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dent and entitled to loss of support. It was the decision of the Board to award the claimant for loss of support under Section 18.67.110(3).

Award. \$10,000.00

Claim No. 77-078/079

The victim, a 31 year old male, was found dead with a massive injury to the head caused by a tremendous blow. The victim in this claim is the same as in the incident described in Claim No. 77-054. As the claimants are the minor children of the victim and in the custody of their mother, ex-wife of the victim, the claim was filed by the mother on their behalf. It was the determination of the Board that the victim was an innocent victim of a violent crime and it was their decision to award each child \$7,500.00 under Section 18.67-.110(3).

Award: \$15,000.00

Claim No. 77-081

The claimant, a 24 year old male, took a girl to his apartment. An altercation took place and the girl shot him nine times. It was the decision of the Board to deny the claim under Section 18.67.130(b)(2) and (3) on the grounds that (1) he was engaged in an act of prostitution which is a crime, (2) he was engaged in a sexual encounter, while it might not be considered maintaining a sexual relationship, it was a sexual encounter, and (3) there was some evidence that he was engaged in an attempted rape.

Award: Denied

Claim No. 77-082

The claimant, a 36 year old male, was involved in an incident wherein a person had antagonized the claimant and a Spanish speaking friend. There was an altercation in which the claimant was attacked and stabbed in the back. It was the decision of the Board that the claimant was an innocent victim of a violent crime and was compensated for loss of earnings during the last fiscal year. The claimant's attorney submitted billings for medical expenses which had not been paid on the original claim as the claimant felt his insurance would cover them. It was the determination of the Board that the billings were legitimate and awarded the claimant the medical expenses under Section 18.67.110(1).

Award: \$127.18

Claim No. 77-083

The victim, a 24 year old male, was found lying in a ditch. He had been shot and died at the hospital several weeks later. The claimant, father of the victim, requested funeral expenses and out of pocket expenses. It was the determination of the Board that the victim was an innocent victim of a violent crime and awarded the claimant funeral and out of pocket expenses under Section 18.67.110(1).

Award: \$3,472.13

X Claim No. 77-084

The claimant, a 42 year old female, was involved in an incident in which she stated her ex-boyfriend came to her apartment and hit her, breaking her jaw and, in a separate incident, broke her hip. There was conflicting information given by the claimant on different occasions and it was the decision of the Board to deny the

claim on the grounds that there was a relationship between the claimant and the assailant and it was a case of simple assault which does not qualify under Section 18.67.100. The claim was denied under Section 18.67-.130(a) and (b)(2). A hearing was scheduled at the request of the claimant but the claimant did not appear. It was the recommendation of the hearing officer that the claim be dismissed with prejudice. The Board concurred with the hearing officer and reaffirmed their denial.

Award: Denied

Claim No. 77-085

The claimant, a 51 year old male, was assaulted by several individuals while on duty as a Security Guard. It was the determination of the Board that he was an innocent victim of a violent crime but denied an award under Section 18.67.080(c) on the grounds that he received Workmen's Compensation for all of his medical expenses and loss of earnings.

Award: Denied

Claim No. 77-086

The victim, a 26 year old male, was shot to death while visiting friends. The claimant was the wife of the victim. It was the decision of the Board to deny the claim under Section 18.67.080(c), on the grounds that there was some question of provocation and it was not clearly established that the victim was an innocent victim of a violent crime.

Award: Denied

Claim No. 77-087

The claimant, a 61 year old male, was arrested by a village policeman who was intoxicated. The claimant had committed no offense. However, in route to the jail, the policeman shot the claimant four times with a .38 special revolver in the arms, legs and chest. It was the determination of the Board that the claimant was an innocent victim of a violent crime and granted an award for permanent partial disability under Section 18.67-110(2).

Award: \$7,500.00

Claim No. 77-088/089/090

The victim, a 31 year old male, was shot and killed outside an apartment building by a former friend of his. There had apparently been some sort of altercation and the friend felt that the victim had taken unfair advantage of him. The assailant plead nolo contendere and was sentenced to thirty years with fifteen years suspended. As the claimants are the minor children of the victim, the claims were filed on their behalf by their mother. It was the determination of the Board that the victim was an innocent victim of a violent crime and the claimants were eligible for compensation. It was the decision of the Board that, although, the mother is getting collateral sources from Social Security and the Veteran's Administration greater than the support she had received from the father, the children had suffered a loss, including a pecuniary loss as a result of the death of their father. It was the decision of the Board to award \$5,000.00 to each of the children to be paid to the conservator in trust for the children. The Board suggested that, if necessary, the money be used for the support and maintenance or any emergency medical needs that might arise but the primary purpose of the award is for future education and, if not so used, that it be given to each child upon reaching the age of 21. This was awarded under Section 18.67.110(3).

Awarded: \$15,000.00

Claim No. 77-091

The claimant is the sister of the deceased victim described in Claims No. 77-088/089/090. It was the determination of the Board that the victim was an innocent victim of a violent crime. It was the decision of the Board to award the claimant funeral expenses incurred as a result of the death of her brother under Section 18.67.110(1).

Award: \$493.24

Claim No. 78-001

The claimant, a 15 year old female, was on her way to school when she was attacked from behind, dragged into the graveyard and raped. As the claimant was a minor, the claim was filed by her parent on her behalf. It was the determination of the Board that she was an innocent victim of a violent crime. It was the decision of the Board to award medical expenses and other out of pocket expenses which the Board determined reasonable under Section 18.67.110(1).

Award: \$683.00

Claim No. 78-002

The claimant, a 16 year old male, was involved in an incident where he was walking home from town when a man he knew slightly joined him. The man forced the boy to walk around for quite awhile, while he hit and abused the boy. The assailant then sexually assaulted the boy and stabbed him in the throat. As the claimant was a minor, the claim was filed on his behalf by his parent. It was the determination of the Board that the claimant was an innocent victim of a violent crime and awarded medical expenses, out of pocket expenses and other expenses the Board determined reasonable under Section 18.67.110(1) and (4).

Award: \$2,337.80

Claim No. 78-003

The claimant, a 36 year old male, was involved in an incident where he and several other friends went to a bar. As they were leaving, the claimant stated that several men harrassed him. The claimant and his friends started to leave in a car but the other men stopped the car. The claimant and his friend got out to see what was the matter. The claimant stated he was beat on the head with a club. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds that there was conflicting evidence and there was not conclusive evidence that he was an innocent victim of a violent crime.

Award: Denied

Claim No. 78-004

The claimant, a 45 year old male, went into the restroom at a bar. He was apparently mugged as he was found by the police with serious injuries to his face and eye and his billfold had been stolen. As more information was needed and several letters were written to the claimant with no response, the case was closed.

Award: Case Closed

Claim No. 78-005

The claimant, a 31 year old male, entered a bar looking for a friend. He was assaulted by a man with a knife and, while trying to get away, was stabbed. It was the determination of the Board that the claimant was an innocent victim of a violent crime and it was their decision to award medical expenses and loss of earnings under Section 18.67.110(1) and (2).

Award: \$1,444.50

Claim No. 78-006

The claimant, a 46 year old male, stated he was hit by a car from behind while he was driving and the accident left him unable to work for approximately four months because of the injury to his back and legs. The claim was denied under Section 18.67.130(4) as the program does not cover injuries as a result of the operation of a motor vehicle, boat or airplane unless the vehicle was used as a weapon in a deliberate attempt to injure or kill the victim.

Award: Denied

Claim No. 78-007

The claimant, a 21 year old male, alleged that he was struck on the head at a bar by an unknown assailant. All witnesses in the bar stated that it was an accident as the claimant was intoxicated and fell, hitting his head. It was the decision of the Board to deny the claim under Section 18.67.130(a) on the grounds that he was not a victim of a violent crime.

