

NOTES

THE DUE PROCESS RIGHT TO THE IMMUNIZATION OF DEFENSE WITNESSES

Throughout the prosecution of criminal defendants, the prosecutor benefits from a number of tools at his disposal. One such tool is the power to obtain testimony from key witnesses that otherwise would be protected by their fifth amendment privilege against self incrimination.¹ This prosecutorial power is rooted in statutes which authorize a prosecutor to compel testimony from recalcitrant witnesses by a grant of immunity from prosecution.² These immunity statutes have existed almost as long as the fifth amendment itself.³ The Supreme Court has repeatedly upheld the validity of these statutory immunity grants as a method of providing the government access to valuable inculpatory testimony by constitutionally supplanting the witness' privilege against self incrimination.⁴ This governmental prerogative is currently authorized by the Federal Immunity of Witnesses Act of 1970.⁵

Criminal defendants, however, have not been accorded a corresponding privilege.⁶ As a result, they are absolutely powerless to compel exculpatory

¹ U.S. CONST. amend. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself"

² For a general discussion of the history of these immunity statutes, see Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968); Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

³ See *Kastigar v. United States*, 406 U.S. 441, 445 n.13 (1972). The purpose of such statutes is to reconcile society's need for certain testimony with the interests of the witness against compulsory self incrimination protected by the fifth amendment privilege. The basic rationale behind these statutes is that by granting immunity against criminal prosecution based on his testimony, a witness can be compelled to testify without violating his privilege against self incrimination. See Note, *Witness Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity"*, 51 B.U. L. REV. 616, 621 (1971).

An underlying policy of these statutes is that an immunity grant serves as a useful governmental tool to mitigate the adverse impact of the privilege against self incrimination on the effective enforcement of certain criminal laws. For example, the early colonial statutes reflected the fact that, in certain classes of crimes such as conspiracy and political bribery, only the persons implicated in the crime were capable of giving useful testimony. See *Kastigar v. United States*, 406 U.S. 441, 446 (1972). These ideas continue to provide the foundation for the present federal immunity statute. 18 U.S.C. §§ 6001-6005 (1976). See generally H.R. REP. NO. 1188, 91st Cong., 2d Sess. 8 (1970).

⁴ See, e.g., *Kastigar v. United States*, 406 U.S. 441 (1972); *Ullman v. United States*, 350 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1893).

⁵ 18 U.S.C. §§ 6001-6005 (1976) (passed as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926) [hereinafter cited as immunity Act of 1970 or Act of 1970]. See note 67 *infra* for the text of the Act pertinent to this Note.

⁶ Under the Immunity Act of 1970, only a United States Attorney is authorized to initiate an immunity grant. See note 67 *infra*. The role of a court under this statute is to issue an order granting immunity upon the request of the United States Attorney. See SENATE COMM ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 145 (1969) ("The court's role in granting the order is merely to find the facts on which the order is predicated."). Although a federal prosecutor is free to grant immunity to a defense

testimony from witnesses who invoke the fifth amendment privilege against self incrimination. This situation raises the question under what circumstances, if any, should defendants also be provided with the immunized testimony of witnesses in their behalf.⁷ In the past, almost all of the courts facing this issue have rejected, rather summarily, defendants' requests that their witnesses be compelled to testify by a grant of immunity.⁸ The primary reason given by those courts to justify denying these requests was that a court is powerless to compel the government to exercise its discretion under an immunity statute to immunize defense witnesses.⁹ Although this is currently the majority view with regard to the issue of defense witness immunity, recently, a minority of courts have indicated that, in certain situations, due process may require that defendants be provided with the immunized testimony of their witnesses.¹⁰

witness if the relevant statutory conditions are met, see 18 U.S.C. § 6003(b)(1) and (2) (1976) at note 67 *infra*, it is highly unlikely that a prosecutor will ever feel obligated to immunize a defense witness. Cf. *Earl v. United States*, 361 F.2d 531, 533 (D.C. Cir. 1966) (Burger, C.J.) ("Obviously the Government would be unlikely to call a witness unless his testimony was thought to be in support of the Government's case."). This Note, therefore, focuses on the responsibility of the courts to provide a due process safeguard to redress the disparate treatment accorded defendants under that Act.

⁷ For previous discussions of this issue, see, e.g., Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978) [hereinafter cited as Harvard Note]; Note, "The Public Has a Claim to Every Man's Evidence": *The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978) [hereinafter cited as *Every Man's Evidence*]; Note, *A Re-examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74 (1972) [hereinafter cited as *Re-examination*]; Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967) [hereinafter cited as Columbia Note].

⁸ See, e.g., *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980); *United States v. Lang*, 589 F.2d 92, 96 (2d Cir. 1978); *United States v. Rocco*, 587 F.2d 144, 147 (3d Cir. 1978); *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978); *United States v. Niederberger*, 580 F.2d 63, 67 (3d Cir. 1978); *United States v. Benveniste*, 564 F.2d 335, 339 n.4 (9th Cir. 1977); *In re Daley*, 549 F.2d 469, 478-79, (7th Cir. 1977); *United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *appeal dismissed sub nom.* *Hoff v. United States*, 425 U.S. 902 (1976); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); *United States v. Bautista*, 509 F.2d 675, 677 (9th Cir. 1975); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); *Cerda v. United States*, 488 F.2d 720, 723 (9th Cir. 1973); *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973); *United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061, 1063-64 (9th Cir. 1972); *United States v. Lyon*, 397 F.2d 505, 512-13 (7th Cir. 1968); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir.), *rehearing denied en banc*, 364 F.2d 666 (1966), *cert. denied*, 388 U.S. 921 (1967).

⁹ See, e.g., *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir.), *cert. denied*, 423 U.S. 933 (1975); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

¹⁰ See, e.g., *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 968 (3d Cir. 1980); *United States v. Herman*, 589 F.2d 1191, 1203-04 (3d Cir. 1978), *cert. denied*, 442 U.S. 913 (1979); *United States v. Gaither*, 539 F.2d 753, 754 (D.C. Cir.) (Bazelon, C.J., concurring in denial of rehearing en banc), *cert. denied*, 429 U.S. 961 (1976); *United States v. De Palma*, 476 F. Supp. 775, 776 (S.D.N.Y. 1979), *appeal pending sub nom.* *United States v. Horwitz*, No. 79-1315 (2d Cir.); *United States v. La Duca*, 447 F. Supp. 779, 787 (D.N.J.), *aff'd on other grounds sub nom.* *United States v. Rocco*, 587 F.2d 144 (3d Cir. 1978).

The purpose of this Note is to suggest that the courts have both the authority and the responsibility to provide a defendant with the immunized testimony of witnesses in his behalf where this is necessary to protect his due process right to a fair trial. To accomplish this, the Note will first analyze the due process considerations involved in a defendant's request for defense witness immunity. Concluding that a defendant's due process right to a fair trial is broad enough to encompass the provision of such immunity, the Note will then examine the current approaches taken by the federal courts to effectuate this right when faced with a request for defense witness immunity. Finally, the Note will propose a practicable resolution of the due process problems created by a defendant's inability to compel testimony in his behalf and suggest under what circumstances the courts should provide him with defense witness immunity.

I. THE CONSTITUTIONAL BASIS OF DEFENSE WITNESS IMMUNITY: DUE PROCESS CONSIDERATIONS

Since a defendant is powerless to compel testimony in his behalf from witnesses who invoke their fifth amendment privilege against self incrimination,¹¹ he may be deprived of the use of valuable exculpatory evidence at his trial absent some other way of introducing the testimony.¹² Without the use of such testimony, a defendant may be denied his right to a fair trial in violation of due process.¹³ Accordingly, this inability to secure otherwise unavailable testimony from defense witnesses by a grant of immunity implicates due process considerations inherent in the right to a fair trial.

A. *Defense Witness Immunity and the Right to a Fair Trial*

A fundamental predicate of our criminal jurisprudence is the constitutional mandate that no defendant shall be tried and convicted of any crime without due process of law.¹⁴ This guarantee of due process is, in essence, the right to a fair trial.¹⁵ To be considered fair, however, a trial need not be free of all errors, but it must be free of actual bias and even the appearance of unfairness.¹⁶ Basic to this concept of a fair trial are the right to the effective assistance of counsel,¹⁷ the right to confront and cross examine witnesses,¹⁸ and the right to call witnesses in one's behalf.¹⁹ These rights combine with others

¹¹ See text and accompanying note at note 6 *supra*.

¹² See, e.g., *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 967 (3d Cir. 1980) (defendant unsuccessfully sought to introduce into evidence earlier statement made by witness, who refused to testify on the ground of his privilege against self incrimination, as an exception to the hearsay rule); *United States v. De Palma*, 476 F. Supp. 775 (S.D.N.Y. 1979) (denial of defendant's motion for admission into evidence of defense witnesses' grand jury testimony pursuant to FED. R. EVID. 804(b)(5)).

¹³ See cases cited at note 10 *supra*.

¹⁴ U.S. CONST. amend. V provides: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

¹⁵ See *Estes v. Texas*, 381 U.S. 532, 564-65 (1965) (Warren, C.J., concurring).

¹⁶ *In re Murchison*, 349 U.S. 133, 136 (1955).

¹⁷ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹⁸ See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

¹⁹ See *Washington v. Texas*, 388 U.S. 14, 19 (1967).

recognized as essential to a fair trial²⁰ to ensure defendants a fair opportunity to present an effective defense.

The Supreme Court has, on several occasions, recognized that the right to a fair trial may be violated when defendants are denied a fair opportunity to develop evidence in their favor in order to present an effective defense. In *Rovario v. United States*²¹ for example, the Supreme Court reversed a defendant's conviction for violating a federal narcotics law because the prosecutor had refused to disclose the identity of an informant.²² The incriminating evidence at the trial consisted of the testimony of government witnesses concerning the alleged illegal transaction between the defendant and the government informer.²³ Before and during the trial, the defendant sought to learn the identity of this informer,²⁴ but the government refused these requests on the ground of its "informer's privilege."²⁵ In reversing the defendant's conviction on appeal, the Supreme Court noted that the informer was the sole participant in the alleged illegal transaction and was, therefore, the only witness capable of either amplifying or contradicting the testimony of the government's witnesses.²⁶ The Court held that the "informer's privilege" must give way "[w]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause"²⁷

In *Brady v. Maryland*,²⁸ the Supreme Court in a different context reiterated the idea that due process considerations prohibit governmental actions which may frustrate a defendant's opportunity to present an effective defense. In *Brady*, the defendant was convicted of murder.²⁹ Subsequently, he discovered that the prosecutor had withheld a confession by a co-defendant that would have tended to exculpate him.³⁰ The Supreme Court affirmed the decision of the Maryland Court of Appeals remanding the case for a retrial.³¹ The Court

²⁰ See, e.g., *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (right to a public trial).

