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PROSPECTIVE DETERMINATIONS OF DERIVED USE IN CIVIL PROCEEDINGS: UPSETTING THE IMMUNITY BALANCE

Introduction

A tension exists between an individual's fifth amendment privilege against self-incrimination and a prosecutor's interest in bringing a

1. U.S. Const. amend. V. The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Id. The fifth amendment was made applicable to the states through the due process clause of the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). The principle nemo tenetur seipsum prodere, no one is bound to betray himself, has its roots in English common law. M. Berger, Taking the Fifth (1980); L. Levy, Origins of the Fifth Amendment 42 (1968); 8 J. Wigmore, Evidence § 2250, at 283-84 (McNaughton rev. ed. 1961); Pittman, The Colonial and Constitutional History of the Privilege Against Self Incrimination in America, 21 Va. L. Rev. 763, 769-74 (1935). The doctrine developed in reaction to the ex officio oath, an instrument of self-accusation, resulting either in torture or death on the one hand, or betrayal of friends and family on the other. L. Levy, supra, at 42; 8 J. Wigmore, supra, § 2250, at 289-90. The oath was used frequently against Puritans and other heretics. M. Berger, supra, at 11; Pittman, supra, at 769-80. Fleeing oppression, these groups brought their hatred of the oath to the New World. Id. at 775. There they incorporated the privilege against self-incrimination into colonial judicial systems. L. Levy, supra, at 368; Pittman, supra, at 775. However, "[t]he history of the privilege does not settle the policy of the privilege." 8 J. Wigmore, supra, § 2251, at 295; accord M. Berger, supra, at 1; Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 679 (1968); McKay, Self-Incrimination and the New Privacy. 1967 Sup. Ct. Rev. 193, 194. The fifth amendment has been called "a doctrine in search of a reason." Friendly, supra, at 685 (footnote omitted) (quoting W. Schaefer, The Suspect and Society 59-60 (1967)). Cases and commentators have proposed numerous policies in support of the privilege. E.g., Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-57 (1964); Malloy v. Hogan, 378 U.S. 1, 9 n.7 (1964); Ullmann v. United States, 350 U.S. 422, 426-29 (1956); Boyd v. United States, 116 U.S. 616, 631-32 (1886); E. Griswold, The Fifth Amendment Today 73 (1955); 8 J. Wigmore, supra, § 2251, at 295-318; McKay, supra, at 214. The Court, in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), stated that "[t]he privilege against self-incrimination registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." . . . It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' " Id. at 55 (citations and footnote omitted).
wrongdoer to justice.² This tension has historically been resolved by prosecutorial grants of immunity that supplant the fifth amendment privilege.³ Under the current federal witness immunity statute,⁴ the prosecutor has the sole authority⁵ to order the district court to issue

2. United States v. Blue, 384 U.S. 251, 255 (1966); United States v. First W. State Bank, 491 F.2d 780, 782-83 (8th Cir.), cert. denied, 419 U.S. 825 (1974); Friendly, supra note 1, at 680-81. Judge Friendly contends that “the privilege, at least in its pre-trial application, seriously impedes the state in the most basic of all tasks, ‘to provide for the security of the individual and his property,’ not only as against the individual asserting the privilege but as against others who it has reason to think were associated with him.” Id. at 680 (footnote omitted) (quoting Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting)).


4. 18 U.S.C. §§ 6001-6005 (1976). Section 6002 contains the general grant of immunity. It provides in full: “Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to (1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.” Id. § 6002.

5. Id. § 6003(b); e.g., In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 n.13 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Franey), 620 F.2d 1096, 1092 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Starkey, 600 F.2d 1043, 1048 (8th Cir. 1979); Ryan v. Commissioner, 508 F.2d 531, 540 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); In re Daley, 549 F.2d 469, 479 (7th Cir.), cert. denied, 434 U.S. 829 (1977); Ellis v. United States, 416 F.2d 791, 796-97 (D.C. Cir. 1969). Section 6003 provides in full: “(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part. (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—(1) the testimony or other information from such individual may be necessary to the public interest; and
grants of immunity. Such a grant confers use-derivative use protection—a bar to the use of any testimony or information derived therefrom in a subsequent prosecution of the witness. Exercise of the prosecutor's authority is based upon a determination that the need for evidence against the accused exceeds the state's interest in allowing the witness to remain silent by standing on his privilege against self-incrimination. This "state-individual balance," which lies at the heart of the fifth amendment privilege, has been upset by judicial interference with the prosecutorial discretionary power.

In recent cases, witnesses who had received immunity for testimony given before federal grand juries investigating antitrust violations were deposed by civil plaintiffs using questions based upon or taken from the immunized grand jury testimony. The question confronting the courts was whether deposition testimony could be compelled over the witness's fifth amendment claims. Some courts have

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7. Id. § 6002; e.g., Kastigar v. United States, 406 U.S. 441, 443-44 (1972); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 75-76 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1047 (8th Cir. 1979).
8. 18 U.S.C. § 6003(b)(1) (1976); e.g., United States v. Dunn, 577 F.2d 119, 126 (10th Cir. 1978); In re Daley, 549 F.2d 469, 478-79 (7th Cir.), cert. denied, 434 U.S. 829 (1977); see Ryan v. Commissioner, 568 F.2d 531, 540 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978).
9. Of the numerous policies said to underlie the fifth amendment privilege, the one that has been given the most credence is that the privilege contributes to a fair state-individual balance at a criminal trial. E.g., In re Gault, 387 U.S. 1, 47 (1967); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1149 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); United States v. Solomon, 509 F.2d 863, 868 (2d Cir. 1975); 8 J. Wigmore, supra note 1, § 2251, at 317; Friendly, supra note 1, at 657; Note, Self-Incrimination and the Likelihood of Prosecution Test, 72 J. Crim. L. & Criminology 671, 673 (1981) [hereinafter cited as Likelihood of Prosecution]; see Malloy v. Hogan, 378 U.S. 1, 7 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951).
10. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1147 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 72-73 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Franey), 620 F.2d 1086, 1088-89 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Starkey, 600 F.2d 1043, 1045 (8th Cir. 1979).
11. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1147 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 73 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Franey), 620 F.2d 1086, 1059 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Starkey, 600 F.2d 1043, 1045 (8th Cir. 1979).
12. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1149 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825);
compelled such testimony, reasoning that it is "derived" from immunized information and, therefore, barred from future prosecutorial use.13 Other courts have honored the fifth amendment claim based upon a belief that a court lacks power to define derived use in a civil setting.14

This Note examines the scope of a district court's powers with respect to its determining, in a civil setting, the parameters of a prior grant of immunity. After weighing the civil litigant's need for information against the interests of the witness and the government prosecutor, this Note concludes that a district court does not have the power to make a determination of derived use in a civil proceeding. Prospective determinations of derived use necessarily undermine the government's ability to bring subsequent criminal prosecutions against the witness. Alternatively, the witness's ability to claim the benefits of his fifth amendment privilege may be imperilled.

