discussion concerned only the double jeopardy clause. There was no discussion of the interplay between the fifth and sixth amendments.<sup>187</sup>

235. Pennsylvania and Vermont adopted the same language. Pa. Dec. of Rights, § IX, *Id.* at 265; Vt. Dec. of Rights, § X, *Id.* at 323.

177 *Id.* at 248.

178 Mass. Dec. of Rights, § XII, *Id.* at 342.

179 Md. Dec. of Rights, § XIX, *Id.* at 282.

180 N.C. Dec. of Rights, § VII, *Id.* at 287.

181 Del. Dec. of Rights, Sect. 14, *Id.* at 278.

182 N.J. Const., § XVI, *Id.* at 260.

183 2 Schwartz at 664-65, 841, 967.

184 *Id.* at 913. Massachusetts, South Carolina and New Hampshire proposed other amendments not related to compulsory process. *Id.* at 677, 756, 760. Maryland voted down proposed amendments. *Id.* at 729. New Jersey, Connecticut and Georgia apparently were not concerned about absence of a Bill of Rights in the federal Constitution. *Id.* at 674.

185 Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 97 (1974).

186 1 ANNALS OF CONG. 756 (Gales & Seator, eds. 1789).

187 *Id.* at 753-54.

At the same time it adopted the Bill of Rights, the first Congress enacted two statutes shedding some light on the scope of the compulsory process clause. Neither suggests the clause was intended to have a broad reach. Section 29 of the Judiciary Act of 1789 provided that in capital cases:

every such person or persons accused or indicted of the crime aforesaid, shall be allowed and admitted in his said defense to make any proof that he or they can produce, by lawful witness or witnesses and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.<sup>188</sup>

In *United States v. Burr*, Chief Justice Marshall construed the act to be declaratory of the common law where the right of compulsory process exists.<sup>189</sup> The statute addressed compelling the appearance of witnesses, suggesting that it was primarily concerned with ensuring that the subpoena power would be available to the defendant which it was not at common law.<sup>190</sup> Since the scope of the defendant's subpoena power was the same as the prosecution's, the right of compulsory process apparently was to be judged by existing government practices rather than by an independent right to present a defense. Finally, the statute provided that the defense could make any proof he could produce by "lawful witnesses." The qualification was important because it indicated that the scope of the witness's testimony was a separate issue to be resolved by the court. By implication, this limitation reinforces the interpretation that the statute related to production of witnesses and left admissibility of testimony to the court. The limitation also suggests that the compulsory process clause did not reach testimony protected by privileges, since such testimony might not be offered by "lawful" witnesses.

The second statute passed at the same time invalidated any writ or process in state or federal courts directed to ambassadors, public ministers of foreign states, or any domestic servant of such officials.<sup>191</sup> The specific limitation on the defendant's subpoena power is reasonable only if the drafters understood that the compulsory process clause, as well as section 29 of the same act, did not require the availability of every witness for the defense, or the availability of the testimony of every otherwise competent witness. The clause's language and the statutes themselves point to a circumscribed right to obtain evidence.

A consistent view of the original conception of sixth amendment rights results from analyzing Aaron Burr's trial for treason.<sup>192</sup> The Burr trials involved

<sup>188</sup> Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118-19 (current version at 18 U.S.C. § 3005 (1976)).

<sup>189</sup> *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (No. 14,692d).

<sup>190</sup> Clinton, *The Right to Present A Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 767 (1976).

<sup>191</sup> Act of April 30, 1790, ch. 9, § 25, 1 Stat. 117-18. In 1854 a federal district court, construing this statute and the compulsory process clause, noted the inconsistency, concluding: "The fact that this act passed by the first congress assembled under the constitution, most of whose members had been members of the convention which framed that instrument, gives to this legislative construction a more than ordinary importance." *In re Dillon*, 7 F. Cas. 710, 712 (N.D. Cal. 1854) (No. 3,914).

<sup>192</sup> See 3, BEVERAGE, *THE LIFE OF JOHN MARSHALL* 274-545 (1919) for a history of the trial and the political attacks made upon Burr, Marshall and Jefferson. Burr surrendered to Mississippi Territorial Officials near Natchez, on January 16, 1807 and was brought to Richmond on March 26. Pre-trial proceedings, principally before the grand jury, lasted until August 3, 1807. The trial on the treason charge ended in an acquittal on September 1, 1807 after Marshall ruled that there was no proof that Burr levied war at Blenneressett's Island as alleged in the indictment, and that there was no proof of any overt act of levying war on Burr's part. The trial for the misdemeanor of invading the Spanish lands ended in an

arguments by distinguished counsel,<sup>193</sup> who had been involved in forming the Union and who were prominent in their profession. These arguments mirror the contemporary understanding of the privileges against self-incrimination, the reach of compulsory process and the Executive's use of the pardon power.

The issuance of a presidential pardon to obtain the testimony of Dr. Bollman, one of Burr's confederates, was particularly significant.<sup>194</sup> Although the argument on whether Dr. Bollman had to accept the pardon was extensive,<sup>195</sup> defense counsel did not object to its use, nor could they. Both Edmund Randolph and Luther Martin, counsel for Burr, had been delegates to the Constitutional Convention and had sought to limit the pardon power during debate.<sup>196</sup> Luther Martin had wanted to prevent pardons until after conviction. However, James Wilson's argument that a "pardon before conviction might be necessary in order to obtain the testimony of accomplices," prevailed.<sup>197</sup> Presidential pardons were thus seen as legitimate evidence-gathering devices although they were obviously not available to the defendant.

