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Defense Witness Immunity: Consitutional Demands and Statutory Change

Ellen Sheriff

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DEFENSE WITNESS IMMUNITY: CONSTITUTIONAL DEMANDS AND STATUTORY CHANGE

I. INTRODUCTION

At the request of the United States attorney, federal courts are directed by 18 U.S.C. §§ 6002-03[1] to give use immunity to a witness, which compels the witness to testify on the condition that his testimony may not be used against him in any criminal case. Until recently, when

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

§ 6003. Court and grand jury proceedings

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

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

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

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

18 U.S.C. §§ 6002-03 (1976). *See generally* 18 U.S.C. §§ 6001, 6004-05. *See* notes 135-39 & accompanying text *infra* for a discussion of use immunity. For definitions and further analysis of transactional and use immunity, *see* notes 125-37 & accompanying text *infra*. For a discussion of immunity generally in the wake of the use immunity statutes and of Kastigar v. United States, 406 U.S. 441 (1972), which upheld the constitutionality of the use immunity statutes, see Bauer, *Reflections on the Role of Immunity In the Criminal Justice System*, 67 J. CRIM. L. & C. 143 (1976); Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633 (1979); Strachan, *Self Incrimination, Immunity, & Watergate*, 56 TEXAS L. REV. 791 (1978).

a defendant in a federal criminal trial requested that his witnesses be granted use immunity pursuant to this statute, the district court judge would deny the motion as beyond his power if the prosecutor did not acquiesce.[2] Because of the inability of defendants to have their witnesses immunized, many witnesses refuse to testify, thereby denying to the court and defendant potentially exculpatory evidence. In response to defense attempts to introduce valuable evidence, two recent cases[3] have set forth different views of the right of a defendant who seeks to have his own witnesses immunized.

In *Government of Virgin Islands v. Smith*,[4] the Third Circuit held that if prosecutorial misconduct were found on remand, a judgment of acquittal would be entered for the defendant unless the government consented to grant statutory use immunity to a defense witness. If immunity were granted, a new trial would be ordered.[5] Alternatively, the judge found that under certain circumstances, the court itself should grant judicial immunity to the witness.[6] The Second Circuit, in *United States v. Turkish*,[7] reached the opposite conclusion, stating that trial judges should "summarily reject claims for defense witness immunity whenever the witness . . . is an actual or potential target of prosecution."[8] The court left open the possibility, however, that under certain strictly prescribed circumstances, the court could intervene on behalf of the defendant.[9]

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2 "[A] district judge is not authorized to initiate immunity. The statute places this responsibility on the United States Attorney, who can act only after receiving approval from the Attorney General, his deputy or an assistant. . . ." Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975). The appellant, Thompson, contended in an habeas corpus proceeding that his conviction had been facilitated by perjured testimony. The appellant's co-defendant, after the trial, swore in an affidavit that he had given a false statement against Thompson. Even though the witness recanted his testimony, the court held that due process was not violated and refused to grant immunity to Thompson's co-defendant to compel him to testify.

See United States v. Turkish, 623 F.2d 769, 772 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981) for a list of cases.

3 Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981).

4 615 F.2d 964 (3d Cir. 1980). While the first holding in *Virgin Islands* is limited by the possibility of a finding of prosecutorial misconduct, the prosecutorial misconduct suggested was basically the arbitrary and unexplained refusal to grant immunity which suggested to the court "that the prosecution deliberately intended to keep this highly relevant, and possibly exculpatory, evidence from the jury." *Id.* at 969.

5 *Id.*

6 *Id. See* notes 88-94 & accompanying text *infra* for a discussion of judicially created immunity.

7 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981).

8 *Id.* at 778.

9 "If a case should arise where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant, and if the defendant on trial demonstrates that the witness's testimony will clearly be

These two conflicting judicial approaches demonstrate the need to analyze whether a defendant has a right to have his witnesses immunized and if he does, what mechanism to use and what guidelines to follow. The major arguments supporting a claim that a defendant has a constitutional right to have his witnesses immunized originate in the sixth amendment compulsory process and fifth amendment due process clauses. While most courts reject the sixth amendment argument,[10] some courts have been persuaded by the fifth amendment due process analysis, especially if there is a showing of prosecutorial misconduct.[11] Absent prosecutorial misconduct, no court has found that a defendant has a general due process right to have his witnesses immunized, though some courts have indicated that the right may exist in certain instances even in the absence of misconduct.[12]

Given a fifth amendment violation, judges disagree as to whether they are empowered to remedy the violation. Because the statute places the immunity power within the prosecutor's discretion, most courts maintain that their intervention on behalf of the defendant would violate the constitutional principle of separation of judicial and executive powers.[13] Invocation of this principle unduly simplifies a very difficult constitutional and policy struggle and is of dubious validity in light of the courts' supervisory[14] and inherent powers.[15] It should therefore be

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material, exculpatory, and not cumulative, it will be time enough to decide whether in those circumstances a court has any proper role with respect to defense witness immunity."

Id. at 778-79. Concurring in the *Turkish* ruling but dissenting in the Turkish dicta, Judge Lumbard was critical of the majority's view that "under certain circumstances the district court would be under the duty of inquiring into whether or not the prosecution should grant use immunity to a prospective defense witness." *Id.* at 779. For a further statement of Judge Lumbard's views, *see* notes 103, 109, and 114 *infra*.

[10] *See, e.g.*, United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981). For further analysis of the sixth amendment claims, *see* notes 17-28 & accompanying text *infra*.

[11] *See, e.g.*, Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976). For further analysis of prosecutorial misconduct as a denial of due process, *see* notes 35-44 & accompanying text *infra*.

[12] *See, e.g.*, Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), modified sub nom., United States v. Horwitz, No. 78-401, slip op. (S.D.N.Y. Dec. 12, 1980); United States v. Alessio, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974) (Bazelon, J., concurring and dissenting). For further analysis and discussion of instances in which courts have acknowledged a right to defense witness immunization based upon due process, *see* notes 45-69 & notes 85-89 & accompanying text *infra*.

[13] *See, e.g.*, United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981). For further analysis of separation of powers issue, *see* notes 113-39 & accompanying text *infra*.

[14] *See, e.g.*, Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). The author observes that "[u]nder the aegis of its 'supervisory power' the Supreme Court . . . has often promulgated rules broadening the protection afforded litigants in federal judicial

possible to create a statutory framework to empower the judiciary to grant immunity in appropriate circumstances.[16]

II. THE SIXTH AMENDMENT COMPULSORY PROCESS RIGHT

While commentators[17] have asserted that the sixth amendment compulsory process clause[18] requires defense witness immunity, federal courts considering the issue have unanimously rejected the contention.[19]

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proceedings," *id.* at 1656, including development of the " 'tainted evidence' doctrine," *id.* at 1658, and the exclusionary rule. *Id.* at 1660.

[15] Article III of the United States Constitution is the source of the powers of the courts. For a discussion of the Article III powers and inferring remedies from constitutional provisions, *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540-52 (1972).

[16] For proposed statutory change, *see* notes 146-51 & accompanying text *infra*. This Comment does not discuss the propriety of compelling witnesses to waive their fifth amendment privilege for the benefit of a defendant since the philosophical arguments have been volleyed back and forth with respect to prosecution witnesses and immunity has gained acceptance. Rather, the Comment assumes that the granting of immunity is an accepted method of obtaining evidence, as long as the witness' own words are not later used to convict him. *But see*, Mykkeltvedt, *United States v. Alessio—Due Process of Law and Federal Grants of Immunity for Defense Witnesses*, 31 MERCER L. REV. 689 (1980), where the author suggests a " 'preferred status' " doctrine to determine whether immunity should be granted for both defense and prosecution witnesses. *Id.* at 705. This doctrine presumes that immunity grants violate the fifth amendment right to silence. *Id.* at 705-06. Therefore, for immunity to be granted, whoever asks for immunity must present "persuasive and cogent arguments" proving "that compulsion orders are essential to the public interest or necessary to prevent a gross injustice to the defendant." *Id.* For a discussion of the tension between the defendant's and witness' rights, see Note, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 83-88 (1972) [hereinafter cited as *A New Use for Kastigar*].

[17] *See* MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 143 at 308 (2d ed. 1972): "It is certainly arguable that without the right to have immunity granted a defendant lacks 'compulsory process for obtaining witnesses in his favor' as guaranteed by the Sixth Amendment"; Westen, *Compulsory Process*, 73 MICH. L. REV. 71 (1974). This article contains a comprehensive history of the compulsory process clause and an argument that "[u]nless the defendant can be distinguished from the prosecution in significant ways, the defendant has a presumptive right to obtain immunity for his witnesses on an equal basis with the prosecution." *Id.* at 168; Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978) [hereinafter cited as *The Sixth Amendment Right*]. The author's thesis is that "the compulsory process clause requires the state to provide use immunity to defense witnesses unless it can justify its denial to do so." *Id.* at 1266; Note, *The Public Has a Claim to Every Man's Evidence: The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978) [hereinafter cited as *the Public Has a Claim to Every Man's Evidence*]. The author characterizes the issue in defense witness immunity as being "the defendant's constitutional right *to obtain favorable evidence*" rather than "the defendant's right to immunize witnesses." *Id.* at 1213. The author cites a series of Supreme Court decision which suggest that "once a defendant shows a significant need for testimony and demonstrates that the testimony is reliable and material, the defendant's interest outweighs a broad range of general state interests in exclusion." *Id.*

[18] "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

[19] *See* United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981). *But see*, United States v. Morrison, 535 F.2d 223, 226-27 (1976).

