SR

78

COMMITTEE REPORT

SENATE

1/29/79

FURTHER: None

Date: 2-13-79

Mr. President:

The Committee on JUDICIARY has had SB 78

immunity and protection of witnesses

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the Finance Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Formerly NO Rec

CHAIRMAN

S 60 (Rev. 12/78)

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM February 7, 1979

SUBJECT: Immunity of Witnesses:
SB 78

TO: Senator Robert Ziegler, Chairman
Judiciary Committee

FROM: Richard A. Bradley, Legislative Counsel RB

You recently requested our comments on the constitutional and policy implications of SB 78. I regret that the press of other business prevented my delivery of these comments before the hearing held on February 1.

The Fifth Amendment to the U.S. Constitution establishes protection to a witness for testimony given which may implicate him criminally; the provision declares:

> No person ... shall be compelled in any criminal case to be a witness against himself.

While the Fifth Amendment applies to cases in both State and Federal court, the Alaska Constitution duplicates almost verbatim the privilege in Section 9 of the Declaration of Rights [Article 1]:

> No person shall be compelled in any criminal proceeding to be a witness against himself.

While courts typically view the privilege to be essentially absolute, if the testimony cannot incriminate the witness, then the privilege cannot be asserted. Thus, if effective immunity has been granted, the witness can properly be ordered to testify and he may linger in prison for contempt so long as he refuses to comply.

But the question that typically, almost uniformly, arises is whether the grant of immunity under a statute [such as SB 78] is coxtensive with the privilege granted by the Fifth Amendment; if it is not, then the privilege granted by the amendment will override any obligation to testify mandated by the statute. This occurs, of course, because

> legislation cannot detract from the privilege afforded by the constitution. Counselman v. Hitchcock, 142 U.S. 547 (1892).

Because the Counselman decision is so significant a statement of the law on immunity, it is useful to examine the case closely.

Counselman was a grain dealer in the Midwest. He transported his grain by train. A grand jury was investigating the question whether he had received rebates from railroads which reduced the amounts he paid for the transfer of his grain below the tariffs published by the railroads. When he was asked these questions, he declined to answer on the grounds that the answers would tend to incriminate him. The grand jury asked the federal court to order him to testify and, relying on a provision of federal law, the court ordered him to testify, and when he refused, held him in contempt and jailed him. On a habeas corpus petition, the circuit court affirmed. The United States Supreme Court reversed.

The statute under which the immunity was allegedly granted provided:

> "That no pleading of a party, nor any discovery or evidence obtained from any party or witness by means of any judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: ... [R.S., §860].

The Court's language is significant:

> It remains to consider whether §860 of the Revised Statutes removes the protection of the constitutional provision for Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence that might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer he could not possibly have been convicted.
>
> The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself;" and the protection of §860 is not co-extensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed 1110, 1114-1115 [Emphasis added].

The Court then proceeded to examine the decision of other American courts on the Fifth Amendment and similar state constitutional provisions.

After an exhaustive discussion, the Court stated:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. ***Section 860, moreover, affords no protection against that use of compelled testimony which consists of gaining there from a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.
>
> ***
>
> From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer.

Two subsequent decisions of the United States Supreme Court on collateral points may be noted relatively briefly. In Murphy v. Waterfront Commission, 378 U.S. 52 (1963) a witness had been called before a state investigating commission. He declined to answer questions after a grant of immunity that was viewed as effective to protect him from prosecution under State law. He answered, however, that the answers would tend to incriminate him under Federal law and the State could offer him no immunity as to that prosecution.

Moreover, previous Supreme Court decisions had agreed that (1) the Federal government could compel a witness to give evidence that would incriminate under state law [United States v. Murdoch, 284 U.S. 141]; (2) that a state could force a witness to testify to evidence that would incriminate him under Federal law [Knapp v. Schweitzer, 357 U.S. 371] and (3) that testimony compelled by a state could be introduced into the federal courts [Feldman v. United States, 322 U.S.487]. The condition of the law led the Supreme Court to reconsider its decisions; it rejected all three:

> We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal law as well as under state law and a federal witness against incrimination under state as well as under federal law.

And

> Applying the holding of that case [Counselman] to our holdings today, that the privilege against self-incrimination protects a state witness against federal prosecution *** and that "the same standards must determine whether [a witness'] silence in either a federal or state proceeding is justified, *** we hold the constitutional rule to be 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. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absense of a state grant of immunity.

> It follows that petitioners here may now be compelled to answer the questions propounded to them. Murphy v. Waterfront Commission, 378 U.S. at 79.

And in a footnote to the quote above, the Court noted that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to a federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

The final case examined in some detail is Kastigar v. United States, 406 U.S. 441 (1972). That case examined the question whether the testimony may be compelled in the face of a Fifth Amendment claim by granting immunity from the use of compelled testimony and evidence derived there from (use and derivative use immunity) or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates (transactional immunity).

The Court reviewed the history of efforts to compel testimony. Quite apart from instances where the witness claims some possibility of incrimination resulting from the evidence, the general rule has long been recognized that a person possessing information may be compelled to disclose the information to a court. Accordingly, a Statute of Elizabeth, 5 Eliz. 1, c. 9, §12 (1562) granted courts the power to compel testimony and Lord Bacon observed in 1612 that all subjects owed their King their "knowledge and discovery." And the general common law principle that "the public has the right to every man's evidence" was considered an "indubitable certainty" by 1742. 12 T Hansard, Parliamentary History of England 675, 693 (1812) [cited in Kastigar at 443].

These rights are recognized in the Sixth Amendment requirements that an accused be confronted with witnesses against him and have compulsory process for obtaining witnesses in his favor. And the Judiciary Act of 1789 provided for compulsory attendance of witnesses in federal courts. 1 Stat. 73, 88-89.

The power to compel testimony is qualified by the Fifth Amendment. The Kastigar court described that right as a "privilege [that] reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. ***This Court has been zealous to safeguard the values that underlie the privilege.

It continued:

> Immunity statutes ... are not incompatible with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses, and their primary use has been to investigate such offenses. ***As Mr. Justice Frankfurter observed, speaking for the Court in Ullmann v. United States, 350 U.S. 422 (1956), such statutes have "become part of our constitutional fabric."

The Court noted that every State in the Union has such laws as do Puerto Rico and the District of Columbia. Alaska presently has several such laws that have narrow application. AS 45.55.190(d) is useful in security act violations and AS 06.05.020 is useful in banking act violations. Other such Alaskan immunity laws may exist.

Initially, I note that the Court summarily rejected the suggestion that the Fifth Amendment prevents the enactment of immunity acts; the Court found "no merit" to this contention.

The second question examined is the classic question: is the scope of the immunity granted co-extensive with the scope of the protection afforded by the Amendment? Petitioner urged the Court to conclude that "transactional immunity" is the minimum immunity co-extensive with the privilege. In that suggestion, the petitioners rely on Counselman. The Court agreed that Counselman had in fact established the scope of immunity acts from its decision in 1892 until the adoption of the present Organized Crime Control Act of 1970, Pub. L. 91-452.

> The new statute, which does not "afford [the] absolute immunity against future prosecution" referred to in Counselman, was drafted to meet what Congress judges to be the conceptual basis of Counselman, as elaborated in subsequent decisions of the Court, namely, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege. Kastigar, 406 U.S. 452-453.

The 1970 Act explicitly prescribes 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)....."

> 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 the 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 than 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 "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. [Emphasis in original].

The Court recognized that the "use and derivative use" doctrine appears to depend upon the good-will of prosecutors. The Court denied that this is so. Citing the footnote in Murphy quoted above.

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. 798 U.S., at 79, n.18.

And the Court stated that this "burden of proof" imposes on the prosecution the "affirmative duty" to indicate that the evidence it proposes to use is derived from a "legitimate source wholly independent of the compelled testimony." The Court noted the analogy to "coerced confessions." A "coerced confession" and its fruits may not be used in a criminal case. Jackson v. Denno, 378 U.S. 368 (1964). A prosecution untainted by the confession may continue.*

With these threshold issues before us, it is now appropriate to examine SB 78.

I. Section 1 of the Act establishes a new article in AS 12.50 relating to the immunity of witnesses; it takes effect with the new criminal code, on January 1, 1980. Section 110 establishes the legislative purpose. Section 120 provides that a prosecutor may, with the concurrence of the attorney general, execute a grant of immunity to a witness on terms mutually agreeable to the prosecutor and the witness.

Section 130 establishes a nonconsensual grant of immunity. It allows for an "in camera, ex parte application" to a superior court judge. In the application, the prosecutor has the burden of demonstrating to the court, "through clear and convincing evidence" that the testimony or evidence sought relates to crimes involving a specified list of felony offenses; the offenses are stated in §130; the prosecutor must also show that the witness has refused to testify or is likely to refuse to testify. Notwithstanding the quoted language, the burden should not be heavy.

The most unusual aspect of §130, and perhaps its most conservative aspect, relates to the provisions of §130(a)(3): the prosecutor is obliged to seal with the court "all evidence, which the state may seek to introduce into a criminal proceeding [subsequently] brought against a witness...compelled to testify under this section, which relates to any transaction about which he is compelled to testify."

Section 130(b) provides that the privilege is not available if a grant of immunity has been issued under §130(a); Sec. 130(c) provides that information responsive to a §130(a) order or "any evidence directly or indirectly derived from the testimony or other evidence or information compelled, may be used" against the witness. The immunity grant does not insulate the witness in any case for perjury. And under the logic and the mandate of §130(a)(3), no prosecution except a perjury prosecution can be filed against a witness except on evidence deposited with the court and sealed before the witness testifies. And additionally, before the superior court issues an order under §130(a) compelling testimony, it shall require the assurance that the witness, his immediate family and household have been offered protection from retribution under new AS 12.50.150.

It will be noted that the subtleties of the requirement of Kastigar that the government maintain its burden of providng that the evidence compelled was not the source of evidence used in a subsequent prosecution against the witness was dissenting Justice Marshall's main concern; he felt that the burden was illusary as a protection to the witness.

It seems that if the prosecutor files complete evidence in his possession prior to his access to compelled testimony, and only that evidence is available in a subsequent prosecution against the witness, then, as to the witness, no evidence compelled from the witness is used against the witness and the policy of the Fifth Amendment is not violated.

On the other hand, if the "evidence" filed under §130(a)(3) is not complete and in such detail as to be itself introduced into the evidence in the trial against the witness, [the term "other evidence or information" is defined in §130(g)] then the reasonable language of §130(a)(3) should require the exclusion of that evidence from the trial.

In any case, §130(a)(3) should be viewed and interpreted as a rule different than the Kastigar rule; §130(a)(3) does not establish a "burden" on the government, as Kastigar does, to show that the source of the evidence is untainted; rather, §130(a)(3) establishes a burden on the prosecution to point to evidence sought to introduced and indicate its location in the sealed deposit. Failing its location, it may not be used.

This provision does appear to be an improvement on the Kastigar rule. While a witness may not know what evidence the prosecutor has against him before compelled evidence is sought, there seems to be reasonable assurance that the evidence he gives will not be used against him.

II. The substantial judicial role in §130 appears to be somewhat unique in immunity statutes. While the Federal statute [18 USC §6003(a)] is designed to grant the District Court minimum discretion to deny a request filed by the U.S. Attorney for immunity [though the courts recognize that they retain discretion: In re Baldinger, 356 F. Supp. 153, 169-170 (C.D. Cal. 1973)], the judges of the superior court would be granted substantial discretion to determine whether the investigation is of a character to qualify for immunity [§130(a)(1)] and to seal the evidence that can be used subsequently against the witness [§130(a)(3)].