The central dispute in Burr's trial focused on executive privilege and pitted the compulsory process clause against the government's need for secrecy and constitutional considerations arising out of the doctrine of separation of powers. Marshall's first ruling dealt with Burr's request for a subpoena to the President to produce a letter dated October 21, 1806, and War Department orders issued for the apprehension of Burr.<sup>198</sup> Although the government attorneys had apparently conceded the issue in previous argument<sup>199</sup> they still opposed the subpoena, and made a generalized objection based upon the need for the confidentiality of government papers.<sup>200</sup> Marshall issued the subpoena, but the opinion shows he did

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acquittal on September 15th. The government then sought to commit Burr for trial in another district where he was present at the time an overt act was committed. This proceeding took from September 15 to October 20th. The Burr case is reported at 25 F. Cas. 2-210 (Cas. No. 14692 to 14694a) (C.C.D. Va. 1807). The principle opinions are 14,692(d) at 30 (subpoena to President), 14,692e at 38 (self-incrimination), 14,683 at 55 (the felony trial), and 14,694 at 187 (second subpoena and misdemeanor trial).

193 Brief biographies of the counsel on both sides are contained in a note to the *Burr* cases. 25 F. Cas. at 24-25.

194 Two transcripts of the trial were prepared. T. CARPENTER, *THE TRIAL OF COL. AARON BURR* (1807); D. ROBERTSON, *REPORTS OF THE TRIALS OF COL. AARON BURR* (1807). A partial record including some documents was sent to Congress by Jefferson on November 23, 1807 and is contained in a report at 10 ANNALS OF CONG. 385 (1807).

195 Dr. Bollman was arrested in the Mississippi Territory and transported to Washington. He filed a petition for writ of habeas corpus which Marshall granted, writing the first opinion on treason. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). After being released Bollman met with Jefferson and discussed the conspiracy which led the President to order a pardon for Bollman. ABERNATHY, *THE BURR CONSPIRACY* 233 (1968). When it was tendered, Bollman refused claiming it would be an admission of guilt, but he testified without it. I ROBERTSON, *supra* note 193, at 193, 196, 211, 230. The definition of treason in the *Bollman* case was used to draft the indictments against Burr, and Marshall's refusal to follow the language of the *Bollman* case ultimately led to Burr's acquittal.

196 I ROBERTSON, *supra* note 193, at 190-97. Marshall subsequently ruled that a pardon must be accepted to be valid. *United States v. Wilson*, 32 U.S. (7 Peters) 150, 160-61 (1833).

197 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 480, 549 (J. Elliot ed. 1845). See generally Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L.J. 475 (1977).

198 5 DEBATES, *supra* note 196, at 480.

199 25 F. Cas. at 30.

200 25 F. Cas. at 34; I ROBERTSON, *supra* note 193, at 127, 131, 136.

201 The argument lasted from June 10th until Marshall issued his opinion on the 15th. Hay told the court that he had sent for the documents and expected that they would be produced. 25 F. Cas. at 31; I ROBERTSON, *supra* note 193, at 120, 126-27. The government's chief arguments were that the request for a subpoena was premature, Burr not having been indicted, *Id.* at 121-24, and that the affidavit supporting the motion was too vague. *Id.* at 132, 136-43, 149-50. There were references to the President's power to

recognize that he might have to accept the government's claim after the documents had been produced.<sup>201</sup> Jefferson mooted the issue by voluntarily producing the documents.<sup>202</sup> Despite his broad language, Marshall did not rule that compulsory process overrode claims of executive privilege. Marshall did indicate that such claims would be considered after the materials were produced,<sup>203</sup> and conceivably could be successful.

The second ruling came after Burr's acquittal on the capital treason charge and during his trial for the misdemeanor of invading the lands of a foreign power. Burr requested a letter of Wilkinson dated November 12, 1806.<sup>204</sup> Hay had the letter<sup>205</sup> but would produce it only with deletions. The defense subpoenaed the entire document from Hay but he produced only the edited version.<sup>206</sup> The government counsel's argument indicates that the deleted material related to allegations made by Wilkinson against others and did not involve military or diplomatic secrets.<sup>207</sup> The allegations posed only the potential of political embarrassment rather than national harm. Also, Marshall evidently saw the letters, although they were not formerly produced by Hay.<sup>208</sup> During the grand jury proceedings Hay had previously shown documents to the court without formally producing them.<sup>209</sup> Marshall also believed that the material withheld by the government was not very important and that both sides were being unreasonable.<sup>210</sup> Since neither side would budge, Marshall ordered the proceedings held in abeyance pending the production of the materials. In so doing, Marshall chose a highly technical rationale, finding the privilege had not been properly asserted since it was claimed by Hay pursuant to general instructions from Jefferson, rather than by Jefferson himself.<sup>211</sup> Finding no privilege asserted by Jefferson, Marshall held that "[t]he only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be

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withhold material. *Id.* at 133-34, 136, 142, 152. But compared with the other points, the argument was not lengthy, and there was no claim that there was a specific danger that would flow from revealing this correspondence. Marshall noted the lack of a specific objection in his opinion. 25 F. Cas. at 37.

201 25 F. Cas. at 37. To the same effect, see Marshall's later opinion. 25 F. Cas. at 191-92.

202 On June 12th, the day before Marshall's opinion, Jefferson wrote to Hay that he had directed that the documents be sent to Hay. On the question of the privilege Jefferson wrote:

But as I do not recall the whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion which it would be my right and duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice.

I ROBERTSON, *supra* note 193, at 210. The original was apparently lost. However, a copy of the letter was accepted by the defense, II ROBERTSON, *supra* note 193, at 504. See 10 ANNALS OF CONG. 538 (1807), where Wickham refers to the letter in cross-examining General Wilkinson.

203 25 F. Cas. at 34-35, 37.

204 25 F. Cas. at 190.

