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SELECTIVE USE OF THE EXECUTIVE IMMUNITY POWER: A DENIAL OF DUE PROCESS?

I. Introduction

Critical trial testimony can often be provided by witnesses who are themselves implicated in a crime with which a defendant is charged. These witnesses, while uncooperative for fear of self-incrimination, can be compelled by the government to testify under a grant of statutory immunity. The ability to compel testimony has greatly helped the government in prosecuting many crimes, particularly white-collar conspiracies. By granting immunity to lower-echelon members, inculpatory testimony is obtained against higher-ups. As convictions are secured, the practice is repeated in the process of "climbing the criminal ladder."[1]

In some instances, the defendant also has an interest in compelling uncooperative witnesses to testify at trial, particularly when such witnesses will offer exculpatory evidence. To protect this interest, courts have alluded to the possibility that a defendant may sometimes have a similiar right to witness immunity.[2] However, courts have been unwilling to infringe upon the discretion to grant immunity conferred upon the executive branch by statute, absent a showing of the government's bad faith in refusing defendant's request for defense witness immunity.[3]

In *United States v. DePalma,*[4] the United States District Court

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1. A classic example of using the immunity power in order to reach the upper echelons of a conspiracy is the Watergate prosecutions. Immunity was given to David Young, a member of the White House staff, for his participation in the burglary of Daniel Ellsberg's psychiatrist's office. This grant of immunity in turn led to the conviction of Egil Krogh, an assistant to John Ehrlichman, one of President Nixon's chief aides. Krogh in turn testified against Ehrlichman who was found guilty by a District of Columbia jury of directing the perpetration of this burglary. NEWSWEEK, Aug. 27, 1979, at 71, col. 1.

2. Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967). *See* notes 26-33 *infra* and accompanying text for a discussion of the *Earl* footnote. *See also* United States v. Lang, 589 F.2d 92, 96 n.1 (2d Cir. 1978) (distinguishing *Earl* footnote without rejecting its rationale); United States v. Ramsey, 503 F.2d 524, 533 (7th Cir. 1974) (distinguishing *Earl* footnote without rejecting its rationale), *cert. denied,* 420 U.S. 932 (1975).

3. United States v. Bacheler, 611 F.2d 443 (3d Cir. 1979); United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979); United States v. Lang, 589 F.2d 92 (2d Cir. 1978).

4. 476 F. Supp. 775 (S.D.N.Y. 1979), *appeal docketed sub nom.* United States v. Hor-

for the Southern District of New York held that a defendant was denied due process because of the government's refusal to immunize key defense witnesses after granting immunity to its own witnesses. The court offered the prosecution the choice of either immunizing the defendant's witnesses at a new trial or retrying its case without the immunized testimony of its principal witness. This decision, unique because of the absence of prosecutorial misconduct as a key element, will affect future prosecutions if upheld by higher courts. The need to reevaluate the question of defense witness immunity in light of the applicable standard of review, selective use of the executive immunity power, and the government's burden of proof in ladder-climbing situations, is thus demonstrated.

Attacks on the government's immunity power have been premised upon numerous grounds, including the equal protection clause of the fourteenth amendment,[5] the sixth amendment right to compulsory process,[6] and the due process clause of the fifth amendment.[7] This Note will focus on the due process clause. It is upon this clause that the district court based its decision in *DePalma* and from which the courts have the greatest power to achieve fundamental fairness. Indeed, the right to due process is comprehensive and broadly framed.[8] The concept has been described alternately as an application of "ordered liberty"[9] to the particular facts

witz, No. 79-1315 (2d Cir. Sept. 13, 1979).

5. The claim that the immunity statute itself violates the equal protection clause, because the government has the sole power to grant immunity, has been rejected. *See, e.g.*, United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977); United States *ex rel.* Tatman v. Anderson, 391 F. Supp. 68, 71 (D. Del. 1975).

6. United States v. Herman, 589 F.2d 1191, 1203 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978) ("The sixth amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel the witness to waive his fifth amendment privilege."); United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976). *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Note, *The Sixth Amendment Right to Have Use Immunity Granted To Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

7. United States v. Gleason, No. 79-1147 (2d Cir. Dec. 19, 1979); United States v. Lang, 589 F.2d 92 (2d Cir. 1978); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979), *appeal docketed sub nom.* United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979).

8. *See, e.g.*, Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 126-27 (1974).

9. Rochin v. California, 342 U.S. 165, 169 (1952), *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

of each case[10] and as a broad standard "of fairness written into the Constitution . . . ."[11]

Part II of this Note will review the traditional arguments against challenging a prosecutor's immunity decision. The procedural and substantive factors required for substantiating a defendant's due process claim will be analyzed in part III. The way in which courts have applied these factors in specific immunity situations, including *DePalma,* will be discussed in part IV. This Note will also examine the effect of immunization on the government's burden of proof in future prosecutions and will offer a practical procedure for reconciling the competing interests of both the government and the defendant.

II. Traditional Arguments Against Challenging The Prosecutor's Immunity Decision

A. Background

The power of the government to compel persons to testify in court, although "firmly established in Anglo-American jurisprudence,"[12] is not absolute; it must be balanced against valid privileges, especially the fifth amendment privilege against compulsory self-incrimination.[13] Under a transactional immunity statute,[14] the government's power to compel testimony does not violate a witness' fifth amendment right because such a statute "accords full immunity from prosecution for the offense to which the compelled testi-

10. Rochin v. California, 342 U.S. 165, 172 (1952).

11. United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring).

12. Kastigar v. United States, 406 U.S. 441, 443 (1972).

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

14. Whenever in the judgment of a United States attorney the testimony of any witness . . . is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . and upon order of the court such witness shall not be excused from testifying . . . on the ground that the testimony . . . required of him may tend to incriminate him . . . . But no such witness shall be prosecuted . . . for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony . . . under compulsion as provided in this section.

Pub. L. No. 84-728, 70 Stat. 574 (1956) (repealed 1970).

mony relates."[15] Title 18, section 6002 of the United States Code[16](section 6002), provides for "use immunity," a more limited grant of immunity. The statute, codifying portions of the Organized Crime Control Act of 1970,[17] prohibits the prosecution from using compelled testimony, and evidence directly gathered therefrom, as evidence in subsequent proceedings against the witness. The question arises whether the use immunity granted under section 6002 is sufficiently broad to protect the fifth amendment rights of an uncooperative witness compelled to testify. The Supreme Court in *Kastigar v. United States*[18] answered this question in the affirmative. It concluded that "the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege."[19] If the defense witness is not granted immunity, he can assert his fifth amendment privilege and the prosecution will be without this testimonial evidence upon which to later base an indictment against him. Likewise, by granting the witness immunity, the prosecution is still without power to use testimony proffered at the trial.[20]

The government alleges that one of the major advantages of the "use immunity" statute, as opposed to the "transactional immunity" statute, is also its nemesis. Under *Kastigar,* the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[21] Thus, while under a "transaction" statute a witness could reveal just enough information to acquire an "im-

15. Kastigar v. United States, 406 U.S. 441, 453 (1972).

16. 18 U.S.C. § 6002 (1976) 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 . . . 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.

17. Pub. L. No. 91-452, 84 Stat. 922 (1970).

18. 406 U.S. 441 (1972).

19. *Id.* at 462.

20. In both instances, independent avenues of investigation are available to the prosecution. *See* notes 60-61 *infra* and accompanying text.

21. 406 U.S. 441, 460 (1972).

munity bath"[22] and then profess to remember no more, a use immunity statute such as section 6002 encourages more complete testimony. However, the more information a witness reveals, the more difficult it becomes for the government to prosecute him on the basis of demonstrably independent evidence.[23]

In *Earl v. United States*,[24] an undercover police officer testified that he purchased heroin from one Frank Scott and was told by Scott to give the money to the defendant, who was standing next to Scott. At trial, Scott, from whom the court had accepted a guilty plea on some counts, asserted his fifth amendment privilege when called to testify by the defense. Defendant claimed that the government's refusal to grant immunity to Scott barred the witness from offering exculpatory testimony. Chief Justice Warren Burger, then a circuit judge, held that the court was without power to command the executive branch of government to exercise its statutory immunity power.[25]

Of particular interest to this discussion is a footnote in the decision. There, Chief Justice Burger posed the following hypothetical:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage *unless* Congress made the same mechanism available to the accused. Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government.[26]

Judge Sweet's decision in *United States v. DePalma* heralds the *Earl* footnote's coming of age. The scenario suggested by the footnote, while not exactly the *DePalma* situation,[27] is sufficiently simi-

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22. *In re* Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

23. UNITED STATES JUSTICE DEPARTMENT GUIDELINES RELATING TO USE OF STATUTORY PROVISIONS TO COMPEL TESTIMONY OR PRODUCTION OF INFORMATION, comment to § 10, at 28 (1977) [hereinafter cited as GUIDELINES].

24. 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

25. For the effect of *Kastigar* upon this holding, *see* notes 52-54 *infra* and accompanying text.

26. 361 F.2d at 534 n.1 (emphasis on "as applied" in original; emphasis on "unless" added).