In *Washington v. Texas*,[20] the Court held that the compulsory process clause prohibits a state from barring a defendant's accomplice as a defense witness because "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."[21] In rejecting the State's claims that co-defendants were likely to perjure themselves and "that the right to present witnesses was subordinate to the court's interest in preventing perjury,"[22] the Court found that "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."[23] Thus, if a defendant is "arbitrarily denied" the right to put a witness on the stand "whose testimony would have been relevant and material to the defense,"[24] the defendant's compulsory process rights would require a reversal of the decision.

While the *Washington* case did not involve an attempt to immunize defense witnesses, commentators suggest that "[t]he constitutional right of the accused to obtain immunity for his witnesses falls squarely within the language and purpose of the compulsory process clause."[25] Courts have rejected this argument. In a decision representative of judicial denial of compulsory process claims, the Second Circuit, in *United States v. Turkish*,[26] concluded that the compulsory process clause does not permit courts to grant immunity without petition by the prosecution, and dismissed the compulsory process claims summarily: "[I]t is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity."[27]

The *Turkish* decision seems basically inconsistent with the philosophy inherent in *Washington*, which established that courts cannot arbitrarily deny a defendant the right to present favorable witnesses. This principle would appear to permit a court to review a prosecutor's deci-

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20 388 U.S. 14 (1967). The Supreme Court applied the compulsory process clause to the states in *Washington*.

21 388 U.S. at 23.

22 *Id.* at 21.

23 *Id.* at 19.

24 *Id.* at 23.

25 Westen, *supra* note 17, at 168.

26 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981).

27 *Id.* at 774. The *Turkish* court summarily dismissed the sixth amendment compulsory process argument. "Traditionally," the court wrote, "the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does nor [*sic*] carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination." *Id.* at 773-74.

sion and fashion a remedy where the prosecutor refuses arbitrarily to grant a defendant's witnesses immunity. Once courts recognize that a defendant has certain rights at trial, including the right to present a defense, they cannot permit a prosecutor to frustrate arbitrarily these rights by declining to request use immunity for defense witnesses.[28] Of course, if the court finds the prosecutor's decision is reasonable after examining the facts, then the courts should not interfere. The difficult questions inherent in reviewing such a decision will be discussed later in this Comment.

III. THE FIFTH AMENDMENT DUE PROCESS CLAIMS

Courts give greater weight to the fifth amendment due process[29] claim than to the sixth amendment compulsory process claim because due process is a more accepted, developed, understood, and enforced right.[30] Due process in criminal trials requires fundamental fairness,[31] that the government produce exculpatory evidence on behalf of the defendant,[32] reciprocity of discovery rights between the prosecution and the defense,[33] and the reversal of convictions when courts find prosecutorial misconduct.[34]

Some courts recognize that due process requires a new trial or acquittal for a defendant whose witness is not immunized when blatant prosecutorial misconduct or an intentional disruption of the fact finding

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[28] 18 U.S.C. § 6003. For the text of the statute, *see* note 1 *supra*.

The author in Note, *The Sixth Amendment Right*, *supra* note 17, at 1280, suggests another formulation of the arbitrariness standard:

> [T]he denial of such immunity when no significant burdens would be imposed on the state must be considered arbitrary. In determining whether an unreasonable burden exists that would justify the refusal to grant immunity in a particular case, the court should consider the extent to which the state has already gathered evidence against the witness as well as the feasibility of isolating the compelled testimony or granting a delay to ensure that the burden is unavoidable.

[29] "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

[30] *But see*, Note, *The Sixth Amendment Right*, *supra* note 17, at 1266 n.3. The writer suggests that due process is "less clearly defined" than the "specific requirements of the sixth amendment" in the defense witness immunity issue. For a discussion of due process requirements and defense witness immunity, *see* Note, *A New Use for Kastigar*, *supra* note 16, at 77-80.

[31] Chambers v. Mississippi, 410 U.S. 284, 290 (1973). In *Chambers*, the Court defined fundamental fairness as "the right to a fair opportunity to defend against the State's accusations." *Id.* at 294.

[32] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[33] Wardius v. Oregon, 412 U.S. 470, 472 (1972).

[34] Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). In *Taylor*, where the appellant was convicted of assault, there were several accounts of the events which led up to the altercation. Although prosecution witnesses had earlier disclosed one version of the incident, at trial the prosecutor permitted a different account to be introduced. Because of the introduction of the perjured testimony, the court found that the appellant's due process rights were violated.

process clearly denied the defendant a fair trial.[35] Serious prosecutorial misconduct was present in *United States v. Morrison*,[36] where a witness who initially indicated her willingness to testify for the defendants was advised on several occasions by the assistant United States attorney that if she did testify, she would be subject to prosecution for perjury. The witness was then served with an invalid subpoena to appear at the assistant United States attorney's office. When she appeared pursuant to the subpoena at a meeting with the prosecutor and the three undercover agents her testimony would discredit, she was told that she was likely to be prosecuted for perjury.[37] Under these circumstances, the court ordered a retrial, finding that there was prosecutorial misconduct[38] and that there was a violation of due process of law under the fourteenth amendment.[39] Because the prosecutorial misconduct violated the defendant's due process rights, the *Morrison* court held that the defendant should be acquitted unless his witness was granted use immunity.

Relying on the decision in *Morrison*, the Third Circuit in *Government of Virgin Islands v. Smith*[40] remanded the case, and directed the district court to determine whether the prosecution had deliberately distorted the fact finding process.[41] In *Virgin Islands*, several juveniles were on trial for assault. The three defendants sought to introduce the testimony of another youth who admitted taking part in the assault, implicated a fifth youth, and exculpated the three who had been indicted. On taking the stand, the defendants' witness refused to testify, invoking his fifth amendment privilege. The defense unsuccessfully attempted to offer into evidence the witness' prior out-of-court statements to the police and then tried to obtain a grant of immunity for the witness.[42] While the juvenile authorities of the Virgin Islands attorney general's office, who

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35 Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976).

36 535 F.2d at 223.

37 *Id.* at 225.

38 *Id.* at 229.

39 *Id.* at 228.

40 615 F.2d 964 (3d Cir. 1980).

41 *Id.* at 969.

42 Since the witness refused to testify, defense counsel sought to invoke an exception to the hearsay rule, FED. R. EVID. 804(b)(3), and have the witness declared unavailable, FED. R. EVID. 804(a)(1), so that his prior out-of-court statement could be introduced. Brief for Appellant at 14-15, Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980). The trial court concluded that the Government would be unable to cross-examine the witness and therefore refused to allow the introduction of the evidence. 615 F.2d at 967. Appellant's counsel also argued that the witness should have been permitted to look at a copy of his prior statement. If the witness' memory was not refreshed, counsel contended that under FED. R. EVID. 803(5), the statement should have been admitted as recorded recollection. Brief for Appellant at 14, Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980). The court did not consider the argument.

were willing to grant immunity, had exclusive jurisdiction over the witness, that office, out of courtesy, applied to the United States attorney's office for approval. For unexplained reasons, the United States attorney did not consent.[43] The circuit court remanded the case for evidentiary hearings to determine if the witness should be immunized to prevent a violation of the defendants' due process rights. The court directed that if the district court found a due process violation, the defendants be acquitted unless their witness received use immunity.[44]

The prosecutorial misconduct in *Morrison* and suggested in *Virgin Islands* induced the Third Circuit to protect the defendant against the violation of his due process rights. Absent prosecutorial misconduct, only one court, in *United States v. DePalma*,[45] has ruled that the defendant was denied his due process rights because his witnesses were not granted immunity. Several other courts have left open the possibility that given the proper circumstances, they might find a due process violation.[46] For example, two Second Circuit opinions indicated that defense witness immunity might be required if grants of use immunity to prosecution witnesses resulted in an "unfair advantage."[47] Under this standard, the court in *DePalma* originally required that the defendant's witnesses be granted immunity.

In *DePalma*, the defendant Horwitz was found guilty of charges of

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[43] 615 F.2d at 967.

[44] *Id.* at 969.

[45] 476 F. Supp. 775 (S.D.N.Y. 1979), *modified sub nom.*, United States v. Horwitz, No. 78-401, slip op. (S.D.N.Y. Dec. 12, 1980). *Virgin Islands* may also be such a case because the prosecutorial misconduct found by the court was basically an arbitrary refusal to grant immunity to a defense witness.

[46] *See, e.g.*, United States v. Alessio, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974) (Bazelon, J., concurring and dissenting). For further analysis of when courts would intervene given proper circumstances, *see* notes 57-68 & accompanying text *infra*.