205 II ROBERTSON, *supra* note 193, at 505.

206 *Id.* at 513-14.

207 *Id.* at 501, 510. MacRae argued that the Wilkinson letter was a confidential communication "respecting the conduct of certain persons holding places of trust and confidence, but who have not hitherto been prosecuted or even suspected. . . ." *Id.* at 520. The letters apparently referred to the Governor of Louisiana and an aide who were trusted Jefferson appointees. Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A.J. 52, 53 (1974).

208 II ROBERTSON, *supra* note 193, at 504-05, 511. Hay repeatedly sought to have Marshall review the letters. *Id.* at 501, 514, 523.

209 I ROBERTSON, *supra* note 193, at 206.

210 25 F. Cas. at 191. See 10 ANNALS OF CONG. 547-48 (1807) where Burr refused to establish its relevance to the hearing on his commitment or trial in Ohio.

211 25 F. Cas. at 192. See also note 202 *supra*.

produced or the cause continued."<sup>212</sup>

Five days after the opinion was handed down, Hay produced Jefferson's certificate that the omitted portions should not be made public.<sup>213</sup> The President's action undercut the rationale for Marshall's second opinion and revived the issue. The transcript is silent as to the impact of Jefferson's certificate. However, the transcript does show the case was not continued but the misdemeanor trial began that day.<sup>214</sup> Although it has always been assumed that Burr withdrew the request for the letter since it would not help the defense,<sup>215</sup> the juxtaposition of the certificate and the start of the trial hints that they are not unrelated.

The issue arose after Burr's acquittal on the misdemeanor charge. Hay sought to have Burr's case remanded for trial in another district where Burr was alleged to have committed an overt act of treason. Once again the letter was demanded by the defense.<sup>216</sup> Had Marshall been consistent with this first opinion holding that the defense was entitled to subpoena records prior to indictment, or to the second opinion holding that the particular letter was not covered by a privilege, or had Marshall even accepted Burr's argument that the letter could not be privileged since it had been shown to the grand jury,<sup>217</sup> Marshall should have ordered the letter's production or a continuance. Instead, he did neither and ordered Burr to demonstrate the letter's relevance; when he either would not or could not do so, Marshall refused to order its production.<sup>218</sup> Marshall did, however, "allow [Burr] all the advantages of supposing the omitted parts related to any particular point. The accused may avail himself of them as much as if they were actually produced."<sup>219</sup> Later, he mentioned that this was a preliminary hearing, and that if it were a trial on the merits, he might have ruled again that the letter be produced or the cause continued.<sup>220</sup>

Reconciling Marshall's words and actions is difficult. Marshall's knowledge of the contents of the letter may have affected his rulings. Having seen the letter, Marshall could have known that the portions the government sought to protect could never be privileged under any reasonable definition, and thus no harm could come to the Republic from disclosure. Also, because after Burr's acquittal on the main charge a successful prosecution on the misdemeanor charge was unlikely, there was little harm in aborting that case if the government kept the letter. Marshall also evidently wanted to avoid ruling on the *merits* of the claim, preferring to rule on a procedural issue if possible. Although requested to do so by Hay, Marshall refused to review the contested material *in camera*. In the one ruling Marshall used a dubious technicality to void the privilege and, in another, he gave the defendant the benefit without requiring production of the actual evidence, deferring until a trial on the merits a determination of whether further action was necessary. A complete reconciliation is not necessary, however. It is enough that Marshall did not rule peremptorily that compulsory process re-

212 *Id.*

213 *Id.* at 192-93.

214 *Id.* at 193.

215 *See* 3 BEVERAGE, THE LIFE OF JOHN MARSHALL 522 n.4 (1919).

216 10 ANNALS OF CONG. 547-48 (1807).

217 *Id.*

218 *Id.*

219 *Id.* at 548-49.

220 *Id.* at 551.



quired the production of the letter; also, when faced with a specific claim to the letter opposed by a specific objection, Marshall temporized and sought a showing of relevance before proceeding. That he was so reluctant to rule decisively when the material could not be privileged suggests the care with which Marshall approached the issue. At the very least, Marshall's reluctance indicates he understood that the balance of compulsory process and privilege required a fine calculus and that the privilege might prevail.

Generalizations about the sweep of the compulsory process clause based upon Marshall's opinions dealing with executive privilege are somewhat hazardous. In *Burr* the case for production was strong and the arguments for secrecy were weak. Marshall never faced a claim where the danger from disclosure was apparent. Thus, Marshall never ruled on the ultimate reach of Jefferson's claim of privilege. Also, the concept of state secrets was not favored in the new republic which had sought to avoid the intrigues and secret diplomacy of the Old World.<sup>221</sup> Then, as now, the privilege offered the opportunity of avoiding political embarrassment rather than affording the nation any real protection. Even so, a close reading of the opinions does not produce an interpretation of the compulsory process clause that overcomes a specific and legitimate claim of state secrets.

On balance the historical record suggests that the compulsory process clause did not provide an unlimited right, nor was it conceived as a source of power to compel the government to exercise unusual powers to obtain evidence helpful to the defendant. The compulsory process clause appears to have been primarily concerned with providing the defendant the power of subpoena, a right not provided by the common law. Legislation enacted at the time limited the reach of that subpoena power. Certainly, the arguments of counsel on other issues in *Burr* indicate that compulsory process did not reach the well-established self-incrimination and attorney-client privileges.<sup>222</sup> If the early view was that compulsory process was circumscribed at least to the extent outlined above, it is difficult to find any historical dictate compelling the courts or the Executive to minimize the impact of privileges on the defendant.