Award: Denied

Claim No. 78-008

The claimant, a 22 year old male, was involved in an incident at a cannery where he and the nightwatchman asked two young males to keep the noise down. Apparently, there was some words and the claimant threw several rocks at the men's skiff. The two men came back with a third man and struck the claimant several times in the back with a piece of pipe. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds that there was conflicting

evidence as to whether there was provocation or actions which contributed to the incident. There was also no medical confirmation of disability although the claimant was requesting disability for a rather extended length of time.

Award: Denied

Claim No. 78-009

The claimant, a 47 year old male, was making a phone call from a pay phone when a man approached him and asked him for a ride to a nearby apartment building. When they had arrived at the apartment, the man asked him to get out of the car and help him find his sister's car. The man then got behind the claimant, struck him behind the left ear, robbed him of his wallet and stole his car. Because of this incident, the claimant has a permanent partial hearing loss. It was the determination of the Board that he was an innocent victim of a violent crime and awarded him permanent partial disability and medical expenses under Section 18.67.110(1) and (2).

Award: \$6,030.00

Claim No. 78-010

The claimant, a 17 year old male, was standing outside a drinking establishment with a group of young men when several other young men came out of the bar. One of the men pulled a gun out of the trunk of a car and started shooting. The victim was shot in the buttock. As the claimant was a minor, the claim was filed on his behalf by his guardian. It was the determination of the Board that the claimant was an innocent victim of a violent crime and it was their decision to award loss of earnings under Section 18.67.110(2).

Award: \$1,625.40

Claim No. 78-011

The victim, a 25 year old female, was beaten to death with a club. The claimant, husband of the victim, requested compensation for funeral expenses plus one week's loss of earnings. It was the determination of the Board that the victim was an innocent victim of a violent crime and awarded the claimant funeral expenses plus loss of earnings under Section 18.67.110(1) and (2).

Award: \$1,363.13

Claim No. 78-012

The claimant, a 34 year old male, was driving cab when two men reportedly robbed the claimant, shot him in the head and shoulder and drove off in his cab. It was the determination of the Board that the claimant was an innocent victim of a violent crime and eligible for compensation. It was their decision to compensate the claimant for loss of earnings and out of pocket expenses under Section 18.67.110(1) and (2).

Award: \$2,095.00

Claim No. 78-013

The claimant, a 42 year old female, stated that persons unknown had set a fire resulting in the complete loss of business and personal property. The claim was denied as the program does not cover property damage but relates specifically to personal injury or death of a victim through a violent crime as listed under Section 18.67.010 and 18.67.100.

Award: Denied

Claim No. 78-014

The claimant, a 37 year old male, had been celebrating his birthday and drinking with his brother. On the way home, he and his brother were apparently jumped by several other individuals and the claimant suffered a broken jaw and bruises. The application was not complete and letters were written requesting further information. As the claimant did not respond, the case was closed.

Award: Case Closed

Claim No. 78-015

The claimant, a 36 year old male, went into a bar to pick up his girlfriend who was working in the bar. There was an altercation and the claimant received a gunshot wound to the face. The Board originally denied the claim under Section 18.67.080(c) on the grounds there was provocation/consent. A hearing was held and the Board reviewed the hearing officer's findings. It was the decision of the Board to again deny the claim on the grounds that to some extent there was provocation on the part of the claimant as he had voluntarily injected himself into a potentially violent situation

Award: Denied

Claim No. 78-016

The claimant, a 64 year old male, was sitting in the lobby of an apartment building when an elderly woman started shooting. The claimant was badly injured after being hit in the leg with a bullet. His medical expenses were covered by Medicare. It was the determination of the Board that the claimant was an innocent victim of a violent crime. The Board awarded loss of earnings and the part of the Homemaker service which could not be covered by Medicare, under Section 18.67.110(1) and (2).

Award: \$1,946.24

Claim No. 78-017

The claimant, a 22 year old male, was drinking at a local bar. He believed he was attacked from behind, dragged into the street and beaten by an unknown assailant but he had no recollection of the incident. More information was required to complete the claim but, as no contact could be made with the claimant, the case was closed.

Award: Case Closed

Claim No. 78-018

The claimant, a 20 year old female, was sexually assaulted while walking home from her place of employment. It was the determination of the Board that the claimant was an innocent victim of a violent crime and awarded loss of earnings, medical expenses and counseling under Section 18.67.110(1), (2) and (4).

Award: \$1,650.00

Claim No. 78-019

The claimant, a 25 year old male, and other members of a motorcycle club entered a bar and there was an altercation between the local workers and the motorcycle club. During the incident, the claimant was shot. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds that there was conflicting evidence, some of which indicated consent and/or provocation.

Award: Denied

Claim No. 78-021

X

The claimant, a 22 year old female, was in her apartment when her ex-boyfriend came in and, following an argument, started striking her. It was the decision of the Board to deny the claim as there appeared to be a boyfriend/girlfriend relationship and it did not appear to be a crime under Section 18.67.100. This was denied under Section 18.67.130(a) and (b)(2).

Award: Denied

Claim No. 78-022

The victim, a 28 year old female, was awakened by a commotion in front of her home and by a rock which was thrown through the window. She stepped outside the house onto the porch to see what had happened and, while standing there, incurred a fatal gunshot wound to the chest. The claimant is the husband of the victim and requested compensation for himself and their three children based on the death of his wife. It was the determination of the Board that the victim was an innocent victim of a violent crime and the claimant was eligible for compensation. It was the decision of the Board to award out of pocket expenses for the funeral and to award the claimant and the dependents pecuniary loss under Section 18.67.110(1) and (3).

Award: \$25,580.00

Claim No. 78-025

The claimant, a 28 year old female, made a derogatory remark to her girlfriend about the man her girlfriend had just married. The man came up and struck the claimant in the face with a drinking glass. It was the determination of the Board that the claimant was an innocent victim of a violent crime and the Board awarded medical expenses and loss of earnings under Section 18.67.110(1) and (2).

Award: \$1,276.23

Claim No. 78-026

The claimant, a 55 year old female, was the night clerk in an apartment building when she was shot in the back of the head and left leg by two assailants. It was the determination of the Board that the claimant was an innocent victim of a violent crime but denied an award under Section 18.67.080(c) on the grounds that collateral sources, namely Workmen's Compensation, covered all of her expenses and her disability as she is unable to work.

Award: Denied

Claim No. 78-027

The victim, a 37 year old male, entered the men's lavatory and was shot for no apparent reason. The victim ran from the lavatory and was shot a second time and killed. The claimant, mother of the victim, requested compensation for funeral expenses. It was the determination of the Board that the victim was an innocent victim of a violent crime and awarded the claimant funeral expenses under Section 18.67.110(1).

Award: \$695.50

Claim No. 78-028

The claimant, a 23 year old male, had his apartment broken into by friends, who chased him out of the apartment, struck him about the head and body, causing a severe concussion and other injuries. The Board denied the claim on the grounds there was an indication he was engaged in criminal activities and did not explore any collateral sources. The claimant requested a hearing and the Board reviewed the hearing officer's findings. It was the decision of the Board to again deny the claim under Section 18.67.080(c) on the grounds there was

evidence of provocation through the claimant's threats to the assailants during a telephone call. The denial was also based on the grounds that this incident arose in connection with the claimant's own criminal activities. As he voluntarily associated with this group in these activities, he voluntarily subjected himself to a high risk element.

Award: Denied

Claim No. 78-029

The claimant, a 26 year old male, was involved in an altercation in a parking lot. The claimant states that the offender threatened him with a gun, pulled him out of his vehicle and started beating him. It was the decision of the Board to deny the claim under Section 18.67.1080(c) on the grounds that (1) there was evidence of provocation, (2) the claimant changed his story in the course of testifying on different occasions, and (3) the information the Board had was not adequate to convince them that the claimant was an innocent victim of a violent crime compensable under the program.

Award: Denied

X Claim No. 78-030

The claimant, a 20 year old male, became involved in an altercation while trying to help his brother, whom he states was being assaulted. When the claimant tried to break up the fight, he was knocked down and kicked repeatedly by several people. It was the decision of the Board to deny the claim under Section 18.67.130(a) on the grounds that the injuries did not result from a crime encompassed under Section 100 of the statute. As it was not one of the crimes covered under the statute, the Board did not reach the question as to whether the claimant was an innocent victim.