27. The government attempts to distinguish *DePalma* from the *Earl* footnote on the basis of a grant of informal immunity, *see* note 137 *infra*, to a principal prosecution witness in

lar to it to have warranted extensive discussion by both the government and the defendant in their appellate briefs.[28] The *Earl* decision encompasses the traditional arguments made both for and against the propriety of allowing the criminal defendant some power in extending immunity to witnesses in his favor. *Earl* therefore provides an efficacious starting point for analysis of the defense witness immunity question.[29] It is submitted, however, that a rephrasing of the footnote's "unless" clause[30] in the following manner would place the issue in a more proper perspective: "In the particular case the Government could not use the immunity statute for its advantage unless the Government grants immunity to a defense witness when necessary to ensure the defendant due process and to serve the public interest."[31] It is not mandatory to characterize the

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DePalma. In the footnote, Chief Justice Burger was speaking of a possible unconstitutional use of the immunity *statute*. Brief for Government at 23 n.*, United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979) [hereinafter cited as Brief for Government]. Chief Justice Burger was concerned not only with the statute *per se* but also with the government's selective grant of immunity to its own witness. This is evidenced by his emphasis on the *application* of the statute. *See* text accompanying note 26 *supra*.

Another strained distinction is founded upon a reading of bad faith into the footnote. Brief for Government, *supra*, at 45 n.*. *See also* note 90 *infra*. There was no finding of prosecutorial misconduct in *DePalma*, 476 F. Supp. at 777 n.5. *See also* notes 149-52 *infra* and accompanying text. However, there could be an analysis along the same lines that would reveal an even more egregious example of prosecutorial misconduct in *DePalma* because there, the government granted immunity to a prosecution non-eyewitness but refused to immunize an eyewitness for the defendant.

28. Brief for Government, *supra* note 27, at 22, 23, 25-27, 31, 45, 46; Brief for Appellee at 22-24, United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979)[hereinafter cited as Brief for Appellee]. The *DePalma* court states that both the government and Horwitz consider *Earl* the "seminal opinion on this issue." 476 F. Supp. at 780.

The *Earl* footnote is particularly relevant because it emphasizes that selective use of immunity is an important factor to be considered in the resolution of an asserted due process violation. The court in *DePalma* explicitly found selectivity to be one of the case's "peculiar facts." 476 F. Supp. at 780 n.13, 781. *See* notes 136-49 *infra* and accompanying text.

29. Many immunity cases have referred to both the *Earl* decision and its footnote. *See, e.g.*, United States v. Klauber, 611 F.2d 512, 518 n.12 (4th Cir. 1979); United States v. Rocco, 587 F.2d 144, 147 n.10 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); United States v. Wright, 588 F.2d 31, 35 n.3 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); United States v. Alessio, 528 F.2d 1079, 1081 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Morrison, 535 F.2d 223, 229 (3d Cir.), *cert. denied*, 429 U.S. 824 (1976).

30. *See* text accompanying note 26 *supra*.

31. This rephrasing would be consistent with the Justice Department Guidelines: "The provisions of 18 U.S.C. 6001-6003 are not to be used to compel testimony or production of other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information." Guidelines, *supra* note 23, § 11. This position also finds support in the immunity statute. 18 U.S.C. § 6003(b)(1) (1976). *See* note 34 *infra*.

problem as forcing the judiciary into performing a legislative function, as Chief Justice Burger suggests, or of encroaching upon the prosecution's vested authority.[32] Alternative and less drastic means can achieve the intended result of arriving at the truth in a criminal proceeding.[33]

B. The Courts' Role In Immunity Decisions

A strict interpretation of 18 U.S.C. section 6003[34] (section 6003) indicates that the prosecution has absolute discretion in requesting an immunity order.[35] One court has noted that the power to grant immunity is intended solely to benefit the government.[36] The statute's legislative history reveals that Congress read the courts' role

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32. *See* notes 35-67 *infra* and accompanying text.

33. Virgin Islands v. Smith, No. 79-1212, slip op. at 13 (3d Cir. Feb. 5, 1980) ("[T]he essential task of a criminal trial is to search for truth . . . ."); Earl v. United States, 364 F.2d 666 (D.C. Cir. 1966) (denial of petition for rehearing en banc denied) (statement by JJ. Leventhal, Bazelon, Fahy and Wright in favor of en banc consideration) ("The immunity statute was passed in furtherance of the search for truth . . . .").

34. 18 U.S.C. § 6003 (1976) provides:

> (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 anciliary 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 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.

See also United States v. LaDuca, 447 F. Supp. 779, 788 (D.N.J.), *aff'd on other grounds sub nom.* Rocco v. United States, 587 F.2d 144 (3d Cir. 1978) ("The public interest is surely advanced where all testimony relevant to ascertaining the defendant's guilt or innocence is available.").

35. "A United States attorney may . . . request an [immunity] order . . . when *in his judgment* . . ." 18 U.S.C. § 6003(b) (1976) (emphasis added). "[T]he United States district court . . . *shall issue* . . . [an immunity order] upon the request of the United States attorney . . . ." 18 U.S.C. § 6003 (a) (1976) (emphasis added). *See* note 34 *supra*.

36. United States v. Herman, 589 F.2d 1191, 1200 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). The court also noted that the legislative purpose of the immunity statute is to "strengthen the hand of the prosecution and to weaken that of the criminal defendant." *Id.* at 1202.

in granting an immunity order as limited to finding the facts upon which the order is predicated.[37] For this reason, the function of district court review of the prosecution's decision to extend or withhold immunity has been characterized as essentially a ministerial task.[38]

Nevertheless, it should be noted that the cases which impose a "ministerial task" limitation upon district court review involved a prosecutor's decision to grant immunity.[39] In defense witness immunity cases, the opposite situation is presented; it is the government's denial of defendant's request for witness immunity that is the basis of an alleged due process violation. Although one court has questioned the validity of distinguishing between decisions to extend and withhold immunity,[40] that same court alluded to the appropriateness, in certain circumstances, of reviewing a prosecutor's decision not to grant immunity.[41] Because the statute authorizes the granting of immunity only upon the request of the United States attorney,[42] another court has held that the only grounds upon which a court can review a prosecutor's immunity decision are the sixth amendment or the due process clause of the fifth amendment.[43] Indeed, courts have not hesitated to review the merits of a federal prosecutor's immunity decision when it has been

37. H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 43, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4018.

38. Ullman v. United States, 350 U.S. 422, 432-33 (1956) (predecessor statute construed to withhold from the district court "any discretion to deny the order on the ground that the public interest does not warrant it"); United States v. Herman, 589 F.2d 1191, 1201 (district court limited in its review "to determine whether the formal prerequisites for an immunity grant had been complied with before granting the order"); II WORKING PAPERS, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1435 (1970) [hereinafter cited as WORKING PAPERS].

39. *See* note 38 *supra* and accompanying text. *See also* United States v. Ellis, 595 F.2d 154, 163 (3d Cir. 1979) (defendants were without standing to contest the propriety of the granting of immunity by the government to witnesses testifying against them); United States v. Hathaway, 534 F.2d 386, 402 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976).

40. United States v. Herman, 589 F.2d 1191, 1201 ("The same separation of powers concerns that compelled *Ullman's* construction of the statute to deny any possibility that a court might bar the prosecutor's application for a grant of immunity apply with equal force to a court order requiring such a grant.").

41. "[T]he gravamen of the *Ulman* holding is that judicial interests of *non-constitutional* stature are insufficient to permit intervention in the prosecutor's immunization decision." *Id.* (emphasis added).

42. 18 U.S.C. § 6003(a) (1976).

43. United States v. Turkish, No. 78-251, slip op. at 8 (S.D.N.Y. Oct. 17, 1979), *appeal docketed*, No. 79-1326 (2d Cir. Oct. 19, 1979).

alleged that the prosecutor's discretion has been exercised in a manner which violates the defendant's right to due process.[44]

Recent Supreme Court cases emphasize that the due process clause can limit other claims of executive prerogative. In *United States v. Lovasco,*[45] a case involving pre-indictment delay which the defendant claimed prejudiced his trial, the Supreme Court, while recognizing that the due process clause "does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment . . .,"[46] went on to explain exactly what the courts are empowered to do: "We are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions . . . .' "[47] Courts should not be relegated to serve as mere "recording agencies"[48] in immunity or other situations where abuses of constitutional magnitude have been asserted by a criminal defendant.

In *United States v. Nixon,*[49] the former President appealed a trial court's denial of his motion to quash a subpoena duces tecum directing him to produce certain tape recordings and documents. The Court held that judicial review of a President's claim of privilege was within its power granted by article III, section 1 of the Constitution,[50] within the basic concept of separation of powers and checks and balances, and within the spirit of *Marbury v. Madison.*[51] Just as production of tapes and documents in *Nixon* was deemed essential to a fair trial, there may be an analogous need for immunization of a defense witness which could override government reluctance to grant defense witness immunity. What is important to note at this point is the power and duty of the courts to vindicate the guarantees of the Constitution, including the fifth

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44. *See, e.g.,* United States v. Gleason, No. 79-1147 (2d Cir. Dec. 19, 1979); United States v. Lang, 589 F.2d 92 (2d Cir. 1978); United States v. Alessio, 528 F.2d 1079 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976).

45. 431 U.S. 783 (1977).

46. *Id.* at 790.

47. *Id.* (*quoting* Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

48. WORKING PAPERS, *supra* note 38, at 1435.

49. 418 U.S. 683 (1974).

50. "The judicial Power of the United States, shall be vested in one supreme Court . . . ." U.S. CONST. art. III, § 1.

51. "It is emphatically the province and duty of the judicial department to say what the law is." United States v. Nixon, 418 U.S. at 703-05, citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

amendment proviso that no person shall be deprived of liberty without due process of law.