Neither do the modern compulsory process clause cases lead to a right to use immunity for defense witnesses. The seminal cases, *Washington v. Texas*<sup>223</sup> and *Chambers v. Mississippi*,<sup>224</sup> do not even consider the question. *Washington* deliberately excluded consideration of the fifth amendment privilege from the requirements of the compulsory process clause.<sup>225</sup> Earlier the court had suggested that the reach of the sixth amendment did not include testimonial privileges. In *Mc-*

<sup>221</sup> Counsel for both sides argued against unnecessary state secrets. I ROBERTSON, *supra* note 193, at 142; II ROBERTSON at 509 (*Burr*).

<sup>222</sup> See the arguments of *Burr*'s counsel, I ROBERTSON at 129. MacRae for the government recognized the principle. *Id.* at 133. Martin and Randolph did argue that the doctor-patient privilege would not apply.

<sup>223</sup> 388 U.S. 14 (1967).

<sup>224</sup> 410 U.S. 284 (1973). Although technically decided under the due process clause, Professor Westen argues persuasively that this was for procedural reasons only and that *Chambers* was really decided under the sixth amendment. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 607-08 (1978).

<sup>225</sup> 388 U.S. at 23 n.21. The footnote reads: "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualification for interest."

*Cray v. Illinois*,<sup>226</sup> the defendant argued he was entitled to elicit the name of an informer during cross-examination of a police officer. The court responded that "it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege . . . . We have never given the Sixth Amendment such a construction, and we decline to do so now."<sup>227</sup>

The compulsory process cases obviously differ from those involving testimonial privileges. The former involve rules of evidence enacted to enhance the trial process's reliability. These exclusionary rules must exclude only unreliable evidence. When they are applied to prevent the defendant from admitting testimony found otherwise reliable, they conflict with the sixth amendment. In *Washington* the Court found that the defendant had been denied compulsory process because the state "arbitrarily" denied him a relevant and material witness.<sup>228</sup> The fifth amendment privilege presents a different issue. Testimony privileged under the fifth amendment is reliable, but its use would erode fundamental values including "our preference for an accusatorial rather than an inquisitorial system of criminal justice, . . . 'a fair state-individual balance. . . ,' [the] inviolability of the human personality . . . [and] our distrust of self-deprecatory statements."<sup>229</sup> The fifth amendment's operation is not arbitrary. The issue is not reliability of evidence and its impact on the defense, but reconciling fundamental values. Neither *Washington* nor *Chambers*<sup>230</sup> confronts such problems nor suggests that their rationales should be extended to privileges.

Additional factors were introduced in *Davis v. Alaska*,<sup>231</sup> where the Court held that the existence of a statute designed to preserve the confidentiality of a juvenile offender's records does not prevent the defense from attempting to establish bias by cross-examining a juvenile witness. Arguably, the privilege created by such a statute is similar to a defendant's other privileges.<sup>232</sup> Although the Court recognized that the state had a rational interest<sup>233</sup> in the statute's enforcement, the Court held the interest could not override the defendant's sixth amendment rights. The argument gains force from *United States v. Nixon*<sup>234</sup> where the Court subordinated a generalized claim of a constitutionally based privilege to the defendant's interest in a fair trial. Together, *Davis* and *Nixon* suggest such a result may be necessary where the privilege against self-incrimination also denies exculpatory evidence to the defendant.

*Davis*, however, is distinguishable on several grounds. First, the case is founded on the sixth amendment confrontation clause. The Alaska statute served the prosecution both as a sword to convict the defendant and as a shield to prevent effective cross-examination. In the case of the fifth amendment privilege,

226 386 U.S. 300 (1967).

227 *Id.* at 314.

228 388 U.S. at 23.

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

230 *Chambers* is unusual because of the high probability that he was innocent. Justice Powell took the rare step of granting him bail pending disposition of his application for certiorari, 405 U.S. at 1205 (1972), which suggests that the case might be limited to its unique facts. For contrasting views on this point see *Weston*, *supra* note 224, at 608 n.112.

231 415 U.S. 308 (1974).

232 See Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implication of Davis v. Alaska*, 73 MICH. L. REV. 1465, 1473 n.46 (1975).

233 415 U.S. at 319.

234 418 U.S. 683 (1974).

the government cannot present testimony and then shield the witness from cross-examination by having the witness assert the privilege.<sup>235</sup> Thus, *Davis* has no direct application to the fifth amendment privilege. *Davis* also noted that the government could have served the interests of the statute by not calling the juvenile as a witness.

Second, the interests served differ substantially. The Alaska statute insulates the witness from temporary embarrassment,<sup>236</sup> a burden the court will impose on the juvenile if the state chooses to use him as a witness. In contrast, the fifth amendment serves additional interests of personal dignity and reflects important values in the state-citizen relationship. Interfering with the fifth amendment's operation will detrimentally affect the witness or the government's interest in a subsequent prosecution and involve the court in a non-judicial function.<sup>237</sup> The interests and the burdens of the statutory privilege in *Davis* and the fifth amendment privilege differ so significantly that *Davis* should not be regarded as supporting compelled defense witness immunity, especially in light of the court's reluctance to reach the fifth amendment issues.

Although *Nixon*<sup>238</sup> suggests that constitutionally based privileges are not absolute, it acknowledges the possibility of cases in which the interests served by executive privilege might require information to be kept secret. Like *Davis*, *Nixon* does not confront the difficult issues raised by constitutional testimonial privileges.

