

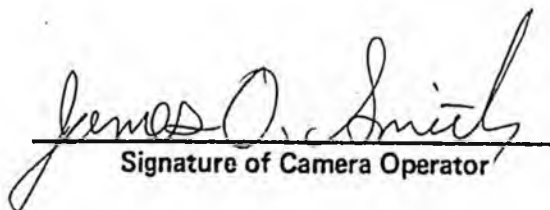
LEG. FINANCE - BILLS 1977 - 1978  
HB 135 thru CSSSHB 143 668

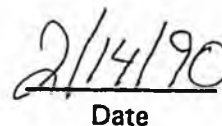


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I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

  
Signature of Camera Operator

  
Date

"An Act making a special appropriation to the Department of Health and Social Services for a senior citizens nutrition and recreation facility in Fairbanks; effective date."

COMMITTEE REPORT

2/11/77

HOUSE

Mr. Speaker:

Date \_\_\_\_\_

The Committee on FINANCE has had HB 135

under consideration. A Majority of the members of the Committee

( ) recommends it DO PASS

( ) recommends it DO NOT PASS

( ) recommends it DO PASS WITH ATTACHED AMENDMENT(S)

( ) recommends it BE REPLACED WITH CS FOR \_\_\_\_\_ AND THAT

CS FOR \_\_\_\_\_ DO PASS

( ) "and" recommends it BE REFERRED TO THE \_\_\_\_\_

COMMITTEE

( ) reports it back WITHOUT RECOMMENDATION

( ) "other"

Members signing the Majority report:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Members NOT concurring in the Majority report:

\_\_\_\_\_ recommends:

\_\_\_\_\_ recommends:

\_\_\_\_\_ recommends:

\_\_\_\_\_ recommends:

\_\_\_\_\_ recommends:

\_\_\_\_\_ Chairman

"An Act making a special appropriation to the Department of Health and Social Services for a senior citizens nutrition and recreation facility in Fairbanks; and providing for an effective date."

### COMMITTEE REPORT

1-28-77

HOUSE

FINANCE

2-10-77

Date

Mr. Speaker:

The Committee on HESS has had HB 135 under consideration. A majority of the members of the Committee

- recommends it do pass
- recommends it do not pass
- recommends it do pass with attached amendment(s)
- recommends it be replaced with CS for \_\_\_\_\_ and that CS for \_\_\_\_\_ do pass
- (and) recommends it be referred to the \_\_\_\_\_ committee
- reports it back without recommendation
- AND attaches a report of its intent
- (other) \_\_\_\_\_

MEMBERS SIGNING THE MAJORITY REPORT:

<del>_____</del>	SCORSEW	do Pass
R. O. O'Connell	Do Pass	MON 20 DO PASS
_____	Do Pass	Don Bennett Do Pass
L. J. O'Connell	Do Pass	Charles H. Pan Do Pass

MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_ recommends: \_\_\_\_\_

Charles H. Pan  
Chairman

7  
Introduced: 1/28/77  
Referred: Health, Education &  
Social Services and Finance

3014  
Berry

1 IN THE HOUSE

BY PARR AND BROWN PARR

2 HOUSE BILL NO. 135

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act making a special appropriation to the Department  
7 of Health and Social Services for a senior citizens  
8 nutrition and recreation facility in Fairbanks; and  
9 providing for an effective date."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 \* Section 1. The sum of \$500,000 is appropriated from the general fund to  
12 the Office of Aging (Department of Health and Social Services) for the acqui-  
13 sition, construction and equipping of a senior citizen nutrition and recrea-  
14 tion facility in Fairbanks, to be operated and administered by the North Star  
15 Council on Aging, Inc., under contract with the Office of Aging (Department  
16 of Health and Social Services).

17 \* Sec. 2. This Act takes effect July 1, 1977.  
18  
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29

ALASKA STATE LEGISLATURE

TENTH Legislature .. FIRST Session

HOUSE BILL ..... NO. 135

By PARR AND BROWN .....

"An Act making a special appropriation to the Department of Health and Social Services for a senior citizens nutrition and recreation facility in Fairbanks; and providing for an effective date."

Sr. citizens center - Fbks.

Introduced in the House ..... 1-28, 1977

HISTORY IN THE HOUSE

1977

Jan. 28

Read first time and referred to Committee on

HESS and Finance

Reported back with recommendation that

Read second time and

Read third time and

PASS	Effective Date
Yeas	Yeas
Nays	Nays
Absent	Absent
Excused	Excused

Reconsideration

PASS	Effective Date
Yeas	Yeas
Nays	Nays
Absent	Absent
Excused	Excused

Reported correctly engrossed  
Signed by Speaker  
Sent to Senate

CHIEF CLERK OF THE HOUSE

HISTORY IN THE SENATE

19

Read first time and referred to Committee on

Reported back with recommendation that

Read second time and

Read third time and

PASS	Effective Date
Yeas	Yeas
Nays	Nays
Absent	Absent
Excused	Excused

Reconsideration

PASS	Effective Date
Yeas	Yeas
Nays	Nays
Absent	Absent
Excused	Excused

Reported correctly engrossed  
Signed by President  
Returned to House

SECRETARY OF THE SENATE

HISTORY IN THE HOUSE

19

Received from Senate

Concurred in Senate amendment thus adopting:

Failed to concur in Senate amendment; asked Sen. to recede

Senate receded from amendment

Senate failed to recede from amendment

FCC appointed by House

FCC appointed by Senate

FCC adopted

To enrolling

Reported correctly enrolled

Sent to Governor

..... by Governor

Filed with Lt. Governor

Chapter No. ....

HB 135

Introduced: 1/28/77  
Referred: Health, Education &  
Social Services and Finance

1 IN THE HOUSE

BY PARR AND BROWN

2 HOUSE BILL NO. 135

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act making a special appropriation to the Department  
7 of Health and Social Services for a senior citizens  
8 nutrition and recreation facility in Fairbanks; and  
9 providing for an effective date."

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16 of Health and Social Services).

17 \* Sec. 2. This Act takes effect July 1, 1977.

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#

The following data was provided by the North Star Council  
on Aging, Ted Drahn spokesperson. 2/4/77

Incorporated in 1973, the North Star Council of Aging has provided service since 1968. It is currently operating out of its third rented quarters which is inadequate and subject to withdrawal at any time. The program is currently reaching approximately 70% of all persons over 60 in the Fairbanks area. The American Legion permits use of the building four hours a day, Monday through Friday, from 10:00am to 2:00pm. A noon meal is served.

Title III Budget is 61,219. with 36,500. from federal funds. Title VII Budget is 155,553. with 108,079. from federal funds. The rest of the funds comes from city donations and earned income.

Services:	Served:
Nutrition	304
Recreation	439
Outreach	608
Transportation	?
Medical	431
Shopping	446
Shopping Assistance	74

Currently there is no facility in the community for the social, recreational, and leisure needs of the people.

Currently they use the American Legion Hall for \$150 a month from 10-2 pm, five days per week. It provides for limited recreation due to the fact that it needs daily cleaning, has no storage facilities, kitchen facilities are nonexistent, and the dining area is not large enough according to federal guidelines and our attendance.

The current average number of people for meals is 42-54 per day, the highest is 60-70; more for recreation. The figure with new facilities could easily double.

The Golden Towers will not satisfy the aged. It is a private apartment and has facilities for its people. The area is not large enough for our recreational program and the kitchen facilities and dining area are not large enough.

There are approximately 1500 people in Fairbanks over 60. Many live alone. They have nothing in common except age. No social place (when the North Star Borough has excess dollars, they generally go toward programs for children), there is no focal point to keep them together.

Any proposed facilities would need to be "large". Some of the activities and needs would include: dancing, recreation, art, and storage space for recreational equipment and art supplies. The kitchen would be for the nutritional program and social events. It would enable them to have congregate dining (and save money paid for rent), and have a snack bar for events in the evening.

There is a real pioneer spirit in Fairbanks. The City of Fairbanks provides \$30,000. annually toward matching funds required by Title III and Title VII of the Older Americans Act. If the community becomes aware of some of the problems, they are generous about helping.

Seniors are participating more in Tanana Valley Community College classes. A senior center would provide an even greater incentive for more classes and transportation would be provided.

Office on Aging  
Position Paper on  
HR 135

"Making a special appropriation to the Department of Health and Social Services for a senior citizens nutrition and recreation facility in Fairbanks."

If this bill becomes law, it would constitute the first direct state appropriations to fund a grantee currently receiving 100% Federal funds through this Office to provide meals and supportive services to the elderly.

Governor Hammond is recommending to the Legislature, \$100,000 from the GF to provide for home helper services (See HB 52, appropriations Bill).

The Office on Aging is currently funding the North Star Council on Aging a total of \$148,500 to provide nutrition and transportation services to the elderly in Fairbanks. Of a total of approximately 1,224 persons 60 years or over living in Fairbanks, these programs have provided 4,315 meals; 4,000 rides for transportation, shopping assistance, recreation, arts and crafts, medical services during a six months period covering July 1, 1976 - December 31, 1976.

The department supports the concept of the bill but cannot support funding in excess of the Governor's budget.