Another impediment to a court's ability to undertake a review of a prosecutor's immunity decision is the formal "separation of powers" argument. It has been present in the arguments discussed above because this concept, that of statutory interpretation and district court review, are all inextricably linked. Pre-*Kastigar* cases generally held it to be peculiarly within the government's absolute authority to seek immunity in order to secure testimony. The judiciary's ostensible powerlessness can be traced to the grave consequences of a grant of statutory transactional immunity.[52] After *Kastigar*'s upholding of statutory use immunity, however, the costs to the government when it grants immunity are reduced.[53] It is doubtful, therefore, whether "transaction" decisions like *Earl*, with their emphasis on the separation of powers, are dispositive of the use immunity issue.[54]

Furthermore, analogies to executive powers, such as a decision whether to prosecute and what charges to file,[55] are not persuasive in this context. These discretionary decisions, like those granting immunity, undoubtedly have constitutional limits.[56] Moreover, while the decision to grant immunity to a witness may be part of the charging process,[57] it is not necessarily equivalent to a decision not to charge the witness with a crime.[58] Equating a decision to prosecute with a decision to immunize assumes the government would never be able to meet *Kastigar*'s "independent source" burden[59] in a subsequent prosecution of a previously-immunized witness. It is true that the government's case would collapse if it had no evidence against a witness other than his tainted immunized

52. United States v. Earl, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967). "In the context of criminal justice it is one of the highest forms of discretion conferred by Congress on the Executive, i.e., a decision to give formal and binding absolution in a judicial proceeding to insure that an individual's testimony will be compelled without subjecting him to criminal prosecution for what he might say.").

53. The government can prosecute the immunized witness in the future if it has evidence other than the witness' immunized testimony. *See* notes 60-61 *infra* and accompanying text.

54. United States v. Gaither, 539 F.2d 753, 754 n.1 (D.C. Cir.) (denying petition for rehearing en banc)(per curiam)(statement of Bazelon, C.J.), *cert. denied*, 429 U.S. 961 (1976).

55. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

56. *Id.* at 365.

57. *In re* Weber, 11 Cal. 3d 703, 720, 523 P.2d 229, 240, 114 Cal. Rptr. 429, 440 (1974).

58. *But see* Brief for Government, *supra* note 27, at 17.

59. *See* text accompanying note 21 *supra*.

testimony. However, it is equally true that in circumstances where incriminating evidence exists prior to immunization, the prosecution can follow clearly defined procedures[60] to ensure that this evidence is insulated from the tainted testimony. It could then be used in a future prosecution against the witness.

It is clear that the government's *Kastigar* burden varies from case to case.[61] Therefore, this burden should not automatically act as a bar to judicial review on the merits of defendant's immunity request, as the logic of a "separation of powers" argument would inevitably conclude.[62]

Blanket allowance of executive privilege to override a defendant's request for immunity for his witness[63] could impair a defendant's guarantee of due process of law.[64] The Supreme Court in *Nixon* reached its conclusion by balancing the President's genera-

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60. The Guidelines provide:

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

GUIDELINES, *supra* note 23, § 7.

61. Note, *Right Of The Criminal Defendant To The Compelled Testimony Of Witnesses*, 67 COLUM. L. REV. 953, 961 (1967).

62. The logic would probably be: (1) a grant of use immunity is equivalent to one of transactional immunity because the government always has an insurmountable *Kastigar* burden; (2) the decision to grant use immunity is equivalent to agreeing not to prosecute the witness in the future; (3) the immunity decision is equivalent to a charging decision; (4) the executive has absolute discretion in making a charging decision; (5) the executive has absolute discretion in making an immunity decision; (6) therefore, the court has no power to review the immunity decision.

63. *See, e.g.*, United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); United States v. Ramsey, 503 F.2d 524, 532 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973).

64. *Cf.* United States v. Nixon, 418 U.S. 683, 712 (allowance of executing privilege would withhold demonstrably relevant evidence from defendant's trial).

lized interest in confidentiality against the constitutional need for all relevant evidence in a criminal proceeding.[65] The government in *DePalma* does not rely solely upon the generalized notion of executive privilege as conferred under section 6003. Rather, the government's strongest argument is a practical one that emphasizes the deleterious effect of defense witness immunization upon ladder-climbing prosecutions.[66] Therefore, the suggestion that the issue of defense witness immunity be removed entirely from the "separation of powers" framework[67] is not justifiable; the government has legitimate interests to protect as does a defendant. Moreover, the suggestion smacks of a legislative, not a judicial, analysis as the statute vests discretion in the executive branch.

III. Requirements To Establish Due Process Violations

Recent cases have emphasized that the defendant must lay a sufficient procedural and substantive foundation for an immunity-related due process claim. The requisite factors include a timely showing that the desired witness will assert his fifth amendment right and that denial of defendant's request for witness immunity will result in the exclusion of relevant testimony. Whether selective use of the executive immunity power and government bad faith are also prerequisites is currently an open question.

A. Procedural Requirements

Section 6003 provides that a United States attorney may request an immunity order when, *inter alia,* the witness "has refused or *is likely to refuse* to testify . . . on the basis of his privilege against self-incrimination."[68] Notwithstanding the leeway provided in the statute, legislative preference is for the witness to specifically claim his privilege to receive immunity.[69] In *United States v. Wright,*[70] the Second Circuit explains why a defendant's due process claim,

65. *Id.* at 712 n.19.

66. *See* notes 163-67 *infra* and accompanying text.

67. Note, *"The Public Has a Claim to Every Man's Evidence:" The Defendant's Constitutional Right to Witness Immunity,* 30 STAN. L. REV. 1211, 1213 (1978) (footnote omitted).

68. 18 U.S.C. § 6003 (b)(2) (1976) (emphasis added).

69. H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 42, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4018.

70. 588 F.2d 31 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979).

premised upon the prosecutor's failure to grant immunity to a potential defense witness, was fatally flawed:

> Because Wright failed to subpoena Parker and to prove any need for use immunity, he cannot now demonstrate that the refusal to confer immunity prejudiced his trial . . . . Whether Parker would have maintained the position that his attorney asserted, had he actually been subpoenaed and called to the stand, is a matter of speculation upon which this court cannot base a finding that Wright was denied his due process right to a fair trial.[71]

The court's concern is with a witness who, prepared to testify if actually subpoenaed and put under oath, might state in advance that he would invoke his fifth amendment privilege in the hope that he thereby would not be called.[72] Despite this contingency, another circuit has not strictly adhered to a subpoena requirement. In *United States v. Klauber*[73] the Fourth Circuit proceeded on the assumption that the defendant's due process claim was preserved despite the fact that the proposed defense witness was never subpoenaed. Nevertheless, counsel for the witness had previously stated that his client would not testify without a grant of immunity. The government's conduct at the trial indicated that it accepted this fact.[74]

In addition to a sufficient showing by the defendant that a proposed witness will refuse to testify without immunity, the defendant's demonstration of need for the testimony must be timely. In *United States v. Turkish,*[75] more than five and one half months elapsed between the first pre-trial conference and the beginning of trial. During this period, the defendants never revealed any intention of requesting immunization of witnesses. The demand was first made in the middle of the trial. This late request would have hampered the prosecutor's ability to make a meaningful immunity recommendation to the United States attorney[76] and increased the al-

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71. *Id.* at 36-37.

72. United States v. Klauber, 611 F.2d 512, 514 (4th Cir. 1979)(footnote omitted) (dictum). *See also* United States v. Praetorius, No. 79-1134 (2d Cir. Dec. 10, 1979) (explicit precondition that proposed witness be subpoenaed and necessary to the defense).

73. 611 F.2d 512 (4th Cir. 1979).

74. *Id.* at 514.

75. No. 78-251 (S.D.N.Y. Oct. 17, 1979), *appeal docketed* No. 79-1326 (2d Cir. Oct. 19, 1979).

76. The Guidelines provide:

> An attorney for the government may request authorization, from the Assistant Attorney General with responsibility for the subject matter of the case, to apply for an order, pursuant to 18 U.S.C. 6003, compelling a person to testify or provide other

ready "heavy burden"[77] imposed on the government if it chose to pursue a future indictment of the proposed witnesses. As a result, the court dismissed the defendants' applications as untimely.[78]

B. Substantive Requirements

1. *Relevant Testimony*

In order to secure immunity for a defense witness, the defendant must show that the testimony of a witness is crucial to his defense. If the desired testimonial evidence is merely cumulative of evidence already before the jury, exclusion of such evidence would not deny the defendant his due process rights.[79] It is necessary that the testimony be material[80] and vital[81] to the defense to establish a constitutional violation. A showing that the testimony is potentially exculpatory would be a sufficient basis.[82] Where the defendant does not offer evidence as to what the witness has said in the past or

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information . . . . The request for authorization shall contain sufficient information to permit the Assistant Attorney General, and the United States Attorney for the district in which the motion for the order is to be made, to make an independent judgment regarding the public interest and the likelihood of the refusal to testify.

GUIDELINES, *supra* note 23, § 2.

77. Kastigar v. United States, 406 U.S. 441, 461 (1972).

78. United States v. Turkish, No. 78-251, slip op. at 8 (S.D.N.Y. Oct. 17, 1979), *appeal docketed*, No. 79-1326 (2d Cir. Oct. 19, 1979); *see also* United States v. LaDuca, 447 F. Supp. 779, (D.N.J.), *aff'd on other grounds sub nom.* Rocco v. United States, 587 F.2d 144 (3d Cir. 1978) (defendant's motion for a new trial on the ground of newly discovered evidence was denied as untimely because the defendant had not made a request at trial for immunization of the witness who was the source of the evidence).