[47] United States v. Gleason, 616 F.2d 2, 28 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980); United States v. Lang, 589 F.2d 92, 97 (2d Cir. 1978). In *Gleason*, four former bank officers were convicted of making false entries in bank records with the intent to defraud the United States government, bank shareholders and lenders. On appeal, Gleason, the chief executive officer, contended that his due process rights were violated because the Government refused to grant use immunity to his indicted alleged accomplice and co-conspirator. 616 F.2d at 27. The court declined to grant immunity noting that this was not "a case where the Government deliberately manipulated grants of immunity to gain an unfair advantage over any defendant. . . ." *Id.* at 28.

In *Lang*, the defendant was arrested for possessing counterfeit money. He sought immunity for a witness who allegedly sold counterfeit bills to Lang's girlfriend for Lang's use. Lang claimed that his witness should be granted immunity because the Government had shown no interest in prosecuting him for selling the bills to Lang's girlfriend. The court held that an immunity grant would be improper because the witness would have testified to other transactions with Lang for which he would be immunized. Since there was no prosecutorial misconduct or "discriminatory use of immunity to obtain an unfair advantage over the defendant," the decision not to grant immunity was upheld. 589 F.2d at 96-97.

racketeering, violating the federal securities laws, defrauding purchasers of stock, and obstructing a grand jury investigation.[48] The district court held that the prosecution violated the defendant's due process rights by granting Horwitz's co-conspirators broad transactional immunity while refusing to immunize probative testimony of Horwitz's witnesses. The court granted a retrial directing that unless the prosecution granted use immunity to two defense witnesses, the Government witnesses' testimony would be excluded.[49] On remand from the court of appeals to consider the case in light of *Turkish*,[50] the district court reinstated the guilty verdict because one of the defendant's witnesses was under indictment and both were under continuing investigation. The *Turkish* decision stated that under those circumstances, immunity could not be granted.[51] The district court judge, however, reiterated that Horwitz's original trial had been unfair and that only the peculiar position of Horwitz's witnesses as actual or potential targets of prosecution precluded the granting of immunity.[52]

The original decision in the *DePalma* case relied heavily on the dictum in a footnote in *Earl v. United States*,[53] the first case to consider defense witness immunity.[54] Chief Justice Burger, then a circuit judge, found that Earl did not have a due process right to have his witnesses immunized, especially because the prosecution did not request immunity for any of its witnesses. Although the *Earl* court concluded that "the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power,"[55] the court's footnote indicated that the defendant might have a due process right to secure immunity for his witnesses, under appropriate circumstances, but held these were not present. The court took pains in the critical footnote to state:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott [the

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48 476 F. Supp. at 776 n.1.

49 *Id.* at 781.

50 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981).

51 [T]rial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution. . . . The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affadavit setting forth the circumstances that support the prosecutor's suspicions of the witness's criminal activity.

United States v. Turkish, 627 F.2d 769, 778 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981).

52 United States v. Horwitz, No. 78-401, slip op. (S.D.N.Y. Dec. 12, 1980).

53 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

54 For a discussion of *Earl* and the transactional immunity statutes, see Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967) [hereinafter cited as *Compelled Testimony*].

55 361 F.2d at 534.

> defendant's witness] to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused.[56]

The basis of the original decision in *DePalma* appears to have been that the action of the prosecution, in building its case on a broad grant of immunity without granting immunity to the defendant's witnesses, created an imbalance, which required the court to protect the defendant's due process rights. Without mentioning *DePalma*, the Second Circuit in *Turkish* rejected this justification: "[a] criminal prosecution, unlike a civil trial is in no sense a symmetrical proceeding."[57]

Though the district court in *DePalma* is the only court to have found refusals to grant defense witness immunity as due process violations in the absence of prosecutorial misconduct,[58] several other courts have indicated that they would have intervened in the proper factual setting. Concurring and dissenting in dicta in *United States v. Leonard*,[59] Judge Bazelon indicated that if faced with the defense witness immunity issue, the court should intervene on behalf of the defendant. Examining the language of the immunity statute, Judge Bazelon found that the due process concern of reliable jury verdicts and " 'the general principle that a prosecutor is not free to decline to make evidence available to the defendant' "[60] might compel defense witness immunity. The *Leonard* court, however, was not faced with the issue, since it was not before the court.[61]

Other courts recognize that proper circumstances may require them to examine due process claims more closely. For example, in *United States v. Alessio*,[62] the Ninth Circuit considered whether the appel-

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56 *Id.* at 534 n.1.

57 623 F.2d at 774.

58 See Note, *Selective Use of the Executive Immunity Power: A Denial of Due Process*, 8 FORDHAM URB. L.J. 879 (1979-80), where the author suggests that due process violations should not be predicated on findings of prosecutorial misconduct, *id.* at 910, and that an evidentiary hearing be held before immunity is granted. *Id.* at 909. If the defendant's witnesses were not immunized based upon the evidentiary hearing, however, then the author argues that a showing of bad faith on the part of the prosecutor should trigger a due process claim. *Id.* at 911.

59 494 F.2d 955 (D.C. Cir. 1974) (Bazelon, J., concurring and dissenting). In *Leonard*, the defendant was convicted of armed robbery and burglary. On appeal, the court held that refusal to permit defense counsel to cross-examine a Government witness concerning felony charges pending against him and the trial court's failure to instruct the jury to be cautious of testimony of immunized government witnesses were reversible errors.

60 *Id.* at 985 n.79 (quoting from Earl v. United States, 364 F.2d 666 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967)).

61 No question of defense witness immunity was presented for review. Instead, Judge Bazelon dealt with a hypothetical situation.

62 528 F.2d 1079 (9th Cir.), *cert. denied*, 416 U.S. 948 (1976). In *Alessio*, the defendant

lant was denied a fair trial as a result of the Government's refusal to seek immunity for defense witnesses. The court indicated that the "testimony sought by appellant was cumulative of the testimony of other witnesses,"[63] and thus found no due process violation. While finding that immunity was not proper in this case, the court suggested defense witness immunity would be permissible when the government exercised power in a manner that would deny the defendant's fifth amendment guarantees.[64]

In other decisions, the Second Circuit has indicated that under " 'extraordinary circumstances'[65] due process may require that the government confer use immunity on a witness for the defendant."[66] In determining whether such circumstances exist, that Circuit requires a threshold showing of "the materiality of the testimony sought from the

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contended that the testimony of the three witnesses that he sought to have immunized would exculpate him from bribery charges. The court found, however, that the testimony was cumulative and declared that there was no due process violation. For a discussion of *Alessio*, see Mykkeltvedt, *supra* note 16.

63 528 F.2d at 1082.

64 *Id.* at 1081-82. Since Alessio's witnesses' testimony was cumulative of other witnesses' testimony, the court found that the trial was fair and that due process was not violated. If the witnesses' testimony had not been cumulative, the court seems to suggest that the witness should have been permitted to testify under a grant of immunity, unless the Government had a good reason for denying immunity. A good reason for denying immunity does not rise to the level of prosecutorial misconduct. The lack of a good reason for denying immunity was in substance equated with prosecutorial misconduct in the *Virgin Islands* case.

65 United States v. Wright, 588 F.2d 31, 35 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979). In *Wright*, the defendant, who was accused of extortion, contended that extraordinary circumstances existed because the witness he sought to immunize was " 'perhaps the most critical witness' " against him and his testimony was needed so that the defendant could cross-examine him, thus assuring a fair trial. *Id.* The court found that the witness' statement "was not the only, nor even the most important" evidence and therefore refused to grant immunity to him. *Id.*

The "extraordinary circumstances" standard is also accepted by the government. The United States Attorneys' Manual concedes that immunity for a defendant's witness should be granted "in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information." DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-11.230 (Aug. 31, 1976) (unpublished manual available from the Dep't of Justice) [hereinafter cited as U.S. ATTORNEYS' MANUAL]. The nine-part Manual, prepared by the Executive Office of United States Attorneys, is available for purchase from the Executive Office of United States Attorneys, United States Department of Justice, Washington, D.C. 20530, under the disclosure requirement of the Freedom of Information Act at a per page fee. *Id.* § 1-1.400.

66 United States v. Praetorius, 622 F.2d 1054, 1064 (2d Cir. 1979), *cert. denied*, 101 S. Ct. 162 (1980). The defendants in *Praetorius* were convicted of conspiring to import, possess, and distribute heroin. On appeal, they alleged several errors including denial of immunity for the defendant's witness. the district court had refused to grant immunity because the witness' testimony related solely to the credibility of another witness. Concluding that extraordinary circumstances did not exist, the court of appeals upheld the district court because the witness' testimony related to the credibility of another witness and did not introduce any additional independent material evidence.

witness," a test which the court did not deem to be met where the testimony sought to be offered, "merely related to the credibility of another witness and, as such, was not crucial to the defense of the case."[67] The Second Circuit in *United States v. Wright*[68] further indicated by way of dictum that the "extraordinary circumstances" test was not met where the testimony sought to be immunized "was not the only, nor even the most important evidence."[69]

Although leaving open the possibility of relief in narrow circumstances, the *Turkish* decision continues the trend of rejection of due process claims. In *Turkish*, the defendant was convicted of income tax evasion, filing false income tax returns and conspiring to defraud the United States.[70] Several of the government's witnesses at trial were co-conspirators involved in the fraudulent transactions. Three of these witnesses who had pleaded guilty received letter agreements[71] stating that they would not be prosecuted if they testified truthfully, as did two other un-indicted witnesses. A sixth prosecution witness was granted statutory use immunity.[72]

After the prosecution had completed its case, Turkish and his co-defendants moved that seventeen of the prospective defense witnesses be granted statutory use immunity.[73] Turkish argued that these witnesses would provide exculpatory testimony, but would refuse to testify fearing self-incrimination. The trial judge asked the prosecution to consider granting immunity, but after consideration, the Government refused. The trial judge subsequently denied the defense motion for a new trial or acquittal, ruling that Turkish's motion was untimely and that none of the witnesses' testimony would be exculpatory.