### B. *Statutory Authority*

Another possible source for the power to compel immunity was originally suggested by Judge Bazelon, who noted that the federal immunity statute's language did not preclude its application to defense witnesses.<sup>239</sup> The legislative history of the present statute, however, fails to support Judge Bazelon's argument. Until 1954 the courts had no role in the grant of immunity. Their responsibility involved only determining the validity of the affirmative defense when raised in a subsequent trial.<sup>240</sup> The only attempt to give the courts discretion in the grant of immunity was rejected by the Supreme Court in *Ullmann v. United States*.<sup>241</sup> In the late 1960s the National Commission on the Reform of the Federal Criminal Law reviewed the immunity statutes and considered the role of the judiciary. Noting the severe constitutional problems that would exist if the court reviewed the efficacy of an immunity grant, the Commission concluded that the court's part could not exceed the ministerial duties outlined in *Ullmann*. The Commission included a provision for a court order, but only because Congress had retained it in prior acts. The commission's recommendation was clearly that there were substantial reasons why court orders should be omitted in applications for testimony before the grand jury or trial, but that there might be some reasons

235 *Douglas v. Alabama*, 380 U.S. 415 (1965); *United States v. Demchak*, 545 F.2d 1029 (5th Cir. 1977).

236 415 U.S. at 319.

237 See notes 141-48 *supra*.

238 418 U.S. at 683.

239 *United States v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part).

240 See notes 150-53 *supra* and accompanying text.

241 350 U.S. 422 (1956). See notes 154-66 *supra* and accompanying text.

why court orders could be retained in immunity grants by Congress.<sup>242</sup>

In the present immunity statute, Congress continued to allow the court, upon application of the Attorney General or Congress, to issue the order. However, as the legislative history makes clear, the court's role is limited: "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.' Review of that second judge's prosecutive discretion is not authorized. Compare *In re Bart*, 304 F.2d 631 (D.C. Cir. 1962)."<sup>243</sup>

*In re Bart* specifically held that the court had no power under the 1954 Act to review the judgment of the United States attorney and the Attorney General that the grant of immunity was in the public interest.<sup>244</sup> The case's citation in the legislative history clearly supports the conclusion that the court has no role in determining the efficacy of the grant of immunity requested by the government. It follows that the court has no power under the statute to order immunity for a person unless the grant is requested by the government.

### C. *Inherent Judicial Authority*

The inherent power of the court to control the admissibility of evidence has been used to prevent the government's introducing evidence obtained in violation of the fifth amendment. Justice Black referred to this power in *Adams v. Maryland*<sup>245</sup> and a form of use immunity was ordered in *Murphy v. Waterfront Commission*.<sup>246</sup> However, this is a remedial power,<sup>247</sup> exercised by the court *after* a fifth amendment violation has been established. Exclusion is the only way to effectuate the constitutional privilege in such circumstances. This remedy for coerced testimony does not provide authority to overcome the fifth amendment privilege. As Judge Leventhal noted in *Ellis v. United States*,<sup>248</sup> the argument is "in the nature of a circular self-fulfilling prophecy . . . outside the scope of judicial authority."<sup>249</sup>

Inherent judicial power is exercised in other cases to enable the defendant to testify to raise a constitutional defense such as unlawful search,<sup>250</sup> double jeopardy<sup>251</sup> and speech and debate clause protection.<sup>252</sup> The need for immunity arises because the defendant must either testify in a pre-trial hearing or forgo the defense. Without judicial preclusion of the use of such testimony, an advantage accrues to the state whether or not the defendant testifies. The state either gains his testimony on a material issue to aid its case, or avoids a substantial constitutional defense. Preclusion allows the defendant to raise his constitutional defense without penalty. Since the defendant's testimony occurs after indictment and

242 II WORKING PAPERS at 143-46.

243 H.R. REP. NO. 1188, 91st Cong., 2d Sess. 13 (1970).

244 304 F.2d at 635.

245 347 U.S. 179, 181 (1954).

246 378 U.S. 52 (1964).

247 *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 872 n.11 (7th Cir. 1979); *In re Corrugated Container Antitrust Litigation*, 620 F.2d 1086, 1093-94 (5th Cir. 1980).

248 416 F.2d 791 (D.C. Cir. 1969).

249 *Id.* at 796.

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

251 *United States v. Inmon*, 568 F.2d 326 (3d Cir. 1977).

252 *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978). *But see* Note, *Right of the Criminal Defendant to the Compelled Testimony of Witness*, 67 COLUM. L. REV. 953, 975-76 (1967).

close to trial, no substantial problem of "derivative" use of the testimony exists. The only "cost" of preclusion may be that it permits the defendant to testify inconsistently in the pre-trial hearing and at trial.<sup>253</sup>

In contrast, the defendant's inability to immunize a witness neither compels the defendant to waive a specific constitutional defense nor offers the government an advantage in its case-in-chief. No additional evidence is generated for use against the defendant. Moreover, the prohibition on the use of the testimony imposed by the court applies only to the *defendant's* testimony, and has not been extended to his witnesses' testimony. Although the Supreme Court has not directly ruled,<sup>254</sup> comparable cases<sup>255</sup> suggest that such testimony also can be used for impeachment.<sup>256</sup> Thus, unlike the blanket prohibition of use compelled by the fifth amendment,<sup>257</sup> court-ordered preclusion is limited in scope and has no potential to prevent prosecution. It is intended to apply only where necessary to protect the assertion of a specific constitutional defense or to remedy constitutional violations. Court-ordered preclusion offers no useful analogy for general application to the defense witness immunity question.<sup>258</sup>

#### D. *Due Process and the Need for Symmetry*

As Judge Burger recognized in *Earl*,<sup>259</sup> the government's retaining the power to override the fifth amendment privilege and obtaining evidence while denying the defendant a similar power underlies all arguments for defense witness immunity. This imbalance creates issues of fairness, particularly when exculpatory evidence for some defendants can be obtained only by providing immunity.<sup>260</sup> But before considering the fundamental fairness required by the due process clause, the practicalities of use immunity as a means of obtaining evidence must be explored to define the scope and impact of the issues posed.

