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The Constitutional Right to Defense Witness Immunity

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THE CONSTITUTIONAL RIGHT TO DEFENSE WITNESS IMMUNITY

I. INTRODUCTION

Imagine a situation in which an individual possesses information which would totally exonerate a criminal defendant. Imagine further that this individual, for fear of implicating himself in the crime for which the defendant has been charged or an unrelated crime, refuses to testify for the defendant by invoking his privilege against self-incrimination. If this witness had information that incriminated the defendant, the United States Attorney could obtain immunity for the witness and compel him to testify.[1] The defense, however, has no such reciprocal power for a witness possessing exculpatory evidence. Instead, the defense must ask the prosecutor to grant immunity to the witness. If the prosecution refuses, the defense has no recourse and will lose what may be the only available exculpatory testimony. Thus, unless the United States Attorney accedes to the defense request to immunize the individual, the innocent defendant may well be convicted and sentenced.

Until recently, this Kafkaesque result has been the rule in federal courts. The rule originated in *Earl v. United States*[2] and has been followed almost universally by other federal courts,[3] despite

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 926, *as amended by* Pub. L. No. 95-405, § 25, 92 Stat. 877; Pub. L. No. 95-598, tit. III, § 314(1), 92 Stat. 2678 (codified at 18 U.S.C.A. §§ 6001-05 (West Supp. 1980) (empowers United States Attorney with approval of his superior to request immunity)). The focus of this Note is on defense witness immunity in the federal courts. The principles, however, apply to states with similar immunity statutes.

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

3. United States v. Davis, 623 F.2d 188, 192-93 (1st Cir. 1980); United States v. Turkish, 623

strong arguments raised by commentators[4] and judges.[5]

The federal immunity statute[6] requires courts to grant immunity to a witness upon the request of the United States Attorney when "the testimony from such individual may be necessary to the public interest" and the individual has refused or is likely to refuse to testify based upon his privilege against self-incrimination.[7] The court's role in issuing the order granting

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F.2d 769, 772-78 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981); United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980); United States v. Klauber, 611 F.2d 512, 517-20 (4th Cir. 1979); United States v. Rocco, 587 F.2d 144, 146-48 (3d Cir. 1978); United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978); United States v. Carman, 577 F.2d 556, 561 (9th Cir. 1978); *In re* Daley, 549 F.2d 469, 478-79 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977); United States v. Caldwell, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); United States v. Alessio, 528 F.2d 1079, 1080-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (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), *cert. denied*, 421 U.S. 999 (1975); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973); People v. Sapia, 41 N.Y.2d 160, 359 N.E.2d 688, 691-92, 391 N.Y.S.2d 93, 96-97 (1976), *cert. denied*, 434 U.S. 823 (1977).

4. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 815-30 (1976); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974); Note, *The Fifth Amendment Testimonial Privilege as an Impediment to the Defense When Invoked by a Potential Exculpatory Witness*, 42 ALB. L. REV. 482 (1978); 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, *A Re-examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); 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).

5. United States v. Saettele, 585 F.2d 307, 310-14 (8th Cir. 1978) (Bright, J., dissenting), *cert. denied*, 440 U.S. 910 (1979); United States v. Gaither, 539 F.2d 753, 753-55 (D.C. Cir.) (statement of Bazelon, C.J., on denial of petition for rehearing *en banc*), *cert. denied*, 429 U.S. 961 (1976); 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); *cf.* Earl v. United States, 364 F.2d 666, 666-67 (D.C. Cir. 1966) (Leventhal, J., dissenting from denial of petition for rehearing *en banc*).

6. 18 U.S.C.A. §§ 6002-05 (West Supp. 1980).

7. The controlling provisions are sections 6002 and 6003. Section 6002 provides:

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

18 U.S.C.A. § 6002 (West Supp. 1980). Section 6003 provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) A United States attorney may, with the approval of the Attorney General, the

immunity has been interpreted to be largely ministerial.[8] If the two basic requirements[9] of the statute are satisfied and the individual requesting immunity is authorized to do so, the court must issue the order.

Generally, courts refuse to order the prosecution to request immunity for defense witnesses.[10] They refuse to do so on the theory that courts themselves have no inherent power to grant immunity, and to require the prosecution to request immunity for a defense witness would violate the principle of separation of powers.[11] Thus, the purported lack of inherent judicial power to grant immunity and the doctrine of separation of powers have been used to deny defense witness immunity absent the prosecutor's cooperation.

This Note will demonstrate that defense witness immunity is not only constitutionally permissible without the Government's cooperation, but in some cases may be constitutionally required. Particular attention will be given to constitutional and statutory developments since *Earl* which make a grant of defense witness immunity possible even without the prosecutor's cooperation. Initially, the historical development of the right to defense witness immunity will be outlined, from its rejection in *Earl* to its recent acceptance in *Government of Virgin Islands v. Smith.*[12] This Note will

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Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

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

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

18 U.S.C.A. § 6003 (West Supp. 1980).

8. *See* Ullman v. United States, 350 U.S. 422 (1956). In *Ullman,* the Court found the predecessor to the current immunity statute, 18 U.S.C.A. § 3486 (West 1969), to require only that the courts ascertain whether the statutory requirements were complied with, thus avoiding an interpretation that would amount to an unconstitutional imposition of a non-judicial function on the federal courts. 350 U.S. at 433-34. *But see* Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes,* 23 GEO. WASH. L. REV. 501 (1955) (suggesting that federal immunity statute is unconstitutional in violation of case and controversy requirement and doctrine of separation of powers).

9. *See* United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979). The court in *Herman* reviewed the legislative and judicial history of the federal immunity acts, concluding that the court's role in granting the order is merely to find the facts on which the order is predicated. *Id.* at 1200-03. The court further held that no right of judicial review exists pursuant to the Administrative Procedure Act to determine whether the United States Attorney properly concluded that the immunized testimony is necessary to the public interest. *Id.*

10. *See* United States v. Alessio, 528 F.2d 1079, 1080-82 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976).

11. *Id.* The *Alessio* court stated that "the power to demand immunity for co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions." *Id.* at 1082. *See* Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.), *cert. denied,* 423 U.S. 933 (1975) (statute places sole authority to initiate immunity on United States Attorney; function of district court is limited to determining whether statutory procedure has been followed); United States v. Allstate Mortgage Corp., 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied,* 421 U.S. 999 (1975) (no one other than United States Attorney, with approval of his superior, is authorized to request an order granting witness immunity, and the judicial creation of such a right is beyond the power of the courts).

12. 615 F.2d 964 (3d Cir. 1980); *see infra* notes 17-58 and accompanying text.

then demonstrate that the separation of powers doctrine need not impede a judicial grant of defense witness immunity,[13] followed by a discussion of the constitutional bases for defense witness immunity[14] and the arguments frequently raised against judicially granted defense witness immunity.[15] Finally, this Note will focus on the implementation of the two kinds of immunity recognized in *Government of Virgin Islands v. Smith* — judicially ordered statutory immunity and judicially granted use immunity.[16]

II. DEVELOPMENT OF THE RIGHT TO DEFENSE WITNESS IMMUNITY

In *Earl v. United States*,[17] in an opinion written by then-Judge Burger, the United States Court of Appeals for the District of Columbia rejected the defendant's argument that due process required a grant of immunity to a defense witness.[18] The defendant was implicated in a narcotics purchase by a man named Scott, who, along with the defendant, had allegedly sold heroin to an undercover agent.[19] The defendant was allegedly introduced as "Sonny."[20] Subsequently, the undercover agent arrested the defendant, who was charged with two counts of narcotics violations. Prior to trial, Scott pleaded guilty to charges arising out of a separate transaction in exchange for dismissal of the charges arising out of the transaction for which Earl was charged.[21] The defense called Scott to testify, but he asserted his privilege against self-incrimination. At that point the defense made an offer of proof that Scott, if granted immunity, would testify that he did not know the defendant, but that he did know someone else named "Sonny," who resembled Earl and frequented the area of the sale.[22] On appeal, the defense argued that the refusal of the United States Attorney and the court to grant immunity denied the defendant a fair trial.[23] In support of its claim, the defense relied upon *Brady v. Maryland*[24] for the proposition that the refusal to grant immunity was tantamount to suppression of favorable evidence in

13. *See infra* notes 59-133 and accompanying text.
14. *See infra* notes 134-202 and accompanying text.
15. *See infra* notes 203-234 and accompanying text.
16. *See infra* notes 235-338 and accompanying text.
17. 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).
18. *Id.* at 534.
19. *Id.* at 532.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 534.
24. 373 U.S. 83 (1963). The *Brady* Court held "that the suppression by the prosecution of

violation of the due process clause.[25] The court rejected this contention, holding that the prosecution had not suppressed favorable evidence because it had not affirmatively withheld the witness or concealed evidence.[26] The court further asserted that the judiciary did not have the power to compel the Government to grant immunity, nor did the judiciary possess the inherent power to grant immunity for defense witnesses. The court did, however, note that Congress could remedy the problem by conferring on the defendant a right to compel testimony comparable to that provided the Government under the immunity statute.[27]

The *Earl* court stated in a footnote that a different question would be presented if the Government grants immunity to its own witnesses in exchange for their testimony, but declines to seek immunity for defense witnesses.[28] That situation, in the words of the *Earl* court, "would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process."[29] When faced with that situation, however, the United States Court of Appeals for the Ninth Circuit, in *United States v. Alessio*,[30] declined to find a due process violation, resting its decision on the doctrine of separation of powers and deferring to the broad prosecutorial discretion enjoyed by the executive branch of government.[31] The court, in examining the actual impact of the Government's refusal to grant immunity to the defense witnesses, determined that the testimony sought to be elicited would be cumulative. Therefore, the court concluded that the refusal to grant the requested immunity did not deprive the defendant of a fair trial.[32]

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evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

25. 361 F.2d at 534.

26. *Id.*

27. *Id.*

28. *Id.* at 534 n.1.

29. *Id.* (emphasis in original). Subsequent decisions have also acknowledged potential due process violations in situations in which the Government has requested immunity for its witnesses, but has refused to seek immunity for defense witnesses. *See* United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), *cert. denied,* 421 U.S. 926 (1975); United States v. Ramsey, 503 F.2d 524, 532-33 (7th Cir. 1974), *cert denied,* 420 U.S. 932 (1975).

30. 528 F.2d 1079 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976).

31. United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976).

32. *Id.* at 1082. In United States v. Carman, 577 F.2d 556 (9th Cir. 1978), the court also rejected a due process challenge based on the Government's refusal to request immunity for a defense witness after having granted immunity to two of its own witnesses. *Id.* at 561. While recognizing a potential due process claim based on the footnote in *Earl,* the court in *Carman* concluded that the defendant had not been prejudiced by the Government's refusal to grant immunity to a potential defense witness because the defendant by failing to call the witness to the stand had not demonstrated any need for immunity. *Id.* According to the court, if the witness were not called to the stand, no one could be sure that he would, in fact, assert his right against self-incrimination. *Id.* Similarly, in United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979), the court rejected a due process challenge when the Government immunized its own witnesses, but refused to grant immunity to the defense witnesses. *Id.* at 1203-05. The court held that, in order to justify

After the decision in *Earl*, Congress amended the federal immunity statute.[33] Where the former statute required that any immunity granted would be "transactional," the statute now permits the granting of more limited "use" immunity.[34] Despite the amendment, most courts continue to refuse to recognize the right to defense witness immunity.[35] These courts rely on the doctrine of separation of powers as the dominant rationale for their refusal to recognize the right.[36]

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reversal on such a claim, the defense would have to show that the Government's decisions were made with the deliberate intention of distorting the judicial factfinding process. *Id.* at 1204.

33. The federal immunity statute was amended by the Organized Crime Control Act of 1970. *See supra* note 1. The current version of the immunity statute provides in relevant part as follows:

> [*N*]*o testimony or other information* compelled under the order [of immunity] *(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 prejury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C.A. § 6002 (West Supp. 1980) (emphasis added).

The statute at issue in *Earl*, section 1406 of Title 18 of the United States Code, read in pertinent part as follows:

> But no such witness shall be prosecuted or subjected to any penalty or forfeiture *for or on account of any transaction, matter or thing* concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding. . . .

18 U.S.C. § 1406 (3) (1964) (emphasis added).

34. "Use immunity," found to be coextensive with the scope of the fifth amendment privilege against self-incrimination, requires only that the testimony of an immunized witness not be used against him directly in a subsequent prosecution for the matter about which he is required to testify, or used derivatively to obtain evidence for future prosecution. Kastigar v. United States, 406 U.S. 441, 449-53 (1972). "Transactional immunity," the form mandated by the federal immunity act under which *Earl v. United States* was decided, precludes subsequent prosecution for the transaction to which the witness testifies. *Id. See* Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633 (1979).

Some states continue to require transactional immunity. *See, e.g.*, N.D. CENT. CODE § 31-01-09 (1976):

> After complying, and if, but for this section, [the witness] would have been privileged to withhold the answer given or evidence produced by him, that person shall not be prosecuted or subject to penalty or forfeiture for or on account of any transaction, matter, or thing concerning which, in accordance with the order, he gave answer or produced evidence.

Id.

In Kastigar v. United States, 406 U.S. 441 (1972), the United States Supreme Court upheld the 1970 Act which amended the federal immunity statute to provide for use rather than transactional immunity. *Id.* at 462. This decision and its effect on the right to defense witness immunity will be discussed *infra* at notes 119-133 and accompanying text.

35. *E.g.*, United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980). The *Lenz* court specifically rejected defendant's contention that the Supreme Court's acceptance of use immunity in *Kastigar* made it possible to grant immunity to defense witnesses. *Id.* at 962-63.

36. *Id.* The defendant in *Lenz* contended that with the acceptance of use immunity by the Supreme Court in *Kastigar* the government no longer had a legitimate reason to deny immunity to defense witnesses. *Id.* at 962. Thus, the defendant argued that he had a compulsory process right to defense witness immunity. *Id.* The court responded by noting:

> [U]se immunity is a statutory creation. 18 U.S.C. § 6003 commits the decision to grant or deny immunity to the sole discretion of the executive branch of the Government, and the courts have no power to compel the United States Attorney to immunize defense witnesses. . . .

Recently, some courts have been receptive to the need for defense witness immunity. For example, in *United States v. Morrison,*[37] the court ordered the Government to grant immunity to a defense witness when the Assistant United States Attorney threatened to prosecute her if she testified on the defendant's behalf.[38] The court also ruled that if the Government did not request immunity, a judgment of acquittal should be entered.[39] Prosecutorial misconduct which resulted in the loss of potentially exculpatory evidence because the defense witness invoked her privilege against self-incrimination necessitated the court's action.[40] Although asserting the power to dismiss the charges if the Government refused to comply with the order to request immunity for the defense witness, the court in *Morrison* nonetheless acknowledged that only the Government could request immunity and that courts lacked inherent power to grant immunity absent such a request.[41]

In *United States v. Herman,*[42] the United States Court of Appeals for the Third Circuit expanded the potential for a right to defense witness immunity when, in addition to acknowledging the right to court-ordered immunity[43] established in *Morrison,* it recognized the possibility of an inherent authority to confer a "judicially fashioned immunity" upon a witness whose testimony is essential to an effective defense.[44] The court-granted immunity alluded to in *Herman* emanates from the due process right to present clearly exculpatory evidence recognized in *Chambers v. Mississippi.*[45] The *Herman* court, however, recognizing the difficult issues raised by a grant of judicially fashioned use immunity, declined to exercise its inherent power, awaiting a case in which the issue was squarely presented to the court.[46]

> While use immunity for defense witnesses may well be desirable. . . . its proponents must address their arguments to Congress, not the courts. We find no authority for it in the compulsory process clause of the sixth amendment.

Id. at 962-63.

37. 535 F.2d 223 (3d Cir. 1976).

38. United States v. Morrison, 535 F.2d 223, 225-26, 229 (3d Cir. 1976).

39. *Id.* at 229.

40. *Id.* at 226.

41. *Id.* at 228-29.

42. 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

43. United States v. Herman, 589 F.2d 1191, 1203-04 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

44. *Id.* at 1204.

45. 410 U.S. 284 (1973). *Chambers v. Mississippi* and its effect on the right to defense witness immunity will be discussed *infra* at notes 184-89 and accompanying text.

