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William J. Bauer

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REFLECTIONS ON THE ROLE OF STATUTORY IMMUNITY IN THE CRIMINAL JUSTICE SYSTEM

WILLIAM J. BAUER*

HISTORICAL PERSPECTIVES

The feeling of antipathy towards the witness who is involved in illegal activity and testifies against his fellow culprits precedes modern history. Western civilization has been taught to despise the "toady," the informer, the spy, the turncoat and the tattletale. In every instance, the witness granted immunity from prosecution is himself guilty of crime—why else seek immunity? Before an intelligent discussion of the right or wrong of the grant of immunity —or whether it is a prosecutorial tool that our system should continue to condone—it is worth a backward look at history to determine how the "accomplice witness" fell into such universal disrepute.

The great historical references to vile men who betrayed their companions all involve people who have, for one reason or another, sold out a "holy" cause. Judas Iscariot, one can surmise, was a patriotic citizen if judged from the standpoint of the loyal Romans. Benedict Arnold came to his senses and returned as a loyal British subject, according to British history of the American Revolution. "The Informer," so despised by O'Flaherty, sold out Irish freedom, but British history would treat him more kindly. These three, and thousands of others, had the bad luck of selecting the losing side; the holy winners have damned them through history. Conversely, losers have unleashed contempt on spies and turncoats that picked the winners. Does anyone wonder how the British viewed Nathan Hale? Or, for that matter, the whole group of men we call "our Founding Fathers"?

The fact is that our hatred for and detestation of the accomplice witness (or dirty spy) is rooted in our belief in the *cause* they betrayed, not the act itself. This lesson is taught so strongly that we frequently fail to recognize that it is *not* a betrayal of the "cause" (*i.e.*, society) to seek the testimony of one guilty man in order to bring to justice other criminals. Further, the use of the informer as a weapon in modern criminal practice under the rule of law is an attempt to prevent the destruction of society, a method of *preserving* the "holy cause," or justice, and not a betrayal of it.

From the viewpoint of the crime syndicate, the "squealer" may be a reprehensible man; from the viewpoint of society he is, for whatever reason, rendering a service to all the rest of us. So the informer, spy, or accomplice witness is to be detested and hated only if one is willing to accept the fact that the men "betrayed" are not engaged in an act or acts that are socially destructive, and probably only if the act or acts are socially *constructive*.

Once we have crossed the hurdle of a school-boy's reluctance to accept the tattle-tale and admit that great social good can and does flow from the use of informants,[1] we can advance to the more perplexing problem: What inducements are permissible or acceptable to acquire accomplice testimony? We can, I assume, rule out torture, threats or drugs.[2] We can also rule out any invasion of constitutional rights such as imprisonment without trial or forfeiture of estate. So we must seek other routes.

One of the most common inducements—and one generally accepted—is the plea bargain. The prosecutor and/or the judge will be less severe in punishment *if* the offender cooperates in present or future trials against other defendants. For purposes of arriving at the final conclusion, it makes no difference whether the bargain goes to the charge or the punishment; the effect is exactly the same. Another inducement is the offer of safety: the government

* J.D. DePaul University 1952; United States Attorney, Northern District of Illinois 1970–1971; Judge of the United States District Court, Northern District of Illinois 1971–1975; presently serving as Judge of the United States Court of Appeals for the Seventh Circuit. The author wishes to acknowledge the assistance of Robert McAllister, J.D. Loyola University 1974, who willingly devoted much time and effort in the preparation of this article.

[1] "Deep Throat"—an informer—really had more to do with the Watergate exposé than research investigation. For that matter, Judge Sirica did not induce the burglars to "talk" by any ardent lecture on the morality of "telling all."

[2] *See* Lynumn v. Illinois, 372 U.S. 528 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Ashcroft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

agrees to protect the informer against reprisals from his companions in crime.[3] But perhaps the most controversial is the present topic of discussion: the grant of immunity from prosecution.

The tradition of compelled testimony runs deep in legal history. Professor Wigmore noted that as early as the fifteenth century recalcitrant witnesses were ordered to testify against their neighbors by use of a summons procedure.[4] The Statute of Elizabeth,[5] on the books in the sixteenth century, authorized courts to compel testimony and punish witnesses who refused to testify after service of process; that judicial power still is firmly entrenched in our legal system today.[6] The modern day concept that every citizen has a duty to testify and that the government is entitled to every man's evidence[7] has ancient origins. In 1612 Lord Bacon stated that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[8] Today, in a modern democracy not even a citizen with the equivalent of a king's stature can avoid giving his evidence.[9]

The only protection a citizen has against being compelled to come forward and tell all is the fifth amendment.[10] Its adoption was in large part caused by the public outrage in England over the use of the Star Chamber and the whipping of witnesses who refused to testify. Seventeenth century England had already adopted a common law privilege of silence, *i.e.*, "no man is bound to answer any question that tends to make him accuse himself, or subject him to any penalties,"[11] which may have been the forerunner of the fifth amendment privilege embodied in the United States Constitution.

The power to compel testimony in the United States was clearly recognized in the Constitution[12] as well as the first Judiciary Act of 1789.[13] However, the co-extensive fifth amendment privilege was never ignored. The privilege against self-incrimination could always be asserted regardless of whether the proceeding was criminal, civil, administrative, or investigative.[14] It guarantees every witness the right to refuse to answer any question that he reasonably believes could be used in a criminal prosecution against him.[15] But it is a privilege only the witness enjoys. It is a personal right which cannot be conveyed to another—generally not even one's lawyer.[16]

In order to protect a witness' fifth amendment privilege while still obtaining evidence necessary to prosecute crime, immunity statutes were devised. A number of statutes were passed by Congress in the nineteenth century granting immunity from crimes revealed by witness testimony.[17] The question of

[3] Frequently, because of the witness' former involvement in organized crime, the government will provide the witness with a new identity, name, employment, and relocation in another part of the country in exchange for testimony. Such action is necessary to prevent reprisals for testifying.

[4] *See* 8 WIGMORE, EVIDENCE § 2190, at 65 (J. McNaughton rev. ed. 1961).