After examining Turkish's fifth amendment due process claims, the appellate court considered two possible bases for defense witness immunity. First, the court rejected the claim of "basic fairness"[74] that would require the Government exercising the right to compel testimony to

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67 *Id. See also* United States v. Davis, 623 F.2d 188 (1st Cir. 1980). The defendant in *Davis* was convicted of conspiring to transfer and conceal a bankrupt corporation's property and of aiding and abetting the bankruptcy fraud. On appeal, he challenged the district court's refusal to order the prosecutor to immunize one of his witnesses. The court found that the defendant's right to a fair trial was not denied because the witness' testimony was introduced merely to establish the credibility of another witness' testimony. *Id.* at 193.

68 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

69 *Id.* at 35.

70 623 F.2d at 770.

71 "Letter immunity consists of a promise by the particular United States attorney not to prosecute the witness for his participation in the transaction about which he testifies." United States v. Wright, 588 F.2d 31, 36 n.5 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

72 18 U.S.C. §§ 6002-03. *See* note 1 *supra*.

73 18 U.S.C. § 6002. *See* note 1 *supra*.

74 623 F.2d at 774.

grant the right for the defendant too. The court concluded that "equalization is not a sound principle on which to extend any particular procedural device."[75] While *Turkish* dismissed the notion that parity must exist between the rights of the defense and prosecution, the court's reasoning is somewhat inconsistent with earlier Supreme Court decisions. For example, in *Wardius v. Oregon*,[76] the Supreme Court held that due process required reciprocity of discovery rights between the defense and the prosecution even when reciprocity would result in the defense obtaining evidence to which the defendant had no independent constitutional right.[77] Concluding that absent a showing of a strong state interest to justify an imbalance in discovery rights, criminal defendants are entitled to rights comparable with those available to the prosecutor, the Court stated that "[t]he growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system."[78]

While, as the *Turkish* court found, the burden of proof and other procedural hurdles favor criminal defendants,[79] the assertion that an immunity grant to defense witnesses is simply procedural is unsound as far as the rights of the defendant are concerned.[80] The right to secure

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[75] *Id.* at 775. *But see*, MCCORMICK, *supra* note 17, § 143 at 308, "[T]he imbalance created by the availability of this power [granting of immunity] to the prosecution but not to the defense may well constitute a deprivation of due process of law." *Cf.*, Westen, *supra* note 17, where he argues that "[o]ne of the prevailing themes of compulsory process is that the defendant should have comparable opportunities with the prosecution to present a case through witnesses." *Id.* at 177. "In short," Westen writes,

> it [compulsory process] seeks to maintain a basic equilibrium between the defendant and the state with respect to the discovery, production, and presentation of witnesses. While it does not guarantee the defendant precise equality with the prosecution, it prohibits the state from giving so much advantage to the prosecution as to frustrate the adversary assumptions implicit in the sixth amendment.

(footnote omitted) *Id.* at 180.

[76] 412 U.S. 470 (1973).

[77] *Id.* at 472.

[78] *Id.* at 474.

[79] The prosecution must prove the defendant's guilt beyond a reasonable doubt to the satisfaction of all the jurors; it may not obtain the defendant's testimony, suppress exculpatory evidence, nor retry the defendant after acquittal. . . . The defendant, by contrast, may prevail without offering any proof at all; he need not disclose whatever inculpatory evidence he discovers, may avoid conviction by persuading a single juror that reasonable doubt exists, and may challenge a conviction by direct appeal and subsequent collateral attack.

623 F.2d at 774.

Reaching the opposite conclusion, one commentator has argued that in fact, "[b]oth doctrinally and practically, criminal procedure, as presently constituted, does not give the accused 'every advantage' but, instead, gives overwhelming advantage to the prosecution." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

[80] Despite the observation in the *Comment on Immunity Provisions*, in NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, II WORKING PAPERS 1405 (1968), [hereinafter cited as II WORKING PAPERS], that "[t]he immunity statutes proposed . . . consist solely

the testimony of a witness whose testimony may acquit the defendant is substantive in any meaningful sense. If an effective defense requires an immunity grant to a defense witness, then the right to introduce that information in evidence is plainly substantive.[81] To call such a right procedural is to exalt semantics over substance.

Although *Turkish* rejected the "basic fairness" basis for defense witness immunity, the court took more seriously the second due process claim that by refusing to grant immunity to defense witnesses, a court blocks the admission of the defendant's exculpatory evidence. The court rejected this contention, supporting its conclusion by noting that various privileges including those of attorney-client and doctor-patient often exclude a defendant's evidence.[82] This reasoning, however, is unpersuasive for two reasons. First, testimonial privileges are not absolute. Several state courts have ruled that the sixth amendment requires that a witness' claim of privilege be rejected when the witness possesses exculpatory evidence.[83] Second, and more fundamentally, compulsion of testimony by an attorney or by other parties to confidential communica-

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of procedural provisions," *id.*, the observation is at best correct only so far as the procedure for immunizing witnesses is concerned, and not as to the question of whether witnesses should be granted immunity. Indeed, even from the standpoint of the witness, the change from transactional to use immunity is substantive since it alters the scope of fifth amendment protection against self-incrimination from overly broad protection to protection coextensive with the fifth amendment privilege. United States v. Kastigar, 406 U.S. 441, 453 (1972). Even if the granting of immunity were deemed solely procedural from the defendant's standpoint, Goldstein, *supra* note 79, at 1192, suggests that "[i]f a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties but rather must assure that such inequality will be minimized as much as human ingenuity can do so." Thus, even if the immunity statutes are merely viewed as procedural tools, due process requires procedural fairness as well.

81 The author in Note, *The Public Has a Claim to Every Man's Evidence*, *supra* note 17, at 1221, suggests that

> the court's primary question would not be whether the defense has a right to grant its witnesses immunity, but whether it has a constitutional right to evidence withheld by the fifth amendment privilege claim. If the answer to this latter question is affirmative, the court could address the immunity issue as a secondary question of procedure and hold that the defendant cannot be tried unless the state makes the evidence available.

82 623 F.2d at 775.

83 Salazar v. State, 559 P.2d 66 (Alaska 1976) (defendant's confrontation clause right outweighed witness' interest in a husband-wife state communications privilege). State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975) (where whole theory of defense rested on privileged information, defendant's confrontation clause right overrode a claim of doctor-patient privilege). State v. Roma. 140 N.J. Super. 582, 357 A.2d 45, *aff'd on reargument*, 143 N.J. Super. 504, 363 A.2d 923 (1976) (defendant's right to compulsory process violated by state statutory marriage counselor privilege).

Although the Supreme Court expressly reserved for future determination the question whether the compulsory process clause applies to claims of privileged communications in Washington v. Texas, 388 U.S. 14, 23 n.21 (1967), state courts construe the later Supreme Court opinion in Davis v. Alaska, 415 U.S. 308 (1974) to permit the defendant's sixth amendment right to override a claim of privilege. In *Davis*, the Court permitted the fact that a key

tions would breach confidentiality and thus thwart the basic policy of the privilege to encourage such communications, even if procedures could be developed to make such testimony inadmissible in other criminal and civil proceedings.[84] But confidentiality is not the root of the self-incrimination privilege and testimony can, therefore, be compelled by granting use immunity without thwarting the policy behind that privilege.

The *Turkish* court also maintained that due process is denied only when the government withholds evidence actually in its possession. This seems an unduly narrow interpretation of *Brady v. Maryland*,[85] the case which established that the government must divulge exculpatory evidence in its possession. "We now hold," the *Brady* Court wrote, "that the suppression by the prosecutor 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."[86] Relying on *Brady*, the Supreme Court has since found that even if a prosecutor merely negligently fails to disclose exculpatory evidence, the defendant's due process rights have been violated.[87] As these decisions indicate, the right to obtain exculpatory evidence may not be denied lightly. Arguably, the arbitrary refusal by the govern-

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prosecution witness was a juvenile offender to be introduced for impeachment purposes, despite a state privilege statute. *Id.* at 319.