III. If the witness persists in his refusal to testify, notwithstanding the safeguards described in I, supra, then the usual sanctions can be imposed for the refusal.

A refusal "without [a] lawful excuse" constitutes civil contempt. The implicit threshold of such a finding is a judicial determination that the immunity granted is coextensive with the privilege. If the court finds that the grant is coextensive, the witness may be imprisoned until he complies or "until it is no longer within his power to comply." [§140(a) This latter phrase apparently is intended to mean that if, for example, the 120-day rule on trials intervenes, then the witness no longer has it "within his power" to comply. The concept could be stated more clearly].

When a person found in civil contempt under §140 o longer has it within his power to comply," he is g y of criminal contempt and is punishable under the penalties of §140(b). An indictment, a separate trial and conviction on the matter would be required.

IV. Secs. 3-6 of the Act constitute temporary law, effective only until §1 can take effect. It largely, if not literally, duplicates the provisions of §1 and, as such, merits no independent analysis.

V. While SB 78 appears to be of broad application, note that it is not of general application. It only applies to a list of crimes listed specifically in §130(a)(1).

VI. Transactional immunity statutes, following Counselman, were heavily criticized [and perhaps, therefore, infrequently used] for granting an "immunity bath." Note: Federal witness immunity problems and practices under 18 USC §§6002-6003, 14 American Crim. L. Rev., 275, 278 (1976). But the author of the note recognizes that "use-derivative use" statutes, such as SB 78 may well "exact the same" price from society, in light of the formidable obstacles facing on any prosecutor who seeks to prosecute an immunized witness. Note, supra, at 275, n.19.

VII. SB 78 follows the example of Federal law [18 USC §§ 6002-6003]: it denies the judiciary any role in initiating a grant of immunity and denies a witness any role in seeking protection for himself.

VIII.SB 78 follows Federal law [18 USC §6003(b)] in requiring the approval of a request by the Attorney General. [But see comment at XII].

IX. The Justice Department has made extensive use of its powers. "More witnesses were immunized under the Witness Immunity Act of 1970 during its first ten months of availability than were immunized in the preceding fifty years,..." Note, supra, at 275, n.18. More than 5,000 requests for immunity were made to the Department of Justice in the 18 months following Kastigar. Id., at 279, n.27.

Yet the number of immunized witnesses who are prosecuted appears few: While the Department of Justice does not maintain statistics on the question, "if any such instances exist, they are rare." Id., at 282, n.46. Apparently this result occurs as much because of cooperation between the Department of Justice and the witness as it does because of the procedural burdens Kastigar imposes on a prosecutor. The burden of the sealed evidence under §130(a)(3) may be expected to have a similar result.

The note indicates that the procedures required by §130(a)(3) have been actually used by the United States with success. Special Watergate Prosecutor Cox used a sealed and dated deposit to preserve evidence against John Dean. Id., p.284, n.54; see also United States v. Henderson, 406 F. Supp. 417 (D. Del. 1975).

X. On the other hand, even if a jurisdiction grants transactional immunity to a witness, he can be prosecuted in a different jurisdiction if the prosecution does not make direct or indirect use of the immunized testimony. United States v. De Diego, 511, F.2d 818, 822 (D.C. Cir. 1975); United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), cert. den., 419 U.S. 825 (1974). The Fifth Amendment does not seem to require a different result.

XI. The Fifth Amendment does not prohibit use of immunized testimony in civil proceedings. Prosecutors concerned that a witness may prefer the penalties of silence to immunized testimony have sought to protect such testimony in specified non-criminal proceedings. For example, testimony was barred against bar owners in license revocation proceedings [United States v. Braasch, 505 F.2d 139, 146 (7th Cir. 1974), Cert. den., 421 U S., 910 (1975) and against lawyers in disbarment proceedings [In re John Daley, cited in 7 Layola U.L.J. (Chic.) 58 (1976)]. The Seventh Circuit noted the "difficult question such orders present" but no decision on appeal reviewing them appears yet in the legal literature. Id., at 288.

XII. One specific policy argument against broad immunity statutes should be noted. These statutes allow prosecutors to immunize politically prominent officials while prosecuting other officials arguably no more culpable. These charges were "widespread" during the trial of former Illinois governor and Federal judge Otto Kerner, who was convicted during the administration of political opponents while "co-conspirators of arguably equal culpability were immunized and compelled to testify against [him]." Id., at 294. The note also notes other examples of the problem that immunity grants create for a perception of "unequal enforcement of the law."

In fairness to the immunity statutes, the end result can occur under other procedures. Consider, for example, selective prosecutious or prosecutious and convictions with the sentencing deferred until after the testimony [no Fifth Amendment rights would be present here after a conviction]; the severity of the sentence could be reviewed as dependent on the effectiveness of the testimony.

XIII. The approval of the Attorney General is of possibly little significance as an effective monitor of the law's use. It will obviously vary with the prejudices and biases of the incumbent officer; its parallel existance in the Federal Act [18 UCS §6003(b)] is viewed by the author of the note as ineffective. See Id., at 294 et seq.

XIV. SB 78 will not vary one rule consistent through all immunity statutes. Though the defense can obtain compelled testimony by way of the Sixth Amendment, if a witness brought into court by the defense refuses to testify because of the Fifth Amendment, the defense is stymied: it cannot grant immunity.

One case, Earl v. United States, 361 F.2d 531, rehn. den, 364 F.2d 666 (D.C. Cir. 1966), cert. den., 388 U.S. 921 (1967), see note, Right of the Criminal Defendent to the Compelled Testimony of Witnesses, 67 Colum. L. Rev. 953 (1967) raised this issue, though ineffectively for that defendant. The prosecution did not use immunized testimony; the defense called a witness who claimed the privilege of the Fifth Amendment: A three judge panel of the D.C. Circuit treated the defense argument as raising arguments by the defense of evidence suppression; the court found no evidence that the prosecution had suppressed evidence. The court suggested, however, that if the government utilized immunized testimony while refusing defense requests for immunity grants for its witnesses, a serious due process question could arise. 361 F.2d 531, 534 n.1.

United States v. Allessio, 528 F.2d 1079 (9th Cir. 1976) raised similar questions. The decision of conviction was upheld because the testimony sought from defense witnesses who claimed the privilege was not viewed as critical but rather cumulative. The court suggested one answer to the question. The court sought to avoid a situation whereby the District Court was involved in complex trial strategies; it similarly sought to avoid conferring on the defense the prerogative of immunizing witnesses. What it suggested, however, was that if a grant of immunity is necessary to ensure a fair trial for the defense, the prosecutor may be faced with the alternative of immunizing defense witnesses or having a conviction reversed. See Note, 14 Am. Crim. L. Rev. at 301.

In conclusion, I can say only that the enactment of SB 78 may present a solution to certain difficulties presently hampering State prosecutors in serious, complex criminal cases. It is, however, absolutely clear that SB 78 will if enacted, merely transfer to the judiciary the resolution of the difficult question whether use and derivative use immunity in Alaska, is coextensive with the privilege against self-incrimination. Other courts have held that statutes similar to SB 78, statutes that may in fact offer less protection to Fifth Amendment rights, have met that test.

If I may assist further, please advise.

Enclosure: Note, Federal Witness Immunity Problems and Practices under 18 USC §§ 6002-6003, 14 Am. Crim., L. Rev., 275

RAB:nem

FOOTNOTE

*Kastigar was written by Justice Powell. I note that Justice Douglas dissented: "[T]he immunity granted is adequate if it operates as a complete pardon for the offense. Brown v. Walker, 161 U.S. at 595. That is the true measure of the Self-Incrimination Clause." Justice Brennan, who did not participate in Kastigar, was quoted by Douglas: "Transactional immunity...provides the individual with an assurance that he is not testifying about matters for which he may be later prosecuted. No question arises about tracing the use or non-use of information gleaned from the witness' compelled testimony. ***Respect for the law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony. Piccirillo v. New York, 400 U.S. at 568-569 (dissenting). Justice Marshall also dissented. "I do not see how it can suffice merely to put the burden of proof on the government. First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." ***For the information relative to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. ***[T]hough the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. Cf. Giglio v. United States, 405 U.S. 150 (1972); Santobello v. New York, 404 U.S. 257, (1971."

FALL, 1976 (Published by ABA Section of Criminal Justice)

NOTE

FEDERAL WITNESS IMMUNITY PROBLEMS AND PRACTICES UNDER 18 U.S.C. §§ 6002-6003

[The sovereign's power to compel individuals to testify before courts, grand juries, and other bodies is firmly rooted in Anglo-American jurisprudence, with statutory authority dating as far back as 1562.[1] Yet it is also well-settled that this power is not without limits. The law has long recognized a number of testimonial privileges, the most important of which is the privilege against compulsory self-incrimination, which cannot be violated no matter how great the government's need for the witness' testimony.[2]]

[Statutes authorizing compulsory testimony in the United States have sought to accommodate the Government's legitimate need to compel vital testimony from unwilling sources, without abrogating the guarantee of freedom from compulsory self-incrimination recognized in the fifth amendment.[3] For nearly 200 years, state and federal authorities in this country have attempted to strike this delicate balance by way of legislative enactments commonly known as "witness immunity statutes."[4]]

Congress' most recent legislation in this field, the Witness Immunity Act of 1970,[5] has generated more than its share of problems and criticisms. The purpose of this Note is to examine present-day federal witness immunity practices under 18 U.S.C. §§ 6002–6003—the provisions of

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[1] Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562). *See generally* 8 WIGMORE, EVIDENCE § 2190 (McNaughton rev. 1961).

[2] *See* 8 WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961).

[3] "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[4] For a concise history of early colonial, state and federal immunity legislation, see *Kastigar v. United States*, 406 U.S. 441, 445 n.13 (1972). For a more thorough history, see Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

[5] 18 U.S.C. §§ 6001–6005 (1970). This paper will deal primarily with the provisions of sections 6002 and 6003 which read as follows:

> § 6002. Immunity generally.
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against

the Witness Immunity Act of 1970 relevant to the investigation and prosecution of criminal activity—with particular emphasis on the use, abuse and importance of witness immunity grants in the enforcement of federal criminal law.

I. BACKGROUND

A. *Development of the Present Statutory Scheme*

As a practical matter, the only way to compel a witness to testify about self-incriminating matters without violating his fifth amendment privilege is to purge the desired testimony of its self-incriminatory character. Historically, federal witness immunity legislation has sought to accomplish this goal by following one of two basic approaches.

Under the first, the legislature authorizes a grant of "transactional immunity," which will prohibit prosecution of an immunized witness for any crimes disclosed in his compelled testimony.[6] With prosecution of the witness for the otherwise self-incriminating disclosures in his compelled testimony thus barred, the potential fifth amendment violation is circumvented.[7]

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the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings.

(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 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.

Section 6001 contains definitions of terms used in the Act, section 6004 authorizes grants of immunity to witnesses in certain administrative proceedings, and section 6005 authorizes grants of immunity to individuals who testify in Congressional hearings.

[6] *See, e.g.*, the transactional immunity provisions cited in notes 9 & 16 *infra*.

[7] In Brown v. Walker, 161 U.S. 591 (1896), the transactional immunity conferred by the Compulsory Testimony Act of 1893 (quoted in note 16 *infra*) was held constitutionally sufficient to compel a witness to testify over an assertion of the fifth amendment privilege.