I. THE STATE—WITNESS BALANCE

A. The Witness's Fifth Amendment Privilege Against Self-Incrimination

The state commands considerable investigative resources in the prosecution of criminal violations of its laws.15 As a shield against these powers,16 the fifth amendment provides that a witness17 may not be compelled to furnish information that, standing alone, could possi-

In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 74-75 (2d Cir. 1981); In re Corrugated Container Antitrust Litig. (Franey), 620 F.2d 1086, 1091 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Starkey, 600 F.2d 1043, 1045 (8th Cir. 1979).

13. In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 77 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1046-48 (8th Cir. 1979); see Little Rock School Dist. v. Borden, Inc., 632 F.2d 700, 705-06 (8th Cir. 1980); Patrick v. United States, 524 F.2d 1109, 1120 (7th Cir. 1975).


16. See supra note 9 and accompanying text.

17. The privilege is a personal one. Rogers v. United States, 340 U.S. 367, 371 (1951); United States v. White, 322 U.S. 694, 698 (1944); Hale v. Henkel, 201 U.S. 43, 69 (1906). It may not be claimed by a corporation or similar organization, Bells v. United States, 417 U.S. 85, 87-89 (1974); Wilson v. United States, 221 U.S. 361, 382 (1911); United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 316 (2d Cir. 1979), and it may not be asserted to protect anyone but the witness. Rogers v. United States, 340 U.S. 367, 371 (1951); McAlister v. Henkel, 201 U.S. 90, 91 (1906). Only
bly subject him to criminal prosecution or "which would furnish a link in the chain of evidence needed to prosecute" him under a criminal statute. The witness is only protected against the use of self-incriminating testimony at a criminal proceeding. To effect fully its protection, however, the privilege may be invoked in any proceeding, "civil or criminal, administrative or judicial, investigatory or adjudicatory," so long as the testimony sought could subsequently subject the witness to criminal liability.

The witness's mere assertion of a fifth amendment claim does not in itself establish its validity; the trial court determines the legitimacy and scope of the claim. Accordingly, the court will make a particularized inquiry, deciding in connection with each area that the inter-

the witness may raise the privilege, though his counsel may advise him of its existence. Maness v. Meyers, 419 U.S. 449, 465-66 (1975); Note, Persons Entitled to Waive or Claim Privileges as to the Admission of Testimony, 30 Colum. L. Rev. 686, 691-92 (1930).


23. Hoffman v. United States, 341 U.S. 479, 486 (1951); United States v. Goodwin, 625 F.2d 693, 700 (5th Cir. 1980); In re Folding Carton Antitrust Litig., 609 F.2d 867, 871 n.5 (7th Cir. 1979) (per curiam); United States v. Mahady & Mahady, 512 F.2d 521, 525 (3d Cir. 1975); Capitol Prods. Corp. v. Hennon, 457 F.2d 541, 542-43 (8th Cir. 1972); see Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965). "The central standard for the privilege's application has been
rogator wishes to explore whether the claim of privilege is well-
founded. When the court erroneously compels testimony over a
valid fifth amendment claim, an exclusionary rule operates to prevent
the admission of this testimony, or its fruits, against the witness in any
subsequent criminal prosecution. If tainted evidence has formed
the basis of a conviction, the conviction should be vacated.

whether the claimant is confronted by a substantial and 'real,' and not merely trifling or imaginary, hazard of incrimination.” Marchetti v. United States, 390 U.S. 39, 53 (1968) (citations omitted); accord United States v. Apfelbaum, 445 U.S. 115, 131 (1980); Zicarelli v. New Jersey State Comm'n of Investig., 406 U.S. 472, 478 (1972). The inquiry is two-pronged: 1) whether the witness's answers might indicate his participation in criminal activity and 2) whether any answers given subject the witness to a possibility of criminal prosecution. In re Corrugated Container Antitrust Litig. (Franey), 620 F.2d 1086, 1091 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); see In re Folding Carton Antitrust Litig., 609 F.2d 867, 871 (7th Cir. 1979) (per curiam); Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1087 n.5 (7th Cir. 1979). Before it may compel testimony over a fifth amendment claim, the court must determine that there is not a real possibility of prosecution. Hoffman v. United States, 341 U.S. 479, 486-87 (1951); Rogers v. United States, 340 U.S. 367, 374-75 (1951); In re Corrugated Container Antitrust Litig. (Franey), 620 F.2d 1086, 1091 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); Illinois v. McCulloch, 507 F.2d 292, 293 (9th Cir. 1974). When, for example, the statute of limitations has run on the crime to which the witness may be a party and no possibility of prosecution therefore exists, the witness's claim of privilege is invalid and he may be compelled to testify. See In re Folding Carton Antitrust Litig., 609 F.2d 867, 872 (7th Cir. 1979) (per curiam); United States v. Miranti, 253 F.2d 135, 138 (2d Cir. 1958).