Recommended: *M.D. Plotnick* *2/10/77*  
M.D. Plotnick, Coordinator Date

Approved: *Francis S.L. Williamson* *2-10-77*  
Francis S.L. Williamson, Commissioner Date

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 135

Title Special Appropriation for Senior Citizens Nutrition Facility

Requested by Rep. Parr

Date February 7, 1977

II. FISCAL DETAIL

Agency Affected Aging

Program Category Affected Aging

Budget Request Unit(s) Affected Aging

EXPENDITURES (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.		500.0				
<b>TOTAL</b>		500.0				

FUNDING (Thousands of Dollars)

GENERAL FUND		500.0				
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

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

IV. DATE February 7, 1977

PREPARED BY M. D. DeLoach

AGENCY Budget Planning and

PHONE 6193

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named) Marsha Hubbard

HB 714

12016 FAIRBANKS ALASKA 84 02-04 1025A AST

PMS HONORABLE CHARLES PARR HOUSE OF REPRESENTATIVES

1976 FEB 4 PM 12 32

ALASKA STATE LEGISLATURE

ALASKA COMMUNICATIONS  
PROJECT 500340  
JUNEAU, ALASKA 99901

JUN

PLANS IN OUR FILE FOR A 30 BY 40 1 1/2 STORY BUILDING

WHICH INCLUDES SOCIAL RECREATIONAL AREA, KITCHEN/

DINING ROOM SEPARATE ROOMS FOR ARTS AND CRAFTS COUNSEL

HAS EXPLORED THE FOLLOWING BUILDINGS FOR USE AS SENIOR

CENTER: 1. OLD MAIN JUNIOR HIGH

2. LIBRARY 1ST AND COWELS

3. MILLER/BENTLEY LOG HOUSE ON COLLEGE RD

4. BAPTIST CHURCH ON 22ND ST

EACH PRESENTED TOO MANY PROBLEMS FOR PURCHASE

AND CONVERSION TO OUR USE GREATLY APPRECIATE YOUR CONTINUING

INTEREST IN FAIRBANKS SENIOR CITIZENS

THEODORE L DRAHN PRES NORTH STAR COUNSEL ON AGING

#

Department of Psychology,  
Sociology and Social Work



UNIVERSITY OF ALASKA  
COLLEGE, ALASKA 99701

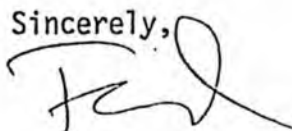
February 25, 1976

Honorable Charles H. Parr  
Pouch V  
State Capitol  
Juneau, Ak 99801

Dear Charlie:

Enclosed are some rough plans and a little past correspondence regarding a Senior Center project for Fairbanks.

We do appreciate your efforts.

Sincerely,  


Theodore L. Drahn

TD:db

Encl.

NORTH STAR COUNCIL ON AGING, INC.  
P.O. BOX 2707; Fairbanks, Alaska  
99701

June 4, 1974

Robert Huffman  
Alaskaland Parkboard Chairman  
Alaskaland

Dear Mr. Huffman and Park Board;

The North Star Council on Aging would like to request an 80' x 40' piece of land next to the Moore Street gate in the Alaskaland parking lot for our senior citizen center. (See drawing.) The site requested is near the water, sewer and steam lines.

Upon your suggestion, we have worked with Park Superintendent Bob Hamme but have found that a site within the park would not be feasible due to the transportation needs of the senior citizens. No cars are allowed to be parked on the grounds and during winter many seniors find it difficult to walk in after dropping off friends especially during icy conditions. During summer our van is not allowed to drive onto the grounds for safety reasons. We have found that there are a few elderly who cannot even walk the distance from the parking lot to the Palace or anyplace further.

The senior citizens, however, would like to have their center at Alaskaland. The charm of Alaskaland brings back nostalgia to many senior pioneers who fit in well with the Gold Rush theme. They believe in making Alaskaland a great park of Alaska and would like to be a part of its future growth.

We are available for any further questions. Please feel free to contact us at 452-1735. We hope to hear from you soon.