Under the second approach, the legislature authorizes a grant of "use immunity," which will prohibit the use of a witness' compelled testimony against him in a subsequent criminal prosecution.[8] Although the witness granted use immunity may still be prosecuted for crimes referred to in his testimony, all prosecutive use of his testimony is barred, and he will be no worse off than he would have been had he been allowed to remain silent. Therefore, no violation of his fifth amendment privilege will have occurred.]

Although Congress' first immunity statute,[9] passed in 1857, made use of the "transactional" approach, within ten years "use immunity" had become the dominant mode. Because a grant of transactional immunity barred prosecution of an immunized witness for crimes disclosed in his testimony, witnesses who testified under grants of transactional immunity received "immunity baths" which rid them of criminal liability for any wrongful acts described in their testimony. This undesirable feature of the 1857 transactional immunity statute led Congress to first adopt the use immunity approach[10] in an 1862 compulsory testimony statue.[11] This statute provided that a witness' compelled testimony could not be used as evidence against the witness in a subsequent criminal proceeding, but permitted prosecution of the "immunized" witness as long as his compelled testimony was not introduced into evidence at his trial.[12]

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[8] *E.g.*, Act of Feb 25, 1868, ch. 13, § 1, 15 Stat. 37, which provided that the witness' testimony "shall not be used as evidence in any criminal prosecution against such witness."

[9] Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155. This statute was enacted to facilitate investigation of charges of vote-buying in the U.S. House of Representatives and provided that: "[N]o person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject [sic] to any penalty or forfeiture for any fact or act touching which he shall be required to testify. . . ."

[10] The problems arising under Congress' 1857 immunity statute were aggravated by the fact that under its provisions, immunity attached automatically to all witnesses who testified before Congress, and its various committees. Individuals seeking the benefits of an "immunity bath" grossly abused the 1857 statute, leading Congress to experiment with a narrower form of immunity—albeit still in an "automatic" immunity grant statute—in its 1862 immunity legislation. Comment, *Federal Witness Immunity Act: Expanding The Scope of Pre-Testimony Judicial Review*, 5 LOYOLA U.L.J. (CHIC.) 470, 475–76 n.30 (1974). For a discussion of a modern "automatic" immunity statute, see notes 136–146 *infra* and accompanying text.

[11] Act of [illegible]n. 24, 1862, ch. 11, 12 Stat. 333. This statute was also applicable only to Congressional testimony: "[T]he testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceedings against such witness in any court of justice. . . ."

[12] Comment, *Federal Witness Immunity Act: Expanding the Scope of Pre-Testimony Judicial Review*, 5 LOYOLA U.L.J. (CHIC.) 470, 476 n.30 (1974).

However, in 1892 the United States Supreme Court, ruling on the constitutionality of these statutes, struck down a use immunity provision in *Counselman v. Hitchcock*[13] because it failed to protect the witness from indirect use of his testimony to the same extent as would the fifth amendment privilege.[14] The Court declared that a witness could not be compelled to testify unless granted immunity co-extensive with the scope of the fifth amendment privilege,[15] and found "use immunity" deficient in this regard. In light of *Counselman*, Congress reverted to the transactional immunity approach in all its subsequent immunity legislation[16] until 1970.

Although transactional immunity grants received approval from the Supreme Court,[17] they were infrequently used as a prosecutive tool.[18] Prosecutors apparently felt that the wholesale "immunity baths" afforded witnesses who were granted transactional immunity exacted too dear a price from the criminal justice system, since a transactionally-immunized witness could never be prosecuted for crimes disclosed in his testimony, no matter how numerous or heinous.[19]

This pattern was broken in 1970, when acting on the recommendation of the National Commission on Reform of Federal Criminal Laws,[20]

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[13] 142 U.S. 547 (1892).

[14] *Id.* at 585. *Counselman* involved the 1868 use immunity statute cited in note 8 *supra*.

[15] The Court held that no grant of immunity could replace or supplant the constitutional privilege against self-incrimination "unless it is so broad as to have the same extent in scope and effect." 142 U.S. at 585.

[16] The *Counselman* decision was followed by Congress' speedy enactment of the Compulsory Testimony Act of 1893, ch. 83, 27 Stat. 443, which served as the model for many state as well as federal statutes: "[N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise. . . ."

[17] *See* note 7 *supra*.

[18] More witnesses were immunized under the Witness Immunity Act of 1970 during its first ten months of availability than were immunized in the preceding fifty years, during which transactional immunity grants were the only form of witness immunity grants. NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES: A MANUAL FOR ATTORNEYS 13–52 (1974). *See also* note 27 *infra*.

[19] But it may be that grants of use-derivative use immunity under 18 U.S.C. § 6002 exact the same "price" from society, in light of the formidable obstacles facing any prosecutor who seeks to prosecute an immunized witness. *See* notes 43–59 *infra* and accompanying text.

[20] As part of its suggested general overhaul of federal criminal law, the National Commission on Reform of Federal Criminal Laws prepared a comprehensive study of federal witness immunity law and submitted a model immunity act to Congress which served as the prototype for 18 U.S.C. §§ 6001–6005. The Commission's principal recommendation was that a grant of use-derivative use immunity would meet the *Counselman* test for constitutional sufficiency—a position later adopted by the U.S. Supreme Court in Kastigar v. United States, 406 U.S. 441 (1972). Report of the National Comm'n

Congress enacted the present immunity statute.[21] The new law repealed all statutory authority for grants of transactional witness immunity[22] and made available a new form of immunity—"use-derivative use immunity." Designed to avoid the "immunity baths" prevalent under transactional immunity grants, the 1970 legislation focused on immunization of testimony rather than on immunization of witnesses, and sought to overcome the constitutional objections raised in *Counselman* by prohibiting indirect exploitation of the compelled testimony ("derivative use") as well as "direct use."[23]

Although there was some cause for apprehension that this more narrowly-drawn protection would be found constitutionally insufficient,[24] in *Kastigar v. United States*[25] the United States Supreme Court held that grants of "use-derivative use immunity" under 18 U.S.C. § 6002 were co-extensive with the scope of the fifth amendment privilege, and were therefore sufficient to compel testimony from witnesses over a claim of that privilege.[26] Since the decision in *Kastigar*, federal prosecutors have made extensive use of immunity grants in investigating all types of criminal activity,[27] and immunity orders have become one of the most valuable resources at the prosecutor's disposal.

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on Reform of Federal Criminal Laws (2d Interim Report, Mar. 19, 1969), in *Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess., ser. 14 at 36 (1969).

[21] 18 U.S.C. §§ 6001–6005 (1970). *See* note 5 *supra*.

[22] Although the Witness Immunity Act of 1970 repealed all statutory authority for transactional immunity grants, this repeal did not become complete until December 15, 1974, the effective date for the repeal of Act of June 19, 1968, Pub. L. No. 90-351, § 802, 82 Stat. 216, a frequently-used transactional immunity provision. *See* Act of Oct. 15, 1970, Pub. L. No. 91–452, § 227(a), 84 Stat. 930–31.

[23] Reading portions of the witness' immunized testimony to a jury in a criminal prosecution is an example of a "direct use" of immunized testimony. Utilization of information disclosed in immunized testimony as a means of tracking down other undisclosed evidence is an example of a "derivative" or "indirect" use. See notes 56–59 *infra* and accompanying text for a discussion of "non-evidentiary use" of immunized testimony.

[24] In the course of its opinion in *Counselman* the Court had stated:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . [A] statutory enactment to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

142 U.S. at 585–86.

[25] 406 U.S. 441 (1972).

[26] *Id.* at 462.

[27] Over 5,000 requests for immunity were submitted for Department of Justice approval in the eighteen months immediately following the *Kastigar* decision. THE NEW YORKER, Apr. 19, 1976, at 42. *See also* note 18 *supra*.

B. *Procedural Considerations Under the Present Statutory Scheme*

Pursuant to 18 U.S.C. §§ 6002–6003, all grants of statutory witness immunity[28] in criminal matters[29] are effected by District Court order issued upon written request by the United States Attorney for the judicial district in which the proceeding is being held.[30] Since the statute authorizes grants of immunity only when requested by the United States Attorney,[31] the courts are powerless to issue immunity orders on their own motion[32] or at the request of a defendant,[33] leaving the United States Attorney with exclusive power to initiate grants of witness immunity.

[28] For a discussion of non-statutory "limited immunity arrangements," see note 30 *infra*.

[29] Grants of immunity in administrative proceedings and Congressional hearings are authorized by 18 U.S.C. § 6004 and § 6005 respectively.

[30] 18 U.S.C. § 6003(a) (1970).

Although §§ 6002–6003 constitutes the exclusive statutory authority for federal grants of immunity in criminal matters, it should be noted that arrangements roughly analogous to immunity grants may be freely made without resort to the statute. As recognized by the National Commission on Reform of Federal Criminal Laws:

> Immunity is also conferred when . . . the United States Attorney refrains from prosecuting in order to secure a witness' cooperation. . . . This kind of immunity grant seemingly has been held valid, even though not authorized by statute.

2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1419–20 (1970). The wide discretion in criminal matters possessed by the United States Attorney leaves him free to enter into agreements promising various prosecutorial concessions in exchange for an individual's full co-operation and testimony against his criminal co-conspirators. These concessions may take the form of a promise not to prosecute the individual for his involvement in the particular criminal acts being investigated, in exchange for his testimony. *Id.* Thus in effect a limited form of transactional immunity is available as a prosecutorial tool despite the repeal of all statutory authority for transactional immunity grants.

Arrangements of this type are frequently used when the coercion of a statutory immunity order is deemed unnecessary, because of the bargaining flexibility they give the prosecutor in dealing with a prospective Government witness. *See, e.g.*, United States v. Kurzer, 534 F.2d 511, 513 n.3 (2d Cir. 1976). As is the case with other prosecutorial promises, these agreements tend to be strictly enforced. *See, e.g.*, United States v. Kurzer, *supra.*, United States v. Carter, 454 F.2d 426 (4th Cir.), *cert. denied*, 417 U.S. 933 (1974); *In re* Kelly, 350 F. Supp. 1198 (E.D. Ark. 1972); United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969). However, problems may arise in asserting one district attorney's promise of freedom from prosecution when prosecution is initiated by a prosecutor in another federal district. *See* United States v. Carter, *supra* (agreements are binding on all federal prosecutors); United States v. Boulier, 359 F. Supp. 165, 170–71 (E.D.N.Y. 1972) United States Attorney in one federal district cannot bind federal prosecutors in other districts).

[31] 18 U.S.C. § 6003(b) (1970). *See* United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975).

[32] Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir. 1975), *cert. denied*, ___ U.S. ___ (1976); United States v. Jenkins, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

[33] United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974), *cert.*

[Before an immunity application can be granted, it must meet the technical requirements of section 6003(b).[34] The immunity request must have approval from a high-ranking Department of Justice official.[35] It must assert that the testimony sought from the subject of the immunity request "may be necessary to the public interest,"[36] and that the witness to be immunized "has refused or is likely to refuse to testify" on the basis of the fifth amendment privilege.[37] Where a technically sufficient immunity request has been submitted by the United States Attorney, the statute explicitly requires that the district court "shall issue" the requested order.[38]]

[Once the immunity order has been issued, the witness will be called, or recalled[39] to testify. If the witness refuses on fifth amendment grounds to respond to any questions put to him, he will be called before the district court judge who issued the immunity order, and asked to show cause for his refusal to testify.]