24. Rogers v. United States, 340 U.S. 367, 374 (1951); In re Folding Carton Antitrust Litig., 609 F.2d 867, 873 (7th Cir. 1979) (per curiam); United States v. Melchor Moreno, 536 F.2d 1042, 1049 (5th Cir. 1976); see United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980); United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978); Capitol Prods. Co. v. Hennon, 457 F.2d 541, 542 (8th Cir. 1972). A witness cannot make a blanket claim of privilege. Murphy v. Waterfront Comm'n, 378 U.S. 52, 100 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951); United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980); National Life Ins. Co. v. Hartford Accident & Indem. Co., 615 F.2d 595, 596, 598 (3d Cir. 1980); United States v. Carroll, 567 F.2d 955, 957 (10th Cir. 1977) (per curiam); United States v. Melchor Moreno, 536 F.2d 1042, 1049 (5th Cir. 1976). Only a defendant in a criminal prosecution can assert the privilege absolutely. 8 J. Wigmore, supra note 1, § 2268, at 406; cf. United States v. Tsui, 646 F.2d 365, 368 (9th Cir. 1981) (district court, based on knowledge of the case, may sustain a witness's blanket claim of privilege if it concludes that the witness could validly refuse to answer all relevant questions).


26. See Miranda v. Arizona, 384 U.S. 436, 444 (1966); United States v. McDan-
The holder of the privilege may himself abrogate his fifth amendment protection. A witness in any proceeding waives the privilege as to particular questions by voluntary response to them.\(^{27}\) Affirmative acts by the witness are not necessary to waive the privilege; relinquishment of fifth amendment protection is predicated upon any objective determination of noncompulsion.\(^{28}\) The subjective intent of the witness thus does not bear upon a finding of waiver.\(^{29}\)

Ordinarly, immunity removes the danger of inadvertent waiver by the witness. Because the prosecutor controls both the initial grant of immunity and the questions posed to the witness, all responses will fall within the scope of the statutory protection.\(^{30}\) Enabling the prosecutor to supplant the fifth amendment privilege with an immunity grant furthers his law enforcement capabilities.

### B. The State’s Power to Compel Testimony

At common law, the state was entitled to “every man’s evidence.”\(^{31}\) This right granted the state unrestricted access to all infor-
information needed in carrying out law enforcement. The fifth amendment, however, severely limits the state's right to this evidence. Recognizing that the privilege against self-incrimination seriously impedes law enforcement efforts, the Supreme Court has consistently upheld immunity statutes. Because immunity "remove[s] those [prosecutorial] sanctions which generate the fear justifying invocation of the privilege," the witness receiving statutory immunity must speak. To be constitutionally valid, however, the immunity must at least be coextensive with the privilege it supplants. Thus, any form of immunity must continue to provide the witness with a shield against governmental compulsion of testimony that may expose him to criminal liability.

In *Kastigar v. United States*, the Supreme Court upheld the constitutionality of section 6002 of the Witness Immunity Act. This statute provides for use-derivative use immunity in all federal pro-


35. See *supra* note 3 and accompanying text.


ceedings.41 Prior to the enactment and validation of the immunity statute, transactional immunity was considered the only form of protection coextensive with the fifth amendment.42 Transactional immunity provides a witness with legal absolution for all crimes confessed during testimony.43 In contrast, under a grant of use-derivative use immunity, a prosecutor is not prevented from proceeding against the witness with evidence that is wholly independent of the immunized information.44

The defendant or witness may not, as a matter of course, receive immunity, nor does the prosecutor have a duty to bestow it on a witness at the defendant’s demand.45 In addition, the court may not

42. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892); see In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 75 n.8 (2d Cir. 1981); Carlson, Witness Immunity in Modern Trials: Observations on the Uniform Rule of Criminal Procedure, 67 J. Crim. L. & Criminology 131, 132 (1976); Measures Relating to Organized Crime: Hearings on S.30, S.974, S.975, S.976, S.1623, S.1624, S.1861, S.3022, S.2122, and S.2298 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 254-85 (1969) (statement of Rep. Poff) (although use-derivative use immunity may be considered by some to be unconstitutional in light of the history of transactional immunity, the National Commission on Reform of Federal Criminal Laws believes it to be constitutional) [hereinafter cited as Senate Hearings]. In Counselman v. Hitchcock, 142 U.S. 547 (1892), the first Supreme Court review of an immunity statute, the Court invalidated an immunity statute because it provided insufficient protection for a witness compelled to testify under it. Id. at 585-86. The statute provided immunity from future prosecutorial use of the compelled testimony given in judicial proceedings. Id. at 560. It did not, however, protect against use of its “fruits”—the use of the immunized testimony to search out leads to other evidence that could be used against the witness. Id. at 564. The Court concluded that to be constitutionally valid, statutory immunity “must afford absolute immunity against future prosecution for the offence to which the question relates.” Id. at 586. The Counselman language was subsequently dismissed by the Kastigar Court as dictum. Kastigar v. United States, 406 U.S. 441, 454-55 (1972). In upholding use-derivative use immunity, the Kastigar Court followed earlier decisions in which it had given limited approval to use-derivative use immunity. Id. at 455-59: see Gardner v. Broderick, 392 U.S. 273, 276 (1968); Murphy v. Waterfront Comm’n, 378 U.S. 52, 79 (1964). Although federal statutory immunity grants provide for use-derivative use protection, states are free to provide transactional immunity at state proceedings. See N.Y. Crim. Proc. Law § 50.10 (McKinney 1981). As against federal authority, however, state transactional immunity provides only use-derivative use protection. Murphy v. Waterfront Comm’n, 378 U.S. 52, 79 (1964); United States v. First W. State Bank, 491 F.2d 750, 785-86 (8th Cir.), cert. denied, 419 U.S. 825 (1974).
issue immunity *sua sponte*— the judicial role is purely ministerial. Once the witness claims or appears likely to claim his fifth amendment privilege, the prosecutor has sole discretion to determine whether the witness’s testimony is sufficiently “necessary to the public interest” to justify a grant of immunity. Should the prosecutor decide that immunity is required, he applies to the district court in which the proceeding is being held for an immunity order. If the application is complete, the order must issue. The prosecutor’s power to grant immunity is tempered by a heavy burden of proving in a subsequent prosecution of the immunized witness that no use was made, directly or indirectly, of testimony that was compelled by such a grant. His task is not easy, as it is not

46. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1156-57 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 n.13 (2d Cir. 1981); United States v. Turkish, 623 F.2d 769, 776 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); In re Corrugated Container Anti-trust Litig. (Freyney), 620 F.2d 1086, 1094 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); Ellis v. United States, 416 F.2d 791, 796-97 (D.C. Cir. 1969); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967); In re Folding Carton Antitrust Litig., 465 F. Supp. 618, 625 (N.D. Ill.), vacated *per curiam on other grounds*, 609 F.2d 867 (7th Cir. 1979); see Ullmann v. United States, 350 U.S. 422, 432-34 (1956). A recent line of cases, however, suggests that in order to effect the defendant's due process rights, the district court may grant defense witnesses judicial immunity at trial at the behest of a criminal defendant. Virgin Islands v. Smith, 615 F.2d 964, 974 (3d Cir. 1980) (remand to determine if judicial immunity is necessary); United States v. Praetorius, 622 F.2d 1054, 1064 (2d Cir. 1979) (immunity not granted), cert. denied, 449 U.S. 860 (1980); United States v. Herman, 589 F.2d 1191, 1203-05 (3d Cir. 1978) (judicial immunity not justified because not raised in district court or on appeal), cert. denied, 441 U.S. 913 (1979); cf. *In re Grand Jury Investigation*, 587 F.2d 589, 597-98 (3d Cir. 1977) (judicial immunity granted to effect speech or debate clause protection). For a brief discussion of this development, see United States v. Turkish, 623 F.2d 769, 772-75 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981).

48. Id. § 6003(b)(1); see supra note 5 and accompanying text.
51. Kastigar v. United States, 406 U.S. 441, 460-61 (1972); United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977); United States v. McDaniel, 482 F.2d 305, 310-11 (8th Cir. 1973). The *Kastigar* Court broadly interpreted § 6002 to prohibit "the prosecutorial authorities from using the compelled testimony in any respect [so
limited to a mere negation of derivative use; rather, the prosecutor must affirmatively prove the independence of his sources.\textsuperscript{52} Prosecutorial exposure to immunized grand jury testimony prior to the return of the indictment taints the government's evidence.\textsuperscript{53} Although the prosecutor may be able to show independent sources of evidence, courts enforce this prohibition for fear that exposure to immunized testimony will result in derivative use of such information.\textsuperscript{54} Such use could include "focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination and otherwise generally planning trial strategy."\textsuperscript{55}

The government's evidence may also be tainted through non-prosecutorial exposure. The government is barred from using evidence given by an informant whose own sources were exposed to immunized testimony.\textsuperscript{56} Additionally, when the giving of immunized informa-
tion by one witness contributes to the decision of another to testify, the latter's evidence may be "derived" from the immunized testimony and therefore be deemed unavailable for prosecutorial use.\(^\text{57}\)

If the prosecutor cannot establish that his evidence is independent of the immunized testimony, that evidence will be suppressed.\(^\text{58}\)

When the prosecutor's case rests largely on tainted evidence, charges against the accused may be dropped,\(^\text{59}\) or a conviction vacated.\(^\text{60}\)

\(^{57}\) United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976). In Kurzer, the court remanded for further consideration the question of whether Kurzer's immunized testimony was the indirect source of evidence used by the prosecutor to indict him. \(\text{Id.}\) at 517. Kurzer had testified, under a grant of § 6003 immunity, before a federal grand jury that had returned an indictment against Steinman. \(\text{Id.}\) at 513. Steinman was allowed to plead guilty to one count of a violation of 26 U.S.C. § 7206(1) (1976) in return for his cooperation with the government. 534 F.2d at 514. Steinman then gave evidence that the federal prosecutor used to have Kurzer indicted. \(\text{Id.}\) In remanding, the Second Circuit instructed the district court to inquire into Steinman's motivation in testifying: "[S]ince 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." \(\text{Id.}\) at 517.

\(^{58}\) Kastigar v. United States, 406 U.S. 441, 453 (1972); 18 U.S.C. § 6002 (1976); Working Papers, \(\text{supra}\) note 45, at 1434-35. To bear his burden of proof, the prosecutor can preserve evidence by sealing and filing it with the court. Goldberg v. United States, 472 F.2d 513, 516 n.5 (2d Cir. 1973); United States v. Henderson, 406 F. Supp. 417, 425 (D. Del. 1975); Thornburgh, Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?", 67 J. Crim. L. & Criminology 155, 162 (1976); Note, Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003, 14 Am. Crim. L. Rev. 275, 284 (1976) [hereinafter cited as \(\text{Problems and Practices}\)]; Standards for Exclusion, \(\text{supra}\) note 25, at 176-78. As a practical matter, however, "little or no incriminating evidence is in the Government's possession prior to an immunized witness' compelled disclosures . . . . Indeed, in many cases the United States Attorney initiates investigation and prosecution of a given individual, completely unaware of the fact that the suspect has previously given immunized testimony." Problems and Practices, \(\text{supra}\), at 284-85; accord Thornburgh, \(\text{supra}\), at 162-63. For example, a problem may arise when the accused has received immunity under a state law without the federal prosecutor's knowledge. United States v. McDaniel, 482 F.2d 305, 307 (8th Cir. 1973).


\(^{60}\) In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 80 (2d Cir. 1981); United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973); see
Given the prosecutor's heavy burden and the serious consequences of a failure to meet it, any interference with the prosecutor's prerogative in granting use-derivative use immunity should be carefully scrutinized. Such interference occurs when a district court in a civil case compels witnesses who have received immunity in a prior criminal proceeding to respond over a fifth amendment claim to questions taken from their immunized testimony.61

C. Recent Treatment by the Courts

In recent private antitrust suits, civil litigants have taken advantage of federal prosecutorial resources by using court-released transcripts of immunized grand jury testimony to depose witnesses.62 Despite the witnesses' assertion of the fifth amendment privilege and the absence of the prosecutor, some courts, upon review of such use of this information, have compelled testimony.63 These courts have held that when immunized testimony is the source of questions asked at civil depositions, responsive answers are "derived" from immunized testimony.64 Because such testimony would be barred from prosecutorial use in a subsequent criminal proceeding, the witness can be compelled to answer.65

For example, in In re Starkey,66 the Eighth Circuit affirmed the district court order adjudging a witness in contempt for failure to


62. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1147 & n.1 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 73 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Fleischacker), 644 F.2d 70, 73 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Fleischacker), 644 F.2d 70, 77 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1045-46 (8th Cir. 1979).