46. 589 F.2d at 1204-05. The *Herman* court specifically stated:

> The existence *vel non* of such immunity power, and the standards which should govern its invocation and exercise, raise a host of difficult issues. It may be, for example, that such grants of immunity would on some occasions unduly interfere with important

That opportunity presented itself a little over a year later. In *Government of Virgin Islands v. Smith,*[47] the United States Court of Appeals for the Third Circuit held for the first time that not only may a court require the prosecution to request defense witness immunity, but under certain circumstances the court itself may grant immunity to enable a defense witness to testify free of the fear of subsequent prosecution based on that testimony.[48]

In *Smith,* the United States Attorney refused to seek the immunization of a witness who, based on his prior statements to the police, could have given testimony exonerating three of four defendants convicted of robbery.[49] The witness, Sanchez, was a juvenile at the time the crime was committed, and thus was under the exclusive jurisdiction of the juvenile authorities in the Virgin Island Attorney General's office.[50] The individual responsible in that office had offered to grant Sanchez use immunity, but as a matter of prosecutorial courtesy conditioned his offer on the consent of the United States Attorney. The United States Attorney, without explanation, refused to consent, and when requested by the defense, declined to seek a grant of immunity for Sanchez.[51]

In reversing the convictions of the three defendants who stood to be exonerated by Sanchez's testimony and remanding for an evidentiary hearing to determine whether due process required that Sanchez be granted immunity, the court set out standards to be applied for both the court-ordered immunity previously recognized in *Morrison* and the judicially fashioned use immunity discussed in *Herman.*[52]

The *Smith* court indicated that in order to establish a due process right to court-ordered statutory immunity the defense must establish at an evidentiary hearing that the witness's testimony would be relevant and that the actions of the United States Attorney in refusing to seek the requested immunity were taken with the deliberate intention of distorting the fact-finding process.[53]

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interests of the prosecution. Because the issue of inherent judicial power to grant use immunity was not raised in the district court, and the parties have not discussed it in the briefs or argument before us, we are reluctant to address it here. . . . If such inherent power is to be recognized and standards formulated for its exercise, that task should be performed in a case where the issue was presented by the defendant, and perhaps by the court sitting in banc.

Id.

47. 615 F.2d 964 (3d Cir. 1980).
48. Government of Virgin Islands v. Smith, 615 F.2d 964, 968-72 (3d Cir. 1980).
49. *Id.* at 967.
50. *Id.*
51. *Id.*
52. *Id.* at 969-72, 974.
53. *Id.* at 969.

The grant of judicially fashioned use immunity, however, does not depend on prosecutorial misconduct, and by definition need not await executive action.[54] The *Smith* court emphasized that the right to judicially granted use immunity is designed to protect the defendant's due process right to "clearly exculpatory evidence necessary to present an effective defense."[55] Because of the unique nature of the remedy and with due deference to separation of powers, the *Smith* court limited grants of judicial immunity to the following conditions: "[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity."[56]

Although other circuits have not yet adopted the position taken by the Third Circuit in *Smith*,[57] those courts which have discussed the issue have implicitly recognized that in certain situations the principle of essential fairness embodied in the due process clause may require that defense witnesses be granted immunity.[58] The decisions of the Third Circuit culminating in

54. *Id.* at 969-70.

55. *Id.* at 971. The *Smith* court found that the due process right to defense witness immunity emanated from the *Brady-Chambers* line of cases. *Id.* at 970-71. The court noted, however, that the remedy of a new trial mandated by those cases was insufficient in the context of defense witness immunity:

> While the constitutional violation in this case is the same as the violation found in the *Chambers* and *Brady* genre of cases — *i.e.*, depriving a defendant of clearly exculpatory evidence necessary to present an effective defense — a new trial such as was provided in those cases would be insufficient to remedy the constitutional infringement which may have occurred here. Any remedy in the present case must take into account the fact that a retrial would be meaningless unless the evidence in issue may be compelled. That compulsion can only be accomplished in the context of a case such as the instant one, by granting immunity to a defense witness, once it is established, however, that the conditions for such a remedy have been satisfied.

Id. at 971.

56. *Id.* at 972 (footnote omitted). Interestingly, the court found its recognition of judicially fashioned use immunity not to be inconsistent with its previous decisions which had apparently rejected the viability of court-granted immunity. For example, in both United States v. Rocco, 587 F.2d 144 (3d Cir. 1978), *cert. denied,* 440 U.S. 972 (1979), and United States v. Niederberger, 580 F.2d 63 (3d Cir.), *cert. denied,* 429 U.S. 980 (1978), the court had stated that "a trial court has no authority to provide use immunity for a defense witness." 587 F.2d at 147; 580 F.2d at 67. The court in *Smith,* however, distinguished this apparent rejection of defense witness immunity:

> Neither *United States v. Rocco* . . . nor *United States v. Niederberger* . . . discuss the subject of *judicially fashioned* immunity for essential defense witnesses. Hence, they do not bear on our holding here. Insofar as both opinions discuss *statutory* immunity . . . neither case was decided in a context involving prosecutorial misconduct or deliberate distortion of the trial process by the government. Therefore their authority, in respect to immunity, is limited and in no way detracts from either the statutory immunity or the judicial immunity analysis in which we have here indulged.

615 F.2d 972 n.11 (citations omitted; emphasis in original).

57. *See, e.g.,* United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981).

58. United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856

Smith have thus articulated the constitutional underpinnings of a right to defense witness immunity, and have demonstrated that the doctrine of separation of powers need not be an insuperable barrier to recognition of the right.

III. SEPARATION OF POWERS AND DEFENSE WITNESS IMMUNITY

The United States Constitution divides the powers of the federal government into three separate spheres: The legislature has the authority to make laws,[59] the judiciary the power to hear and decide cases,[60] and the executive the duty to see that the laws are faithfully executed.[61] The issue of defense witness immunity brings all three branches of the federal government into potential conflict. The judiciary is implicated both in ordering the grant of immunity[62] and in the trial itself. The legislature is involved by virtue of having enacted the federal immunity statute,[63] and the executive must decide whether to request immunity,[64] or to prosecute at all.[65]

The immunity statute requires that the request for witness immunity originate with the United States Attorney.[66] This provision has been interpreted to preclude judicial grants of statutory immunity absent a prosecutorial request,[67] thus representing a legislative determination that the executive, not the judiciary, possesses the power to seek witness immunity. A judicial grant of immunity, therefore, potentially impinges not only on executive prerogative, but on the power of Congress as well. The

(1981) ("Without precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered wherever it seems fair to grant it."); United States v. Davis, 623 F.2d 189, 193 (1st Cir. 1980) ("We need not decide to what extent we agree with [*Smith* and *Morrison*] since no such circumstances exist in the instant case."); United States v. Praetorius, 622 F.2d 1054, 1064 (2d Cir. 1980) ("This Circuit has followed the general rule that the United States ordinarily need not grant statutory immunity to a defense witness, although . . . under 'extraordinary circumstances,' due process may require that the government confer use immunity on a witness for the defendant.").

59. U.S. CONST. art. I, § 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." *Id.*

60. *Id.* art. III, § 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties. . . ." *Id.*

61. *Id.* art. II, § 3. "[The President] shall take Care that the Laws be faithfully executed. . . ." *Id.*

62. *See* 18 U.S.C.A. § 6003(a) (West Supp. 1980) (court shall issue order requiring individual to testify).

63. 18 U.S.C.A. §§ 6001-05 (West Supp. 1980).

64. *Id.* at § 6003.

65. Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (our legal system vests broad discretion in prosecuting attorneys).

66. 18 U.S.C.A. § 6003 (West Supp. 1980) ("the United States district court . . . shall issue . . . upon the request of the United States attorney . . . an order requiring such individual to give testimony").

67. *See supra* note 3 and cases cited therein.

ultimate conflict, however, is between the judiciary, with its power to control the trial of criminal cases, and the executive, with its broad prosecutorial discretion.

A. THE FUNCTION OF THE COURT AND THE PROSECUTOR UNDER THE FEDERAL IMMUNITY STATUTE

Without statutory authorization neither the courts[68] nor the prosecution[69] possesses an inherent power to grant witness immunity. The federal immunity statute gives the prosecutor sole authority to seek an order for immunity.[70] He must, however, request a court order granting witness immunity.[71] The court enjoys no discretion in granting or denying the requested order.[72] Its duty is simply to ascertain whether the requirements of the statute have been satisfied.[73] Therefore, under the present federal immunity provision,[74] the United States Attorney alone has the power to secure immunity for any witness—be it for the prosecution or the defense.

Before immunity may be requested, however, the prospective witness must refuse to testify or provide the desired information by invoking his fifth amendment privilege against self-incrimination.[75] While the role of the court in actually ordering immunity may be limited to determining that the requirements of the statute have been complied with,[76] its role in determining whether the fifth amendment privilege has been validly asserted is not so restricted.[77] The court must determine that the person claiming the privilege indeed has a right to assert it[78] and that under the circumstances he

68. Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

69. *Id.*; Whiskey Cases, 99 U.S. 594 (1878).

70. 18 U.S.C.A. § 6003 (West Supp. 1980).

71. *Id.*

72. Ullman v. United States, 350 U.S. 422, 432-34 (1956).

73. *Id.* A challenge to the predecessor of the current statute was made on the ground that to allow the court to approve the application for the grant of immunity was tantamount to the exercise of a veto power over the decision of the United States Attorney, and thus constituted the exercise of non-judicial power by an Article III court in violation of the principle of separation of powers. *In re* Ullman, 128 F. Supp. 617, 624 (S.D.N.Y.), *aff'd sub nom.*, Ullman v. United States, 221 F.2d 760 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956). The Supreme Court, however, rebuffed this challenge by construing the statute to vest no discretion in the court, thus avoiding the constitutional issue. 350 U.S. at 433-34 (adopting the reasoning of the federal district court judge).

74. 18 U.S.C.A. § 6003 (West Supp. 1980).

75. *Id.* (immunity order requires "individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination").

76. *See* Ullman v. United States, 350 U.S. 422, 432-34 (1956).

77. Hoffman v. United States, 341 U.S. 479, 486-87 (1951) ("It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' ").

78. The privilege against self-incrimination is purely personal and cannot be asserted by or on behalf of a corporation, United States v. White, 322 U.S. 694, 699 (1944), or an unincorporated association. Rogers v. United States, 340 U.S. 367, 372 (1951). Moreover, the person desiring its protection must claim it, as it is deemed waived unless invoked. *Id.* at 370-71. The Constitution itself

has validly invoked it.[79]

In the context of defense witness immunity, the problems surrounding a valid invocation of the privilege against self-incrimination take on special importance. On one hand, in order to successfully obtain a grant of immunity for its witness the defense must demonstrate that the witness validly has invoked the privilege. On the other hand, if the defense is unsuccessful in obtaining immunity for its witnesses, it will want to show that their privilege is limited in order to obtain at least some favorable evidence.

Initially, in the context of defense witness immunity, it may be crucial to a valid claim for immunity that the witness will, in fact, invoke his fifth amendment privilege.[80] Failure to call the witness and demonstrate that the witness would indeed invoke his fifth amendment privilege has been held to be a prerequisite to a request for defense witness immunity.[81] Thus, to ensure a proper foundation for appeal, the defense must demonstrate the need for

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does not forbid the asking of incriminating questions, and, absent a valid claim of privilege, the duty to testify remains absolute. United States v. Mandujano, 425 U.S. 564, 574-75 (1976) (plurality opinion) (grand jury testimony).

Once a person has been convicted, Reina v. United States, 364 U.S. 507, 513 (1960), or pleaded guilty to a crime, Namet v. United States, 373 U.S. 179, 188 (1963), the privilege no longer remains. *Cf.* United States v. Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978) (despite a guilty plea, the privilege will remain with respect to crimes to which the guilty plea does not pertain). Similarly, the privilege does not exist with respect to a crime for which prosecution is barred by the statute of limitations. Brown v. Walker, 161 U.S. 591, 598 (1896). Moreover, a grant of immunity, coextensive with the privilege, will compel the witness to testify despite a claim of privilege. Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 475 (1972).

79. While the privilege protects against "real dangers, not remote and speculative possibilities," Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 478 (1972), it is validly invoked not only if the answers themselves would support a conviction, but also if those answers would furnish a link in the chain of evidence needed to prosecute the witness. Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159, 161 (1950). Ultimately, the court must determine whether the privilege is validly asserted and to require the witness to answer if it clearly appears that his assertion of the validity of his claim is mistaken. 341 U.S. at 486. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination." *Id.* In determining the validity of the claim of privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87.

Furthermore, courts have held that the witness himself must assert the privilege on the stand and under oath, and that it may not be invoked by an attorney as his surrogate. State v. Jennings, 126 N.J. Super. 70, 312 A.2d 864, 867 (1972), *cert. denied,* 70 N.J. 141, 358 A.2d 188 (1976). This rule, however, does not apply to a defendant in a criminal case, because of the likelihood that the jury will infer guilt from the assertion of the privilege. United States v. Haldeman, 559 F.2d 31, 96 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977). No ritualistic formula or talismanic phrase is required in order to invoke the privilege. *See, e.g.,* Empsak v. United States, 349 U.S. 190, 194 (1955) (where petitioner based his refusal to answer on "primarily the first amendment, supplemented by the fifth," the privilege had been validly asserted).

80. *See* United States v. Carman, 577 F.2d 556 (9th Cir. 1978). "Even though the government did grant immunity to two of its own witnesses, Carman cannot claim that the refusal to grant immunity to Hoffe prejudiced his trial when he failed to call Hoffe to the stand to establish any *need* for immunity." *Id.* at 561 (emphasis in original).

81. *Id.;* United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978) (defense witness immunity properly denied where defense made no affirmative showing that either of the witnesses would have refused to testify if called as defense witnesses).

immunity by showing that the favorable testimony will not be forthcoming without a grant of immunity.[82]

Additionally, while the guilty plea of a codefendant or accomplice generally may abrogate that person's privilege,[83] it will not automatically do so.[84] For example, the accomplice in *Earl v. United States,*[85] although having pleaded guilty, was nevertheless deemed to have validly invoked his privilege,[86] because the accomplice had pleaded guilty to a separate transaction.[87]

Therefore, while the role of the court under the immunity statute has been deemed to be essentially ministerial in terms of ascertaining whether the requirements of the immunity statute have been met, its role in determining the existence and validity of the witness's assertion of his fifth amendment privilege is potentially more substantial. This enhanced role of the court affords both an obstacle to obtaining defense witness immunity and an opportunity to obtain favorable defense evidence should the court refuse to grant immunity to the defense witness.

B. DEVELOPMENT OF A FLEXIBLE APPROACH TO THE DOCTRINE OF SEPARATION OF POWERS

Because the doctrine of separation of powers has formed the

82. Although assertion of the privilege against self-incrimination by the witness or a likely refusal to testify based upon the privilege is a prerequisite to a request for witness immunity, 18 U.S.C.A. § 6003 (b)(2) (West Supp. 1980), and the witness ordinarily must take the stand to claim the privilege, these determinations are often made outside the presence of the jury. *See, e.g.,* United States v. Nelson, 529 F.2d 40, 43-44 (8th Cir.), *cert. denied,* 426 U.S. 922 (1976) (suggesting procedure for trial court to conduct inquiry into claim of privilege outside of jury's presence). If the court determines in its *voir dire* of the witness that the privilege may validly be comprehensively claimed, it may excuse him entirely from testifying. United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973). In such cases, the defendant has no right to call the witness for the sole purpose of benefiting from inferences the jury may draw from his assertion of the privilege. *Id. See also* United States v. Beechum, 582 F.2d 898, 909 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979); United States v. Martin, 526 F.2d 485, 487 (10th Cir. 1975); United States v. LaCouture, 495 F.2d 1237, 1240 (5th Cir.), *cert. denied,* 419 U.S. 1053 (1974). Similarly, if the government calls a witness it knows will invoke the fifth amendment privilege, prejudicial error may result. United States v. Beechum, 582 F.2d at 908.

In determining whether the witness has validly invoked his privilege, courts sometimes have refused to entertain a blanket assertion of the privilege, and have passed on the validity of the privilege with respect to each question asked. United States v. Bautista, 509 F.2d 675, 678 (9th Cir.), *cert. denied,* 421 U.S. 976 (1975). *See generally* Note, *The Fifth Amendment Testimonial Privilege as an Impediment to the Defense When Invoked by a Potential Exculpatory Witness,* 42 ALB. L. REV. 482 (1978). To aid in this matter courts have suggested examining witnesses in the presence of the prosecution and defense, but outside the presence of the jury. *See, e.g.,* United States v. Nelson, 529 F.2d 40, 43-44 (8th Cir.), *cert. denied,* 426 U.S. 922 (1976). At least one court has suggested the possibility of an *in camera* examination to establish the proper scope of the privilege. United States v. Melchor Moreno, 536 F.2d 1042, 1047-48 (5th Cir. 1976).