Westen, *supra* note 17, at 170-77 also argues that "[a] privilege that denies the defendant the benefit of exculpatory testimony for insufficient reasons is unconstitutional as applied." *Id.* at 171. Westen suggests: that the doctor-patient privilege can be constitutionally narrowed, *id.*, or modified, *id.* at 172, the executive privilege be narrowed, *id.* at 171, and that the lawyer-client and priest-penitent privileges be modified by permitting "disclosure for the defense while prohibiting the disclosed information from being used against the client or penitent in future civil or criminal proceedings." *Id.* at 173. For a proposed procedure to resolve clashes between testimonial privileges and defendant's sixth amendment rights, see Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 976-90 (1978).

84 Testimonial privileges are designed to promote privacy and the free exchange of information in special relationships given statutory recognition by the states. MCCORMICK, *supra* note 17, § 72 at 152, § 77 at 157.

85 373 U.S. 83 (1963). *Brady* did not concern immunity grants.

86 *Id.* at 87.

87 Giglio v. United States, 405 U.S. 150, 154 (1972). *Giglio* stands for the proposition that when there is nondisclosure of material evidence whether by "negligence or design," *id.*, the defendant's due process rights are violated. The petitioner in *Giglio* was convicted of passing forged money orders. While appeal was pending, the defendant discovered new evidence which indicated that to ensure his unindicted co-conspirator's testimony, the Government had promised not to prosecute him. The co-conspirator, however, had not revealed the promise at trial under cross-examination, and the prosecutor did not correct the co-conspirator's misrepresentation because he did not know about it. Inasmuch as the disclosure may have cast doubt on the witness' credibility, the Court found that the defendant's due process rights had been violated and ordered a new trial, since all material evidence had not been disclosed. *Id.* at 155.

ment to grant immunity to a defense witness which prevents a defendant from presenting exculpatory evidence is the equivalent of suppression of evidence.

Indeed, this in substance was the alternative basis of the *Virgin Islands* case. There, the court suggested that the defendant's due process rights are violated "by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case."[88] To prevent this violation of rights, the court determined it had "inherent authority"[89] to grant immunity to defense witnesses.

The *Virgin Islands* court's foundation for the inherent judicial power is grounded in several Supreme Court cases. The court relied on the holding in *Chambers v. Mississippi*[90] that since Mississippi's evidence rules denied Chambers the right to introduce exculpatory evidence and thus deprived him of his due process right to a fair trial, the defendant was entitled to a new trial to permit him to introduce exculpatory evidence. Similarly, the Third Circuit noted that a defendant whose witnesses are not immunized cannot introduce "clearly exculpatory evidence necessary to present an effective defense."[91]

The court also interpreted a Supreme Court decision and two other Third Circuit decisions[92] as exercises of inherent authority to grant immunity to defense witnesses. Thus the court construed the Supreme

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88 615 F.2d at 969.

89 *Id.* The Third Circuit "laid the groundwork," *id.* at 970, for judicially created immunity in Herman v. United States, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). In *Herman*, the defendant was convicted of violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d) (RICO). On appeal, Herman contended that he was denied his sixth amendment right of compulsory process and that his indictment should be dismissed. *Id.* at 1199. The court held that Herman had no sixth amendment claim because the prosecutor had not threatened or intimidated any of Herman's witnesses, *id.* at 1200, and concluded that there is no "general sixth amendment right to demand that witnesses . . . be immunized or that . . . indictments be dismissed." *Id.*

In addition to rejecting Herman's compulsory process argument, the court also denied his due process claim. Due process, the court found, may be required "in a case where the government relies on the testimony of witnesses who have received a grant of immunity, it [the government] may have an obligation, as a matter of fundamental fairness, to grant use immunity for defense witnesses as well." *Id.* at 1203. The court also rejected the due process claim because there was no prosecutorial misconduct. *Id.* at 1204.

While rejecting both the defendant's compulsory process and due process arguments, the court said that if the issue were presented, the court might have "inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense." *Id.* Since the issue was not presented, the *Herman* court did not actually utilize its inherent power to confer defense witness immunity.

90 410 U.S. 284 (1973).

91 615 F.2d at 971.

92 *In re* Grand Jury Investigation, 587 F.2d 589, 597 (3d Cir. 1978) (testimony under Speech and Debate Clause defense); United States v. Inmon, 568 F.2d 326, 332-33 (3d Cir. 1977), *cert. denied*, 444 U.S. 859 (1979) (testimony given might violate double jeopardy).

Court decision in *Simmons v. United States*,[93] as creating an immunity grant by refusing to allow self-incriminatory testimony at a fourth amendment suppression hearing to be later used against the defendant. The *Simmons* Court reasoned that the use of this testimony would mean that a defendant could assert his fourth amendment right only by sacrificing his fifth amendment right. Declining to require this sacrifice, the Court held that since the defendant had admitted possession of contraband to assert fourth amendment rights, he was immune from prosecution by reason of this testimony.[94] While *Simmons* is not precisely analogous to the defense witness situation, it is similar in principle because the Court, in effect, without the prosecutor's request or approval, granted immunity to the defendant for his testimony admitting ownership at the suppression hearing. This decision is therefore a precedent for the grant of judicial immunity for a defense witness to protect the defendant's constitutional rights.

IV. THE POLICY CONSIDERATIONS IN GRANTING IMMUNITY

The potential for abuse by defendants of witness immunity has concerned some courts. The *Turkish* court feared that the defendant and his witnesses would participate in "cooperative perjury"[95] that would acquit the defendant. A threat of a perjury conviction, the court reasoned, would not be enough to deter this conduct since perjury is difficult to prove and the penalties associated with perjury are often much less severe than are those for the substantive crime.[96] This argument does not seem persuasive because there is also a risk of perjury (though not "cooperative perjury") by immunized prosecution witnesses who hope to

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93 390 U.S. 377 (1968).

94 *Id.* at 394.

95 "Cooperative perjury" is defined as when "[c]o-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense." United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981). A court should be resourceful enough, however, to minimize this problem by using its discretion to decline immunity for testimony of a witness inconsistent with that given at an earlier trial by the defendant. Establishment of such a rule would reduce the incentive for witness A to perjure himself at the trial of defendant B since witness A would know that at his own subsequent trial, he could not obtain the benefit of "cooperative perjury" from defendant B.

96 *Id.* If an immunized witness gives false testimony under oath, he will be subject to prosecution for perjury. "Under 18 U.S.C. 6002, testimony or information cannot be used, directly or indirectly, in a prosecution of a person who provides it, except a prosecution for perjury. . . ." U.S. ATTORNEYS' MANUAL, *supra* note 65, § 1-11.212. *See* Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421, 433 (1980). The author writes that "[t]he theory [is] . . . that since the immunity is contingent on truthful testimony, perjured testimony did not benefit from the immunity at all and was thereby available for use at a criminal trial" (footnote omitted).

escape prosecution. Other courts are concerned with co-defendants or other defense witnesses benefitting from immunity baths[97] as a result of immunity grants to a defendant's witnesses.[98] Once granted immunity, a witness might take the stand and answer questions broadly to attempt to prevent the prosecutor from relying on matters covered by his testimony in a subsequent prosecution against him. This risk also applies, however, when immunity is given to prosecution witnesses.

A corollary of the possibility of immunity bath abuse is the danger that the prosecution will be reluctant to engage in rigorous cross-examination, fearing that the witness will disclose too much and thereby preclude a future prosecution. Without effective cross-examination, the prosecutor cannot fully explore the witness' credibility or impeach his testimony. While this fear may have some basis, it is appropriate to observe that a witness will have an opportunity to take an immunity bath on direct examination. Further, the fear that a witness will disclose too much has not deterred prosecutors from granting immunity to their own witnesses.

Recognizing the harm that may result by immunizing a witness, the United States Attorneys' Manual condemns defense witness immunity. The Manual states that "a requirement that the government seek to compel the testimony of defense witnesses would place the government in an intolerable situation" because the government "would be inundated with such requests."[99] While immunization requests may delay a trial, strict judicial or statutory guidelines may reduce the number of requests and therefore the number of trial delays.[100] More fundamentally, a due process right clearly takes precedence over an administrative burden or procedural inconvenience.

An additional problem raised by the Manual is that "the govern-

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97 Commonly used by courts, the term "immunity bath" means that the "[g]overnment might be trapped into conferring unintended immunity by witnesses volunteering to testify." United States v. Monia, 317 U.S. 424, 429 (1943). *See also* United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981). If a witness discloses information that is potentially incriminating, he is not likely to be prosecuted because the prosecutor must then independently derive the evidence to be able to use it. A contrasting view regarding transactional immunity is expressed in Comment, *Compelled Testimony*, *supra* note 54. The author suggests that

> the burden on the prosecution of immunizing the witness will be negligible. The witness may, for example, already have been prosecuted for crimes growing out of the subject matter . . . or he may have pleaded guilty to one count in a deal with the prosecution. It is likely that the government has little interest in further prosecution of the witness, particularly when . . . it has already decided to dismiss charges arising from the events about which he would be compelled to testify.

Id. at 960.

98 623 F.2d at 775.