[Typically, the court will then issue a second order directing the witness to testify, cautioning him that continued refusal to answer any question on fifth amendment grounds will result in his being cited for contempt. If the witness persists in his refusal to answer any question, he will again be brought before the district court and adjudged in contempt of the court's orders.] Although criminal contempt charges may be brought,[40] civil contempt proceedings pursuant to 28 U.S.C. § 1826[41] are generally insti-

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denied, 421 U.S. 999 (1975); United States v. Ramsey, 503 F.2d 524, 532 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); Cerda v. United States, 488 F.2d 720, 723 (9th Cir. 1973); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973); United States v. Jenkins, 470 F.2d 1061, 1063-64 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973). For a discussion of the defense witness immunity problem, see notes 119-135 *infra* and accompanying text.

[34] *See* note 5 *supra*.

[35] The Assistant Attorney General in charge of the Criminal Division of the Department of Justice is specifically empowered to authorize requests for immunity orders under section 6003 by 28 C.F.R. § 0.175 (1970). In order to receive Department of Justice approval, a two-page form ("Request for Immunity Authorization, Form USA-167") must be submitted. This form calls for clerical information and short answers to eleven questions about the relevant investigation or prosecution. See notes 102-105 *infra* and accompanying text for a discussion of the sufficiency of this information.

[36] 18 U.S.C. § 6003(b)(1) (1970). *See* note 5 *supra*.

[37] 18 U.S.C. § 6003(b)(2) (1970). *See* note 5 *supra*.

[38] 18 U.S.C. § 6003(a) (1970). *See* note 5 *supra*.

[39] Section 6003(b)(2) authorizes the United States Attorney to obtain an immunity grant for a witness either before or after he is called upon to testify. *See* note 5 *supra*.

[40] 18 U.S.C. § 3691; *See also* United States v. Wilson, 421 U.S. 309 (1975).

[41] § 1826. Recalcitrant witnesses

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other informa-

tuted, resulting in the witness' confinement until such time as he is willing to comply with the court's order to testify. Confinement under 28 U.S.C. § 1826 may be for as long as eighteen months.[42]

II. SUBSEQUENT PROCEEDINGS AGAINST IMMUNIZED WITNESSES

A. *Barriers to Future Criminal Prosecution*

Section 6002 of Title 18 of the United States Code directs only that testimony compelled from a witness pursuant to an immunity order may not subsequently be used against that witness in any[43] criminal proceeding. Thus, unlike grants of transactional immunity which barred prosecution of immunized witnesses for crimes disclosed in their compelled testimony,[44] section 6002 immunity grants permit the prosecution of immunized witnesses as long as the statutory prohibition on exploitation of compelled testimony is honored.[45]

In practice, however, few immunized witnesses are subsequently prosecuted for crimes described in their immunized testimony.[46] While this may in part reflect a policy of non-prosecution to promote the co-opera-

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tion, including any book, paper, document, record, recording or other material, the Court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. § 1826 (1970).

[42] *Id. See also* United States *ex rel.* Womack v. United States Attorney for the Northern District of Illinois, 348 F. Supp. 1331 (N.D. Ill. 1972), where uncooperative grand jury witnesses were confined for over fourteen months for their failure to testify after having been granted immunity.

[43] Immunized testimony may, however, be used against its declarant in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the terms of an immunity order." 18 U.S.C. § 6002 (1970).

[44] *See* text accompanying note 6 *supra*.

[45] As the Supreme Court has pointed out, "The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." Kastigar v. United States, 406 U.S. 441, 461 (1972).

[46] The United States Department of Justice has reported that, while its Immunity Unit does not maintain statistics on the number of times witnesses have been subsequently prosecuted for matters disclosed in their immunized testimony, "if any such instances exist, they are rare." Letter from E. Ross Buckley, Attorney-in-Charge, Freedom of Information Privacy Unit, Criminal Division, Department of Justice, to David J. Sugar, October 1, 1976, on file in the offices of the *American Criminal Law Review*, Washington, D.C.

tion of immunized witnesses, there is little doubt that strict judicial enforcement of the "use" prohibition has done much to deter such prosecutions. In particular, close judicial scrutiny of the Government's case, aimed at detecting two distinct forms of "use," has made successful prosecution of immunized witnesses exceedingly difficult and increasingly rare.

First, to determine if the prosecution has made derivative use of the defendant's immunized testimony in obtaining its evidence, all evidence the Government intends to introduce against the previously immunized witness is judicially examined, usually at a special pre-trial evidentiary hearing.[47] This effort to ferret out "tainted evidence" (i.e., evidence obtained through impermissible derivative use of the defendant's prior immunized testimony), is the judicial response to the rule established in *Kastigar*, that a "[a] person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted . . . 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."[48]

This procedural shield has proven hard to penetrate, as the prosecution's burden of proof at these so-called "taint hearings" is not satisfied by a mere negation of taint.[49] Rather, the Government must establish by a preponderance[50] that its evidence was derived from legitimate[51] sources

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[47] Although this evidentiary hearing is usually conducted prior to or at trial, appellate courts have remanded cases with instructions to conduct this type of hearing where the possibility of derivative use was not properly investigated at trial. *See, e.g.*, United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972).

Typically these evidentiary hearings are precipitated by a pre-trial motion to dismiss, charging that all of the Government's evidence has been obtained through derivative use of the defendant's prior immunized testimony. *See, e.g.*, United States v. Catalano, 491 F.2d 268 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. DeDiego, 511 F.2d 818 (D.D.C. 1971).

Where the alleged exploitation is limited to a particular piece of evidence, a motion to suppress the evidence in question will trigger an evidentiary examination into the evidence's source. *See, e.g.*, United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974).

[48] Kastigar v. United States, 406 U.S. 441, 460–61 (1972).

[49] *Id.* at 460.

[50] The "preponderance of the evidence" standard of proof at taint hearings was applied in United States v. Seiffert, 357 F. Supp. 801, 804–05 (S.D. Tex. 1973), *affirmed*, 501 F.2d 974, 982 (5th Cir. 1974). *But see* United States v. Henderson, 406 F. Supp. 417, 423 (D. Del. 1975), where the court for the purposes of argument used "proof beyond a reasonable doubt" as the appropriate standard of proof at taint hearings.

[51] Evidence obtained from sources wholly apart from the immunized testimony will, of course, be suppressed if obtained illegally (*e.g.*, through use of illegal wiretaps or illegal searches and seizures). *See* Gelbard v. United States, 408 U.S. 41 (1972).

wholly independent of the defendant's immunized testimony. Failure to sustain this burden of proof as to any Government evidence will result in its suppression. If the prosecution's case depends largely on evidence found to be tainted, dismissal of the charges may be necessary. Even untainted evidence may be suppressed at a taint hearing if the prosecutor is unable to establish the sources of his evidence to the court's satisfaction.

Because of these difficulties, a prosecutor will rarely proceed knowingly against an individual who has previously testified under an immunity grant, unless special precautions have been taken by his office in anticipation of the inevitable taint problems. To illustrate, if the United States Attorney's files include transcripts containing the immunized testimony of an individual presently under investigation, access to such transcripts should be restricted.[82] The sources of all evidentiary leads should be recorded for later presentation at a taint hearing, and all informants should be questioned as to the sources of their information to prevent unknowing receipt of immunized information.[83] Moreover, when the Government intends to prosecute a prospective immunity grant recipient, all available incriminating evidence and investigatory leads may be sealed in a dated envelope and filed with the court before the witness begins his immunized testimony. When the witness is subsequently prosecuted, the date on which the evidence envelope was filed can be used to establish that the evidence and leads contained therein were obtained prior to—and therefore independent of—the witness' immunized disclosures, effectively negating any claim of taint.[84]

However, in most cases, little or no incriminating evidence is in the Government's possession prior to an immunized witness' compelled disclosures, and such techniques are of little value. Indeed, in many cases the United States Attorney initiates investigation and prosecution of a

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[82] *Cf.* Kastigar v. United States, 406 U.S. 441, 449 (1972) (dissenting opinion); Zimmett, *The Federal Use Immunity Statute Since* Kastigar, 1973/1974 ANNUAL SURVEY OF AMERICAN LAW 343, 356 (N.Y.U. School of Law 1974).

[83] *Cf.* United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973). This is necessary to prevent the tainting of an entire investigation through unintentional receipt of the contents of an individual's immunized testimony by way of a well-meaning courtroom observer who was present when the immunized testimony was given.

[84] This procedure was first used by Special Watergate Prosecutor Archibold Cox to preserve evidence against John Dean. *See* Zimmett, *The Federal Use Immunity Statute Since* Kastigar, 1973/1974 ANNUAL SURVEY OF AMERICAN LAW 343, 359 (N.Y.U. School of Law 1974). It has also been used with success in other cases; *See, e.g.*, United States v. Henderson, 406 F. Supp. 417 (D. Del. 1975).

Despite the courts' reliance on this prophylactic procedure, a careful reading of *Kastigar* suggests that this alone will be insufficient to sustain the Government's burden of proof at a taint hearing unless independent sources for the contents of the sealed envelope are also established. *See* text accompanying notes 47–51 *supra*.

given individual, completely unaware of the fact that the suspect has previously given immunized testimony with regard to the very matters for which he is being prosecuted.[55] In such cases, it is unlikely that the prosecutor will have carefully questioned all would-be informants about the sources of their knowledge, or that he will have investigated the sources of other investigative leads. As a result, an investigation initiated solely on the basis of information which is protected by an undiscovered immunity order should cause all of the Government's evidence to be suppressed because of the tainted investigative lead from which it was derived.

A second deterrent to the prosecution of a previously immunized witness is the possible bar against "non-evidentiary use" of testimony by the prosecutor as background information in preparation for trial. Emphasizing that *Kastigar* prohibited *any* use of immunized testimony,[56] the Eighth Circuit in *United States v. McDaniel*[57] vacated the conviction of a previously immunized witness, where the Assistant United States Attorney trying the case had examined transcripts of the defendant's prior immunized testimony relating to the very matters for which he was being prosecuted. Although the Government was apparently able to establish independent, legitimate sources for the evidence it sought to introduce against the defendant, the court ruled that significant use of the immunized testimony had been made in ways other than in obtaining its evidence.[58] While the courts have not enforced the prohibition on "non-evidentiary use" of immunized testimony as strictly as they have treated instances of derivative evidentiary use,[59] growing concern for the protec-

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[55] *Cf.* United States v. McDaniel, 482 F.2d 305, 307 (8th Cir. 1973). The suspect may have given immunized testimony before a local court or grand jury without the federal prosecutor's knowledge. Similarly, federal prosecutors may not be aware that an individual has given immunized testimony in a Bankruptcy Act proceeding. For a discussion of the Bankruptcy Act immunity provision, see notes 136–146 *infra* and accompanying text.

[56] The *Kastigar* Court characterized section 6002 as providing "a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." Kastigar v. United States, 406 U.S. 441, 460 (1972).

[57] 482 F.2d 305 (8th Cir. 1973).

[58] *Id.* at 311.

Under facts similar to those in *McDaniel*, the district court in United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973), granted a motion to dismiss certain charges, holding that a virtually irrebuttable presumption of improper derivative use arises whenever the prosecutor has, prior to trial, read transcripts of the defendant's prior immunized testimony relating to the charged offenses. However, the Second Circuit reversed the lower court's decision, not because of any disagreement with the finding that derivative use of the immunized testimony had been made, but rather because the statute under which the defendant had been immunized only provided immunity from direct use. United States v. Dornau, 491 F.2d 473, 479–80 (2d Cir.), *cert. denied*, 419 U.S. 872 (1974).