[5] 5 ELIZ. 1, c. 9 § 12 (1562), which reads in the language of the sixteenth century, "An Act For the Punyshement of Suche Persones as Shall Procure or Comit any Ulyllful Perjurye." The statute authorized a penalty and civil action against anyone who refused to testify after service of process and payment of expenses. *See* 8 WIGMORE, EVIDENCE §§ 2190-93 (J. McNaughton rev. ed. 1961). *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

[6] Rule 45(f) of the Federal Rules of Civil Procedure provides:

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed in contempt of the court from which the subpoena issued.

[7] United States v. Calandra, 414 U.S. 338, 345 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

[8] Speech of Sir Francis Bacon, in Countess of Shrewsbury's Case, 77 Eng. Rep. 1369, *as quoted in* 2 How. St. Tr. 770, 778 (K.B. 1612).

[9] *Cf.* United States v. Nixon, 418 U.S. 683, 710 (1974).

[10] U.S. CONST. amend. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This privilege has also been extended to the States. Malloy v. Hogan, 378 U.S. 1 (1964). Throughout its legal history this constitutional prohibition has been a constant source of legal argument, maneuver and sometimes manipulation. *See* E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); Pittman, *The Colonial and Constitutional History of the Privilege Against Self Incrimination in America*, 21 VA. L. REV. 763 (1935).

[11] Trial of Sir John Freind, 13 How. St. Tr. 1, 17 (1696).

[12] U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall . . . have compulsory process for obtaining witnesses in his favor. . . . "

[13] Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 73.

[14] Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

[15] Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159 (1950).

[16] Hale v. Henkel, 201 U.S. 43 (1906) and *In re* January 1976 Grand Jury, Edward M. Genson v. United States, No. 76-1065 (7th Cir., decided Mar. 29, 1976) hold that an attorney has no standing to assert his client's fifth amendment privilege. However, this is not a per se rule, as the court states in *Genson* there is recent conflict among the circuits.

[17] Immunity laws were enacted in 1857, 1862 and 1868. *See* Note, *Compelled Testimony with Immunity: Applying the Standard of Use and Derivative Use*, 27 SW. L.J. 517, 518 (1973).

the scope of immunity was first reviewed by the Supreme Court in the decision of *Counselman v. Hitchcock*[18] in 1892. The Court in a very broad decision found the immunity statute[19] lacking in protecting the witness' fifth amendment privilege against self-incrimination. The Court stated:

> We are clearly of [the] opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege [against self incrimination] conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford *absolute immunity against future prosecution* for the offense to which the question relates.[20]

Because the *Counselman* decision talked in terms of absolutes, Congress reacted by amending the immunity statute to require that a grant of immunity cover "any transaction, matter, or thing,"[21] about which a witness could possibly testify. In *Brown v. Walker*[22] the Supreme Court gave approval to the new, amended immunity statute. Various state and subsequent federal statutes were based on the statute approved in *Brown*.[23] The American criminal justice system thus operated on a concept of transactional immunity for the next seventy-five years.[24]

There are several varieties of immunity. Certain of these—the informal immunity offered by law enforcement agents or the unwritten or non-court approved agreement of the prosecutor not to prosecute—are beyond the scope of this discussion.[25] What is obviously the area of current concern is the compelled testimony of an "accomplice" witness; that is, the stripping of the fifth amendment privilege from a potential witness by granting him, with or without his consent, immunity from prosecution, either general or limited. The general immunity grants a witness freedom from prosecution from any crime that might be covered by testimony elicited from him after the conferring of immunity. The limited "use" immunity simply prevents the prosecution from using the elicited testimony for either investigative leads to incriminate the witness or the testimony itself in any prosecution. Independently developed evidence can still be used to prosecute the witness, even for the crime discussed in the compelled testimony. Obviously even a general grant of immunity does not confer upon the witness a right to lie, and false testimony may still subject the witness to a charge of perjury.[26]

Immunity in the Modern Context

The genesis of today's use of derivative use immunity can be found in *Murphy v. Waterfront Commission*,[27] where the witnesses refused to answer questions despite grants of immunity from state authorities because they believed they would be incriminating themselves under federal laws.[28] The Court prohibited the federal government from using the compelled testimony in a subsequent proceeding. The Court's language was quite noteworthy, Justice Goldberg stating for the Court that

> [We] hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.[29]

The new standard enunciated in *Murphy* was a sharp deviation from the *Counselman* prohibition. *Counselman*, by requiring full or absolute transanctional immunity, prevented any prosecution for a

[18] 142 U.S. 547 (1892).

[19] The statute, Act of Feb. 25, 1868, ch. 13, 15 Stat. 37, provided:

> [No . . . evidence obtained by means of any judicial proceeding from any party or witness . . . shall be given in evidence, or in any manner used against such party or witness . . . in any court of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture . . .

[20] 142 U.S. 585-86 (emphasis added).

[21] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

[22] 161 U.S. 591 (1896).

[23] *See* 8 Wigmore, Evidence § 2281 n.11 (J. McNaughton rev. ed. 1961).

[24] Transactional immunity was consistently affirmed from the time of Counselman v. Hitchcock, 142 U.S. 547 (1892), until the passage of 18 U.S.C. § 6002 (1970), which provided for use immunity. Adams v. Maryland, 347 U.S. 179 (1954); United States v. Monia, 317 U.S. 424 (1943); United States v. Murdock, 284 U.S. 141 (1931); McCarthy v. Arndstein, 266 U.S. 34 (1924); Hale v. Henkel, 201 U.S. 43 (1906).

[25] *See generally* Comment, *Judicial Supervision of Non-Statutory Immunity*, 65 J. Crim. L. & C. 334 (1974).

[26] 18 U.S.C. § 6002 (1970) provides in part:

> [N]o testimony or other information compelled under the order . . . 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.

Cf. Note, *Statutory Immunity and the Perjury Exception*, 10 Calif. W.L. Rev. 428 (1974).

[27] 378 U.S. 52 (1964).

[28] In Malloy v. Hogan, 378 U.S. 1 (1965), the Supreme Court held that the fourteenth amendment required the states to guarantee their citizens the fifth amendment privilege against self-incrimination.