Use immunity operates effectively to help the grand jury investigate crimes. The grand jury functions at the beginning of the investigation when the primary objective is information, not necessarily admissible evidence. Information is needed to understand the criminal scheme, identify the participants, guide further investigation, and explain information gained by law enforcement officials. The decision to compel testimony on condition that elicited information cannot be used against the witness is a tactical one justified by the lack of other available means for obtaining the information, the level of witness culpability, or the lack of effect on subsequent witness prosecutions.<sup>261</sup> In any event, the government

<sup>253</sup> *Simmons v. United States*, 390 U.S. 377, 396-98 (Black, J., concurring in part and dissenting in part).

<sup>254</sup> *United States v. Salvucci*, 100 S. Ct. 2547, 2554 (1980).

<sup>255</sup> *United States v. Havens*, 446 U.S. 620 (1980); *Harris v. New York*, 401 U.S. 222 (1971).

<sup>256</sup> *United States v. Salvucci*, 100 S. Ct. at 2555 (Marshall, J., dissenting).

<sup>257</sup> *New Jersey v. Portash*, 440 U.S. 450 (1979).

<sup>258</sup> *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3482 (Jan. 13, 1981).

<sup>259</sup> See note 1 *supra*.

<sup>260</sup> Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974); Note, *The Public has a Right to Every Man's Evidence: The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1233 (1978); Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1971); Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 77-79 (1972).

<sup>261</sup> See II WORKING PAPERS at 1434-35 which views immunity as the cost to the government of obtaining information. See also Federal Immunity Guidelines, 1-11.211-20 for a list of the factors to be evaluated in applying for immunity. See Note, *The Federal Witness Immunity Acts in Theory and Practice*:

attempts to retain the option to prosecute the witness if possible. The prosecutor controls the extent of the immunity granted since he conducts the questioning. The immunity can be as broad or as narrow as the circumstances demand. Volunteered statements are of no value to the witness<sup>262</sup> and the prosecutor can structure the examination to cover subjects most valuable to him and avoid areas of future prosecutorial interest. Finally, use immunity is involuntary on the witness's part. The bargain of use immunity is forced upon him and his sole remedy is a motion to suppress the evidence derived from the compelled testimony in the subsequent prosecution. Consequently, in grand jury proceedings, the government can obtain information without offering inducements to the witness.

However, obtaining the testimony of an implicated witness at the trial of another differs from the grand jury setting. The trial occurs at the conclusion of the investigation when the prosecutor has determined the extent of the culpability of the parties and the quantum of admissible evidence available against each. If the prosecution then needs an implicated potential defendant's testimony to establish the guilt of others, the utility of use immunity diminishes. The government has only one opportunity to prosecute and the witness's failure to testify may cause the case against the others to fail for lack of evidence. For a successful prosecution, tactically the prosecutor needs more than the compelled testimony of the witness available through use immunity. Before the witness is called, the prosecutor needs to know how the witness's testimony will appear after direct and cross-examination. The testimony is useless if cross-examination will undercut or destroy the witness's credibility. And, unlike in the grand jury proceeding, the prosecutor cannot control the trial's conduct, since defense counsel cross-examining the witness will attempt to damage the witness's credibility. The scope of impeachment is broad and its subject matter is limited only by the witness's activities. To prepare for trial the prosecutor must conduct an extensive pre-trial witness interrogation. This can be done only in an informal setting with the witness's cooperation. Because the witness is implicated in at least one criminal scheme, such interrogation will often reveal information that could lead to indictments against the witness for other crimes.

The witness who recognizes the value of his testimony possesses an important bargaining tool. Use immunity offers him no substantial protection since the government retains the option of prosecuting him on independent evidence. In preparing for the witness's testimony, the government also may learn of other evidence supporting prosecutions for other criminal activity. In some cases, the witness's testimony will expose him to certain hazards from others.<sup>263</sup> In any event the witness is in a substantial bargaining position because the government needs his testimony and it likewise has the ability to surrender or substantially modify its option to prosecute the witness. The actual terms of the agreement may vary from granting complete immunity and witness relocation to allowing a plea to a lesser crime, recommending a lenient sentence or probation, or recom-

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*Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1598-1610 (1963) for a discussion of the factors used by officers to authorize transactional immunity prior to the adoption of use immunity in 1970.

<sup>262</sup> *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472 (1972).

<sup>263</sup> The Federal Immunity Guidelines require the prosecutor to assess the likelihood of physical or economic retaliation. *See* Federal Immunity Guidelines, 1-11.216.

mending the sentence be served in a particular institution.<sup>264</sup> The dynamics of obtaining the testimony of an implicated witness do not depend upon use immunity. In isolation, use immunity is inconsequential. The government's power to control the charging process and to influence sentencing and corrections is decisive.<sup>265</sup>

Although this analysis has been made from the prosecution's viewpoint, the same pressures exist for the defense in obtaining the co-defendant's hopefully exculpatory testimony. The defendant usually has the advantage of personal knowledge of the alleged events as well as the witness's interest in delivering testimony consistent with the defendant's.<sup>266</sup> However, without extensive pre-trial preparation, the defendant risks that the testimony may backfire. In such circumstances, use immunity provides the witness insufficient protection. Use immunity does not protect the witness's statements unless made at trial,<sup>267</sup> nor does it cover disclosures of his testimony by any member of the defense team<sup>268</sup> which are also not included in the defense counsel's attorney-client privilege. In some cases, the witness's pre-trial statements might have to be made available to the government for cross-examination purposes after the witness testifies.<sup>269</sup> Something more comprehensive than use immunity for trial testimony would be required to provide complete protection. The prohibition on using the testimony would have to extend not only to trial testimony, but also to any information obtained during trial preparation. Obviously, broadening "immunity" in scope and time would greatly increase the already difficult burden of establishing independent source in a subsequent prosecution.