²¹ 353 U.S. 53 (1957).

²² *Id.* at 65-66.

²³ *Id.* at 55.

²⁴ *Id.*

²⁵ *Id.* at 55-56. This "informer's privilege" consists of the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. See *Scher v. United States*, 305 U.S. 251, 254 (1938).

²⁶ 353 U.S. at 64.

²⁷ *Id.* at 60-61.

²⁸ 373 U.S. 83 (1963).

²⁹ *Id.* at 84. Under state law, the jury was empowered to impose either a death sentence or restrict the punishment to life imprisonment. *Id.* at 85. During his trial, Brady took the stand and admitted his participation in the crime, but claimed that his co-defendant did the actual killing. *Id.* at 84. Nonetheless, the jury sentenced him to death.

³⁰ *Id.* In this statement, Brady's co-defendant confessed to the actual homicide. If this confession had been introduced into evidence during Brady's trial, the jury might have reduced his sentence to life imprisonment.

³¹ *Id.* at 86. The Maryland Court of Appeals found that the suppression of this evidence denied the defendant due process and remanded the case for a retrial of the question of punishment, not the question of guilt. *Id.* at 85.

observed that this suppression of evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice" ³² Consequently, the Court held that the suppression of evidence favorable to an accused by the prosecutor, regardless of good or bad faith, violates due process. ³³

As these cases demonstrate, inherent in the due process guarantee of a fair trial is the notion that a defendant is entitled to a fair opportunity to present an effective defense. One important element of this notion is the defendant's ability to discover and employ material exculpatory evidence in his trial defense. ³⁴ Indeed, as these cases implicitly affirm, the due process right to a fair trial may become meaningless unless a defendant can obtain and use available testimony on his behalf. Thus, the basic inquiry becomes whether a particular defendant has been deprived of a fair trial because he was denied a fair opportunity to present an effective defense.

Like the defendants in *Rovario* and *Brady*, a defendant in the immunity context can be equally disadvantaged by a prosecutor's refusal to immunize defense witnesses who invoke their privilege against self incrimination. Without an immunity grant, these witnesses cannot be compelled to testify on the defendant's behalf, thereby depriving the defendant of evidence that may be vital to an effective defense. Moreover, the only apparent distinction between the defense witness immunity situation and those involved in the foregoing Supreme Court decisions is the awareness of the defendant concerning the available evidence. To illustrate, in *Rovario* and *Brady*, the defendants had no knowledge of the potentially exculpatory testimony that could be derived from the prosecutor's evidence. ³⁵ In contrast, in the immunity context, a defendant has typically been informed of or is aware of the available exculpatory testimony which his witnesses would be willing to give on his behalf if they could do so without incriminating themselves. ³⁶ Because of the prosecutor's refusal to immunize these witnesses, however, the defendant may be totally unable to use

³² *Id.* at 88.

³³ *Id.* at 87.

³⁴ See *Chambers v. Mississippi*, 410 U.S. 284, 302-03. See also *Every Man's Evidence*, *supra* note 7, at 1213; *Re-examination*, *supra* note 7, at 84-85.

³⁵ For example, the defendant in *Rovario* did not argue that he knew that the government's informer could provide testimony helpful to his defense. Instead, he contended that, as a matter of fundamental fairness, the prosecutor should be required to disclose the informer's identity so that he could examine the informer and discover whether the informer's testimony could assist his defense. See 353 U.S. at 58. Similarly, in *Brady* the defendant was unaware that the prosecutor had suppressed an out-of-court statement made by his co-defendant which exculpated the defendant. This statement did not actually come to the defendant's attention until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed. See 373 U.S. at 84.

³⁶ See, e.g., *United States v. Herman*, 589 F.2d 1191, 1199 (3d Cir. 1978) (where the defendant relied upon prior admissions made by witnesses, whose testimony he sought to compel, to the FBI and the grand jury to support his claim for defense witness immunity); *United States v. Morrison*, 535 F.2d 223, 225 (3d Cir. 1976) (where the court observed that the defendant had planned his defense around the testimony of a prospective witness who, prior to invoking the fifth amendment privilege, was prepared to give exculpatory testimony in the defendant's behalf).

this testimony in his defense. The ultimate consequence of the different situations is identical — a defendant is tried and convicted without the benefit of all available evidence to employ in his favor. Under these circumstances, a defendant's inability to compel this testimony by an immunity grant can have as devastating an effect on his defense as those which concerned the courts in *Rovario* and *Brady*.

Consequently, in light of a defendant's inability to compel exculpatory testimony from witnesses who invoke the fifth amendment privilege, a prosecutor's refusal to grant defense witness immunity can deprive the defendant of a fair opportunity to present an effective defense.³⁷ Moreover, the government may actually benefit strategically, to the detriment of the defendant, by its refusal to immunize defense witnesses who could provide helpful testimony to the defense of the accused. Absent a grant of defense witness immunity, the defendant may be unable to marshal sufficient evidence in his favor to present an effective defense.³⁸ To this extent, the due process rule of a fair trial cannot be satisfied and the essential task of the proceedings, the search for the truth,³⁹ is likely to be frustrated. The result of the trial essentially becomes dependent upon the prosecutor's decision whether to make exculpatory testimony available to the defense by exercising its statutory immunity power.

Although decided in a different factual context for immunity, the Supreme Court's decision in *Chambers v. Mississippi*⁴⁰ furnishes further support for the principle that due process may be violated when a defendant is denied a fair opportunity to present available testimony in his behalf. The defendant in *Chambers*, during his trial for murder, sought to cross-examine his own witness who had orally confessed on several previous occasions to committing the crime for which the defendant was charged.⁴¹ The defendant, however, was prevented from doing this by the state's common law "voucher rule" which prohibited the impeachment of one's own witness.⁴² The defendant then attempted to introduce the testimony of several witnesses to whom the confessions allegedly had been made.⁴³ This second attempt to introduce the exculpatory evidence was frustrated by the state's hearsay rules,⁴⁴ and the defendant was ultimately convicted.⁴⁵ Recognizing the crucial importance of the excluded

³⁷ Fairness of the trial is further jeopardized when a defendant who is entirely powerless to compel testimony in his favor by an immunity grant is convicted solely on the strength of testimony compelled from witnesses immunized by the prosecutor. See *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir.), rehearing denied, 364 F.2d 666 (D.C. Cir. 1966) (en banc), cert. denied, 388 U.S. 921 (1967) (dictum suggesting that due process as applied may be violated where prosecutor has statutorily immunized government witnesses while, at the same time, refusing to grant immunity to defense witnesses).

³⁸ For example, see the factual discussion of *Earl v. United States* at text and notes 94-98 *infra*.

³⁹ See *Washington v. Texas*, 388 U.S. 14, 19 (1967). See also *United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980).

⁴⁰ 410 U.S. 284 (1973).

⁴¹ *Id.* at 288-93.

⁴² *Id.* at 294.

⁴³ *Id.* at 292.

⁴⁴ *Id.* at 292-94.

⁴⁵ *Id.* at 285.

testimony,⁴⁶ the Supreme Court reversed his conviction and held that Chambers' right to a fair trial had been violated because he was not given a fair opportunity to present an effective defense.⁴⁷

The due process violation found in *Chambers* — the denial of a fair opportunity to present available exculpatory evidence in one's defense — lends support to the argument for defense witness immunity. In each instance, the defendants are powerless to present testimony on their behalf. In *Chambers*, the source of the defendant's helplessness was the state and its strict adherence to evidentiary rules designed to protect the factfinder from hearing typically unreliable evidence.⁴⁸ In the immunity context, it is the government's refusal to exercise its statutory immunity power which renders the defendant powerless to obtain the exculpatory testimony for his defense. In the first situation, the Supreme Court weighed the right to a fair opportunity to present an effective defense against the state's interest in its evidentiary rules and found the former paramount.⁴⁹ Accordingly, in the immunity context, *Chambers* would appear to call for a similar weighing of a defendant's right to present an effective defense through a grant of defense witness immunity against the state's interest in opposing such a grant. Thus, although *Chambers* may be factually distinguishable, its underlying rationale for determining whether a due process violation has occurred when a defendant is tried and convicted without having been given a fair opportunity to employ available exculpatory testimony in his defense applies with equal force to the immunity situation.

Once one perceives the true constitutional basis which supports a defendant's claim for defense witness immunity — the due process right to a fair trial — the considerations raised by a defendant's request for defense witness immunity no longer appear novel. The issue becomes not whether a defendant has a *constitutional right*⁵⁰ to the immunized testimony of his witnesses, but rather whether the *due process right to a fair trial* requires that, under certain circumstances, a court provide a defendant with available exculpatory evidence by a grant of witness immunity. Thus, courts no longer need be troubled with the proposition of establishing a new or unique constitutional right in this area, but merely concerned with the creation of a new remedy to protect an established right.⁵¹ Viewed in this light, once the same due process considerations already well-founded in the law are examined, the issue raised by a request for defense witness immunity becomes capable of clearer resolution.

Yet, recognition that due process concepts are broad enough to require the provision of immunity to defense witnesses does not necessarily mean that such

⁴⁶ *Id.* at 297. In this regard, the Court stated, "[t]o the extent that [the witness'] sworn confession tended to incriminate him, it tended also to exculpate Chambers." *Id.*

⁴⁷ *Id.* at 302.

⁴⁸ *Id.* at 295-98.

⁴⁹ *Id.* at 302-03.

⁵⁰ *See, e.g.,* United States v. Allstate Mortgage Corp., 507 F.2d 492, 495 (7th Cir. 1974) (no merit to argument that a defendant has a constitutional right to have immunity conferred upon a defense witness who exercises his fifth amendment privilege); *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973) (no constitutional right to defense witness immunity).

⁵¹ *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 971 (3d Cir. 1980).

immunity will be granted in every case. Instead, the courts must balance⁵² the defendant's right to a fair trial against the competing interests contained in a grant of such immunity.⁵³ If legitimate governmental interests would be infringed, the courts must act cautiously in determining whether defense witness immunity should be provided for a defendant.