Award: Denied

Claim No. 78-031

The victim, a 37 year old male, was murdered in a bar when he entered the men's lavatory and was shot for no apparent reason. The victim ran from the lavatory and was shot a second time and killed. The victim in this claim is the same as in the incident described in Claim No. 78-027. The claimant, father of the victim, requested compensation for funeral expenses. It was the decision of the Board to grant the award under Section 18.67.110(1).

Award: \$810.15

Claim No. 78-032

The claimant a 20 year old male, was walking home when he was struck on the back of the head with a large piece of wood and was robbed. The claimant suffered a concussion. It was the determination of the Board that the claimant was an innocent victim of a violent crime and awarded loss of earnings under Section 18.67-.110(2).

Award: \$609.00

X

Claim No. 78-033

The claimant, a 29 year old female, was involved in an altercation with her roommate. The roommate's boyfriend entered the argument and struck the claimant. It was the decision of the Board to deny the claim under Section 18.67.130(a) on the grounds it was a simple assault and not a crime compensable under Section 18.67.100 of the statute.

Award: Denied

Claim No. 78-035

The claimant, a 52 year old male, was robbed at gun-point in a parking lot. The claimant tried to grab the man with the gun after handing him his money and, in the process, the gun went off and the claimant was wounded in the shoulder. It was the determination of the Board that the claimant was an innocent victim of a violent crime and awarded medical expenses and loss of earnings under Section 18.67.110(1) and (2). An Emergency Award in the Amount of \$1,200.00 had previously been granted.

Award: \$1,410.50

Claim No. 78-037

The victim, a 21 year old male, was sitting in the back seat of a car when another young man came up and exchanged angry words with the victim. At that point, the man outside the car stabbed the victim in the chest. The victim died as a result of the wound later the same day. The claimant is the ex-wife of the victim and requested compensation for loss of support for their daughter. It was the decision of the Board that the victim was an innocent victim of a violent crime and awarded the claimant on behalf of the daughter for loss of support under Section 18.67.110(3).

Award: \$11,200.00

Claim No. 78-038

The claimant, a 19 year old male, was struck down by a hit and run driver. The application was denied under Section 18.67.130(b)(4) as the program does not cover personal injuries or death as the result of the operation of a motor vehicle unless the vehicle was used as a weapon in a deliberate attempt to injure or kill the victim.

Award. Denied

Claim No. 78-039

The claimant, a 58 year old male, was attacked in his apartment by three men. He was beaten severely and lost all of his lower teeth and some of his upper teeth. It was the decision of the Board to deny the claim on the grounds that there was nothing compensable under the statute. The medicals were paid by the Veteran's Administration and the Board cannot compensate for money stolen and this was all the claimant requested. The claim was denied under Section 18.67.080(c) and the Board did not reach the issue of eligibility as to whether the claimant was an innocent victim.

Award. Denied

Claim No. 78-040

The claimant, a 24 year old male, was standing by his truck while a man was pouring gas into the truck. The man turned and threw the remaining gas on the claimant's legs and then invited him into his trailer for the purpose of changing clothes. The claimant, after waiting about five minutes for the change of clothes, approached the man who stuck a cigarette lighter at his legs and ignited the claimant's pants. The claimant suffered burns on both of his legs. He was transferred out of state for grafting of the non-healing burn wounds on his right foreleg. It was the determination of the Board that he was an innocent victim of a violent crime and awarded medical expenses and loss of earnings under Section 18.67.110(1) and (2). An Emergency Award of \$1,500.00 had previously been granted.

Award: \$8,624.26

Claim No. 78-041

The claimant, a 49 year old male, who lived and worked at a lodge, had closed the lodge for the night when he heard a knock at the door. He opened the door and saw

three men standing there. As one man had a gun, he quickly slammed the door shut. Four shots were fired through the door and two bullets struck the claimant in the back, one lodging next to his heart. It was the determination of the Board that the claimant was an innocent victim of a violent crime and awarded him loss of earnings and medical expenses under Section 18.67.110(1) and (2).

Award: \$1,277.75

Claim No. 78-042

The claimant, a 21 year old male, states that he was assaulted and threatened with a gun, however, the application was incomplete and gave no dates. After several letters were written and there was no reply, the case was closed.

Award: Case Closed

Claim No. 78-043

The claimant, a 52 year old male, alleged he was assaulted at the airport. His application was denied as there was no evidence of a crime committed, no medical reports or verification as is necessary under Section 18.67.030(b) and Section 18.67.130(a). The same application had been submitted in a prior year and had been denied.

Award: Denied

Claim No. 78-044

The claimant, a 25 year old female, picked up a male hitchhiker. He pulled a small caliber pistol on her, directed her to an area off the road and raped her. It was the determination of the Board that the claimant was an innocent victim of a violent crime and eligible

for compensation. It was the decision of the Board to compensate the claimant for out of pocket expenses, loss of earnings and future counselling under Section 18.67.110(1), (2) and (4).

Award: \$2,307.90

Claim No. 78-049

The claimant, a 49 year old male, was attacked in a friend's apartment by three men. He was shot in the buttocks and beaten severely about the head causing lacerations and broken teeth. Several letters were written requesting information and, as there was no reply, the case was closed.

Award: Case Closed

Claim No. 78-050

The claimant, a 49 year old female, suffered injuries to her back and eye when the car in which she was riding was struck by another vehicle. The application was denied under Section 18.67.130(b)(4) as the program does not cover personal injury as a result of the operation of a motor vehicle unless the vehicle was used as a weapon in a deliberate attempt to injure or kill the victim.

Award: Denied

Claim No. 78-053

The victim, a 36 year old male, was shot and killed when a man walked into a market and started shooting with a .357 magnum. The assailant was later convicted of First Degree Murder and sentenced to life in prison.

The claimant, wife of the victim, requested compensation for herself and six children. It was the determination of the Board that the claimant and her children were eligible for compensation under Section 18.67-.110(3) and the Board awarded the maximum amount, \$40,000.00, for the dependents of the deceased victim. An Emergency Award of \$1,500.00 had previously been granted and was deducted from the final award.

Award: \$40,000.00

Claim No. 78-054

The claimant, a 29 year old male, was home with his wife and new baby when the landlord entered the house and accused the claimant of hiding the landlord's girlfriend. The landlord picked up a part from a handyman jack and beat the claimant, breaking the claimant's arm, in addition to giving him severe cuts, bruising the claimant's wife, threatening harm to the baby and destroying several articles of furniture. A hearing was held and the Board, after reviewing the hearing officer's report, made the decision to award out of pocket expenses and loss of earnings under Section 18.67-110(1) and (2).

Award: \$1,387.50

Claim No. 78-055

The victim, a 39 year old female, was found by the side of the road over an embankment with numerous injuries. She had already expired and was identified at a later date. The claimant is the mother of the victim and requested compensation for funeral expenses. It was the decision of the Board to deny the claim on the grounds there was lack of evidence that she was an innocent victim of a violent crime. There was evidence

that indicated a hit and run accident. There was the possibility that someone attacked her, however, the evidence was not conclusive to prove she was a victim of a violent crime compensable under this program. The claim was denied under Section 18.67.080(c).

Award: Denied

Claim No. 78-056

The claimant, a 52 year old female, alleged she was assaulted and raped in her apartment. After several letters were written requesting information, the claimant advised that she no longer wished to pursue her claim because of the amount of paperwork and loss of privacy involved.

Award: Case Closed

Claim No. 78-057/058

The victim, a 30 year old male, entered a bar with a friend and sat on a bar stool. There was a slight discussion with the offender regarding the bar stool but nothing of any magnitude. The offender left the bar and returned a while later and killed the victim by shooting him in the head. As the claimants are the two minor children of the victim and in the custody of their mother, the claims were filed on their behalf by their mother. It was the determination of the Board that the victim was an innocent victim of a violent crime and the children were eligible for compensation under Section 18.67.110(3). It was the decision of the Board to award each of the children \$10,000.00. The Board suggested that, if necessary, the money be used for the support and maintenance or any emergency medical needs that might arise but that the primary purpose of the award was for future education and, if not so used, that it be given to each child upon reaching the age of maturity.