99 U.S. ATTORNEYS' MANUAL, *supra* note 65, § 1.11-230.

100 For a discussion of proposed guidelines, *see* notes 142-44 & accompanying text *infra*.

ment would not know what the witness' testimony would be; thus the government would have no basis for concluding that compulsion of his testimony might be in the public interest."[101] This argument is not persausive because the primary public interest argument, of special concern to the prosecutor, is that the witness is a potential defendant, a fact which is known to the prosecutor without hearing the witness' testimony. To the extent the "public interest" determination involves a determination of the exculpatory nature of the witness' testimony necessary to the furtherance of the truth-seeking process so as not to convict innocent defendants, the public interest can be weighed by the judge. It is true that the Manual recommends that when the prosecutor "realizes that a potential defense witness will exercise his privilege against self-incrimination, he [the prosecutor] has discretion as to whether he should proceed with the case in view of his estimate of the truthfulness, materiality, and exculpatory nature of the potential testimony."[102] While it would clearly be appropriate for a prosecutor to make this determination in the case of his own witness, he has an obvious bias in the case of defense witnesses and the determination as to such witnesses should more appropriately be left in the hands of the judge.

A judge can obtain the information requisite to such a determination while protecting the interests of both the prosecution and defense by conducting an in camera hearing at which the potential witness, his lawyer, and a court reporter would be present. While the defense lawyer would not be present, the interest of the defense could be protected by the defense lawyer supplying the judge with a list of questions to pose to the proposed witness. The answers to these questions would then be sealed to prevent the prosecution from obtaining them. After the witness and his lawyer withdraw from the hearing, the prosecutor would then be permitted to enter the hearing to attempt to demonstrate why immunity should not be granted. After evaluating the prosecutor's arguments the judge would determine whether the witness' testimony was exculpatory and whether the prosecutor had demonstrated that the public interest would not be served by granting immunity.[103]

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101 U.S. ATTORNEYS' MANUAL, *supra* note 65, § 1.11-230.

102 *Id.*

103 *See* Note, *The Public Has a Claim to Every Man's Evidence*, *supra* note 17, at 1238-41. When the prosecutor denies a request for defense witness immunity, the author suggests that such immunity may be obtained by requesting an "in camera hearing in which the court can measure the proferred evidence against the materiality threshold." *Id.* at 1238. Other authors have also suggested the use of in camera hearings in the defense witness immunity situation. For example, in Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977) [hereinafter cited as *Separation of Powers*], the author suggests that there be an ex parte, in camera proceeding before the trial to determine if the defendant's potential witness will present material evidence. *Id.* at 80. Since the witness' fifth amendment rights are jeopardized when the prosecutor is aware of information from the witness' own mouth, a neutral

Another reason prosecutors are reluctant to ask for witness immunity is that the government must sustain a "heavy burden"[104] to prove that the evidence later used to prosecute the witness[105] was not obtained as a result of the immunized testimony.[106] The government rarely succeeds in proving independent derivation because of this burden, and thus prefers to grant immunity sparingly. Commentators and judges have suggested several means to remedy prosecutorial reluctance to grant use immunity. The prosecutor could preserve the independence of

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party, such as a judge, must conduct the in camera hearing. However, a judge at a pre-trial hearing might encounter difficulty in determining whether the proposed testimony is exculpatory and not merely cumulative. Thus, perhaps the better time to conduct such a hearing would be after the defense is presented so the judge could determine if the evidence, in light of the testimony already introduced, is exculpatory. This suggestion may create difficulties, however, because of the interruption of trials. If the witness should invoke his fifth amendment privilege at the in camera hearing, the judge should grant the witness immunity for the limited purpose of that hearing. Since the testimony will be sealed, the prosecutor will not have a chance to use it against the witness. In addition to the suggestion of an in camera hearing, the author in Note, *A New Use for Kastigar*, *supra* note 16, proposes other solutions to effectuate defense witness immunity: judicial review of the good faith of the prosecutor's decision, and the prosecutor granting immunity or facing a "missing witness" instruction or dropping the case. *Id.* at 88-96.

Judge Lumbard's dissent in *Turkish* regarding the propriety of in camera hearings envisions such a proceeding as a bureaucratic disaster because in addition to the judge determining whether the prosecutor properly refused to grant immunity, the judge will also have to determine whether the fifth amendment claims were made in good faith. 623 F.2d 780. Whenever a witness invokes the fifth amendment privilege against self-incrimination, however, the judge does not know whether it was done in good faith. The purpose behind an in camera hearing is to determine whether the witness possesses exculpatory evidence, while preventing the prosecutor from hearing the witness' potentially incriminating evidence.

The in camera hearing also largely protects against another of Judge Lumbard's fears. Lumbard worries about "unnecessary disclosure of information by the prosecution" which "increases the difficulties of administering criminal justice." *Id.* However, since the defense attorney would not be present during the presentation of evidence to the judge by the prosecutor, in the in camera hearing, no unnecessary disclosure of evidence would take place except to court reporters and other administrative aides.

104 623 F.2d at 775.

105 Granting use immunity permits the government to prosecute the witness, if the evidence was derived independently of the immunized testimony. Kastigar v. United States, 406 U.S. 441, 460 (1972). Kastigar challenged the constitutionality of the use immunity statutes, arguing that use immunity was not coextensive with the fifth amendment right against self-incrimination. The Supreme Court found that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege," *id.*, and that transactional immunity was broader than the scope of the self-incrimination privilege. The Court concluded that use immunity sufficiently protected a witness from other possible uses of the compelled testimony because " '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.' " *Id.* at 460.

106 At least one commentator has noted the difficulty of proving that evidence is independently derived. *See* Simon, *Federal Witness Immunity in Business Crime Investigations*, 4 LITIGATION 17, 19 (1978).

the evidence by placing sealed documents in the custody of the courts.[107] Rejecting this method, the *Turkish* court found this possibility inadequate when a continuing investigation disclosed "vital evidence after though not resulting from, the immunized testimony."[108] The United States Attorneys' Manual directly addresses this concern, providing that if a witness is granted immunity, but future prosecution may be warranted, the United States attorney should "maintain a record of the nature, source, and date of receipt of evidence concerning the witness's past criminal conduct that becomes available after he has testified or provided other information. . . ."[109]

Another response to the concern about impairing future prosecutions, suggested by the *Virgin Islands* court, is to delay the case to permit the prosecution to gather more evidence on the potential witness.[110] Of course, this option would detract from the defendant's right to a speedy trial.[111] A reasonable delay of a few weeks, however, may be

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[107] Goldberg v. United States, 472 F.2d 513, 516 n.5 (2d Cir. 1973) (the court suggested that testimony could be sealed). *See* Note, *The Public Has a Right to Every Man's Evidence*, *supra* note 17, at 1240, and Westen, *Compulsory Process*, *supra* note 17, at 169-70. Westen also suggests several other methods to avoid an immunity bath for the witness, including "ordering the defendant to submit his proposed questions for the witness in advance, and requiring the witness to give responsive answers." *Id.* at 170.

The U.S. ATTORNEYS' MANUAL, *supra* note 65, § 1-11.330 also establishes the following guidelines for "*Ensuring Integrity of Any Future Prosecution*:"

> In a case in which a person is to testify or provide other information pursuant to a compulsion order:
>
> (a) if it then appears that the public interest may warrant a future prosecution of the witness, on the basis of independent evidence, for his past criminal conduct about which he is to be questioned, the attorney for the government shall:
>
> (1) before the witness has testified or provided other information, prepare for the case file a signed and dated memorandum summarizing the evidence then known to exist concerning the witness, and designating its sources and date of receipt;
>
> (2) ensure that all testimony given, or information provided, by the witness be recorded verbatim and that the recording or reporter's notes, together with any transcript thereof, be maintained in a secure location and that access thereto be documented; and
>
> (3) maintain a record of the nature, source, and date of receipt of evidence concerning the witness's past criminal conduct that becomes available after he has testified or provided other information . . . .

[108] 623 F.2d at 775.

[109] U.S. ATTORNEYS' MANUAL, *supra* note 65, § 1-11.330(b). In this situation, the Manual also provides that the United States attorney should "ensure that all testimony, or information provided by the witness be recorded verbatim. . . ." *Id.* The method suggested by the Manual also provides an answer to Judge Lumbard's criticism in his dissent to *Turkish* where he wrote that defense witness immunity would subject the prosecutor to a heavy burden to maintain "separate staffs to ensure compliance with a restriction that no use may be made of what the witness might say." 623 F.2d at 779. By keeping a careful log of information uncovered by the prosecution, as the Manual suggests, the need to maintain separate staffs would be alleviated.

[110] 615 F.2d at 973.

[111] The sixth amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.

permissible to allow the prosecution to finish its investigation without sacrificing the defendant's right to a speedy trial.[112] Further, it would not be unreasonable to require a defendant who wishes to obtain immunity for a witness to waive his right to contest trial delays reasonably necessary to avoide prejudice to the government by reason of the request for immunity.