B. *Balancing the Interests: Transactional Versus Use Immunity*

Several reasons have been given to justify the prosecutor's refusal to grant defense witness immunity. One rationale is that this type of immunity grant would have a detrimental effect on the public welfare⁵⁴ and the way in which the public perceives the role of prosecutor.⁵⁵ Thus, it is contended that, by allowing a defendant to immunize his witnesses on the pretext that they will give valuable exculpatory testimony in his behalf, the defendant is given the power to confer absolution from prosecution on all of his cronies in crime.⁵⁶ As one court has stated, "[a] person suspected of crime should not be empowered to give his confederates an immunity bath."⁵⁷ Where defense witnesses are immunized by a prosecutor exercising his statutory immunity power the public's

⁵² This balancing process was given implicit recognition by the Supreme Court in *Rovario* and *Chambers*. In *Rovario*, the Court stated that no "fixed rule" of disclosure was defensible. Rather, the Court reasoned that the problem "is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare a defense." 353 U.S. at 62. And in *Chambers* the Court apparently applied a balancing test to determine if due process considerations required an exception to be made to the state's evidentiary rules. Concluding that the state had no legitimate interest in the "rigid application" of these rules, the Court held that they could not be "applied mechanistically to defeat the ends of justice." 410 U.S. at 302. See generally *Re-examination*, *supra* note 7, at 86-88.

⁵³ Since the Supreme Court has held that a grant of immunity under the Act of 1970 constitutionally supplants a witness' fifth amendment privilege against self incrimination, see *Kastigar v. United States*, 406 U.S. 441, 462 (1972), the witness' interest in being compelled to give testimony for the defense is adequately protected. Thus, this note will not focus on the interest of the immunized defense witness. Instead, only the government's interest in opposing a grant of defense witness immunity will be examined. It may be noted, though, that the witness' testimony which is compelled under a grant of immunity can expose him to both criminal and noncriminal consequences. Insofar as the Supreme Court has determined that the fifth amendment protects a witness solely against criminal results, see *Brown v. Walker*, 161 U.S. 591, 605 (1896), the possibility of noncriminal consequences is irrelevant to the witness' interest in a grant of defense witness immunity.

⁵⁴ See Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. OF CRIM. L. & CRIMINOLOGY 143, 152 (1976) [hereinafter cited as Bauer]. This author is of the opinion that every witness who seeks immunity is himself guilty of criminal acts. If the power to grant immunity was given to defendants, the author questions what would prevent them from conferring such immunity grants on their co-defendants in order to "beat the rap." He concludes that, since every grant of immunity entails the social cost involved in not prosecuting an admitted criminal, the decision to immunize should not be placed in the hands of defendants who could choose to confer immunity on the basis of friendship or self-interest. *Id.*

⁵⁵ Cf. Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 155 (1976) (author observes public's perception that prosecutors are too lenient in immunizing potential government witnesses).

⁵⁶ See Bauer, *supra* note 54, at 152.

⁵⁷ In re Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973).

perception of the prosecutor, as the protector of the public interest by seeing that all deserving criminals are properly prosecuted,⁵⁸ is damaged. Another reason for sustaining a prosecutor's refusal is that a defendant's request for defense witness immunity infringes on the prosecutor's interest in prosecuting both the defendant and, at some later date, his witnesses who are also participants in crime.⁵⁹ In short, a grant of defense witness immunity would invade the prosecutor's discretion over the manner and the timing of its prosecutions.⁶⁰ The significance accorded to these governmental interests, however, will necessarily vary depending on the scope of the immunity sought for a defense witness.⁶¹

Prior to 1970, a number of federal statutes provided grants of "transactional immunity" to witnesses.⁶² Transactional immunity absolves a witness from prosecution for any matter about which he testifies while under the immunity grant.⁶³ In several early decisions involving immunity grants, the Supreme Court held that anything less in scope than transactional immunity was insufficient to supplant a witness' fifth amendment privilege against self incrimination and therefore could not be used to compel testimony over a claim of the privilege.⁶⁴ The interests of the prosecutor in preventing wholesale immunity baths and maintaining complete discretion over the timing of prosecutions become significant when the immunity sought for defense witnesses is transactional in scope.⁶⁵ This is because a grant of transactional immunity to a defense witness forces the prosecutor to forego prosecuting the witness for any crimes that his trial testimony reveals he committed.⁶⁶ Thus, under a grant of transactional immunity to a defense witness, the possibility of an immunity bath for a defendant's accomplices in crime becomes a reality. To this extent, a

⁵⁸ Cf. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION 1.1(a) (1974) ("The office of prosecutor is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of the law").

⁵⁹ See, e.g., *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980); *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir. 1976); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966). See also *Harvard Note*, *supra* note 7, at 1273-74; *Columbia Note*, *supra* note 7, at 960-61.

⁶⁰ See *Re-examination*, *supra* note 7, at 80.

⁶¹ See *United States v. Morrison*, 535 F.2d 223, 228-29 (1976); *United States v. La Duca*, 447 F. Supp. 779, 786 (D.N.J. 1978). See also *Re-examination* *supra* note 7, at 80.

⁶² For a listing of these statutes, see NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, WORKING PAPERS 1444-45 (1970) [hereinafter cited as WORKING PAPERS].

⁶³ See, e.g., The Compulsory Testimony Act of 1893, Act of Feb. 11, 1893, 27 Stat. 443, repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 245, 84 Stat. 931, which provided in part: "No person shall be prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify . . ." See also *Kastigar v. United States*, 406 U.S. 441, 451-53.

⁶⁴ See, e.g., *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892); *Brown v. Walker*, 161 U.S. 591, 594-95 (1896); *Hale v. Henkel*, 201 U.S. 43, 67 (1906).

⁶⁵ See *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976); see also *Harvard Note*, *supra* note 7, at 1273-74.

⁶⁶ Under a typical transactional immunity statute, if a witness takes the stand and testifies to several criminal acts he has participated in, he is protected against any criminal prosecution for those acts. Thus, these types of statutes have the effect of giving the witness who is re-

grant of defense witness immunity places a substantial restraint upon the government's discretion to prosecute. A narrower grant of immunity may, however, reduce significantly the infringement on the prosecutor's interest in prosecuting the witness at a later date.

In 1970, Congress provided this narrower scope of immunity by enacting the Federal Immunity of Witnesses Act.⁶⁷ This Act created one comprehensive federal immunity statute applicable to all cases involving a violation of any

quired to testify under the immunity grant, an "immunity bath" if he admits to criminal activities during his testimony.

A good illustration of such immunity baths occurred in a case which arose under the first federal immunity statute. Act of Jan. 24, 1857, 11 Stat. 155 (1857). In this case, two clerks in the Department of Interior had embezzled \$2,000,000.00 in government funds and then had arranged to testify before a House Committee, where they disclosed their criminal acts under a grant of transactional immunity. When the government attempted to prosecute, the court dismissed the case, holding that the clerks were immune from prosecution. See 42 CONG. GLOBE, 37th Cong., 2d Sess. 364 (1860) (remarks of Rep. Wilson).

⁶⁷ 18 U.S.C. §§ 6001-6005 (1976) (passed as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926). This Note will deal primarily with the provisions of sections 6002 and 6003, reprinted below, as they relate to a grant of immunity for testifying before a judicial tribunal. Section 6001 of the Act contains definitions of terms used in the statute. Section 6004 authorizes immunity grants to witnesses in certain administrative proceedings. Section 6005 authorizes immunity grants to witnesses testifying at congressional hearings. Section 6002 of the Act provides as follows:

§ 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

- (1) a court or grand jury of the United States . . . 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 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.

Section 6003 provides as follows:

§ 6003. Court and grand jury proceedings.

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

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

- (1) the testimony or other information from such individual may be necessary to the public interest; and
- (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

federal law.⁶⁸ The Act substituted "use and derivative use immunity" for the previously authorized transactional immunity.⁶⁹ As the legislative history indicates, Congress intended that witnesses granted immunity under this Act would only be protected from having their testimony or any evidence derived therefrom used against them in a subsequent prosecution.⁷⁰ Unlike transactional immunity, therefore, "use immunity" does not absolve the witness from prosecution for any crimes revealed by his immunized testimony.⁷¹ Instead, it merely prohibits a prosecutor from introducing the testimony or any derivative information as evidence in a subsequent prosecution for those crimes.⁷² This narrower scope of immunity was thought to better accommodate the interests of the witnesses and the government by eliminating immunity baths, while still providing the witnesses with protection from prosecutions based solely on the compelled testimony or any of its fruits.⁷³

Two years later, the Supreme Court in *Kastigar v. United States*,⁷⁴ approved the Act's adoption of use immunity.⁷⁵ After examining the history of federal immunity statutes and its own precedents concerning immunity grants,⁷⁶ the Supreme Court held that immunity from use and derivative use was coextensive with the scope of the privilege against self incrimination and was therefore sufficient to compel testimony over a claim of that privilege.⁷⁷ The Court noted that the fifth amendment privilege was not intended to inhibit the effective enforcement of criminal laws by protecting those who violate them.⁷⁸ On the contrary, an immunized witness could still be subsequently prosecuted for any crimes that his immunized testimony revealed he committed, but the privilege against self incrimination requires the prosecutor to satisfy a "heavy burden."⁷⁹ The prosecutor has the affirmative duty to prove that all the evidence it proposes to use in the subsequent prosecution of the witness was derived from a legitimate source wholly independent of the compelled testimony.⁸⁰

⁶⁸ By its enactment, the Act repealed all other federal immunity statutes and substituted a comprehensive statutory scheme to serve all federal purposes. See H.R. REP. NO. 1549, 91st Cong., 2d Sess. 32 (1970).

⁶⁹ Section 6002 of the Act, see note 67 *supra*, provides in pertinent part that "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 . . ." 18 U.S.C. § 6002 (1976). The scope of immunity sanctioned by this Act has been termed "use and derivative use immunity." See *Kastigar v. United States*, 406 U.S. 441, 449 (1972) [hereinafter referred to as "use immunity"].

⁷⁰ See, e.g., H.R. REP. NO. 1549, 91st Cong., 2d Sess. 32 (1970).

⁷¹ The legislative history of section 6002 clearly indicates that Congress intended the protection afforded by a grant of use immunity to be narrower than that of transactional immunity. See *id.*

⁷² See note 67 *supra*.

⁷³ See WORKING PAPERS, *supra* note 62, at 1446.

⁷⁴ 406 U.S. 441 (1972).

⁷⁵ *Id.* at 462.

⁷⁶ *Id.* at 443-59.

⁷⁷ *Id.* at 459.

⁷⁸ *Id.* at 453.

⁷⁹ *Id.* at 461-62.

⁸⁰ *Id.* at 460.