[29] Murphy v. Waterfront Comm'n, 378 U.S. at 79.

criminal act described in the testimony. *Murphy* narrowed the scope so that a witness was not totally immunized. Rather, a witness could not be prosecuted for criminal acts revealed in his testimony so long as the evidence presented against him was not derived directly or indirectly from his compelled testimony.

In 1970 Congress passed the Organized Crime Control Act,[30] which established use immunity on the federal level.[31] Two years later when the Supreme Court approved the new act's adoption of use immunity in *Kastigar v. United States*,[32] Justice Powell stated the majority opinion as follows:

> We hold that such immunity from use and derivative use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader.
>
> . . . The broad language in *Counselman* [requiring absolute transactional immunity] . . . was unnecessary to the Court's decision, and cannot be considered binding authority.[33]

The *Kastigar* decision is buttressed by the principle that a necessary and essential power of government is to compel testimony.[34] That power is only limited by the fifth amendment privilege which, in the words of Justice Douglas, is the "safeguard of conscience and human dignity and freedom of expression."[35] The dissents of Justices Douglas and Marshall record for history the numerous arguments against limiting the scope of immunity.[36] However, for the present,[37] the battle is over; use immunity can be granted in the federal system.[38] Thus, our discussion centers around the proper implementation of use immunity in the administration of the criminal justice system.

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[30] 18 U.S.C. § 6002 (1970) provides:

> 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 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.

[31] The legislative history of section 6002 clearly indicates that Congress intended that the protection provided the individual by a grant of immunity under this statute was to be limited to the using of his compelled testimony against him in a criminal proceeding. That history states:

> Title II is a general Federal immunity statute that will afford "use" immunity rather than "transaction" immunity when a witness before a court, grand jury, Federal agency, either House of Congress, or a congressional committee or subcommittee, asserts his privilege against self-incrimination. It is contemplated that the title will enable effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege; that is, protection against the use of compelled testimony directly or indirectly against the witness in a criminal proceeding.

H. R. REP. No. 1549, 91st Cong., 2d Sess. 32 (1970).

[32] 406 U.S. 441 (1972). *See also* Zicarelli v. New Jersey, 406 U.S. 472 (1972).

[33] United States v. Kastigar, 406 U.S. at 453–55 (footnotes and citations omitted).

[34] Citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 93–94 (1964), Justice Powell states:

> Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. . . . Such testimony constitutes one of the Government's primary sources of information.

406 U.S. at 444 (citation omitted).

[35] *See* Ullman v. United States, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting). *See also* United States v. Kastigar, 406 U.S. at 467 (Marshall, J., dissenting).

[36] 406 U.S. at 462 (Douglas, J., dissenting); 406 U.S. at 467 (Marshall, J., dissenting).

[37] Although the make-up of the Court has changed since Justice Douglas retired, there is little chance that a majority of the Court would require full transactional immunity in the near future. Only Justice Douglas and Justice Marshall dissented in *Kastigar*. Justices Brennan and Rehnquist took no part in the consideration or decision. However, Justice Brennan has previously stated his opposition to use and derivative use immunity in Piccirillo v. New York, 400 U.S. 548, 552 (1971) (Brennan, J., dissenting). Therefore at this time there are only two sitting justices (Brennan and Marshall) who are on record against use or derivative use immunity. Of course, the opponents of use immunity could continue their battle in Congress.

[38] There are a number of transactional immunity statutes that have special applicability to various federal agency and administrative proceedings. When use immunity was added to the federal code it repealed or amended all inconsistent sections of law. Whether all laws providing transactional immunity were repealed is unclear. *See* Act of Oct. 15, 1970, Pub. L. No. 91-452, § 259, 84 Stat. 922. As a practical matter only use immunity is being granted in criminal cases.

The enactment of any immunity statutes stems from the need of the government prosecutor to obtain evidence that is otherwise unavailable. The decision as to which type of immunity to grant rests upon a number of factors that may be present: how badly is the testimony of the proposed witness needed, how strong is the case against the witness, is the witness in some sense a "victim" even though he participated in some criminal activity, and so forth. The obvious example would be the "victim" of official extortion; that is, the citizen who pays a public official either to do his duty or refrain from doing his duty. The witness has, in fact, participated in a bribe, but prosecutorial discretion (a very important consideration in the whole process) may require that the bribe-taker be prosecuted rather than the bribe-giver.

Let me discuss the rationalization for that last statement. A public official who accepts a bribe, regardless of whether it was solicited or offered, has corrupted a public office and violated a public trust. The elected or appointed public official has, in a very real sense, agreed with society—the public at large—to do a competent, honest job for the benefit of all of us. He is, in fact, our agent and representative and acts in the name of the public. When he deals behind our backs for his own benefit, he corrupts us all. He is no more than a traitor, a man who has betrayed his public trust and eroded the integrity of society and government.

This is not to suggest that the bribe-giver is not to be condemned. To participate in public corruption, even as a private citizen, is reprehensible and criminal. Faced, however, with the choice—as frequently happens—of prosecuting a bribe-giver or a public bribe-taker, the public would seem to be better served by the exposure and prosecution of the bribe-taker.

It is not sufficient to suggest that both should be prosecuted; given that option, all prosecution would be easier in the public corruption cases. The fact is, strong evidence may be available that a private citizen has given a bribe (bank records, large cash flow, testimony of employees and the like), but no evidence exists as to *whom* he gave the bribe unless the briber can be compelled to disclose his partner-in-crime. Now, the problem: to prosecute the briber and permit the corrupt official to continue his corruption or pursue the official at the sacrifice of giving the private citizen immunity?

The above bribe case model is frequently encountered, particularly at a federal level. There are more illustrations that require rather painful—and painstaking—scrutiny by the prosecution. For instance, when a small-deal narcotics peddler is apprehended, is it worthwhile to "deal" in immunity in order to obtain testimony against the big wholesaler? When can the government work to obtain, by giving immunity, the testimony of the organized crime "street soldier" in order to convict the bosses who are insulated from the overt acts of criminal conspiracy? When can immunity be granted without doing damage to the system of justice under which we function; that is, when will society's needs best be served by giving a guilty man immunity from prosecution in exchange for testimony against other criminals? These decisions can only be made by a prosecutor of independence and integrity. It is a subjective decision that cannot properly be made by a court or, for that matter, a legislature.