Sincerely,

*Gordon F. Taylor*

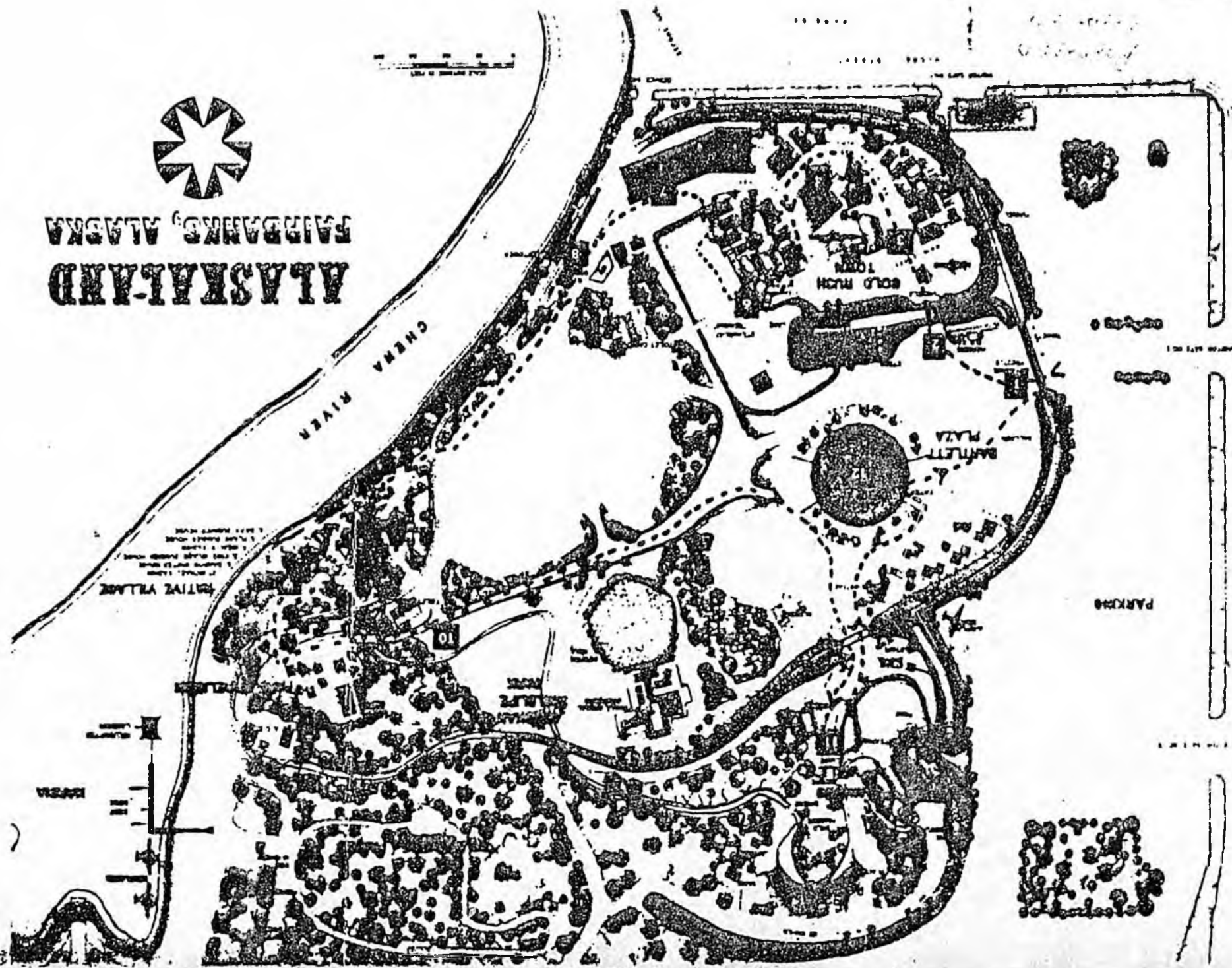
Gordon F. Taylor,  
President

Enc): 3

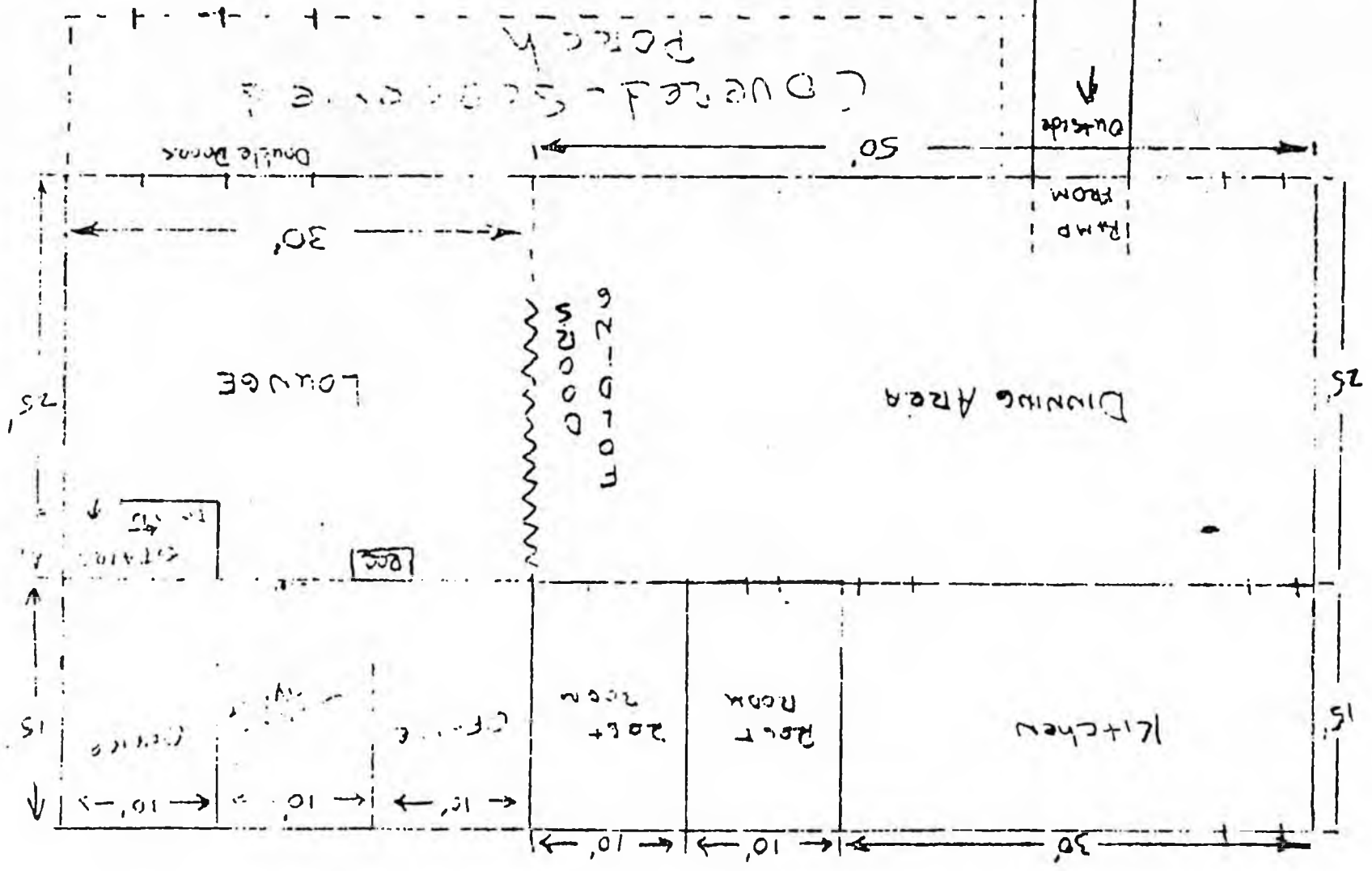
cc: Wally Droz  
Rob Hamme



**ALASKA-LAND**  
**FAIRBANKS, ALASKA**

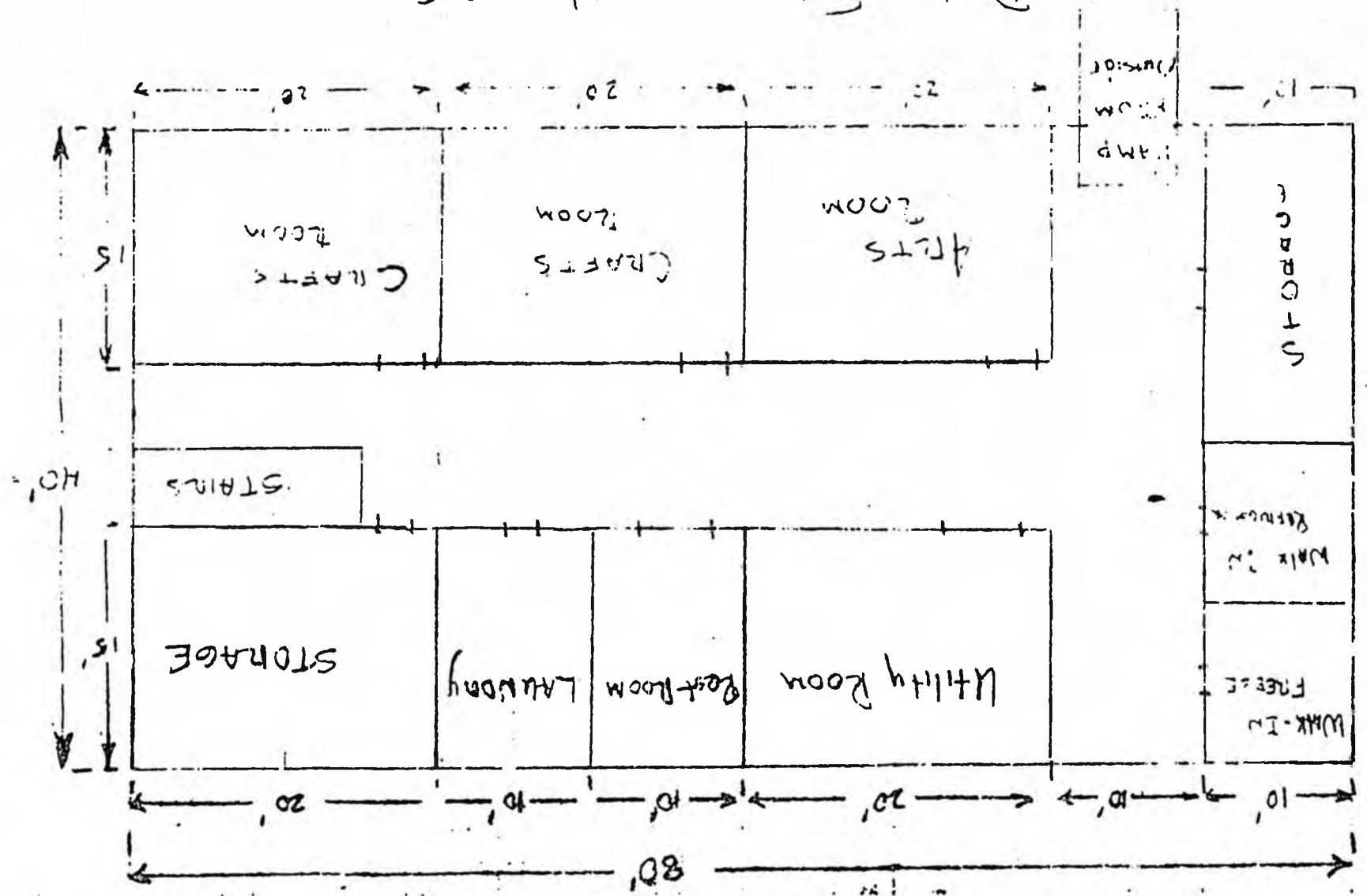


1st Floor  
 SENIOR CITIZEN CENTER



RAMP  
 FROM  
 OUTSIDE  
 RAMP  
 TO  
 BASEMENT  
 (downward)

D.L. BASEMENT OF SENIOR CITIZEN CENTER  
 STAIRS heat?

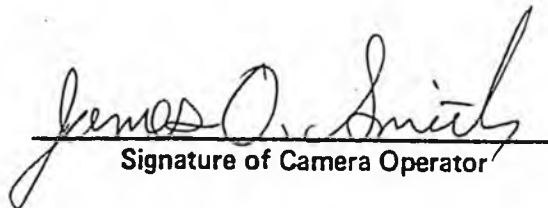


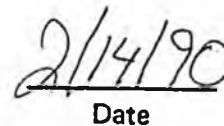


# RECORDS CERTIFICATION



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Signature of Camera Operator

  
Date

*See attached fiscal note (\$0)*

COMMITTEE REPORT

SENATE

3/11/77

March 29, 1977

Date

Mr. President:

The Committee on FINANCE has had HB 141 transferring the trademark function to Dept. of Commerce & Economic Development under consideration. A majority of the members of the Committee

- recommends it do pass
- recommends it do not pass
- recommends it do pass with attached amendment(s)
- recommends it be replaced with CS for \_\_\_\_\_ and that CS for \_\_\_\_\_ do pass
- (and) recommends it be referred to the \_\_\_\_\_ committee
- reports it back without recommendation
- AND attaches a report of its intent
- (other) \_\_\_\_\_

MEMBERS SIGNING THE MAJORITY REPORT:

\_\_\_\_\_

*Mr. [unclear]*

\_\_\_\_\_

*Tillion*

\_\_\_\_\_

MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

*Lee [unclear]* recommends: \_\_\_\_\_

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_  
Chairman

NOTE: HB 141 was reported out of Senate Finance on 3/29/77 with -0- fiscal impact. The printing of forms and the filing of documents (FY 77 \$.4 and FY 78 \$.1) should be absorbed by the Department of Commerce and Economic Development.

THE LEGISLATURE OF THE STATE OF ALASKA  
TENTH LEGISLATURE

*Alison Farnan*  
Alison Farnan  
Legislative Finance 3/29/77

FISCAL NOTE - *Revised*

I. REQUEST

Bill/Resolution No. HB 141  
Title Functions for Trademarks transfer from Lt. Gov.'s Office to Dept. of Comm & Ec. Dev.  
Requested by Office of the Governor Date 12/27/76

II. FISCAL DETAIL

Agency Affected Commerce and Economic Development  
Program Category Affected Public Protection  
Budget Request Unit(s) Affected Banking, Securities, Small Loans and Corporations

EXPENDITURES (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
100 PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
200 TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
300 CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
400 COMMODITIES	<del>-0-</del>	<del>-0-</del>	-0-	-0-	-0-	-0-
500 EQUIPMENT	<del>-0-</del>	-0-	-0-	-0-	-0-	-0-
600 LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
700 GRANTS, CLAIMS, ETC.	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	<del>-0-</del>	<del>-0-</del>	-0-	-0-	-0-	-0-

*(See note above)*

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify)	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

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

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

Costs are associated with the printing of forms and filing of documents in accordance with Alaska Statutes, Section 45.50, Article I.

Introduced: 1/28/77  
Referred: Commerce

1 IN THE HOUSE

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

2 HOUSE BILL NO. 141

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act transferring the trademark function to the  
7 Department of Commerce and Economic Development; and  
8 providing for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 45.50.020 is amended to read:

11 Sec. 45.50.020. APPLICATION FOR REGISTRATION. A person who  
12 adopts and uses a trademark in the state may file with the depart-  
13 ment [IN THE OFFICE OF THE LIEUTENANT GOVERNOR], on a form furnished  
14 by the department [LIEUTENANT GOVERNOR], an application for registra-  
15 tion of the trademark setting out the following information:

16 (1) the name and business address of the person applying  
17 for registration; and, if a corporation, the state of incorporation,

18 (2) the goods in connection with which the mark is used,  
19 the manner in which the mark is used in connection with the goods and  
20 the class of the goods,

21 (3) the date when the trademark was first used anywhere and  
22 the date when it was first used in this state by the applicant or his  
23 predecessor in business, and

24 (4) a statement that the applicant is the owner of the  
25 trademark and that no other person has the right to use the trademark  
26 in this state either in the identical form or in a near resemblance to  
27 it as might be calculated to deceive or to be mistaken for it.

28 \* Sec. 2. AS 45.50.040 is amended to read:

29 Sec. 45.50.040. FILING FEE. The application for registration

1 shall be accompanied by a filing fee of \$10 payable to the Department  
2 of Commerce and Economic Development [LIEUTENANT GOVERNOR].

3 \* Sec. 3. AS 45.50.050 is amended to read:

4 Sec. 45.50.050. FORM AND CONTENTS OF CERTIFICATE OF REGISTRATION.  
5 Upon compliance by the applicant with the requirements of secs. 10 -  
6 200 of this chapter, the commissioner [LIEUTENANT GOVERNOR] shall  
7 issue and deliver a certificate of registration to the applicant. The  
8 certificate of registration shall be issued under the signature of the  
9 commissioner [LIEUTENANT GOVERNOR] and the seal of the state. The  
10 certificate shall show

11 (1) the name and business address and, if a corporation,  
12 the state of incorporation, of the person claiming ownership of the  
13 trademark,

14 (2) the date claimed for the first use of the trademark  
15 anywhere and the date claimed for the first use of the trademark in  
16 this state,

17 (3) the class of goods and a description of the goods on  
18 which the trademark is used,

19 (4) a reproduction of the trademark,

20 (5) the registration date, and

21 (6) the term of the registration.

22 \* Sec. 4. AS 45.50.060 is amended to read:

23 Sec. 45.50.060. CERTIFICATE OF REGISTRATION AS EVIDENCE. A  
24 certificate of registration issued by the department [LIEUTENANT  
25 GOVERNOR] under the provisions of secs. 10 - 200 of this chapter or a  
26 copy of it certified by the commissioner [LIEUTENANT GOVERNOR] is  
27 admissible in evidence as competent and sufficient proof of the  
28 registration of the trademark in an action or judicial proceeding in  
29 the state.