Accordingly, in theory, a grant of use immunity under the Act of 1970 leaves the witness and the prosecutor in the same position as if the witness had never taken the stand to testify.⁸¹ The government does, however, bear the additional burden of proving the independence of its sources in any subsequent prosecution.⁸² In some situations, this burden may prove insurmountable; the prosecutor will be unable to establish the independence of his evidence to the court's satisfaction.⁸³ Where this result obtains, a grant of use immunity to a defense witness may mean that the prosecutor will be foreclosed from prosecuting the immunized witness. Under these circumstances, a grant of use immunity to a defense witness becomes tantamount to a grant of transactional immunity and the government's interests which would be infringed by such a grant should be accorded substantial weight.

Nevertheless, in many cases, the government will be able to satisfy its burden under *Kastigar*⁸⁴ and valid prosecutions of immunized defense witnesses need not be sacrificed in order to effectuate a defendant's right to a fair trial. By providing for the possible subsequent prosecution of immunized witnesses, therefore, *Kastigar* reduces the invasion of prosecutorial discretion potentially occasioned by a defendant's request that his witnesses be immunized. As a result, *Kastigar* lessens the weight accorded to the governmental interests⁸⁵ involved in a grant of defense witness immunity. Under certain circumstances,⁸⁶ this may tip the scale in favor of effectuating a defendant's right to a fair trial by providing his witnesses with such immunity so that the defendant can use their testimony in presenting his defense. Since the significance of the governmental interests involved in a grant of defense witness immunity, however, will necessarily vary from case to case, the courts will have to weigh these interests carefully in each instance in order to determine whether they outweigh the defendant's need for the testimony to present an effective defense under the due

⁸¹ See *id.* at 458-59, 462.

⁸² See *id.* at 460-62. For a general discussion of the evidentiary burden faced by the prosecutor with respect to future prosecutions of immunized witnesses, see Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275, 282-86 (1976).

To determine whether the prosecutor has satisfied this evidentiary burden, a pre-trial hearing is held to examine the evidence proposed to be used. Here, the prosecutor must establish by a preponderance of proof that its evidence was derived from legitimate sources independent of the immunized testimony. Suppression of the evidence will result from the prosecutor's failure to sustain this burden and dismissal of the charges may even be necessary. See *id.* at 284.

⁸³ See, e.g., *United States v. Kurzer*, 534 F.2d 511, 517 (2d Cir. 1976); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); *United States v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd on other grounds*, 491 F.2d 473 (2d Cir.), *cert. denied*, 419 U.S. 872 (1974).

⁸⁴ See, e.g., *United States v. Kuehn*, 562 F.2d 427, 432 (7th Cir. 1977) (prosecutor's burden of showing lack of taint under *Kastigar* was met); *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974) (prosecutor had satisfied burden under *Kastigar* even though the prosecutor had heard the witness' prior immunized testimony with regard to crimes for which the witness was convicted); *United States v. Meyers*, 339 F. Supp. 1154, 1060-61 (E.D. Pa. 1972) (*Kastigar* burden satisfied even though prosecutor had seen a newspaper article which paraphrased the immunized witness' testimony).

⁸⁵ See text and notes at notes 55-60 *supra*.

⁸⁶ See text at note 190 *infra*.

process guarantee of a fair trial. When the court determines that the balance tips in the defendant's favor, it must then decide whether it has the power to provide the specific remedy sought by the defendant, a grant of immunity for his witnesses. The next section of this Note will examine how the federal courts have treated this issue.

II. THE TREATMENT OF THE ISSUE OF DEFENSE WITNESS IMMUNITY IN THE FEDERAL COURTS

A. *The Traditional Approach: Denial of any Remedy*

Courts facing the issue of defense witness immunity have adopted a number of ways to handle a defendant's request for an immunity grant for his witnesses. The traditional approach of the federal courts is simply to deny any relief whatsoever.⁸⁷ The courts following this approach tend to view a defendant's application for defense witness immunity as raising a claim to a novel and unique constitutional right⁸⁸ rather than merely the prescription of a new remedy to effectuate the well established due process right to a fair trial.⁸⁹ Finding no specific support in the Constitution for the creation of this new "right," the courts following this approach summarily refuse to grant the requested relief.⁹⁰ As a result, these courts completely ignore the necessity of balancing the defendant's interest in a fair trial against the governmental interests involved in a grant of defense witness immunity. To this extent, the significance of *Kastigar* is largely overlooked.

Earl v. United States,⁹¹ decided by the Court of Appeals for the District of Columbia, provides a good illustration of the application of this type of approach. In *Earl*, the court held that a defendant has no constitutional right to defense witness immunity. Although the facts of *Earl* involved a transactional immunity statute,⁹² the court's holding is still relied upon by the majority of federal courts to deny requests for defense witness immunity without engaging in a thorough analysis of the relevant due process considerations.⁹³

In *Earl*, the defendant and an alleged accomplice, Scott, were charged with violating a federal narcotics law.⁹⁴ During the trial, an undercover agent testified that he had purchased contraband from Scott and a man who the agent later identified as Earl.⁹⁵ Earl attempted to call Scott as his witness, but Scott

⁸⁷ See cases cited in note 8 *supra*.

⁸⁸ See cases cited in note 50 *supra*.

⁸⁹ See text and note at note 51 *supra*.

⁹⁰ See note 8 *supra*.

⁹¹ 361 F.2d 531 (D.C. Cir.), *reh. denied*, 364 F.2d 666 (1966), *cert. denied*, 388 U.S. 921 (1967).

⁹² See 18 U.S.C. § 1406 (1964), *repealed by* 18 U.S.C. §§ 6001-6005 (1976).

⁹³ See, e.g., *United States v. Benveniste*, 564 F.2d 335, 339 (9th Cir. 1977); *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977); *United States v. Smith*, 542 F.2d 711, 713 (7th Cir. 1976); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975); *United States v. Jenkins*, 470 F.2d 1061, 1063-64 (9th Cir. 1972).

⁹⁴ 361 F.2d at 532.

⁹⁵ *Id.*

asserted his privilege against self incrimination.⁹⁶ Earl then requested that the prosecutor be ordered to grant statutory immunity to Scott to compel his testimony alleging that, if he was immunized, Scott would admit that Earl had not participated in the illegal transaction.⁹⁷ This request was denied and Earl was convicted.⁹⁸ Earl appealed claiming that this refusal violated his rights under due process.

The Court of Appeals for the District of Columbia Circuit affirmed Earl's conviction.⁹⁹ Rejecting the defendant's argument that the prosecutor's refusal to immunize Scott resulted in the suppression of evidence in violation of the *Brady* rule,¹⁰⁰ the court decided that *Brady* was inapplicable because the prosecutor had not affirmatively withheld a witness or concealed evidence.¹⁰¹ Finding that the facts of *Earl* raised a different issue than that presented in *Brady*, the court stated:

What Appellant asks this Court to do is to command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. This power is not inherent in the Executive and surely is not inherent in the judiciary. In the context of criminal justice, it is one of the highest forms of discretion conferred by Congress on the Executive¹⁰²

Thus, the court concluded that it was powerless to compel the prosecutor to immunize a witness. The court also rejected the defendant's argument that it had the power to create a judicial grant of immunity for Scott.¹⁰³ The court reasoned that certain safeguards would be required to preclude abuses in such an immunity grant.¹⁰⁴ Viewing these considerations as involving a legislative question, the court held that this type of immunity grant was beyond the power of the judiciary.¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Id.* In this offer Earl stated that Scott would admit that he did not know Earl, that Earl had not been with him on the day in question and that he knew a third person who frequented the same area and resembled Earl in appearance. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 535. Chief Justice Burger, then circuit judge, wrote the majority opinion.

¹⁰⁰ See text and notes at notes 29-33 *supra*.

¹⁰¹ 361 F.2d at 534. The court noted that the government had transported the witness from prison and produced him in court, but that Scott himself had declined to testify. *Id.*

¹⁰² *Id.* The court observed that the prosecutor did not argue that Congress was powerless to provide defendants with a comparable procedure to compel testimony, but rather only that Congress had not done so. *Id.* This argument, however, overlooks the important due process considerations raised by this issue.

¹⁰³ *Id.*

¹⁰⁴ *Id.* The court stated that "the complexity and difficulty of evaluating the impact of that course [providing judicial immunity] suggest at once the inadequacy of the facilities available to the judiciary to make the assessment." *Id.* It will be argued in this Note that the courts are capable of such an assessment and that it is their responsibility to make it. See text and notes at notes 185-226 *infra*.

¹⁰⁵ *Id.* In a footnote, the court stated that had the prosecutor secured testimony by grant-

As the decision in *Earl* demonstrates, the traditional approach to this issue characterizes a defendant's request for defense witness immunity as involving a claim to a new constitutional right rather than merely the creation of a new remedy to preserve an established right — the due process right to a fair trial.¹⁰⁶ The courts following this approach conclude that since Congress has vested exclusive authority in the prosecutor to initiate immunity grants, the judiciary is powerless to provide immunity to defense witnesses. Consequently, this approach forecloses any consideration of the power of a court to protect a defendant's right to a fair trial. In so doing, it ignores the essential need for a balancing test in this area and overlooks the significance of *Kastigar* in resolving the issue.

B. Recent Attempts to Protect a Defendant's Right to a Fair Trial

Recently, a few federal courts have recognized the due process issues raised by a defendant's request for defense witness immunity.¹⁰⁷ These courts discern that the question at stake involves a defendant's due process right to a fair trial. Therefore, where a determination is made that a defendant's inability to compel testimony in his behalf by an immunity grant results in a denial of the due process guarantee of a fair trial, these courts conclude that they have the power to provide a remedy by virtue of the due process clause. This determination, however, is accomplished by various methods. One consists of ascertaining whether the prosecutor's refusal to grant the requested defense witness

ing immunity to a witness, an argument could have been made on behalf of *Earl* that this use of the statutory immunity power denied *Earl* due process. *Id.* at n.1. This statement, although dictum, nevertheless reflects the court's misconception of the due process considerations involved in a defendant's request for defense witness immunity. In this situation, it is not the fact that the government possesses the power to immunize certain witnesses or even that it has used this power to its advantage which is critical. Rather, it is the fact that the defendant, because of his ability to compel exculpatory testimony from his witnesses, may be denied a fair trial in violation of his due process rights that is the important consideration.