The major problem of course is that a witness or potential defendant who waives his fifth amendment privilege in exchange for immunity walks away a free man while other participants in the crime are convicted on the basis of the immunized testimony. The visceral reaction of the average citizen is usually a feeling of disgust at such an unfair and unjust result created when the witness is allowed to take a so-called "immunity bath."[39] The adoption of use immunity is an attempt to limit the amount of immunity from prosecution a witness must now be given. Use immunity prevents the witness from using a grant of immunity as a shield from all future prosecution for crimes or civil consequences of the crime. The immunized witness may still be prosecuted for the crime so long as

> no testimony or other information compelled under the order (or any other evidence or information derived from such testimony or other information) may be used against the witness in any criminal case . . . .[40]

A witness is prevented from taking an "immunity bath," since a state or federal government may still prosecute if it can demonstrate that the evidence it uses is untainted. All the prosecution need show is that the evidence is "derived from a legitimate source wholly independent of the compelled testimony."[41]

No longer can a witness use his fifth amendment privilege as a sword to extricate himself from the previous criminal conduct. The prosecutor or investi-

[39] The legislative history of Title II contained in H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970), *quoted in* 2 U.S. CODE CONG. & AD. NEWS 4007, 4017 (1970), states specifically: "The proposed provision is not an immunity bath." Thus it is clear that the intent of Congress was to limit the extent of immunity.

[40] 18 U.S.C. § 6002 (1970). *See* note 30 *supra*.

[41] United States v. Kastigar, 406 U.S. at 460.

gating committee is not required to exchange freedom from all prosecution for evidence against other defendants. It is also now clear that a person who violates the law, receives immunity, and testifies is not totally free of the consequences of his crime. That person is still subject to many penalties and forfeitures. For example, a grant of use immunity does not prohibit the use of the witness' testimony in civil proceedings. Thus a witness who testifies about his participation in a crime under a grant of use immunity[42] may lose his job,[43] or his license to practice his profession,[44] in addition to subjecting himself to civil liabilities[45] as well as public infamy and disgrace.[46] Even a member of the judiciary stands to be brought to task despite a grant of immunity.[47] The fact that the testimony might subject the witness to criminal liabilities in another country does not automatically give him a privilege from testifying once immunity is granted.[48]

Critics of use immunity contend that the new standard does not leave the witness in the same position he would have been in had he remained silent.[49] If an immunized witness remains silent he can be incarcerated for a substantial period of time.[50] If the immunized witness testifies, he is not completely free of subsequent prosecution or other civil penalties. They argue further that the defendant is subject to the good faith of the prosecuting attorneys, since the information relevant to the question of the use of the evidence or taint is uniquely within the prosecutor's possession. In short, the major complaint is that under use immunity the defendant is granted far less than is taken away. However, the key point that the detractors of use immunity ignore is that immunity is only required to be co-extensive with protection afforded by the fifth amendment.

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[42] The Supreme Court's decision in Ullman v. United States, 350 U.S. 422 (1956), made it clear that under any grant of immunity, transactional or use, a witness was subject to civil penalties and forfeitures.

[43] Gardner v. Broderick, 392 U.S. 273 (1968).

[44] *See* Note, *The Intrusion of Federal Immunity Protection into State Disbarment Proceedings*, 7 LOYOLA U.L.J. 58 (1976). The exact question of whether a prosecutor may grant immunity from collateral civil proceedings as well as criminal proceedings remains undecided. The article mentioned heretofore is an excellent analysis of the issues involved in that situation. It is clear, however, that a literal reading of the use immunity statute only prevents use of the testimony in a *criminal* case. Disbarment proceedings have been traditionally considered civil proceedings.

[45] Most notable are the civil tax liabilities that are created by giving immunized testimony. *See* Patrick v. United States, 524 F.2d 1109, 1118-19 (7th Cir. 1975) where the court stated:

> Patrick's Fifth Amendment privilege against being compelled to be a witness against himself in any criminal case does not afford him protection against giving testimony that will disclose his civil liability unless, of course, that testimony may subject him to criminal prosecution. The grant of immunity removed his only legitimate objection to giving the government an honest and complete statement, even if compelled, of the facts which may give rise to gambling tax liability. Unlike a forfeiture or the imposition of a fine, the jeopardy assessment is merely a method of enforcing a civil obligation, rather than a form of punishment.

[46] The fact that immunity statutes fail to shield the witness against personal disgrace that often is an incident of the relevation of one's connection with a crime does not render the immunity inadequate in a constitutional sense. Smith v. United States, 337 U.S. 137, 147 (1949).

[47] Nepolitano v. Ward, 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972).

[48] Zicarelli v. New Jersey, 406 U.S. 472 (1972); *In re* Tierney, 465 F.2d 806 (5th Cir. 1972); United States v. Doe, 361 F. Supp. 226 (E.D. Pa), *aff'd*, 485 F.2d 678 (3d Cir.), *cert. denied*, 415 U.S. 989 (1973). *See* text accompanying notes 73-77 *infra*.

[49] *See generally* Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470 (1974); Recent Development, *Criminal Procedure—Immunity: Fifth Amendment Privilege Against Self-Incrimination Eclipsed by Use Immunity*, 48 WASH. L. REV. 711 (1973). A witness who refuses to testify has no right to remain silent once immunity is granted. If an immunized witness refuses to testify he can be sent to jail until he agrees to testify. A witness may be compelled to testify under a grant of immunity even after he has been acquitted. *Cf. In re* Bork, No. 75-1925 (7th Cir., decided Oct. 29, 1975); *In re* Persico, 492 F.2d 1156, 1162 (2d Cir. 1974), *cert. denied*, 419 U.S. 924 (1975).

[50] 28 U.S.C. § 1826 (1970) provides:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
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> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.
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> (b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable but not later than thirty days from the filing of such appeal.