Defense witness immunity is intended to solve the problem posed by the defense's inability to obtain exculpatory information protected by the fifth amendment privilege. Other privileges, notably the attorney-client privilege, also prevent the defense from having the use of exculpatory testimony.<sup>270</sup> Often if the co-participant has exculpatory testimony, so does his attorney, who has heard the co-participant's admissions during trial preparation. Calling the attorney also has the advantage of producing evidence through a more credible witness.

Finally, the remedy cannot be limited only to use immunity. The above analysis suggests that use immunity alone is often of little value in obtaining testimony for the government. The same conclusion follows when the defense needs the testimony. Moreover, in many circumstances exculpatory evidence can be obtained only if the defense has the power of the grand jury, or of search and

<sup>264</sup> The government has complete control over the institution of criminal charges. See notes 122-27 *supra*. It can pay the expenses of its witnesses, including relocation expenses. 18 U.S.C. § 495 (1976). See also 28 U.S.C. § 524 (1976). Federal prisoners are within the custody of the Attorney General and he can designate the place of confinement. 18 U.S.C. §§ 4001, 4082 (1976).

<sup>265</sup> For example, in *United States v. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979), the government did not use the immunity statute. It gave its chief witness a very broad transactional immunity covering all crimes known and unknown to the government. The other principal witness was given leniency in the form of a plea to a reduced sentence. *Id.* at 779.

<sup>266</sup> In *De Palma*, for example, the witnesses who might have been prosecuted had an interest in testifying that the fraud did not occur, as did the defendant. *Id.*

<sup>267</sup> *United States v. Kuehn*, 562 F.2d 427 (7th Cir. 1977).

<sup>268</sup> *United States v. Romano*, 583 F.2d 1, 7 (1st Cir. 1978); *State v. Broady*, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

<sup>269</sup> See *United States v. Nobles*, 422 U.S. 225 (1975).

<sup>270</sup> See *Westen, The Compulsory Process Clause*, 73 MICH. L. REV. 71, 172-77 (1974).

seizure, or even of presidential pardon. If the defense can compel the exercise of the Executive's power to immunize to obtain exculpatory evidence, the same rationale should apply to other executive powers. Thus, the defense witness immunity issue poses a fundamental due process question about the existing balance of investigatory powers between prosecution and defense.

Due process incorporates the "fundamental conceptions of justice which lie at the base of our civil and political institutions" and defines the community sense of fair play and decency.<sup>271</sup> Courts have held that no due process violation results from the defendant's inability to obtain evidence because of the fifth amendment.<sup>272</sup> Providing defense witness immunity as a means of obtaining evidence is a recent suggestion based on the constitutionality of use immunity and the assumption that it differed from transactional immunity. As argued above, that assumption is subject to grave doubt.<sup>273</sup> There are other reasons, however, why due process does not compel defense witness immunity.

In general, the government's advantage in gathering evidence accrues because its investigation begins with the report of the crime, while the defendant's does not begin in many cases until arrest. The government also has greater resources and mechanisms (warrants and grand juries) with which to conduct the investigation. The defendant does not have evidence in some cases either because he had no opportunity to obtain it when it was available, or because he did not have the same means to obtain the evidence as did the prosecution.

The Supreme Court examined the first problem in *Marion v. United States*,<sup>274</sup> and more recently in *United States v. Lovesco*,<sup>275</sup> when it considered a claim of prejudice caused by pre-indictment delay. The Court held that the government was not constitutionally obliged to obtain indictments as soon as probable cause was established, nor even when the government had obtained proof beyond a reasonable doubt, even if "the defense might have been somewhat prejudiced by the lapse of time."<sup>276</sup> If due process does not require the government to use its powers to provide notice of its intentions and an increased opportunity for the defendant to obtain evidence and witnesses, then it is difficult to see how due process requires the government to make its investigatory powers available to the defense.

The second problem—the government's superior resources to discover evidence—was raised by *Brady v. Maryland* and its progeny<sup>277</sup> which established a due process right to obtain exculpatory evidence in the possession of the government. Conceivably, the problem posed by a defendant's need to obtain exculpatory evidence could have been remedied by increasing the defense's investigatory powers. The Supreme Court, however, chose to make available to the defendant information learned during the government's investigation that tended to show

271 *United States v. Lovesco*, 431 U.S. 788, 790 (1977).

272 *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978); *United States v. Gay*, 567 F.2d 916, 919 (9th Cir. 1978); *Royal v. Maryland*, 529 F.2d 1280 (4th Cir. 1976); *Myers v. Frye*, 401 F.2d 18 (7th Cir. 1968); *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974).

273 See notes 75-119 *supra* and accompanying text.

274 404 U.S. 307 (1971).

275 See note 271 *supra*.

276 431 U.S. at 796.

277 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Giglio v. United States*, 405 U.S. 150 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972); *United States v. Agurs*, 427 U.S. 97 (1976).



his innocence. Despite the narrow line between making exculpatory evidence available and conducting an investigation to obtain exculpatory evidence, the line of cases following *Brady* has not imposed an affirmative duty on the government to obtain exculpatory evidence.<sup>278</sup> The *Brady* approach is justified because an investigation, unfocused in the beginning, eventually uncovers information that both inculpatates and exculpates a particular individual. Also, the government has the obligation to do justice. Making the government's exculpatory information available to the defense in most cases satisfies the defendant's need for evidence it could not uncover in its investigation. The basic policy choice of not providing the defense with the government's investigative powers remains undisturbed, not only in this area but in related ones. For example, the defendant has no right to appear before a grand jury investigating his activities.<sup>279</sup>

Although superficially the government may appear to have an insurmountable advantage in criminal prosecutions by virtue of its resources and investigatory powers, the obligations of the parties are entirely different. The government must first identify the culpable party often without the cooperation of principals or witnesses. The government must then convince a jury beyond a reasonable doubt of the party's guilt, using evidence obtained in a constitutionally permissible manner. Generally the government has only one opportunity to do this, and a failure to convict, unless due to the jury's inability to decide, prevents re-prosecution.