1 \* Sec. 5. AS 45.50.070 is amended to read:

2           Sec. 45.50.070. DURATION AND RENEWAL. Registration of a trade-  
3 mark is effective for a term of 10 years from the date of registra-  
4 tion. Upon application filed within six months before the expiration  
5 of the term, on a form furnished by the department [LIEUTENANT GOVERNOR],  
6 the registration may be renewed for an additional term of 10 years.

7 \* Sec. 6. AS 45.50.100 is amended to read:

8           Sec. 45.50.100. NOTIFICATION OF EXPIRATION OF REGISTRATION  
9 PERIOD. The commissioner [LIEUTENANT GOVERNOR] shall notify each  
10 registrant of the necessity of renewal within the year preceding the  
11 expiration of the 10 years from the date of registration. Notifica-  
12 tion shall be by writing to the last known address of the registrant.

13 \* Sec. 7. AS 45.50.110 is amended to read:

14           Sec. 45.50.110. REGISTRATIONS EXISTING ON JULY 1, 1961. A  
15 registration in force on July 1, 1961, expires five years from the  
16 date of the registration and may be renewed by filing an application  
17 with the department [LIEUTENANT GOVERNOR] on a form furnished by  
18 the department [HIM] and paying the renewal fee specified in sec. 80  
19 of this chapter within six months before the expiration of the registra-  
20 tion.

21 \* Sec. 8. AS 45.50.120 is amended to read:

22           Sec. 45.50.120. ASSIGNMENT. (a) A trademark and its registra-  
23 tion are assignable with the good will of the business in which the  
24 trademark is used, or with that part of the good will of the business  
25 connected with the use of and symbolized by the trademark.

26           (b) An assignment shall be in writing and may be recorded with  
27 the department [LIEUTENANT GOVERNOR] upon the payment of a fee of \$2,  
28 payable to the department [LIEUTENANT GOVERNOR]. The commissioner  
29 [HE] shall record the assignment, and shall issue in the name of the

1 assignee a new certificate for the remainder of the term of the regis-  
2 tration.

3 (c) An assignment of registration is void as against a subse-  
4 quent purchaser for valuable consideration without notice, unless it  
5 is recorded with the department [LIEUTENANT GOVERNOR] within three  
6 months after the date of the assignment or before the subsequent  
7 purchase.

8 \* Sec. 9. AS 45.50.130 is amended to read:

9 Sec. 45.50.130. COMMISSIONER [LIEUTENANT GOVERNOR] TO KEEP  
10 RECORD OF REGISTRATION. The commissioner [LIEUTENANT GOVERNOR] shall  
11 keep for public examination a record of all trademarks registered or  
12 renewed under secs. 10 - 200 of this chapter.

13 \* Sec. 10. AS 45.50.140 is amended to read:

14 Sec. 45.50.140. CANCELLATION. The commissioner [LIEUTENANT  
15 GOVERNOR] shall cancel from the register

16 (1) each registration under a previous law which is more  
17 than five years old and not renewed in accordance with secs. 10 - 200  
18 of this chapter;

19 (2) a registration requested by the registrant or the  
20 assignee of records to be cancelled;

21 (3) each registration under secs. 10 - 200 of this chapter  
22 which is not renewed;

23 (4) a registration found by a court to be

24 (A) abandoned,

25 (B) not owned by the registrant,

26 (C) granted improperly,

27 (D) obtained fraudulently, or

28 (E) so similar, as to be likely to cause confusion or  
29 mistake or to deceive, to a trademark registered by another

1 person in the United States Patent Office, before the date of  
2 filing of the application for registration by the registrant  
3 under secs. 10 - 200 of this chapter, and not abandoned; however,  
4 if the registrant proves that he is the owner of a concurrent  
5 registration of his trademark in the United States Patent Office  
6 covering an area including this state, the registration shall not  
7 be cancelled;

8 (5) when a court orders cancellation of a registration on  
9 any ground.

10 \* Sec. 11. AS 45.50.160 is amended to read:

11 Sec. 45.50.160. FRAUDULENT REGISTRATION. A person who procures  
12 the filing or registration of a trademark with the department [IN THE  
13 OFFICE OF THE LIEUTENANT GOVERNOR], by knowingly making a false or  
14 fraudulent representation or declaration, verbally or in writing, or  
15 by any other fraudulent means, is liable to pay all damages sustained  
16 in consequence of the filing or registration, which may be recovered  
17 by the party injured.

18 \* Sec. 12. AS 45.50.200 is amended by adding new paragraphs to read:

19 (6) "commissioner" means the commissioner of the Department  
20 of Commerce and Economic Development;

21 (7) "department" means the Department of Commerce and  
22 Economic Development.

23 \* Sec. 13. This Act takes effect July 1, 1977.  
24  
25  
26  
27  
28  
29

18 B 141

January 28, 1977

The Honorable Hugh Malone  
Speaker of the House  
Alaska State Legislature  
Juneau, Alaska 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18 of the Alaska Constitution, and accordance with AS 24.30.060 (b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill transferring the trademark function from the Office of the Lieutenant Governor to the Department of Commerce and Economic Development.

I urge special consideration of this bill as it implements recommendation number 6 (revised) of the Management and Efficiency Review study.

Sincerely,

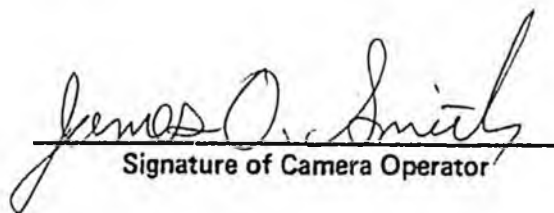
Jay S. Hammond  
Governor

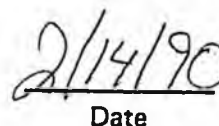


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Signature of Camera Operator

  
Date

# COMMITTEE REPORT

4/13/77

## HOUSE

4-2-77

Date

Mr. Speaker:

The Committee on Finance has had HB 142 under consideration. A majority of the members of the Committee

- recommends it do pass
- recommends it do not pass
- recommends it do pass with attached amendment(s)
- recommends it be replaced with CS for \_\_\_\_\_ and that CS for \_\_\_\_\_ do pass
- (and) recommends it be referred to the \_\_\_\_\_ committee
- reports it back without recommendation
- AND attaches a report of its intent
- (other) \_\_\_\_\_

### MEMBERS SIGNING THE MAJORITY REPORT:

<u>Freeman</u>	_____	_____
<u>Boe</u>	<u>Stinson</u>	_____
<u>_____</u>	_____	_____
<u>_____</u>	_____	_____

### MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

<u>Boe</u>	recommends:	<u>No Rec.</u>
<u>_____</u>	recommends:	<u>_____</u>
<u>_____</u>	recommends:	<u>_____</u>

Freeman  
Vice Chairman

Introduced: 1/28/77  
Referred: State Affairs,  
Health, Education & Social  
Services and Finance

1 IN THE HOUSE

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

2 HOUSE BILL NO. 142

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act transferring the Alaska Historical Commission  
7 to the Department of Natural Resources; and providing  
8 for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 \* Section 1. AS 44.19.461 is amended to read:

11 Sec. 44.19.461. CREATION. There is created in the Department of  
12 Natural Resources [OFFICE OF THE GOVERNOR] the Alaska Historical  
13 Commission. The department shall provide necessary administrative  
14 services.

15 \* Sec. 2. AS 44.19.466 is amended to read:

16 Sec. 44.19.466. COMPOSITION. The Alaska Historical Commission  
17 consists of four members appointed by the governor, ex officio the  
18 commissioner of the Department of Natural Resources or his designee  
19 [LIEUTENANT GOVERNOR], and ex officio the executive director who may  
20 not vote. The commissicner or his designee [LIEUTENANT GOVERNOR]  
21 shall serve as chairman.

22 \* Sec. 3. AS 44.19.496 is repealed.

23 \* Sec. 4. This Act takes effect July 1, 1977.  
24  
25  
26  
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28  
29

AMENDMENT #1

OFFERED IN THE HOUSE:

BY: STATE AFFAIRS

To: \_\_\_\_\_ HOUSE BILL No. 142

SENATE BILL No. \_\_\_\_\_

PAGE: 1

LINE: 17

Page 1, line 17: Delete ex officio and add: <sup>plus</sup> Plus.

Page 1, line 19: Delete ~~and~~ "and ex officio  
the executive director"

Introduced: 1/28/77  
Referred: State Affairs,  
Health, Education & Social  
Services and Finance

BY THE RULES COMMITTEE BY  
REQUEST OF THE GOVERNOR

1 IN THE HOUSE

2 HOUSE BILL NO. 142

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

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20 not vote. The commissioner or his designee [LIEUTENANT GOVERNOR]  
21 shall serve as chairman.

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23 \* Sec. 4. This Act takes effect July 1, 1977.  
24  
25  
26  
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28  
29

A M E N D M E N T

OFFERED IN THE HOUSE:

By: STATE AFFAIRS

To: \_\_\_\_\_ HOUSE BILL No. 142

SENATE BILL No. \_\_\_\_\_

PAGE: 1 Sec. 2

LINE: 19

Delete: Sec. 2. "and ex officio the executive director."

THE LEGISLATURE OF THE STATE OF ALASKA  
TENTH LEGISLATURE

FISCAL NOTE

I. REQUEST  
 Bill/Resolution No. HB 142  
 Title Transfer of Historical Commission to Dept. of Natural Resources  
 Requested by Office of the Governor Date Jan 27, 1977

II. FISCAL DETAIL  
 Agency Affected Office of the Governor, Dept. of Natural Resources  
 Program Category Affected Education, NRMEC  
 Budget Request Unit(s) Affected Historical Commission, Statewide Programs

EXPENDITURES (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
100 PERSONAL SERVICES		(51.0)	(53.6)	(56.3)	(60.0)	
200 TRAVEL		(2.0)	(2.1)	(2.2)	(2.3)	
300 CONTRACTUAL (space)		(9.6)	(10.1)	(10.6)	(11.1)	
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		(62.6)	(65.8)	(69.1)	(73.4)	

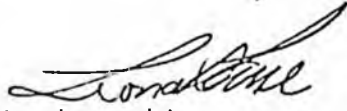
FUNDING (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
GENERAL FUND		(62.6)	(65.8)	(69.1)	(73.4)	
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
FULL TIME		(1)	(1)	(1)	(1)	
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)  
 The resources budgeted for the support of the Historical Commission need to be moved from the Office of the Governor to the Statewide Programs Budget Request Unit in the Dept. of Natural Resources.  
 Incorporation of the Historical Commission activities into the Dept. of Natural Resources will allow the deletion of the Commission's Executive Director position at a savings of \$ 53,000 (\$51,000 in Personal Services and \$ 2,000 in Travel) in FY 78.  
 The Dept. of Natural Resources will fit the Commission's staff into existing quarters resulting in a savings of \$9,600 in office rental cost in FY 78.