As the Court clearly stated in *Kastigar:*

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'"[51]

The current use immunity statute was not designed to strip a witness of his fifth amendment rights. The purpose of immunity is to obtain information needed to prosecute and end criminal activity; such information will probably not be obtained by any other means. It was intended to obtain every man's evidence for the benefit of society while preserving the individual's constitutional right not to accuse himself. The importance of the fifth amendment is perhaps best summarized in Erwin Griswold's oft-quoted phrase that: "[T]he privilege against self-incrimination is one of the greatest landmarks in man's struggle to make himself civilized."[52] Nevertheless, the fifth amendment is not a technique that was incorporated into the Bill of Rights to inhibit effective law enforcement and protect those citizens who choose to violate the law. Nor was the fifth amendment intended to insulate witnesses from the personal hardship or liabilities that the revelation of one's connection with a crime can bring.

There have recently been a host of arguments against allowing prosecutors free reign in granting use immunity.[53] The primary claim is that evidence obtained through use immunity is inherently unreliable since the witness might testify to whatever is expected of him without necessarily telling the truth. As a former prosecutor and trial judge, I believe this argument fails to face reality. Any experienced prosecutor knows that his immunized witness will be subject to a brutal cross-examination at trial. Thus no prosecutor offers immunity to a witness without first receiving an off-the-record proffer of testimony.[54] Prosecutors, like judges and juries, approach the offer of immunized testimony on the *qui vive.* With this attitude the prosecutor can then examine the testimony, check for corroborating facts, and make an independent judgment as to its overall reliability. Often times a prosecutor's entire case stands to win or lose on the key testimony of the immunized witness.[55] Consequently only a totally inept prosecutor would rely upon immunized evidence that was not clearly factually accurate. In addition, if the witness is granted immunity, then lies before the grand jury, or at trial, he is subject to being prosecuted for perjury.[56] Thus, the witness himself has strong incentives to testify truthfully.

Some members of the criminal bar have advocated a sort of mini-hearing before each grant of immunity is extended. Such a proposal would involve a hearing before a member of the judiciary, with the prosecutor, counsel for witnesses and potential defendants present. Witnesses would present their testimony and theoretically the defendants would present objections to the testimony as being untrue or unreliable. Then the judge could rule on the reliability of the immunized testimony and on whether or not the testifying witness as opposed to other participants in the crime (who were supposedly more culpable) is the proper person to receive immunity.

The mini-hearing concept is an improvident idea for a number of reasons. First, no member of the judiciary currently has the legal power to review the prosecutor's choice in deciding which parties to prosecute and which parties to immunize.[57] The

[51] 406 U.S. at 453.

[52] *See* E. GRISWOLD, FIFTH AMENDMENT TODAY 7 (1955).

[53] Wolfson, *Immunity, Right or Wrong? Wrong!*, 57 CHI. B. RECORD 174 (1976); Wolfson, *Immunity—How It Works in Real Life,* 67 J. CRIM. L. & C. ___ (1976); Comment, *supra* note 25, at 335.

[54] A proffer of testimony is a technique whereby the prosecutor requests counsel for the defense to state an off-the-record summary of answers that the witness will give to the questions of the prosecutor or the grand jury. If the answers by the witness are material to the investigation and in fact are privileged by the fifth amendment the prosecutor then offers a formal grant of immunity in exchange for an on-the-record repetition of the answers by the witness himself either before the grand jury or in court. *See* Skinner, *Immunity, Right or Wrong? Right!*, 57 CHI. B. RECORD 168, 172 (1976).

[55] Crimes which by their nature only involve two parties, *e.g.*, bribery, extortion, gambling, prostitution, etc., are often difficult to prosecute because there is no complaining witness. Without the testimony of one of the participants, generally there can be no prosecution.

[56] 18 U.S.C. § 6002 (1970) states:

> [N]o testimony . . . 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.

[57] However, it is clear that the court under its supervisory powers can regulate immunity where it is obviously abused by members of the executive branch. For instance, in United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969) the court dismissed an indictment, stating:

> [W]hen the conduct of an officer of the executive branch becomes enmeshed in the judicial process, the courts have the power and resulting duty to supervise that conduct to the extent it uses the judicial administration of criminal justice.

In that case the court's dismissal of the case was not an attempt to grant the prosecutor's broken promise of immunity but rather an attempt to deter blatant government misconduct. *Cf.* Giglio v. United States, 405 U.S. 150

power to decide whether a grant of immunity to a particular witness would serve the public interest is intimately interwoven with the concept of prosecutorial discretion. A large degree of flexibility is therefore justified since this policy determination is necessarily one within the executive agency's exclusive area of expertise.[58] Under our historical principle of separate but co-equal branches of government the judicial involvement in the executive branch's decision would clearly be unwarranted.[59]

Second, the mini-hearing procedure would seriously jeopardize the rights of other citizens. For instance, consider the situation where witness *A* at such a hearing states publicly and in open court that *B* extorted money from *A* and *B* failed to report the funds on his income tax return. Now, the government may choose not to grant immunity to *A* either because it believes the testimony is untrue, or because it believes it cannot successfully prosecute *B* because of other reasons, such as insufficient admissible evidence or the fact that the statute of limitations has run. Even if *B* is innocent he is severely injured by the publicity of *A*'s testimony in open court at the mini-hearing. Further, and more important, *B* has no way to defend his name or clear himself of the accusation because the prosecutor has chosen not to present formal charges against him. Of course the mini-hearings could all be heard "in camera," but as experience has demonstrated, the press usually discovers the testimony through informal methods. The mere fact that the court is conducting a mini-hearing would arouse the curiosity and suspicion of the public, court employees, and especially the press corps. Finally, federal courts would be presented with a difficult jurisdictional problem unless Congress enacted legislation to provide for such hearings.[60]

Involving the judicial branch in the decision to grant immunity is no real resolution of the problem. Under our current system a judge or magistrate is occasionally called upon to issue warrants. Unlike the granting of immunity, the decision to issue a search warrant generally involves only a fairly straightforward question of probable cause. On the other hand, securing prior judicial approval for grants of immunity involves a legion of very difficult factual questions as well as policy decisions.[61] It is apparent that the mini-hearing would create difficult questions of "justiciability."[62]

Another frequent argument made against immunity is that it enables a zealous prosecutor to select targets of prosecution for his own personal gain or to advance or inhibit a particular ideology. It is true that an improper use of the grand jury and the power to grant immunity can be used to harass witnesses by requiring them to travel great distances or suffer the political and social consequences of being under investigation.[63] In reality however it is not the

(1972); Santobello v. New York, 404 U.S. 257 (1971); *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973); United States v. McLeod, 385 F.2d 743 (5th Cir. 1967); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), *cert. denied* 381 U.S. 950 (1964); United States *ex rel.* Berberion v. Cliff, 300 F. Supp. 8, 13 (E.D.Pa. 1969).