V. THE SEPARATION OF POWERS ARGUMENT

While citing the aforementioned policy reasons for rejecting defense witness immunity, courts have emphasized that the major obstacle to defense witness immunity is the disruption of the separation of powers balance between the judicial and executive branches of government.[113] As the court in *Turkish* wrote,

> [h]ow these substantial concerns are to be weighed against the defendant's interest in securing truthful exculpatory testimony through defense witness immunity turns in large part upon whether the balancing of these interests is appropriately a judicial function. The Government suggests it is not, contending that the granting of immunity is pre-eminently a function of the Executive Branch.[114]

It could be argued with equal plausibility that a determination whether defense testimony is exculpatory and should be submitted to the jury is

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112 The Supreme Court in Beavers v. Haubert, 198 U.S. 77, 87 (1905) held that "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." This holding was later reflected in Klopfer v. North Carolina, 386 U.S. 213, 214 (1967) where the Court stated that a state may not "indefinitely postpone prosecution or an indictment without stated justification." These cases indicate that delaying a case against a defendant to gather evidence against a potential witness would constitute sufficient justification and would properly balance the defendant's rights and the "rights of public justice." The Speedy Trial Act, 18 U.S.C. § 3161 (1976) lists numerous instances justifying a delay, including:

> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Id. at (h)(8)(A). For a discussion of the Speedy Trial Act, see Steinberg, *Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974*, 66 J. CRIM. L. & C. 229 (1975).

113 For a good discussion of the relationship between defense witness immunity and the separation of powers doctrine, see Note, *The Public Has A Claim to Every Man's Evidence*, *supra*, note 17, at 1212-21 and Note, *Separation of Powers*, *supra* note 103, at 55-66.

114 623 F.2d at 776. Judge Lumbard, dissenting in *Turkish*, reiterated what he saw as a grave separation of powers problem. "The judicial function exercised by the judge," Judge Lumbard wrote, "should not be confused with the executive function to determine how to prosecute defendants and present evidence against them." *Id.* at 779.

primarily a judicial function and not one which may properly be exercised by a prosecutor. Fundamental rights should not turn on abstruse conceptions of separation of powers.

Even if the issue is viewed as a conceptual separation of powers issue, the separation of powers doctrine does not require that the three branches of government "operate with absolute independence."[115] In fact, the power of judicial review of legislative acts was established early by the Supreme Court in *Marbury v. Madison*.[116] In addition to legislative review, the judiciary can also review executive decisions, as did the Court in *United States v. Nixon*.[117] In the case of defense witness immunity, separation of powers is arguably violated by judicial infringement of prosecutorial discretion. Courts acknowledge that the prosecution knows better what investigations are being conducted and the risks involved in granting immunity to witnesses.[118] Courts are reluctant to oversee and second-guess prosecutorial decisions because of the superior knowledge of prosecutors. Yet, courts have limited this absolute prohibition to the decision to initiate a prosecution. Refusing to sanction prosecutorial misconduct, courts will intervene to grant a new trial or order reversal when they find such misconduct.[119] "[T]he 'control' exercised by the courts over federal prosecutors has been limited to discouraging unethical behavior, pursuant to their authority and duty to supervise the conduct of the United States Attorney as an officer of the court. They simply refuse to permit the court to become a party to the federal prosecutor's unethical or otherwise improper behavior."[120]

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115 United States v. Nixon, 418 U.S. 683, 707 (1974).

116 5 U.S. (1 Cranch) 137 (1803). The Court in *Marbury* held that Congress unconstitutionally conferred upon the court original jurisdiction to issue a writ of mandamus to the Secretary of State, thereby enlarging the Court's jurisdiction in contravention of its Article III powers. *Marbury* established that the Constitution was the "fundamental and paramount" law and any legislative act "repugnant to the constitution, is void." *Id.* at 177.

117 418 U.S. 683 (1974). *Nixon* established that the President's claim of executive privilege in refusing to honor a subpoena duces tecum for "certain tapes, memoranda, papers, transcripts or other writings relating to certain precisely identified meetings between the President and others," *id.* at 688, which was rooted in the separation of powers doctrine, was outweighed by the need for "specific evidence" in a pending criminal trial. *Id.* at 713. For a discussion of the separation of powers argument, see Note, *The Public Has a Claim to Every Man's Evidence*, *supra* note 17, at 1214-21 and Note, *Separation of Powers*, *supra* note 103.

118 623 F.2d at 776.

119 Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968) (new trial ordered because prosecutor introduced facts in his summation that had not previously been admitted because of defense attorney objections); Reichert v. United States, 389 F.2d 278, 282 (D.C. Cir. 1966) (district court reversed because prosecutor in his closing statement based his argument on excluded evidence).

120 Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577, 594 (1973) [hereinafter cited as *The Special Prosecutor*]. The authors suggest that prosecutorial discretion, especially concerning the appointment of special prosecutors, is too broad and should be reviewed like other decisions of executive officials.

Examples of this supervisory control include judicial intervention when the prosecutor, in his closing statement, introduces facts that have not been admitted in evidence during the trial,[121] when the prosecutor breaks an agreement with the defendant,[122] and when the prosecutor fails to call perjured testimony to the attention of the court.[123] Although a refusal to grant defense witness immunity might not rise to the level of unethical or improper behavior, the court must supervise the prosecutor to protect important constitutional rights of due process and compulsory process. One commentator states that

> [w]hen an individual defendant's constitutional rights are concerned, courts have shown an even greater inclination to review discretionary acts. If such acts deprive defendants of their rights, courts have felt free to require the prosecutor to take steps to insure that those rights are protected. It seems logical that courts should take the same approach when faced with a prosecutor's refusal to grant immunity.[124]

Further support for the judicial power to review prosecutorial discretion in refusing to grant use immunity to a defendant's witnesses lies in the history of immunity. The congressional grant of authority to the prosecutor rests on an historical basis.[125] Immunity to compel a witness to testify despite his fear of self-incrimination was originally conferred in England by executive pardon. In *Queen v. Boyes*,[126] a witness refused to testify that he received a bribe from the defendant. To compel the witness to speak, "the counsel for the Crown handed a pardon under the Great Seal to the witness."[127] The court held that the pardon protected the witness from all further connected legal proceedings and compelled the witness to testify.

Relying on the English precedent, the Supreme Court required the early immunity statutes in the United States to be transactional and hence very broad. Transactional immunity, like a pardon, precludes prosecution of protected witnesses for any crime arising out of the same transaction, event, or occurrence.[128] Thus, once transactional immunity was granted, the witness could not be prosecuted.

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121 *See* note 119 *supra*.

122 Note, *The Special Prosecutor*, *supra* note 120, at 594 n.99.

123 Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

124 Note, *Separation of Powers*, *supra* note 103, at 65. The author suggests that courts employ a balancing test to determine if defense witness immunity should be granted and that the separation of powers doctrine should not bar judicial review of prosecutorial discretion.

125 *See* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972). This footnote in *Kastigar* explains that immunity "indemnified" the witness from prosecution.

126 1 B. & S. 311, 121 Eng. Rep. 730 (Q.B. 1861).

127 *Id.* at 328-29, 121 Eng. Rep. at 731.

128 United States v. Earl, 361 F.2d 531, 533 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). According to the *Earl* court, the transactional immunity statute, 18 U.S.C. § 1406 (1964), provided that once immunized, witnesses were "granted immunity from prosecution and penalty or forfeiture for or on account of any event or thing they testify about, and that

The first immunity statute in the United States was passed in 1868 and was designed to encourage testimony before congressional committees.[129] The statute was challenged in *Counselman v. Hitchcock*[130] on the ground that the immunity grant was not coextensive with the fifth amendment privilege against self-incrimination. The Supreme Court agreed, finding that the statute did not preclude the government from using the forced testimony to develop leads and gather evidence which could later be used against the witness and "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."[131]

To remedy the defects of the 1868 statute, Congress then passed another statute[132] which the Supreme Court in *Brown v. Walker*[133] found constitutional, stating that since the witness had already been pardoned "he cannot longer set up his privilege since he stands with respect to such offense as if it had never been committed."[134]

Subsequent immunity statutes were challenged, but were upheld if they granted transactional immunity to witnesses. Upholding the constitutionality of the use immunity statutes enacted in 1970,[135] the Supreme Court in *Kastigar v. United States*[136] found that transactional immunity conferred broader protection than the self-incrimination privilege required. In contrast to transactional immunity statutes which rendered the witness immune from prosecution, the use immunity statutes, which "prohibit the prosecutorial authorities from using the compelled testimony in *any* respect,"[137] do not preclude further prosecution of the witness based upon independent evidence.[138] Use immunity thus departed from the historical concept of an executive pardon and instead adopted this narrower standard for immunity. Under a grant of use immunity, the witness is in no better or worse position than if he had not been called to testify.

Since the original concept of immunity was an executive pardon,

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their testimony shall not thereafter be used as evidence against them in any criminal proceeding." *Id.*

129 Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

130 142 U.S. 547 (1892).

131 *Id.* at 564.

132 Act of Feb. 17, 1893, ch. 83, 27 Stat. 443-44.

133 161 U.S. 591 (1896).

134 *Id.* at 599.

135 *See* note 1 *supra*.

136 406 U.S. 441, 453 (1972).

