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## IMMUNITY—HOW IT WORKS IN REAL LIFE

WARREN D. WOLFSON\*

A major issue confronting Americans today is the amount of power we want to give the federal government. That is where do a purportedly free people draw the line between their government and their right to be let alone? The subject of immunity raises moral and philosophical questions that must be asked about a government's behavior toward its citizens. In each instance where immunity is granted to a witness, a change takes place in the power relationship between government and citizen. The line between them becomes blurred. The witness gives up something; his concerns change.

A practical analysis of this shift in power must concern itself with two kinds of immunity. By that, I do not mean "transactional" as against "use" immunity. While distinctions between the two are important, the inquiry is not begun until it separates voluntary from involuntary immunity. Some people seek immunity and some have it thrust upon them. Different questions should be asked in each instance.

It is not intellectually safe to conclude that whenever a witness is granted immunity he must be guilty of a crime. An involuntary witness often receives immunity simply because a prosecutor wants to know what the witness knows. He is given use immunity, the only kind allowed by statute, but his lawyer will tell him, correctly, that he still may be indicted. The government might have a taint problem, and some United States Attorneys have a policy of not indicting immunized witnesses, but the possibility of indictment is real in terms of legal permissibility.

Voluntary witnesses are immunized pursuant to a strategic decision by the prosecutor. There is no statutory way to get immunity from *prosecution*, but friendly witnesses get it anyway when they, in person or through their lawyers, sit down and make a deal with the government.

The issue in either case is not the guilt of the witness. The decisive factor is the conclusion that has been reached by the prosecutor and the way he

communicates that conclusion to the witness or to the witness's lawyer. For the witness, it is the prosecutor's belief and asserted position that create the crime. After all, the witness's real fear is the indictment itself. He knows what every prosecutor should know: that the power to indict is the power to destroy. The witness knows who holds the power; he reacts to what he is told, although what he is told is not necessarily a valid legal conclusion.

What must be remembered is that the prosecutor alone decides who will receive immunity. He can do it by obtaining a formal court order, by writing a letter, or by making an oral commitment, but there is no one outside the Justice Department who has the power to review or overrule a prosecutor's decision to immunize.

The procedure for obtaining a court-ordered grant of immunity is the same for witnesses who are friendly or unfriendly to the prosecution. First, the local prosecutor decides he wants the testimony. Then he convinces his United States Attorney that he ought to begin the machinery for obtaining a court order. A request, signed by the United States Attorney, is sent to the Justice Department. The request is examined and, almost always, a form approval is sent back.<sup>1</sup>

On September 22, 1975, I sent a letter to Attorney General Edward H. Levi asking, among other things, whether the Justice Department has made any "meaningful review" of local requests for immunity. The answer, dated November 14, 1975, came from Deputy Chief Roger A. Pauley: "The standards for approving requests are being reviewed and modified at present."<sup>2</sup> I take this to mean that at

<sup>1</sup> Invariably, it says:

Your request for authority to apply to the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ for an order requiring \_\_\_\_\_ to give testimony or provide other information pursuant to 18 U.S.C. 6002-6003 in the above matter and in any further proceeding resulting therefrom or ancillary thereto is hereby approved pursuant to the authority vested in me by 18 U.S.C. 6003 and 28 C.F.R. 0.175.

Assistant Attorney General

<sup>2</sup> Letter from Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division,

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least until November of 1975 the Justice Department has been virtually without standards for approval of the requests. Hopefully, the system will change. But the point remains valid; decisions that are basic to the existence of a free people cannot be left simply to the good faith and judgment of a man who holds an office at a particular time. Recent history has made that lesson clear.

When the local United States Attorney receives approval from Washington, he files a petition before the presiding judge. All he really has to do is tell the judge the witness has used or has threatened to use the fifth amendment. Then he indicates that it is his judgment as United States Attorney that the witness's testimony in regard to the investigation before the Grand Jury is necessary to the public interest. Defense lawyers in some instances have attempted to oppose these petitions, citing the lack of factual allegations. After all, the judge has not been told the specific area of inquiry or why the witness's testimony might be relevant to that inquiry. Whether the evidence could be obtained from other sources is immaterial. Judges are not eager to receive arguments that the prosecutor is not in good faith, that his motives are something other than a search for needed information.

In effect the judge is being asked to sign an order affecting basic rights without being given an opportunity to exercise judicial discretion. The witness is told: "Answer all questions or you will go to jail until you do. Your testimony cannot be used against you, unless you testify falsely." There is no other area in the law where a judge is told he must do so much to a person without pausing to determine if he should. The judge is, in reality, a rubber stamp for the prosecutor.

When a defense lawyer is opposed to a grant of immunity, he should say so to the presiding judge, clearly stating his reasons. The law is against him, but the issue must be raised repeatedly. The present system is unjust, and if change is to come about, rational opposition must be expressed at every opportunity.

The Justice Department has kept count of the number of requests for court-ordered immunity it has received during the past five years. Some of the requests involve more than one witness:<sup>3</sup>

United States Department of Justice, to Attorney General Edward H. Levi, Sept. 22, 1975.

<sup>3</sup>*Id.* 18 U.S.C. § 2514 was repealed, effective December 14, 1974; 18 U.S.C. §§ 6002-6004 now cover immunity of witnesses giving testimony or producing evidence under compulsion in federal grand jury or court proceedings.

About one-half of the authorizations actually were used in court during 1970 through 1973. Figures on actual use were not kept for 1974 and 1975. 'Emerging from the statistics, or more accurately the lack of them, is the clear impression that at least for the past five years the Justice Department really does not know what local prosecutors have been doing with their power to grant different kinds of immunity. Clearly, the power has been used. Any criminal defense lawyer who has practiced in the federal courts

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§ 6003 provides as follows:

(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. § 6003. Court and grand jury proceedings. Section 6004 provides:

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the 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) An agency of the United States may issue an order under subsection (a) of this section only if in its 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. § 6004. Certain administrative proceedings.