79. United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976); United States v. Gleason, No. 79-1147, slip op. 659, 708 (2d Cir. Dec. 19, 1979)(witness' testimony would at best be cumulative of the defendant's testimony).

80. Roviaro v. United States, 353 U.S. 53, 62 (1957) (improper for the government to withhold identity of an informer whose testimony would have been significant); Brady v. Maryland, 373 U.S. 83 (1963). *See* United States v. Agurs, 427 U.S. 97, 104-07 (1976); United States v. Morell, 524 F.2d 550, 557 (2d Cir. 1975).

81. Brady v. Maryland, 373 U.S. at 896.

82. Earl v. United States, 364 F.2d 666 (D.C. Cir. 1966) (denial of petition for rehearing en banc)(statement by JJ. Leventhal, Bazelon, Fahy and Wright in favor of en banc consideration), *cert. denied*, 388 U.S. 921 (1967); United States v. LaDuca, 447 F. Supp. 779, 787 (D.N.J.), *aff'd on other grounds sub nom.* Rocco v. United States, 587 F.2d 144 (3d Cir. 1978)(sixth amendment breach would occur if the government withheld immunity which would make exculpatory testimony available to the defendant)(dictum). *Cf.* Virgin Islands v. Smith, No. 79-1212, slip op. at 9 n.7 (3d Cir. Feb. 5, 1980) ("Immunity . . . need not be predicated upon a finding that the witness' testimony is clearly exculpatory or otherwise essential to the defendant's case . . . . The trial court must find, however, that the proffered testimony would be relevant to the defendant's case.").

what he is expected to offer in court, the defendant has not met this burden.[83]

2. *Selective Use of Immunity Power*

A perplexing question in defense witness immunity cases is whether the selective use by the government of its immunity power[84] is a prerequisite for a defendant's due process claim. One court has argued that the government's extension of immunity to its own witnesses is irrelevant in demonstrating a violation of defendant's right of due process:

> While it is true that the fundamental fairness of a trial is affected by the presence of the immunity power in the government's and not the defendant's arsenal, it is the availability and not the use of the power which creates the imbalance. If the government immunizes a witness and the defendant's important witnesses do not require immunity, the trial is not thereby rendered fundamentally unfair. Conversely, if the defendant's important witnesses do require immunity, the defendant should not be foreclosed from this right merely because the government chose not to exercise the power on its own behalf. In addition, an equation which includes the factor of government use of immunity for its own witnesses would permit the government to avoid its responsibility to request immunity for a defendant where otherwise appropriate merely by declining to use the immunity power for itself.[85]

This argument recognizes that an imbalance in the government's favor can exist independently of the selective use of the immunity power. It is incorrect, however, to dismiss the actual use of the immunity power by the government as irrelevant. It is likely that the immunization of and resulting testimony by a government witness would be damaging to the defense because an important consideration guiding a prosecutor's decision to grant immunity is whether

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83. United States v. Taylor, 562 F.2d 1345, 1361-62 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977); Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1978), *cert. denied*, 440 U.S. 929 (1979) (trial court's holding that petitioner had not shown that the testimony of either co-conspirator would be favorable to his defense, a conclusion based partially on defense counsel's lack of knowledge of what the witness would testify to, was overturned by the court of appeals); United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976) (One appellant made a motion to sever the trial so that co-defendants could offer exculpatory testimony. The court held that there was an insufficient showing that co-defendant would testify at a severed trial and waive his fifth amendment privilege).

84. *See* note 137 *infra* for differences between grants of statutory and informal immunity. For purposes of this discussion, the two will be considered equivalent.

85. United States v. Turkish, No. 78-251, slip op. at 19-20 (S.D.N.Y. Oct. 17, 1979) (dictum), *appeal docketed*, No. 79-1326 (2d Cir. Oct. 19, 1979).

the testimony will be helpful to the government.[86] This "availability rather than use" argument[87] ignores the reality that the government's extension of immunity to its own witnesses is the means by which inculpatory testimony against the defendant is elicited. Although not a material factor in itself, selective use can aggravate the imbalance already present at trial due to the defendant's inability to present a full defense.[88]

3. *Government Bad Faith*

Another perplexing issue in the area of defense witness immunity is whether government bad faith is a prerequisite to a defendant's due process claim. Bad faith is a prerequisite in other circumstances where the government exercises wide discretion.[89] Moreover, the *Earl* footnote has been construed as requiring a finding of government misconduct before a due process violation is recognized[90] although it does not explicitly discuss the bad faith require-

86. GUIDELINES, *supra* note 23, comment to § 3(b).

87. The argument has been suggested by other courts. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (defendant's right to present full defense does not depend upon the manner in which the state presents its case); United States v. Alessio, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). The *Alessio* court lists the state's grant of immunity to a prosecution witness as a factor, but then disregards it in determining whether defendant was deprived of due process. This can be explained by the fact that the witness' testimony was only cumulative. *Id.* at 1082. Because the defendant never satisfied one of the initial prerequisites, the issue of selectivity was never reached. *See also* Note, *The Sixth Amendment Right To Have Use Immunity Granted To Defense Witnesses*, 91 HARV. L. REV. 1266, 1270 (1978).

88. It cannot be denied that the method in which the government conducts its case can affect a defendant's trial. In Jencks v. United States, 353 U.S. 657 (1957), the petitioner, president of a mine workers union, was convicted of filing a false affidavit stating that he was not a member of the Communist Party. The government's case was built on the testimony of two witnesses paid by the FBI. *Id.* at 659. In reviewing the trial court's denial of petitioner's motion to inspect the reports filed by the witnesses with the FBI, the Supreme Court remarked: "The crucial nature of the testimony of Ford and Matusow to the Government's case is conspicuously apparent. The impeachment of the testimony was singularly important to the petitioner." *Id.* at 667.

89. United States v. Marion, 404 U.S. 307, 324 (1971) (due process clause would require dismissal of indictment if defendant could prove, *inter alia*, that the delay was "an intentional device to gain tactical advantage over the accused") (footnote omitted). *See* United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)(the defendant "bears the heavy burden of establishing . . . that the government's discriminatory selection of him for prosecution has been invidious or in bad faith . . ."). *But see* United States v. Calzada, 579 F.2d 1358, 1362 n.9 (7th Cir.) (in a case involving the government's deportation of a material witness, "a finding of 'bad faith' or prosecutorial misconduct is not a precondition to dismissing an indictment . . ."), *cert. dismissed*, 439 U.S. 920 (1978).

90. Brief for Government, *supra* note 27, at 45 n.*. The government contends that, in the

ment.[91] Two relatively recent Third Circuit cases have dealt with this issue.

In *United States v. Morrison,*[92] the government conducted an intimidating interview with a prospective defense witness. The interview prompted the witness to assert her fifth amendment privilege against self-incrimination at the defendant's trial. Although the government did not extend immunity to any prosecution witnesses, its refusal to grant immunity to defendant's witness was held to have deprived the defendant of relevant evidence and a fair trial. The court remarked:

> There are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness . . . . Such a circumstance was created in this case when prosecutorial misconduct caused the defendant's principal witness to withhold out of fear of self-incrimination testimony which would otherwise allegedly have been available to the defendant.[93]

The misconduct present in *Morrison,* although undeniably integral to the government's plan to later withhold immunity, occurred prior to the prosecution's denial of defendant's request for witness immunity. Had the harassing interview not occurred, the witness would not have invoked the fifth amendment and the immunity issue would never have been raised. Although the court mentioned that prosecutorial bad faith was one circumstance in which such a conclusion could be justified, it did not hold that lack of bad faith would necessarily bar a due process claim.

In contrast to *Morrison,* the same court in *United States v. Herman*[94] expressly stated that government bad faith is a prerequisite for a due process claim. In this case, two former state court magistrates, Herman and McCann, were convicted of racketeering and accepting bribes. Two government witnesses, a former bail bondsman and a secretary from the agency where he worked, testified against Herman under grants of immunity. The prosecution denied

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Earl hypothetical, the prosecution improperly or arbitrarily chose to immunize the eyewitness who inculpated the defendant and not the witness who could have offered exculpatory testimony. This is not necessarily suggested by the *Earl* footnote. The government there could have had a valid reason for not granting defendant's request. To belabor the already vague footnote would be fruitless.

91. *See* text accompanying note 26 *supra.*

92. 535 F.2d 223 (3d Cir.), *cert. denied,* 429 U.S. 824 (1976).

93. *Id.* at 229.

94. 589 F.2d 1191 (3d Cir. 1978), *cert. denied,* 441 U.S. 913 (1979).

Herman's request for immunity for prospective defense witnesses. The court rejected Herman's due process claim because he failed to meet a "substantial" evidentiary showing required to justify reversal:

> The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact-finding process. Where such a showing is made, the court has inherent remedial power to require that the distortion be redressed by requiring a grant of use immunity to defense witnesses as an alternative to dismissal.[95]

The court made no attempt to explain what types of intentional misconduct, other than that present in *Morrison,* might be so egregious as to distort the "judicial fact finding process." It is logical to assume that, under *Herman,* decisions made in order to safeguard legitimate governmental interests would be justifiable; only those made to conceal relevant evidence[96] from the defendant would provide a basis for a due process claim.