IV. DATE January 27, 1977 PREPARED BY Leonard Lane  
 AGENCY Office of the Governor  
 Original: Legislative Finance PHONE 465-4860  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)

HB 142

January 28, 1977

The Honorable Hugh Malone  
Speaker of the House  
Alaska State Legislature  
Juneau, Alaska 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18 of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill to transfer the Alaska Historical Commission from my office to the Department of Natural Resources. The MANAGEMENT AND EFFICIENCY REVIEW suggested moving this agency out of my office; locating it in the Department of Natural Resources would be compatible with functions of that department pertaining to historic preservation.

I urge special consideration of this bill as it implements a part of recommendation number 3 of the Management and Efficiency Review study.

Sincerely,

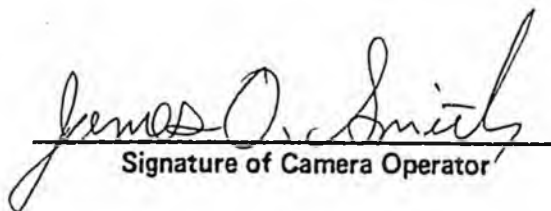
Jay S. Hammond  
Governor

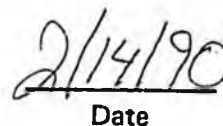


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Signature of Camera Operator

  
Date

COMMITTEE REPORT  
SENATE

5/6/77

<sup>12</sup>  
May 8, 1977 Date

Mr. President:

The Committee on FINANCE has had CSSSB 143  
evidence in Judicial procedure  
under consideration. A majority of the members of the Committee

- recommends it do pass
- recommends it do not pass
- recommends it do pass with attached amendment(s)
- recommends it be replaced with CS for \_\_\_\_\_ and that

CS for \_\_\_\_\_ do pass

(and) recommends it be referred to the \_\_\_\_\_  
committee

reports it back without recommendation

AND attaches a report of its intent

(other) Additional Recommendations

MEMBERS SIGNING THE MAJORITY REPORT:

<u>Wm. White</u>	<u>No Pass</u>	<u>Tillian Do Pass</u>
<u>W. Johnson</u>	<u>no rec.</u>	<u>Do Pass</u>
<u>Thomas H.</u>	<u>No Pass</u>	<u>Amendment - No Rec.</u>
<u>Ken McLeod</u>	<u>no Rec</u>	

MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_ recommends: \_\_\_\_\_

\_\_\_\_\_ Chairman

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU 99811

JAY S. HAMMOND, GOVERNOR

May 10, 1977

The Honorable John C. Sackett  
Chairman  
Senate Finance Committee  
Alaska State Senate  
Pouch V  
Juneau, Alaska 99811

Re: Proposed Legislation Relating to Immunity  
and Protection of Witnesses

Dear Senator Sackett:

Ms. Crondahl of your office has requested that I provide your committee with some background materials on the referenced subject that might be of assistance in considering CSHB 143, SB 275 and SB 276.

As an initial matter, I should emphasize that, with some very minor technical exceptions, CSHB 143 is virtually identical to SB 275, the same version of which was introduced in the House as HB 393. Enclosed is a list of the amendments made to that bill in House Judiciary, the product of which was CSHB 143.

I have also enclosed the following materials which I believe will be of assistance to your committee in considering the bills now pending on the subject of immunity and protection of witnesses in criminal proceedings:

- (1) a copy of the Governor's letter of transmittal for SB 275 and SB 276 which explain the bills and their objectives in considerable detail;
- (2) a copy of the Fiscal Note accompanying SB 275 and SB 276;
- (3) a memorandum addressing the issues of federal prosecution of a witness compelled to testify pursuant to a state grant of immunity from prosecution, an issue which was

The Honorable John C. Sackett  
Page 2

raised on the floor of the House during the debate on CSHB 143;

(4) Standards 7.9 relating to immunity and 7.10 relating to witness protection adopted by the National Advisory Committee on Criminal Justice Standards and Goals in its recently released Report of The Task Force on Organized Crime; and

(5) a recent law review article on the subject of witness immunity under the Federal Organized Crime Act of 1970.

If there is any additional information which your committee desires on this subject, please let me know.

Very truly yours,

AVRUM M. GROSS  
ATTORNEY GENERAL

By: 

\_\_\_\_\_  
Daniel W. Hickey  
Chief Prosecutor

DWH:gm

Enclosures

AMENDMENTS TO HB 393  
(Introduced in the Senate as SB 275)

p. 1, line 1: Change sponsor to Judiciary Committee

p. 1, line 2: Delete all material and insert:  
"CS for House Bill No. 143"

p. 3, lines 13-20: Delete all material and insert:

(3) all evidence which the state may seek to introduce in a criminal proceeding brought against a witness who is compelled to testify under this section, which relates to any transaction about which he is compelled to testify, has been filed in sealed form with the superior court;

p. 4, line 16: Delete "provided for" and insert:  
"filed with the superior court"

p. 4, line 20: Delete "may" and insert "shall"

p. 4, line 20: Between "that" and "steps" insert: "necessary"

p. 4, line 20: Delete "," after "been"

p. 4, line 21: Delete ", if necessary,"

p. 5, line 3: Delete "remains" and insert "is"

p. 5, line 11: Delete "it no longer remains" and insert  
"it is no longer"

p. 5, line 13: Delete "some and insert "a"

SB  
275

"March 22, 1977"

SB  
276

The Honorable John L. Rader  
President of the Senate  
Alaska State Legislature  
Juneau, Alaska 99811

Dear Mr. President:

Under the authority of art. III, sec. 18 of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill to enable the state to obtain necessary evidence in serious felony prosecutions through a grant of immunity to witnesses and to provide for the protection of prosecution witnesses and their families who may be placed in danger as a result of testifying in a criminal proceeding. I am also transmitting a companion appropriation bill, to fund the protection-of-witnesses function described in the last section of the bill.

At present, Alaska is one of the very few jurisdictions which does not have some statutory framework for providing immunity to a witness in a criminal prosecution. The National Advisory Committee on Criminal Justice Standards and Goals recently recommended in its Report of the Task Force on Organized Crime, released in December of 1976, that

States should enact or revise legislation to provide for immunity from the use of compelled testimony by witnesses before a grand jury, investigating commission, or State court having felony jurisdiction. These witnesses should receive only "use" immunity --i.e., they should be immunized only from the use of evidence derived directly or indirectly from the compelled testimony.

In serious offenses that are conspiratorial in nature and committed within the context of a high degree of secrecy by professional criminals, the key tool available in successfully solving and prosecuting the crime is the ability to compel testimony from a less culpable participant or an uncooperative witness. The basic premise underlying the immunity provisions of this bill is that the privilege against self-incrimination should not be invoked so as to deprive the people of this state of necessary evidence of serious criminal activity when the person asserting the privilege is afforded no less protection from a grant of immunity than is available under the Constitution of the United States and the Constitution of the State of Alaska. The power to compel individuals to testify before courts and grand juries is firmly rooted in Anglo-American jurisprudence, with statutory authority dating as far back as 1562.

SB  
275SB  
276

Historically, witness immunity legislation has struck the delicate balance between the government's legitimate investigative needs and the individual's constitutional protections through two basic approaches. The first has been characterized as "transactional immunity" under which a witness becomes immune from prosecution for any transaction, matter, thing, or occurrence about which he is compelled to testify. Under the second approach, referred to as "use and derivative use immunity," focus is placed on immunization of testimony and prohibits only the direct or indirect use of testimony compelled in a subsequent criminal proceeding, but does not constitute a complete bar to a prosecution based on wholly independent evidence.

This bill is unique in that it retains the good aspects, while eliminating the potentially bad aspects of the two distinct types of traditional immunity statutes. In preserving the desirable features of "use and derivative use immunity," the bill eliminates the possibility of surreptitious and dishonest use of compelled testimony or its derivative fruits through the fabrication of an independent evidentiary base by overzealous prosecutors and investigators. It does this by providing that a witness whose testimony is compelled can be prosecuted for the "transaction, matter, occurrence, or thing" about which he is compelled to testify only with evidence that has been previously filed and sealed with the court.

This bill also addresses the potential for abuse and corruption that many recognize as present in other immunity statutes. Under statutes in other states, the decision to immunize is exclusively a prosecutorial decision and courts are virtually powerless to deny requests for orders compelling testimony upon a grant of immunity. This bill, however, explicitly recognizes that there are potentially improper motives which can lead to grants of immunity, such as intentional harassment and the invasion of the privacy of an individual over a relatively minor matter in which the public does not have an overriding interest.

The bill specifically limits, however, the situations in which a court will issue an order compelling testimony and requires the state to demonstrate and a court to find through clear and convincing evidence that the case is of a nature that justifies the compulsion of testimony.

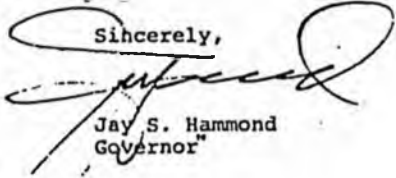
As an additional protection, this bill requires the written approval of the attorney general in each case. It also provides that a court may require assurances from the state in appropriate cases that the person who is the subject of an application for an order compelling testimony and members of his immediate family and household will be provided adequate protection from

SB retribution due to his testimony. In that respect, the  
275 bill also enacts an additional section creating  
specific authority to provide for the health, safety  
SB and welfare of witnesses, potential witnesses, and  
276 their families.