The defendant shoulders a lesser burden. He is not interested in determining who is culpable, and would rarely present his defense to establish another's guilt. Rather he must raise a reasonable doubt in the mind of at least one juror of any critical element of the government's case. He has no obligation to ascertain the truth or accomplish justice and, under the fifth amendment's protection, can conceal incriminating testimony. Some have argued that the defendant even has the right to present perjured testimony.<sup>280</sup> Thus, when the government's superior powers for obtaining evidence are balanced against its heavy burden, the argument for symmetrical allocation of investigatory devices diminishes.

Other problems would arise if defendants received access to evidence-gathering mechanisms peculiar to the government. The most obvious is that governmental investigative powers impose burdens on others. People's homes are searched, and witnesses are called before grand juries. Even with immunity, the witness is exposed to disrepute. The potential for abuse is so high that the Constitution imposes limitations on police techniques, including search warrants and interrogation. Any provision for use of such techniques by the defense would inevitably increase the potential for abuse since parallel investigations would have to be conducted by the defense.

Nor is their use susceptible to effective control. If these powers are somehow limited by requiring their use in conjunction with the prosecution's investigation,

278 See *United States v. Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967); *Tutman v. Anderson*, 391 F. Supp. 68, 71-72 (D. Del. 1975) (rejecting the claim that *Brady* compels immunity for defense).

279 *E.g.*, *United States v. Smith*, 552 F.2d 257, 261 (8th Cir. 1977).

280 Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

problems of self-incrimination and the secrecy of the defendant's case emerge. The defense can hardly suggest investigative leads without revealing its case or risking that the clue will complete the government's case. Also, a joint investigation assumes many characteristics of an inquisitorial rather than an adversarial system. If the court must arbitrate the use of these devices independent of the executive, its role becomes less judicial and independent and more investigative.

A move toward the inquisitorial system would make the judiciary less impartial and more vulnerable to criticism for its non-judicial role. Neither the courts nor Congress has attempted to promote defendants' rights by assigning defendants the powers of investigation held by the government. Instead, Congress's method is primarily financial. Congress has taken steps to ensure that the defendant has free counsel and that his attorney has the resources to conduct an investigation and defense.<sup>281</sup>

Thus, defense witness immunity's ultimate problem is that its rationale cannot be limited to use immunity at trial to overcome the privilege against self-incrimination. If accepted, the rationale is equally applicable to any of the government's investigatory powers. This would inevitably produce wholesale changes in the criminal justice system and involve the judiciary in the investigatory process.

## V. Conclusion

The argument for defense witness immunity fails to recognize that the immunity procedure was intended primarily as an investigative tool for government use. Immunity's application in the adversarial trial context necessarily changes its operation and effect and results in a high probability of "immunity bath," and separation of powers problems for the court. More generally, the argument for defense witness immunity proves too much. If accepted, there are no interests, governmental or personal, that can prevail over a defendant's claim that he is entitled to obtain the evidence. Nor is there any limitation upon the means by which the evidence may be obtained. The argument assumes the defendant's rights are paramount regardless of potential adverse consequences to others, the adversary system or the administration of justice. Because the logic is open-ended and the consequences large and unpredictable, the courts are an inappropriate instrument to enforce such a complete reordering of the criminal justice system. Thus, demands for judicially-imposed immunity for defense witnesses must be rejected.

This article has concentrated only on the problems flowing from the use of defense witness immunity and does not solve the defendant's problem of gaining access to exculpatory evidence. The federal immunity guidelines suggest that the government, in an appropriate case, may voluntarily grant immunity to a defense witness. But the guidelines also suggest that such incidents will be rare

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<sup>281</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Mayer v. Chicago*, 404 U.S. 189 (1971) (free transcript); *Jacobs v. United States*, 350 F.2d 571, 573 (7th Cir. 1965) (free transcript); Fed. R. Crim. P. 17(b) (free witness and service of subpoenas). In cases where the defense seeks foreign witnesses courts have not ordered the government to act although, presumably, it would have a greater chance of locating the witness. *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (no obligation to request cooperation of Swedish officials).

since generally all requests are to be opposed.<sup>282</sup> Alternate methods of introducing the testimony may be developed, such as in *United States v. Klauber*,<sup>283</sup> when the court permitted the introduction of the witness's testimony before the grand jury. Also, the courts might more strictly monitor the validity of claims of fifth amendment privilege, and consider that in many cases future prosecution is unlikely although still technically possible.<sup>284</sup> Nevertheless, some court inevitably will be forced to decide whether the lack of evidence is so damaging that a trial would violate fundamental considerations of justice. However, the precedents holding there is no due process violation when evidence is unavailable because of the fifth amendment suggest such cases would be very rare.<sup>285</sup>

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282 Federal Immunity Guidelines, 1-11.230.

283 611 F.2d 512 (4th Cir. 1979).

284 *United States v. Goodwin*, 625 F.2d 693 (5th Cir. 1980); *In re Folding Carton Antitrust Litigation*, 465 F. Supp. 618 (N.D. Ill.), *rev'd*, 609 F.2d 867 (7th Cir. 1979).

285 See note 278 *supra*.