[59] The courts have been particularly lax in recognizing "nonevidentiary use" in grand jury situations. In United States v. Henderson, 406 F. Supp. 417, 427 (D. Del. 1975),

tion of immunized witnesses as prosecutors increasingly resort to immunity grants suggests that a prohibition on "non-evidentiary use" might be more strictly enforced in the future.

Taken together, these barriers to successful prosecution of immunized witnesses are formidable. Under a strict reading of *Kastigar*, not only must the prosecution sustain its heavy burden of establishing independent sources for all its evidence, but *all* exposure to immunized information must be avoided regardless of whether or not such contact generates evidence. Clearly, prosecution is not impossible. As a rule, however, a witness once immunized is unlikely to face subsequent prosecution.

B. *Effect Of Local Transactional Immunity Grants On Federal Criminal Proceedings*

Although transactional immunity may no longer be granted within the federal system,[60] state courts are not similarly constrained. Several states have statutes authorizing grants of transactional immunity to witnesses before local courts and grand juries.[61]

The treatment accorded these local transactional immunity grants in the federal courts is governed by constitutional principles. Under *Kastigar*, the fifth amendment privilege against compelled self-incrimination requires only that prosecutive use of testimony compelled from a witness

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the court recognized the "non-evidentiary use" problem, but still refused to find that a defendant's compelled testimony had been "used" against him, even though he was indicted in a grand jury proceeding conducted by a prosecutor who had personally heard the defendant give immunized testimony with regard to the very crimes charged in the indictment. *See also* United States v. Catalano, 491 F.2d 268 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974), where the court affirmed the conviction of a previously immunized grand jury witness, even though the trial prosecutor had heard—indeed elicited—the defendant's prior immunized testimony with regard to crimes for which the defendant was convicted.

[60] *See* note 22 *supra*.

[61] For example, ILL. ANN. STAT., ch. 38, § 106–1 (Smith-Hurd 1970), provides: "In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce."

Similarly, 3 N.D. CENT. CODE § 16–20–10 (1970) provides:

> No person shall be excused from attending and testifying or producing any books, papers, or other documents before any court upon any investigation, proceeding, or trial for a violation of any of the provisions of section 16-20-08, (illegal campaign contributions) upon the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him. No person shall be prosecuted nor subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding.

be barred. Measured by this standard, local grants or transactional immunity provide state court witnesses with protections in excess of the federal Constitution's requirements. Of course, any state is free to statutorily or constitutionally require that its citizens be accorded broader protections, and the courts of these jurisdictions must honor such grants. However, when the federal Government or a sister state seeks to prosecute the recipient of a broad immunity grant of this type, only the fifth amendment's requirements need be obeyed, and any "extraneous" protections may be disregarded.[62] The federal Government thus guards its right to effectively enforce federal laws unhampered by overly protective gr ts of immunity by any state.[63]

C. *Use Of Immunized Testimony In Non-Criminal Proceedings*

Although testimony elicited under a grant of immunity may not be used against the witness in a subsequent criminal prosecution, that testimony may be freely used against him in any non-criminal proceeding. Because the scope of protection under 18 U.S.C. § 6002 is co-extensive with that under the fifth amendment—which permits a witness to withhold only information which might subject him to *criminal* liability—it follows that grants of immunity under section 6002 afford no protection against the use of the testimony in any proceeding other than a criminal prosecution.[64] Courts have thus held that civil penalties may be based on testimony given pursuant to a grant of section 6002 immunity,[65] and that a witness's immunized testimony may properly be used against him in civil actions[66] and administrative proceedings,[67] whether held before state or federal bodies.

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[62] Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); United States v. First Western State Bank, 491 F.2d 780, 786 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974).

[63] United States v. Del go, 511 F.2d 818, 822 (D.C. Cir. 1975). This situation is well-illustrated by United States v. First Western State Bank, 491 F.2d 780 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974). In that case, federal criminal defendants sought to have indictments against them quashed because they had previously testified under a North Dakota statutory grant of transactional immunity with regard to the very transactions on which the federal indictment was based. *See* note 61 *supra*. Despite their claims of absolute immunity from prosecution for crimes disclosed in their compelled testimony, the court refused to block the federal prosecution, holding that as long as the federal prosecutors did not make direct or derivative use of the defendants' locally-immunized testimony, federal prosecution of the defendants for the crimes disclosed therein was constitutionally permissible. 491 F.2d at 786.

[64] Patrick v. United States, 524 F.2d 1109, 1120–21 (7th Cir. 1975); United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir.), *cert. denied*, 420 U.S. 925 (1975).

[65] Patrick v. United States, 524 F.2d 1109, 1118 (7th Cir. 1975).

[66] United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir.), *cert. denied*, 420 U.S. 925 (1975).

[67] In Segretti v. State Bar, 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976),

Prosecutors concerned with the possibility that a key witness, though immunized, will nonetheless remain silent and suffer imprisonment for contempt rather than incur the serious non-criminal consequences which might attend disclosure of his own criminal activities, have in some instances requested immunity orders prohibiting use of a witness's testimony in specified non-criminal proceedings as well as in any criminal prosecution. Although section 6002 in no way authorizes these additional protections, the courts have occasionally granted them. For example, an immunity order which purported to prohibit use of immunized testimony against bar-owners in liquor license revocation proceedings[68] was issued by one court, as was an order to prohibit similar use in disbarment proceedings.[69]

Although the Seventh Circuit has recognized the "difficult question" posed by the issuance of such non-statutory orders,[70] their propriety has not yet been reviewed. And while local administrative bodies have felt compelled to honor their terms, there is no evident reason why the additional protections contained in these supplemented federal immunity grants should not be disregarded, much as the federal courts disregard "constitutionally unnecessary" protections in local immunity grants.[71] As in the case of over-broad state immunity grants, such treatment may be justified as necessary to prevent federal infringement of a sovereign state's power to enforce its own laws.[72]

D. *Threat Of Foreign Prosecution As A Basis For The Underlying Fifth Amendment Claim*

Since *Counselman v. Hitchcock*,[73] the constitutional sufficiency of all immunity grants has turned on the scope of the fifth amendment priv-

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and Maryland State Bar Ass'n, Inc. v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974), *cert. denied*, 420 U.S. 974 (1975), federally-immunized testimony given by lawyers was later used against them in disbarment proceedings. *See also* Napolitano v. Ward, 457 F.2d 279 (7th Cir. 1972), *cert. denied*, 409 U.S. 1037, *reh. denied*, 410 U.S. 947 (1973), where a federal judge's immunized testimony was used against him in a federal proceeding for his removal as a judge.

[68] *See* United States v. Braasch, 505 F.2d 139, 146 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

[69] *In re* John Daley, No. 71 GJ 3567 (N.D. Ill., July 18, 1974), *reproduced in* Note, *The Intrusion of Federal Immunity Protection into State Disbarment Proceedings*, 7 LOYOLA U.L.J. (CHIC.) 58 (1976).

[70] United States v. Braasch, 505 F.2d 139, 146 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

[71] *See* notes 62-63 *supra* and accompanying text.

[72] *Id.*

[73] 142 U.S. 547 (1892). *See* text accompanying notes 13-15 *supra*.

ilege. Unless at least co-extensive with that privilege, no grant of immunity is adequate to compel an unwilling witness to testify.[74]

While it has been established that the fifth amendment privilege protects testimony which incriminates the witness under either federal or local law,[75] whether or not it affords similar protection to testimony that is incriminating under foreign law is an unresolved question of increasing practical significance.[76] As it relates to witness immunity, the question posed is whether or not a section 6003 use-derivative use immunity order is constitutionally sufficient to compel testimony which might later be used against the witness in a foreign criminal proceeding.

The Supreme Court has offered little guidance in this regard. While noting probable jurisdiction to decide the question in *Zicarelli v. New Jersey Commission of Investigation*,[77] the Court disposed of the issue on other grounds, expressly leaving it unresolved.[78]

In the lower federal courts, witnesses' inability to satisfy the heavy burden of proving real or substantial danger of foreign prosecution[79] has provided an avenue to sidestep the question.[80] Some courts[81] have avoided ruling on the constitutional sufficiency of an immunity grant where danger of foreign prosecution has been adequately shown, by noting that insofar as grand jury testimony is concerned, the cloak of secrecy

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[74] *See* note 15 *supra*.

[75] In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), the U.S. Supreme Court held that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.* at 77–78.

[76] Particularly in view of the significant number of narcotics smuggling cases presently before the courts, applicability of the fifth amendment to foreign incrimination in domestic courts has important implications under 18 U.S.C. §§ 6002–6003. For an excellent treatment of this question, see Zimmett, *The Federal Use Immunity Statute Since* Kastigar, 1973/1974 ANNUAL SURVEY OF AMERICAN LAW 343, 349–56 (N.Y.U. School of Law 1974).

[77] 401 U.S. 933, 934 (1972).

[78] 406 U.S. 472 (1972). Resolution of the foreign self-incrimination question was deemed unnecessary because the questions asked of the witness were not viewed by the Court as calling for answers that gave the witness a reasonable basis for fearing foreign prosecution. 406 U.S. at 478–81.

[79] In *Zicarelli*, the Court announced that no problem of foreign self-incrimination would be raised unless the witness has a "real and substantial fear of foreign prosecution" as opposed to a "remote or speculative" fear. *Id.* at 478.

[80] *In re* Quinn, 525 F.2d 222, 223 (1st Cir. 1975); United States v. Doe, 361 F. Supp. 226, 227 (E.D. Pa. 1973), *aff'd*, 485 F.2d 682 (3d Cir.), *cert. denied*, 415 U.S. 989 (1974). *See also in re* Morahan, 359 F. Supp. 858, 874 (N.D. Tex), *aff'd. sub nom. In re* Tierney, 465 F.2d 806 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973).

[81] *In re* Weir, 495 F.2d 879, 881 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974); *In re* Tierney, 465 F.2d 806, 811 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973).

imposed by Rule 6(e) of the *Federal Rules of Criminal Procedure*[82] will supposedly bar disclosure of the witness' testimony to foreign authorities.[83]

The only two cases which have squarely confronted this problem reached contrary results. In *In re Parker*,[84] decided prior to both *Kastigar* and *Zicarelli*, the Tenth Circuit found the fifth amendment's protections inapplicable to foreign self-incrimination. Without direct citation of authority the court concluded that "the fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states, but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation."[85] Thus, the court ruled that a witness in danger of foreign pros-

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[82] FED. R. CRIM. P. 6(e):

> Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. . . .

[83] In rejecting this solution, the district court in *In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972), observed that

> [The Rule 6(e) argument] rests on the assumption that all law enforcement officials with access to grand jury minutes can be relied upon to abide by the disclosure requirements of Rule 6(e). While there is no reason to believe that any enforcement officials presently involved in this grand jury proceeding would not honor the rule, the constitutional protection of the witness must rest on more than faith. If in fact a law enforcement official wanted to make the witness' answers known to foreign prosecuting officials, it is unlikely that he would apply to this Court for disclosure of the grand jury minutes. He would simply send the transcript. It may well be that such conduct would render the official subject to disciplinary powers of this Court, if the conduct and the identity of the person responsible ever became known, but such an after-the-fact sanction would provide no protection for the witness.
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> The inability of American courts to use Rule 6(e) as an effective protection for the witness against foreign use of her compelled testimony is highlighted by comparison with the ability the courts have to enforce within this country the derivative use prohibition of 18 U.S.C. § 6002.