Earl's petition for a rehearing en banc was denied by an equally divided court. 364 F.2d 666 (D.C. Cir. 1966). In dissenting from the denial, Judge Leventhal noted that the court's decision that it was powerless to grant immunity to the defense witness failed to answer the argument that there was "unfairness to the defendant in denying availability of testimony." *Id.* He specifically regretted that the trial court had not made any findings as to whether any interest of the government would be infringed by a grant of defense witness immunity. This inquiry, he stated, "bears on the fairness of the prosecutor's course." *Id.*

¹⁰⁶ Another case which illustrates this approach is the Seventh Circuit Court of Appeals' decision in *United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974). In *Allstate*, the court refused to compel a prosecutor to immunize a defense witness under the Immunity Act of 1970. Rejecting the defendant's argument that *Earl* was distinguishable because it had involved transactional immunity as compared to use immunity under the Act of 1970, the court simply replied that this was "a distinction without a difference." *Id.* at 495. The court felt that it was precluded from compelling the prosecutor to grant immunity or from granting it on its own because this would intrude upon the prosecutorial discretion of the executive branch. The court, therefore, concluded that there was no merit "to the argument that a defendant has a constitutional right to have immunity conferred upon a defense witness who exercises his privilege against self incrimination." *Id.*

¹⁰⁷ See note 10 *supra*.

immunity results in an "unfair trial."¹⁰⁸ The other involves determining whether that refusal is "deliberately intended to distort the judicial fact finding process."¹⁰⁹ In the former method, the court weighs the conflicting interests of the government and the defendant in order to decide whether the defendant has been denied a fair trial by his inability to compel testimony through an immunity grant. In the latter method, the court simply determines whether the prosecutor, by refusing the defendant's request that his witnesses be immunized, has deliberately intended to conceal relevant evidence from the fact finder.

1. The Ninth Circuit's Approach: The Fair Trial Standard

The Court of Appeals for the Ninth Circuit in *United States v. Alessio*¹¹⁰ was one of the first federal courts willing to acknowledge that a defendant's right to a fair trial may require that, under certain circumstances, use immunity be provided for his witnesses who assert their fifth amendment privilege against self incrimination. The court in *Alessio* adopted a balancing test to determine whether the prosecutor's refusal to immunize a defense witness coupled with the defendant's inability to compel testimony on his behalf violated the defendant's due process right to a fair trial. The court examined the fairness of the trial by weighing the defendant's need for the testimony against the government's interest in refusing to immunize the defense witness.

In *Alessio*, the defendant was charged with violating a federal extortion statute.¹¹¹ During the trial, the defendant sought use immunity for three defense witnesses who had threatened to invoke their privileges against self incrimination if called to testify.¹¹² The prosecutor refused this request and the defendant was convicted.¹¹³ The Court of Appeals for the Ninth Circuit affirmed the conviction.¹¹⁴ The court noted that an interpretation of the fifth amendment to allow defendants to demand defense witness immunity would unacceptably invade the prosecutor's discretion to prosecute those witnesses.¹¹⁵ The court, however, reasoned that "whatever power the government possesses it may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment"¹¹⁶ Consequently, the court held that the key question is whether the defendant was denied a fair trial because of the government's refusal to seek immunity for his witnesses.¹¹⁷ Applying this standard, the court found that the defendant had not been denied a

¹⁰⁸ See *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976), discussed in text at notes 110-20 *supra*.

¹⁰⁹ See *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), discussed in text at notes 123-36 *supra*.

¹¹⁰ 528 F.2d 1079 (9th Cir. 1976).

¹¹¹ *Id.* at 1080.

¹¹² *Id.* at 1081.

¹¹³ *Id.* at 1080-81.

¹¹⁴ *Id.* at 1083.

¹¹⁵ *Id.* at 1082.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

fair trial because the testimony he sought from his witnesses was cumulative of that which had already been presented to the jury.¹¹⁸

As is apparent from the decision in *Alessio*, the Ninth Circuit's approach does not mean that the prosecutor's refusal to grant defense witness immunity coupled with the defendant's inability to compel the testimony in his behalf will always result in a denial of due process. Rather, the court will balance the competing interests of the government and the defendant involved in the particular case to determine whether defendant has been denied a fair trial. According to the decision in *Alessio*, one of the major elements in weighing the defendant's interest in a fair trial is his actual need for the testimony.¹¹⁹ If the defendant fails to establish any significant need for the immunized testimony of his witnesses, then the court will strike the balance in favor of the government and deny the defendant his requested relief.¹²⁰

The approach employed by the Ninth Circuit, therefore, avoids placing any restrictions on the prosecutor's discretion to grant statutory immunity where the exercise of that discretion does not prejudice a defendant's due process right to a fair trial. Conversely, where the exercise of that discretion along with the defendant's inability to compel his witnesses to testify in his defense does prejudice a defendant's right to a fair trial, the court has the power to provide an appropriate remedy to cure the due process violation. Thus, this type of approach rejects the majority view that a court is powerless in all circumstances to remedy the disparate treatment accorded to defendants with regard to immunity grants for witnesses by the Immunity Act of 1970. Nevertheless, since there have been no cases in the Ninth Circuit providing the court with an opportunity to exercise its remedial power in the immunity context, the question of exactly what remedy that court would apply when it finds a due process violation remains open.¹²¹ In contrast, the Third Circuit Court of Appeals,

¹¹⁸ *Id.* Typically, a request for defense witness immunity will be made prior to trial and before the defendant has introduced the testimony of any of his witnesses. To this extent, the circuit court's determination that the witness' testimony would have been cumulative of other defense testimony can only be made in retrospect when the case is on appeal from the lower court's refusal to grant defense witness immunity. Therefore, the court's holding did not address the issue of what standards the lower court should have applied to determine whether to grant or deny the defendant's request.

¹¹⁹ *See id.*

¹²⁰ Further support for this test can be found in a subsequent decision by the Ninth Circuit Court of Appeals in *United States v. Carmen*, 577 F.2d 556 (9th Cir. 1978). There, the court held that the prosecutor's refusal to grant immunity did not deny the defendant due process under *Alessio* because the defendant had failed to call his witness to testify. The court reasoned that his failure rendered speculative any argument in support of granting the witness immunity since it was uncertain whether the witness would invoke the fifth amendment privilege if called to testify. *Id.* at 561. Hence, the defendant had failed to demonstrate sufficient need for the immunized testimony of his witness. *See also* *United States v. Wright*, 588 F.2d 31, 35 (2d Cir. 1978) (unnecessary to decide due process issue raised by defendant's request for defense witness immunity because defendant failed to subpoena witness).

¹²¹ This question has recently been answered by one district court applying the "fair trial" standard of *Alessio*. *See United States v. De Palma*, 476 F. Supp. 775, 782 (S.D.N.Y. 1979), *appeal pending sub nom.* *United States v. Horwitz*, No. 79-1315 (2d Cir.) (testimony of immunized government witness will be excluded at new trial unless government grants use immunity to defense witnesses).

although employing a different standard to determine whether there has been a due process violation, has developed at least one remedy to be applied where it finds that a defendant has been denied his right to a fair trial.

2. The Third Circuit's Approach: Prosecutorial Misconduct

The Court of Appeals for the Third Circuit has recently indicated a willingness to protect a defendant's right to a fair trial by providing a remedy when it finds that the prosecutor's refusal to grant defense witness immunity, coupled with the defendant's inability to compel testimony from his witnesses on his behalf without the use of such immunity grant, violates that right. Unlike the "fair trial" standard adopted by the Ninth Circuit whereby the court engages in a balancing test to determine if the defendant has been denied a fair trial, the Third Circuit has adopted a different approach to determine whether a due process violation has occurred. This approach consists of deciding whether the prosecutor's refusal to immunize a defense witness is deliberately intended to distort the judicial fact finding process. Where the court finds that it is, it will order the prosecutor to grant statutory use immunity to the defense witness or suffer a judgment of acquittal for the defendant.

Although the Court of Appeals for the Third Circuit first developed this remedy in *United States v. Morrison*¹²² to protect a defendant's sixth amendment right to compulsory process, it has recently applied it in the *United States v. Herman*¹²³ to protect a defendant's due process right to a fair trial.¹²⁴ In *Herman*, the court considered a defendant's arguments that the prosecutor's refusal to immunize his witnesses, whose testimony allegedly would have exculpated him, violated his rights under both the compulsory process clause of the sixth amendment and the due process clause of the fifth amendment.¹²⁵ The court initially rejected the defendant's contention that he had a general sixth amendment right to defense witness immunity.¹²⁶ The court distinguished its holding in *Morrison* by noting that *Morrison* involved prosecutorial misconduct resulting in the witness' invocation of the fifth amendment privilege, and that the

¹²² 535 F.2d 223 (3d Cir. 1976). In *Morrison*, the defendant was charged with conspiracy to distribute narcotics. As part of his defense, he planned to call a witness who would testify that she, rather than the defendant, had been involved in the conspiracy. Before the witness could testify, however, the prosecutor confronted her outside of court and threatened her with prosecution for perjury if she falsely incriminated herself in order to exculpate the defendant. Thereafter, when called to testify, the witness refused to answer a number of questions by invoking her fifth amendment privilege and the defendant was convicted. *Id.* at 224-25.

On appeal, the Third Circuit Court of Appeals reversed and held that the prosecutor's actions had deprived the defendant of his sixth amendment right to compulsory process. Noting that the approval of use immunity in *Kastigar* removed much of the rationale behind the traditional approach because a witness could still be prosecuted if the government could sustain its burden, the court concluded that it had the power to provide the defendant with a remedy. The court remanded with instructions to enter a judgment of acquittal unless the prosecutor offered use immunity to the defense witness for her potentially incriminating testimony concerning her participation in the conspiracy. *Id.* at 228-29.

¹²³ 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 442 U.S. 913 (1979).

¹²⁴ *Id.* at 1204.

¹²⁵ *Id.* at 1199.

¹²⁶ *Id.* at 1200.

remedy applied there was only a cure for that misconduct.¹²⁷ In contrast, in *Herman* the court observed that it could find no such instances of prosecutorial abuse.¹²⁸ Absent such proof, the court concluded that the defendant had no general sixth amendment right to demand that his witnesses be immunized.¹²⁹

Next, the court considered the defendant's argument that he was deprived of his due process right to a fair trial by the prosecutor's refusal to immunize his witnesses.¹³⁰ Rather than adopting a balancing test to resolve the issue as the Ninth Circuit had done in *Alessio*, the court decided that the basic inquiry was whether the prosecutor had exercised his statutory discretion under the Immunity Act of 1970 in a way that violated due process.¹³¹ Recognizing the "strong tradition of deference to prosecutorial discretion . . . and . . . the necessary tendency of the executive branch to exercise that discretion in ways that make it more likely that defendants will be convicted,"¹³² the court reasoned that a substantial evidentiary burden must be met by a defendant requesting the court to compel the prosecutor to immunize his witnesses.¹³³ The court concluded that:

[t]he 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.¹³⁴

After setting forth this evidentiary standard, however, the court found that the facts of the case did not demonstrate such a showing.¹³⁵ Therefore, the court affirmed the defendant's conviction.¹³⁶

Accordingly, the Third Circuit Court of Appeals has determined that a prosecutor's refusal to immunize defense witnesses may, under certain circumstances, deny a defendant his due process right to a fair trial. Although recognizing that a court seriously encroaches upon a prosecutor's discretion when it orders him to grant statutory use immunity to defense witnesses, the Third Circuit has, nonetheless, affirmed the availability of this particular remedy to protect a defendant's right to a fair trial. This remedy, however, is conditioned upon an evidentiary showing by a defendant that the prosecutor's refusal to grant immunity to his witnesses was deliberately intended to distort the fact finding process.