[58] *In re* Kilgo, 484 F.2d 1215 (4th Cir. 1973).

[59] That Congress intended the traditional separation of powers concept to apply to immunity is indicated by the legislative history. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. (1970), *quoted in* 2 U.S. CODE CONG. & AD. NEWS 4007, 4018 (1970), where it stated: "The Court's role in granting the order is merely to find the facts on which the order is predicated." *See* Ullman v. United States, 350 U.S. at 431-34; *In re* Russo, 448 F.2d 369, 373 (9th Cir. 1971); United States v. DiMauro, 441 F.2d 428, 437 (8th Cir. 1971); *cf. In re* Grand Jury Investigation, 317 F. Supp. 792, 796 (E.D. Pa. 1970).

[60] A criminal prosecution in the district court may only be instituted by an indictment or information. *See* 8 MOORE, FEDERAL PRACTICE § 7.02 (2d ed. 1971). The fifth amendment also provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...." U.S. CONST. amend V. Consequently, it is conceptually difficult to conceive of an underlying jurisdictional basis for a mini-hearing on immunity. Previously, in Ullman v. United States, 350 U.S. at 434, the Supreme Court stated that:

> Since the Court's duty under [the immunity statute] is only to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney, and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of "judicial power."

[61] Many factors are involved in a prosecutor's decision to prosecute; for example: Has sufficient legally admissible evidence been discovered to prove the government's case beyond a reasonable doubt? Is there any conduct on the part of a government agency or official which endangers successful prosecution? Would the prosecution merely be repetitive of actions taken by a state prosecutor? Does the criminal conduct justify the expense and allocation of available resources to prosecute? Could the accused, because of age, physical or mental condition, qualify for deferred prosecution?

[62] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Baker v. Carr, 369 U.S. 186 (1962); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Note, *Judicial Enforcement of Nonstatutory "Immunity Grants": Abrogation by Analogy*, 25 HAST. L. REV. 435 (1974).

[63] There is no doubt that the grand jury process may be used as a political weapon against political dissidents. One investigation by the Internal Security Division of the Justice Department spanned ten cities and subpoenaed 200

prosecutor's ability to grant immunity that provides the potential for abuse. Immunity is only an effective device when it is clear that a crime exists. The prosecutor always had the power to select the party to prosecute.[64] Immunity is ideally a device which enables a prosecutor to investigate and prosecute crime. If in fact immunity grants are utilized, convictions secured, and crime curtailed, then it can be said that immunity may have helped a prosecutor's reputation and thus enhanced his political possibilities. However, in that sense, immunity is the same as hard work, thorough investigation, and effective trial presentation. Charges that immunity grants are being used politically stem from the increasing attacks made on official corruption[65] in the last five years.

The choice of which party to immunize is always difficult. Some prosecuting attorneys maintain a policy of immunizing the first witness to come forward. Such a policy is only proper when all the participants in the crime are equally culpable. The better practice, and the one that the Justice Department generally requires, is to bring the prosecution which furthers the "public interest." Our present form of statutory immunity requires the involvement of a number of different people who each make an independent determination of the circumstances surrounding the potential immunity grant.[66] Initially, the Assistant United States Attorney in charge of the case must make a determination based on his intimate knowledge of the case. Next, the United States Attorney for the district must determine whether the public interest is best served either by granting immunity or by attempting to proceed to trial on other evidence. Obviously the U.S. Attorney's decision takes into account such factors as the probability of conviction, the magnitude of the offense, and the culpability of the witness in relation to all others who may have been involved. Approval for the grant of immunity must be secured from the Attorney General in Washington. The local U.S. Attorney must demonstrate that a serious crime is involved and that the witness has evidence of great import to present. The Attorney General has the authority to reject an application for immunity.[67] When commentators argue against allowing unfettered power to remain in the hands of the prosecutor, their arguments should be directed against the use or abuse of the entire criminal justice process and not against the concept of use immunity. An innocent person can be brought before the grand jury by an unscrupulous prosecutor and easily harrassed and intimidated because of his religious, political or philosophical beliefs even when there is no evidence that a crime has been committed. But the granting of immunity does not involve an innocent person. Immunity is only granted to a participant in a crime in an attempt to convict other participants.

The granting of immunity can occasionally place a witness in a dire situation. For instance, a witness who is granted immunity often has no protection from reprisals of fellow criminals. Unfortunately, the choice may result in refusing to talk and going to jail, or talking and facing the threat of death. This was the argument raised in *LaTona v. United States*,[68] where the witness made a due process argument (instead of the usual self-incrimination argument) that he would literally be deprived of "life, liberty, or property without due process in violation of the fifth amendment" if he should be required to testify before the grand jury pursuant to a grant of immunity. The Court properly rejected the claim, quoting a very pertinent hypothetical example from the Supreme Court in *Piemonte v. United States:*[69]

> If two persons witness an offense—one being an innocent bystander and the other an accomplice who is

persons. *See* Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 432, 433 (1972). However, abuse of immunity grants to politically harass has become highly improbable in light of Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

[64] By federal statute, 28 U.S.C. § 547 (1970), the U.S. Attorney is vested with authority to prosecute all offenses against the United States. He has the power to select whom to prosecute and under which particular parts of the criminal code. United States v. Marshall, 463 F.2d 1211, 1212 (5th Cir. 1972); *cf.* Ganger v. Peyton, 379 F.2d 709, 713 (4th Cir. 1967).

[65] The cases brought in the Northern District of Illinois involving public officials have brought the question of immunity to the attention of the public. *Cf.* United States v. Keane, 522 F.2d 534 (7th Cir. 1975); United States v. Wigoda, 521 F.2d 1221 (7th Cir. 1975); United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974), *cert. denied*, 421 U.S. 464 (1975); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 966 (1974).