63. In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 77 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1046-48 (8th Cir. 1979); see Little Rock School Dist. v. Borden, Inc., 632 F.2d 700, 705-06 (8th Cir. 1980); Patrick v. United States, 524 F.2d 1109, 1120-21 (7th Cir. 1975).

64. In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 77 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1046 (8th Cir. 1979); see Little Rock School Dist. v. Borden, Inc., 632 F.2d 700, 705 (8th Cir. 1980); Patrick v. United States, 524 F.2d 1109, 1120 (7th Cir. 1975).

65. See supra notes 36-37 and accompanying text.

66. 600 F.2d 1043 (8th Cir. 1979). The witness, Starkey, had testified under a § 6003 grant of immunity before a federal grand jury investigating price-fixing in the Arkansas dairy industry. Id. at 1045. He asserted his fifth amendment privilege at deposition in the ensuing civil action. Id. Many of the deposition questions were taken verbatim from the immunized grand jury testimony. Id. at 1046. The trial
respond to deposition questions.  The circuit court stated that the district court’s compulsion of deposition testimony did not constitute a de facto grant of immunity.  Rather, the court was merely fulfilling its duty to determine the scope of an immunity grant.  To preserve the immunized nature of the deposition testimony, however, the Starkey court ordered inquiry to be confined to “the same time, geographical and substantive framework as the grand jury testimony.”

Similarly, the Second Circuit, in In re Corrugated Container Antitrust Litigation (Fleischacker), approved the district court’s order compelling testimony, reasoning that the prospective determination of derived use was part of the district court’s assessment of the validity of a fifth amendment claim, a traditional function of the court. The Fleischacker court acknowledged, however, that if deposition examination were to extend beyond that of the grand jury, the exclusion of the resultant testimony in a subsequent criminal proceeding would subvert government efforts to prosecute the witness. The court therefore modified the guidelines established by the Starkey court for deposition inquiry, narrowing it to specific subjects actually touched upon by questions found in the grand jury minutes. By validating prospective determinations of derived use, both the Starkey and Fleischacker courts favored the interests of the civil litigant at the expense of those of the witness and the government. Other courts, however, indicate that the interests properly accommodated by the immunity grant are those of the witness and the prosecutor.
These courts recognize that when testimony is compelled in civil suits, the scope of statutory protection is impermissibly controlled by the civil litigant who directs the questioning at deposition, and not by the prosecutor, who has the sole discretion to issue the immunity.\textsuperscript{77} For this reason, the Fifth Circuit, in \textit{In re Corrugated Container Anti-trust Litigation (Franey),}\textsuperscript{78} declined to compel testimony.\textsuperscript{79} The court concluded that because a district court lacks competence in a civil setting to make prospective determinations of derived use, such a determination could not protect the witness.\textsuperscript{80} Rather, the court stated, the prospective determination constituted an impermissible judicial grant of immunity which, in turn, triggered the operation of the exclusionary rule. This rule, not the prospective determination, was the true source of the witness's protection.\textsuperscript{81} The Seventh Circuit adopted the rationale of the \textit{Franey} decision in \textit{In re Corrugated Container Antitrust Litigation (Conboy)}.\textsuperscript{82} In addition, the court


\textsuperscript{78}. 620 F.2d 1086 (5th Cir. 1980), \textit{cert. denied}, 449 U.S. 1102 (1981). Franey and Hopkins had been granted statutory immunity for testimony given before a federal grand jury investigating price-fixing allegations in the corrugated container industry. \textit{Id.} at 1088. Although Franey did not appear before the grand jury, he consented to an interview with the Department of Justice in return for a letter promising that the interview information would not be used against him in any subsequent criminal prosecution. \textit{Id.} The government released the transcript of the interview to the grand jury. \textit{Id.} Later, both Franey and Hopkins testified at the criminal trial of the indicted container corporations under additional grants of immunity. \textit{Id.} at 1089. During the criminal trial, purchasers of the containers filed a private treble-damage action against the container manufacturers, some of which had been indicted by the grand jury. \textit{Id.} at 1088. The court ordered the grand jury testimony released to the civil plaintiffs, who attempted to depose Franey and Hopkins using questions taken verbatim from the transcript. \textit{Id.} at 1089 n.2. Franey and Hopkins, former employees of the defendant corporations, asserted their privilege against self-incrimination. \textit{Id.} at 1089. The district court held them in contempt on the theory that their answers would be derived from their immunized grand jury testimony and thus beyond prosecutorial reach. \textit{Id.} On appeal, the Fifth Circuit vacated the contempt orders. \textit{Id.} at 1095.

\textsuperscript{79}. \textit{Id.} at 1093-95.

\textsuperscript{80}. \textit{Id.} at 1094.

\textsuperscript{81}. \textit{Id.}

\textsuperscript{82}. 661 F.2d 1145, 1153 (7th Cir. 1981), \textit{cert. granted}, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825). The Circuit Court held that a deponent in a civil suit could not be compelled to testify over a fifth amendment claim. 661 F.2d at 1147. Writing for the majority, Judge Sprecher approved the Fifth Circuit opinion, agreeing that it was beyond the district court's powers to make a prospective determination of taint. \textit{Id.} at 1153. Such a predetermination, he reasoned, would result in an impermissible judicial grant of immunity. \textit{Id.} at 1155-57. Alternatively, the deposition testimony could constitute an independent source of evidence upon which the
indicated that a district court's compulsion of testimony in a civil suit could result in a witness's loss of fifth amendment protection through inadvertent waiver.\textsuperscript{83} Such a loss could not be justified on the ground of facilitating private discovery efforts.\textsuperscript{84}

The Fifth and Seventh Circuits correctly identify the issues underlying the imbalance in the state-individual relationship created by judicial control of immunity. These courts, however, fail to explain the implications of these issues or to resolve them adequately. A proper resolution of the issues demands an in-depth examination of the district court's authority, when sitting as a civil court, to determine the derived use of a prior immunity grant. Further, consideration must also be given to the effect that such a determination has on the interests of the prosecutor, the witness, and the civil litigant.