83. Namet v. United States, 373 U.S. 179, 188 (1963).

84. *See* United States v. Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978) (waiver of fifth amendment rights applies solely to the crime to which the guilty plea pertains, not to other crimes for which witness may still be subject to prosecution).

85. 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

86. *Id.* at 532.

87. *Id.*

basis for courts' refusal to recognize a right to defense witness immunity,[88] it is important to determine whether that doctrine and its corollary, broad prosecutorial discretion, continue to provide legitimate obstacles to recognition of the right to defense witness immunity. Although the Constitution does not explicitly enunciate the separation of powers doctrine, it clearly envisions three separate branches of government.[89] Federal courts traditionally have given great deference to the executive as prosecutor.[90] Thus, in criminal matters, the doctrine of separation of powers confers broad prosecutorial discretion on the executive.[91] In *United States v. Cox,*[92] the court characterized this discretion as follows:

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.[93]

Courts have construed this discretion not only to confer on the prosecutor broad latitude in initiating or refusing to initiate criminal prosecutions,[94] but also in prosecuting under the heavier of two criminal statutes proscribing the same conduct,[95] in plea bargaining,[96] and in granting immunity to witnesses.[97]

Prosecutorial discretion, however, is not unbounded. The doctrine of separation of powers does not envision separate

88. Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967). *See generally* Note, *Separation of Powers and Defense Witness Immunity,* 66 GEO. L.J. 51 (1977).

89. Springer v. Philippine Islands, 277 U.S. 189, 201 (1928).

90. United States v. Batchelder, 442 U.S. 114, 124 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868).

91. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965).

92. *Id.*

93. *Id.* (footnote omitted). In *Cox,* the court held that a United States Attorney could not be compelled by the court to sign a duly returned grand jury indictment, thereby initiating criminal proceedings. *Id.* at 172.

94. *Id. See also* Inmates of Atttica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-82 (2d Cir. 1973) (courts have no authority to interfere in decision not to prosecute).

95. United States v. Batchelder, 442 U.S. 114, 123-29 (1979) (federal gun control statutes). *See also* Berra v. United States, 351 U.S. 131, 134 (1956) (two tax evasion statutes construed to prohibit identical conduct).

96. *See* Brady v. United States, 397 U.S. 742, 753 (1970) (upholding validity of plea bargaining). *But see* Santobello v. New York, 404 U.S. 257 (1971) (prosecutor is bound by promises made in exchange for guilty plea).

97. Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

branches of government totally independent of one another.[98] The roles of the executive and the judiciary inevitably overlap in federal criminal prosecutions. For example, as the final arbiter of the Constitution,[99] the judiciary must ensure that the prosecution exercises its discretion within the bounds of the Constitution. Thus, a criminal defendant may raise a claim of selective prosecution or selective enforcement if the decision to prosecute is based upon an unjustifiable criterion, such as race, religion, or another arbitrary classification.[100]

While it would be an overstatement to suggest that in recent years the doctrine of separation of powers has been abandoned in the criminal trial context,[101] recent developments suggest that courts have adopted a flexible[102] approach to the doctrine of

98. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

99. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

100. United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979); Oyler v. Boles, 368 U.S. 448, 456 (1962). *See also* United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973) (prosecutor cannot discriminate based on exercise of free speech).

101. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978). In *Bordenkircher,* the Court, while recognizing the constitutional limitations on prosecutorial discretion, nonetheless upheld the exercise of that discretion by a state prosecutor who carried out his threat to have the defendant reindicted under the stricter habitual criminal act if he did not plead guilty to a lesser charge. *Id.* at 358-59, 365.

In United States v. Batchelder, 442 U.S. 114 (1979), the Court upheld, as a valid exercise of prosecutorial discretion, a prosecution decision to proceed under the stricter federal gun control statute when two different statutes proscribed the same conduct. *Id.* at 124-25. In Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), the Court reiterated the general rule that "[o]ur legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process." *Id.* at 1616.

102. In upholding the Presidential Recordings and Materials Preservation Act against a challenge based upon grounds that it violated the separation of powers doctrine, the Court, in Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-46 (1977), espoused a flexible approach to the doctrine:

> [T]he more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in United States v. Nixon [418 U.S. 683, 1974]. There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena *duces tecum* of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due great respect from the other branches, 418 U.S. at 703, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952).
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> > "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*" 418 U.S. at 707 (emphasis supplied).
>
> Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F. Supp., at 342. Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon,* 418 U.S., at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

separation of powers in general,[103] and in the criminal trial context in particular.[104] The leading Supreme Court decision in this regard, *United States v. Nixon*[105] exemplifies this flexible approach. In *Nixon,* the Supreme Court recognized that concerns for the principle of separation of powers must give way in the criminal trial context.[106] Even such a weighty concern as executive privilege cannot be allowed to thwart the truth-finding function of a criminal trial. In this regard, the Court stated:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[107]

The Court further noted that the defendant's sixth amendment rights of confrontation and compulsory process, as well as the due process guarantee, required the production of all

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Id. at 442-43 (footnotes omitted).

103. *See e.g.,* Dunlop v. Bachowski, 421 U.S. 560, 566-68 (1975) (decision of Secretary of Labor not to bring a civil action to set aside union election pursuant to the Labor-Management Reporting and Disclosure Act of 1959 is subject to judicial review). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09 (1958).

104. *See* United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), *cert. denied,* 475 U.S. 971 (1976). In *Cowan,* the court applied a flexible approach to the doctrine of separation of powers to conclude, based on rule 48(a) of the Federal Rules of Criminal Procedure, that a court may review a United States Attorney's decision to dismiss a pending prosecution. *Id.* at 513. The *Cowan* court recognized that the executive retains absolute discretion to initiate a prosecution, but once the prosecution has been initiated, its exercise is subject to judicial review. *Id.* In addition to relying on the flexible approach to separation of powers problems espoused by the Supreme Court in United States v. Nixon, 418 U.S. 683 (1974), the court in *Cowan* relied on a previous United States Supreme Court decision, Young v. United States, 315 U.S. 257, 259 (1942), in which the Court asserted its power to review a case despite the government's confession of error. The *Young* Court noted that "[t]he public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers." 315 U.S. at 259. The *Cowan* court, however, declined to uphold the district court's refusal to dismiss the pending charges and to appoint a special prosecutor. 524 F.2d at 513-15. *Cowan,* nevertheless, clearly stands for the proposition that once criminal proceedings have been instituted, the discretion of the prosecutor is circumscribed and reviewable by the courts.

105. 418 U.S. 683 (1974).

106. United States v. Nixon, 418 U.S. 683, 709-13 (1974).

107. *Id.* at 709.

relevant and admissible evidence.[108] Moreover, a generalized assertion of executive privilege could not counterbalance the specific need for evidence in a criminal trial.[109] Thus, *Nixon* not only lends support for the right to defense witness immunity in the face of an assertion of a constitutional privilege,[110] but broadly stated, it mandates a reevaluation of the separation of powers doctrine in the criminal trial context. After *Nixon*, blanket assertions of prosecutorial discretion should no longer serve to shield testimony of recalcitrant witnesses, for as the Court noted, "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[111]

In other contexts, the Court has recognized that a criminal trial is not a poker game, but a search for the truth,[112] and that rules, whether legislatively[113] or judicially[114] created, will be construed to avoid the suppression of relevant and reliable evidence.[115] To limit the application of rules which restrict access to admissible evidence to one side only furthers the image that criminal trials are, in fact, poker games, albeit played with a stacked deck.[116] The Supreme Court has repeatedly cut back on the application of the exclusionary rule because the cost of deterrence, in the form of the loss of reliable evidence, is too great.[117] The underlying basis for this retrenchment is that the exclusionary rule impairs the truth-finding function of criminal trials.[118] The

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108. *Id.* at 711.
109. *Id.* at 713.
110. *See infra* note 161 and accompanying text.
111. 418 U.S. at 710.
112. Wardius v. Oregon, 412 U.S. 470, 475 (1973) (pre-trial discovery).
113. *Id.* at 477-79 (holding invalid state notice-of-alibi statute which required defendant to notify prosecution of prospective alibi witnesses, but which imposed no reciprocal duty upon the state to reveal its rebuttal witnesses).
114. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). In *Powell*, the Court acknowledged the fourth amendment exclusionary rule as a judicially created remedy designed primarily to deter unlawful police conduct. *Id.* at 482-84.
115. *Id.* at 490. The Court in *Powell* described the effect of the fourth amendment exclusionary rule as follows:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty.

Id. at 489-90 (footnotes omitted).
116. The United States Supreme Court has itself echoed this concern when it stated, "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." Wardius v. Oregon, 412 U.S. 470, 475 (1973) (footnote omitted).
117. 428 U.S. at 490.
118. *Id.*

inability to obtain immunity for witnesses with potentially exculpatory evidence similarly impedes the truth-finding function. Extension of the right of immunity to the defense, at least in cases in which the evidence is crucial to the defense and to a fair adjudication of guilt or innocence, is therefore consistent with the Court's concern for an unencumbered truth-finding function in criminal trials.

C. KASTIGAR AND DEFENSE WITNESS IMMUNITY

Prior to the enactment of the current federal witness immunity statute, a grant of immunity insulated a witness from future prosecution for any transactions relating to his compelled testimony.[119] A grant of transactional immunity was therefore tantamount to an exercise of the prosecutor's discretion not to prosecute the immunized witness. Because the decision to initiate a criminal prosecution is a matter within the absolute discretion of the prosecutor,[120] the doctrine of separation of powers precludes a grant of judicial immunity which completely bars future prosecution of the witness. Prior to the enactment of the current federal statute, courts understandably felt constrained by the doctrine of separation of powers from granting immunity or ordering a grant of immunity to defense witnesses.[121]

In 1970, Congress amended the immunity statute to provide for "use" rather than "transactional" immunity.[122] Language in United States Supreme Court cases had suggested that, in order to withstand constitutional scrutiny, an immunity statute must provide full transactional immunity.[123] The issue of the constitutionality of the "use" immunity statute was presented in

119. *See* Kastigar v. United States, 406 U.S. 441, 451-52 (1972) (historical perspective of immunity acts). *See also* Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1611-12 (1963) (collecting various federal immunity acts).

120. *See* United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). "The Executive remains the absolute judge of whether a prosecution should be initiated. . . ." *Id.* at 513.

121. *See, e.g.*, Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

122. *See supra* note 1. *See also* notes 33-34 and accompanying text for the distinction between "use" and "transactional" immunity.

123. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892). In *Counselman*, the Court held invalid a statutory grant of use immunity, noting that it "afford[ed] no protection against the use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *Id.* at 586.

The *Counselman* dictum was repeated in subsequent decisions, most notably Albertson v. Subsersive Activities Control Board, 382 U.S. 70 (1965), in which the Court declared invalid the registration requirement of the Subversive Activities Control Act. The Court noted that the immunity provision of that statute, which required Communist Party members to register under certain circumstances, did not "preclude the use of the admission as an investigatory lead," a use barred by the fifth amendment privilege against self-incrimination. *Id.* at 80. The *Counselman* dictum was thus thought to require transactional immunity.

Kastigar v. United States,[124] and the Supreme Court upheld the amended federal witness immunity statute against a fifth amendment challenge.[125] The Court held that the statutory grant of "use" and "derivative use" immunity was coextensive with the privilege against self-incrimination.[126] In so holding, the Court dismissed as dicta language in prior cases which had suggested that an immunity statute must afford absolute immunity against prosecution for the offense to which the question relates.[127] *Kastigar* therefore dispelled the notion that the Constitution required full transactional immunity .

Enactment of the use immunity statute and its approval in *Kastigar* recasts the entire issue of defense witness immunity.[128] A judicial grant of immunity to a defense witness or an order

124. 406 U.S. 441 (1972).

125. Kastigar v. United States, 406 U.S. 441, 453 (1972).

126. *Id.* The Court in *Kastigar,* in explaining why the immunity statute was coextensive with the fifth amendment privilege, reasoned:

> The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection then does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to. . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Id. (footnote omitted; emphasis in original).

127. *Id.* at 454-55, 455 n.39. The *Kastigar* Court dismissed as dictum language in Counselman v. Hitchcock, 142 U.S. 547 (1892), to the effect that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* at 586.

The Court in *Kastiar,* however, refused to recognize such a requirement. Instead, the Court acknowledged the validity of *Counselman* and *Albertson* to the extent that they held that use immunity, without a restriction on the derivative use of the witness's testimony, was constitutionally invalid. The Court concluded, however, that immunity from use and derivative use of the witness's testimony was coextensive with the protection afforded by the fifth amendment and therefore constitutionally permissible. 406 U.S. at 453.

In Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964), the Court alluded to the permissibility of use and derivative use immunity when, in recognizing that a state grant of immunity was effective against federal prosecution and vice versa, it stated that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless *the compelled testimony and its fruits* cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 79 (emphasis added). Thus, the "use plus fruits" immunity recognized by the Court in *Murphy* became the "use plus derivative use" immunity which was statutorily implemented in 1970 and found to be constitutional in *Kastigar. See generally* Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity,* 30 MERCER L. REV. 633 (1979).

128. In United States v. Gaither, 539 F.2d 753 (D.C. Cir. 1976) (statement of Bazelon, C.J., explaining denial of rehearing en banc), Judge Bazelon questioned the vitality of *Earl* in light of the availability of use immunity:

requiring the prosecution to request immunity on behalf of the defense no longer bars a subsequent prosecution of the immunized witness. Thus, the separation of powers problem no longer focuses on the pretrial decision to prosecute, a determination which enjoys virtually unfettered protection from judicial interference. Instead, the separation of powers analysis centers on the conduct of the trial itself, a context in which the discretion of the prosecution is not absolute.[129] Although a judicial grant of use immunity could affect a subsequent decision to prosecute the immunized witness, because *Kastiger* requires the Government to bear a "heavy burden" to establish that the evidence used in the subsequent prosecution was not derived from the witness's immunized testimony,[130] such a grant of immunity would not altogether bar future prosecution of that witness.[131]

Nixon clearly indicates that in the context of a criminal trial both the executive and judiciary must play a role in protecting the public interest — to see that justice is done.[132] Therefore, because the availability of use and derivative use immunity makes it possible to grant defense witness immunity without unduly

> This court has decided that the Government cannot be compelled to grant transactional immunity to a defense witness. *Earl v. United States,* 124 U.S. App. D.C. 77, 361 F.2d 531 (1966). The costs to the Government when it grants transactional immunity, however, are much greater than when it grants use immunity. Thus I do not believe *Earl* is dispositive of the use immunity issue.

Id. at 754 n.1.

But see United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980) (rejecting argument that *Kastigar's* approval of use immunity affects the issue, because courts have no inherent power to grant immunity).

129. Unites States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied,* 425 U.S. 971 (1976).

130. 406 U.S. at 461-62. In *Kastigar,* the Court held that once a defendant demonstrated that he had testified under a grant of immunity to matters related to his prosecution the Government has the burden of establishing that its evidence against him is not tainted by showing that all of the evidence it intends to use is derived from legitimate independent sources. *Id.* at 460-62. The Court characterized the Government's burden as a "heavy" one. *Id.* at 461. *See infra* Notes 209-22 and accompanying text.

131. *See* 406 U.S. at 460-62. Some jurisdictions still employ a form of transactional immunity. For example, the North Dakota and California immunity statutes confer full transactional immunity. *See* N.D. CENT. CODE § 31-01-09 (1976); CAL. PENAL CODE § 1324 (West Supp. 1980). The fact that statutory immunity is transactional, however, does not prevent the court from fashioning a form of judicial use immunity. In Daly v. Superior Court, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977), the California Supreme Court held, in a civil discovery setting, that the trial court had the power to grant use and derivative use immunity to compel the defendants to respond to questions in depositions. *Id.* at 146-47, 560 P.2d at 1202-03, 137 Cal. Rptr. at 23-24.

132. In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court recognized that the ends of justice would be defeated if the executive branch were allowed to prevent a full exposition of the facts needed by either the prosecution or defense. *Id.* at 709. While *Nixon* did not present a conflict in positive form between the judiciary and the executive *qua* prosecutor, it did implicate the separation of powers doctrine in a conflict between the courts and the President as a third party to a criminal prosecution. *Id.* at 703-13. Thus, while *Nixon* is not express authority for the proposition that prosecutorial discretion may be tempered in the trial context by the needs of the defense and the interest of the judiciary in seeing that justice is done, it nevertheless contains very sweeping language suggesting that executive prerogative may not be used to thwart the goals of criminal justice, *i.e.,* "that guilt shall not escape or innocence suffer." *Id.* at 709 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

infringing upon prosecutorial prerogative in the charging decision, the doctrine of separation of powers no longer poses an insurmountable barrier to judicial intervention in granting or ordering immunity. Moreover, the separation of powers analysis is no longer focused upon the pretrial stage, where the prosecution enjoys virtually unfettered discretion, but upon the trial itself, where judicial concerns for the integrity of the criminal justice system weigh more heavily and where the court may exercise its inherent supervisory power.[133]

IV. CONSTITUTIONAL BASES FOR DEFENSE WITNESS IMMUNITY

Thus far, this Note has emphasized the competing interests and powers of the executive and the judiciary in the context of witness immunity. Attention is now turned to the conflict between the prosecution and the rights of the defendant, particularly his right to defense witness immunity.

