

1976

## Symposium: The Granting of Witness Immunity-- Foreword

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### Recommended Citation

Symposium: The Granting of Witness Immunity--Foreword, 67 J. Crim. L. & Criminology 129 (1976)

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# CRIMINAL LAW

## SYMPOSIUM: "THE GRANTING OF WITNESS IMMUNITY"

### FOREWORD

Prosecutors, with increasing frequency, have been granting immunity to alleged accomplice witnesses in order to secure their testimony against another defendant. In this symposium on witness immunity the *Journal of Criminal Law and Criminology* presents a critical examination of the practices surrounding the grant of immunity, or the promise of a reduced charge or lighter sentence, in return for testimony. The analysis is presented from the viewpoints of an academician, a federal judge, a prosecutor, and a defense attorney.

The four individuals who authored these articles were chosen because of their experience in this field. Ronald L. Carlson is a professor of criminal law at the Washington University School of Law in St. Louis, Missouri. The Honorable William J. Bauer, Judge of the United States Court of Appeals for the Seventh Circuit, previously sat as a Federal District Judge for the Northern District of Illinois, having served as the United States Attorney for the same district. The Honorable Richard L. Thornburgh, Assistant Attorney General, Criminal Division, United States Department of Justice, served previously as the United States Attorney for the Western District of Pennsylvania. The Honorable Warren D. Wolfson, Circuit Court Judge for Cook County, Illinois, was formerly a prominent criminal defense attorney in Chicago who was associated with a number of cases involving grants of witness immunity, most notably that of former Illinois governor and federal appellate judge Otto Kerner.

Professor Carlson begins by providing an historical perspective of the development of the immunity statutes. He discusses recent developments including the problem of actual prosecution of the immunized witness and the question of whether or not to hold a "taint" hearing to determine whether the evidence subsequently used against said witness was derived independently from the testimony he provided at the earlier trial. He also considers some selective trial problems relating to the closing

argument, impeachment on cross-examination, use of immunity testimony in later proceedings against the immunized defendant for purposes of impeachment, the risk of foreign prosecution, and the importance of the judge's instructions regarding immunized testimony.

Judge Bauer focuses on the proper extent of judicial involvement in the immunity process. He evaluates the proposal for a mini-hearing before the grant of immunity to determine whether there is a proper exercise of prosecutorial discretion and responds to the arguments of critics as to the scope of immunity, the unreliability of evidence from immunized witnesses, and the contention that the defense should have a reciprocal right to grant immunity. In addition, he considers the problem of selecting the proper witness to receive immunity, as well as the difficulty of proving an independent source of evidence for a later case against the immunized witness. Judge Bauer concludes that there should be no expansion of the present judicial involvement in the immunity process and that reliance should continue to be placed on the trial process to bring out any injustice or misuse of this prosecutorial power.

Judge Wolfson emphasizes the difference between what he terms "voluntary" and "involuntary" immunity by setting out a hypothetical scenario. He discusses the impact of the judicial order of immunity at trial and the problems associated with a witness who refuses to comply with an immunity order. Further, he suggests various approaches which a defense attorney might take in his opening statement, cross-examination of immunized witnesses, and closing argument. He then proposes standards for the administration of immunity grants, based generally on his conclusion that the present system impinges upon the rights of a defendant and creates an atmosphere in which it is difficult to obtain a fair trial.

Assistant Attorney General Thornburgh discusses the statutory advantage of use immunity, the process

by which an order to compel immunity testimony is obtained, the proposal for a "taint" hearing, as well as the problems of demonstrating in a subsequent prosecution that the evidence was independently derived. He discusses the efforts by the Department of Justice to ensure that evidence for a subsequent

prosecution will not be subject to attack. Finally, he considers prosecution agreements with defendants in return for a promise to provide information or testimony.

THE EDITORS