\*The Justice Department, as of late 1975, had not kept

TABLE I

Time Period	Requests -			Witnesses		
	18 U.S.C. § 2514	18 U.S.C. §§ 6003-6004	Total	18 U.S.C. § 2514	18 U.S.C. §§ 6003-6004	Total
1971	339	363	702	946	1645	2591
1972	341	364	705	821	1517	2338
1973	11	1149	1160	27	2688	2715
1974*	1314		1314	3305		3305
1975*	1535		1535	3383		3383

\* Unsegregated as between 18 U.S.C. § 2514 and 18 U.S.C. §§ 6003-6004.

knows that. Anyone who has kept track of current history knows it, too. But only recently have we begun to hear any substantial expressions of concern about the government's use of immunity powers. The murmurs of discontent coincide in time with immunity grants in cases involving lawyers, police officers, businessmen and public officials.

Few words of dissent were heard in the early 1970's when the Internal Security Division of the Department of Justice began a massive grand jury campaign against antiwar and leftist groups. The immunity grant was the chief weapon between 1970 and 1973, when the I.S.D. presented evidence to more than 100 grand juries in 36 states and 84 cities. More than a thousand witnesses were called.<sup>5</sup> Many received little or no notice. They were required to travel hundreds and sometimes thousands of miles for their grand jury appearance.

Faced with grants of immunity, witnesses were compelled to answer questions about political ideas and associations, about conversations with friends and neighbors, and about relatives. In short, traditional first amendment rights were trampled upon by zealous prosecutors.<sup>6</sup> The I.S.D. investigation

track of the number of times the government made formal promises of no prosecution. Those promises do not require court orders. Although they are not authorized by statute, a prosecutor's promise that he will not prosecute is legally binding. He saves it for cases where the witness's proffered testimony is attractive enough to warrant governmental munificence.

<sup>5</sup>Cowan, *The New Grand Jury*, N.Y. Times, Apr. 29, 1973, § 6 (Magazine), at 19.

<sup>6</sup>The following was typical of the questions used:

I want you to describe for the grand jury every occasion during the year 1970, when you have been in contact with, attended meetings which were conducted, or attended by, or been any place when any individual spoke whom you knew to be associated with or affiliated with Students for a Democratic Society, the Weatherman, the Communist Party, or any other organization advocating revolutionary overthrow of the United States, describing for the grand jury when these incidents occurred, who was present,

was a shameful episode in American jurisprudence. It could not have happened without the unfettered power to obtain immunity grants.<sup>7</sup>

Criminal defense lawyers who have practiced in the courts of the Northern District of Illinois have learned, painfully, that there are different categories of immunized witnesses. Within these categories there are degrees. Any attempt to deal with and understand immunized testimony must carefully take into account the kind of witness that has been created and the pressures used to make him that way.

#### THE WITNESS WHO IS VOLUNTARY ALL THE WAY

This witness is best characterized by his quickness; that is, an impressively short reaction time. He is alert to the danger that faces him and wastes no time before seeking legal advice. His lawyer weighs the odds, makes suggestions to his client or accepts some from him, and then visits the prosecutor's office. There, the lawyer learns more about his client's prospects. Usually, when a lawyer seeks a deal to avoid a charge against his client, he gives the prosecutor a fairly detailed idea of what the client would say should he become a witness. The prosecutor may or may not express deep interest the first time he hears the proposed testimony. Negotiations begin.

Of course, not every case is the same; nor is every defense lawyer and prosecutor. Each has a different

and what was said by all persons there and what you did at the time that you were in these meetings, groups, associations or conversations.

Donner & Cerruti, *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*, 214 NATION 5 (1972).

<sup>7</sup>The silence was just as crushing when the Justice Department used its immunity powers to pursue alleged hoodlums. Sam Giancana was jailed for a year when he refused to testify before a grand jury. A new grand jury was ready to repeat the process, but Attorney General Ramsey Clark apparently had misgivings about overuse of punitive immunity.

way of dealing with the immunity question. The suggested scenario is one that haunts every lawyer who is concerned about the integrity of the fact-finding process in criminal cases. It could happen, and it probably has.

Assume, as part of a hypothetical fact situation, that a big-time real estate developer (Developer) has income tax problems. He has received cash that did not turn up on his return. An IRS special agent pays him a visit. The agent explains that he knows about the cash, but what he really is interested in is the place to which the cash went. Further questioning makes it clear that the agent is interested in the large new shopping center put up by Developer after obtaining a vital zoning change. It is at this point that Developer decides he had better talk to his lawyer. The agent is put off to another day.

Since Developer has agreed to pay a handsome retainer, he decides to be frank and open with his lawyer. The cash, \$50,000, was given to Developer's former lawyer, a self-avowed zoning expert (Expert), who had said he needed the cash to "take care of" the zoning commissioner (Commissioner). It was Commissioner who arranged for the change that allowed the shopping center to be built. Developer never met Commissioner, but shortly after the necessary zoning change was accomplished, the cash was paid to Expert.

After talking to his client, Developer's lawyer contacts the IRS agent for the purpose of learning the name of the assistant United States Attorney handling the file. Then the lawyer makes an appointment with the prosecutor. They agree to hold an "off the record" conversation.

Lawyers have different ways of conducting these conferences. Some frame their proposals in the future conditional: "Suppose my client should say he gave the money to Expert as a bribe to Commissioner, what would his criminal liability be?" Some use the straightforward approach: "My client gave the money to Expert so he could bribe Commissioner. What are you going to do for my client?" There are variations of the theme, but the result is the same. The prosecutor agrees that in return for Developer's testimony, as proposed, the government will not charge him with a crime. Developer is off the hook. The first-in, first-out theory, learned in law school, has been used successfully. Speed, not virtue, has been rewarded.

But this does not solve the prosecutor's problem. He has a fairly good case against Expert, but the target is, and always has been, Commissioner. At this point, the prosecutor has to make a decision. He can

decide Expert fraudulently extracted the \$50,000 from Developer by falsely claiming he was going to use the money to bribe Commissioner. After all, as an experienced zoning lawyer Expert probably knew he was entitled by law to the zoning change. He could have told Developer he needed the money for a bribe; then, when the zoning change went through in the ordinary course of proceedings, he collected the money and kept it. Or, the prosecutor could take the position that the money was paid to Commissioner as a bribe, since Commissioner did support and vote for the zoning change. The prosecutor makes the choice that has been made in so many other cases. Commissioner will be the target.<sup>8</sup>

Word of what is going on must get to Expert. Perhaps Developer's lawyer tells him. The special agent might pay him a visit, or he might receive a grand jury subpoena. At any rate, Expert learns that Developer had told the government about their transaction. It is clear that Developer is in the government lineup and that what he has said to the prosecutor is accepted and believed.