[66] *See* Bursey v. United States, 466 F.2d at 1075; Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture," or "A Rational Accomodation"?*, 67 J. CRIM. L. & C. 155 (1976).

[67] The fact that the Attorney General has the power to reject a request for immunity does not mean that a witness has a right to object to a grant of immunity where the guidelines for submitting requests to the Justice Department were not followed by the local U.S. Attorney. As stated in *In re* Tierney, 465 F.2d at 813, the guidelines "are not directed to the procedural or substantive rights of prospective witnesses."

[68] 449 F.2d 121, 122 (8th Cir. 1971).

[69] 367 U.S. 556 (1961).

> thereafter imprisoned for his participation—the latter has no more right to keep silent than the former. The Government of course has an obligation to protect its citizens from harm. But fear of reprisal offers an immunized prisoner no more dispensation from testifying than it does any innocent bystander without a record.[70]

Although most persons would sympathize with a witness who found himself in the position where he faced bodily harm or jail depending upon his choice to accept immunity, that sympathy clearly should not lead to engrafting a privilege upon the heretofore sacrosanct mandate of criminal law that every man must come forward with his evidence. Once again the reason that there should be no privilege is that the witness would not be in such a dire predicament but for his criminal involvement.

Another frequent criticism of immunity is that it is inherently unfair to the defendant because the government has the power to immunize witnesses but the defendant has no power to compel testimony from other witnesses on the same basis. There is an aspect of inequality in the criminal process. But it is the government who generally suffers from the inequality. It is the government which must come forward with the evidence. It is the government which must bear the burden of proving the defendant guilty beyond a reasonable doubt. It is the government which must overcome the defendant's presumption of innocence. The criminal system was designed to protect those charged with crimes from unwarranted charges. Thus, it is appropriate that the system favor the defendant. But the fact that the defense lacks immunity power does not change a system of justice in which the defendant always has the benefit of the doubt.

In *Kastigar* Justice Powell noted that historically the granting of immunity has been the sole prerogative of the government.[71] Traditionally that prerogative is supposed to be exercised sparingly. If the power to grant immunity were given to defendants, what would prevent them from showering their co-defendants with immunity grants in order to "beat the rap"? As stated earlier in this article, every grant of immunity involves a social cost; *i.e.*, an admitted criminal is not prosecuted. Consequently, the decision to immunize should be made in the interest of society as a whole, and not in the interest of a sole defendant who could choose to immunize on the basis of friendship or self-interest. Certainly no defendant has a constitutional right to a corresponding power of immunity. As Judge Butzner noted in *In re Kilgo* when reviewing this argument:

> The sixth amendment assures an accused "compulsory process for obtaining witnesses in his favor." But the authors of the Bill of Rights did not deem it essential to enhance this right by empowering the accused to confer immunity, and nowhere in the Constitution do we find any justification for conditioning the government's ability to grant immunity on a corresponding grant to private individuals.[72]

Although I believe immunity is an effective law enforcement tool, sometimes the granting of immunity, regardless of its scope, can place a witness in a situation where his fifth amendment privilege cannot be adequately guarded. Take, for example, the situation where a witness is granted immunity but his testimony will jeopardize his freedom in another jurisdiction in which the laws of the United States have no application. This problem was presented in *Zicarelli v. New Jersey State Commission of Investigation*[73] where the witness asserted that he could not be compelled to testify before the commission because his testimony would expose him to danger of foreign prosecution. The Court did not reach the constitutional question, however, because it believed that the appellant was never in real danger of being compelled to disclose information that might incriminate him under foreign law.[74] Thus the exact parameters of the fifth amendment privilege remain open when dealing with the possibility of foreign prosecution.[75] But the *Zicarelli* decision leaves one with the distinct impression that if the Court found the threat of foreign prosecution to be real and substantial, then the prosecutor would be unable to compel testimony by granting immunity. Should the Court reach the merits of this question in the future, the probable outcome is that the fifth amendment privilege will be extended to bar immunity when

[70] 449 F.2d at 122, *quoting* 367 U.S. at 559 n.2.

[71] United States v. Nixon, 418 U.S. 683, 693 (1974); Kastigar v. United States, 406 U.S. at 450; United States v. Bautista, 509 F.2d 675, 677 (9th Cir. 1975); Smith v. United States, 375 F.2d 243 (5th Cir. 1967). A recent decision by the Ninth Circuit reaffirms the basic premise that the defense witnesses will not normally be granted immunity. However, the court allows that in some situations a defendant could be denied a fair trial by the government's refusal to seek immunity for defense witnesses. United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976). *See also* Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966).

[72] 484 F.2d at 1222.

[73] 406 U.S. 472 (1972).

[74] *Id.* at 481.

[75] *In re* Tierney, 465 F.2d at 811, states that "Whether the reach of the Fifth Amendment is such as to protect against foreign prosecution is an open question . . ." In light of the language of *Zicarelli*, the question may be open but the possible answers are obvious.

there is a real and substantial threat of foreign prosecution.

A number of the appellate courts have faced this problem and concluded that no threat of foreign prosecution can exist when the immunized testimony is only requested before the grand jury.[76] Since the grand jury proceedings are secret,[77] the courts have reasoned that there cannot be disclosure of the testimony to persons in other jurisdictions, ergo, no threat of foreign prosecution. Yet, that conclusion ignores the fact that often the secrecy of the grand jury proceedings is not preserved. The secrecy of the grand jury can be breached in the event a witness' testimony is used to impeach or if perjury proceedings are instituted. Furthermore, one defendant may be compelled to disclose a co-defendant's grand jury testimony in order to defend against the charges against himself. The better practice might be to carve out an exception in this instance. When the Supreme Court receives a case where there is a real and substantial threat of foreign prosecution, they may well choose to narrow the prosecutor's power to grant immunity.