¹²⁷ *Id.* at 1199-1200. See note 122 *supra*.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1203-04.

¹³¹ *Id.* at 1203.

¹³² *Id.* at 1203-04.

¹³³ *Id.* at 1204.

¹³⁴ *Id.*

¹³⁵ *Id.* The court reasoned that "so far as it appears, the decision to immunize [the prosecution witnesses] was unrelated to the decision first to prosecute and later to drop the prosecution of the [defense witnesses]." *Id.*

¹³⁶ *Id.*

In order to sustain this burden, a defendant will have to prove two things to the trial court. First, he must demonstrate that the excluded testimony is relevant to his defense.¹³⁷ Unlike the balancing approach employed by the Ninth Circuit, the availability of a remedy to cure the prosecutor's refusal to grant defense witness immunity under this theory does not have to be predicated upon a showing that the testimony is clearly exculpatory or otherwise essential to the defense.¹³⁸ As the Third Circuit Court of Appeals has noted, where the prosecutor's refusal constitutes an abuse of discretion, "it cannot be held that the jury would not have believed the testimony or that the error was harmless."¹³⁹

Second, a defendant must also demonstrate that the prosecutor's refusal to immunize his defense witnesses was made with the deliberate intention of distorting the judicial fact finding process.¹⁴⁰ This evidentiary requirement will generally be difficult for a defendant to sustain. Part of the difficulty lies with a defendant's limited fact gathering ability. A defendant is usually unable to obtain direct evidence concerning the intention of the prosecutor in refusing his request for defense witness immunity. Consequently, a defendant will have to rely on circumstantial evidence surrounding the prosecutor's refusal to sustain his evidentiary burden. Another difficulty arises from the Third Circuit's failure to explain what types of circumstantial evidence surrounding the prosecutor's refusal will be sufficient to sustain this burden.¹⁴¹ Although it is still too early to determine exactly what type of evidentiary showing will be required under the Third Circuit's approach, it is certain that if a defendant can sustain this burden, the trial court will enter a judgment of acquittal for the defendant unless the prosecutor grants statutory use immunity to his witnesses.

In sum, the reduced scope of the use immunity adopted by Congress in the Immunity Act of 1970 and approved by the Supreme Court in *Kastigar* strongly supports an argument that the courts have the duty to protect a defendant's right to a fair trial where that right outweighs the governmental interests in refusing to grant defense witness immunity. Yet, this narrower scope of immunity has had very little impact on changing the traditional rule, followed

¹³⁷ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 969 n.7 (3d Cir. 1980).

¹³⁸ *Id.*

¹³⁹ *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir. 1976).

¹⁴⁰ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 968 (3d Cir. 1980).

¹⁴¹ Recently, in its decision in *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), the Third Circuit has furnished some guidelines on sustaining this evidentiary burden. In *Smith*, the court found that a defendant could meet this burden by demonstrating that the prosecutor's refusal to immunize his defense witness was intimately connected to its strategy for prosecuting the defendant's case. *Id.* at 969. To make this particular showing a defendant could prove that the prosecution was aware that its case was inherently weak and that a grant of immunity to defense witnesses might result in testimony which would be severely damaging to the government's case. *Id.* Also, a defendant may be able to demonstrate that by refusing the request for defense witness immunity, the prosecutor not only prevented the witness from testifying at the defendant's trial, but that this refusal also furnished the predicate for the prosecutor's objection to the admission of an earlier statement made by the witness outside of court. *Id.* Finally, the defendant might argue that where the United States Attorney has no jurisdiction over the defense witness, but refuses to consent to the immunity offered by the proper jurisdictional agency, this conduct suggests that the prosecutor deliberately intended to keep relevant evidence from the fact finder. *Id.*

by a majority of federal courts, that a court is powerless to provide a remedy to protect a defendant's right to a fair trial. This is because these courts view the issue raised by a defendant's request for defense witness immunity as involving a claim to a new constitutional right rather than the provision of a new type of remedy to effectuate an established right. Thus, these courts overlook the need for a balancing approach suggested by a line of Supreme Court decisions which, in effect, weigh the defendant's interest in a fair trial against the government's countervailing interests. As a result, they largely ignore the real significance of *Kastigar* to the defense witness immunity situation.

Recently, however, the Ninth and Third Circuit Courts of Appeals have recognized that they have the power to provide a remedy in order to effectuate a defendant's right to a fair trial where the prosecutor's refusal to immunize a defense witness, coupled with the defendant's own inability to compel testimony in his defense, violates that right. The Ninth Circuit, on the one hand, has adopted a balancing approach to weigh the government's interest involved in a grant of defense witness immunity against the defendant's need for the immunized testimony. Where the court determines that the absence of the immunized testimony deprives the defendant of a fair trial, presumably it will provide a remedy, though it is too early to determine exactly what the remedy will be. On the other hand, the Third Circuit has developed the remedy of ordering the prosecutor to grant statutory immunity to a defense witness or suffer a judgment of acquittal for the defendant. This remedy, however, has a major limitation. It will only be applied where the court finds that the prosecutor has abused his discretion in refusing to grant defense witness immunity thereby violating the defendant's right to a fair trial. Thus, this remedy does not completely resolve the due process problems raised by a defendant's request for defense witness immunity in the situation where there is no instance of prosecutorial misconduct.

Although the Ninth Circuit's decision in *Alessio* implies that, in this particular situation, a court has the inherent power to provide a remedy to protect a defendant's due process rights, that court has not been afforded the opportunity to develop this idea. Such a remedy, however, has been suggested by the Third Circuit. In dicta contained in its decision in *Herman*, the Court of Appeals recognized the possibility of such a remedy stemming from a court's inherent power to protect a defendant's right to a fair trial.¹⁴² This remedy would consist of "conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense" of the defendant.¹⁴³ The next section of this Note will examine this suggestion more fully and propose the circumstances under which the courts should exercise this power.

III. RESOLVING THE DUE PROCESS ISSUE: A PROPOSAL

As this Note has suggested,¹⁴⁴ a defendant's request that his witnesses be immunized so that they can be compelled to testify in his behalf clearly impli-

¹⁴² 589 F.2d 1191, 1204 (3d Cir. 1978).

¹⁴³ *Id.*

¹⁴⁴ See text and notes at notes 14-51 *supra*. See also *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 971 (3d Cir. 1980).

cates the due process guarantee of a fair trial. Under this guarantee, the courts have the duty to remedy a violation of a defendant's fundamental right to a fair trial. To determine whether a defendant's inability to compel testimony in his defense by a grant of immunity violates this right, a court must balance the defendant's need for the testimony against the government's interest in opposing a grant of defense witness immunity.¹⁴⁵ Where it decides that the balance favors the defendant, a court must then determine exactly what remedy is appropriate to effectuate the due process guarantee of a fair trial.

A. *The Remedy: Judicial Use Immunity*

Several remedies have been proposed by commentators to protect a defendant's right to a fair trial within the immunity context.¹⁴⁶ One such remedy is that which the Third Circuit applied in *Herman*.¹⁴⁷ A court would put the prosecutor to an election either to statutorily immunize the defense witness whose testimony is sought by a defendant or suffer a judgment of acquittal.¹⁴⁸ Although this particular remedy might be appropriate in certain situations, it is improper in many instances where a defendant's right to a fair trial has been violated because of his inability to compel testimony. As the Third Circuit Court of Appeals recognized, it should be applied only where the prosecutor's refusal to grant defense witness immunity has been made with the deliberate

¹⁴⁵ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980). See generally *Re-examination*, *supra* note 7; *Columbia Note*, *supra* note 7.

One recent commentator has recast the issue under discussion as the defendant's constitutional right to obtain favorable evidence. See *Every Man's Evidence*, *supra* note 7, at 1222-30. That commentator finds support for this new right in the Supreme Court decisions in *Rovario* and *Brady* and in a defendant's sixth amendment rights. *Id.* A procedure is proposed whereby once a court determines that the defense witness' testimony meets a certain standard of materiality, it must provide the defendant with relief. *Id.* at 1214. By proposing this procedure, that commentator abandons the balancing approach set forth in this note. *Id.* at 1220-21.

It is submitted that a flexible due process approach is more appropriate to the situation under discussion. As the foregoing commentator recognizes, the governmental interests involved in *Rovario* and *Brady* were both general and fairly constant. *Id.* at 1222. For example, in *Rovario* the Supreme Court was called upon to balance the defendant's need for the evidence against the government interest in maintaining the anonymity of its informers, see text at notes 21-27 *supra*, and in *Brady*, the prosecution failed to offer any specific governmental interest to weigh against the defendant's need for the suppressed evidence. See *Brady*, 373 U.S. 83 (1963). Unlike these situations, however, the interest of the government in opposing a grant of defense witness immunity may vary with the individual case. See text at notes 83-84 *supra*. Further, the sixth amendment has never been held to guarantee a defendant the right to the immunized testimony of his witnesses. See, e.g., *United States v. Turkish*, 623 F.2d 769, 773-74 (2d Cir. 1980); *United States v. Herman*, 589 F.2d 1191, 1199-1200 (3d Cir. 1978), *cert. denied*, 442 U.S. 913 (1979); *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974), *cert. denied*, 419 U.S. 1053 (1974). Therefore, this note rejects the application of a rigid constitutional rule in favor of a case-by-case balancing approach to determine whether due process requires that a court provide a particular defendant with a judicial remedy.

¹⁴⁶ See, e.g., *Note, Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977); *Re-examination*, *supra* note 7, at 88-92; *Columbia Note*, *supra* note 7, at 973-75.

¹⁴⁷ 589 F.2d 1191 (3d Cir. 1978). See also *Every Man's Evidence*, *supra* note 7, at 1239 (court should order the prosecutor either to statutorily immunize defense witness or to drop the charges against defendant).