Expert hires a lawyer, who quickly makes contact with the prosecutor. It is made clear to Expert that he is not the real target, that the government is much more interested in Commissioner. The signals are sent. We know, says the prosecutor, or the agent, that Expert received the \$50,000 claiming it was to be a bribe to Commissioner, and that the money was paid to Commissioner for his help in getting the zoning change. That means that Expert and Commissioner must have met and discussed the bribe at least once before the zoning change took place. It is a well-known fact that the two men knew each other during the time the zoning change proposal was pending.

Expert is not a fool. He receives the signal and his lawyer delivers the response: "If Expert tells you how he bribed Commissioner to go along with the zoning change, what will you do for him?" In some cases, the prosecutor will hold out for a plea to a minor charge with a recommendation of probation, but if he wants the "target" badly enough, he will offer complete immunity in return for the testimony.

The case now takes shape. Developer and Expert will testify against Commissioner. Developer will show how he generated the cash by going to his safety

<sup>8</sup>The Northern District of Illinois has been an especially fertile ground for this type of case. *United States v. Wigoda*, 521 F.2d 1221 (7th Cir. 1975); *United States v. Colitz*, Crim. No. 75-66 (N.D. Ill., bench trial, not guilty, Sept. 19, 1975, indicted Jan. 30, 1975); *United States v. Bonk*, Crim. No. 75-88 (N.D. Ill., jury trial, not guilty, June 6, 1975, indicted Feb. 13, 1975).

deposit box. An entry receipt at the vault will support his testimony. Expert will testify to payoff conversations with Commissioner, the corroboration coming in the form of Expert's diary entries showing the two men were scheduled to meet on the dates of the conversations. The other evidence is uncontested. Commissioner twice spoke in favor of the zoning change. Commission minutes show he voted in favor of the change. At trial, Commissioner will deny talking about or receiving money from Expert. They did meet, but the conversation consisted of Expert's attempts to persuade him of the proposal's merit.

It could be that just before Commissioner is indicted he is subpoenaed to appear before the grand jury. By then, his lawyer has learned that the government has dealt for and accepted Expert's evidence. He wisely advises Commissioner to refuse to testify. His grand jury testimony would be nothing more than a discovery deposition taken by the government, or an invitation to a false statement indictment.

Other things happen before trial. Both Developer and Expert receive court-ordered use immunity before appearing at the grand jury. Just before the trial begins the trial judge, at the request of the government, again grants use immunity to Developer and Expert.

One might wonder why the government bothered to obtain use immunity grants when it was clear that the decision not to prosecute the two men had been made and communicated. The answer is that it is a strategic play by the prosecutor which becomes apparent during preliminary questioning of the witnesses at trial.

The following is an example of this line of questioning:

Q: On \_\_\_\_\_, 19\_\_\_\_, did you testify before a Federal Grand Jury pursuant to a court order granting you immunity but requiring that you testify?

A: Yes, sir.

Q: When was the immunity order entered?

A: About one week before I testified, by Judge \_\_\_\_\_.

Q: Now, would you relate to the Court and Jury your understanding of the terms of the immunity order under which you testified before that Federal Grand Jury?

A: I was compelled to testify. Anything I testified to could not be used against me in a court of law, unless I perjured myself on the stand.

Q: You understood at that time that if you lied under oath you could still be prosecuted for perjury?

A: Yes, sir.

Q: Now are you also testifying here today pursuant to a court order granting you immunity?

A: Yes, sir.

Q: And that order was entered just a few hours ago by Judge \_\_\_\_\_ [trial judge]?

A: Yes, sir.

Q: And do you understand that the terms of your immunity are the same, that your testimony cannot be used against you unless you give false testimony?

A: Yes, sir.

Q: In addition to the order entered under the statute granting you immunity, has any representative of the government made you any other promise?

A: Yes, sir.

Q: What is that promise and who made it?

A: Mr. \_\_\_\_\_

[assistant United States Attorney] told me I would not be prosecuted for anything that came during this investigation, in return for my truthful testimony.<sup>9</sup>

The impact on the jurors is substantial. Twice the witnesses have been ordered by a judge to testify truthfully. The first judge and the grand jury must have believed them, because they were not prosecuted for perjury. Obviously, the government believed them. Now the trial judge is adding his prestige to the picture the prosecutor seeks to create, that of a witness who has nothing to fear from telling the truth, who faces peril only if he tells a lie. The preliminary questions create the impression that the trial judge has reviewed and approved of the immunized testimony. The jurors cannot help but be impressed.

If the point somehow escapes them, they will be reminded by the prosecutor at final argument:

Developer and Expert had no reason to lie. They knew they could not be prosecuted if they told the truth. They had absolutely nothing to lose by telling the truth. Judge \_\_\_\_\_'s order made it clear to them. They were told the only way they would be prosecuted was if they told a lie. And that is the same order they were given before they appeared before the grand jury that returned this indictment.

In setting out this scenario, it is not contended that Expert is lying while Commissioner is truthful. The point is that the case against Expert for obtaining and keeping the money was just as strong as, if not stronger than, the bribery case against Commissioner. Expert was the witness and Commissioner the defendant because the prosecutor so decreed. Once the prosecutor determined his priority, the pieces fell in place. The power of the prosecutor in this situation is immense.

Testimony such as Expert's is inherently unre-

<sup>9</sup>Questions and answers taken from trials conducted in the Northern District of Illinois, Eastern Division, *e.g.*, *United States v. Bishop*, Crim. No. 74-137, at 4-6 (N.D. Ill., jury trial, not guilty, Nov. 25, 1974, indicated Nov. 22, 1974).

liable. It is, in effect, purchased. The government gives a reward and the seller-witness knows that. In return, he usually is smart enough to know what is expected of him, especially after conversations with an agent or prosecutor. There is no requirement in law or practice that the immunized witness be corroborated in matters material to his testimony. This is not to say that agents and prosecutors tell a witness to lie. Most really believe what is told them by people like Expert. They want to believe, and that which fits the pre-ordained theory is accepted. That which is inconsistent with the theory is rejected.