Lastly, the bill contains specific enforcement provisions for a wilful failure or refusal to comply with a court order compelling testimony. Because of the unique provisions contained in this bill which establish standards under which an order compelling testimony is issued, it was necessary to specifically provide for the witness who wilfully fails or refuses to comply with an order with the intent to simply noid out until the proceeding which has given rise to the order has come to an end. Thus, the penalty provisions in the bill provide that a wilful failure or refusal to comply is a civil contempt for so long as the witness has it within his power to comply, but that if he persists and the proceeding has come to an end, then he is guilty of criminal contempt, a specific criminal offense under the bill. These provisions are consistent with and based on prior decisions of the Supreme Court of Alaska on the subject of contempt, primarily State v. Browder, 486 P.2d (Alaska 1971); Johansen v. State, 491 P.2d 759 (Alaska 1971); and Gwynn v. Gwynn, 530 P.2d 1311 (Alaska 1975)..

I believe that this bill represents a useful law enforcement tool which will assist the successful prosecution of highly sophisticated and secretive criminal activity. I urge your serious consideration.

Sincerely,



Jay S. Hammond  
Governor

SB SENATE BILL NO. 276 by the Rules Committee by request of  
276 the Governor, entitled:

"An Act making a special appropriation to the Department of Law for protection of witnesses and providing for an effective date."

was read the first time and referred to the Judiciary Committee and the Finance Committee.

There is no fiscal note on the above bill. Governor's transmittal letter accompanying SENATE BILL NOS. 275 and 276 follows SENATE BILL NO. 275.

SENATE  
JOURNAL SUPPLEMENT

March 23, 1977

Wednesday

No. 26

FISCAL NOTE

I. REQUEST

Bill Resolution No. SENATE BILL 275 SB  
 Title An Act relating to witnesses; and providing for an effective date. 275  
 Requested by The Governor Date 3-21-77

II. FISCAL DETAIL

Agency Affected Department of Law  
 Program Category Affected Administration of Justice  
 Budget Request Unit(s) Affected Prosecution, Adm'n. & Support

EXPENDITURES (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
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.						
<b>TOTAL</b>		25.0	26.5	28.1	29.8	31.6

FUNDING (Thousands of Dollars)

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
GENERAL FUND		25.0	26.5	28.1	29.8	31.6
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

	FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
FULL TIME						
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 this amount will be insufficient and, likewise, there will be years when much if not all of the appropriation will lapse. Ongoing costs have been projected using a 6% inflation factor. A companion bill requesting a special appropriation for implementing the purposes of this bill is also being introduced.

IV. DATE March 21, 1977

PREPARED BY Richard J. Rogers, Chief Officer

AGENCY Department of Law

PHONE 465-3695

Original: Legislative Finance  
 cc: Director and Management  
 Prime Sponsor (First Legislator Named)

# MEMORANDUM

TO:  Avrum M. Gross  
Attorney General

DATE: April 20, 1977

FILE NO:

TELEPHONE NO:

FROM: Daniel W. Hickey  
Chief Prosecutor

SUBJECT: Federal Prosecution of  
Witnesses Compelled to  
Testify Pursuant to a  
State Grant of Immunity  
from Prosecution

A question has recently arisen regarding the provisions of CS HB 143, relating to immunity of witnesses. The question is whether testimony compelled in a state prosecution, under a grant of immunity from the use of such testimony, may nevertheless be directly or indirectly used in a federal prosecution.

This issue has been researched extensively and it is unequivocally clear that the landmark opinion of the United States Supreme Court in Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.Ct. 1594 (1964), answers the question in the negative. Additionally, it should be emphasized that the decision in Murphy remains controlling under the Constitution of the United States.

In that case, Mr. Justice Goldberg, in a majority opinion pursuant to a unanimous decision for a Court that included Justices Douglas, Brennan and Black, stated:

[W]e 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 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 absence of a state grant of immunity. (emphasis added)

In conclusion, it is clear that federal prosecutors can no more utilize testimony compelled under CS HB 143, which is with minor technical variations identical to the bill introduced by request of the Governor as HB 393, than their counterparts in Alaska.

National Advisory Committee on Criminal Justice  
Standards and Goals, REPORT OF THE  
TASK FORCE ON ORGANIZED CRIME (Dec., 1976)

## Standard 7.9

### Immunity Statute

States should enact or revise legislation to provide for immunity from the use of compelled testimony by witnesses before a grand jury, investigating commission, or State court having felony jurisdiction. These witnesses should receive only "use" immunity—i.e., they should be immunized only from the use of evidence derived directly or indirectly from the compelled testimony.

#### Commentary

In conspiratorial crimes, the key recourse available to a prosecutor is granting immunity from prosecution to potential defendants in order to obtain their testimony against others. [Ordinarily, immunity will be granted in cases involving a high degree of secrecy because the only probable witness whose testimony is essential to obtain convictions against more culpable persons also was a participant in the criminal acts.]

As a matter of general practice, immunity should be granted only to the minimum number of coconspirators in order to obtain convictions against one or more key individuals. This favorable treatment of several "low-level" witnesses is justified if it results in the conviction of a defendant suspected or known to be a major figure in organized crime operations. However, government officials or high political officeholders who are participants in a conspiracy

should not be granted immunity in order to obtain convictions against less important or less culpable coconspirators.

[An immunity grant is a valid and proper tool for the prosecutor and has proved useful in pursuing top-level members of organized crime organizations.<sup>13</sup> The purpose of an immunity statute is to provide a prospective witness with enough legal protection to supplant the fifth amendment privilege against self-incrimination. This permits the compulsion of testimony or the production of other incriminating evidence. An immunity statute should provide for the situation where a witness refuses on the basis of the privilege against self-incrimination to testify or provide information in a proceeding before a grand jury, investigating commission, or a State court having felony jurisdiction.]

After the grant of immunity, testimony may be compelled. However, according to the "use and derivative use" immunity provisions (Title II) of the Organized Crime Control Act of 1970, the testimony that is so compelled, or information derived from that testimony, may not be used against the witness in most criminal cases.

Title II was drafted to reflect the use and derivative use restriction of *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), rather than the transactional

<sup>13</sup> See Fn. 5, Chpt. 7.

immunity concept of *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The Supreme Court upheld the constitutionality of the "use and derivative use" immunity provisions of the 1970 Organized Crime Control Act (18 U.S.C. Section 6002) in *Kastigar v. United States*, 406 U.S. 441 (1972). In reaching its decision, the Court approved the general concept of immunity provisions on both logical and historical grounds, finding them compatible with fifth amendment rights.

The standard prescribes that use rather than transactional immunity be granted because it strikes the proper balance between the rights of the witness, who may be a potential defendant, and the public's right to learn details known by the witness of an organized criminal conspiracy.

As a matter of related interest, case law precludes local authorities from using testimony compelled under Federal authority against the witness in a State trial. In addition, the use immunity statute, like previous transactional immunity statutes, extends only to past offenses and does not prohibit the prosecution of the witness for offenses committed in the future, or for contempt or perjury committed in the course of the compelled testimony.

## References

1. The President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. 1967.
2. Salerno, Ralph and Tompkins, John S. *The Crime Confederation*. Doubleday and Company, Inc., 1969.
3. Lavine, Lorin G. "Immunity Legislation: Making Better Use of a Valuable Law Enforcement Tool." *Columbia Journal of Law and Social Problems*. Volume 9, Number 2. Winter 1973.
4. The National Association of Attorneys General. *Organized Crime Control Legislation*. Committee on the Office of Attorney General. January 1975.
5. N.Y. Rev. Stat. Sec. 2A:81-173 (1968).
6. Ohio Rev. Code Sec. 2939.17.

## Related Standard

The following standards may be applicable in implementing Standard 7.9:

9.6 Attorneys General and Prosecutors

## Standard 7.10

### Witness Protection Statute

State legislatures should enact protective laws and establish procedures, including relocation, new identities, etc., for persons who cooperate and/or provide information in organized crime investigations, to insure that they are not harmed as a result of their testimony. This provision would also protect persons who testify before appropriate State legislative committees.

#### Commentary

In view of the scarcity of evidence in organized crime prosecutions, it is imperative that public officials take positive steps to encourage witnesses to come forward. Witnesses who choose to testify because of their sense of obligation to the community, their legal duty, or other reasons, may be exposed to the danger of violent retaliation from organized crime figures. Government at all levels must provide physical protection for such witnesses. The Federal Government has this authority and can make its facilities available to State and local prosecutors.

Special problems exist in protecting witnesses in organized crime cases. Such cases often rely on informants who are granted immunity in return for their testimony, and the testimony may involve third persons vulnerable to retaliation. It is necessary to protect these witnesses and their families to insure

that (1) they continue to agree to testify, and (2) they are not prevented from testifying. Moreover, a witness protection program is generally important in protecting life, assuring that justice is done, and controlling organized crime.

Such legislation should identify the agency or official responsible for requesting and providing such protection and the types of proceedings involved.

Procedures should be established to address the special issues that arise in protecting witnesses in organized crime cases. These will include the sources of funding and time limits, if any, placed on the period before and after trial during which protection may be afforded. The answers to these important decisions depend on the agency and laws existing in each jurisdiction.

Witness protection can be an expensive operation. Furnishing personal and family guards and security may involve a great expenditure of personnel. Placing witnesses in a "safe house" or special secure facility requires a restriction on their activities, and it is difficult to keep the location of such facilities confidential. Further, relocation of witnesses and family members involves a variety of details to accomplish the move in secret and establish a new identity in the new location.

There are also problems connected with reemploying witnesses. Documentation must be substituted for actual records that would reveal their true identity.

Records must be changed or replaced without violating laws or requiring individuals to commit perjury. The people being protected often have criminal histories, which pose problems of employability and adaptability. An outstanding reemployment program has been implemented at the national level through the U.S. Chamber of Commerce, and this effort may serve as a guide.

The costs of witness protection on a large scale may be prohibitive for most States and local jurisdictions. If State legislatures enact a witness protection statute, adequate funding is needed. No information is available as to whether any States budget funds specifically to provide protection for witnesses. However, the National Association of Attorneys General reports that "a number of State organized crime control units . . . have (used) confidential funds" for witness protection.

The formidable obstacles associated with a program of detailed witness protection may dictate that State programs should be part of a Federal-State cooperative effort. That has been successfully undertaken in the past. Cooperative efforts are particularly helpful in completing elements of a witness protection program that has national or international implications, such as providing the witness with a new name, job, documents, passport, etc.

In accordance with the directive of the Omnibus Crime Control and Safe Streets Act of 1968, which requires special emphasis on "programs dealing with the prevention, detection and control of organized crime," Federal funds may be made available to aid in providing for proper protection of government witnesses.