The Future of Immunity

Considering the future of use immunity statutes, the major problem that will often recur involves what constitutes evidence from an independent source. In *Kastigar* the majority fashioned an evidentiary principle which would serve under an exclusionary rule. Justice Powell stated:

> This total prohibition on use [of the immunized testimony] provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.
>
> . . . This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.[78]

Justice Marshall vehemently disagreed with the majority's characterizations of the new test as a "comprehensive safeguard."[79] He feared that "the government [would] have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence."[80] Thus, he concluded, the good faith of the prosecutor will be the sole safeguard of the witness' rights. The few cases[81] that have dealt with this problem would seem to allay Justice Marshall's concern.

The Court's adoption in *Kastigar* of an exclusionary type rule stemmed from the fact that Congress designed the use immunity statute to have such an effect.[82] As a practical matter the enforcement of an exclusionary rule by a pretrial suppression hearing may not be necessary. There are a number of situations in which a per se admissible rule can be adopted. For example, suppose there are simultaneous state and federal investigations in which the federal authorities conclude their investigation first, and have sufficient evidence to convict the defendant. Before a federal indictment is presented, the state authorities grant use immunity to the defendant. Query: Should the federal authorities be allowed to try the defendant? Clearly the answer is

[76] *Id.*; *In re* Parker, 411 F.2d 1067 (10th Cir. 1969).

[77] Rule 6(e) of the Federal Rules of Criminal Procedure provides that:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

[78] Kastigar v. United States, 406 U.S. at 460 (footnote omitted).

[79] *Id.* at 460.

[80] *Id.* at 489 (Marshall, J., dissenting).

[81] *See* United States v. First Western State Bank, 491 F.2d 780 (8th Cir. 1974), *cert. denied*, 419 U.S. 825 (1975); United States v. McDaniel, 449 F.2d 832 (8th Cir.), *cert. denied*, 405 U.S. 992 (1971).

[82] *See* House Comm. on the Judiciary, Report on Organized Crime Control Act of 1970, H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970). One Congressman stated:

> [T]he immunity grant would constitute a ground for the suppression of the use of compelled testimony and the fruits of that testimony, rather than a total defense. It would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, evidence acquired in violation of the Miranda warnings, to cite only a few examples. The witness could be prosecuted for his crime under this bill, provided the evidence used against him is independent of and untainted by the compelled testimony or its fruits.

yes. In this situation there is no doubt that the federal authorities are not using the compelled testimony and that their investigation was not derived from the immunized testimony. The federal government can establish the independence of its evidence beyond all doubt simply by stating the dates of its investigation and the fact that it did not cooperate with the state authorities. This example is not at all far fetched, since it is based in part on the facts of *United States v. First Western State Bank.*[83] In that case the Federal Bureau of Investigation had investigated various campaign contributions before the state granted immunity. The court took on the task of deciding whether the government met its burden of showing that its evidence and investigation were not derived from use of the compelled testimony. The Eighth Circuit held that there was an independent source and noted that a suppression hearing might not always be the best method for making a determination on the evidence, stating:

> Not every case, however, would call for a further fragmentation of the trial process by having a full-scale suppression hearing prior to trial. The ascertaining of independent sources can often be better considered during the trial, since all the evidence is placed on the record or offered for introduction at the trial.[84]

It seems that the best approach to dealing with the tainted evidence problem would be to allow the counsel for the defense to make a continuing objection throughout the trial against that evidence which he believes was improper. Then, if at some point it becomes clear to the trial judge that some evidence or part of the investigation was derived from the immunized testimony, a mistrial can be declared. This procedure seems much more practicable than a pretrial suppression hearing at which the judge must make a determination without the benefit of all the evidence the government eventually will present. Of course, before beginning the trial some type of initial screening process could be conducted; *i.e.,* the judge could request affidavits from the prosecutor and investigator stating that they have not used the immunized testimony in their investigation or preparation of the case.

Those cases where the government meets its burden of demonstrating the independence of its evidence but admits that it has reviewed the compelled testimony create the greatest danger. These are the cases where the government could gain certain tactical or strategic advantages. Even though their evidence and investigation may have been independent, disclosure of the compelled testimony could give away the strength and weaknesses of the defense case. Decisions as to which witnesses to cross-examine, not to cross-examine, to impeach, or how to structure a certain argument become much easier once the prosecutor has full knowledge of the case. The Supreme Court has yet to delineate a procedure which would adequately eliminate these subtle strategic advantages a prosecutor gains. However, it is clear that in this narrow class of cases the comprehensive safeguard envisioned by the majority in *Kastigar* is at least partially lacking. Further, since in a criminal proceeding a defendant has a rather circumspect right of disclosure[85] it is nearly impossible for him to refute the government's contention that it is not using information derived from his previous testimony.[86]

However, many of the fears created by the adoption of use immunity are unwarranted. Rarely, if ever, are defendants prosecuted after being granted use immunity despite the fact that under the use immunity statute there is a potential for prosecution.[87]

The right to grant immunity has, over many years, proved an effective weapon of prosecution. It is not enough to suggest that the use of such a weapon is capable of abuse and, therefore, should be curtailed or abolished. *Any* governmental function of authority is capable of abuse and can be attacked with the same lance. The safeguards of law, the intelligent appraisal of facts by judges and juries, and the proper defense of the accused by diligent members of the bar all stand in the way of such abuse. Misuse of any of the prosecutorial tools always spells disaster for the prosecution—and that too remains a safeguard for those accused.

[83] 491 F.2d 780 (8th Cir. 1974), *cert. denied*, 419 U.S. 825 (1975).

[84] *Id.* at 787.

[85] Under Federal Rule of Criminal Procedure 16(a) a defendant has only the limited right to discover his own prior statements made to the government, the results of examinations and scientific tests, as well as his grand jury testimony. But local rules such as N.D. ILL. CRIM. R. 2.04 and the Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1963), guarantee a defendant the right to obtain evidence that is favorable to him. It is at least arguable that a prosecutor who indicts a previously immunized witness must disclose all his evidence before trial since, if the defendant can show that it is derived from his previous testimony, it is therefore favorable to him in that it would result in a dismissal of the indictment.

[86] *See* Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 485–89 (1974).

[87] The present United States Attorney for the Northern District of Illinois has stated publicly that his office has never indicted anyone who was previously granted use immunity—except in cases involving perjury. Under the former transactional immunity statute a perjury prosecution could always be brought.