Award: \$20,000.00

X Claim No. 78-059

The claimant, an 18 year old female, was confronted by three females whom she knew and a fight ensued. The claimant was struck on the head with a pair of num-chucks. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds there was evidence that indicated consent and/or provocation.

Award: Denied

X Claim No. 78-062

The claimant, a 21 year old male, received a gunshot wound in the thigh after an argument with the offender. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds that there was not enough evidence to establish that the claimant was an innocent victim of a violent crime and the Board felt there was some indication of provocation/consent on the part of the claimant.

Award: Denied

Claim No. 78-063

The claimant, a 30 year old male, was waiting outside an apartment building when he noticed a fight in progress. He and a friend walked over and broke up the fight. The offender walked away and came back a few minutes later, pulled out a revolver and shot the claimant. The claimant was in the hospital for approximately a month and a half and had not been able to work for three months after the hospitalization. The Board granted an Emergency Award of \$1,500.00 and requested more information before making a final determination on the claim. The Emergency Award was granted under Section 18.67.120(1).

Emergency Award: \$1,500.00

X Claim No. 78-065

The claimant, a 25 year old male, was in his apartment when two men forced their way into the apartment and beat the claimant severely. It was the decision of the Board to deny the claim under Section 18.67.130(a) on the grounds that the injuries did not result from a crime encompassed under Section 18.67.100 of the statute.

Award: Denied

X Claim No. 78-066

The claimant, a 22 year old male, was involved in an altercation in a bar and states that he was severely beaten. It was the decision of the Board to deny the claim under Section 18.67.130(a) on the grounds that the injuries did not result from a crime encompassed under Section 18.67.100 of the statute, therefore, the Board did not reach the question as to whether the claimant was an innocent victim.

Award: Denied

Claim No. 78-068

The victim, a 29 year old male, was hitchhiking when he was picked up by a male and female who later beat him brutally and then shot him to death. The claimant is the foster mother of the victim and requested compensation for funeral expenses. It was the determination of the Board that the claimant was eligible for compensation and awarded funeral expenses under Section 18.67.110(1).

Award: \$697.00

Claim No. 78-069

The claimant, a 26 year old male, stated he was helping the management of a bar evict a man and he was jumped by three or four other men and received several blows to the head requiring approximately thirty-five stitches. It was the decision of the Board to deny the claim under Section 18.67.130(a) on the grounds that there was no report to the police as is required in the statute.

Award: Denied

Claim No. 78-071

The claimant, a 31 year old male, went to an apartment to pick up a person who needed to go to the Emergency Clinic. He walked into the person's house and was attacked by a guard dog. The police reported that the claimant had leaned down to pet the dog and the dog attacked him. The claimant lost the sight in one eye. The Board ruled that the claim was ineligible under Section 18.67.130(a) on the grounds that it was not a crime encompassed under Section 18.67.100 of the statute.

Award: Denied

Claim No. 78-073

The claimant, a 31 year old male, was critically injured when a man walked into a market where the claimant was working and started shooting with a .357 magnum. Another victim was shot and killed at the same time. The assailant was convicted of First Degree Murder and sentenced to life in prison. It was the decision of the Board to award the claimant the maximum allowable under their Standards of Compensation for vocational retraining and rehabilitation in the amount of

\$10,000.00 under Section 18.67.110(2) and out of pocket expenses under Section 18.67.110(1). An Emergency Award of \$1,500.00 had previously been granted and was deducted from the final award.

Award: \$10,939.34

Claim No. 78-074

The claimant, a 21 year old male, was involved in a scuffle in a bar. The claimant and offender reconciled their differences and left the bar together. A short time later the offender stabbed the claimant in the arm. By the claimant's own statement, he provoked the incident through name calling. The claimant voluntarily injected himself into a situation that was volatile and violent thereby consenting to the incident. It was the decision of the Board to deny the claim under Section 18.67-.080(c) on the grounds that there was provocation and consent.

Award: Denied

Claim No. 78-077

The claimant, a 44 year old male, was involved in an altercation in the parking lot of a bar. The claimant produced a rifle from his vehicle and several men started beating the claimant until he lost consciousness. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds that there was evidence that the claimant's use of the rifle and possible verbal exchange contributed to or provoked the incident. The Board did not feel they had enough evidence to establish the claimant as an innocent victim of a violent crime.

Award: Denied

Claim No. 78-078

The victim, a 9 year old female, was sexually assaulted and brutally murdered. The claimant is the mother of the victim. It was the determination of the Board that the girl was an innocent victim of a violent crime and the claimant was eligible for compensation for out of pocket expenses, funeral expenses and loss of earnings under Section 18.67.110(1), (2) and (4).

Award: \$4,954.99

Claim No. 78-080

The claimant, a 28 year old female, was involved in an incident where she was raped, the offender deliberately drove her car in the ditch, proceeded to beat her severely and left her lying in the snow. Injuries included severe frostbite of both hands and feet, which resulted in the loss of multiple falanges of both hands, residual stiffness of both hands and amputation of multiple falanges of one foot. It was the determination of the Board that the claimant was an innocent victim of a violent crime and eligible for compensation. The Board awarded the claimant under Section 18.67.110(2) for permanent partial disability according to the Board's Standards of Compensation.

Award: \$7,500.00

Claim No. 78-081

The claimant, a 34 year old male, alleged he suffered emotional injury due to a divorce. The application was denied as it did not meet any of the eligibility requirements under the statute.

Award: Denied

Claim No. 78-082

The claimant, a 13 year old male, requested compensation as his bicycle was stolen from the school's bicycle rack. The application was denied as the program does not cover monetary loss or property damage but relates specifically to personal injury or death of the victim through a violent crime under Section 18.67.100.

Award: Denied

Claim No. 78-083

The claimant, a 24 year old female, was riding her motorcycle when she was struck by a car and suffered a compound fracture to her right leg. The application was denied under Section 18.67.130(b)(4) as the program does not cover personal injury or death as a result of the operation of a motor vehicle unless the vehicle was used as a weapon in a deliberate attempt to injure or kill the victim.

Award: Denied

X Claim No. 78-084

The claimant, a 39 year old female, stated she received a broken nose in an altercation over an alleged trespassing incident. The feud between the claimant and offender had been ongoing for some time as to whether a road was private or public. It was the decision of the Board to deny the claim on the grounds that (1) it was a simple assault not compensable under the statute as the crimes compensable are listed under Section 18.67.100, (2) the incident was attributable to the claimant's own actions and would be ineligible because of provocation and consent under Section 18.67.080(c), and (3) there was no police report filed which is required under Section 18.67.130(a).

Award: Denied

Claim No. 78-086

The claimant, a 20 year old male, was sitting in a bar when he was confronted by a complete stranger who started beating him with a pool cue. It was discovered that the offender thought the claimant was someone else. It was the determination of the Board that the claimant was an innocent victim of a violent crime and eligible for compensation. The Board awarded medical expenses under Section 18.67.110(1).

Award: \$950.00

Claim No. 78-088

The claimant, a 34 year old female, was sexually assaulted. It was the determination of the Board that the claimant was an innocent victim of a violent crime and eligible for compensation. It was the decision of the Board to award out of pocket expenses and future counselling under Section 18.67.110(1) and (4).

Award: \$4,904.90

Claim No. 78-093

The victim, a 58 year old male, was visiting in the home of a friend. They were drinking when the friend pulled a gun and shot and killed the victim. The claimant is the wife of the victim. It was the decision of the Board to deny the claim under Section 18.67.080(c) on the grounds that there was inadequate evidence that the victim was an innocent victim of a violent crime.