Id. at 1082.

Of course, Rule 6(e) will afford absolutely no protection to testimony given in open court by witnesses fearing foreign prosecution.

[84] 411 F.2d 1067 (10th Cir. 1969), *vacated as moot sub nom.* Parker v. United States, 397 U.S. 96 (1970)

[85] *Id.* at 1070.

ecution could not properly refuse to testify on fifth amendment grounds once granted domestic immunity.[86]

The opposite view was taken by the federal district court for Connecticut in *In re Cardassi*.[87] There a grand jury witness had been granted section 6002 immunity, but had persisted in refusing to answer questions concerning her alleged dealings in marijuana in Mexico on the grounds that her answers to these questions could later be used against her in a criminal prosecution in Mexico. Extending the Supreme Court's rationale in *Murphy v. Waterfront Commission*,[88] the district court held that a witness could not be ordered to answer any question which could lead to foreign prosecution, since the fifth amendment privilege "clearly" affords protection from foreign incrimination.[89]

If *Cardassi* is correct in its reasoning, and the fifth amendment privilege does extend to witnesses threatened with foreign prosecution, then it follows that a prosecutor's request for immunity in such a case must be denied. Because the domestic court would be powerless to enforce its sanction against the use of compelled testimony in the foreign forum, any grant would fall short of the mandate that immunity be co-extensive with the protections of the privilege.

Denial of a request for a section 6002 immunity order deemed constitutionally inadequate to protect the witness' fifth amendment privilege is not without precedent. In *In re Baldinger*,[90] the court flatly refused to issue an immunity order because it felt that the protection afforded by a section 6002 immunity grant was not fully co-extensive with the scope of the witness' fifth amendment privilege.[91] Although the *Baldinger* court erred in holding that a section 6002 immunity grant would be insufficient

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[86] *Id.*

[87] 351 F. Supp. 1080 (D. Conn. 1972).

[88] 378 U.S. 52 (1964). In *Murphy*, the Court held that the fifth amendment privilege can properly be asserted in the courts of one sovereign to guard against prosecution in the courts of another sovereign. While the two sovereigns involved in *Murphy* were a state government and the U.S. federal government, the *Cardassi* court extended the same principle to the foreign sovereign-domestic sovereign situation.

[89] 351 F. Supp. at 1086.

[90] 356 F. Supp. 153 (C.D. Cal. 1973).

[91] The court ruled that a grant of section 6002 immunity could not be co-extensive with the fifth amendment privilege because the statute appeared to leave the witness open to prosecution for having previously made false statements (the falsity of which would be disclosed in the witness' compelled testimony) to the F.B.I. *Id.* at 171. This interpretation of the statute's perjury/false statement exception was erroneous, since the exception refers only to false statements made after immunity has attached. To the extent that the *Baldinger* case suggests that section 6002 is constitutionally insufficient because of the perjury/false statement exception, *Baldinger* was overruled *sub silentio* in United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973). *See also* United States v. Watkins, 505 F.2d 545, 546 (7th Cir. 1974).

on the facts of that case, the court's analysis of its duty to protect the constitutional rights of citizens in immunity matters is cogent. Both on constitutional grounds and as a matter of statutory construction of section 6003, the court rejected the proposition that it was powerless to deny immunity orders affording constitutionally inadequate protections to a given witness:

> Congress cannot compel the courts to issue orders which violate the Constitutional privileges of this nation's citizens. . . . The court cannot engage in any action which deprives a party before it of his Constitutional rights. It has long been recognized that it is a proper function of courts to act as a check on improper use of both executive and legislative investigatory powers. . . . [T]he court concludes that it is not relegated to a ministerial role, but that it can, and hereby does exercise discretion to decline to issue the immunity order in the face of a violation of the witness' Constitutional rights.[92]

It should be noted that a blanket denial of immunity would make it impossible to compel testimony relating to matters other than activities for which the witness might be prosecuted abroad. However, this undesirable side-effect could be avoided by granting the request for immunity while specifying that the witness retains the right to refuse to answer any question which might incriminate him in a foreign jurisdiction. If the witness refuses to answer any question, the United States Attorney will as usual seek an order specifically directing the witness to answer upon threat of contempt.[93] If the question is directed to matters wholly unrelated to the witness' foreign activities, the court should issue an enforcing order. But if the question calls for a response that might be incriminating under foreign law, the court should not enforce its order to testify. In this way, testimony adequately protected by the immunity order may still be compelled, without violating the witness' possible fifth amendment privilege against foreign self-incrimination.[94]

III. DEFICIENCIES UNDER THE PRESENT STATUTORY SCHEME

A. *Prosecutorial Control and the Potential for Abuse*

1. *Ineffective Judicial Restraints.* One of the most frequently voiced criticisms of 18 U.S.C. §§ 6002-6003 focuses on the seemingly limitless powers vested in the United States Attorney in witness immunity matters. The prosecutor has exclusive statutory authority to initiate grants of im-

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[92] 356 F. Supp. at 169–70.

[93] For a discussion of immunity grant procedures, see notes 28–42 *supra* and accompanying text.

[94] This procedure was employed in *In re* Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

munity under section 6003,[95] and issuance, under present judicial practice, is virtually automatic upon receipt by the courts of an immunity application which conforms to section 6003's pleading requirements.[96] Judges have felt compelled to adopt this course in light of the unqualified directive in § 6003(a), that the court "shall issue" an immunity order upon receipt of a technically sufficient written request from the United States Attorney. Relying on § 6003(a), courts have repeatedy held that they are wholly without discretion to deny technically adequate immunity requests,[97] and have limited their inquiries accordingly.[98]

This policy, evident in the statute and implemented in the courts, has two justifications. First, only the prosecutor can intelligently weigh the necessity of compelling a witness to testify under a grant of immunity, against the resulting impediments to subsequent prosecution of the witness for crimes he may disclose, and his judgment should not be subject to judicial second-guessing. Second, judicial involvement in matters within the discretion of the Executive Branch might give rise to separation of powers problems.[99]

This reliance on the prosecutor's *bona fides* invites prosecutorial abuse. The most blatant way in which the court's co-operation might be exploited by a corrupt prosecutor would be to seek grants of immunity for the testimony of friends or influential individuals involved in criminal activity.[100] Conversely, should the United States Attorney decide to "get" an individual suspected of criminal involvement with others, he would be free to exercise his immunity powers with respect to affiliates to achieve

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[95] 18 U.S.C. § 6003(a) (1970).

[96] United States v. Leyva, 513 F.2d 774 (5th Cir. 1975); *In re* Grand Jury Investigation, 486 F.2d 1013 (3d Cir. 1973), *cert. denied sub nom.* Testa v. United States, 417 U.S. 919 (1974).

[97] See cases cited in note 96 *supra*.

[98] Thompson v. Garrison, 516 F.2d 986 (4th Cir. 1975), *cert. denied*, ___ U.S. ___ (1976); Urasaki v. United States District Court, 504 F.2d 513 (9th Cir. 1974); *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973).

[99] *See generally* Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 627 (1955).

[100] A recently concluded bribery trial in the Northern District of Illinois, United States v. Craig, No. 74 CR 879 (N.D. Ill., June 25, 1976), has raised charges that a form of cronyism resulted in grants of immunity to a wealthy and politically influential corporate president and eight of his officers who were involved in an alleged scheme to bribe Illinois state legislators for the passage of favorable legislation. One of the defense counsel first raised the issue in an opening statement that characterized the immunized corporation president as an "elitist" whose immunity was secured through the intervention of influential law firms on his behalf with the United States Attorney. Subsequently, an obviously upset juror passed a note to the trial judge, asking if the prosecution intended to explain the circumstances surrounding the immunity grants. Chicago Tribune, April 30, 1976, § 1, at 1, col. 3. Subsequently, Samuel K. Skinner, U.S. Attorney for the Northern District of Illinois, personally took the stand at trial to explain his office's immunity practices in that case.

this end. The target suspect might be singled out on the basis of race, sex, political affiliation, or any other improper considerations. Charges of this very tenor have recently surfaced with regard to official corruption prosecutions, where it has been claimed that politically prominent individuals were singled out for prosecution, while co-conspirators of arguably equal culpability were immunized and compelled to testify against the target.[101]

2. *Ineffective Administrative Restraints.* The statutory requirement that all immunity requests have prior authorization from the Department of Justice[102] is largely ineffective against these abuses. Although the Department of Justice requires the United States Attorney to answer eleven general questions about the circumstances surrounding his decision to seek immunity,[103] none calls for the kind of detailed information necessary to uncover improperly motivated immunity requests. Moreover, the Department of Justice does not verify the accuracy of any of the information submitted and authorizes virtually all of the immunity requests submitted for its approval.[104] This necessarily perfunctory administrative review[105] is not a substitute for effective judicial supervision.

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[101] Charges of this tenor were particularly widespread during the trial of former federal judge and Illinois governor Otto Kerner, who was convicted for his part in a race track scandal on the strength of testimony from individuals involved in the scheme who were granted immunity and produced as Government witnesses.

[102] 18 U.S.C. § 6003(b) (1970).

[103] Requests for Department of Justice immunity authorization are made by completing a two-page questionnaire ("Request for Immunity Authorization," Form USA-167). Part A of this form calls for clerical information such as the witness' name, address, birthplace, birthdate and the name of the case for which his testimony is being sought.

Part B of this form calls for brief answers to the following questions:

1. Relative importance of the witness in criminal activity in the area.
2. Pertinent Federal and local offices have been notified. (Check box)
3. Are any current Federal or local charges pending against witness? If so, give details.
4. If witness is presently incarcerated, state circumstances.
5. Give brief resume of background of case or proceeding.
6. Witness' part in the case or matter under investigation.
7. Summary of the witness' anticipated testimony or information.
8. How testimony or information sought may be necessary to the public interest.
9. Why witness is likely to invoke Fifth Amendment privilege.
10. Is witness likely to testify or produce information if immunity is granted?
11. What Federal or state offenses on the part of the witness may be disclosed if the witness testifies under a grant of immunity?

[104] During a three and one-half month period in 1973, the Department of Justice authorized federal prosecutors to obtain immunity grants in all but seven of 785 instances in which they were requested. NEWSWEEK, Oct. 29, 1973, at 68. The United States Department of Justice has reported that from December 14, 1970 to June 30, 1976, formal immunity requests for 170 witnesses were denied, whereas 15,505 witnesses were immunized between July 1, 1971 and June 30, 1976. Letter from E. Ross Buckley, *supra* note 46.

[105] In light of the tremendous number of requests for immunity authorization sub-

So-called practical safeguards against oppressive immunity tactics have only limited impact.[106] While it is true that trial jurors may sympathize with a target defendant whom they perceive to be a "fall guy" being victimized by his own co-conspirators as well as by the prosecutor, if the prosecutor feels he can make a sufficiently strong case based on immunized testimony he will not be likely to refrain from overzealous immunity tactics.

Allegations of discriminatory prosecution will also be of little concern to the prosecutor, in light of the defendant's burden in raising this defense. Not only must the defendant present *prima facie* proof that he was singled out for prosecution because of racial, religious, or other impermissible considerations,[107] but he must also establish that "others similarly situated" have generally not been prosecuted for committing the same acts which form the basis for the charges against him.[108] Aside from the formidable evidentiary difficulties in establishing even the first element of proof, it will be impossible to prove the second element unless the defendant can convince the court to construe "others similarly situated" to refer to his co-conspirators who are immunized rather than prosecuted. In light of the court's broad construction of this phrase in discriminatory prosecution cases,[109] the threat of such an allegation is a hollow one, and prosecutors are unlikely to be deterred by it.