THE WITNESS WHO AT FIRST SAYS "NO"  
BUT LATER SAYS "YES"

Some people, for various reasons, resolutely set themselves against the idea of testifying on behalf of the government. But later, after the immunity power is felt, they have a change of heart. The best example of that occurred during the Chicago Avenue police investigation that eventually resulted in *United States v. Braasch*.<sup>10</sup> The government had information that tavern owners in the district were making monthly payoffs to police officers as a kind of protection. Three of the officers who allegedly ran the "club" were subpoenaed to a grand jury. They refused to testify, before and after being granted use immunity. Each went to the Cook County Jail for violating the order to testify, their term to be the life of the grand jury or to the moment when they decided to answer questions. Life in the County Jail took its toll. Each man struck a bargain: freedom, no prosecution, in return for being a government witness. The indictment resulted. They testified against fellow officers. With a few exceptions, the policemen who were convicted had played minor roles in the shakedown. Mostly, they were in the "go-along" category. The three club-leaders went free.

The jury thought the testimony was reliable, but the machinery that brought it about must at least make one pause to consider. First, a prosecutor decided he needed the testimony. Then, the steps mandated by the statute were taken. The three men, after refusing to testify, ended up in the Cook County Jail, an unpleasant place by any standards. They were told, in effect, talk or stay there for 18 months.

Lawyers are trained to believe that beating people and coercing them psychologically in order to get statements violate the law and our sense of decency. Basic to our distaste for those kinds of tactics is that they result in unreliable evidence. The fact that the

three Chicago Avenue witnesses were coerced by a court order does not change the nature of what happened to them. Court orders, like blackjacks, can be irrational and inhumane.

One of the most famous cases ever tried in the Northern District of Illinois involved a man who did not become the "star" government witness until *after* he was indicted. William Miller was named in the indictment with Otto Kerner and Theodore Isaacs.<sup>11</sup> His negotiations with the government before indictment were unsuccessful. After he was charged the negotiations continued, and an agreement finally was reached: dismissal from the case in return for his "truthful" testimony. The agreement was contained in a letter from the United States Attorney.

A reading of the trial transcript leads to the conclusion there was no case without Miller's testimony. If that is accurate, why then was the indictment returned? One might conclude, as I do, that the purpose was to recruit Miller as a government witness. If that was the strategy, it was successful.<sup>12</sup>

There are other ways witnesses can start out unfriendly to the prosecutor's theory, yet end up testifying for the government. For example, assume old friend Expert had made a statement to the IRS agent denying he received any cash from Developer. Or perhaps he made his denial under oath at the grand jury. In either case, the prosecutor makes it clear he is convinced Expert has made a false statement, since he already has Developer's testimony about the \$50,000 payment. Expert is in a dilemma. He knows he faces prosecution for his denial. If he changes his story, to be consistent with that of Developer, nothing will happen to him. He will gain approval of the people who procure the indictments from grand juries. After obtaining a promise of immunity, Expert changes his story to fit that of Developer.

Expert's second story is not necessarily untrue. The point is that the change was brought about because the prosecutor had decreed the first version to be false. He was ready to support that decision with the tremendous prosecutorial strength of the government.

THE WITNESS WHO AT FIRST SAYS  
"NO" AND MEANS IT

Some people never do become government witnesses, no matter how hard the prosecutor tries.

<sup>11</sup> *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

<sup>12</sup> The author represented Theodore J. Isaacs in the district court.

<sup>10</sup> 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

There is the case of Lennie Patrick, an alleged hoodlum. Over his objection, after immunity was imposed by court order, he testified at a grand jury. As a result, a Chicago police lieutenant was indicted on income tax charges. But, at trial, Patrick refused to testify, despite an immunity order from the trial judge. The lieutenant was acquitted, but Patrick was proceeded against pursuant to rule 42(b) of the Federal Rules of Criminal Procedure. He received a four-year sentence for his refusal to testify. The case is on appeal at this writing.<sup>13</sup>

Something else happened to Patrick before the lieutenant's trial. As a result of his three immunized grand jury appearances, the Internal Revenue Service made an \$835,558 jeopardy assessment against him for unpaid gambling taxes. His lawyers reminded the Court of Appeals for the Seventh Circuit that the Supreme Court in *Kastigar*<sup>14</sup> had assured an immunized witness that his testimony could not be used against him. The court of appeals answered by holding that the immunity applies only to criminal proceedings. The assessment is civil. Patrick was stuck.<sup>15</sup>

Rewards for friendly witnesses, however, have gone beyond promises of non-prosecution. The tavern owners who have testified in police cases such as the Chicago Avenue trial have received added protection. Their immunity orders extend to city or state license revocation proceedings.<sup>16</sup> In a recent case, a lawyer-witness not only received immunity, but gained a court order stating that his compelled testimony could not "be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment."<sup>17</sup> In other words, a federal judge told the Illinois Supreme Court it could not use the lawyer's testimony in any disciplinary proceedings. At trial, the lawyer told how he bribed a county commissioner to obtain zoning changes.<sup>18</sup>

At that same trial, the defense found a witness who had told the prosecution something that would have been helpful to the accused, but the witness told the defense lawyers he would invoke the fifth amendment. The government then was asked, but refused,

to request use immunity for the defense witness. The government had made its choice. It would believe its own witnesses, and there would be no immunity for someone who contradicted them.

The government has another technique for using the immunity statute to pry testimony from unwilling witnesses. After a man is convicted of a crime and is sent to the penitentiary he is brought back, placed before a grand jury, and immunized. If he refuses to testify, he is in civil contempt and is sent to a local jail for the life of the grand jury. His original sentence is interrupted and does not begin to run again until he purges himself of the contempt or the grand jury is disbanded. This procedure was upheld in *Anglin v. Johnston*.<sup>19</sup> There is an obvious cruelty involved in the sentence-interruption procedure. Consider the pressure that kind of technique puts on a man to conform his thoughts and words to the desires of his questioner. For those who resist and are subjected to longer incarceration, present law does not provide for any kind of meaningful judicial review.

#### HOW TO DEAL WITH AN IMMUNIZED WITNESS

The foregoing represents some of the ways people come into contact with the government's immunity powers. All prosecutors do not do all those things all of the time, and there is no intent to demean or attack the conduct of any specific United States Attorney. But prosecutors have the *power* to do these things. The point is that there are no real controls on their behavior, except self-restraint. That is not enough. One must consider, warily, the existence of power and its possible exercise.

Aside from the philosophical implications arising from the immunity power, there is, for criminal defense lawyers, the more immediate and practical problem of how to deal with the immunized government witness at trial. The defense lawyer will have to make the jury understand the way in which the witness was created and the reasons why he therefore is unreliable. It should be noted at this point that it is easier to write about this task than it is to accomplish it in a real courtroom.