It has been argued that the *Brady v. Maryland*[97] rule should be applied in immunity situations. In this case, the petitioner and a companion were convicted of first degree murder in a state court. Prior to the trial, petitioner requested transcripts of witness statements in which the witness admitted committing the homicide.[98] The prosecution withheld the admission. The Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[99] The justification for extending the *Brady* rule to defense witness immunity cases is that the government's denial of a defendant's immunity request is equivalent to the suppression of exculpatory evidence in its possession. However, courts have almost unanimously refused to extend the *Brady* rule to immunity situations.[100] The rationale most often

95. *Id.* at 1204.

96. *See* text accompanying notes 79-83 *supra.*

97. 373 U.S. 83 (1963).

98. *Id.* at 84.

99. *Id.* at 87.

100. United States v. Caldwell, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 1087 (1976); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967); United States *ex rel.* Tatman v. Anderson, 391 F. Supp. 68, 71-72 (D. Del. 1975). *But see* United States v. Turkish, No. 78-251, slip op. at 33 n.21 (S.D.N.Y. Oct.

used is that the witness' fifth amendment assertion was a product of voluntary choice, not government intimidation.[101] This is therefore not a *Brady* suppression, it is argued, because the government has not affirmatively withheld the evidence. *Brady*, however, explicitly rejects the materiality of the good or bad faith of the prosecutor. The case should not be interpreted as a mere suppression case but rather as one based on ensuring the accused's right to present a full defense.[102]

It has also been argued that *Brady* suppression cases are inapposite to immunity situations because, in the latter cases, the government does not actually possess the relevant testimony which the defendant requires for his defense. However, drawing a distinction between the dominion and control the government retains when physical or testimonial evidence is in its possession and the power it has, via statute, to control access to information in a witness' possession, emphasizes form over substance.[103] In sum, the subordination of the "government conduct" factor in due process immunity analysis would harmonize *Brady* and immunity cases; attention thereby would be focused on the affirmative discovery rights of the defendant[104] rather than on punishing prosecutorial misconduct.

17, 1979)(dictum), *appeal docketed*, No. 79-1326 (2d Cir. Oct. 19, 1979); United States v. Saettele, 585 F.2d 307, 313 (8th Cir. 1978)(dissenting opinion), *cert. denied*, 440 U.S. 910 (1979).

101. *But see* United States v. Morrison, 535 F.2d 223 (3d Cir.), *cert. denied*, 429 U.S. 824 (1976).

102. *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 121-22 (1974). *See also* 2 A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 317, at 2-247-48 (2d ed. 1971).

103. *See* Note, *A Re-Examination Of Defense Witness Immunity: A New Use For Kastigar*, 10 HARV. J. LEGIS. 74, 86 (1974). When a defendant's right to due process is involved, it seems incongruous to impose a burden on the government in *Brady* situations irrespective of its good or bad faith, and not to impose any burden on the government, or to impose it only upon a showing of bad faith, in immunity situations. In both circumstances the evidence sought is crucial for the defense. Such a right to due process should not revolve around the prosecutor's bad faith; the defendant would be in the same position regardless.

Judge Garth, dissenting in *Herman*, equated the prosecution's denial of a defendant's immunity request with the situation in *Brady* when he wrote that "a due process violation in the present context should [not] require the defendant to prove the subjective bad faith of the government in order to establish his due process claim." 589 F.2d at 1206.

104. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1213 (1978) (footnote omitted).

IV. Recent Immunity Decisions

The majority of the recent cases have rejected defendants' due process claims, including reverse immunity situations similar to *DePalma*. These decisions can usually be traced to an inadequate showing by the defendant of one of the substantive and procedural requirements discussed previously.[105]

In *United States v. Bacheler*,[106] the defendants, convicted of engaging in racketeering, bribery, and conspiracy, claimed that their right to a fair trial had been violated. The prosecution had granted immunity to its own witness but the trial court refused to compel the government to immunize a prospective defense witness. The United States Court of Appeals for the Third Circuit rejected the defendants' claim because it did not "rise to the level of constitutional deprivation encompassed in the *Herman* discussion."[107] The court also based its decision on the defendants' failure to demonstrate the exclusion of clearly exculpatory testimony.

In the Second Circuit, similar procedural and substantive inadequacies have vitiated immunity-based due process claims. In *United States v. Gleason*,[108] officers of the Franklin National Bank were convicted of various bank frauds. Gleason, former chairman of the bank, contended that his due process rights were violated by the government's refusal to grant statutory use immunity to an alleged co-conspirator who was charged in a separate indictment.[109] The court held that there was no due process violation despite the informal immunization[110] of two lesser government witnesses. The court deferred to the United States attorney's discretion in immunity decision-making. The court additionally noted that the defendant did not claim that the potential witness would offer exculpatory evidence; rather, it "would at best be merely cumulative of Gleason's testimony and from an obviously interested witness who would be subject to intensive cross-examination that might well destroy his credibility."[111] Finally, there was no evidence of prosecutorial misconduct in order to gain a tactical advantage over

105. *See* text accompanying notes 68-83 *supra*.
106. 611 F.2d 443 (3d Cir. 1979).
107. *Id.* at 450.
108. No. 79-1147 (2d Cir. Dec. 19, 1979).
109. *Id.*, slip op. at 706.
110. For a discussion of informal immunity, *see* note 138 *infra*.
111. No. 79-1147, slip op. at 708 (2d Cir. Dec. 19, 1979).

the defendant.

The Second Circuit's strict subpoena requirement[112] was recently reaffirmed[113] in *United States v. Praetorius.*[114] Here, seven defendants were found guilty of involvement in a heroin importation conspiracy. One appellant contended that the trial court should have ordered statutory immunity for a defense witness.[115] The court had denied the request because the desired testimony was only probative of the credibility of one of the government informants and was therefore considered a collateral matter insufficient to require the grant of immunity.[116] The Court of Appeals for the Second Circuit reiterated its general rule that "the United States need not ordinarily grant statutory immunity to a defense witness."[117] It did, however, acknowledge that the decision in *Wright*[118] left open the possibility that certain, albeit unspecified, circumstances would mandate the government's conferral of use immunity on a defense witness so as not to violate a defendant's right to due process. However, because this appellant never subpoenaed the potential witness,[119] the question of the government's possible duty to grant immunity was never reached by the court.[120]

Satisfactory compliance with the procedural and substantive requirements described earlier[121] was present in *United States v.*

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112. *See* text accompanying notes 69-72 *supra.*

113. The subpoena requirement's progenitor is United States v. Wright, 588 F.2d 31 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979). *See* text accompanying notes 70-71 *supra.*

114. No. 79-1134 (2d Cir. Dec. 10, 1979).

115. *Id.*, slip op. at 5661. Despite the fact that this witness was granted informal letter immunity by the United States Attorney for the Eastern District of New York, she refused to testify unless she received formal statutory immunity.

116. *Id.*

117. *Id.* at 5662. *See* United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976).

118. United States v. Wright, 588 F.2d 31 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979).

119. United States v. Praetorius, No. 79-1134, slip op. at 5662 (2d Cir. Dec. 10, 1979).

120. For other Second Circuit immunity cases, see United States v. Lang, 589 F.2d 92 (2d Cir. 1978) (defendant's due process claim rejected on the basis of the traditional "executive discretion" argument, the absence of government bad faith, the non-exculpatory nature of the potential witness' testimony, important policy considerations concerning the prosecutor's subsequent burden, and the fact that a reverse immunity situation was not present); United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976) ("[T]he government [was not] obligated to grant immunity to the [proposed defense witnesses] . . . so that they could be called to testify." This was evidently based on the non-exculpatory nature of the proposed evidence).

121. *See* notes 68-83 *supra* and accompanying text.

DePalma.[122] An indictment was filed in 1978 charging multiple defendants with bankruptcy fraud, securities fraud, obstruction of justice, and racketeering[123] with regard to the operation of the Westchester Premier Theatre in Tarrytown, New York. The gravamen of the charge against defendant Leonard Horwitz was that he fraudulently induced Warner Communications, Inc. to invest in theatre stock by bribing two of the corporation's officials, Jay Emmett and Solomon Weiss. After the government rested its case in the first trial,[124] Horwitz subpoenaed Emmett and Weiss and was advised that they both intended to invoke the fifth amendment if called to testify.[125] Horwitz requested the granting of use immunity to Emmett and Weiss, or alternatively, for admission of their grand jury testimony pursuant to rule 804(b)(5).[126] The government declined to grant immunity, and despite the court's determination that the witnesses' grand jury testimony was exculpatory,[127] Judge Sweet sustained the government's objection to the proffered evidence.[128] No due process objection was preserved, however, because a mistrial resulted.[129]

Upon retrial, Horwitz again subpoenaed Emmett and Weiss who both took the stand and invoked their fifth amendment right

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122. 476 F. Supp. 775 (S.D.N.Y. 1979), *appeal docketed sub nom.* United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979). The court avoided the bad faith question by not expressly adopting any standard of review. *Id.* at 780 n.13.

123. The proof against Horwitz was confined to the latter three charges. *Id.* at 776 n.1.

124. The principal evidence against Horwitz was gained through the immunized testimony of Norman Brodsky and the testimony of Bruce Kosman who had plea-bargained with the government in exchange for his cooperation. *See* notes 137-42 *infra* and accompanying text.