3. *Statutory Construction As A Guide To More Effective Restraints.* In adopting the view that the directive in 18 U.S.C. 6003(a), that the judge "shall issue" the immunity grant, is absolute in the face of a technically sufficient request, the courts have not adequately reviewed the genesis of the Witness Immunity Act of 1970. The Act was based on a prototype developed by the National Commission on Reform of Federal Criminal Laws and presented to Congress for its consideration.[110] The

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mitted to the Department of Justice (*see* notes 18 and 104 *supra*), more extensive review does not seem feasible.

[106] A position paper issued by Americans for Effective Law Enforcement, Inc. argues that juror response at trial serves as a significant safeguard against abuse of the prosecutor's discretion in immunity matters. AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., GRANTS OF IMMUNITY TO WITNESSES: POSITION PAPER No. 6 (1975).

[107] United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

[108] *Id.*

[109] This phrase has generally been held to refer to that class of individuals who have previously committed the same acts as the discriminatorily prosecuted defendant, but have not been prosecuted. *See* United States v. Falk, 479 F.2d 616 (7th Cir. 1973).

[110] "[18 U.S.C. §§ 6002-6003] is the product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served as the model for this statute." *Kastigar v. United States*, 406 U.S. 441, 452 n.36 (1972).

Commission's extensive report accompanying this proposed immunity act[111] was relied upon heavily by both the House and Senate in their deliberations.

Examination of the Commission's Working Papers provides considerable insight into the district courts' powers and duties as originally conceived. As envisioned by the Commission, the United States Attorney's assessment of the tactical advantages and disadvantages of granting immunity to a particular witness would be controlling. Judicial second-guessing of the prosecutor's decision to immunize would not be tolerated because

> [I]mmunity is the fixed price which the government must pay to obtain certain kinds of information, and only the government can determine how much information it wants to "buy" in light of the fixed price. Viewed thusly, a court has nothing on which to base a determination whether a given immunity grant is "right" or "wrong," whether it should be made, or whether it should not be made.[112]

However, the Commission also recognized that immunity grants could easily become a tool for prosecutorial corruption and abuse either through the prosecutor's immunization of criminally-involved friends ("cronyism") or through other unspecified forms of "abuse of authority by prosecutors."[113] Because of this potential for abuse, the Commission sought to formulate statutory language which would preclude judicial interference with the prosecutor's decision to immunize a given witness without leaving the courts powerless to reject immunity requests submitted for corrupt purposes. Noting a prior report which suggested that the courts would have "inherent power" to deny immunity requests submitted for corrupt purposes,[114] the Commission concluded that an immunity provision with language virtually identical to the "shall issue" directive in 18 U.S.C. § 6003(a) would be appropriate.[115] The Commission made it clear that

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[111] The report was prepared by Professor Robert G. Dixon, Jr., of the George Washington University Law Center for the Commission. It appears, with appendices, in 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1405–48 (1970) [hereinafter cited as WORKING PAPERS].

[112] WORKING PAPERS at 1434.

[113] WORKING PAPERS at 1435.

[114] Blakey, *Aspects of Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 87 (1967).

[115] 18 U.S.C. § 6003(a) uses the active voice ("the court . . . shall issue . . . an order"), while the Commission's proposed statute was drafted in the passive voice ("The direction to testify . . . shall be issued by the United States District Court"). The Commission's proposed immunity act appears in WORKING PAPERS at 1447–48.

> . . . the proposed language, while clearly negating a full policy review, would not prevent a Federal district court from finding sufficient reserve authority to deny a request for an immunity order [in an instance of abuse]. . . . This approach leaves open the question of residual inherent power of the court in [instances of immunity grant abuse].[116]

Once the intrinsic power of the judiciary to withhold its cooperation from efforts to subvert justice is recognized, it becomes unnecessary to expressly provide the courts with discretionary power to effect the same result. At the same time, judicial interference with the prosecutor's tactical decision to immunize a given witness will be precluded except where a finding of impropriety triggers the court's duty to withhold its cooperation and deny issuance of the immunity order sought by the prosecutor.

No court has yet exercised this inherent power, and current immunity grant procedures suggest none will. Because they assume that all technically competent applications must be granted, the courts never even inquire into the circumstances surrounding immunity requests.[117]

[Given the potential for abuse, change in the judicial handling of immunity requests is essential. The courts must take cognizance of the fact that they are not powerless to deny immunity requests where there are improper motives underlying the application. Judges must therefore inquire into the circumstances surrounding each immunity request, and refuse cooperation where the underlying motive is a corrupt one.]

This inquiry need not be burdensome for either the judge or the prosecutor. A list of questions could be submitted to the United States Attorney in charge of the case, calling for written responses under affirmation[118] which would be kept secret from the public. Matters of relevance might include:

1. The existence of any familial, personal, or business relationship between the witness for whom immunity is being sought and any prosecutor involved in the grand jury investigation or prosecution at which the witness will be called to testify.

2. The existence and nature of any federal or local charges presently pending against the witness.

3. Whether the Government expects to subsequently prosecute the witness for his involvement in the matter under investigation.

4. Where the Government does not intend to prosecute the witness

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[116] WORKING PAPERS at 1435–36.

[117] *See* cases cited at note 98 *supra*.

[118] This would make the prosecutor liable for any false or materially incomplete and misleading answers.

at a later date, the reasons behind the Government's decision not to prosecute this individual.

5. The number of other individuals with significant criminal involvement in the matters under investigation who have been granted immunity or have agreed to testify in exchange for prosecutive concessions.

6. If more than one witness has already been immunized or promised freedom from prosecution, the reasons for the Government's decision to seek immunity for the subject of the immunity grant rather than for any of the remaining unimmunized conspirators.

Should the prosecutor's responses to any of these questions raise serious doubts about the propriety of issuing an immunity order, the judge should seek additional information. If convinced that issuance of the requested immunity order would be inappropriate, it should be refused as against the best interests of justice.

B. *Disparity in the Treatment of Defense Witnesses: Due Process Problems*

Section 6003(a) directs the court to issue orders compelling witnesses to testify, upon the request of the United States Attorney.[119] There is no comparable provision for the issuance of immunity orders on the request of the defense. This reflects the traditional view that only the Government can compel witnesses to testify.[120] Nor can the court command the United States Attorney to submit immunity requests on the defense's behalf.[121] Thus, criminal defendants are not able to obtain section 6002 orders to compel their witnesses to testify, even though the prosecution has ready access to them for its own witnesses.

The consequences of this disparity can be devastating to the defense. A defendant who sits powerless to compel a key witness to give vital exculpatory testimony may well be indicted and convicted solely on the strength of testimony compelled by the prosecution through use of an immunity order. Yet, Congress' reluctance to make section 6002 orders available to the defense is not without reason. Since the subsequent prosecution of a witness is greatly impeded if he testifies under a grant of immunity,[122] defendants thus privileged could entice their colleagues, themselves threatened with prosecution, to give perjured exculpatory testimony under a grant of immunity. Such an offer might prove irre-

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[119] 18 U.S.C. § 6003(a) and (b) (1970).

[120] *See* note 1 *supra*.

[121] United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), *cert. denied*, 421 U.S. 5,6 (1975); United States v. Jenkins, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *cf.* Cerda v. United States, 488 F.2d 720 (9th Cir. 1973).

[122] *See* notes 43-59 *supra* and accompanying text.

sistible. With the scope of the immunized witness' testimony controlled by the defense rather than by the prosecution, the witness could conveniently divulge the details of his own past criminal involvements, assured that the more he disclosed, the less likely that he could be successfully prosecuted.[123]

[Judicial authority to issue defense witness immunity grants as a matter of discretion might limit the potential for abuse, but serious problems of judicial administration would be presented. Informed decisions as to which requests were worthy would necessitate a time-consuming "mini-trial" whenever a defense request for immunity was made. In light of the courts' already overburdened dockets, this solution may be impractical.]

Still, if the search for truth justifies grants of immunity to compel witnesses to divulge otherwise self-incriminatory information, that search must not be one-sided, or it may well mistake the object it seeks. Judicial treatment of this problem, under both 18 U.S.C. § 6003 and its predecessors, has been somewhat myopic. Despite the manifest unfairness of leaving the defense totally without access to immunity orders, the courts have steadfastly refused to recognize any defense right to obtain them[124] in all but two cases.

The first of these cases, *Earl v. United States*,[125] was decided in 1966, and involved a transactional immunity statute[126] which, like section 6002, made witness immunity grants available exclusively to the prosecution. On appeal of a narcotics conviction, Earl argued that the unavailability of defense witness immunity grants under the statute, coupled with the prosecutor's refusal to seek immunity for a key defense witness who refused on fifth amendment grounds to testify at trial, deprived him of a fair trial, in violation of the Due Process Clause of the fifth amendment.[127] Although this argument was clearly framed as a challenge to the fairness of his trial, a three-judge District of Columbia Circuit panel affirmed Earl's conviction in an opinion that treated his claim as one of

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[123] Once a crin inal act has been revealed in a witness' immunized testimony, prosecution of the witness for that act is automatically hamstrung by problems of evidentiary use, non-evidentiary use, and proof of investigative sources. *See* notes 43-59 *supra* and accompanying text.

[124] *See, e.g.*, Thompson v. Garrison, 516 F.2d 986 (4th Cir. 1975), *cert. denied*, 423 U.S. 933 (1976); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975), United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975).

[125] 361 F.2d 531, *reh. denied*, 364 F.2d 666 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). The case is analyzed in Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967).

[126] Act of July 18, 1956, ch. 924, § 201, 70 Stat. 574 (repealed by Act of Oct. 15, 1970, Pub. L. No. 91-452, § 224(a), 84 Stat. 929).

[127] 361 F.2d at 534.

evidence suppression by the prosecution.[128] However, the court went on to suggest in a footnote that a serious due process problem could arise where the prosecution avails itself of an immunity grant while declining to seek immunity grants at the defense's request.[129] Because no Government witnesses were immunized in *Earl*, this footnote had no bearing on the disposition of the case.[130]

United States v. Alessio[131] similarly involved a defendant who asked the United States Attorney to request an immunity order (under 18 U.S.C. § 6002) to compel the testimony of three prospective defense witnesses who threatened to remain silent on fifth amendment grounds if called to testify on his behalf. The prosecution refused, although an immunity grant had been sought and obtained for one of its own witnesses, and Alessio was convicted in a trial at which the three defense witnesses relied on their right to remain silent.

On appeal, the defendant charged that the prosecutor's failure to seek immunity for his witnesses deprived him of vital exculpatory testimony, resulting in a denial of "important Fifth and Sixth Amendment rights."[132] Recognizing that these facts presented the situation raised hypothetically in the footnote to *Earl*, the court's analysis focused on the fairness issue:

> To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential 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. Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment. . . . The key question, then, is whether appellant was denied a fair trial because of the government's refusal to seek immunity for the defense's witnesses.[133]

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[128] The court stated:

> "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. State of Maryland . . . . No such suppression is involved here, however. Here the prosecution has not affirmatively withheld a witness or concealed evidence. . . .

Id.

[129] *Id.* at 534 n.1.