II. THE COURT'S POWER, IN A CIVIL SETTING, TO DETERMINE THE SCOPE OF AN IMMUNITY GRANT

Decisions that compel testimony based on a prospective determination of derived use rely on the traditional power of all courts to assess fifth amendment claims.\textsuperscript{85} Given this power, these courts contend that they are not creating immunity but are merely defining the scope of the existing protection.\textsuperscript{86} They, however, fail to recognize the distinction between a court's authority to rule on a fifth amendment claim and its ability to determine the scope of an immunity grant.

There is no basis for equating the civil court's ability to rule on a fifth amendment plea with its authority to determine the scope of an immunity grant. The presiding judge in all proceedings necessarily has the power to evaluate a fifth amendment claim because the privilege against self-incrimination may be raised in any proceeding.\textsuperscript{87} To
postpone assessment and compel testimony would result in the initial loss of fifth amendment protection and the witness's testimony becoming a part of the record of the proceedings. This testimony may ultimately be excluded from prosecutorial use as erroneously compelled.\textsuperscript{88} Such information could also taint other evidence that the government accumulates against the witness.\textsuperscript{89} A squandering of judicial and prosecutorial resources, therefore, occurs.\textsuperscript{90} Alternatively, were the claimant incorrectly permitted to stand on the privilege, the court would confer upon the witness the power to arrest the fact-finding process.\textsuperscript{91} This result improperly provides the witness with the power to use the shield of privilege as a sword against the parties to the proceeding.\textsuperscript{92}

Similar reasoning does not support the defining of the scope of immunity in a civil proceeding. No imperatives of privilege or prosecutorial and judicial cost exist in the prospective evaluation of the bounds of an immunity grant during a civil suit. The witness would remain protected by asserting the fifth amendment.\textsuperscript{93} Moreover, only


\textsuperscript{90} See, e.g., In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 80 (2d Cir. 1981); United States v. McDaniel, 482 F.2d 305, 312 (8th Cir. 1973); United States v. Goodwin, 470 F.2d 893, 903 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973). If the prosecutor has based all or part of his case against the claimant on this testimony, the case will fall because of a determination that the testimony was erroneously compelled. See supra notes 58-60 and accompanying text. Further, derivative use of the testimony would be prohibited and would similarly undermine the prosecutor's evidence. See In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 n.13 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Frayen), 620 F.2d 1086, 1093 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Folding Carton Antitrust Litig., 465 F. Supp. 618, 624-25 (N.D. Ill.), vacated per curiam on other grounds, 609 F.2d 867 (7th Cir. 1979). Thus, the investigation, in whole or in part, will have been wasted. Similarly, an evidentiary hearing at criminal trial could have been avoided had assessment been made in the proceeding in which the fifth amendment was first asserted.

\textsuperscript{91} United States v. Melchor Moreno, 536 F.2d 1042, 1046 (5th Cir. 1976).


\textsuperscript{93} In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1147-48 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-
at the criminal trial is evaluation of the scope of immunity proper, as it is only here that the witness may raise immunity as a bar to criminal liability. In the civil litigation, the perceived danger is not to the witness, but to the civil litigant, in the possible loss of but one of several sources of useful information. A civil court's attempt to determine the scope of immunity, therefore, is not within the constitutional grant given to all courts in determining a fifth amendment claim. Rather, if the power to make a prospective determination of taint in a civil proceeding exists, it must be found within the immunity statute itself.

III. BALANCING THE INTERESTS OF THE PROSECUTOR, WITNESS AND CIVIL LITIGANT

A. The Prosecutor's Interest in Facilitating Law Enforcement

Immunity is a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." This accommodation is referred to as the immunity bargain. In exchange for the witness's testimony, the prosecutor will not use the testimony or its fruits against the witness in any criminal proceeding.

825); In re Corrugated Container Anti-trust Litig. (Franey), 620 F.2d 1086, 1091-92, 1094 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981).

94. See United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Kates, 419 F. Supp. 846, 857-58 (E.D. Pa. 1976); cf. In re Corrugated Container Anti-trust Litig. (Franey), 620 F.2d 1086, 1093 (5th Cir. 1980) (because the government must bear the burden of proof on the issue of taint, the issue was not properly raised where the government was not a party), cert. denied, 449 U.S. 1102 (1981).

95. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1159 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825). Civil plaintiffs may uncover the desired information through general discovery, including testimony from witnesses other than those who had previously received immunity.

96. See supra notes 23-24 and accompanying text.


In enacting sections 6002 and 6003 of the Witness Immunity Act, Congress clearly vested the granting and control of immunity in the Attorney General and his delegates. Prosecutorial grants of statutory immunity are designed to be a part of a comprehensive scheme of law enforcement. The legislative history of the Witness Immunity Act states:

In a precise sense there is no "right" to a grant of immunity. The starting point is a witness plea of the fifth amendment. At that point, if the government wishes to go forward with the investigation it must make a determination in these terms: Is the public need for the particular testimony in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case.

Courts compelling testimony, after determining that it is derivatively immunized, claim that such action does not improperly remove the control of immunity from the prosecutor. These courts, however, ignore the true effect that their holdings have on the intended scope of a prosecutor's immunity grant.

99. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 n.13 (2d Cir. 1981); In re Corrugated Container Anti-trust Litig. (Franev), 620 F.2d 1086, 1092 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Starkey, 600 F.2d 1043, 1047 (8th Cir. 1979); Ryan v. Commissioner, 568 F.2d 531, 540 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); In re Daley, 549 F.2d 469, 479 (7th Cir.), cert. denied, 434 U.S. 829 (1977); 18 U.S.C. § 6003(b) (1976).


101. Working Papers, supra note 45, at 1433. This policy has received judicial recognition. In re Daley, 549 F.2d 469, 478-79 (7th Cir.) ("Once the bar of the privilege against self-incrimination has been raised . . ., the decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony . . . against the social cost of granting immunity . . . . Therefore, the relative importance . . . to federal law enforcement interests is a judgmental rather than a legal determination, one remaining wholly within the competence of the appropriate executive officials, i.e., the United States Attorney with the approval of the Attorney General or his delegate."), cert. denied, 434 U.S. 829 (1977); United States v. Dunn, 577 F.2d 119, 126 (10th Cir. 1979) ("Immunity statutes are . . . ordinarily for the benefit of the government, designed to effectively serve the compelling needs of the criminal justice system by preventing a substantial avoidance of prosecution and penalty."). rev'd on other grounds, 442 U.S. 100 (1979).