Courts have characterized the right to defense witness immunity as stemming from the constitutional right to present a defense,[134] the defendant's constitutional right to obtain favorable evidence,[135] and the right to present an effective defense.[136] In *United States v. Nixon,*[137] the Court alluded to the due process[138]

133. One can make a plausible argument that the power to order or grant defense witness immunity is derived from the inherent supervisory power of the federal courts over the conduct of criminal trials. In holding inadmissible statements taken during a delay in presenting the accused before a magistrate, the United States Supreme Court characterized the supervisory power of the federal courts as follows:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.

McNabb v. United States, 318 U.S. 332, 340 (1943).

The supervisory power serves the two-fold purpose of protecting judicial integrity and deterring illegality. United States v. Payner, 447 U.S. 727, 735-36 n.8 (1980). Although this power has been employed primarily to exclude evidence, *see, e.g.,* Elkins v. United States, 364 U.S. 204, 223 (1960); McNabb v. United States, 318 U.S. 332 (1943), and occasionally to prevent prosecution, *see* United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974) (outrageous conduct by government officials in kidnapping defendant in foreign country shocked the conscience of the court), there is no apparent reason why the federal courts could not exercise their supervisory powers to facilitate the admission of evidence. Indeed, while recent decisions of the Supreme Court suggest that the supervisory power should not be used to impede the truth-finding process, *see, e.g.,* United States v. Payner, 447 U.S. 727, 735 (1980), nowhere does the Court suggest that the power not be exercised in favor of the accused to enhance this same process. *See* United States v. Nobles, 422 U.S. 225, 231 (1975).

134. *See* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials,* 9 IND. L. REV. 711, 824-30 (1976).

135. Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 STAN. L. REV. 1211, 1213 (1978).

136. Government of Virgin Islands v. Smith, 615 F.2d 964, 970 (3d Cir. 1980).

137. 418 U.S. 683 (1974).

138. United States v. Nixon, 418 U.S. 683, 711 (1974).

guarantee and the sixth amendment right to compulsory process[139] as potential sources for the right to evidence withheld under the doctrine of executive privilege. In the ordinary case it is not executive privilege, but rather the privilege against self-incrimination, which serves to bar defense access to favorable evidence. This section of this Note will explore the constitutional underpinnings of the right to defense witness immunity. The due process and compulsory process clauses are the constitutional guarantees most frequently cited as the basis for the right.[140] In certain contexts the confrontation clause may also support a right to defense witness immunity.[141]

A. COMPULSORY PROCESS AS A SOURCE FOR THE RIGHT TO DEFENSE WITNESS IMMUNITY

In *Earl v. United States,*[142] the court's refusal to grant immunity to a witness for the defense was challenged only on due process grounds.[143] Subsequently, in *Washington v. Texas,*[144] the Supreme Court breathed new life into the compulsory process clause[145] by incorporating it into the fourteenth amendment due process provision and giving it an expanded interpretation.[146] In striking

139. *Id.* at 709, 711.

140. *See generally supra* note 4 and sources cited therein.

141. United States v. Yates, 524 F.2d 1282, 1286 (D.C. Cir. 1975). In *Yates,* the court held that a police officer's testimony rebutting the defendant's alibi, by referring to statements of an acquaintance of the defendant who refused to testify, violated the defendant's sixth amendment confrontation rights. *Id.* The court suggested that a grant of use immunity to the defendant's acquaintance, thereby allowing cross-examination, would have rectified the problem. *Id.*

It should also be noted that in a situation in which a witness testifies against the defendant on direct examination but refuses to testify on cross-examination by asserting his fifth amendment privilege, all or part of that witness's direct testimony is subject to a motion to strike. United States v. Gould, 536 F.2d 216, 222 (8th Cir. 1976); Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), *cert. denied,* 390 U.S. 1005 (1968); United States v. Cardillo, 316 F.2d 606, 611 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963).

The confrontation clause is generally viewed as the converse of the compulsory process clause, and as such is not viewed as conferring a general right to present evidence in one's favor. Rather, it gives the accused the right to confront the witness "against" him. *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978). Some state courts have, however, used the confrontation clause to override testimonial privileges. *See, e.g.,* Salazar v. State, 559 P.2d 66 (Alaska 1976) (marital communication privilege); State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975) (physician-patient privilege). *Cf.* Davis v. Alaska, 415 U.S. 308, 319-20 (1974) (confrontation right to reveal bias of state's witness is paramount to state interest in maintaining confidentiality of juvenile records).

142. 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

143. Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

144. 388 U.S. 14 (1967).

145. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." *Id.* From 1807, when the clause was given a liberal reading by Chief Justice Marshall sitting as a circuit judge in the trial of Aaron Burr, United States v. Burr, 25 F. Cas. 30, 33-34 (C.C.D. Va. 1807) (No. 14, 692d), until the Supreme Court's decision in *Washington v. Texas,* the compulsory process clause lay virtually dormant as a means of guaranteeing the rights of the criminally acused. *See* Westen, Compulsory Process II, 74 MICH. L. REV. 192, 193-95 (1975); Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71 (1974).

146. Washington v. Texas, 388 U.S. 14, 18-23 (1968).

down two Texas statutes which precluded the defendant from calling a coparticipant as a witness in his favor,[147] the Court held that the compulsory process clause required more than merely extending the state subpoena power to the defense.[148] The Court held that, in addition to making available the means of compelling the attendance of witnesses, the compulsory process guarantee gives the defense the right to use the testimony of witnesses in its favor.[149] The Court concluded that the right was, in essence, "the right to present a defense."[150] The Court specifically left open the question whether or to what extent the compulsory process clause could prevail over a claim of testimonial privilege.[151]

Because *Earl* predated *Washington v. Texas,* it has been argued that the issue of defense witness immunity should be reevaluated[152] in light of the expanded definition of compulsory process. Subsequent lower court decisions, however, have refused to recognize the right to defense witness immunity as springing from the compulsory process clause.[153] Such courts rely upon the assumption that whenever a conflict arises between the defendant's sixth amendment right to compulsory process and the witness's fifth amendment privilege against self-incrimination, the fifth amendment privilege must prevail.[154]

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147. TEX. PENAL CODE ANN. art. 82 (Vernon 1952); TEX. CRIM. PRO. CODE ANN. art. 711 (Vernon 1925). The Texas statutes at issue prevented the coparticipant in *Washington,* who had been convicted and would have offered testimony exonerating the defendant, from testifying for the defendant, but not the state. 388 U.S. at 16-17.

148. 388 U.S. at 23.

149. *Id.* "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testsimony he had no right to use." *Id.*

150. *Id.* at 19. The Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

151. *Id.* at 23 n.21. The Court noted:

> 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 disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.

Id.

152. *See Clinton, supra* note 134, at 825.

153. United States v. Turkish, 623 F.2d 769, 773-74 (2d Cir. 1980). *cert. denied,* 101 S. Ct. 856 (1981); United States v. Lenz, 616 F.2d 960, 962 (6th Cir. 1980).

154. *See* United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied,* 439 U.S.

Although several commentators have argued that the right to defense witness immunity stems from the sixth amendment compulsory process clause,[155] courts which have discussed the issue appear uniformly to reject the argument.[156] Even those decisions which have recognized the right apparently have rejected the contention that it derives from the compulsory process clause.[157] Yet, in *United States v. Nixon,*[158] the Supreme Court suggested that the compulsory process clause,[159] as well as the due process clause,[160] required the production of evidence over a claim of constitutional privilege.[161] Thus, a defense witness's claim of

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1005 (1978) ("The Sixth Amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his Fifth Amendment privilege."); United States v. LaCouture, 495 F.2d 1237, 1240 (5th Cir. 1974) (defendant's rights under the compulsory process clause could not override witness's privilege against compelled self-incrimination); United States *ex rel.* Tatman v. Anderson, 391 F. Supp. 68, 71 (D. Del. 1975) ("when a witness's Fifth Amendment right against compulsory self-incrimination comes in conflict with a defendant's Sixth Amendment right to compulsory process, the witness's Fifth Amendment right dominates, forcing the defendant to go to trial on less than all the possible evidence"); Holloway v. Wolff, 351 F. Supp. 1033, 1038 (D. Neb. 1972), *rev'd on other grounds,* 482 F.2d 110 (8th Cir. 1973) ("When the Sixth Amendment and Fifth Amendment guarantees collide. . . the Sixth Amendment right must yield.").

Perhaps the most egregious example of an application of the rule that the fifth amendment right of the witness is paramount to the compulsory process right of the accused is found in Walden v. State, 284 So. 2d 440 (Fla. Dist. Ct. App. 1973). The defendant had been convicted of robbery and assault with intent to commit murder, and had been sentenced to a thirty-five year prison term. *Id.* at 440. While in prison, the defendant met another convict who admitted that he had committed the crimes for which the defendant had been convicted. *Id.* The convict gave an affidavit to that effect and agreed to testify for the defendant. Defendant moved for a new trial, but at an evidentiary hearing on his motion the man who admitted committing the crimes invoked his fifth amendment right. *Id.* at 440-41. The court refused to grant defendant's motion for new trial, citing the footnote in *Washington v. Texas,* and *Holloway v. Wolff* for the proposition that the accused's sixth amendment right must yield in such a situation. *Id.* at 441.

155. *See, e.g.,* Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 166-70 (1974); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 HARV. L. REV. 1266 (1978).

156. United States v. Lenz, 616 F.2d 960, 962 (6th Cir. 1980); United States v. Lyon, 397 F.2d 505, 512-13 (7th Cir.), *cert. denied,* 393 U.S. 846 (1968).

157. Government of Virgin Islands v. Smith, 615 F.2d 964, 970-71 (3d Cir. 1980) (discussing right to judicial immunity as stemming from due process clause); United States v. Herman, 589 F.2d 1191, 1199-1200 (3d Cir. 1975), *cert. denied,* 441 U.S. 913 (1979) (rejecting argument that right to immunity derives from sixth amendment).

158. 418 U.S. 683 (1974).

159. United States v. Nixon, 418 U.S. 683, 709 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.").

160. *Id.* at 711.

161. *Id.* at 705-06. In United States v. Nixon, 418 U.S. 683 (1974), the President asserted a claim of executive privilege as a bar to a subpoena *duces tecum* directing him to turn over certain documents and tape recordings to the Watergate Special Prosecutor. *Id.* at 686. The Court recognized that executive privilege was a constitutionally based privilege, *id.* at 708-11, but held that a generalized claim of executive privilege must yield to the specific need for evidence in a pending criminal trial. *Id.* at 713. While *Nixon* is easily distinguishable as a case *sui generis,* or as a case in which the evidence was sought over a claim of privilege not by the defense but by the prosecutor, the language of the Court speaks in general terms of constitutionally based privilege and the production of evidence "needed either by the prosecution or by the defense." *Id.* at 709.

The Court also discussed the fifth amendment privilege and other testimonial privileges. *Id.* While it is fairly arguable that such privileges might receive a different treatment than the generalized assertion of executive privilege at issue in *Nixon,* the Court's remarks concerning the scope of these privileges in a criminal case are quite universal: "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710 (footnote omitted). Thus, although

privilege arguably presents a classic confrontation between two constitutional guarantees. The Supreme Court has long recognized that in such situations the fifth amendment should not unilaterally prevail, but that a proper accomodation may be possible:

> When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent . . . .[162]

The means of making an accommodation between fifth and sixth amendment rights, which reasonably preserves both, is a grant of immunity. The Court has previously recognized that it has the inherent power to remedy constitutional violations[163] and has specifically recognized that it has the power to grant use immunity to obviate conflicts between constitutional guarantees.[164]

While recent lower court decisions suggest that the compulsory process clause may not serve as the basis for a right to defense witness immunity,[165] the Supreme Court's decision in *United States v. Nixon* lends support to a contrary conclusion. Even if the compulsory process clause alone would not provide the constitutional basis for the right to defense witness immunity, it may nevertheless provide ancillary support for recognition of the right through the due process clause.[166]

Nixon dealt with executive privilege rather than the fifth amendment privilege against self-incrimination, both are constitutionally based, and according to the Court must be narrowly construed.

162. Mason v. United States, 244 U.S. 362, 364 (1917) (quoting *In re* Willie, 25 F. Cas. 38, 38-39 (C.C.D.Va. 1807) (No. 14,692e) (Marshall, Circuit Justice, 1807)).

163. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971) (federal courts possess equitable power to remedy constitutional violations of the equal protection clause in the form of segregation in the public schools). *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532 (1972).

164. Simmons v. United States, 390 U.S. 377, 394 (1968) (Court found it intolerable that fifth amendment right would have to be surrendered to assert fourth amendment standing, and thus created a form of use immunity for defendant's suppression hearing testimony).

165. *See supra* note 153.

166. The *Nixon* Court suggested that the compulsory process right and the due process clause together might create a right to favorable evidence when it stated:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate

B. DUE PROCESS AS A SOURCE OF THE RIGHT TO DEFENSE WITNESS IMMUNITY

The due process clause is the constitutional guarantee relied on by courts that have recognized a right to defense witness immunity,[167] and is regarded by those courts which have thus far refused to find such a right as the constitutional provision from which such a right would likely emanate if it were to be recognized.[168] Moreover, the evolution of decisions of the Supreme Court suggests that if the right were to be fully recognized by that Court, it would be based on the general due process clause, rather than the more specific compulsory process clause.[169] Therefore, a discussion of the appropriate rationale for recognition of the due

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those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

418 U.S. at 711. *See also* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (plurality opinion) (constitutional right to privacy emanates from penumbras of several specific guarantees).

167. In United States v. Morrison, 535 F.2d 223 (3d Cir. 1976), the court held that the compulsory process and due process clauses were violated when the prosecutor drove a defense witness from the stand by threats of future prosecution, and thus required that the prosecution request immunity for that witness or suffer an acquittal of the defendant. *Id.* at 226-29. The Third Circuit subsequently interpreted *Morrison* as not basing the right of defense witness immunity on the compulsory process clause. United States v. Herman, 589 F.2d 1191, 1199-1200 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). In *Herman*, the court read *Morrision* as not recognizing the right to defense witness immunity based upon the compulsory process clause, but rather recognizing statutory immunity as a cure for government misconduct. *Id.* at 1200. The *Herman* court did, however, acknowledge that the possibility for judicially fashioned use immunity for defense witnesses did exist, but that a right to such immunity sprang from the due process clause, not the compulsory process clause.

Finally, in Government of Virgin Islands v. Smith, 615 F.2d 964, 968-72 (3d Cir. 1980), the Third Circuit recognized that the defense right to both statutory and judicially granted use immunity for its witnesses was based on the due process clause.

168. United States v. Turkish, 623 F.2d 769, 773-74, 777 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981); United States v. Davis, 623 F.2d 188, 193 (1st Cir. 1980); United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980); United States v. Allessio, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

169. While the Warren Court was more likely to find constitutional violations under the specific guarantees of the Bill of Rights, perhaps because of its selective-incorporation approach to the fourteenth amendment due process clause, *cf.* Israel, *Criminal Procedure, The Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1326-30 (1977) (discussing Warren Court's selective incorporation of specific constitutional protections), the Burger Court seems to prefer to base its decisions on the more general protection of the due process clause. *See, e.g.*, Ham v. South Carolina, 409 U.S. 524 (1973) (defect in *voir dire* found to violate "essential demands of fairness" of due process, rather than right to jury trial).

One commentator has urged that decisions, where possible, should be grounded on specific constitutional guarantees rather than the general protection of the due process clause because of the greater protections afforded under the specific guarantees. *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 130-31 (1974). *See also* Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The *Donnelly* Court stated:

> When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.

Id. at 643.

process right to defense witness immunity is necessary. Two separate but supporting justifications emerge from case law buttressing a right to defense witness immunity under the due process clause: First, the due process clause supports the defendant's right to exculpatory evidence; second, the due process clause supports a defense right to a fair balance of procedures in the search for truth.