The U.S. Department of Justice raised certain witness protection issues during hearings on the Organized Crime Control Act of 1970, noting that "The question of protecting government witnesses is not one of law but of practicality." The Department agreed that funds should not be limited to acquiring facilities but should also be allowed for such items as the salaries and expenses of U.S. Marshals. Further, appropriations should be authorized to protect witnesses "in whatever manner is deemed most useful under the special circumstances of each case." Such a provision in a State law would provide the necessary flexibility to adequately deal with a problem that is not unique to, but is very much a part of effective organized crime control at every governmental level.

### References

1. The President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. 1967.
2. National Association of Attorneys General. *Organized Crime Control Legislation*. Committee on the Office of Attorneys General. January 1975.
3. (84 Stat. 933-34). This statute gives the Attorney General authority to establish and operate protected housing facilities for the safety and security of witnesses and their families who are in danger of violence because of their cooperation with the government.
4. Chamber of Commerce of the United States. *Deskbook on Organized Crime*. 1972.

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.<sup>1</sup> 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.<sup>2</sup>]

[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.<sup>3</sup> 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."<sup>4</sup>]

Congress' most recent legislation in this field, the Witness Immunity Act of 1970,<sup>5</sup> 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

<sup>1</sup> Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562). See generally 8 WIGMORE, EVIDENCE § 2190 (McNaughton rev. 1961).

<sup>2</sup> See 8 WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961).

<sup>3</sup> "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup> With prosecution of the witness for the otherwise self-incriminating disclosures in his compelled testimony thus barred, the potential fifth amendment violation is circumvented.<sup>7</sup>

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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.

<sup>6</sup> See, e.g., the transactional immunity provisions cited in notes 9 & 16 *infra*.

<sup>7</sup> 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.<sup>8</sup> 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,<sup>9</sup> 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<sup>10</sup> in an 1862 compulsory testimony statute.<sup>11</sup> 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.<sup>12</sup>

<sup>8</sup> 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."

<sup>9</sup> 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. . . ."

<sup>10</sup> 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.

<sup>11</sup> Act of Jan. 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. . . ."

<sup>12</sup> 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*<sup>13</sup> because it failed to protect the witness from indirect use of his testimony to the same extent as would the fifth amendment privilege.<sup>14</sup> 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,<sup>15</sup> 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<sup>16</sup> until 1970.

Although transactional immunity grants received approval from the Supreme Court,<sup>17</sup> they were infrequently used as a prosecutive tool.<sup>18</sup> 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.<sup>19</sup>

This pattern was broken in 1970, when acting on the recommendation of the National Commission on Reform of Federal Criminal Laws,<sup>20</sup>

<sup>13</sup> 142 U.S. 547 (1892).

<sup>14</sup> *Id.* at 585. *Counselman* involved the 1868 use immunity statute cited in note 8 *supra*.

<sup>15</sup> 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.

<sup>16</sup> The *Counselman* decision was followed by Congress' speedy enactment of the Compulsory Testimony Act of 1893, ch. 33, 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. . . ."

<sup>17</sup> See note 7 *supra*.

<sup>18</sup> 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*.

<sup>19</sup> 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.

<sup>20</sup> 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.<sup>21</sup> The new law repealed all statutory authority for grants of transactional witness immunity<sup>22</sup> 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."<sup>23</sup>]

Although there was some cause for apprehension that this more narrowly-drawn protection would be found constitutionally insufficient,<sup>24</sup> in *Kastigar v. United States*<sup>25</sup> 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.<sup>26</sup> Since the decision in *Kastigar*, federal prosecutors have made extensive use of immunity grants in investigating all types of criminal activity,<sup>27</sup> 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).*

<sup>21</sup> 18 U.S.C. §§ 6001-6005 (1970). See note 5 *supra*.

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 406 U.S. 441 (1972).

<sup>26</sup> *Id.* at 462.

<sup>27</sup> 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<sup>28</sup> in criminal matters<sup>29</sup> 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.<sup>30</sup> Since the statute authorizes grants of immunity only when requested by the United States Attorney,<sup>31</sup> the courts are powerless to issue immunity orders on their own motion<sup>32</sup> or at the request of a defendant,<sup>33</sup> leaving the United States Attorney with exclusive power to initiate grants of witness immunity.]

<sup>28</sup> For a discussion of non-statutory "limited immunity arrangements," see note 30 *infra*.

<sup>29</sup> Grants of immunity in administrative proceedings and Congressional hearings are authorized by 18 U.S.C. § 6004 and § 6005 respectively.

<sup>30</sup> 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. Boulter*, 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).

<sup>31</sup> 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).

<sup>32</sup> *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).

<sup>33</sup> *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 495 (7th Cir. 1974), *cert.*

*M.B.*

[Before an immunity application can be granted, it must meet the technical requirements of section 6003(b).<sup>34</sup> The immunity request must have approval from a high-ranking Department of Justice official.<sup>35</sup> It must assert that the testimony sought from the subject of the immunity request "may be necessary to the public interest,"<sup>36</sup> and that the witness to be immunized "has refused or is likely to refuse to testify" on the basis of the fifth amendment privilege.<sup>37</sup> 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.<sup>38</sup>]

[Once the immunity order has been issued, the witness will be called, or recalled<sup>39</sup> 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,<sup>40</sup> civil contempt proceedings pursuant to 28 U.S.C. § 1826<sup>41</sup> 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.

<sup>34</sup> See note 5 *supra*.

<sup>35</sup> 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.

<sup>36</sup> 18 U.S.C. § 6003(b)(1) (1970). See note 5 *supra*.

<sup>37</sup> 18 U.S.C. § 6003(b)(2) (1970). See note 5 *supra*.

<sup>38</sup> 18 U.S.C. § 6003(a) (1970). See note 5 *supra*.

<sup>39</sup> 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*.

<sup>40</sup> 18 U.S.C. § 3691; See also *United States v. Wilson*, 421 U.S. 309 (1975).

<sup>41</sup> § 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.<sup>42</sup>

## 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<sup>43</sup> criminal proceeding. Thus, unlike grants of transactional immunity which barred prosecution of immunized witnesses for crimes disclosed in their compelled testimony,<sup>44</sup> section 6002 immunity grants permit the prosecution of immunized witnesses as long as the statutory prohibition on exploitation of compelled testimony is honored.<sup>45</sup>

In practice, however, few immunized witnesses are subsequently prosecuted for crimes described in their immunized testimony.<sup>46</sup> 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).

<sup>42</sup> *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.

<sup>43</sup> 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).

<sup>44</sup> See text accompanying note 6 *supra*.

<sup>45</sup> 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).

<sup>46</sup> 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.<sup>47</sup> 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."<sup>48</sup> ]

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.<sup>49</sup> Rather, the Government must establish by a preponderance<sup>50</sup> that its evidence was derived from legitimate<sup>51</sup> sources

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<sup>47</sup> 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).

<sup>48</sup> *Kastigar v. United States*, 406 U.S. 441, 460-61 (1972).

<sup>49</sup> *Id.* at 460.

<sup>50</sup> 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.

<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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

<sup>52</sup> Cf. *Kastigar v. United States*, 406 U.S. 441, 449 (1972) (dissenting opinion); Zimmert, *The Federal Use Immunity Statute Since Kastigar*, 1973/1974 ANNUAL SURVEY OF AMERICAN LAW 343, 356 (N.Y.U. School of Law 1974).

<sup>53</sup> 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.

<sup>54</sup> This procedure was first used by Special Watergate Prosecutor Archibold Cox to preserve evidence against John Dean. See Zimmert, *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.<sup>55</sup> 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,<sup>56</sup> the Eighth Circuit in *United States v. McDaniel*<sup>57</sup> 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.<sup>58</sup> 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,<sup>59</sup> growing concern for the protec-

<sup>55</sup> 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.

<sup>56</sup> 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).

<sup>57</sup> 482 F.2d 305 (8th Cir. 1973).

<sup>58</sup> *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).

<sup>59</sup> 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,<sup>60</sup> state courts are not similarly constrained. Several states have statutes authorizing grants of transactional immunity to witnesses before local courts and grand juries.<sup>61</sup>

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.

<sup>60</sup> See note 22 *supra*.

<sup>61</sup> 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.<sup>62</sup> The federal Government thus guards its right to effectively enforce federal laws unhampered by overly protective grants of immunity by any state.<sup>63</sup>

### 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.<sup>64</sup> Courts have thus held that civil penalties may be based on testimony given pursuant to a grant of section 6002 immunity,<sup>65</sup> and that a witness's immunized testimony may properly be used against him in civil actions<sup>66</sup> and administrative proceedings,<sup>67</sup> whether held before state or federal bodies.

<sup>62</sup> *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).

<sup>63</sup> *United States v. DeDiego*, 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.

<sup>64</sup> *Patrick v. United States*, 524 F.2d 1109, 1120-21 (7th Cir. 1975); *United States v. Cappelto*, 502 F.2d 1351, 1359 (7th Cir.), *cert. denied*, 420 U.S. 925 (1975).

<sup>65</sup> *Patrick v. United States*, 524 F.2d 1109, 1118 (7th Cir. 1975).

<sup>66</sup> *United States v. Cappelto*, 502 F.2d 1351, 1359 (7th Cir.), *cert. denied*, 420 U.S. 925 (1975).

<sup>67</sup> *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<sup>68</sup> was issued by one court, as was an order to prohibit similar use in disbarment proceedings.<sup>69</sup>

Although the Seventh Circuit has recognized the "difficult question" posed by the issuance of such non-statutory orders,<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

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

Since *Counselman v. Hitchcock*,<sup>73</sup> 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.

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

<sup>69</sup> *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).

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

<sup>71</sup> See notes 62-63 *supra* and accompanying text.

<sup>72</sup> *Id.*

<sup>73</sup> 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.<sup>74</sup>

While it has been established that the fifth amendment privilege protects testimony which incriminates the witness under either federal or local law,<sup>75</sup> whether or not it affords similar protection to testimony that is incriminating under foreign law is an unresolved question of increasing practical significance.<sup>76</sup> 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*,<sup>77</sup> the Court disposed of the issue on other grounds, expressly leaving it unresolved.<sup>78</sup>

In the lower federal courts, witnesses' inability to satisfy the heavy burden of proving real or substantial danger of foreign prosecution<sup>79</sup> has provided an avenue to sidestep the question.<sup>80</sup> Some courts<sup>81</sup> 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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<sup>74</sup> See note 15 *supra*.