Award: Denied

MEMORANDUM

State of Alaska

TO: Jos Mapranath
Budget Analyst
Department of Public Safety

DATE: January 29, 1979

FILE NO:

TELEPHONE NO:

FROM: Nola K. Capp, Administrator *nc*
Violent Crimes Compensation Board

SUBJECT: Senate Bill 77

Based on the historical data at our disposal, we do not feel there will be a fiscal impact over and above the appropriated funds.

The Honorable Robert Ziegler
Alaska State Senate
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Ziegler:

The Violent Crimes Compensation Board, at their November meeting, requested I write asking your assistance with a problem in the statute that has arisen several times during the past year.

Several claims have been submitted where the claimant was kicked and beaten causing severe injuries. The Board has had to deny the claims because Aggravated Assault doesn't qualify as a compensable crime under Section 100 of the statute.

The Board would like your assistance in amending Section 100 of the statute to include Aggravated Assault as a qualifying crime so innocent victims of brutal attacks can be compensated.

The Board does not feel this would have a great fiscal impact on the program as claims of this nature do not request large sums of money so no fiscal note would be required.

Your assistance in this matter and your support of the program is appreciated.

Sincerely,

Nola K. Capp
(Mrs.) Nola K. Capp
Administrator

NKC:mang

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
 Bill/Resolution No. SB77
 Title An act relating to compensation for criminal injuries.....
 Requested by Legislative Finance Date 1-29-79

II. FISCAL DETAIL
 Agency Affected Department of Public Safety
 Program Category Affected Administration of Justice
 BRU, Program, or Subprogram(s) Affected Violent Crime Compensation Board/Due Process
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 79	FY 80	FY 81	FY 82	FY 83	FY 84
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

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

Aggravated assault claims usually involve no large sum of money and the program manager estimates no fiscal impact at all.

IV. DATE 1/29/79 PREPARED BY Jos Mapranath, Budget Analyst
 AGENCY Department of Public Safety
 PHONE 465-4368

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

A M E N D M E N T

Offered in the SENATE

By the Judiciary Committee

TO: SENATE BILL NO. 77

Page 2, lines 4 - 10:

Delete all material and insert the following:

"(2) the commission or attempt on the part of one other than the applicant to commit any of the following offenses: murder in any degree, manslaughter, criminally negligent homicide, assault in the first or second degree, kidnapping, sexual assault in any degree, sexual abuse of a minor, contributing to the delinquency of a minor under AS 11.51.130(a)(4), threats to do bodily harm, or lewd, indecent, or obscene acts."

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 31, 1979

SUBJECT: Proposed amendment to Senate Bill No. 77
TO: Members of the Senate Judiciary Committee
FROM: ^{JAMc} James A. McKenzie, Legislative Counsel

The purpose of Senate Bill No. 77 is to allow the Violent Crimes Compensation Board to compensate victims of aggravated assault. This is provided for in sec. 1 by adding aggravated assault to the list of offenses for which compensation may be paid. This list of offenses, however, will be obsolete when the new criminal code takes effect on January 1, 1980. Section 2 of the bill is an attempt to translate the list of offenses, including aggravated assault, into the language of the new criminal code. The difficulty is in translating the terms "threats to do bodily harm" and "lewd, indecent, or obscene acts." (Page 2, lines 22-23). Threats to do bodily harm and lewd, indecent, or obscene acts are not, as such, crimes under the present criminal code or under the new criminal code. I had thought it best to eliminate these general terms and replace them with specific crimes under the new criminal code. Upon reviewing the bill, however, I believe that it is better to leave these terms as they are. There are a number of crimes under the new criminal code which could, in some circumstances, involve threats to do bodily harm or lewd, indecent, or obscene acts. For example, harrassment under AS 11.61.120(a)(4) involves anonymous phone calls, obscene phone calls, and phone calls that threaten physical injury. If this were added to the list, it would read, "harrassment under AS 11.61.120(a)(4) which involves an obscene phone call or a phone call that threatens physical injury."

Use of the general terms in the existing law eliminates the complexity and confusion of listing, with appropriate qualifications, every crime which might come under those terms and helps to insure that new crimes coming under those terms will be covered. The proposed amendment translates the specific crimes listed in sec. 1 into their counterparts under the new criminal code and retains the general terms "threats to do bodily harm" and "lewd, indecent, or obscene acts."

JAMcK:nem

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

VIOLENT CRIMES COMPENSATION BOARD

POUCH N
JUNEAU, ALASKA 99811

January 30, 1979

The Honorable Robert P. Ziegler, Sr.
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Ziegler:

The Violent Crimes Compensation Board requests passage of SB 77 amending Section 100 of the statute to include Aggravated Assault.

Five claims were submitted in FY78 which had to be denied because the injuries did not result from a crime encompassed under Section 100. While the number does not seem large, the Board believes innocent victims should be compensated for medical expenses and loss of earnings due to injuries received at the hands of assailants.

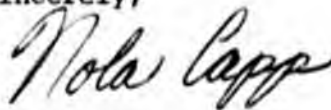
For example, one claimant was at home when two men forced their way into the apartment and beat and kicked the claimant severely. The claimant incurred fractured nasal bones and multiple abrasions and contusions about the head, neck, arms and upper chest. The claimant's medical expenses were \$2,157.00 of which the insurance company paid \$1,561.50, leaving the claimant owing a balance of \$645.50. Since the claimant was in the hospital eight days and unable to work for a period of three weeks total, loss of earnings were incurred in the amount of \$880.55.

As the amount of compensation for each of the claims would be approximately \$2,000.00, the Board does not feel there would be a fiscal impact on the program over and above the appropriated funds.

The Crime of Aggravated Assault appears to be within the intent of the original statute therefore the Violent Crimes Compensation Board supports this bill.

As a Board meeting was previously scheduled in Anchorage on February 1, 1979, it is impossible to personally testify at the hearing. However, your thoughtful consideration will be appreciated.

Sincerely,



(Mrs.) Nola K. Capp
Administrator

NKC:mmg

SB 77 JUDICIARY BY REQUEST.....RELATING TO COMPENSATION FOR
CRIMINAL INJURIES.

THE PURPOSE OF THIS BILL IS TO ADD " AGGRAVATED ASSAULT" TO THE
CRIMES WHICH A PERSON MAY APPLY FOR COMPENSATION FROM THE VIOLENT
CRIMES COMPENSATION BOARD.

SECTION 1. Adds "aggravated assault" to the current offenses
under which a person may apply for compensation.

SECTIONS 2-6 These sections have been rewritten and amended in order
to include the new term for aggravated assault and to
conform to internal cross references under the
new criminal code, which will be effective January,
1980.

*NOTE: Only section 1 will take effect immediately, all other
sections will take effect January 1980.

SB

78

COMMITTEE REPORT
SENATE

1/29/79

FURTHER: None

Date: 2-13-79

Mr. President:

The Committee on JUDICIARY has had SB 78
immunity and protection of witnesses

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

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the Finance Committee

MEMBERS SIGNING
DO PASS

[Signature]

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Signature]

[Signature]

[Signature]

CHAIRMAN

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 7, 1979

SUBJECT: Immunity of Witnesses:
SB 78

TO: Senator Robert Ziegler, Chairman
Judiciary Committee

FROM: Richard A. Bradley, Legislative Counsel B

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

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

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

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

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

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

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

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

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

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

The statute under which the immunity was allegedly granted provided:

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

Senator Robert Ziegler
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February 7, 1979

The Court's language is significant:

It remains to consider whether §860 of the Revised Statutes removes the protection of the constitutional provision for Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence that might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer he could not possibly have been convicted.

The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself;" and the protection of §860 is not co-extensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed 1110, 1114-1115 [Emphasis added].

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

After an exhaustive discussion, the Court stated:

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

From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer.