137 *Id.*

138 *Id.* *See* note 105 *supra*.

the courts traditionally did not decide whether to grant immunity, for the Constitution dictates that the pardoning power is absolute and entirely an executive function.[139] With the creation of use immunity, however, the executive branch can no longer argue that in granting immunity, the judiciary usurps an executive function since use immunity still permits the later prosecution of the witness. There would therefore appear to be little if any basis for the separation of powers argument in the case of use immunity.

VI. A JUDICIALLY CREATED ALTERNATIVE

In the *Virgin Islands* case, the court held that if, on remand, the district court found that prosecutorial misconduct had occurred at the original trial, the defendant would be acquitted unless the prosecutor granted immunity at a new trial.[140] This is a harsh remedy which leaves the prosecution with no choice when prosecuting the defendant. Recognizing that such action might not be justified when there was no prosecutorial misconduct and recognizing the possible presence of a "strong countervailing systemic interest"[141] the court outlined a less drastic procedure for accommodating the rights of prosecution and defense. The court's guidelines, designed to protect against judicial abuse of the immunity power, are: (1) immunity must be properly sought in the district court; (2) the defense witness must be available to testify; (3) the proffered testimony must be clearly exculpatory; and (4) no strong

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139 U.S. CONST. art. II, sec. 2, cl. 1. *See* Schick v. Reed, 419 U.S. 256 (1974), where a presidential commutation of a death sentence to life imprisonment without parole was upheld, even though only two sentences were authorized for the crime: death or life imprisonment with the possibility of parole. The Court held that the pardoning power could not be "modified, abridged or diminished by the Congress," *id.* at 266, but "[t]he plain purpose of the broad [constitutional] power conferred . . . was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce [the punishment], or to alter it with conditions which are in themselves constitutionally unobjectionable." *Id.*

140 615 F.2d 964, 969 (3d Cir. 1980).

141 615 F.2d at 970. *See* United States v. McMichael, 492 F. Supp. 205 (D. Colo. 1980). In *McMichael*, the trial judge was asked to immunize a defense witness who would testify that the defendant had "lack of knowledge," *id.* at 206, of the contents of a box shipped from Ecuador. *Id.* at 207. The judge refused to grant immunity to the witness, and in dicta, criticized and rejected the decision in *Government of Virgin Islands v. Smith*. Finding that *Virgin Island*'s facts were unusual and were "a perfect example of a case in which hard facts make . . . bad law," *id.* at 206, the judge concluded that judicially created witness immunity does not exist, "with the exception of an enunciation of a judicial power to order that statutory immunity be granted with dismissal to follow if the grant does not issue." *Id.* at 210.

In contrast to *McMichael*, and without finding prosecutorial misconduct, the court in United States v. Lowell, 490 F. Supp. 897 (D.N.J. 1980), accepted and applied the *Virgin Islands* tests. The *Lowell* court found that judicially conferred witness immunity could not be granted because the proposed witness' testimony was not exculpatory, *id.* at 905, and that immunity was properly denied because the witness was a potential target of prosecution. *Id.*

governmental interests must countervail the grant of immunity.[142] Under these guidelines, the prosecution would have the opportunity to rebut the defendant's showing of need and to establish that immunity would be a disservice to the public interest[143] because of "significant costs" to the government.[144] Thus, defendants could not automatically secure a grant of immunity for witnesses because courts would only consider a judicially created immunity grant when the defendant's due process rights were jeopardized and the public interest was not harmed.

VII. THE NEED FOR STATUTORY CHANGE

Most courts currently take the position that they are unable to immunize witnesses because the use immunity statutes grant the power to immunize to the executive branch. Yet, several courts have invited the legislature to intervene and change the statute to permit courts to grant use immunity.[145] A possible model for statutory change would be a re-

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142 615 F.2d at 972. The author in Note, *The Public Has A Claim to Every Man's Evidence*, *supra* note 17, at 1235-36, suggests judicial use of a high materiality threshold requiring that

> If the defendant shows that the testimony of a witness claiming the fifth amendment *could reasonably affect the outcome of the case*, and if the defense has no alternate source for the identical evidence, the court should order the prosecution either to immunize the witness or to drop the charges against the defendant.

(footnotes omitted).

143 The statute only permits use immunity grants which will serve the "public interest." Although "public interest" is not defined in the statute, II WORKING PAPERS, *supra* note 80, at 1433, characterizes the public interest inquiry as follows: "Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law?"

An alternative description of the public interest, found in the U.S. ATTORNEYS' MANUAL, *supra* note 65, § 1-11.210 suggests a balancing process:

> In determining whether it may be necessary to the public interest to obtain testimony or other information from a person, the attorney for the government should weigh all relevant considerations, including:
>
> (a) the importance of the investigation or prosecution to effective enforcement of the criminal laws;
>
> (b) the value of the person's testimony or information to the investigation or prosecution;
>
> (c) the likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
>
> (d) the person's relative culpability in connecton with the offense or offenses being investigated or prosecuted, and his history with respect to criminal activity;
>
> (e) the possibility of successfully prosecuting the person prior to compelling him to testify or produce information; and
>
> (f) the likelihood of adverse collateral consequences to the person if he testifies or provides information under a compulsion order.

144 615 F.2d at 973. Significant costs include the government's inability to prosecute the potential witness because of the heavy burden imposed to show that evidence was independently derived. *See* notes 104-12 & accompanying text *supra*.

145 United States v. Turkish, 623 F.2d 769, 779 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 856

pealed provision of the Illinois transactional immunity statute,[146] which gave to courts the power to immunize:

> Whenever . . . it shall appear to the court that another person than the one charged is a material and necessary witness in the case, and that his testimony would tend to criminate himself, the court may cause an order to be entered of record that such witness be released from all liability to be prosecuted or punished on account of any matter to which he shall be required to testify . . . .[147]

The statute was not challenged because courts acquired an immunity power, but because the immunity conferred was not coextensive with the fifth amendment privilege against self-incrimination. The Illinois Supreme Court upheld the statute.[148]

It may be suggested that the Illinois statute does not provide sufficient guidelines for the courts. But guidelines which limit the circumstances in which immunity would be granted could be provided. One way to effectuate this change in the context of section 6003[149] would be to add after the clause "in accordance with subsection (b) of this section, upon the request of the United States attorney for such district" the following provision: "or upon the order of the presiding judge, in accordance with subsection (c) of this section." Subsection (c) would contain the following provisions:

> (c) The presiding judge may enter an order under subsection (a) of this section when in his judgment—
>
> (1) the testimony or other information from such individual may be necessary to the public interest[150] as defined in subsection (d) of this section; 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.
>
> (d) In determining the "public interest," the following factors will be taken into account—
>
> (1) whether the witness' testimony will be clearly exculpatory,
>
> (2) whether the witness' testimony is cumulative,
>
> (3) whether the potential witness is a target of investigation for the same offenses.

The proposed statutory amendment preserves the power of the prosecutor to grant immunity to witnesses. While respecting the prose-

(1981); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

146 Ill. Rev. Stat. ch. 38, § 35 (1874). There is no legislative history indicating why the statute was repealed.

147 People v. Boyle, 312 Ill. 586, 602, 144 N.E. 342, 347-48 (1924).

148 *Id.*

149 *See* note 1 *supra*.

150 *See* note 143 *supra*.

cutor's province, the provision permits a judge to grant immunity to a defendant's witnesses upon a determination that such a grant will serve the public interest. The "public interest" should be determined by balancing the degree to which the immunity grant will enhance the fact finding process against the need to prosecute the witness.[151] While the guidelines should enable the courts to dispose of most cases in a consistent manner, the proposal does leave room for conflicting decisions in a case where the potential witness is a target but his testimony is clearly exculpatory and noncumulative. The determination of public interest is intended to reflect the case law which recognizes that minimizing the effect of an immunity grant on the prosecutor's continuing investigations and possible future indictments is important. The overall effect of the statute is to balance a defendant's fifth and sixth amendment rights with the need for apprehending and convicting criminals. With this statutory change, immunity will be sparingly granted, thus allaying the fears of those who oppose granting immunity to defense witnesses.

CONCLUSION

Defense witness immunity is an issue that raises both fifth and sixth amendment problems. Some courts recognize the need for compelling immunity when there is prosecutorial misconduct. One court has indicated that immunity should be granted based upon a general due process right to produce exculpatory evidence. Courts argue that judicial intervention on behalf of defendants may violate the separation of powers required by the Constitution, but this at best conceptual argument is unsound because the use immunity statutes alter the traditional concept of the granting of a pardon under the transactional immunity statutes. While use immunity does not preclude future prosecution of a witness, and while the policy objections to grants of immunity to defense witnesses are not persuasive, courts are reluctant to accept judicially created defense witness immunity even with proper safeguards. The inadequacies in these judicial remedies dictate that legislatures amend use immunity statutes. This change would retain immunity as a prosecutorial power, but would also confer power on the courts to grant immunity to defense witnesses if the statutory tests which emphasize public interest considerations are fulfilled. This statutory change will enable courts to balance effectively important societal interests with fundamental contitutional rights.

ELLEN SHERIFF

151 *Id.*