102. In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1047-48 (8th Cir. 1979).
The danger of an impermissible judicial creation of immunity is evidenced by the expansive range of deposition inquiry permitted by courts compelling testimony. By failing to limit examination to questions taken verbatim from the immunized grand jury testimony, these courts endow the civil litigant with the power to enlarge the original deposition grant, a prerogative attaching solely to the prosecutor. The Starkey approach of permitting questioning as to the subjects within “the same time, geographical and substantive framework as the grand jury” and the even more restrictive Fleischacker guidelines permitting inquiry into “specific subjects that actually were touched upon by questions appearing in the transcript of the immunized testimony,” allow civil plaintiffs to enter with impunity areas which the prosecutor may have declined to explore. As a result, subjects that the prosecutor had purposefully left untouched for future discovery may become tainted. The civil litigant has no incentive to confine his questioning in order to maintain the prosecutor’s reserve; indeed, with judicial sanction to go further, there is no need for restraint. Broad-ranging testimony is certain to render impossible the prosecutor’s burden of proving that any evidence he may have against the witness is from a legitimate source, wholly independent of the witness’s immunized testimony.

103. In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1048 (8th Cir. 1979).
105. In re Starkey, 600 F.2d 1043, 1048 (8th Cir. 1979).
107. See In re Folding Carton Antitrust Litig., 465 F. Supp. 618, 629 (N.D. Ill.), vacated per curiam on other grounds, 609 F.2d 867 (7th Cir. 1979). Significantly, one court that compelled testimony recognized this danger and tried to eliminate it by restricting the scope of permissible inquiry. In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78-79 (2d Cir. 1981).
109. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); see In re Folding Carton Antitrust Litig., 465 F. Supp. 618, 629 (N.D. Ill.), vacated per curiam on other grounds, 609 F.2d 867 (7th Cir. 1979). The burden is increased in two ways. First, there is the additional volume of immunized testimony that has been rendered unusable. See In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 77 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1047 (8th Cir. 1979). Second, it is likely that the informants who are in a position to provide the government with evidence against the witness will also be sources of information to the civil plaintiffs and, through their involvement in the civil litigation, may be exposed to the immunized testimony. Because evidence may be tainted by virtue of the fact that “someone who has seen the [immunized] testimony was... led to evidence that was furnished to federal investigators,” the government may be fore-
By authorizing an expansive inquiry, the courts endow the civil plaintiff with power to place all “subjects” touched upon at the grand jury beyond the reach of the federal prosecutor. This result strikes at the heart of the Witness Immunity Act, the purpose of which was to narrow the witness’s historically broad immunity protection. Judicially-sanctioned private examination instead confers a form of subject matter immunity that marks a regression toward transactional witness protection.

Moreover, this problem would not be resolved by stricter standards of deposition inquiry. Even when a court limits inquiry to questions taken from the immunized grand jury testimony, the original scope of immunity is expanded by the witness’s answers to those questions. Depending upon the court’s application of the after-the-fact exclusionary rule, the operation of that rule may protect the witness from prosecution based on compelled deposition testimony that expands upon that of the grand jury. In such a case, the witness would have no incentive to refrain from testifying at greater length when questioned by the civil litigant, as the more extensive the witness’s responses, the greater his protection will be. By compelling testimony, the court necessarily creates immunity and thus improperly removes control of immunity from the prosecutor.

closed from the use of information supplied by those involved in the civil suit. United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977); accord Kastigar v. United States, 406 U.S. 441, 470 (1972) (Marshall, J., dissenting); Thornburgh, supra note 58, at 163.


111. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 n.17 (7th Cir. 1981), cert. granted. 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); see In re Corrugated Container Antitrust Litig. (Franey), 620 F.2d 1086, 1093-94 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Folding Carton Antitrust Litig., 465 F. Supp. 618, 629 (N.D. Ill.), vacated per curiam on other grounds, 609 F.2d 867 (7th Cir. 1979).

112. In re Folding Carton Antitrust Litig., 465 F. Supp. 618, 629 (N.D. Ill.), vacated per curiam on other grounds, 609 F.2d 867 (7th Cir. 1979); see In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1155-57 (7th Cir. 1981), cert. granted. 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825). Another danger exists if the witness is examined during a subsequent civil trial. Even in the unlikely event that the witness’s responses to verbatim questions do not extend beyond his earlier testimony, cross examination may necessarily expand the scope of that testimony and, hence, the witness’s immunity. See Brown v. United States, 356 U.S. 148, 155-56 (1958); Powers v. United States, 223 U.S. 303, 314 (1912); United States v. Beechum, 552 F.2d 898, 907 (5th Cir. 1977) (en banc), cert. denied, 440 U.S. 920 (1979); United States v. Pate, 357 F.2d 911, 915 (7th Cir. 1966).

113. See supra notes 25-26 and accompanying text.

114. See In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 (2d Cir. 1981); Thornburgh, supra note 58, at 156.

115. In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1156-57 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-
B. The Witness’s Fear of Waiver

In addition to creating difficulties for the prosecutor, a civil court’s determination of the scope of immunity creates a hazard of waiver for the witness. Ordinarily, once immunity issues, the witness may respond to questions posed by the prosecutor without fear of waiver. The witness is assured that responses made during his examination will be immunized because the prosecutor has sole authority to determine whether immunity shall be granted and what its limits will be. The prosecutor’s questions and the witness’s responses shape the ultimate scope of the immunity; therefore, no difficulty concerning the parameters of the protection arises in a subsequent criminal proceeding.

When a civil court compels the witness to speak, however, a waiver problem arises because control of immunity is no longer solely within the hands of the prosecutor. Although the initial grant of immunity has been authorized by the government, the determination of the scope is shared by the prosecutor, the civil court, in compelling testimony, and the civil litigant, in framing the questions to be asked. Because the scope of immunity is twice-defined, once by the prosecutor and once by both the civil court and civil litigant, a question concerning the true parameters of the protection will arise in the ensuing criminal proceeding.

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See supra note 30 and accompanying text.

See supra notes 5-8 and accompanying text.