125. United States v. DePalma, No. 78-401, slip op. at 1 (S.D.N.Y. Dec. 21, 1978).

126. FED. R. EVID. 804(b)(5) provides in part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

127. United States v. DePalma, No. 78-401, slip op. at 2 (S.D.N.Y. Dec. 21, 1978).

128. *Id.* at 3. The interests of justice were not sufficient to invoke the exception of FED. R. EVID. 804(b)(5) to the hearsay rule.

129. The jury was unable to reach a unanimous verdict. United States v. DePalma, 476 F. Supp. 775, 776 (S.D.N.Y. 1979), *appeal docketed sub nom.* United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979).

against self-incrimination. When the court asked the government[130] if it would grant use immunity to the witnesses, the Assistant United States attorney responded in the negative because both men were subject to continuing investigation.[131] The jury convicted the defendants[132] on May 22, 1979. Three weeks later Horwitz moved for acquittal or, alternatively, for a new trial, alleging that he was denied due process because of the government's selective exercise of its immunity power. Horwitz' due process claim was preserved because he made a timely showing[133] that the government's refusal to extend immunity to uncooperative defense witnesses would result in the exclusion of exculpatory evidence.[134] Judge Sweet agreed that there had been a due process violation and, in an opinion rendered on August 15, 1979,[135] revealed the rationale of his holding:

> Horwitz was deprived of the due process of law because broad immunity was granted to government witness Brodsky and, to a lesser extent, Kosman, while two witnesses to the events at issue sought to be called by Horwitz were unavailable because of the government's failure to grant them even limited use immunity.[136]

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130. It is unclear from the record whether this request was made *sua sponte*. Regardless, the pertinent procedural issue is whether the request made at the conclusion of the government's case in the second trial was timely. Due to the fact that a similar request was made during the first trial, *see* text accompanying note 126 *supra*, the government was obviously aware of Horwitz' desire for defense witness immunity before commencement of the second trial and could not therefore claim prejudice. *See* United States v. Klauber, 611 F.2d 512, 514 (4th Cir. 1979).

131. 476 F. Supp. at 777.

132. Horwitz was found guilty on all counts. *Id.* at 776.

133. *See* note 130 *supra*.

134. The government contends that there was an insufficient showing that Emmett and Weiss would offer exculpatory evidence per their grand jury testimony. Brief for Government, *supra* note 27, at 49. Conversely, there was no indication that the witnesses were not going to adhere to their sworn grand jury testimony. Brief for Appellee, *supra* note 28, at 47.

There was no requirement that witnesses will definitely offer exculpatory evidence if they are granted immunity. No one can predict with certitude what a witness will actually testify to once on the stand. It should be sufficient that a witness has knowledge of or access to relevant evidence. The very existence of the exculpatory grand jury statements makes the showing in *DePalma* greater than in Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1978), *cert. denied*, 440 U.S. 929 (1979), where the court found that the potential witness would have provided favorable evidence which was neither cumulative nor irrelevant despite defense counsel's ignorance as to what the witness would testify.

135. The government appealed on September 13, 1979. Oral argument before a three judge panel of the United States Court of Appeals for the Second Circuit, JJ. Feinberg, Smith and Owen (sitting by designation from the Southern District of New York) presiding, was heard on January 23, 1980.

136. *Id.* at 777 (footnote omitted). The court later remarked that "the foundation of the

Because "selectivity" was a decisive factor in the court's judgment, it would be helpful to examine the nature of the government's agreement with Brodsky, its principal witness, and with Kosman and Carino, two lesser figures, and to evaluate the impact of their testimony at Horwitz' trial.

Brodsky initially entered into an agreement with the government near the end of 1977. He was told that if he cooperated by tape-recording incriminating conversations with Horwitz and others the government would probably grant him immunity. Fifteen of the twenty recordings introduced into evidence at the second trial were taped by Brodsky before he received informal letter immunity[137] in

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government's case against Horwitz was built by means of a far-reaching immunity grant. . . ." 476 F. Supp. at 781.

137. Letter from Robert B. Fiske, Jr., United States Attorney (by Nathaniel H. Akerman, Assistant United States Attorney) to Andrew Maloney, Esq. (Feb. 13, 1978), *reprinted in* Joint Appendix on Appeal at 53-54, United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979). In return for his cooperation, Brodsky was promised immunity from prosecution for any potential charge based upon information currently known to the office of the United States Attorney or supplied to it by Brodsky. However, if Brodsky were to commit any future crimes, give perjured testimony, or violate any provision of the agreement, the agreement would be null and void.

The Court juxtaposes "limited use" immunity conferred by statute with "broad, far-reaching" immunity conferred informally by letter agreement, *see* notes 134-35 *supra* and accompanying text, but never adequately explains the difference between them. Indeed, some courts operate under the assumption that letter immunity is equivalent to use immunity. *See* United States v. Klauber, 611 F.2d 512, 514 n.2 (4th Cir. 1979); United States v. Kurzer, 534 F.2d 511, 513 n.3 (2d Cir. 1976). The possible invalidity of this assumption has been recognized. United States v. Klauber, 611 F.2d 512, 514 n.2 (4th Cir. 1979).

There are obvious differences between the two types of immunity vis-a-vis the government. The government in effect granted transactional immunity to Brodsky and thus foreclosed any possibility of his future prosecution. If it had granted immunity pursuant to 18 U.S.C. §§ 6002-6003 (1976), the government theoretically would have retained such power of prosecution. *See* note 53 *supra*. It is equally important to evaluate how each immunity grant operates to elicit testimony favorable to the party requesting it, *i.e.*, whether full and truthful disclosure or perjured testimony is likely to occur. Under the informal agreement Brodsky apparently would have little reason to lie because if he did, the entire agreement would be voided and he would be prosecutable for any and all known crimes. Under the statute, immunity cannot be revoked despite perjurious testimony. *See* 18 U.S.C. § 6002 (1976)(untruthful witness still prosecutable for lying under immunity grant). This distinction disappears when instances of non-prosecutable perjury are present. Moreover, a witness' motivation for offering perjured testimony is relevant in assessing the effect of immunized testimony on the adverse party. A witness' ostensible reluctance to commit perjury when testifying under an informal grant of immunity does not necessarily imply that he would lie and inculpate the defendant more if compelled to testify by statute.

If the primary concern is a properly balanced trial, it is immaterial whether the government grants statutory immunity or informal letter immunity to a prosecution witness. A prosecution witness who testifies under an immunity agreement is more helpful to the gov-

February, 1978.[138] On appeal to the Second Circuit, the government argues that its case was not "built" on its eventual grant of immunity to Brodsky because the majority of the tapes were recorded before any grant was made.[139] This contention fails to account for the fact that the likelihood of the government's immunity grant was certainly the impetus for Brodsky's acts.[140] Moreover, Brodsky's testimony at trial, apart from the tapes, played a major role in the government's case.[141] This testimony was given after Brodsky had received letter immunity.

The testimony of Kosman and Carino also provided support for the prosecution. Although they too did not receive formal statutory immunity,[142] their willingness to cooperate was due to arrangements with the government assuring them of future leniency.

It is impossible to accurately assess the weight a jury has accorded particular items of evidence during its deliberation. Nevertheless, it would be difficult to deny that the testimony of the three government witnesses, *in toto*, was sufficiently convincing to aid the jury in its conclusion that Horwitz was guilty beyond a reasonable doubt. It was for this reason that, in fashioning a remedy, Judge Sweet rejected acquittal and dismissal of the indictment as

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ernment and more damaging to the defendant than if there been no such agreement. *See* Note, *The Sixth Amendment Right To Have Use Immunity Granted To Defense Witnesses*, 91 HARV. L. REV. 1266, 1268 n.15 (1978).

138. Brief for Government, *supra* note 27, at 5-6.

139. *Id.* at 27 n.*.

140. He had a lot to lose since he faced a possible 2000 years in jail for past crimes, according to his own approximation, 476 F. Supp. at 779. The likelihood of an actual grant was great and was in fact forthcoming.

141. The majority of incriminating testimony against Horwitz was offered at trial by Brodksy. *See* Brief for Government, *supra* note 27, at 8-12.

142. Kosman entered into a plea bargain cooperation agreement with the government. *See* Letter from Robert B. Fiske, Jr., United States Attorney (by Nathaniel H. Akerman, Assistant United States Attorney) to John Doyle, Esq. (June 22, 1978), *reprinted in* Joint Appendix on Appeal at 56-58, United States v. Horwitz, No. 79-1315 (2d Cir. Sept. 13, 1979). However, Kosman thought he was testifying pursuant to an immunity grant. 476 F. Supp. at 777 n.6.

The government refutes Judge Sweet's statement that "[p]art of Carino's plea arrangement was a promise by the government that Carino would not receive more than five years in jail for charges that he was pleading guilty to in New Jersey." 476 F. Supp. at 777 n.7. It contends that the promise was made, not by the United States government, but rather by the State of New Jersey. Brief for Government, *supra* note 27, at 5 n.*. However, the alleged imbalance at trial due to a one-sided immunity grant would be the same regardless of the identity of the promisor; Carino testified while fully aware of the promise of the reduced maximum sentence.

too drastic.[143] Rather, the court held that "[b]ecause the constitutional defect can be remedied, Horwitz' motion for a new trial is granted, and upon such retrial Brodsky's testimony will be excluded unless the requested use immunity is granted to Emmett and Weiss."[144] Although the court remarked that the interests of justice would best be served if the latter course were chosen by the government,[145] the very fact that the former option was acceptable demonstrates that the government's selective use of its immunity power played a critical role in the court's analysis.