[130] Although four judges on the District of Columbia Circuit recognized the inadequacy of the panel's treatment on the fairness issue, Earl's petition for a rehearing *en banc* was denied. 364 F.2d 666 (D.C. Cir. 1966).

[131] 528 F.2d 1079 (9th Cir. 1976).

[132] *Id.* at 1080.

[133] *Id.* at 1082.

Although the Ninth Circuit was unable to find that Alessio's right to a fair trial had been violated under the facts of the case,[134] the court's acknowledgment of the constitutional violations which might result from the disparate treatment accorded defendants under the immunity statutes signals that some new accommodation may have to be developed if the procedure is to survive at all.

By implication, *Alessio* suggests one workable method of making immunity grants available to defense witnesses. This approach would charge the prosecutor with a duty to seek immunity grants on the defense's behalf, or face reversal of any conviction, whenever it appears that a grant of defense witness immunity is necessary to ensure a fair trial. Leaving this decision to the prosecution is appropriate, since the prosecutor's familiarity with the case should enable him to intelligently assess whether the unavailability of a particular witness' testimony would prejudice the defendant's case. As with the prosecutor's duty to disclose evidence tending to exculpate the defendant,[135] an error in judgment might be grounds for reversal.

Of course, this mechanism will not preclude any of the abuses inherent in grants of immunity to defense witnesses. One solution would be to restrict the scope of the witness' immunized testimony to relevant matters by requesting immunity orders whose protections would be limited to the witness' responses to a list of questions submitted by the defense and approved by the prosecution prior to trial. However, such a procedure would unfairly force the defense to reveal its case to the prosecution in advance of its presentation, and would improperly circumscribe the defense in the conduct of its case. Nonetheless, *Alessio* indicates that the potential for abuse of immunity grants to defense witnesses cannot offset the constitutional violations which might occur under the present immunity scheme.

C. *The Automatic Immunity Anomaly in 11 U.S.C. § 25(a) 10*

Before Congress' enactment of the present immunity provision in 1970, there existed a number of federal statutes which automatically conferred either transactional or use immunity on testimony given in diverse federal administrative and investigatory proceedings.[136] It was thought that

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[134] The court held that the evidence being sought by Alessio from his key witnesses was cumulative of testimony presented to the jury by other defense witnesses. Because all the facts and claims Alessio intended to elicit from these witnesses were presented to the jury through other witnesses, the absence of these witnesses' testimony did not deprive the defendant of a fair trial. *Id.*

[135] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[136] *E.g.*, Act of Feb. 25, 1903, ch. 755, § 1, 32 Stat. 904 (repealed in 1970 by Act of

witnesses could thereby be compelled to testify, without resorting to time-consuming formalities which required that a witness assert his fifth amendment privilege and that he then be brought before a district court judge to receive a grant of immunity.

Under the Witness Immunity Act of 1970, considerations of convenience were preempted by considerations of uniformity, both of type[137] and of method, in that an "assertion of the privilege would be required in all instances, thus preventing an unwitting, automatic grant of immunity as may presently occur under some existing federal statutes."[138]

With these objectives in mind, Congress repealed all existing automatic immunity statutes, with one conspicuous exception. That exception is 11 U.S.C. § 25(a)10,[139] a provision of the Bankruptcy Act applicable to both corporate and individual bankruptcy.[140] Typically, once an adjudication of bankruptcy has been made, the efficient and orderly settlement of the bankrupt's estate makes it necessary for him to testify fully and completely at various discovery proceedings with regard to the conduct of his business, the cause of bankruptcy, and all other matters affecting the administration of his estate or the granting of a discharge. In order to ensure that this information will not be withheld on the basis of the fifth amendment privilege against self-incrimination, the present

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Oct. 15, 1970, Pub. L. No. 91–452, § 209, 84 Stat. 929) which provided:

> No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1–7 of [the Sherman Antitrust Act].

[137] After all of Congress' 1970 immunity legislation became effective, all statutory grants of witness immunity were restricted to use-derivative use immunity grants.

[138] WORKING PAPERS, *supra* note 111, at 1405. *See also* H.R. REP. No. 1549, 91st Cong., 2d Sess. 32–33 (1970).

[139] Although this statute was amended by the Witness Immunity Act of 1970 to confer use-derivative use immunity in conformity with the provisions of 18 U.S.C. § 6002, the amendment did not affect the automatic immunity aspect of 11 U.S.C. § 25(a)10. *See* Act of Oct. 15, 1970, Pub. L. No. 91–452, tit. II, § 207.

As amended, 11 U.S.C. § 25(a)10 (1970) provides:

> The bankrupt shall . . . at the first meeting of his creditors, at the hearing on objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, and in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding. . . .

[140] The House and Senate reports are silent as to their reasons for not repealing the automatic immunity aspect of 11 U.S.C. § 25(a)10 as was recommended by the National Commission on Reform of Federal Criminal Laws. *See* H.R. REP. No. 1188, 91st Cong., 2d Sess. (1970); SENATE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1970, S. REP. No. 617, 91st Cong., 1st Sess. (1969); WORKING PAPERS, *supra* note 111, at 1442, 1446.

version of section 25(a)10 automatically provides a grant of use-derivative use immunity covering all testimony given by a bankrupt at the first meeting of creditors and at any other bankruptcy hearings at which his testimony is pursuant to court order. By immunizing the bankrupt's testimony, the bankrupt cannot refuse to answer any question put to him by creditors or the bankruptcy judge without being cited for contempt.[141]

Thus, while all other grants of immunity are preceded by an administrative determination that the testimony being sought is sufficiently vital to warrant an immunity grant to compel its production,[142] section 25(a)10 allows immunity to automatically attach to testimony provided by the bankrupt at the statutorily specified hearings without such a determination. The most disturbing aspect of this provision is the unique opportunity it presents for bankrupts to help themselves to grants of immunity which will impede or even prevent their prosecution for past criminal acts. All testimony given by the bankrupt under section 25(a)10 is automatically immunized, regardless of whether it is relevant to the bankruptcy proceeding.[143] Witnesses are apparently free to disclose all their prior misdeeds and thereby severely hamper any subsequent efforts to prosecute them for those crimes.[144] Problems of taint are particularly troublesome with respect to immunized Bankruptcy Act testimony because the prosecution may well be unaware that the defendant has testified under a section 25(a)10 immunity grant.[145]

To make this situation even more distressing, it is possible for witnesses to reap the benefits of testifying under section 25(a)10's protections without being adjudged in bankruptcy. Since the section applies to corporate as well as personal bankruptcy proceedings, any knowledgeable official of a bankrupt corporation designated to testify under section 25(a)10 with regard to the corporate bankrupt's business activities will automatically have immunity attached to his disclosures.[146]

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[141] *See* Block v. Consino, 535 F.2d 1165, 1167–1169 (9th Cir. 1976).

[142] *See* 18 U.S.C. § 6003(b)(1) and (2), 18 U.S.C. § 6004(b)(1) and (2), and 18 U.S.C. § 6005(b)(1)(2) and (3).

[143] In Goldberg v. Weiner, 480 F.2d 1067 (9th Cir. 1973), the court held: "[Section 25(a)10] provides that 'no testimony' given by the bankrupt shall be used in subsequent criminal proceedings, not merely 'relevant' testimony, or only testimony within the proper scope of examination authorized by the statute." *Id.* at 1070.

[144] *See* notes 43–59 *supra* and accompanying text. For a more complete examination of these problems under section 25(a) 10, *see* Keeney & Serino, *The Effect of the Organized Crime Control Act of 1970 in Bankruptcy Proceedings*, 46 AM. BANK. L.J. 1 (1972); McGuire, *Immunity under the Bankruptcy Act, Automatic or Controlled?*, 48 AM. BANK. L.J. 159 (1974); Note, *The Future of Testimonial Immunity in Bankruptcy Proceedings*, 48 S. CAL. L. REV. 92 (1974).

[145] *See* Block v. Consino, *supra* note 141 at 1169.

[146] This designation is made by the Bankruptcy Judge pursuant to 11 U.S.C. § 25(b). The designated individual typically is an officer of the bankrupt corporation since a

Under proposed revisions of the Bankruptcy Act, automatic immunity would be repealed and testimony in such proceedings would become subject to the uniform provisions of the Witness Immunity Act of 1970.[147] These reforms have been pending for three years,[148] and are long overdue.

IV. CONCLUSION

The Witness Immunity Act of 1970 is a relatively new statute, and while it attempts to deal with difficulties encountered under its predecessors, it has created several problem areas of its own. Some, such as the automatic immunity anomaly in bankruptcy proceedings, may be easily remedied by Congressional action. Others, such as the constitutional questions raised where a witness is threatened with prosecution abroad, are less susceptible to legislative solutions and will require action by the Supreme Court before the scope of the statutory scheme is fully defined.

These problems aside, it is not at all clear that the shift from transactional to use-derivative use immunity has proven to be as great a boon to effective law enforcement as had originally been hoped. Although much employed, the formidable barriers to subsequent prosecution of immunized witnesses have prompted at least one key prosecutor's office to sharply curtail its use.[149] Apart from uniformity, this most recent statutory immunity scheme appears to have made questionable practical improvements over those that came before.

DAVID SUGAR*

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corporate official will best be able to assist in the administration of the bankrupt's assets by providing information about the corporation's business affairs. For a more thorough discussion of Bankruptcy Act practices, see Note, *The Future of Testimonial Immunity in Bankruptcy Proceedings*, 48 S. CAL. L. REV. 92, 92–103 (1974).

[147] H.R. 10792, 93d Cong., 1st Sess. § 4–313 (1973) *See generally* Note, *The Future of Testimonial Immunity in Bankruptcy Proceedings*, 48 S. CAL. L. REV. 92, 109–14.

[148] The Bankruptcy Act reform bill (S. 234–236, H.R. 31–32, 94th Cong., 1st Sess. (1975)) was still in committee as of June 1, 1976.

[149] Mr. Samuel K. Skinner, the United States Attorney for the Northern District of Illinois, has publicly announced his intention to abandon broad use of immunity grants in order to compel witnesses to testify. *See* Chicago Tribune, Apr. 30, 1976, § 1, at 21, col. 6.

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FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB 78

Title "An Act relating to immunity and protection of witnesses . . ."

Requested by Senate Judiciary Committee Date Feb. 6, 1979

II. FISCAL DETAIL

Agency Affected LAW

Program Category Affected Administration of Justice

Budget Request Unit(s) Affected Prosecution

EXPENDITURES (Thousands of Dollars)

		FY 79	FY 80	FY 81	FY 82	FY 83	FY 84
100	PERSONAL SERVICES						
200	TRAVEL						
300	CONTRACTUAL		25.0	26.5	28.1	29.8	31.6
400	COMMODITIES						
500	EQUIPMENT						
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL		25.0	26.5	28.1	29.8	31.6

FUNDING (Thousands of Dollars)

GENERAL FUND		25.0	26.5	28.1	29.8	31.6
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME		-0-	-0-	-0-	-0-	-0-
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

Granting of immunity as proposed by Article 3 will have little, if any, financial impact and any changes which might occur therefrom would be slight. The proposed Article 4 will cause a financial impact estimated at $25,000 for the first year. This figure represents a minimum amount necessary for short-term, two or three week periods, when witnesses would be placed in safe housing. Obviously, there will be years when much if not all of the appropriation will lapse. Ongoing costs have been projected using a 6% inflation factor.

IV. DATE February 6, 1979 PREPARED BY Richard I. Pegues, Admin Officer

AGENCY LAW

PHONE 465-3695

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 10/78)