<sup>75</sup> 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.

<sup>76</sup> 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 Zimmert, *The Federal Use Immunity Statute Since Kastigar*, 1973/1974 ANNUAL SURVEY OF AMERICAN LAW 343, 349-56 (N.Y.U. School of Law 1974).

<sup>77</sup> 401 U.S. 933, 934 (1972).

<sup>78</sup> 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.

<sup>79</sup> 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.

<sup>80</sup> *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).

<sup>81</sup> *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*<sup>82</sup> will supposedly bar disclosure of the witness' testimony to foreign authorities.<sup>83</sup>

The only two cases which have squarely confronted this problem reached contrary results. In *In re Parker*,<sup>84</sup> 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."<sup>85</sup> Thus, the court ruled that a witness in danger of foreign pros-

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<sup>82</sup> 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. . . .

<sup>83</sup> 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.

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.

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

<sup>85</sup> *Id.* at 1070.

ecution could not properly refuse to testify on fifth amendment grounds once granted domestic immunity.<sup>86</sup>

The opposite view was taken by the federal district court for Connecticut in *In re Cardassi*.<sup>87</sup> 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*,<sup>88</sup> 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.<sup>89</sup>

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*,<sup>90</sup> 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.<sup>91</sup> Although the *Baldinger* court erred in holding that a section 6002 immunity grant would be insufficient

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<sup>86</sup> *Id.*

<sup>87</sup> 351 F. Supp. 1080 (D. Conn. 1972).

<sup>88</sup> 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.

<sup>89</sup> 351 F. Supp. at 1086.

<sup>90</sup> 356 F. Supp. 153 (C.D. Cal. 1973).

<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup>

### 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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<sup>92</sup> 356 F. Supp. at 169-70.

<sup>93</sup> For a discussion of immunity grant procedures, see notes 28-42 *supra* and accompanying text.

<sup>94</sup> This procedure was employed in *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972).

munity under section 6003,<sup>95</sup> 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.<sup>96</sup> 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 repeatedly held that they are wholly without discretion to deny technically adequate immunity requests,<sup>97</sup> and have limited their inquiries accordingly.<sup>98</sup>

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.<sup>99</sup>

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.<sup>100</sup> 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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<sup>95</sup> 18 U.S.C. § 6003(a) (1970).

<sup>96</sup> *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).

<sup>97</sup> See cases cited in note 96 *supra*.

<sup>98</sup> *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).

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

<sup>100</sup> 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.<sup>101</sup>

2. *Ineffective Administrative Restraints.* The statutory requirement that all immunity requests have prior authorization from the Department of Justice<sup>102</sup> 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,<sup>103</sup> 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.<sup>104</sup> This necessarily perfunctory administrative review<sup>105</sup> is not a substitute for effective judicial supervision.

<sup>101</sup> 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.

<sup>102</sup> 18 U.S.C. § 6003(b) (1970).

<sup>103</sup> 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?

<sup>104</sup> 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.

<sup>105</sup> In light of the tremendous number of requests for immunity authorization sub-

So-called practical safeguards against oppressive immunity tactics have only limited impact.<sup>106</sup> 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,<sup>107</sup> 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.<sup>108</sup> 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,<sup>109</sup> 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.<sup>110</sup> The

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

<sup>106</sup> 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).

<sup>107</sup> *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

<sup>108</sup> *Id.*

<sup>109</sup> 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).

<sup>110</sup> "[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<sup>111</sup> 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.<sup>112</sup>

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 ("cronism") or through other unspecified forms of "abuse of authority by prosecutors."<sup>113</sup> 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,<sup>114</sup> 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.<sup>115</sup> The Commission made it clear that

<sup>111</sup> 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].

<sup>112</sup> WORKING PAPERS at 1434.

<sup>113</sup> WORKING PAPERS at 1435.

<sup>114</sup> 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).

<sup>115</sup> 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].<sup>116</sup>

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.<sup>117</sup>

[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<sup>118</sup> 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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<sup>116</sup> WORKING PAPERS at 1435-36.

<sup>117</sup> See cases cited at note 9f *supra*.

<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> Nor can the court command the United States Attorney to submit immunity requests on the defense's behalf.<sup>121</sup> 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,<sup>122</sup> 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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<sup>119</sup> 18 U.S.C. § 6003(a) and (b) (1970).

<sup>120</sup> See note 1 *supra*.

<sup>121</sup> *United States v. Bautista*, 509 F.2d 675, 677 (9th Cir.), *cert. denied*, 421 U.S. 976 (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).

<sup>122</sup> 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.<sup>123</sup>

[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<sup>124</sup> in all but two cases.

The first of these cases, *Earl v. United States*,<sup>125</sup> was decided in 1966, and involved a transactional immunity statute<sup>126</sup> 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.<sup>127</sup> 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

<sup>123</sup> Once a criminal 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.

<sup>124</sup> 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).

<sup>125</sup> 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).

<sup>126</sup> 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).

<sup>127</sup> 361 F.2d at 534.

evidence suppression by the prosecution.<sup>128</sup> 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.<sup>129</sup> Because no Government witnesses were immunized in *Earl*, this footnote had no bearing on the disposition of the case.<sup>130</sup>

*United States v. Alessio*<sup>131</sup> 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."<sup>132</sup> 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.<sup>133</sup>

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<sup>128</sup> 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.*

<sup>129</sup> *Id.* at 534 n.1.

<sup>130</sup> 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).

<sup>131</sup> 528 F.2d 1079 (9th Cir. 1976).

<sup>132</sup> *Id.* at 1080.

<sup>133</sup> *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,<sup>134</sup> 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,<sup>135</sup> 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.<sup>136</sup> It was thought that

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<sup>134</sup> 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.*

<sup>135</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>136</sup> 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<sup>137</sup> 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."<sup>138</sup>

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,<sup>139</sup> a provision of the Bankruptcy Act applicable to both corporate and individual bankruptcy.<sup>140</sup> 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].

<sup>137</sup> After all of Congress' 1970 immunity legislation became effective, all statutory grants of witness immunity were restricted to use-derivative use immunity grants.

<sup>138</sup> WORKING PAPERS, *supra* note 111, at 1405. See also H.R. REP. NO. 1549, 91st Cong., 2d Sess. 32-33 (1970).

<sup>139</sup> 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 bearing 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. . . .

<sup>140</sup> 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.<sup>141</sup>

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,<sup>142</sup> 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.<sup>143</sup> Witnesses are apparently free to disclose all their prior misdeeds and thereby severely hamper any subsequent efforts to prosecute them for those crimes.<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup>

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<sup>141</sup> See *Block v. Consino*, 535 F.2d 1165, 1167-1169 (9th Cir. 1976).

<sup>142</sup> 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).

<sup>143</sup> 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.

<sup>144</sup> 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).

<sup>145</sup> See *Block v. Consino*, *supra* note 141 at 1169.

<sup>146</sup> 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.<sup>147</sup> These reforms have been pending for three years,<sup>148</sup> 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.<sup>149</sup> Apart from uniformity, this most recent statutory immunity scheme appears to have made questionable practical improvements over those that came before.

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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).

<sup>147</sup> 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.

<sup>148</sup> 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.

<sup>149</sup> 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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Offered: 4/14/77  
Referred: Rules

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 143

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to immunity and protection of wit-  
7 nesses; and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 12.50 is amended by adding new sections to read:

10 ARTICLE 3. IMMUNITY OF WITNESSES.

11 Sec. 12.50.110. DECLARATION OF PURPOSE. The purpose of secs.  
12 110 - 140 of this chapter is to provide a means to solve serious felony  
13 offenses committed with a high degree of secrecy, through the mechanism  
14 of witness immunity and, when necessary, the issuance of a court order  
15 compelling testimony or the production of other evidence or information  
16 in a criminal proceeding or investigation under specified standards  
17 consistent with an individual's guarantee under the Constitution of the  
18 United States and the Constitution of the State of Alaska not to be  
19 compelled to incriminate himself. Immunity should not be extended to a  
20 witness under an order compelling testimony or the production of other  
21 evidence or information unless a compelling state interest has been  
22 demonstrated within the context of a criminal proceeding or investiga-  
23 tion in which the public interest in prosecuting the offense which is  
24 the subject of a criminal proceeding or investigation is of a nature  
25 sufficient to outweigh the individual privacy interests of the witness  
26 as specified in sec. 130(a) of this chapter.

27 Sec. 12.50.120. PROSECUTORIAL IMMUNITY. (a) Whenever a person  
28 has been or may be called to testify in a criminal proceeding or in-  
29 vestigation before or ancillary to a court or a grand jury of the

1 State of Alaska, a state prosecuting attorney may, with the written  
2 concurrence of the attorney general, execute in writing a grant of  
3 immunity from prosecution to him upon terms that may be agreed upon  
4 between the prosecution and the prospective witness.

5 (b) Whenever a person is called to testify in a proceeding under  
6 a grant of immunity under (a) of this section, the grant of immunity  
7 shall be made a part of the record of the proceeding.

8 Sec. 12.50.130. ORDER COMPELLING TESTIMONY OR OTHER EVIDENCE;  
9 IMMUNITY OF WITNESS FROM PROSECUTION. (a) In the case of a person who  
10 has been or may be called to testify or provide other evidence or  
11 information in a criminal proceeding or investigation before or ancil-  
12 lary to a court or a grand jury of the State of Alaska, the superior  
13 court for the judicial district in which the proceeding is or may be  
14 held shall issue, upon the in camera, ex parte application of a state  
15 prosecuting attorney with the written concurrence of the attorney  
16 general, an order requiring the person to testify or provide other  
17 evidence or information as requested whenever the court finds that it  
18 has first been demonstrated by affidavit or otherwise through clear and  
19 convincing evidence that

20 (1) the testimony or other evidence or information sought to  
21 be compelled relates to and is likely to be material to an inquiry into  
22 criminal activity which constitutes a felony offense or offenses, the  
23 commission or attempted commission of which involves

24 (A) violence, threats of violence or a high potential  
25 for violence;

26 (B) property loss or illegally obtained property of an  
27 aggregate value in excess of \$10,000;

28 (C) blackmail under AS 11.15.300;

29 (D) extortion under AS 11.20.345;