¹⁴⁸ See text at note 134 *supra*.

intention to distort the fact finding process by concealing relevant evidence.¹⁴⁹ Under the Immunity Act of 1970, a court does not have the power to order the prosecutor to exercise its statutory discretion to grant immunity for defense witnesses.¹⁵⁰ Nonetheless, a court is empowered to put the prosecutor to an election to either grant the immunity or suffer certain consequences at trial where it determines that he has abused this discretion.¹⁵¹ This authority stems from a court's power to control the trial itself.¹⁵² In this situation, however, it is the abuse of discretion by the prosecutor in refusing a request for defense witness immunity which forms the due process violation and, thereby, empowers the court to supply a cure. In accordance with the concept of separation of powers, the courts have traditionally exercised deference to prosecutorial discretion¹⁵³ and recognized the tendency of the executive branch to exercise this discretion in ways that make it more likely that defendants will be convicted.¹⁵⁴ Therefore, it is only where the prosecutor has abused his discretion that a remedy which impinges on this discretion becomes appropriate. It follows then that, absent some misconduct or abuse of discretion by the prosecutor in refusing to grant defense witness immunity, a court should refrain from employing this type of remedy to protect a defendant's right to a fair trial. To do so would raise serious separation of powers questions.

Where a court determines that a prosecutor has not abused his discretion by refusing a defendant's request that his witnesses be immunized, but nevertheless finds that a defendant's inability to compel the testimony deprives him of a fair trial, the proper solution is for the court to grant judicial use immunity to the witnesses.¹⁵⁵ Although grants of judicial use immunity have never been employed to enable a defendant to compel his witnesses to testify in his behalf, this particular remedy has been applied by the federal courts in other contexts. In *Murphy v. Waterfront Commission of New York Harbor*,¹⁵⁶ the Supreme Court pioneered the use of this type of remedy. In that case, certain witnesses were subpoenaed to testify at a hearing conducted by the Waterfront Commission, a bi-state agency approved by Congress.¹⁵⁷ After refusing to answer certain questions on the ground that the answers might tend to incriminate them, the witnesses were granted immunity from prosecution under the laws of New Jersey and New York.¹⁵⁸ They continued to refuse to testify, however, on the ground

¹⁴⁹ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 968 (3d Cir. 1980).

¹⁵⁰ See text and note at note 6 *supra*. See also *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-95 (7th Cir. 1974).

¹⁵¹ See *United States v. Herman*, 589 F.2d 1191, 1203-04 (3d Cir. 1978).

¹⁵² See *Columbia Note*, *supra* note 7, at 973.

¹⁵³ See *United States v. Nixon*, 418 U.S. 683 (1974); *Linda R. S. v. Richard D.*, 410 U.S. 683 (1973).

¹⁵⁴ See *United States v. Herman*, 589 F.2d 1191, 1203-04 (3d Cir. 1978).

¹⁵⁵ Recently, the Third Circuit has decided that it will apply this remedy to effectuate a defendant's due process right to a fair trial. See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 969-71 (3d Cir. 1980). This Note examines the basis for this remedy and proposes a procedure for its implementation.

¹⁵⁶ 378 U.S. 52 (1964).

¹⁵⁷ *Id.* at 53.

¹⁵⁸ *Id.*

that their answers might tend to incriminate them under federal law to which the immunity did not purport to extend.¹⁵⁹ The New Jersey Supreme Court affirmed a judgment holding them in contempt.¹⁶⁰

On appeal, the Supreme Court vacated the contempt judgment.¹⁶¹ It held that a state may not compel a witness to give testimony which might be used against him in a federal prosecution.¹⁶² The Court concluded, moreover, that in order to implement this constitutional rule, the testimony elicited under compulsion by the state immunity grants could not be used in a federal prosecution against the witnesses.¹⁶³ In effect, the Supreme Court granted the witnesses use immunity.

The Supreme Court's decision in *Murphy* demonstrates that a court has the power to supply judicial immunity grants, notwithstanding the availability of statutory immunity grants. The *Murphy* Court, exercising its supervisory power over the federal judiciary, judicially fashioned grants of use immunity to protect the witnesses' fifth amendment privilege against self incrimination. Consequently, this decision supports an argument in favor of recognizing a court's ability to confer judicial use immunity upon defense witnesses where necessary to protect a defendant's due process right to a fair trial.¹⁶⁴

Further support for the idea that a court is empowered to grant judicial use immunity to effectuate a defendant's constitutional rights can be found in the Supreme Court's decision in *Simmons v. United States*.¹⁶⁵ The Court in *Simmons* reaffirmed the existence of an inherent judicial power to grant use immunity. In that case, several defendants were charged with armed robbery.¹⁶⁶ Prior to trial, one of the defendants moved to suppress the introduction of a suitcase containing certain incriminating items which he alleged had been illegally seized.¹⁶⁷ In order to establish standing for the motion, the defendant testified that, although he could not identify the suitcase with certainty, it was similar to one he owned and that it was his clothing which was found in it.¹⁶⁸ The district court denied the motion to suppress and the defendant's testimony at the suppression hearing was subsequently admitted against him at trial.¹⁶⁹ The defendant was convicted and his conviction was affirmed by the Seventh Circuit Court of Appeals.¹⁷⁰

The Supreme Court vacated his conviction on appeal.¹⁷¹ It agreed with the defendant that his constitutional rights were violated when his testimony in

¹⁵⁹ *Id.* at 53-54.

¹⁶⁰ *Id.* at 54.

¹⁶¹ *Id.* at 80.

¹⁶² *Id.* at 78-79.

¹⁶³ *Id.* at 79.

¹⁶⁴ See *United States v. Turkish*, 623 F.2d 769, 776 (2d Cir. 1980).

¹⁶⁵ 390 U.S. 377 (1968).

¹⁶⁶ *Id.* at 381.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 382.

support of the motion to suppress was admitted against him at trial.¹⁷² The Court reasoned that a defendant should not have to surrender his fifth amendment privilege against self incrimination in order to assert a valid fourth amendment claim.¹⁷³ In conclusion, the Court stated:

We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.¹⁷⁴

Therefore, the Court applied a judicial grant of use immunity in *Simmons* to effectuate the defendant's fourth amendment guarantee of freedom from unreasonable searches and seizures. In addition, this particular remedy has been applied by lower federal courts to effectuate other constitutional rights of criminal defendants.¹⁷⁵ Moreover, without statutory authority, federal courts have granted judicial use immunity in a growing number of situations other than criminal prosecutions.¹⁷⁶

Consequently, the use of a judicial grant of immunity is only novel in the sense of its application to protect a defendant's right to a fair trial where that right has been violated by his inability to compel testimony in his behalf.¹⁷⁷ The fact that an established remedy has never been applied to protect a particular constitutional right was attributed little significance by the Supreme Court in its decision in *Bivens v. Six Unknown Named Federal Narcotics Agents*.¹⁷⁸ There the Court permitted a plaintiff to bring a private action for damages based upon a violation of his fourth amendment right against unreasonable searches and seizures.¹⁷⁹ Although the fourth amendment does not explicitly provide for the remedy of money damages, the Court held that this remedy would be applied to effectuate the plaintiff's fourth amendment rights.¹⁸⁰ The Court noted that this particular remedial mechanism was generally available in the federal courts to protect other rights and, in the absence of affirmative action by Congress, saw no reason why it could not be used to protect this particular constitutional right.¹⁸¹

Bivens represents a healthy trend on the part of the judiciary to give effect to the principle that every deprivation of a constitutional right should find vin-

¹⁷² *Id.* at 390.

¹⁷³ *Id.* at 394.

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g.*, *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) (testimony given to assert Speech and Debate Clause defense); *United States v. Immon*, 568 F.2d 326 (3d Cir. 1977) (testimony given to assert double jeopardy clause defense).

¹⁷⁶ *See, e.g.*, *Shimabku v. Britton*, 503 F.2d 38 (10th Cir. 1974) (inmate testifying before prison disciplinary proceedings); *United States v. Deritt*, 499 F.2d 135 (7th Cir. 1974) (public employee testifying before disciplinary proceedings); *Flint v. Mullen*, 372 F. Supp. 213 (D.R.I. 1974) (defendant testifying at deferred sentence hearing).

¹⁷⁷ *See* *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 971 (3d Cir. 1980).

¹⁷⁸ 403 U.S. 388 (1971).

¹⁷⁹ *Id.* at 397.

¹⁸⁰ *Id.* at 396-97.

¹⁸¹ *Id.* at 395-97.

dication in an effective remedy.¹⁸² Where an individual may be deprived of a constitutional right, it is the responsibility of the courts to develop remedies to protect that right.¹⁸³ The analysis employed by the *Bivens* Court is equally applicable to the issue of whether the federal courts have the power to grant judicial use immunity to defense witnesses to effectuate a defendant's right to a fair trial. Although the application of this remedy is novel when applied to protect the due process guarantee of a fair trial, there is no reason why this right is entitled to any less affirmative judicial protection than the rights to which this remedy has already been applied. Indeed, as the Third Circuit Court of Appeals has recognized:

It would seem that a case in which clearly exculpatory testimony would be excluded because of a witness' assertion of the fifth amendment privilege would present an even more compelling justification for such a grant of judicial use immunity than that accepted in *Simmons* itself.¹⁸⁴

Accordingly, when a court decides that a defendant's inability to compel testimony on his behalf by a grant of immunity deprives him of his due process right to a fair trial, it should grant judicial use immunity to his witnesses.

B. Implementing the Remedy

The determination in each case of whether to provide this remedy to protect a defendant's right to a fair trial will involve a court in a difficult balancing process. The court, upon being confronted with a request for defense witness immunity, will have to decide whether the defendant's need for the testimony, otherwise unavailable to him, outweighs the prosecutor's interest in opposing the immunization of the defense witness. Moreover, because of the unique and affirmative nature of this remedy and the important governmental interests involved in a grant of defense witness immunity, implementation of judicial use immunity to protect a defendant's due process right should be bounded by special safeguards and made subject to certain conditions.¹⁸⁵ These considerations, however, do not mean that the due process guarantee of a fair trial within the immunity context should be protected any less vigilantly than the same right in other situations. On the contrary, the constitutional right is entitled to the same amount of protection in each case.¹⁸⁶ To this extent, the difficulty of administering the proposed remedy cannot be used to justify a court's refusal to apply it where a defendant's right to a fair trial is jeopardized by his inability to compel testimony from his witnesses.