It is perplexing that the court has apparently conditioned Horwitz' right to have his witnesses immunized upon the fortuity that the government has granted immunity to a major prosecution witness.[146] The remedy reveals the court's belief that the absence of the proposed crucial testimony would not of itself have denied Horwitz a fair trial. This is no doubt a function of the court's conception of the wrong done to the defendant; that is, an imbalanced trial due to one-sided immunization rather than an imbalanced trial due to defendant's inability to present a complete defense. However, because the imbalance may be blatant in the first instance does not necessarily mean that a due process violation has occurred or that there is no constitutional deprivation in the second instance. Defendant's wrong is not rectified by putting him in the position he would have been in had there been no immunization of a prosecution witness. Judge Sweet's remedy is therefore perfectly suited to his misconception. In redressing defendant's wrong, why should it not be permissible to take a crucial weapon away from the government if it is proper to arm the defendant with a similar weapon?

Whether the court would have reached the same conclusion had Brodsky provided the same inculpatory testimony without the grant of immunity is unclear. The trial still would have been in-

143. 476 F. Supp. at 781 n.15, 782.

144. *Id.* at 782. Horwitz contends that because this order is cast in the alternative, it is not appealable as a suppression order under 18 U.S.C. § 3731 (1976) ("An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . ."). Brief for Appellee, *supra* note 28, at 15-17. The court considered it appealable, 476 F. Supp. at 782 n.17. *See also* United States v. Cannone, 528 F.2d 296, 298 (2d Cir. 1975).

145. *I.e.*, "a third trial with immunized testimony by witnesses from *both* sides . . . ." *Id.* at 782.

146. Brief for Government, *supra* note 27, at 30.

balanced[147] and the defense placed in the same position regardless of whether the government's case were built by a grant of immunity or by the independent cooperation of a relevant witness.

Selective use of the executive immunity power should not be determinative in resolving a defendant's due process claim.[148] Fulfilling both the procedural and substantive requirements should be sufficient. The selective use of executive immunity can only serve to strengthen a defendant's due process claim. The defendant's right to criminal discovery can still be abridged in the absence of damaging testimony by a prosecution witness, whether or not immunized.

DePalma is unique in that the absence of prosecutorial misconduct[149] was held not to be a bar to defendant's due process claim. However, the court was careful to avoid formulating a general standard in determining whether a defendant has met his burden in asserting a due process immunity claim: "On the peculiar facts of this case, however, the court concludes that such burden has been met by Horwitz."[150] The court first emphasized the government's grant of selective immunity as the root of defendant's constitutional deprivation. Attention was thus focused on the actions of the prosecution rather than on defendant's incomplete defense. Subse-

147. Whether defendant would have been deprived of due process still depends on his ability to present an adequate defense.

148. No clear holding has emerged regarding the role "selectivity" is to play in immunity-due process cases. The *Earl* footnote, *see* text accompanying note 26 *supra*, is merely a suggestion that the immunity statute could be applied so as to deprive a defendant of a fair trial. Although *DePalma* concluded that "selectivity" was the source of the unconstitutional imbalance at defendant's trial, the decision's utility is diminished by the court's failure to formulate any general standard to be applied in defense witness immunity cases; it limited its holding to "the peculiar facts of this case. . . ." 476 F. Supp. at 780 n.13. *Turkish* promulgates an "availability rather than use" approach to selective-immunity analyses, *see* text accompanying note 85 *supra*, but this, too, was only dictum.

149. 476 F. Supp. at 777 n.5 ("no finding of bad faith or intent on the part of the prosecutor is made by the court in connection with the disposition of this motion").

One court has characterized *DePalma* as an "unfair conduct" case. United States v. Klauber, 611 F.2d 512, 517-18 (4th Cir. 1979). *Klauber* interprets *DePalma* as based on the conclusion that what the government did was "to pick and choose among those principally involved in the alleged scheme to defraud as to whom to call and whom effectively to bar defendant from using." *Id.* at 518. Although selective use of the executive immunity power necessarily involves "picking and choosing" whom to immunize, it is not equivalent to an egregious *Morrison* "intimidation," *see* text accompanying notes 92-94 *supra*, as *Klauber* contends. Moreover, a reading of government bad faith into the decision is refuted by *DePalma*'s express finding.

150. 476 F. Supp. at 780 n.13.

quently, the court abandons its focus on prosecutorial conduct and the *Herman* bad faith standard in reaching its conclusion. The latter course of action is laudable.[151] Nevertheless, the "government conduct" factor should not be eliminated from the scheme,[152] as was ostensibly done in *DePalma*.

Another of the "peculiar facts"[153] which characterized *DePalma* relates to the "independent source" burden placed upon the government by *Kastigar*. The court noted that "the evidence sought by the defense . . . [was] affected by the government's continuing investigation of the potential defense witnesses . . . ."[154] Despite his finding of prosecutorial good faith, Judge Sweet's reference to the *Kastigar* burden indicates his belief that government immunization of the two defense witnesses would not thwart their future prosecution. The government contends that this fact does not further the argument that the defendant's rights have been violated.[155] While this is true, the question whether defense witnesses are currently under investigation is relevant in the weighing process; such a fact is important in determining whether the government is justified in withholding immunity even in the face of a perhaps incomplete defense for the defendant.[156]

V. The Government Burden of Proof: A Proposed Solution

The *Kastigar* burden, as the Supreme Court has noted, is a heavy one.[157] It has been characterized as oftentimes insurmountable and tantamount to having granted transactional immunity,[158] and, as a consequence, leading to the "escape from trial and punishment of someone guilty of an offense against society and its laws."[159] However, this burden is significantly reduced if the gov-

151. *See* note 103 *supra*.

152. *See* text accompanying notes 176-77 *infra*.

153. 476 F. Supp. at 780 n.13. *See also* note 28 *supra*.

154. 476 F. Supp. at 781.

155. Brief for Government, *supra* note 27, at 29.

156. *See* notes 157-76 *infra* and accompanying text.

157. 406 U.S. 441, 461 (1972).

158. United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

159. United States v. Klauber, 611 F.2d 512, 520 (4th Cir. 1979). *See also* United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977) (prosecutor's disclaimer regarding his access to compelled testimony does not preclude possibility that someone else, earlier in the chain of investigation, has seen it). *See generally* Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 282-86 (1976) (successful

ernment already has evidence against the witness.[160] In *DePalma*, the government's investigation of Emmett and Weiss had been proceeding for at least two years. Horwitz asserts this fact, as well as the availability of the witnesses' unimmunized grand jury testimony, as reasons for the invalidity of the government's claim that immunization of the defense witnesses at defendant's trial would make their future prosecution a practical impossibility.[161] The government concedes that substantial evidence already exists implicating the two men in the stock fraud charged in the indictment.[162] However, a grant of immunity to Emmett and Weiss would effectively prevent the government from calling Horwitz as a witness at their subsequent trial. If permitting Emmett and Weis to give immunized testimony results in Horwitz' conviction, the availability of Horwitz to testify[163] would be impermissibly "derived from" the original immunization of the two witnesses.[164] Moreover, Horwitz would have heard the immunized testimony of Emmett and Weiss at his own trial. It would be impossible for the government to prove that Horwitz' testimony at the Warner officials' trial was not in any way related to what he had heard earlier.[165]

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prosecution of immunized witnesses are difficult and exceedingly rare); Carlson, *Witness Immunity In Modern Trials: Observation on the Uniform Rule of Criminal Procedure*, 67 J. CRIM. L. & CRIMINOLOGY 131, 134 (1976) (subsequent prosecution of immunized witnesses virtually impossible).

160. *See* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1274-79 (1978). *See also* note 53 *supra*.

161. Brief for Appellee, *supra* note 28, at 43-44.

162. Brief for Government, *supra* note 27, at 39.

163. A convicted Horwitz would make an ideal government witness. *Id.* at 39-40.

164. At first it may seem illogical to state that exculpatory testimony could lead to a conviction. However, Judge Learned Hand, when speaking of the power of a witness' demeanor, remarked that "such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story." Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

165. In United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976), the immunized grand jury testimony of one Kurzer resulted in two indictments against one Steinman. Steinman decided to plead guilty to lesser charges in return for his cooperation in indicting Kurzer. Kurzer moved to dismiss the indictment on the theory that it was the product of his original immunized testimony. The trial court dismissed the indictment, holding that "the immunized Kurzer testimony led the government to Steinman who in turn led the government to Kurzer." *Id.* at 515 (*quoting* United States v. Kurzer, No. 74-288 (S.D.N.Y. Nov. 12, 1957)). The government appealed, citing as error the trial court's refusal to consider Steinman's testimony "that his decision to cooperate was based on factors entirely independent of the indictment to which Kurzer's testimony had contributed." 534 F.2d at 515. The Second Circuit noted:

The issue therefore is whether the loss of a defendant's testimony in a subsequent prosecution of a witness who is immunized at the defendant's trial would be debilitating to the government's case. Usually, where substantial evidence of complicity is accumulated prior to any immunity grant, such loss would probably not prove damaging enough to warrant the denial of a defendant's legitimate request for defense witness immunity. However, special circumstances are present where ladder-climbing situations are involved. In a far-ranging conspiracy of the variety alleged in *DePalma,* testimonial evidence is an especially crucial element;[166] to permit a higher-up to give immunized testimony at defendant's trial would be to emasculate any government attempts to climb the criminal ladder. Assuming the defendant has met all the procedural and substantive criteria, it nevertheless would be improper to grant immunity in these situations despite selective use of executive immunity power. *DePalma* ignores the practical consequences of its ruling, consequences which demand reevaluation of the present procedures of due process analysis of defense witness immunity questions.