1. Due Process Right to Exculpatory Evidence

The due process right to defense witness immunity, based on the need for exculpatory evidence, proceeds from a line of United States Supreme Court cases beginning with *Roviaro v. United States*,[170] and culminating in *Chambers v. Mississippi*.[171] In *Roviaro*, the Supreme Court held that an assertion of the informer's privilege must yield "'[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'"[172] In *McCray v. Illinois*,[173] the Court found that the same privilege need not give way in the context of a suppression hearing where the issue contested was probable cause to justify a search and seizure.[174] The Court did, however, reaffirm the validity of its holding in *Roviaro*, which involved "the trial itself where the issue was the fundamental one of innocence or guilt."[175]

The ability to hang the right to defense witness immunity on a single constitutional peg could admittedly provide greater protection and avoid the case by case jurisprudence of the due process approach of fundamental fairness. Courts which have considered the issue, though, have universally rejected the notion that the compulsory process clause is the source of the right. The mere fact that the right to defense witness immunity stems from the general protection of the due process clause, however, does not necessarily mean that a court may not lay down specific guidelines and standards for the application of the right. In Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980), this is precisely what the court did. *Id.* at 972. Moreover, the Supreme Court in related contexts has set down similar standards for judging the application of rights emanating from the due process clause. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 103-12 (1976) (establishing standard of materiality for prosecutorial disclosure of exculpatory matter to the defense).

170. 353 U.S. 53 (1957).

171. 410 U.S. 284 (1973).

172. Roviaro v. United States, 353 U.S. 53, 60-61 (1957). In *Roviaro*, the defendant appealed his conviction for sale and illegal transportation of narcotics. *Id.* at 58-59. He contended that the trial court committed reversible error when it allowed the Government to refuse to disclose the identity of an informer who participated in the sale and was therefore a material witness to the defendant's connection with the narcotics. *Id.* at 55. The Government's refusal to disclose the identity of the informant was based on the informer's privilege. *Id.* at 59. The Supreme Court found that this privilege was limited, and that disclosure may be required where relevant and helpful to the defense of the accused. *Id.* at 60-61. A determination whether disclosure was required involved a balancing of the needs of the public in protecting the flow of information to the police and the individual's right to prepare his defense. *Id.* at 62. In evaluating the defendant's right, the Court considered the materiality of the informer's potential testimony in light of the charges and the other evidence. *Id.* Because the unidentified informer was the only witness to counteract the testimony of the police officer, who had secreted himself in the trunk of the car in which the defendant and the informer were riding, the Court held that prejudicial error had been committed. *Id.* at 64-65.

173. 386 U.S. 300 (1967).

174. McCray v. Illinois, 386 U.S. 300, 309 (1967).

175. *Id.*

Thus, *Roviaro* broadly supports a defendant's right to information helpful to the preparation of his defense or essential to a determination of his innocence or guilt, despite the interjection of a privilege or the Government's refusal to make the needed information available.

In *Brady v. Maryland*,[176] the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[177] Thus, *Brady*, by forbidding prosecutorial suppression of favorable evidence, broadly mandates prosecutorial disclosure of all exculpatory evidence. In *United States v. Agurs*,[178] the *Brady* holding was extended to exculpatory evidence not requested at all, or requested in only general terms.[179] The Court in *Brady* noted: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[180]

A due process challenge based on *Brady* was raised in *Earl v. United States*,[181] but was rejected on the ground that prosecutorial refusal to request defense witness immunity did not involve the affirmative suppression of evidence.[182] *Agurs*, however, suggests

176. 373 U.S. 83 (1963). In Brady v. Maryland, 373 U.S. 83 (1963), petitioner and a companion were found guilty of murder and sentenced to death. Brady and his companion were tried separately, with Brady being tried first. *Id.* at 84. There was no apparent question as to Brady's participation in the crime; however, Brady testified that his companion had done the actual killing. *Id.* Prior to trial, the defense had specifically requested disclosure of any statements made by Brady's companion. Several statements were shown to defense counsel, but one statement of the companion, in which he admitted the actual homicide, was withheld until after Brady had been tried, convicted, and sentenced. *Id.* Although acquiescing in the conclusion of the Maryland court that withholding this evidence would not have affected the outcome of the trial with respect to the issue of guilt, the Supreme Court nevertheless concluded that a new trial on the issue of punishment was required. *Id.* at 87-91.

177. *Id.* at 87.

178. 427 U.S. 97 (1976). In *Agurs,* the Supreme Court addressed the issue of the standard of materiality that was required to entitle the defense to evidence in the prosecution's possession. United States v. Agurs, 427 U.S. 97, 107 (1976). The evidence at issue in *Agurs* consisted of the murder victim's two prior convictions for assault and carrying a deadly weapon. *Id.* at 100-01. The *Agurs* Court set out the various standards of materiality depending upon prosecutorial use of perjured testimony, suppression of obviously exculpatory evidence specifically requested, and voluntary disclosure of exculpatory evidence unrequested or only generally requested. *Id.* at 103-12. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 STAN. L. REV. 1211, 1235-36 n.111 (1978).

The Court in *Agurs* held that evidence which is not obviously material or exculpatory need be turned over to the defense only if the omitted evidence would create a reasonable doubt that does not otherwise exist. 427 U.S. at 112. The Court, however, read *Brady* as requiring the disclosure of evidence which is obviously of substantial value to the defense, even without a specific request. *Id.* at 110.

179. *Id.* at 102.

180. Brady v. Maryland, 373 U.S. 83, 87 (1963).

181. 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

182. Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967) ("Here the prosecution has not affirmatively withheld a witness or concealed evidence.").

that affirmative action by the prosecutor to make evidence or testimony unavailable is not the *sine qua non* for the assessment of a due process violation.[183] Indeed, the distinction seems artificial when viewed in the light of the prosecution's affirmative duty to disclose exculpatory evidence. Moreover, the fact that the unavailability of the exculpatory evidence is occasioned by a witness's invocation of his privilege against self-incrimination, rather than prosecutorial obstinance, is immaterial because the prosecuting attorney has the power to compel the testimony by requesting immunity.

In *Chambers v. Mississippi*,[184] the Court held that the combination of the state's hearsay and voucher rules violated due process in that they prevented the defense from cross-examining its own witness and precluded testimony of other individuals who would have testified that the witness had confessed to the crime for which the defendant was charged.[185] Although the Court alluded to the confrontation and compulsory process clauses,[186] it ultimately based its decision on due process grounds,[187] holding, in effect, that the mechanistic application of state rules of evidence to exclude exculpatory evidence could not be allowed to defeat the ends of justice.[188]

Chambers, at the very least, stands for the proposition that due process will not permit arbitrary rules of procedure to prevent the introduction of exculpatory evidence by the defense. Broadly stated, *Chambers* suggests that due process guarantees the defense a constitutional right to present exculpatory evidence. It was precisely this latter reading that the United States Court of Appeals for the Third Circuit employed as the basis for recognizing the due process right to defense witness immunity.[189] In *Government of Virgin Islands v. Smith*, the court concluded that the prosecutorial refusal to request immunity for the juvenile witness whose testimony would have been exculpatory was not different in substance from the violation found in *Chambers*.[190]

Roviaro, Brady, and *Chambers* establish the defendant's right to

183. 427 U.S. at 107.
184. 410 U.S. 284 (1973).
185. Chambers v. Mississippi, 410 U.S. 284, 289-94, 302-03 (1973).
186. *Id.* at 301-02.
187. *Id.* at 302 ("We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.").
188. *Id.* at 297-98, 302.
189. Government of Virgin Islands v. Smith, 615 F.2d 964, 970 (3d Cir. 1980) ("*Chambers v. Mississippi*, . . ., albeit in a context different than immunity, furnishes strong support for the holding that immunity may be required for a defense witness if realistic meaning is to be given to a defendant's due process right to have exculpatory evidence presented to the jury.").
190. *Id.* at 970.

exculpatory evidence. A broad reading of these cases further establishes that, to be meaningful, the due process right to exculpatory evidence includes access to such evidence over a claim of privilege[191] and the right to effectively present such evidence at trial.

2. *Due Process Requirement of a Fair Balance of Procedures in Search for the Truth*

The recent decisions of the Supreme Court clearly evidence an understanding that although a criminal trial is an adversary proceeding it is, above all else, a search for the truth.[192] Thus, rules which interfere with the truth-finding function are disfavored, and testimonial privileges will be narrowly construed to avoid the loss of valuable evidence.[193] Although the Constitution itself places obstacles in the path of the search for truth by providing the accused with certain safeguards[194] and by casting the role of the defense as that of a true adversary, the Supreme Court has indicated that the adversary role of the prosecutor is limited by an overriding obligation to establish the truth:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[195]

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191. Roviaro v. United States, 353 U.S. 53, 59-61 (1957) (government informer's privilege).

192. In upholding the notice-of-alibi rule at issue in Williams v. Florida, 399 U.S. 78, 82 (1970), the Court acknowledged that the purpose of a criminal trial is a search for the truth:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id. (footnote omitted).

193. United States v. Nixon, 418 U.S. 683, 709-10 (1974).

194. The sixth amendment contains the primary trial safeguards guaranteed to the criminally accused. Other protections are afforded by the fourth and fifth amendments and the due process and equal protection clauses of the fourteenth amendment.

195. Berger v. United States, 295 U.S. 78, 88 (1935). The Code of Professional Responsibility also imposes constraints on the prosecutor. It subjects him to discipline if he institutes a prosecution when he knows or it is obvious that he lacks probable cause, or if he fails to disclose all exculpatory evidence. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1980).

In the context of pretrial discovery, the Court has recognized that the adversary nature of the trial must be tempered by due process concerns for balanced procedures designed to enhance the search for the truth. For example, in *Wardius v. Oregon,*[196] the Court held unconstitutional a notice-of-alibi rule which imposed a duty on the defense to disclose alibi witnesses without requiring a reciprocal obligation on the prosecution. The Court stated "that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street."[197]

The language of the *Wardius* Court is most instructive in assessing the due process ramifications of that decision regarding the right to defense witness immunity: "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."[198] Although a witness with potentially exculpatory evidence who invokes the fifth amendment is not technically a witness for the government, the due process clause, as construed in *Wardius,* demands, under certain circumstances, that the Government's power to make such testimony available be employed on behalf of the defense. If the Government refuses to make the testimony available by requesting immunity, the court has the power to dismiss the action[199] or, according to recent decisions of the United States Court of Appeals for the Third Circuit, grant judicial immunity.[200]

Although the due process clause clearly does not require that precisely the same procedures be made available to the defense as are vested in the government,[201] under certain circumstances the Constitution requires that witness immunity be made available to the defense. To hold otherwise would not only deprive the defendant of his right to present potentially exculpatory evidence,[202] but would be in derogation of the model of the criminal trial as a search for the truth. In addition, it would

196. 412 U.S. 470, 474-75 (1973).

197. Wardius v. Oregon, 412 U.S. 470, 475 (1973).

198. *Id.*

199. *See* United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976). *Cf.* Roviaro v. United States, 353 U.S. 53, 61 (1957) ("in these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action").

200. Government of Virgin Islands v. Smith, 615 F.2d 964, 970-71 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191, 1203-04 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

201. *See* Moore v. Illinois, 408 U.S. 786, 795 (1972) (Constitution does not require police to make a complete and detailed accounting to the defense of all police investigatory work on a case). *But see* Dennis v. United States, 384 U.S. 855 (1966), in which the Court stated with regard to defense access to grand jury minutes: "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Id.* at 873 (footnote omitted).

202. *See supra* notes 170-91 and accompanying text.

constitute an implicit rejection of the prosecutor's role as a representative of the sovereign whose duty, above all else, is to see that justice is done.

V. PROBLEMS WITH DEFENSE WITNESS IMMUNITY

Theoretically, a grant of defense witness use immunity, because it is coextensive with the fifth amendment privilege against self-incrimination, poses no problems for the witness.[203] Defense witness immunity may, however, create problems for the Government should it later decide to prosecute the witness. There are two primary arguments[204] raised against defense witness immunity: (1) It will effectively prevent subsequent prosecution because of the heavy burden imposed by *Kastigar* to prove that the evidence used in the subsequent prosecution was not derived from

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203. Kastigar v. United States, 406 U.S. 441, 453 (1972). Although a grant of use immunity is theoretically coextensive with the fifth amendment privilege, a grant of use immunity may have collateral consequence for the witness. For example, a grant of immunity will not be effective in civil proceedings. *See* Patrick v. United States, 524 F.2d 1109, 1118 (7th Cir. 1975). In addition, immunized testimony may be used in administrative proceedings. *In re* Daley, 549 F.2d 469, 476-77 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977); Segretti v. State Bar, 15 Cal. 3d 878, 886-87, 544 P.2d 929, 932-33, 126 Cal. Rptr. 793, 796-97 (1976) (holding federal use immunity order ineffective to shield witness from use of tesitmony in state bar disciplinary proceedings). Thus, a witness may have more at stake than the possibility of self-incrimination.

An additional problem for the defendant arises if the immunized witness still refuses to testify. In such situations the defendant most likely will have to be tried without the testimony, even if a due process right to defense witness immunity has been established, unless he can show that governmental misconduct produced the loss of testimony. *See* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials,* 9 IND. L. REV. 711, 830 (1976). The only remedy the defense has in such a situation is a contempt order against the witness. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

Furthermore, a witness granted immunity under a state statute providing transactional immunity will not enjoy full immunity if a separate sovereign, such as another state or the federal government, seeks to prosecute that individual on related matters. *See* Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). In United States v. First Western State Bank of Minot, 491 F.2d 780 (8th Cir.), *cert. denied,* 419 U.S. 825 (1974), the court held that a state statute automatically granting transactional immunity to witnesses did not bar a subsequent federal prosecution where the government had established, consistent with the requirements of *Kastigar* and *Murphy,* that the evidence used against the defendants was derived from independent sources. *Id.* at 782, 787.

204. Other arguments recently raised include: (1) a grant of defense witness immunity may curtail prosecutorial cross-examination of the witness for fear that in a subsequent prosecution the witness may claim that the evidence used was tainted by use of his immunized testimony; and (2) a requirement of defense witness immunity may interfere with joint trials of co-defendants. *See* United States v. Turkish, 623 F.2d 769, 775-76 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981). It is beyond the scope of this Note to provide a comprehensive treatment of these two recently raised issues.

The simple answer to the argument that the scope of prosecutorial cross-examination may be narrowed is that the prosecution enjoys no constitutional right to cross-examine witnesses. Moreover, if it did suspect that cross-examination might involve matters concerning offenses for which it would later prosecute the witness, it could seek to complete its investigation on those matters in order to sterilize its evidence against charges that it was tainted by the immunized testimony.

The question of severance of joint trials is more problematic. There is a body of authority which suggests that severance is required where one of the co-defendants possesses exculpatory evidence which he would be willing to divulge if he were tried separately. *E.g.,* United States v. Martinez, 486 F.2d 15, 22-23 (5th Cir. 1973); United States v. Shuford, 454 F.2d 772, 776 (4th Cir. 1971); United States v. Echeles, 352 F.2d 892, 897 (7th Cir. 1965). *See generally* United States v. Stout, 499 F. Supp. 605 (E.D. Pa. 1980) (addressing defendant's motion for severance and immunity for co-defendant).

the witness's prior immunized testimony;[205] and (2) a grant of defense witness immunity will allow the witness to give his confederates an "immunity bath."[206]

A. SUBSEQUENT PROSECUTION OF THE IMMUNIZED WITNESS

A grant of defense witness immunity, whether it be statutory or judicially fashioned use immunity, does not bar a subsequent prosecution of that witness.[207] However, as the Court stated in *Kastigar,* "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the Government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."[208]

1. Kastigar's Heavy Burden

The Court made it clear in *Kastigar* that the prosecution's burden of proof "was not limited to a negation of taint," but imposed an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[209] The Court, however, did not specify the burden of proof required to satisfy the affirmative duty. One court has held, by analogy to confession law standards, that the prosecution need only establish by a preponderance of the evidence[210] that the evidence sought to be used was derived from independent sources. At least one other court, however, has assumed that the prosecution must establish the independent nature of the evidence beyond a reasonable doubt.[211]

Regardless of the precise standard applied, it is clear that the burden, while not insurmountable, is substantial.[212] Because the

205. In *Turkish,* the court argued that, in order to staisfy the heavy burden imposed by *Kastigar* requiring proof that its evidence was obtained from sources wholly independent of the witness's immunized testimony, the Government may be forced to forego contact with the witness and arrange for a new team of prosecutors and investigators to pursue the case against him. 623 F.2d at 775.

206. *Id.; In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

207. *See* Government of Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980).

208. 406 U.S. at 461-62.