There is a theme to play for the jury. It begins in the opening statement, continues through the cross-examination, and reaches a crescendo in the final argument. It is that of a tainted witness with a good

<sup>13</sup> *United States v. Patrick*, No. 75-2014 (7th Cir., heard Apr. 14, 1976, filed Nov. 4, 1975).

<sup>14</sup> *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>15</sup> *Patrick v. United States*, 524 F.2d 1109 (7th Cir. 1975).

<sup>16</sup> See note 6 *supra*.

<sup>17</sup> *In re John Daley*, Grand Jury No. 71-3567 (N.D. Ill., order dated July, 1974).

<sup>18</sup> *United States v. Bonk*, Crim. No. 75-88 (N.D. Ill., jury trial, not guilty, June 6, 1975, indicted Feb. 13, 1975).

See also, *In re Bonk*, No. 75-1925 (7th Cir., decided Oct. 29, 1975) (affirming district court's contempt order against Bonk for declining to answer before the grand jury nine questions involving matters for which he had been previously acquitted).

<sup>19</sup> *Anglin v. Johnston*, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975).



reason to lie. He has done something wrong, and to extricate himself he has sold a story to the government. Once the prosecution indicated acceptance of the story, the wrongdoer-seller has a vital interest in repeating that same story to the jury. He knows that as long as he sticks with that version no harm can befall him. After all, it is the prosecutor-buyer who will determine the fate of his witness.

#### THE OPENING STATEMENT

The defense lawyer who knows he will be facing one or more immunized witnesses never should waive opening statement. Reasonable men will differ on how much to tell the jury, but after extensive ordeals by fire I have concluded that the immunity issue ought to be met head-on. Consider the following:

The star government witness, \_\_\_\_\_ will tell you how he betrayed his trust, sold out his badge and the public, extorted money from small businessmen and told lies, all for his own personal gain, for his own selfish purposes. You will hear him say he passed some of that money along to my client, \_\_\_\_\_. The evidence will show that when the witness was threatened with indictment, realizing the danger he was faced with, he began bargaining with the government, again for his own personal gain, for his own selfish purpose. The evidence will show he concocted a story of how he paid money to my client . . . and the evidence will show he did that to get himself off the hook. You will see that he sold his false story to the prosecution, a story—the evidence will show—that includes meetings and conversations that never took place. You will hear that the witness has immunity from prosecution, that he will not be charged with all the things he has done, but that he can be charged with perjury for testifying falsely. The evidence will show \_\_\_\_\_ has no fear of being charged with perjury, because he has sold his phony story to a willing listener, the prosecution. You will see the deal has been made, and all that \_\_\_\_\_ must do to save himself is to tell the same story to you.

Of course, the defense lawyer who makes that statement must be prepared to back up his words.<sup>20</sup> The jury should discern from the defense lawyer's opening statement just what he thinks of the government witness and the way in which the witness was created and nurtured.

<sup>20</sup> Some judges, however, are quite particular about controlling opening statements which sound too much like final argument. See *United States v. Dinitz*, \_\_\_ U.S. \_\_\_, 96 S.Ct. 1075 (1976), in which the Court indicates that the purpose of the opening statement is to summarize the facts the evidence will show and state the issues, not give personal opinions.

Since the witness will testify to meetings and conversations, the jury should know in advance there will be evidence that those meetings and conversations never took place. The jury should not be allowed to hear the witness's testimony without first being made aware that its truth will be challenged. Finally, promising that a defendant will testify is not ordinarily a good idea. Hopefully, a major portion of the defense lawyer's purpose can be reached during cross-examination.

#### CROSS-EXAMINATION

Many of these prosecution witnesses, before making their separate peace with the government, have made statements to agents or grand juries that are at odds with their trial testimony. But the defense lawyer must be wary of proving too much. There is a trap involved. For example, when the witness is forced to admit in great detail his prior lies or misconduct, he then might be able to convince the jury all of that took place before his personal reformation. He was bad, now he is good. He lied, but now he is telling the truth.

The trap is especially deadly when the defense lawyer goes into detail about a prior "false" statement that exculpated the defendant along with the witness. For example, if the witness told a grand jury he never paid money to the defendant, but now he says he did pay off, it is silly to take the position that all the first testimony was false. That would mean he is telling the truth at trial. The point to make for the jury is that his current story is false, that he is telling it for reasons of his own, and that he knows he never will be charged with perjury as long as he sticks with it.

A witness's motivation and expectations are legitimate areas of inquiry.<sup>21</sup> Questions directed to these areas should be framed in a way that tightly controls the scope of answer. "Yes", "No," and "I don't know" are the desired answers. Unfortunately, witnesses do not always follow scripts, for the cross-examiner at least. What follows is a proposal for the cross-examination of a police officer who has testified he lied to the grand jury when he denied taking bribes or paying money to the defendant. The selection is lengthy, but must be so in order to convey the necessary elements. Please note that some of the questions are risky, and others may not survive objection.

<sup>21</sup> *Davis v. Alaska*, 415 U.S. 309 (1974); *United States v. Haggett*, 438 F.2d 396, 399 (2d Cir. 1971); *United States v. Padgent*, 432 F.2d 701, 705 (2d Cir. 1970); *Beaudine v. United States*, 369 F.2d 417, 423 (5th Cir. 1966); *United States v. Masino*, 275 F.2d 129, 132-33 (2d Cir. 1960).

*Setting the Tone*

Q: When did you become a police officer?

A: January of 1960.

Q: When you became a police officer, you took an oath, didn't you?

A: Yes, sir.

Q: Did that oath state, "I...do solemnly swear to uphold and defend the Constitution of the United States of America and the State of Illinois, that I will faithfully enforce the laws of the State of Illinois and City of Chicago, and that I will protect life, liberty and property to the best of my ability, so help me God?"

A: Yes, sir.

[Lawyers and public officials ordinarily take some kind of oath.]

Q: Did you understand that that oath was going to be binding upon you throughout your career as a police officer?

A: Yes, sir.

Q: You never forgot during your career as a police officer that you had taken that oath, did you?

A: No, sir.

Q: You violated that oath, didn't you?

A: Yes, sir.

Q: Through the years you were a police officer you violated it many times, didn't you?