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

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Senator Robert Ziegler
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February 7, 1979

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

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

And

Applying the holding of that case [Counselman] to our holdings today, that the privilege against self-incrimination protects a state witness against federal prosecution *** and that "the same standards must determine whether [a witness'] silence in either a federal or state proceeding is justified, *** we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

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

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

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

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

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

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

It continued:

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

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

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

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

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

The 1970 Act explicitly prescribes the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)....."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When a person found in civil contempt under §140 no longer has it within his power to comply," he is guilty of criminal contempt and is punishable under the penalties of §140(b). An indictment, a separate trial and conviction on the matter would be required.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If I may assist further, please advise.

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

RAB:nem

FOOTNOTE

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

NOTE

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

[The sovereign's power to compel individuals to testify before courts, grand juries, and other bodies is firmly rooted in Anglo-American jurisprudence, with statutory authority dating as far back as 1562.¹ Yet it is also well-settled that this power is not without limits. The law has long recognized a number of testimonial privileges, the most important of which is the privilege against compulsory self-incrimination, which cannot be violated no matter how great the government's need for the witness' testimony.²]

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

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

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

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

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

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

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

§ 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

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

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

I. BACKGROUND

A. *Development of the Present Statutory Scheme*

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

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

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 in the public interest; and

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

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

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

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

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

Although Congress' first immunity statute,⁹ passed in 1857, made use of the "transactional" approach, within ten years "use immunity" had become the dominant mode. Because a grant of transactional immunity barred prosecution of an immunized witness for crimes disclosed in his testimony, witnesses who testified under grants of transactional immunity received "immunity baths" which rid them of criminal liability for any wrongful acts described in their testimony. This undesirable feature of the 1857 transactional immunity statute led Congress to first adopt the use immunity approach¹⁰ in an 1862 compulsory testimony statute.¹¹ This statute provided that a witness' compelled testimony could not be used as evidence against the witness in a subsequent criminal proceeding, but permitted prosecution of the "immunized" witness as long as his compelled testimony was not introduced into evidence at his trial.¹²

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

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

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

¹¹ Act of 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. . . ."

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

However, in 1892 the United States Supreme Court, ruling on the constitutionality of these statutes, struck down a use immunity provision in *Counselman v. Hitchcock*¹³ because it failed to protect the witness from indirect use of his testimony to the same extent as would the fifth amendment privilege.¹⁴ The Court declared that a witness could not be compelled to testify unless granted immunity co-extensive with the scope of the fifth amendment privilege,¹⁵ and found "use immunity" deficient in this regard. In light of *Counselman*, Congress reverted to the transactional immunity approach in all its subsequent immunity legislation¹⁶ until 1970.

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

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

¹³ 142 U.S. 547 (1892).

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

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

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

¹⁷ See note 7 *supra*.

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

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

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

Congress enacted the present immunity statute.²¹ The new law repealed all statutory authority for grants of transactional witness immunity²² and made available a new form of immunity—"use-derivative use immunity." Designed to avoid the "immunity baths" prevalent under transactional immunity grants, the 1970 legislation focused on immunization of testimony rather than on immunization of witnesses, and sought to overcome the constitutional objections raised in *Counselman* by prohibiting indirect exploitation of the compelled testimony ("derivative use") as well as "direct use."²³

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

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

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

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

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

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

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

142 U.S. at 585-86.

²⁵ 406 U.S. 441 (1972).

²⁶ *Id.* at 462.

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

B. *Procedural Considerations Under the Present Statutory Scheme*

[Pursuant to 18 U.S.C. §§ 6002-6003, all grants of statutory witness immunity²⁸ in criminal matters²⁹ are effected by District Court order issued upon written request by the United States Attorney for the judicial district in which the proceeding is being held.³⁰ Since the statute authorizes grants of immunity only when requested by the United States Attorney,³¹ the courts are powerless to issue immunity orders on their own motion³² or at the request of a defendant,³³ leaving the United States Attorney with exclusive power to initiate grants of witness immunity.]

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

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

³⁰ 18 U.S.C. § 6003(a) (1970).

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

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

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

Arrangements of this type are frequently used when the coercion of a statutory immunity order is deemed unnecessary, because of the bargaining flexibility they give the prosecutor in dealing with a prospective Government witness. See, e.g., *United States v. Kurzer*, 534 F.2d 511, 513 n.3 (2d Cir. 1976). As is the case with other prosecutorial promises, these agreements tend to be strictly enforced. See, e.g., *United States v. Kurzer*, *supra*; *United States v. Carter*, 454 F.2d 426 (4th Cir.), *cert. denied*, 417 U.S. 933 (1974); *In re Kelly*, 350 F. Supp. 1198 (E.D. Ark. 1972); *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969). However, problems may arise in asserting one district attorney's promise of freedom from prosecution when prosecution is initiated by a prosecutor in another federal district. See *United States v. Carter*, *supra* (agreements are binding on all federal prosecutors); *United States v. 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).

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

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

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

u.B

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

[Once the immunity order has been issued, the witness will be called, or recalled³⁹ to testify. If the witness refuses on fifth amendment grounds to respond to any questions put to him, he will be called before the district court judge who issued the immunity order, and asked to show cause for his refusal to testify.]

[Typically, the court will then issue a second order directing the witness to testify, cautioning him that continued refusal to answer any question on fifth amendment grounds will result in his being cited for contempt. If the witness persists in his refusal to answer any question, he will again be brought before the district court and adjudged in contempt of the court's orders.] Although criminal contempt charges may be brought,⁴⁰ civil contempt proceedings pursuant to 28 U.S.C. § 1826⁴¹ are generally insti-

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

³⁴ See note 5 *supra*.

³⁵ The Assistant Attorney General in charge of the Criminal Division of the Department of Justice is specifically empowered to authorize requests for immunity orders under section 6003 by 28 C.F.R. § 0.173 (1970). In order to receive Department of Justice approval, a two-page form ("Request for Immunity Authorization, Form USA-167") must be submitted. This form calls for clerical information and short answers to eleven questions about the relevant investigation or prosecution. See notes 102-105 *infra* and accompanying text for a discussion of the sufficiency of this information.

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

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

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

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

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

⁴¹ § 1826. Recalcitrant witnesses

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

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

II. SUBSEQUENT PROCEEDINGS AGAINST IMMUNIZED WITNESSES

A. *Barriers to Future Criminal Prosecution*

Section 6002 of Title 18 of the United States Code directs only that testimony compelled from a witness pursuant to an immunity order may not subsequently be used against that witness in any⁴³ criminal proceeding. Thus, unlike grants of transactional immunity which barred prosecution of immunized witnesses for crimes disclosed in their compelled testimony,⁴⁴ section 6002 immunity grants permit the prosecution of immunized witnesses as long as the statutory prohibition on exploitation of compelled testimony is honored.⁴⁵

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

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

(1) the court proceeding, or

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

28 U.S.C. § 1826 (1970).

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

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

⁴⁴ See text accompanying note 6 *supra*.

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

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

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

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

This procedural shield has proven hard to penetrate, as the prosecution's burden of proof at these so-called "taint hearings" is not satisfied by a mere negation of taint.⁴⁹ Rather, the Government must establish by a preponderance⁵⁰ that its evidence was derived from legitimate⁵¹ sources

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

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

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

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

⁴⁹ *Id.* at 460.

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

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

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

Because of these difficulties, a prosecutor will rarely proceed knowingly against an individual who has previously testified under an immunity grant, unless special precautions have been taken by his office in anticipation of the inevitable taint problems. To illustrate, if the United States Attorney's files include transcripts containing the immunized testimony of an individual presently under investigation, access to such transcripts should be restricted.⁵² 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.⁵³ [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.⁵⁴]

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

⁵² 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).

⁵³ Cf. *United States v. M. Daniel*, 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.

⁵⁴ 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.⁵⁵ In such cases, it is unlikely that the prosecutor will have carefully questioned all would-be informants about the sources of their knowledge, or that he will have investigated the sources of other investigative leads. As a result, an investigation initiated solely on the basis of information which is protected by an undiscovered immunity order should cause all of the Government's evidence to be suppressed because of the tainted investigative lead from which it was derived.

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

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

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

⁵⁷ 482 F.2d 305 (8th Cir. 1973).

⁵⁸ *Id.* at 311.