209. *Id.* at 460.

210. United States v. Seiffert, 357 F. Supp. 801, 805-06 (S.D. Tex. 1973), *aff'd,* 501 F.2d 974, 982 (5th Cir. 1974).

211. United States v. Henderson, 406 F. Supp. 417, 423 (D. Del. 1975).

212. *See* United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973). The court in *McDaniel* held that, on the facts of that case, the Government's burden of proof was virtually undischargeable. *Id.* The prosecutor had obtained and read a three-volume transcript of the defendant's immunized state grand jury testimony. *Id.* at 311. Despite the Government's offer of proof that all of the evidence used in the prosecution had been obtained prior to the perusal of the immunized testimony by the United States Attorney, *id.* at 309, the court held that the immunized testimony could not be used for any purpose, including the decision to prosecute. *Id.* at 311. The court stated that because

fifth amendment requires that a grant of immunity afforded by one sovereign be recognized by other sovereigns, at least to the extent of use and derivative use, a grant of witness immunity by a federal prosecutor may affect state prosecution of related matters, and vice-versa.[213] Where the same sovereign both grants immunity and subsequently prosecutes, it may be very difficult to establish that the evidence used to prosecute was derived from an independent source.[214] Prosecution, however, is not impossible. For example, evidence that has been obtained prior to the immunity grant is undisputably derived from an independent source.[215]

There has been some question whether *Kastigar* precludes even non-evidentiary use of the immunized testimony. The language of *Kastigar* suggests that it does,[216] and the United States Court of Appeals for the Eighth Circuit has so held.[217] Thus, not only may the immunized evidence not be used to develop investigatory leads,[218] but according to the Eighth Circuit, it also may not be used to decide to initiate prosecution or otherwise plan trial strategy.[219]

Although *Kastigar's* approval of use immunity enhances the prospect for a right to defense witness immunity,[220] the heavy burden it imposes on the prosecution to prove the independent nature of evidence used in a subsequent prosecution of the witness poses a problem for full recognition of the right to defense witness immunity. Although the argument that a grant of defense witness

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the immunized testimony could have had a subjective effect on the prosecutor, the Government could not meet its burden. *Id.* at 312. *But see* United States v. First Western State Bank of Minot, 491 F.2d 780, 787 (8th Cir.), *cert. denied,* 419 U.S. 825 (1975) (Government met its burden by showing that federal authorities had no knowledge of the compelled testimony and by introducing FBI reports and federal grand jury transcripts compiled before immunzed testimony given).

213. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

214. United States v. First Western State Bank of Minot, 491 F.2d 780, 783 (8th Cir.), *cert. denied,* 419 U.S. 825 (1975). *See also* Kastigar v. United States, 406 U.S. 441, 469 (1972) (Marshall, J., dissenting).

Perhaps the reason that subsequent prosecution of immunized witnesses is thought to be so difficult is that rarely are such prosecutions attempted. It seems logical that for the same reasons that prosecutors are unlikely to seek harsh penalties for those who cooperate, so too are they unlikely to prosecute witnesses who have been immunized to aid in the conviction of others. *Cf.* United States v. Kuehn, 562 F.2d 427, 430 (7th Cir. 1977) (United States Attorney sought to enjoin state prosecution of previously immunized federal witness).

215. In *United States v. First Western State Bank of Minot,* the United States Court of Appeals for the Eighth Circuit noted that FBI reports made prior to the date of the immunized testimony and federal grand jury sessions held prior to the testimony "irrefragably should be considered as independent sources." 491 F.2d at 783.

216. Kastigar v. United States, 406 U.S. 441, 453 (1972). In *Kastigar,* the Court stated that the use immunity statute "prohibit[ed] the prosecutorial authorities from using the compelled testimony in *any* respect." *Id.* (emphasis by court).

217. In *United States v. McDaniel,* 482 F.2d 305 (8th Cir. 1973), the court interpreted the *Kastigar* prohibition against any use, direct or indirect, to include "focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *Id.* at 311.

218. *Id.*

219. *Id.*

220. *See supra* notes 125-33 and accompanying text.

immunity would *prevent* subsequent prosecution of that witness, thus interfering with the prosecutorial prerogative, should no longer be considered valid,[221] a variation of that argument remains. The argument now advanced is that, because the prosecution has such a heavy burden to prove that evidence it uses in a subsequent prosecution is derived from independent sources, the decision to prosecute is impeded or is made so costly that rarely will an immunized witness be prosecuted.[222] There are, however, ways to alleviate the heavy burden imposed on the prosecution and thus facilitate the prospect for defense witness immunity.

2. Sterilization of Prosecution Evidence

In many cases, a grant of defense witness use immunity will be virtually costless to the Government. For example, if the Government has already assembled all the evidence necessary to prosecute the witness, the Government will be able to establish that it has derived from independent sources all of the evidence it seeks to use against the witness.[223] To facilitate the burden of establishing that the evidence is free of taint, the Government may catalogue the evidence or submit it to the court under seal.[224] Similarly, when the sovereign granting immunity is different from the sovereign prosecuting the witness, the compelled testimony may be isolated from the prosecuting sovereign.[225]

Problems arise, however, when the same sovereign grants immunity and later attempts to prosecute the witness.[226] In such cases, the court may grant a continuance to allow the prosecution to assemble evidence against the witness prior to his testimony.[227] In

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221. *Id.*

222. The irony of this situation is that the more the prosecution's burden is lightened, the easier it will be to justify a right to defense witness immunity. Thus, in order to enhance the rights of the defendant, the rights of the witness and future defendant must be limited.

223. *See* United States v. First Western State Bank of Minot, 491 F.2d 780, 783 (8th Cir.), *cert. denied,* 419 U.S. 825 (1975) (discussed in note 215 *supra*). *See also* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 HARV. L. REV. 1266, 1276-77 (1978).

224. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 STAN. L. REV. 1211, 1240 (1978); *cf.* Government of Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980) (Government may be able to "sterilize" the testimony of the immunized witness and isolate it from future testimony).

225. *See* United States v. Bianco, 534 F.2d 501, 509-10 (2d Cir.), *cert. denied,* 429 U.S. 822 (1976) (immunized grand jury testimony kept under lock and key by state district attorney, thus indicating independent source of evidence in federal prosecution).

226. *See supra* note 214.

227. It seems likely that a continuance for a reasonable time to allow the prosecution to gather evidence for future prosecution would not infringe upon the defendant's right to a speedy trial, given the flexible analysis adopted by the Supreme Court in *Barker v. Wingo,* 407 U.S. 514, 530 (1972). In *Barker,* the Court held that two of the factors used to determine a speedy trial violation were the defendant's assertion of his right and prejudice to the defendant. *Id. Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 553 (1976) (continuance to allow publicity to abate may be necessary to ensure fair trial).

cases in which it is impractical for the prosecution to complete its investigation before trial or when it has no firm commitment to prosecute the witness, the Government, in order to preserve a future prosecution, may be required to isolate the immunized testimony and any leads derived from it.[228] Although these procedures and others that may be devised will not be costless, our system of criminal justice, of necessity, imposes certain costs on the prosecution, and implicitly recognizes that it is better that a few guilty people go free than that an innocent person suffer.[229]

B. THE IMMUNITY BATH PROBLEM

The "immunity bath" argument contains two aspects. First, it is feared that an immunized defense witness may attempt to enlarge the scope of his own immunity by spontaneously testifying to unrelated crimes, thereby setting up a challenge to a subsequent prosecution on grounds of taint. Second, grants of defense witness immunity may foster cooperative perjury. For example, a coparticipant may secure immunity for himself, admit to the crime, and exculpate his confederates with perjured testimony. The other participants, having been acquitted, will be precluded from being tried again by the double jeopardy provision;[230] the witness, even if guilty of the substantive crime, can only be prosecuted for perjury,[231] unless the Government can establish evidence of the substantive crime by independent sources. In this manner, defendants can avoid conviction of the substantive offense by exposing themselves to perjury convictions, which often carry lighter penalties.[232]

The first aspect of the immunity bath argument — spontaneous testimony about unrelated crimes — presents no real problem. The immunity conferred applies only to responsive answers.[233] Unsolicited spontaneous outbursts would not enjoy immunity. Thus, subsequent prosecution on such matters would not subject the prosecution to *Kastigar's* heavy burden.

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228. Government of Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980).

229. *Cf.* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."). Indeed, the very idea of witness immunity assumes that some guilty people must go free. Therefore, in a given situation, the prosecution may be forced to choose which of two offenders to prosecute.

230. U.S. CONST. amend. V.; Green v. United States, 355 U.S. 184, 188 (1957) (acquittal is a bar to subsequent prosecution for same offense).

231. The immunity statute itself exempts perjury from its effect. 18 U.S.C.A. § 6002 (West Supp. 1980). This provision was recently interpreted by the Supreme Court to permit, in a perjury prosecution, the use of the truthful as well as untruthful testimony given under the grant of immunity. United States v. Apfelbaum, 445 U.S. 115 (1980).

232. United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981).

233. Zicarelli v. N.J. Investigation Comm'n, 406 U.S. 472, 477 (1972).

The second aspect of the immunity bath argument is more problematic. The simple answer is that the Government already uses accomplices and coparticipants to obtain convictions. It is equally probable that such individuals when acting as witnesses for the Government will commit perjury to exculpate themselves and inculpate the defendant, as it is probable that they will subject themselves to a perjury prosecution in order to absolve their accomplices. As the Supreme Court noted in *Washington v. Texas,* "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."[234] Traditionally, concerns regarding perjury have not been allowed to dictate what evidence will be submitted to the jury. Our system of criminal justice places great faith in the jury's ability to weigh and evaluate the evidence and the credibility of the witnesses. Fear of perjury should not dictate a rule that would exclude potentially exculpatory evidence.

VI. JUDICIALLY ORDERED STATUTORY IMMUNITY AND JUDICIALLY GRANTED IMMUNITY

Having established the existence of a constitutional right to defense witness immunity under certain circumstances, it remains to be determined what circumstances will require or permit the grant of such immunity. The United States Court of Appeals for the Third Circuit, in *Government of Virgin Islands v. Smith,*[235] established two different methods for obtaining defense witness immunity — judicially ordered and judicially granted[236] — and set out requirements for each method. This section of this Note will discuss the requirements as defined by the Third Circuit and attempt to delineate the standards for possible future application.

A. JUDICIALLY ORDERED IMMUNITY

Prior to the *Smith* decision, the United States Court of Appeals for the Third Circuit had established the right to judicially ordered

234. Washington v. Texas, 388 U.S. 14, 22-23 (1967).

235. 615 F.2d 964 (3d Cir. 1980).

236. Government of Virgin Islands v. Smith, 615 F.2d 964, 968-72 (3d Cir. 1980). "Judicially ordered immunity" refers to the situation recognized in United States v. Morrison, 535 F.2d 223 (3d Cir. 1976), and United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979). The court held that, because of prosecutorial misconduct, due process required that the prosecution either request defense witness immunity or face acquittal. 535 F.2d at 229; 589 F.2d at 1204. In actuality, all statutory immunity is judicially ordered. The term is used in this section of this Note to distinguish between statutory immunity ordered by the court and judicially fashioned use immunity, which is referred to as "judicially granted immunity."

immunity. In *United States v. Morrision,*[237] the court held, under the circumstances of that case, that due process required the Government to request immunity for the defense witness or face an acquittal.[238] In *United States v. Herman,* the court read *Morrison* as requiring the defendant to show that the Government's action was taken "with the deliberate intention of distorting the judicial fact finding process."[239] Later, in *Smith,* the court added the further requirement that the defendant show that the evidence is relevant.[240] Thus, to be entitled to an order requiring the Government to request a grant of immunity for a defense witness or face an acquittal, the defendant must establish that the witness's testimony is relevant and that the government action resulting in the loss of the witness's testimony was taken with the deliberate intention of distorting the factfinding process.[241] The burden is clearly on the defendant to establish these two elements, and while the applicable burden of proof has not been articulated, the *Herman* court suggested that inclusion of the second element required a substantial evidentiary showing, at least for reversal.[242]

1. Relevancy

The *Smith* court's discussion of the relevancy requirement for judicially ordered immunity clearly indicates that the court did not intend to impose a high materiality standard as a prerequisite for such immunity.[243] Although the materiality standard the court intended remains unclear, it is unlikely that mere relevance in the evidentiary sense would suffice.[244] Both *Morrison* and *Smith* involved

237. 535 F.2d 223 (3d Cir. 1976).

238. United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976).

239. United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

240. Government of Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980). The court, however, was careful to point out that "relevancy" did not require that the witness's testimony be either clearly exculpatory or essential to the defendant's case. The court noted: "Immunity granted under this theory need not be predicated upon a finding that the witness' testimony is clearly exculpatory or otherwise essential to the defendant's case." *Id.* at 969 n.7.

241. *Id.* at 969.

242. 589 F.2d at 1204. "[W]e think that the evidentiary showing required to justify reversal on that ground must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact-finding process." *Id.*

243. *See supra* note 240.

244. In the strict evidentiary sense, "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

It seems unlikely that the defense would be entitled to have a witness immunized merely because that witness had some relevant evidence to present. It seems more probable that some higher standard of materiality or need would be required. Even if mere evidentiary "relevance" is all that is required, judicially ordered immunity would likely not be available unless the evidence were highly relevant or material to a crucial issue. In situations in which the evidence is not highly relevant or material to a crucial issue it would be difficult to show that the prosecutor was deliberately trying to distort the factfinding process.

testimony that was either crucial to the defense[245] or clearly exculpatory,[246] thereby suggesting the possibility of a high materiality standard. The *Smith* court, however, explicitly avoided such a high standard.[247]

Courts in the future will probably find evidence that is cumulative[248] or that concerns the credibility of a witness on a collateral matter[249] will not satisfy the materiality standard implicit in the *Smith* relevancy requirement. Courts, however, should avoid imposing high materiality standards similar to those set forth in *United States v. Agurs*.[250] The standards of materiality articulated in *Agurs* — whether the suppressed evidence might have affected the outcome of the trial or created a reasonable doubt — relate to post-trial review of the effect of the prosecution's withholding potentially exculpatory evidence.[251] Those standards are inappropriate in an immunity situation, in that they were specifically designed for reviewing courts and necessarily require a post-trial evaluation of the effect the excluded evidence may have had on the trial.[252] A decision by the trial court to grant immunity based on prosecutorial misconduct, however, necessarily becomes a pretrial or trial decision,[253] and should not be held to the same standard as post-trial review by an appellate court.

Smith and *Herman* make clear that the second element —

245. The witness the Government refused to immunize in *Morrison* would have testified that she, and not the defendant, had been involved in the conspiracy to sell drugs. 535 F.2d at 225. The witness's testimony, while not totally exculpatory of the defendant, would have shown that the defendant's participation in the conspiracy was minimal. *Id.*

246. The testimony of the witness in *Smith* would have been clearly exculpatory as to three of the defendants. 615 F.2d at 970.

247. *Id.* at 969 n.7.

248. *See* United States v. Turkish, 623 F.2d 769, 778 (2d Cir. 1980), *cert denied*, 101 S. Ct. 856 (1981) (testimony would have been cumulative, immaterial, or impeaching only on collateral matters).

249. *Id. See also* United States v. Praetorius, 622 F.2d 1054, 1064 (2d Cir. 1979) (testimony would have gone to witness credibility which, under the circumstances, was a collateral matter).

250. 427 U.S. 97 (1976).

251. *See supra* notes 177-83 and accompanying text. The Court, in United States v. Agurs, 427 U.S. 97 (1976), interpreted the standard of materiality in *Brady* as follows: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that *the suppressed evidence might have affected the outcome of the trial.*" *Id.* at 104 (emphasis added).

The *Agurs* Court discussed the materiality standard in a situation in which the evidence was not obviously exculpatory as follows: "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by *evidence establishing guilt beyond a reasonable doubt.*" *Id.* at 112 (footnote omitted; emphasis added). Thus, in the *Agurs* setting, the withholding of evidence does not violate due process unless the additional evidence would be sufficient to create a reasonable doubt. *Id.* at 112-13.

252. Although the *Agurs* Court recognized that the problem of withholding potentially exculpatory evidence arises in two contexts—before trial and after trial—and that the same standard for materiality applies in both contexts, 427 U.S. at 107-08, the *Agurs* standard, which requires that the omitted evidence create a reasonable doubt, is peculiarly designed for the post-trial context. *Id.* at 112-13.