A: Yes, sir.

Q: You violated your oath because doing so was beneficial to you, is that correct?

A: Yes, sir.

Q: And you violated your oath when there was something for you to gain, didn't you?

A: Yes, sir.

Q: You violated your oath to help yourself, didn't you?

A: Yes, sir.

Q: You were willing to violate your oath whenever it was useful to you, isn't that correct?

A: Yes, sir.

Q: As a Chicago police officer you were bound and obligated to follow the rules and regulations of the Chicago Police Department, were you not?

A: Yes, sir.

Q: And one of those rules and regulations prohibited you from taking money from any citizen, didn't it?

A: Yes, sir.

Q: Another of the rules and regulations of the Chicago Police Department required that you report any other police officer you found violating the law, isn't that correct?

A: Yes, sir.

Q: You didn't do that, did you?

A: No, sir.

Q: It was to your advantage to violate those rules and regulations, wasn't it?

A: Yes, sir.

Q: You violated those rules and regulations to suit

your own purpose, didn't you?

A: Yes, sir.

*The Prior "False" Testimony*

Q: You appeared before the grand jury on December 1, 1975, didn't you?

A: Yes, sir.

Q: And that was a large room with a number of men and women listening to your testimony, was it not?

A: Yes, sir.

Q: Before you testified you raised your right hand to God and swore to tell the truth, didn't you?

A: Yes, sir.

Q: That was the same oath you took in this courtroom today, wasn't it?

A: Yes, sir.

Q: At that grand jury you were asked questions, by Mr. \_\_\_\_\_ [prosecutor], weren't you?

A: Yes, sir.

Q: Do you say now that you lied under oath to that grand jury?

A: Yes, sir.

Q: You did so because you thought you would gain some advantage for yourself, didn't you?

A: Yes, sir.

Q: You testified the way you did in order to help yourself, didn't you?

A: Yes, sir.

Q: You knew then what perjury was, didn't you?

A: Yes, sir.

Q: You know today what perjury is, don't you?

A: Yes, sir.

Q: Are you a perjurer?

A: Well, I lied to the grand jury.

Q: You know that makes you a perjurer, don't you?

A: Yes, sir.

Q: Have you been charged with perjury?

A: No, sir.

*The Making of the Witness*

Q: After you appeared before that grand jury you had meetings with Mr. \_\_\_\_\_ [prosecutor] and Agent \_\_\_\_\_, didn't you?

A: Yes, I did.

[At this point the witness should be asked for details of times, places and dates of those meetings.]

Q: During those meetings you were told you could be charged with certain crimes, were you not?

A: Yes, sir.

Q: You didn't want to be charged, did you?

A: No, sir.

Q: During those discussions the prosecutor told you what he believed you had done, didn't he?

A: Yes, sir.

Q: It was during those meetings with the prosecutor that you decided to change your story, wasn't it?

A: Yes, sir.

Q: And you did that to avoid being charged, didn't you?

A: Yes, sir.

Q: During those meetings you were told that if you changed your story you would be given immunity from prosecution, weren't you?

A: Yes, sir.

Q: And you changed your story in order to gain an advantage for yourself, didn't you?

A: Yes, sir.

Q: You changed that story to help yourself, didn't you?

A: Yes, sir.

Q: You knew before you changed your story that the prosecutor wasn't satisfied with the answers you gave to the grand jury, didn't you?

A: Yes, sir.

Q: After you changed your story the prosecutor agreed to give you immunity, didn't he?

A: Yes, sir.

Q: And after you changed your story you knew you would not be charged with a crime, didn't you?

A: Yes, sir.

Q: You knew you would not be charged with a crime as long as you stuck with that same story, didn't you?

A: Yes, sir.

Q: You have not been charged, have you?

A: No, sir.

Q: You are named in this indictment as an unindicted co-conspirator, aren't you?

A: Yes, sir.

Q: It is to your advantage to be named as an unindicted co-conspirator, is it not?

A: Yes, sir.

Q: You don't expect to be convicted for any of the crimes you committed as a police officer, do you?

A: No, sir.

Q: You don't expect to spend any time in a penitentiary, do you?

A: No, sir.

Q: Did you file federal income tax returns for the years 1967 through 1970?

A: Yes, sir.

Q: When you signed these returns you certified under pain and penalties of perjury that they were true and correct, did you not?

A: Yes, sir.

Q: Did your tax returns include the income you say you received from tavern owners?

A: No, sir.

Q: Have you been prosecuted for filing a false income tax return?

A: No, sir.

Obviously, the cross-examiner does not always get the answer he is seeking. At times, a witness will throw curves. For instance, when you ask about his conversations with the prosecutor, he might say:

A: He asked me to tell the truth.

Or, when you ask the witness about whether he expects to be charged, he might say:

A: That's up to this jury.

If those things happen the defense attorney might ask:

Q: Well, the prosecutor asked you questions at the grand jury on December 1, 1976, didn't he?

A: Yes.

Q: And you knew he wanted you to tell the truth then, didn't you?

A: Yes.

Q: But you didn't do that, did you?

A: No.

Q: After that grand jury you learned he wasn't satisfied with your testimony, didn't you?

A: Yes.

Q: So you went to see him, didn't you?

A: Yes.

Q: He didn't force you to talk to him, did he?

A: No.

Q: You went there of your own free will, didn't you?

A: Yes.

Q: And then you had those several meetings with him that you told us about, didn't you?

A: Yes.

Q: And you kept meeting with him until you believed he was satisfied with your story, didn't you?

A: Yes.

Q: In fact, he arranged for your story to be written down in a statement, didn't he?

A: Yes.

Q: And that statement reflects your testimony here today, doesn't it?

A: Yes.

Q: And when you were having these meetings with the prosecutor you knew that he was the one who asks questions at the grand jury, didn't you?

A: Yes.

Q: And as an experienced police officer you knew that it is the prosecutor who decides which witness will appear at the grand jury, didn't you?

A: Yes.

Q: And you knew that it was the prosecutor who presents evidence to the grand jury, didn't you?

A: Yes.

Q: So you knew that if the prosecutor didn't present evidence about you that you wouldn't be indicted, isn't that correct?

A: Yes.

Q: And you haven't been indicted, have you?

A: No.

Q: And you know that if you stick to your latest story you won't be indicted, isn't that correct?

A: Yes.