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

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

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

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

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

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

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

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

⁶⁰ See note 22 *supra*.

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

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

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

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

C. Use Of Immunized Testimony In Non-Criminal Proceedings

Although testimony elicited under a grant of immunity may not be used against the witness in a subsequent criminal prosecution, that testimony may be freely used against him in any non-criminal proceeding. Because the scope of protection under 18 U.S.C. § 6002 is co-extensive with that under the fifth amendment—which permits a witness to withhold only information which might subject him to *criminal* liability—it follows that grants of immunity under section 6002 afford no protection against the use of the testimony in any proceeding other than a criminal prosecution.⁶⁴ Courts have thus held that civil penalties may be based on testimony given pursuant to a grant of section 6002 immunity,⁶⁵ and that a witness's immunized testimony may properly be used against him in civil actions⁶⁶ and administrative proceedings,⁶⁷ whether held before state or federal bodies.

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

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

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

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

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

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

Prosecutors concerned with the possibility that a key witness, though immunized, will nonetheless remain silent and suffer imprisonment for contempt rather than incur the serious non-criminal consequences which might attend disclosure of his own criminal activities, have in some instances requested immunity orders prohibiting use of a witness's testimony in specified non-criminal proceedings as well as in any criminal prosecution. Although section 6002 in no way authorizes these additional protections, the courts have occasionally granted them. For example, an immunity order which purported to prohibit use of immunized testimony against bar-owners in liquor license revocation proceedings⁶⁸ was issued by one court, as was an order to prohibit similar use in disbarment proceedings.⁶⁹

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

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

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

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

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

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

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

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

⁷² *Id.*

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

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

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

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

In the lower federal courts, witnesses' inability to satisfy the heavy burden of proving real or substantial danger of foreign prosecution⁷⁹ has provided an avenue to sidestep the question.⁸⁰ Some courts⁸¹ 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

⁷⁴ See note 15 *supra*.

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

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

⁷⁷ 401 U.S. 933, 934 (1972).

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

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

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

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

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

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

⁸² FED. R. CRIM. P. 6(e):

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

⁸³ In rejecting this solution, the district court in *In re Carlassi*, 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.

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

⁸⁵ *Id.* at 1070.

ecution could not properly refuse to testify on fifth amendment grounds once granted domestic immunity.⁶⁶

The opposite view was taken by the federal district court for Connecticut in *In re Cardassi*.⁶⁷ 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*,⁶⁸ 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.⁶⁹

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*,⁷⁰ 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.⁷¹ Although the *Baldinger* court erred in holding that a section 6002 immunity grant would be insufficient

⁶⁶ *Id.*

⁶⁷ 351 F. Supp. 1080 (D. Conn. 1972).

⁶⁸ 378 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.

⁶⁹ 351 F. Supp. at 1086.

⁷⁰ 356 F. Supp. 153 (C.D. Cal. 1973).

⁷¹ The court ruled that a grant of section 6002 immunity could not be co-extensive with the fifth amendment privilege because the statute appeared to leave the witness open to prosecution for having previously made false statements (the falsity of which would be disclosed in the witness' compelled testimony) to the F.B.I. *Id.* at 171. This interpretation of the statute's perjury/false statement exception was erroneous, since the exception refers only to false statements made after immunity has attached. To the extent that the *Baldinger* case suggests that section 6002 is constitutionally insufficient because of the perjury/false statement exception, *Baldinger* was overruled *sub silentio* in *United States v. Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973). See also *United States v. Watkins*, 505 F.2d 545, 546 (7th Cir. 1974).

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

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

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

III. DEFICIENCIES UNDER THE PRESENT STATUTORY SCHEME

A. Prosecutorial Control and the Potential for Abuse

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

⁹² 356 F. Supp. at 169-70.

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

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

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

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

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

⁹⁵ 18 U.S.C. § 6003(a) (1970).

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

⁹⁷ See cases cited in note 96 *supra*.

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

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

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

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

2. *Ineffective Administrative Restraints.* The statutory requirement that all immunity requests have prior authorization from the Department of Justice¹⁰² is largely ineffective against these abuses. Although the Department of Justice requires the United States Attorney to answer eleven general questions about the circumstances surrounding his decision to seek immunity,¹⁰³ none calls for the kind of detailed information necessary to uncover improperly motivated immunity requests. Moreover, the Department of Justice does not verify the accuracy of any of the information submitted and authorizes virtually all of the immunity requests submitted for its approval.¹⁰⁴ This necessarily perfunctory administrative review¹⁰⁵ is not a substitute for effective judicial supervision.

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

¹⁰² 18 U.S.C. § 6003(b) (1970).

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁸ *Id.*

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

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

Commission's extensive report accompanying this proposed immunity act¹¹¹ was relied upon heavily by both the House and Senate in their deliberations.

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

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

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

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

¹¹² WORKING PAPERS at 1434.

¹¹³ WORKING PAPERS at 1435.

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

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

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

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

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

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

This inquiry need not be burdensome for either the judge or the prosecutor. A list of questions could be submitted to the United States Attorney in charge of the case, calling for written responses under affirmation¹¹⁸ 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

¹¹⁶ WORKING PAPERS at 1435-36.

¹¹⁷ See cases cited at note 98 *supra*.

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

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

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

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

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

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

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

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

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

¹²⁰ See note 1 *supra*.

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

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

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

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

Still, if the search for truth justifies grants of immunity to compel witnesses to divulge otherwise self-incriminatory information, that search must not be one-sided, or it may well mistake the object it seeks. Judicial treatment of this problem, under both 18 U.S.C. § 6003 and its predecessors, has been somewhat myopic. Despite the manifest unfairness of leaving the defense totally without access to immunity orders, the courts have steadfastly refused to recognize any defense right to obtain them¹²⁴ in all but two cases.

The first of these cases, *Earl v. United States*,¹²⁵ was decided in 1966, and involved a transactional immunity statute¹²⁶ which, like section 6002, made witness immunity grants available exclusively to the prosecution. On appeal of a narcotics conviction, Earl argued that the unavailability of defense witness immunity grants under the statute, coupled with the prosecutor's refusal to seek immunity for a key defense witness who refused on fifth amendment grounds to testify at trial, deprived him of a fair trial, in violation of the Due Process Clause of the fifth amendment.¹²⁷ Although this argument was clearly framed as a challenge to the fairness of his trial, a three-judge District of Columbia Circuit panel affirmed Earl's conviction in an opinion that treated his claim as one of

¹²³ 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.

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

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

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

¹²⁷ 361 F.2d at 534.

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

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

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

To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions. Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment. . . . The key question, then, is whether appellant was denied a fair trial because of the government's refusal to seek immunity for the defense's witnesses.¹³³

¹²⁸ The court stated:

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

Id.

¹²⁹ *Id.* at 534 n.1.

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

¹³¹ 528 F.2d 1079 (9th Cir. 1976).

¹³² *Id.* at 1080.

¹³³ *Id.* at 1082.

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

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

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

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

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

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

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

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

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

Under the Witness Immunity Act of 1970, considerations of convenience were preempted by considerations of uniformity, both of type¹³⁷ and of method, in that an "assertion of the privilege would be required in all instances, thus preventing an unwitting, automatic grant of immunity as may presently occur under some existing federal statutes."¹³⁸

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴⁴ See notes 43-59 *supra* and accompanying text. For a more complete examination of these problems under section 25(a) 10, see Keeney & Serino, *The Effect of the Organized Crime Control Act of 1970 in Bankruptcy Proceedings*, 46 AM. BANK. L.J. 1 (1972); McGuire, *Immunity under the Bankruptcy Act, Automatic or Controlled?*, 48 AM. BANK. L.J. 139 (1974); Note, *The Future of Testimonial Immunity in Bankruptcy Proceedings*, 48 S. CAL. L. REV. 92 (1974).

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

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

Under proposed revisions of the Bankruptcy Act, automatic immunity would be repealed and testimony in such proceedings would become subject to the uniform provisions of the Witness Immunity Act of 1970.¹⁴⁷ These reforms have been pending for three years,¹⁴⁸ and are long overdue.