253. In United States v. Shober, 489 F. Supp. 412 (E.D. Pa. 1980), the court, although awaiting the close of the Government's case before deciding whether to grant judicial immunity, nevertheless recognized that the right should be afforded before trial "when the accused can still marshal his resources to make the right actually, not just theoretically, a useful one." *Id.* at 417.

whether the government action was taken with the deliberate intention of distorting the fact finding process — should impose the chief obstacle to judicially ordered immunity.[254] Because of the extraordinary nature of defense witness immunity, the relevancy requirement should include a materiality standard that reflects the defendant's need for the evidence and relates to the central issue of guilt or innocence.[255] In *Roviaro v. United States,*[256] the Supreme Court considered the relevancy of the testimony of an unidentified government informer. The Court applied a relevancy requirement[257] to determine whether the informer's privilege was outweighed by the "individual's right to prepare his defense."[258] In concluding that the informer's possible testimony would be "highly relevant" and potentially helpful to the defense, the Court discussed three possible ways in which the informer's testimony could have been "relevant" to the defense.[259] First, because the informer had helped set up the drug transaction and was the defendant's sole contact, his testimony might have disclosed entrapment.[260] Second, he was the only witness who might have testified to the defendant's lack of knowledge of the contents of the package.[261] Finally, the informer was the only person who could contradict the testimony of the officer concealed in the trunk of the car,[262] who was the Government's crucial witness in the case.[263]

The standard of materiality used in *Roviaro*[264] is equally applicable to the relevancy requirement for judicially ordered defense witness immunity. Both situations properly require pretrial or trial determinations, in which the defendant's access to evidence necessary to the preparation of his defense is thwarted by the assertion of a privilege. While the standard does not require the evidence to be clearly exculpatory or essential to the defendant's case, it does demand that the evidence not be otherwise available and that it somehow relate to crucial issues in the case. Although testimony going to the issue of factual guilt would clearly be relevant, the

254. *See infra* note 266 and accompanying text.

255. *See supra* note 244.

256. 353 U.S. 53 (1957).

257. The Court held that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is *relevant* and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (emphasis added).

258. *Id.* at 62.

259. *Id.* at 63-65.

260. *Id.* at 64.

261. *Id.*

262. *Id.* at 56.

263. *Id.* at 64.

264. That standard requires that the evidence be "relevant and helpful to the defense of the accused, or . . . essential to a fair determination of a cause." *Id.* at 60-61. Evidence meeting this standard would include the testimony of a witness or participant, at least when he is the sole material witness for the defense. *Id.* at 64.

materiality standard employed in *Roviaro* encompasses testimony relevant to legal guilt[265] as well. Moreover, testimony which goes to the credibility of crucial government witnesses would also be relevant under the materiality standard of *Roviaro.*

Therefore, while the relevancy requirement articulated in *Smith* demands more than evidentiary relevance, it was not designed to impose the chief obstacle to court-ordered immunity. The materiality standard implicit in the relevancy requirement should not be patterned after the high standards of *Agurs,* but should be similar to the more relaxed standard adopted in *Roviaro.*

2. Deliberate Distortion of the Factfinding Process

It is clear that the second requirement for establishing a right to judicially ordered immunity — that the governmental action resulting in the loss of the witness's testimony was taken with the deliberate intention of distorting the factfinding process — was designed to impose a substantial burden on the defense.[266] The *Smith* court, however, failed to articulate the burden of proof with respect to this element, although it did indicate that in order to be entitled to judicially *granted* immunity the defendant must convincingly establish the prosecution's wrongful intent.[267] On the facts of *Smith* the court did, however, find that the defense had made a prima facie showing entitling it to an evidentiary hearing on the issues of judicially ordered statutory immunity and judicially granted immunity.[268] Thus, in order to determine what constitutes a prima facie showing of a deliberate intention to distort the factfinding process, it is helpful to examine *Smith* and the factors the court found persuasive on this issue. In addition, an examination of *Morrison* and *Herman* may be useful to determine what specific conduct might satisfy this requirement.

In *Morrison,* the court held that due process mandated that the

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265. The *Roviaro* Court's discussion of the evidence as highly relevant because possibly bearing on entrapment and lack of knowledge, clearly indicates that the Court was concerned with testimony relevant to legal as well as factual guilt.

In a recent federal district court case involving a motion for defense witness immunity, the court rejected the request, in part because the proffered testimony concerned the defendant's "lack of knowledge," and the court felt that a witness other than a psychiatrist could not testify to another person's state of mind. United States v. McMichael, 492 F. Supp. 205, 208 (D. Colo. 1980). This decision is clearly inconsistent with the relevancy requirement set out in *Smith.*

266. United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

267. Government of Virgin Islands v. Smith, 615 F.2d 964, 972 (3d Cir. 1980). Before a court can grant defense witness immunity the "defendant must make a convincing showing sufficient to satisfy the court that the testimony . . . is both clearly exculpatory and essential to the defendant's case." *Id.; see infra* notes 316-25 and accompanying text.

268. 615 F.2d at 966.

prosecution request immunity or suffer an acquittal when the prosecutor by his threats and warnings had effectively driven the defense witness from the stand.[269] Such conduct, under the *Herman* reconstruction, evidenced a deliberate intention to distort the factfinding process.[270] The court in *Herman* did not indicate why there should be a distinction between a prosecutor's warning to a witness that she would be subject to prosecution based on her testimony, and the implicit threat of future prosecution every witness faces.[271] Nevertheless, *Smith* and *Herman* make clear that the loss of testimony must result from prosecutorial misconduct,[272] not merely from the chilling effect posed by the implicit threat of future prosecution.

In *Herman,* the court found no intention to distort the factfinding process when the Government refused to request immunity for the defense witness, against whom charges had been dismissed without prejudice.[273] The court deemed it crucial that the evidence established no relationship between the decision to grant immunity to prosecution witnesses and not to defense witnesses.[274] The *Herman* court concluded that the defense had not met its burden of showing that the prosecution's refusal to request defense witness immunity was done with the deliberate intention of distorting the factfinding process.[275]

The United States Court of Appeals for the Third Circuit has explicitly noted that the mere tendency of the prosecution to use its discretion in granting immunity to make it more likely that defendants will be convicted does not constitute prosecutorial misconduct requiring judicially ordered immunity.[276] In *Smith,* the court noted three factors which created a prima facie case of prosecutorial misconduct: First, the prosecution's case was inherently weak, resting mainly on the testimony of one witness; second, the prosecution's refusal to request immunity resulted not only in the loss of the witness's testimony, but furnished the basis for the Government's objection to a prior favorable statement of the witness; and finally, the Government's lack of jurisdiction over the juvenile witness and its failure to justify its refusal to seek immunity suggested that it deliberately intended to keep his testimony from

269. United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976).

270. United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

271. *See* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 HARV. L. REV. 1266, 1271 (1978).

272. *See* 615 F.2d at 968.

273. 589 F.2d at 1199.

274. *Id.* at 1204.

275. *Id.*

276. *Id.* at 1203-04; Government of Virgin Islands v. Smith, 615 F.2d 964, 968 (3d Cir. 1980).

the jury.[277] The court indicated that the crucial factor was the lack of jurisdiction, coupled with the "highly relevant, and possibly exculpatory" nature of the evidence.[278]

Subsequent decisions have distinguished *Smith* as involving an unusual or bizarre set of facts.[279] The United States Court of Appeals for the Second Circuit, in *United States v. Turkish,*[280] distinguished *Smith* on the ground that in *Smith* the United States Attorney had no jurisdiction over the juvenile witness and the authorities with jurisdiction had agreed to a grant of immunity.[281] Based on this analysis, it appears that the prosecution must justify its refusal to grant immunity if it does not have jurisdiction over the witness and the authorities who do have jurisdiction consent to immunity or do not intend to prosecute. Simply stated, if the Government cannot establish an interest in future prosecution of the witness, its refusal to seek immunity for a defense witness with highly relevant evidence may constitute a prima facie showing of a deliberate intention to distort the factfinding process. This analysis would shift the burden to the prosecution to justify its refusal.[282] The defendant, however, would bear the initial "substantial" burden to show no interest in future prosecution of the witness.[283]

While it may be unfair to require the prosecution to demonstrate a present intent to prosecute the witness for whom immunity is sought,[284] it would not be unfair to require an *in camera* disclosure to the court[285] of an ability to prosecute or palpable interest in future prosecution either by federal or state

277. 615 F.2d at 969.

278. *Id.*

279. United States v. Turkish, 623 F.2d 769, 773 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981); United States v. McMichael, 492 F. Supp. 205, 206 (D. Colo. 1980).

280. 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981).

281. *Id.* at 773.

282. Because questions of motivation are peculiarly within the knowledge of the prosecutor, it would be unrealistic to require the defense to also prove that the refusal to request immunity was unjustified. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 343 (2d ed. E. Cleary 1972). Just as courts often shift the burden of proof when proof of a negative fact is required, *see, e.g.,* DeRyder v. Metropolitan Life Ins. Co., 206 Va. 602, ____, 145 S.E.2d 177, 184 (1965), similarly, when facts are peculiarly within the possession of the prosecution it should be forced to come forward with evidence to justify its refusal, once the defense has shown that the prosecution has no palpable interest in a future prosecution of the witness. *See also* Government of Virgin Islands v. Smith, 615 F.2d 964, 972-73 (3d Cir. 1980) (discussing shifting burden in context of judicially granted immunity).

283. *See* 615 F.2d at 968.

284. *See* United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981). As the *Turkish* court noted, the prosecution may not yet have enough evidence to seek an indictment, but may want to keep the option of future prosecution open. *Id.* at 777.

285. An *in camera* proceeding would allow the prosecution to maintain the secrecy of any ongoing investigations, yet interpose a judicial determination as to the validity of the prosecution's assertion that it or some other jurisdiction has a legitimate claim to future prosecution of the witness. An *in camera* procedure was employed in United States v. Nixon, 418 U.S. 683 (1974), and was approved by the Court as necessary to a proper accommodation of the interests of the parties and the various branches of government, given the assertion of executive privilege. *Id.* at 714-16.

authorities.[286] Such a procedure would not unduly burden the prosecution, and in cases in which the court determines that immunity of the witness is required, the prosecution could use the *in camera* procedure to "sterilize" its evidence against the witness for future prosecution.[287]

Accordingly, based on the factors considered in *Morrison* and *Smith,* to establish a case of prosecutorial misconduct, the defense must either show overt conduct by the prosecution resulting in the witness's refusal to testify, or it must establish that the prosecution has no interest in future prosecution of that witness. The degree of relevance of the evidence will, of course, affect the prosecution's burden of rebutting the defense's evidence. For example, if the evidence is highly relevant and clearly exculpatory, the prosecution should be required to meet a heavier burden to overcome the defense's evidence that the Government has no interest in prosecuting the witness.[288] Correspondingly, if the evidence is only slightly relevant or helpful to the defense, the prosecution's rebuttal burden should be lighter.

Application of this analysis to *Earl v. United States,*[289] a case in which the requested defense witness immunity was denied, will emphasize how this analysis may affect similar cases. In *Earl,* the defense sought immunity for a witness who had negotiated a guilty plea to another transaction, and who remained subject to prosecution for the transaction with which Earl had been charged. The defense sought to adduce evidence that was highly relevant and possibly exculpatory. According to the defense, the witness would have testified that someone other than the defendant was with him on the day of the drug transaction.[290] To force the prosecution to justify its refusal to immunize the witness, the defense would initially have to show that the prosecution had no interest in future prosecution of the witness. Although the witness remained subject

286. Because the State may also have an interest in prosecuting the witness, and because a federal grant of immunity will impose upon the State *Kastigar's* heavy burden of proving that its evidence was derived from sources independent of the immunized testimony, a strong showing of a state interest in prosecution could justify a refusal to grant immunity. This would, of course, necessitate some communication between state and federal authorities, a situation which could create difficulties in proving that the State's evidence is not tainted if communications persist after the testimony is taken. However, when the communication precedes the testimony no such problem arises, and, in fact, knowledge by the State that immunized testimony is about to be given will allow it to take precautions to ensure that its leads and investigation of the witness steer clear of his immunized testimony.

287. *See supra* notes 223-29 and accompanying text.

288. Such a calculus was suggested by the court in *Smith,* when it noted that the most important factor in its determination that the defense had made out a prima facie case of prosecutorial misconduct was the absence of jurisdiction to prosecute the witness, coupled with the "highly relevant, and possibly exculpatory" nature of the evidence. 615 F.2d at 969.

289. 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967).

290. *Id.* at 532.

to future prosecution for the transaction at issue in the case, by showing that the prosecutor had dismissed those charges in return for a plea of guilty for an earlier transaction, the defense would shift the burden to the prosecutor to justify his refusal to request immunity for the witness. The prosecutor could presumably meet that burden by demonstrating that another jurisdiction had an interest in prosecuting the witness, or that despite its plea agreement it continued to assert an interest in prosecuting the witness. It is unlikely that the prosecutor could have met his burden in *Earl* because the evidence was highly relevant,[291] the government had conditioned the plea agreement on dismissal of the related charges,[292] and the District of Columbia could not prosecute the witness for the same offense.[293] Therefore, judicially ordered immunity would have been appropriate.

The prosecution rarely will be justified in refusing a defense request for immunity for a witness with whom it has entered into a plea agreement on related charges, unless another jurisdiction demonstrates a strong interest in prosecution. Similarly, once the witness has been tried and convicted on charges related to the same transaction, immunity rarely should be denied.[294] In such instances, the prosecution has already publicly demonstrated that it has no apparent interest in future prosecution of the witness, and in most cases will be foreclosed from future prosecution by the double jeopardy clause.[295]

291. In *Earl*, the defense made a proffer that the witness, if granted immunity, would have testified that he did not know the defendant, and that someone resembling the defendant was most likely involved in the drug transaction. *Id.*

292. If the plea agreement with the witness in *Earl* rested to any significant degree on the promise of the prosecutor not to initiate future prosecution for crimes arising out of the transacation with which Earl was charged, the prosecutor would be bound by his promise. Santobello v. New York, 404 U.S. 257, 262 (1971). Indeed, some courts have gone so far as to hold that the individual has a right to specific performance of the bargain even if it has not been totally consummated. *See* Cooper v. United States, 594 F.2d 12, 18 (4th Cir. 1979). *But see* Government of Virgin Islands v. Scotland, 614 F.2d 360, 362 (3d Cir. 1980).

293. The Supreme Court has recognized the "dual sovereignty" doctrine in the double jeopardy context. Thus, separate federal and state prosecutions for the same acts do not contravene the bar of double jeopardy. Abbate v. United States, 359 U.S. 187, 195-96 (1959); Bartkus v. Illinois, 359 U.S. 121, 132-36 (1959). The Court has, however, held that the dual sovereignty doctrine does not permit separate prosecutions for the same offense by a municipality and the state, Waller v. Florida, 397 U.S. 387, 394-95 (1970), or by the United States Government and a territory. Grafton v. United States, 206 U.S. 333 (1907). Therefore, the District of Columbia, being an offspring of the federal government, would not have a separate interest in prosecuting the witness in *Earl*. *Cf.* Graves v. United States, 287 A.2d 524, 529 (D.C. 1972), *vacated*, 310 A.2d 857 (1973) (discussing dual sovereignty doctrine with respect to the District of Columbia).

294. In the normal case, a conviction or guilty plea based on the very transaction for which the witness's testimony is sought will result in a loss of the privilege against self-incrimination. A guilty plea and a conviction ordinarily will erase any privilege with respect to the conduct on which they are based. Namet v. United States, 373 U.S. 179, 188 (1963); Reina v. United States, 364 U.S. 507, 513 (1960). There may, however, be situations in which the privilege is validly asserted in such contexts, if, for example, the plea or conviction left the individual subject to prosecution for related offenses. *See, e.g.*, United States v. Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978). Thus, in most cases in which the witness has pleaded guilty or been convicted prior to being called as a witness for the defense the privilege will pose no obstacle to obtaining his testimony.

295. *See* Brown v. Ohio, 432 U.S. 161, 165 (1977) (double jeopardy clause protects against

B. JUDICIALLY GRANTED IMMUNITY

Perhaps the most novel and far-reaching aspect of the court's decision in *Government of Virgin Islands v. Smith* is its holding that courts themselves possess the inherent power to grant immunity to defense witnesses.[296] The court concluded that this inherent power to grant use immunity derived from *Simmons v. United States*[297] and other decisions,[298] which assumed the inherent power of the federal courts to grant immunity to vindicate constitutional rights.[299] In *Simmons,* the United States Supreme Court granted a form of use immunity to the defendant for testimony given to establish fourth amendment standing at a suppression hearing.[300] In that context the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another."[301] Similarly, in the context of defense witness immunity, courts have inherent power to prevent the assertion of the witness's fifth amendment privilege from resulting in the surrender of the defendant's due process right to present exculpatory evidence.[302] Cognizant of separation of powers considerations, the *Smith* court was careful to minimize potential intrusion into prosecutorial prerogative by delineating the standards under which judicial immunity could be granted: "immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be

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second prosecution for same offense upon conviction).