Ryan v. Commissioner, 568 F.2d 531, 541 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); see Kastigar v. United States, 406 U.S. 441, 461 (1972); United States v. McDaniel, 482 F.2d 305, 309 (8th Cir. 1973); Thornburgh, supra note 58, at 156.

119. 18 U.S.C. § 6003 (1976); see In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1147 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 (2d Cir. 1981); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 78 (2d Cir. 1981); In re Corrugated Container Antitrust Litig. (Franey), 620 F.2d 1086, 1088 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); In re Starkey, 600 F.2d 1043, 1045 (8th Cir. 1979).

120. See In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 (2d Cir. 1981); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 (2d Cir. 1981); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 (2d Cir. 1981); In re Starkey, 600 F.2d 1043, 1047-48 (8th Cir. 1979).

121. See In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1157 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 (2d Cir. 1981).
A criminal court may adopt the enlarged immunity conferred by the civil court, or alternatively, the court could accept the prosecutor's narrower version as encompassing the totality of immunized testimony. Between the two extremes lie numerous options, any one of which the court could recognize. If the criminal court adopts any version of immunity protection other than that of the civil court, the witness's testimony will be admissible against him, as he will be deemed to have waived the privilege.\textsuperscript{122}

A witness, therefore, cannot be certain that even his answers to verbatim questions will be deemed immunized by the district court in a subsequent criminal proceeding. The risk of waiver is further increased when the civil court permits nonverbatim questions. It may then be difficult for the witness to determine whether the immunized grand jury testimony was the source of these questions.\textsuperscript{123} Absent the witness's claim of privilege as to each and every question propounded, inadvertent waiver may occur.\textsuperscript{124} Answers to deposition questions of ambiguous origin may be deemed not to have been compelled and hence admissible by the criminal court.\textsuperscript{125} Rather than ensuring that

\textsuperscript{122} In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1158 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); see In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 n.14 (2d Cir. 1981).

\textsuperscript{123} See, e.g., United States v. Bursey, 466 F.2d 1059, 1078-79 (9th Cir. 1972) (questions relating to the training of Black Panthers for violent action and the secrecy of their activities are within the scope of immunity for information concerning violent acts against the President, but not questions relating to plans to kill federal or state judges); Presser v. United States, 284 F.2d 233, 235 (D.C. Cir. 1960) (witness at Senate hearing, having testified that he had complied with a subpoena \textit{duces tecum} to the best of his ability, had waived the privilege in refusing to answer a question as to whether he had destroyed pertinent records); Prentice v. Hsu, 280 F. Supp. 384, 388 (S.D.N.Y. 1968) (in an action in which the plaintiff claimed that the defendant had defrauded him of $150,000, the defendant's acknowledgement that he had given promissory notes to the plaintiff upon receipt of the "loans," and his disclaimer of any debt owed to the plaintiff, did not waive the privilege as to questions regarding the defendant's actions in concert with others to defraud).

\textsuperscript{124} See Rogers v. United States, 340 U.S. 367, 376-77 (1951) (Black, J., dissenting); In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1158 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 317 (2d Cir. 1979). A witness may waive the privilege without subjective intent to do so. See \textit{supra} notes 27-29 and accompanying text.

\textsuperscript{125} In re Corrugated Container Antitrust Litig. (Conboy), 661 F.2d 1145, 1158 (7th Cir. 1981), cert. granted, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825); In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70, 79 n.14 (2d Cir. 1981).
a witness’s deposition testimony will be immunized, prospective determinations of derived use may have the contrary effect of increasing the risk of loss of fifth amendment protection.

C. Protecting the Civil Litigant

Courts that refuse to predetermine the scope of immunity properly shield the interests of the witness and the prosecutor, the parties whom the immunity statute and the fifth amendment were designed to protect. This position, though preserving the immunity bargain, forecloses the civil litigant’s access to the testimony of the witness. To the extent that the civil litigant serves as a “private attorney general,” encouraged by Congress and the courts to prosecute private antitrust suits as a means of effectuating federal antitrust policy, he may have a limited entitlement to this information. It is the government, however, that has the primary responsibility of enforcing the antitrust laws. The interest of the civil litigant cannot overcome the strong considerations that mandate strict governmental control of immunity.

Although the civil litigant’s interest cannot be promoted by a court’s prospective determination of taint, his interests may be accommodated by making an application to the Department of Justice for a new grant of statutory immunity. Neither the immunity statute

126. See supra pt. I.
127. See supra notes 97-98 and accompanying text.
132. See supra pt. III(A), (B).
133. Brief for the United States of America as Amicus Curiae at 24(d) n.20, In re Corrugated Container Antitrust Litig. (Fleischacker), 644 F.2d 70 (2d Cir. 1981), (appended to Reply Brief in Support of Petition for a Writ of Certiorari, In re Corrugated Container Anti-trust Litig. (Franey), 620 F.2d 1086 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981)). Sanford Litvack, former Assistant Attorney General in the Antitrust Division of the Department of Justice, stated that the power of the government to grant immunity is not limited to cases in which the United States is a party. Id.; see Little Rock School Dist. v. Borden, Inc., 632 F.2d 700, 702-03 (8th Cir. 1980). But see In re Starkey, 600 F.2d 1043, 1046 (8th Cir. 1979) (federal prosecutor refused to grant immunity on the ground that the federal government was
itself nor its underlying policies prohibit such a grant.\textsuperscript{134} This procedure would promote the interests of the private attorney general and allow the government to maintain control of the scope of immunity, as intended by the statute.

**Conclusion**

In determining the scope of a prior grant of immunity, civil courts subvert the protective aspect of the federal immunity statute. Compulsion of testimony disturbs the accommodation of interests achieved by the statute. Neither the witness nor the prosecutor is properly shielded. The witness faces a possible waiver of protection; the prosecutor is likely to lose the use of evidence from whatever source he may have against the witness. The civil court has thus taken the shield of immunity away from the witness and the prosecutor, and has placed it in the hands of the civil plaintiff, who wields it as a sword against the two parties for whose benefit it was created.

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\textsuperscript{134} 18 U.S.C. § 6003 (1976); \textit{see supra} notes 97-101 and accompanying text.

not a party to the case); \textit{Likelihood of Prosecution, supra} note 9, at 679 n.43 (apparently, the government must be a party to the action before a grant of immunity can issue).