IV. CONCLUSION

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

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

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

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

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

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

* B.A. Degree University of Illinois at Chicago Circle Campus, 1972; J.D., Northwestern University School of Law, 1976; U.S. Dept. of Justice Legal Intern, U.S. Attorney for Northern District of Illinois, 1975-76; Associate with Gottlieb and Schwartz, Chicago, Ill. This note was prepared as part of the Northwestern University School of Law Senior Research Program, under the supervision of Prof. Frank N. Wiggins. The author would like to express his thanks to Assistant U.S. Attorney George N. Gilkerson for his assistance and guidance in the preparation of this manuscript.

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB 78
 Title "An Act relating to immunity and protection of witnesses . . ."
 Requested by Senate Judiciary Committee Date Feb. 6, 1979

II. FISCAL DETAIL

Agency Affected LAW
 Program Category Affected Administration of Justice
 Budget Request Unit(s) Affected Prosecution

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

	FY 79	FY 80	FY 81	FY 82	FY 83	FY 84
GENERAL FUND		25.0	26.5	28.1	29.8	31.6
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

	FY 79	FY 80	FY 81	FY 82	FY 83	FY 84
FULL TIME		-0-	-0-	-0-	-0-	-0-
PART TIME						
TEMPORARY						

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

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

Richard I. Pegues

IV. DATE February 6, 1979 PREPARED BY Richard I. Pegues, Admin. Officer
 AGENCY LAW
 PHONE 465-3695

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

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COMMITTEE REPORT
SENATE

FURTHER:

3/15/79

Date:

3/20/79

Mr. President:

The Committee on JUDICIARY has had SB 88
relating to truant children

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

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for _____ same title
 new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- ~~WKO~~ reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

John Hany

John Malan

3 copies - N. Rec

3 copies

CHAIRMAN

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. Senate Bill No. 88
 Title An Act relating to truant children.
 Requested by _____ Date _____

II. FISCAL DETAIL

Agency Affected Health and Social Services
 Program Category Affected Social Services
 BRU, Program, or Subprogram(s) Affected Social Services BRU
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

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

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

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

When the original fiscal note was prepared for the bill the Department understood that the intent of the bill was to involve the Department in broad attendance problems in school districts. Subsequent discussions with the Department of Education indicated that the intent of the bill is only to deal with a small number of severe cases of habitual truancy.

If this is in fact the case there would be no significant fiscal impact. If, however, the intent of the bill is to address routine truancy problems it would have a large fiscal impact on the Department.

IV. DATE 3/20/79 PREPARED BY Art Holmberg, Director
 AGENCY Division of Social Services
 PHONE 465-3170
 Original: Legislative Finance
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

(4) "committee" means the Catastrophic Illness Committee, created under § 20 of this chapter;

(5) "elective medical or surgical procedures" means treatment which is not essential to the life or health of a pers

(6) "family" means two or more persons related by blood or marriage or adoption living as one economic unit;

(7) "liquid assets" means assets which can be readily converted to cash;

(8) "medical expense" means any financial obligation incurred in the course of treatment of illness as prescribed by a physician, including bills for ancillary services, patient transportation, transportation of a medical or family escort when reasonably necessary, or living expenses while receiving outpatient treatment in a community to which the applicant is not reasonably able to commute from his permanent place of abode;

(9) "nonliquid assets" means all assets which are not liquid assets;

(10) "permanent place of abode" means a dwelling, or a dwelling unit in a multiple dwelling, including lots and outbuildings or an appropriate portion of these, which are necessary to convenient use of the dwelling unit;

(11) "provider" means a licensed physician, pharmacist, dentist, or other health service worker or a licensed hospital, clinic, skilled nursing home, intermediate care facility or health maintenance organization which has provided services not excluded by § 50 of this chapter to an applicant as a result of a catastrophic illness;

(12) "third-party payments" means payments of medical expenses related to a catastrophic illness by sources other than the applicant or the committee, including but not limited to state and federal medical assistance programs, private health insurance, employment-related health insurance, military health insurance, workmen's compensation, violent crimes compensation, Indian Health Service of the United States Department of Health, Education and Welfare, and awards in legal actions. (§ 1 ch 107 SLA 1978)

Chapter 10. Delinquents and Wards of the Court.

Article 1. Juvenile Courts.

Section	Section
10. Jurisdiction	residual parental rights and responsibilities
30. Summons and custody of minor	85. Child in need of aid; religious treatment
40. Release of minor	90. Records
50. Appointment of guardian ad litem or attorney	100. Retention of jurisdiction over minor
60. Waiver of jurisdiction	110. Appointment of guardian or custodian
60. Judgments and orders	120. Support of minor
81. Predisposition hearing reports	142. Emergency custody and temporary placement hearing
82. Best interests of the child	
8. Review hearing information	
84. Legal custody, guardianship, and	

Sec. 47.10
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Sec. 47.10.010. Jurisdiction. (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the court finds the minor

(1) to be a delinquent minor as a result of violating a criminal law of the state or of a municipality of the state; or

(2) to be a child in need of aid as a result of

(A) the child being habitually absent from his home or refusing to accept available care, or having no parent, guardian, custodian or relative caring or willing to care for him, including physical abandonment by

(i) both parents,

(ii) the surviving parent, or

(iii) one parent if the other parent's rights and responsibilities have been terminated under § 80 of this chapter or voluntarily relinquished;

(B) the child being in need of medical treatment to cure, alleviate, or prevent his suffering substantial physical harm, or mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others, and his parents are unwilling to provide the medical treatment;

(C) the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by his parent, guardian or custodian or the failure of his parent, guardian or custodian adequately to supervise him;

(D) the child having been sexually abused either by his parent, guardian or custodian, or as a result of conditions created by his parent, guardian or custodian, or by the failure of his parent, guardian or custodian adequately to supervise him;

(E) the child committing delinquent acts as a result of pressure, guidance, or approval from his parents, guardian or custodian.

(b) When a minor is accused of violating a traffic statute or regulation, a traffic ordinance or regulation of an incorporated municipality, a fish and game statute or regulation under AS 16 or a parks and recreational facilities statute or regulation under AS 41.20, excepting a statute the violation of which is a felony, the procedure prescribed in §§ 20 — 90 of this chapter may not be followed, except that a parent, guardian or legal custodian shall be present at all proceedings. The minor accused of a traffic offense, a fish and game statute or regulation violation under AS 16 or parks and recreational facilities violation under AS 41.20 shall be charged, prosecuted, and sentenced in the district court in the same manner as an adult.

(am §§ 7, 8 ch 63 SLA 1977)

Effect of amendments.

The 1977 amendment rewrote subsection (a), and in subsection (b), deleted "or"

following "traffic statute or regulation" and inserted the language beginning "a fish and game statute" and ending "AS

POSITION PAPER

SENATE BILL NO. 88

"An Act relating to truant children."

This Bill would amend AS 47.10.010(a)(2)(A) to include habitual truancy from school as a reason for adjudication of a child as a "child in need of aid."

The Governor's Children's Code Task Force, after considerable study and deliberation, recommended that truancy be eliminated as a reason justifying adjudication of a child as a child in need of aid. The Department supported this recommendation which was accepted by the Legislature and became law in 1977.

The Department does not consider truancy alone as sufficient justification for it to intervene in a family and to initiate court action. If the Department is required to assume this additional responsibility it would be very costly, requiring the hiring of staff to deal with this problem area.

In addition, if a child protection situation such as abuse, neglect, or abandonment exists in addition to habitual truancy, the Department can intervene and initiate court action under AS 47.10.010(a) as it presently reads. Under AS 47.17.020, schools are required to report child abuse and neglect situations to the Department of Health and Social Services.

RECOMMENDED BY: Art Holmberg DATE: 3/5/79
Art Holmberg, Director
Division of Social Services

APPROVED BY: Helen D. Beirne DATE: _____
Helen D. Beirne, Commissioner
Department of Health and Social Services