Some commentators[167] contend that the *Kastigar* burden is the same in situations where the prosecution grants immunity to its own witnesses and where use immunity is extended to defense witnesses. While the argument is plausible, its practical inadequacies

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> It is not seriously disputed that Steinman's identity was known to the Government before it had ever heard of Kurzer, and that Steinman was a target of the investigation from its earliest stages. But since Steinman's identity and potential value as a witness were not discovered through Kurzer, the only way in which Steinman's testimony could be derived, either directly or indirectly, from Kurzer's information is if the giving of that information contributed to Steinman's decision to testify. Steinman's motivation is thus directly relevant to the central question in this case.

Id. at 517. On remand, the trial court found that Steinman's testimony was impermissibly derived from Kurzer's immunized testimony. 422 F. Supp. 487 (S.D.N.Y. 1976). The fact that Steinman did not hear Kurzer's immunized testimony (the latter had testified at a grand jury proceeding) did not affect the court's holding. In *DePalma,* the government's "independent source" burden would be more pronounced because Emmett and Weiss would testify in open court; the nexus between Horwitz and the tainted testimony is self-evident.

166. Interview with Nathaniel H. Akerman, Assistant United States Attorney for the Southern District of New York, in New York City (Feb. 22, 1980). *See also* NEWSWEEK, Aug. 27, 1979, at 71, col. 1 (A former United States attorney remarked that " '[t]he only way to make white-collar cases stick is to break the bonds between the defendants . . . . Usually the price is immunity.' ").

167. *See, e.g.,* Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 169-70 (1974).

are evident. In the former case the government has voluntarily granted immunity to the prosecution witness while cognizant of the substantial burden it would be required to shoulder should it eventually decide to prosecute. The "public interest" factors have undoubtedly been weighed[168] and the government has concluded that the high probability of losing future prosecution is warranted in the particular case. However, if the defendant were deemed to possess the unilateral right to compel the government to extend immunity to his witnesses, then the weighing process that had been incorporated into the government's decision regarding prosecution witnesses would be unjustifiably eliminated.[169] This would be evident in cases where the threshold factors were established but no preliminary determination as to the government's *Kastigar* burden had been made. The necessity of some type of evidentiary hearing is therefore demonstrated so that the prosecutor's discretion is not severely undercut and the interests of justice are best served.

Such a proposal has not been warmly received.[170] The court in *Herman* remarked that "public interest" review "would necessarily require the court to weigh, if only in limited circumstances, the considerations that are traditionally associated with the decision to prosecute."[171] It is submitted, however, that intrusion into an exec-

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168. The Guidelines provide:

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

GUIDELINES, *supra* note 23, § 3.

169. A defendant's primary concern is with acquittal, not with the "public interest." Brief for Government, *supra* note 27, at 36.

170. *But see* Virgin Islands v. Smith, No. 79-1212 (3d Cir. Feb. 5, 1980). *See also* note 178 *infra*.

171. 589 F.2d at 1200.

utive domain at this point is justifiable in order to avoid a more severe usurpation which would result under a restricted "criminal discovery" analysis.[172] Moreover, the proposed review would be more circumscribed than that suggested by *Herman*. The actual decision whether the proposed defense witness will be prosecuted in the future remains in the hands of the government. If no such investigation is contemplated, the scope of the evidentiary hearing is greatly reduced; the presence of other factors[173] would simply mandate the grant of immunity to the defense witnesses. If the government plans to conduct, or is in the midst of an investigation, the court must assess the prosecution's *Kastigar* burden. This burden varies with the amount and nature of evidence already accumulated and with the scope of the prosecution; that is, whether it is a ladder-climbing situation or one that involves a more limited scope of culpability. Any danger of institutional abuse[174] can be mitigated by an explicit showing that the government has a good-faith intention to eventually indict the witness based upon a substantial foundation of suspicion.

The only unresolved issue remaining is that of *Brady* and prosecutorial misconduct. The motivation for including bad faith as one of the prerequisites for a due process claim is the fear that vested executive discretion will be diluted if *Brady*'s "irrespective of good faith or bad faith" rule were to be applied.[175] That fear has been assuaged in the proposed structure because the government's interest is taken into account, albeit at a different stage than it had been previously. The various procedural and substantive factors demonstrate how the defendant has been deprived of due process. However, prosecutorial misconduct, just as selectivity, serves only to magnify the constitutional violation. It should not be prerequisite because the defendant still has an incomplete defense whether the government intimidated the witness into claiming his fifth

172. Under this approach, the defendant's rights are considered independently of any governmental interest in future prosecution. *See generally* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 121-23 (1974).

173. *See* text accompanying notes 68-83 *supra*.

174. An example would be where the witness is not currently subject to investigation and yet the government claims it plans to embark upon one.

175. In *Herman*, the court required a substantial evidentiary showing to justify reversal on the ground of a due process violation "in view of our governmental systems strong tradition of deference to prosecutorial discretion. . . ." 589 F.2d 1191, 1203 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

amendment right or whether the witness did so of his own free will. Therefore, if the court were to find at the evidentiary hearing that the government's *Kastigar* burden would be surmountable, then the defense witness should be immunized irrespective of government good faith. Were the court to reach an opposite conclusion, only prosecutorial bad faith would be sufficient to trigger a valid due process claim by the defendant.

The proposed evidentiary hearing need not be authorized by congressional legislation. Just as courts are deemed to possess the power to order a remedial grant of statutory use immunity to a defense witness in circumstances involving prosecutorial misconduct,[176] there should be no need for legislative mandate to empower courts to act in the absence of government bad faith. Unconstitutional abuse is as present in the latter situation as it is in the former in cases where the government has refused to grant a defense witness immunity when it would be "necessary to the public interest."[177] The public interest would be disserved by denying a defendant a fair trial. Because courts have no inherent power to grant immunity,[178] their only power is to impose sanctions for the govern-

176. *See, e.g., id.* at 1204.

177. 18 U.S.C. § 6003(b)(1) (1976). *See* note 34 *supra.*

178. *See* United States v. Housand, 550 F.2d 818, 824 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973); United States v. Turkish, No. 78-251, slip op. at 8 (S.D.N.Y. Oct. 17, 1979), *appeal docketed,* No. 79-1326 (2d Cir. Oct. 17, 1979). *But see* Virgin Islands v. Smith, No. 79-1212 (3d Cir. Feb. 5, 1980). Dicta in *Herman* regarding the possibility of a judicially-fashioned immunity, 589 F.2d at 1204-05, was recently adopted by the Third Circuit as an alternative holding in *Smith, id.,* slip op. at 18-19. At trial, three of the four named defendants sought to introduce the potentially exculpatory testimony of one Ernesto Sanchez, a witness who claimed his fifth amendment privilege against self-incrimination. The court found that the United States attorney's decision not to consent to immunity was made in bad faith, and remanded the case for an evidentiary hearing to determine whether Sanchez should be immunized so as not to violate the defendants' due process rights.

The court found inherent judicial power to grant witness immunity by coupling cases involving a defendant's right to present an effective defense, *e.g.,* Chambers v. Mississippi, 410 U.S. 284 (1973) (Mississippi's strict adherence to its evidentiary rules prevented defendant's disclosure of exculpatory evidence); Brady v. Maryland, 373 U.S. 83 (1963); Roviaro v. United States, 353 U.S. 53 (1957), with those recognizing the judiciary's power to suppress testimony in order to vindicate constitutional rights, *e.g.,* Simmons v. United States, 390 U.S. 377 (1968) (testimony at fourth amendment suppression hearing); *In re* Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978)(testimony predicate to Speech and Debate Clause defense). If the defendant meets a threshold burden similar to that outlined in this Note, *see* text accompanying notes 68-83 *supra* (with the added requirement that the testimony be clearly exculpatory), and the government cannot present any legitimate countervailing interests, the court may grant judicial immunity. However, if the district court determines at the

ment's unjustified failure to grant a defendant's request for immunization of his key witnesses. This amounts to forcing the prosecution to choose between extending immunity or suffering dismissal. Although this may be a drastic remedy, especially in instances where incriminating evidence already exists against a defendant, it is the only remedy which would cure the trial's constitutional defect.[179]

Howard Schwartz

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evidentiary hearing that judicial immunity is not required, then statutory immunity, *i.e.*, compelling the government to extend immunity pursuant to section 6003, may be warranted. Under a statutory theory, only a showing of relevancy need be made by the defendant although the *Herman* bad faith standard is a prerequisite.

While the concept of judicial immunity is analytically appealing, it is unclear whether Congress intended 18 U.S.C. §§ 6001-05 (1976) to be the sole source of an immunity grant to a witness. The procedure proposed in part V of this Note takes this possibility into account by dealing only with statutory immunity.

It should also be noted that, if statutory immunity is substituted for judicial immunity, *Smith*'s formulation is essentially that proposed in part V of this Note. An insufficient showing by the defendant in *Smith*'s first step, *e.g.*, the balancing test reveals that the government would have an insurmountable *Kastigar* burden, does not foreclose the possibility of an immunity grant if government bad faith is revealed in step two. *See* text accompanying notes 175-76 *supra*.

179. The same if true for situations involving the government's selective use of its immunity power. *See* text accompanying notes 146-49 *supra*.