296. 615 F.2d at 970-72. The first case to suggest the possibility of judicially granted use immunity for defense witnesses was United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979). One state court has recognized the court's right to grant statutory immunity to a defense witness. State v. Broady, 41 Ohio App. 2d 17, 321 N.E.2d 890 (1974).

297. 390 U.S. 377 (1968).

298. *In re* Grand Jury Investigation, 587 F.2d 589, 597 (3d Cir. 1978) (use immunity accorded testimony of Congressman to protect his privilege under the Speech and Debate Clause); United States v. Inmon, 568 F.2d 326, 332-33 (3d Cir. 1978) (use immunity accorded to defendant's testimony in pretrial double jeopardy hearing).

299. 615 F.2d at 971.

300. Simmons v. United States, 390 U.S. 377, 394 (1968). Although the Court in *Simmons* did not characterize its action as a form of use immunity, it has since acknowledged that *Simmons* "grants a form of 'use immunity' " to allow criminal defendants to testify at suppression hearings to assert a fourth amendment invasion. United States v. Salvucci, 448 U.S. 83, 90 (1980).

301. 390 U.S. at 394.

302. In United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981), the court distinguished the assertion of conflicting constitutional rights by different persons from the situation in *Simmons,* in which the same person was forced to choose between potentially conflicting rights. *Id.* at 776 n.4. The Supreme Court has recognized that the assertion of constitutional rights by different individuals may result in conflict. Yet, the Court has noted that the "authors of the Bill of Rights did not undertake to assign priorities" between those various rights "ranking one as superior to the other." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) (first amendment and sixth amendment rights). Instead, the Court found that it was unnecessary to establish a priority among the various rights when alternatives existed to accommodate the competing interests. *Id.* at 561, 569-70. *See also* Richmond Newspaper, Inc. v. Virginia, 100 S. Ct. 2814, 2830 n.18 (1980) (situations may arise in which right to fair trial overrides public's first amendment right to attend criminal trials).

essential; and there must be no strong governmental interests which countervail against a grant of immunity.''[303]

1. Immunity Must be Properly Sought and the Witness Must be Available

The court in *Smith* indicated that an application for judicially granted defense witness immunity in district court must name the proposed witness and specify the particulars of that witness's testimony.[304] In order to enable the court to appreciate the significance of the excluded evidence, the application for immunity must ''clearly identify'' the witness's testimony.[305] One court, recently applying this standard, held that a letter from the witness's attorney which suggested only by inference that the witness's testimony would exculpate the defendant did not clearly identify the witness's testimony.[306] The court also noted that the letter was not based upon any recent conversation with the witness, but on the witness's prior public statements.[307] Inferentially, the court suggested that the defense could meet the requirement of particularly identifying the witness's proposed testimony if the application specified a recent statement made by the witness himself. In *Smith,* the defense met this requirement by referring to the witness's statement to the police which inculpated himself and exculpated three of the defendants.[308]

At least one court has suggested that, to be timely, a motion for judicially granted defense witness immunity must be made before trial.[309] In addition, one court has held that, although the motion should be ruled on before trial, a court may await the close of the Government's case to decide whether to grant immunity.[310] When the defense is aware of potentially exculpatory evidence which may be withheld by assertion of the fifth amendment privilege, it should move for defense witness immunity before trial.[311] If, however, the defense is not aware of the existence of the

303. 615 F.2d at 972 (footnote omitted).
304. *Id.*
305. *Id.*
306. United States v. Shober, 489 F. Supp. 412, 414-15 (E.D. Pa. 1980).
307. *Id.* at 415.
308. 615 F.2d at 966-67, 974.
309. United States v. Turkish, 623 F.2d 769, 772 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 856 (1981) (referring to district court's ruling denying immunity motion because it was not filed at the beginning of that trial).
310. United States v. Shober, 489 F. Supp. 412, 417-18 (E.D. Pa. 1980).
311. A pretrial motion for immunity not only will assure that the motion is timely made, but will also put the prosecution on notice that defense witness immunity may be granted. This advance notice will allow the prosecution to assess the relative merits of prosecuting the defendant as opposed to the witness, give it time to conduct an investigation of the witness, and, if necessary, provide it with an opportunity to seek a postponement of the trial.

potentially exculpatory evidence before trial, courts should permit the defense to apply for witness immunity during trial.[312]

Additionally, in order to make a proper application for judicially granted defense witness immunity, the defense must show that the witness is available.[313] "Available" presumably means physically available; however, one court has suggested that an assertion of privilege based on the speech and debate clause would render the witness unavailable for the purpose of granting judicial immunity.[314] It seems logical, however, that availability as a requirement for seeking a grant of defense witness immunity should be limited to physical availability, rather than availability in the sense of failure or refusal to testify for whatever reason. Even if some other privilege may be validly interposed, a grant of judicial immunity would be virtually harmless and costless to the prosecution. If immunity were granted and the witness refused to testify or asserted some other privilege, the only cost to the Government would be the time and effort expended to challenge the defense motion for immunity. The Government would be in no worse position to prosecute the witness than if immunity had never been granted. Moreover, to require the defense to demonstrate that the witness would not assert some other privilege, such as spousal immunity, or generally refuse to testify in spite of the grant of immunity, would impose an unrealistic burden on the defense and require a degree of prescience not normally demanded. Because the defense cannot guarantee that a witness, even if granted immunity, will not stubbornly refuse to testify, it would be unrealistic to impose a requirement of availability that demanded more than the ability to produce the witness at trial.[315]

2. *Testimony Must be Clearly Exculpatory and Essential to the Defendant's Case*

In addition to making proper application in the district court

312. Because Brady v. Maryland, 373 U.S. 83 (1963), has been interpreted to impose no duty to disclose the exculpatory evidence before trial, the defense may not be aware of the need for defense witness immunity until after the trial has begun. *See, e.g.*, United States v. Alberico, 604 F.2d 1315, 1319 (10th Cir.), *cert. denied*, 444 U.S. 992 (1979) (although nondisclosure was "troubling," *Brady* was not violated since information was presented at trial); Biddy v. Diamond, 516 F.2d 118, 124 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) (*Brady* not violated because evidence was introduced at trial and there was no indication that defense could not have taken as much time as it needed to study it during trial); United States v. Cole, 449 F.2d 194, 198 (8th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972) (no error where defendants were not informed of exculpatory information prior to trial, since *Brady* dealt with disclosure at trial). *But see* State v. Hilling, 219 N.W.2d 164, 170 (N.D. 1974) (*Brady* creates a duty of disclosure at time of demand, regardless of stage of proceedings).

313. Government of Virgin Islands v. Smith, 615 F.2d 964, 972 (3d Cir. 1980).

314. United States v. Shober, 489 F. Supp. 412, 415 (E.D. Pa. 1980).

315. To aid in the production of witnesses the defense should be entitled to use all available

and showing that the witness is available, the defense "must make a convincing showing . . . that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case."[316] Although the *Smith* court did not specify what standard of proof constitutes a "convincing showing,"[317] it is clear that the crucial requirement for judicially granted immunity is a showing that the evidence is essential and clearly exculpatory.[318] It is also clear that evidence that is ambiguous, cumulative, or relates only to the credibility of a government witness does not satisfy this requirement.[319]

The requirement that the evidence be essential to the defendant's case incorporates necessity as a predicate for judically granted immunity. Thus, judicially granted immunity should not be available unless the defense can show a *need* for the proffered testimony.[320] To establish the requisite need, the defense must show that the witness intends to assert his privilege against self-incrimination and that the evidence is not otherwise available. Thus, if other witnesses could testify to the crucial evidence for which immunity is sought, a grant of judicial immunity would be inappropriate.

The defense must also establish that the proffered testimony will be "clearly exculpatory."[321] The clearly exculpatory nature of the evidence will necessarily depend on the facts of each case. In this regard, it may be helpful to examine case law which has determined whether particular evidence withheld by the prosecution is "obviously exculpatory" as that term has been defined in situations involving the prosecutor's duty to disclose.[322] Thus, evidence disclosing mistaken identity[323] would be clearly

judicial resources. *See, e.g.*, 28 U.S.C. § 2241(c) (5) (1977) (authorizing writ of habeas corpus *ad testificandum*).

316. Government of Virgin Islands v. Smith, 615 F.2d 964, 972 (3d Cir. 1980).

317. In United States v. Shober, 489 F. Supp. 412 (E.D. Pa. 1980), without stating what would constitute a "convincing showing," the court stated that "while the burden here rests upon the defendants, that burden need not be met by any prescribed standards, such as beyond a reasonable doubt, by a preponderance of the evidence, or even by establishing that what they seek is more likely so than not so." *Id.* at 416.

318. 615 F.2d at 972 n.11.

319. *Id.* at 972.

320. In United States v. Carman, 577 F.2d 556 (9th Cir. 1978), the court concluded that the defense failed to demonstrate a need for defense witness immunity because it did not show that the witness would invoke the fifth amendment if put on the stand. *Id.* at 561.

321. 615 F.2d at 972.

322. In United States v. Agurs, 427 U.S. 97 (1976), the Court read *Brady* as holding that the prosecution has a constitutional duty to disclose obviously exculpatory evidence even if not requested to do so by the defense. *Id.* at 107.

323. The court in *Smith* found that testimony relating to the mistaken identity of three of the defendants would have been clearly exculpatory. *See* 615 F.2d at 970. *But cf.* Earl v. United States, 361 F.2d 531, 532, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) (no due process right to defense witness immunity despite testimony which would have shown mistaken identity).

exculpatory, as would alibi testimony.[324] Statements by co-participants disclosing the defendant's relative lack of involvement, while highly relevant and perhaps clearly exculpatory with respect to certain degrees of criminal offenses, would present a closer question.[325]

3. No Strong Countervailing Governmental Interest

The court in *Smith* also concluded that once the defendant has met the foregoing requirements for a grant of judicial immunity, the burden shifts to the prosecution to either rebut the defendant's showing or establish a strong countervailing governmental interest for denying the requested immunity.[326] The governmental interest in future prosecution of this witness clearly presents the strongest, and perhaps the only countervailing interest that would justify a denial of the application for defense witness immunity.[327] Assertion of an interest in future prosecution alone, however, will not satisfy the Government's burden.[328] As the *Smith* court noted, the Government's ability to prosecute the witness and to meet the heavy burden of *Kastigar*[329] may be preserved by sterilizing the witness's testimony, by granting a continuance to allow the Government to gather and marshal its evidence against the witness, or by any other option which would further the same purpose.[330] Moreover, if any option is available to the Government, it cannot meet its burden of establishing a strong countervailing governmental interest, and a grant of judicial immunity would be inappropriate.[331]

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324. Alibi testimony would qualify for immunity if the defendant was observed elsewhere at the time of the crime by a witness who was himself engaged in a crime or who feared that his testimony might implicate him in a crime or furnish a link to a crime.

325. This was essentially the question presented in United States v. Morrison, 535 F.2d 223 (3d Cir. 1976), in which the court found a right to judicially ordered, as opposed to judicially granted, immunity. *Id.* at 225.

326. Government of Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980).

327. *Id.*

328. *Id.*

329. *See supra* notes 209-22 and accompanying text.

330. 615 F.2d at 973. Although not discussed by the court in *Smith*, one option which is clearly available to the prosecution if it intends to prosecute the witness is to reverse the order of trials and try the witness first.

331. In certain situations it may be easier to obtain judicially granted immunity than judically ordered immunity. In order to be eligible for judicially ordered immunity, the defense must show a deliberate intention on the part of the prosecution to distort the fact finding process. United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). While the materiality requirement for judically ordered immunity is lower than that for judicially granted immunity, 615 F.2d at 969 n.7, the defense burden to show governmental misconduct may be difficult to meet. *See* United States v. Shober, 489 F. Supp. 412, 415, 419 (E.D. Pa. 1980) (dismissing motion for statutory immunity with prejudice, but without prejudice for judicial immunity).

C. ADDITIONAL CONSIDERATIONS OF DEFENSE WITNESS IMMUNITY

Although the court in *Smith* articulated the standards to govern grants of defense witness immunity, it generally left unresolved questions relating to its practical implementation. The *Smith* court did indicate, however, that whether the court grants or denies immunity it should carefully explain the basis for its ruling.[332] The court, however, did not state whether the trial court's ruling on the application for immunity would fall within the "collateral order" doctrine[333] and therefore be appealable before trial.

Additionally, *Smith* leaves unanswered questions regarding the actual implementation of the procedure for receiving evidence on a motion for defense witness immunity. *Smith* clearly requires an evidentiary hearing of some sort.[334] It is not clear, however, whether the various stages of the proceedings may be conducted *ex parte* or whether both sides must be present. For example, the defense may be unwilling to reveal its theory of the case in advance of trial and before the presentation of the Government's case. Such a revelation may be necessary, however, if the defense is to establish that the proffered testimony of the witness is essential to its case. Similarly, the Government may be reluctant to disclose the status of on-going investigations. Disclosure of such investigations, however, may be required to show that it has an interest in future prosecution of the witness and that no options exist to preserve that interest. To accommodate these concerns courts may employ a procedure similar to that used in determining whether to require the prosecution to reveal an informer's identity.[335] Other suggested procedures include *in camera* examination of the prospective witness by the trial judge, outside of the presence of both the prosecution and defense.[336] Such a procedure has two distinct advantages. First, it allows the court to ascertain if the testimony is clearly exculpatory and essential to the defense; and second, it provides a

332. Government of Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980).

333. Generally, only final judgments are appealable in the federal courts. 28 U.S.C. § 1291 (1977). Thus, interlocutory orders are generally not appealable because they are not final. The Supreme Court however, has created an exception to the finality requirement for orders which are collateral to the main proceeding. Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-47 (1949). The Court has recently had the opportunity to rule on two pretrial orders in criminal cases, holding that denial of a motion to dismiss on double jeopardy grounds falls within the collateral order exception of *Cohen,* Abney v. United States, 431 U.S. 651, 659-60 (1977), but that a denial of a similar motion on speedy trial grounds does not fall within the exception. United States v. MacDonald, 435 U.S. 850, 853-56 (1978).

334. 615 F.2d at 974.

335. *See* Note, *Separation of Powers and Defense Witness Immunity,* 66 GEO. L.J. 51, 79 (1977).

336. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 STAN. L. REV. 1211, 1240-41 (1978).

means, through use of a sealed record, for meaningful judicial review of the trial court's decision. An *in camera* hearing alone, however, will not enable the court to determine whether the government can establish a strong interest in not granting immunity and the unavailability of options to preserve a future prosecution of the witness. Thus, although an *in camera* examination of the witness may provide a useful adjunct to the evidentiary hearing envisioned by the court in *Smith*, it cannot by itself provide for the requisite determination that must be made to ascertain whether a grant of judicial immunity is appropriate under the *Smith* guidelines.

Other issues not addressed by the *Smith* court include the following: (1) The extent to which the trial court, in granting immunity, should limit the scope of questions that may be asked of the witness;[337] and (2) the procedures that might be used to sterilize the witness's testimony and evidence that the prosecution has already gathered against the witness for use in a future prosecution. Moreover, the court did not discuss, let alone suggest, a procedure allowing state prosecutors to intervene to establish a strong countervailing state interest in future prosecution of the witness. While these unanswered questions suggest problems for the future of defense witness immunity, they are not insurmountable given the availability of procedures used in analogous contexts.[338] The guidelines and standards for granting and ordering immunity for defense witnesses have been set down and await further explication and embellishment. Despite the potential problems and questions of proper application of the guidelines, a framework has been established for dealing with and accomodating the assertion of conflicting constitutional rights, the clash of interests between the prosecution and the defense, and the conflict between prosecutorial prerogative and judicial authority as they converge in the setting of a criminal trial.

VII. CONCLUSION

The right to defense witness immunity, hinted at in a footnote in *Earl v. United States*, has finally been recognized. While it would be an overstatement to suggest that the right is well established, it is clear, even from those cases rejecting the need for defense witness immunity on their particular facts, that most courts would recognize the right under certain circumstances. The United States

337. *Id.*
338. *See supra* note 335 and accompanying text.

Court of Appeals for the Third Circuit, in *Government of Virgin Islands v. Smith,* established guidelines for applying the right. Those guidelines represent a first step toward defining the circumstances in which courts may implement the right to defense witness immunity. The question facing courts in the future is no longer whether a right to defense witness immunity exists, but rather when that right should be applied.

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