There will be cases where the witness, instead of receiving immunity from prosecution, has plead guilty to a lesser charge. Ordinarily, he will not be sentenced until he completes his testimony. It is imperative that the cross-examiner obtain the transcript of the guilty plea proceeding. It often will reveal statements inconsistent with his testimony. If you are not able to obtain a transcript, you can try to improvise from the questions set out above, developing the proposition that the agreement was reached with the prosecution during several of the meetings described in the testimony. You might add:

Q: Part of your agreement was that the prosecutor would recommend probation, was it not?

A: Yes, sir.

Q: As you testify here today you hope for that sentence, isn't that correct?

A: Yes, sir.

Q: When you plead guilty, Judge \_\_\_\_\_ told you the charge of \_\_\_\_\_ carries a sentence of \_\_\_\_\_ years, didn't he?

A: Yes, sir.

Q: You knew at that time that the original charge of \_\_\_\_\_ carried a \_\_\_\_\_ year sentence, didn't you?

A: Yes, sir.

[This might not impeach the witness but at least it will let the jury know the length of years the defendant faces should he be convicted.]

Q: You began talking to the prosecutor because you didn't want to go to jail, isn't that correct?

A: Yes, sir.

Q: And you still don't want to go to jail, do you?

A: No, sir.

#### FINAL ARGUMENT

Final argument is the defense lawyer's last opportunity to bring home to the jury the message he has been sending throughout the trial. Again, he must establish the buyer-seller relationship between the witness and the prosecution. There is a fine line to walk here because it is dangerous to accuse a prosecutor of knowingly using perjured testimony. Not only do you create a lifelong enemy, but since he has the last word before the jury he can remind the jurors of his dedication to decent law enforcement

and to pursuit of truth and justice on behalf of the government.

The defense lawyer is better off emphatically stating to the jury that he is not, absolutely not, accusing the prosecutor of knowingly putting on false testimony. It is simply that the witness was so devious and so consumed by self-interest that he fooled the prosecutor just as he is attempting to fool the jury. The prosecutor, after all, was an eager buyer. The witness was selling, and he would say anything he thought the buyer wanted to hear to get himself off the hook.

During one of his final arguments the prosecutor will say that he really regretted having to use someone like \_\_\_\_\_ [his witness], but how else could he root out the cancer of corruption that is represented by the defendant? It is for that reason, the prosecutor will say, that his witness received immunity. He then will underline the indisputable fact that the witness's grant of immunity does not cover perjury.

The defense lawyer must anticipate that argument by tracing the way in which the witness was created. Consider the following suggestions:

The prosecutor argues he had to arrange immunity from prosecution for \_\_\_\_\_ to take out a cancer. But what worse disease can there be than to use the word of a man like \_\_\_\_\_

\_\_\_\_\_ to unfairly and wrongfully convict someone of a serious crime? The prosecutor says he had no choice, that he had to take his witness as he found him. That's not so. He had a choice. He could have said, "We are not going to try to destroy someone solely on the word of \_\_\_\_\_."

Well, in law as in life, you make decisions. And one decision you have to make is—how high a price do you pay for what you get? If you force someone to give you something by threatening him with indictment and jail, how reliable is it? If you dangle a man's freedom in front of him he will say anything he thinks you want to hear. \_\_\_\_\_

has learned his lesson well. He doesn't want to be charged and he doesn't want to go to jail so he tells the prosecution a series of stories; when he finds one that he knows they want to hear, and when it is accepted by them, he comes here and repeats it to you. Why not? He has everything to gain and nothing to lose, because he knows that as long as he sticks to the story he will not be charged. If he did change it now the buyer would call off the deal, and terrible things, such as indictments, would happen to him. He has to keep selling. Like any good salesman, \_\_\_\_\_ knows his customer. He knows what his customer is looking for, and now he's trying to sell the product to you. Are you buying? If \_\_\_\_\_

\_\_\_\_\_ came to your house to sell you something would you risk 2¢ on his word knowing what you know about him? You are being asked to risk much more in this case.<sup>22</sup>

There are numerous possibilities and each lawyer will have to decide for himself which approach to take. It is my conviction that the immunized witness must be met offensively and with indignation. By communicating that indignation to the jury in a professional and responsible manner, the lawyer will be performing a service for his client.

#### SUGGESTIONS FOR CHANGE

I do not take the view that all immunity is wrong all the time. There are occasions when immunity can be a reasonable prosecutorial as well as defensive tool. But my suggestion is that immunity is too powerful a weapon to entrust to prosecutors and their sense of self-restraint. *Kastigar* and its progeny make fruitless any attempt to seek change in the courts. The remedy is in the Congress. Congress should establish binding guidelines for immunity grants. These guidelines would extend to trials, grand jury proceedings, and administrative and congressional hearings. The courts would be charged with the duty of enforcing them.

I can suggest at least some of the standards which should be imposed. The government, at a fact hearing, should be required to show the following:

(1) That the grant of immunity is in the public interest. That is, the government ought to make a showing that the one to be immunized is not more blameworthy or more culpable than the one he will talk about. I have mentioned the three Chicago Avenue club-leaders who went free while their go-along associates received jail sentences. The question is also raised in some of the extortion cases involving public officials. Who is more culpable: the millionaire industrialist who arranged for and paid

relatively small bribes to make big money, or the salaried public official who cannot resist the temptation? Indicting the public official is easier and makes more headlines, but is it good policy? The question is important and merits serious debate.

For those who say immunity is the only way to obtain evidence against wrongdoers, a reading of the Watergate Special Prosecution Force Report is instructive.<sup>23</sup> Not only did the Watergate prosecutors feel the witness who pleaded guilty was more credible to a jury than the immunized witness, but,

plea bargaining is probably a better basis than a grant of immunity for assuring that a witness does not fabricate information he thinks the prosecutors "want to hear" in his offer of proof, since he would expect the offer to result only in a negotiated guilty plea rather than in his freedom. *Most important, it avoided the unfairness of permitting one guilty of serious misconduct to avoid all liability.*<sup>24</sup>

The special prosecutors recognized that plea bargaining is more cumbersome than immunizing a witness and getting his immediate cooperation. "But the result of the practice was that no one whom the prosecutors could prove had major responsibility for criminal conduct was immunized on WSPF's initiative."<sup>25</sup>

In the plea bargain, the man who does the corrupting of the official would make a public and legal admission of his criminal conduct. Here one might pause to consider whether the public is served by protecting the license of the lawyer who admits that on several occasions he paid bribes to a county commissioner. That is a very large reward to pay for a man's testimony. Such a witness has everything to gain from accommodating his testimony to the expectations of his protector. Beyond that, consider what happens to the public view of a profession that contains a self-confessed corruptor of public officials.

(2) That there is no countervailing legal interest. Here, one might inquire into whether the anticipated

<sup>22</sup> As a different approach, the reader should consider the following:

I suppose we should be charitable and have pity for \_\_\_\_\_. He is struggling to save himself. He's acting out of that most powerful of forces—fear. Fear of indictment, fear of jail. At one time or another we all act out of fear, even the child who insists on a nightlight grows up to have other fears. But decent people draw a line. They, say—I'll go this far and no further. \_\_\_\_\_ has gone way beyond that line. He has no sense of decency and that is why pity comes hard. His lies threaten to destroy a good and decent man. And he is trying to use you people to do it. I know you will refuse to be used that way.

<sup>23</sup> WATERGATE SPECIAL PROSECUTION FORCE REPORT ch. 2 (Policy and Procedure in the Investigation and Prosecution of Government Officials) (1975), reprinted in 12 CRIM. L. BULL. 26 (1976).

<sup>24</sup> *Id.* at 39 (emphasis added). On April 18, 1976, Samuel K. Skinner, United States Attorney for the Northern District of Illinois, said his office would "severely curtail" the granting of immunity from prosecution to government witnesses. Now, he said, "We're holding out for plea agreements." Chicago Tribune, Apr. 19, 1976, § 1, at 6, col. 1.

<sup>25</sup> WATERGATE SPECIAL PROSECUTION FORCE REPORT, *supra* note 23, at 39.

area of questioning violates first amendment rights. At least, the right to raise the issue would serve to deter the kind of prosecutor who used the immunity statutes to harass and terrorize alleged radicals and radical sympathizers in the early 1970's.

This is an appropriate place to consider the plight of Charles Bonk, the county commissioner who faced payoff charges in the Northern District of Illinois.<sup>26</sup> Bonk was acquitted, despite the testimony of two immunized lawyers. He was then given a grand jury subpoena, immunized, and ordered to testify. A textbook issue arises: how should a government treat its citizens? The real impact on Bonk is one of harassment and continuing anxiety.

(3) That the grant is sought for the witness's information and not for some other purpose. Implicit in the seeking of a grant of immunity is the government's good faith. At a hearing, a witness whose testimony is sought ought to be given the chance to show that the government intends some other purpose. For instance:

(a) The government may be immunizing a potential defendant in order to obtain what is, in effect, a discovery deposition. Under present law, there is nothing to stop a prosecutor from calling in a defendant in a pending case, putting him before the grand jury, immunizing him, and asking him questions about the transaction with which he already has been charged. That practice was approved in *United States v. Goldberg*,<sup>27</sup> where the Court noted that the immunity statute made no exception for defendants in pending cases. The potential mischief is obvious.

(b) The immunity grant may really be a strategy move to impress the jury. There are some prosecutions where the facts are basically uncontested, where the issue really is whether, given those facts, a federal crime has been committed. In a recent case in the Northern District of Illinois, a Chicago alderman was charged with violating the mail fraud statute by voting on matters in which he held a concealed interest.<sup>28</sup> Very little was in dispute. The defense claimed that the facts did not add up to a crime. The jury heard evidence from witnesses who had been granted immunity from prosecution. In effect, it received the impression that a judge believed a crime had been committed. Why else would he grant immunity? The message, admittedly, is less than clear, but jurors are finely tuned to judicial signals. A de-

fendant in such a case ought to have the right to raise the issue.

(c) The immunity grant might be an effort to punish a witness for non-cooperation, or to set him up for a potential false statement charge.

The other standards which are suggested are self-explanatory:

(4) There is a need for the testimony sought and no other reasonable way to get it. (5) A statement should be made of the specific area of inquiry and the nature of the relevant questions to be asked in that area. (6) The government should state what it expects the testimony to be and how it comes by that expectation.

In sum, the government must show it is engaged in a good faith attempt to gain information. I would bar any attempt to immunize an imminent or present defendant against his will. For a voluntary witness, the kind who seeks immunity, I would require corroboration of material parts of his testimony before it could be used.

Some proceeding ought to exist where the defense might establish to a judge's satisfaction that the interests of justice would be served by immunizing a potential defense witness. A defendant does not have the constitutional right to compel the government to seek immunity for a defense witness who has exercised his privilege against self-incrimination.<sup>29</sup> The hearings at which these standards would be litigated could be confidential, the record sealed until such time as secrecy would not be needed. The right to counsel must be applicable.

The list of guidelines is not exhaustive, but it is a beginning. Admittedly, the hearings suggested would make the prosecutor's task more laborious, but immunity without strict legislative and judicial control is wrong and dangerous. It imperils our traditional notions of individual dignity and freedom.

#### CONCLUSION

For purposes of analysis and inquiry, immunity grants were separated into two categories—voluntary and involuntary. My concern with the voluntary witness, the one who seeks governmental protection, is his impact on the integrity of the fact-finding process. To understand how he becomes a witness is to understand the danger he poses. This is not to

<sup>26</sup>See note 18 *supra*.

<sup>27</sup>472 F.2d 513 (2d Cir. 1973).

<sup>28</sup>*United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3532 (U.S., Mar. 22, 1976). (No. 75-867). See also *United States v. Keane*, 375 F. Supp. 1201 (N.D. Ill. 1974).

<sup>29</sup>*United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975). But see *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976) for the possibility of a due process challenge when the government immunizes its witnesses but refuses to seek immunity for defense witnesses.

say or even suggest that all witnesses who seek and obtain immunity are liars. But the possibility of false testimony must be considered.

The involuntary witness arouses different concerns although he, too, might be tempted to fit his coerced testimony to what he thinks his questioner wants to hear. He is the witness who has asserted his privilege against self-incrimination but must testify anyway. Although it is too late in the day to say that Congress cannot constitutionally require that testimony, we may still contemplate Mr. Justice Goldberg's view of the privilege:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusa-

tion, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . . . It is "an expression of the moral striving of the community . . . a reflection of our common conscience. . . ."<sup>30</sup>

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<sup>30</sup>Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 56 n.5 (1964) (citations omitted).