The Supreme Court's decision in *Chambers* assists in laying the groundwork for deciding when a court should exercise its inherent remedial powers to protect this due process right to a fair trial. There the Court found that a de-

¹⁸² See *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁸³ See *Re-examination*, *supra* note 7, at 88.

¹⁸⁴ *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978).

¹⁸⁵ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 971-72 (3d Cir. 1980).

¹⁸⁶ See *id.* at 972.

fendant's need for certain testimonial evidence outweighed the government's interest in the rigid enforcement of its evidentiary rules that prohibited the admission of such evidence.¹⁸⁷ Central to the Court's analysis was the existence of two factors which the court found particularly relevant. First, the Court noted the clearly exculpatory nature of the excluded evidence.¹⁸⁸ Second, the Court adverted to the fact that the government had no strong interest in strictly enforcing the evidentiary rules that precluded the admission of this evidence.¹⁸⁹ The logic of *Chambers* can be readily applied to a case involving a defendant's request for defense witness immunity. Before a court should grant judicial use immunity to a defense witness, therefore, it should require that two conditions first exist: (1) the nature of the witness' testimony must be clearly exculpatory and otherwise unavailable to the defendant; and (2) there must be an absence of any strong governmental interests which militate against a grant of defense witness immunity. Where each of these conditions exist, the court should not hesitate to grant judicial immunity to a defense witness.¹⁹⁰

The judicial determination of the existence of these two conditions, as a prerequisite to granting immunity to defense witnesses, can be practicably implemented pursuant to the following standard form of procedure.¹⁹¹ At the outset, when a defendant first learns that a prospective witness intends to invoke his privilege against self-incrimination if called to testify, he should immediately request the prosecutor to statutorily immunize his witness. If the prosecutor accedes to this request, the witness can be immunized pursuant to the Act of 1970 and his testimony compelled in accordance with the provisions of that statute. If, however, the prosecutor refuses this request,¹⁹² the defendant should then apply for a grant of judicial use immunity for his witness.¹⁹³ In support of this motion, the defendant should submit to the court a list of questions he seeks to ask the witness at trial, specify the witness' expected responses, explain the relationship between the prospective testimony and the

¹⁸⁷ See text and notes at notes 41-49 *supra*.

¹⁸⁸ See *Chambers*, 410 U.S. 294, 297-98 (1973).

¹⁸⁹ See *id.* at 297.

¹⁹⁰ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980).

¹⁹¹ This proposed procedure to implement the remedy of a judicial grant of use immunity to defense witnesses incorporates various suggestions made by previous commentators. See, e.g., *Every Man's Evidence*, *supra* note 7, at 1238-40; *Re-examination*, *supra* note 7, at 93-95. Although a court may adopt its own method for implementing this remedy, this procedure is proposed here because of its manageability.

¹⁹² If the defendant happens to be in the Third Circuit, he may be able to argue, at this point, that the prosecutor's refusal violates due process. See *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978). To be successful in this argument, however, the defendant will have to show that the prosecutor's refusal was made with the deliberate intention to distort the judicial fact finding process. *Id.*

¹⁹³ This note contemplates that the application for judicial use immunity will usually be made before the trial. Thus, assuming that the court finds that judicial immunity is warranted, the defendant will gain access to the testimony in time to carefully prepare his defense. See *United States v. Shober*, 489 F. Supp. 412, 417-18 (E.D. Pa. 1980). Permitting this motion in the middle of the trial may result in a delay of the proceedings. Moreover, a court should be more inclined to deny the motion if made during trial because of the additional burden it would place on the government to marshal the evidence then available concerning the witness, who might be the subject of a future prosecution, at a time when the prosecutor's resources are tied up in conduct-

defendant's case-in-chief and give his reasons why he believes that equivalent evidence is not otherwise available.¹⁹⁴ If the court finds that the proffered testimony is ambiguous, not clearly exculpatory, cumulative or relates only to the credibility of a witness, it should deny the defendant's motion.¹⁹⁵ If, however, the court decides that, on the basis of this information, the defendant has satisfied the first condition of the *Chambers* test by demonstrating the requisite material nature of the excluded testimony,¹⁹⁶ it should schedule an evidentiary hearing.

The purpose of this evidentiary hearing is two-fold. The court should utilize this hearing to determine whether the fifth amendment privilege would actually protect the witness' testimony and, if so, whether that testimony closely approximates the responses expected by the defendant. In order to avoid later difficulties, this evidentiary hearing should be an in camera proceeding¹⁹⁷ with only the judge, court reporter and the defense witness present.¹⁹⁸ Initially, the court should examine the witness to determine the exact extent to which the privilege against self incrimination may excuse the witness from answering the

ing the trial. See *United States v. Turkish*, 623 F.2d 769, 778 n.5 (2d Cir. 1980). Further, allowing such a motion to be made during the trial might permit unscrupulous defense counsel to use this as a tool to harass the prosecutor. See *Re-examination*, *supra* note 7, at 95.

A case may arise, however, where it may be necessary for a defendant to request defense witness immunity during the trial. For example, the defendant may discover a new witness after the trial has begun who could give exculpatory testimony but who refuses to testify by invoking the fifth amendment privilege. See *id.* Or a situation may occur where it may be necessary for a court to postpone the defendant's motion until the close of the government's case in order to determine whether the witness' testimony meets the relevant standard of materiality. See *United States v. Shober*, 489 F. Supp. 412, 418 (E.D. Pa. 1980). Therefore, the court should avoid a mechanical rule of timing of the defendant's motion and, instead, consider the factor of timing in its overall assessment whether to grant judicial use immunity to the witness. See *id.*

¹⁹⁴ See *Every Man's Evidence*, *supra* note 7, at 1238-39; *Re-examination*, *supra* note 7, at 94. See also *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980) (defendant should submit application naming the proposed witness and specifying the particulars of his testimony). In order to prevent the prosecutor from discovering the defendant's defense, this material should be kept confidential by the court. See *Every Man's Evidence*, *supra* note 7, at 1239 n.125.

¹⁹⁵ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980).

¹⁹⁶ To determine whether the testimony of the proposed witness is clearly exculpatory under the proposed test, a court might adopt the materiality standard suggested by a recent commentator. See *Every Man's Evidence*, *supra* note 7, at 1235. That standard is whether the witness' testimony "could reasonably affect the outcome of the case." *Id.* As this commentator notes, such a high materiality threshold assures that a request for defense witness immunity will only succeed where demonstrably necessary thus preventing defendant's use of such requests to obstruct the proceedings. *Id.* at 1236.

¹⁹⁷ Support for this in camera hearing can be found in the Fifth Circuit's decision in *United States v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976), where the court approved the lower court's use of this procedure to determine the extent to which a defense witness who invoked the fifth amendment privilege would be excused from answering the defendant's proposed questions. *Id.* at 1044-47. The in camera nature of the hearing adequately protects the witness' fifth amendment privilege. *Id.* See generally Note, *The Fifth Amendment Testimonial Privilege as an Impediment to the Defense When Invoked by a Potential Exculpatory Witness*, 42 ALB. L. REV. 482 (1978) [hereinafter cited as *Albany Note*].

¹⁹⁸ A general in camera hearing in the presence of the prosecutor and the defense would be useless because it would have to be limited to questions which did not require the witness to reveal incriminatory information. See *Hoffman v. United States*, 341 U.S. 479 (1951). More-

defendant's proposed questions.¹⁹⁹ At this point, if the court finds that the witness' claim of the fifth amendment privilege is not well founded, it should terminate the hearing.²⁰⁰ The court, in this instance, should deny the defendant's motion for a grant of judicial immunity because such a remedy is unnecessary since the court has decided that the witness cannot invoke the privilege if called to testify.²⁰¹ On the other hand, if the court decides that the privilege can be properly invoked by the witness, it should then proceed to examine him to determine whether his testimony tracks the expected responses by the defendant previously held by the court to satisfy the materiality standard.²⁰² When the court finds this to be the case, the defendant has met his threshold burden of establishing the existence of the first condition of the *Chambers* test.

At this point in the procedure, the focus should shift to a consideration of the prosecutor's countervailing interests, if any, involved in a grant of judicial immunity to the witness.²⁰³ Unlike the situation where a prosecutor is ordered by a court to disclose evidence he has suppressed in violation of the *Brady* rule, a judicial grant of immunity to a defense witness impacts not only on the prosecutor's ability to successfully prosecute the defendant, but also on his ability to successfully prosecute the immunized witness at a later date. It is precisely for this reason that, after having determined that the prospective witness' testimony would be material to the defense of the accused, the courts should carefully examine the governmental interest at stake before granting immunity.²⁰⁴ This circumstance, however, does not necessarily mean that there can be no reconciliation of the prosecutor's interest and the defendant's right to a fair trial. Indeed, in many instances, a grant of defense witness immunity may be virtually costless to the government. For example, the prosecutor may have already gathered all the evidence necessary to prosecute the witness exclusive

over, the presence of the defendant alone would raise another problem. As one commentator has noted, if the court decided to deny judicial immunity to the witness, the witness could later argue that he was forced to reveal incriminatory information before the defendant. This would impose a burden on the prosecutor to prove that its evidence against the witness in a subsequent prosecution was not tainted. See *Every Man's Evidence*, *supra* note 7, at 1239 n.126.

¹⁹⁹ See Albany Note, *supra* note 197, at 488.

²⁰⁰ In this event, the record of the witness' testimony should be prepared and sealed by the court. See *United States v. Melchor Moreno*, 536 F.2d 1042, 1045 (5th Cir. 1976). This record would then be available to the appellate court in the event of an appeal of the denial of defense witness immunity by the defendant. See *id.* See also Albany Note, *supra* note 197, at 491; *Every Man's Evidence*, *supra* note 7, at 1240.

²⁰¹ Thus, under the first part of the test proposed here, the witness would not be "unavailable" to the defendant. See text at note 190 *supra*.

²⁰² See *Every Man's Evidence*, *supra* note 7, at 1239.

²⁰³ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972-73 (3d Cir. 1980).

²⁰⁴ This conclusion flows from the flexible due process approach adopted in this note, which balances the defendant's need for the testimony against the government's interest in opposing a grant of defense witness immunity. For a discussion of a contrary approach taken by one recent commentator, see *Every Man's Evidence*, *supra* note 7, at 1213-14. It is submitted here that only a balancing approach such as the one proposed in this note adequately reconciles the conflicting interests of the government and the defendant while still sufficiently protecting the defendant's right to a fair trial. Accordingly, where the government does not have a specific and significant interest in opposing a grant of defense witness immunity, the court will provide a judicial remedy to protect the defendant's right to due process.

of the prospective testimony to be given at the defendant's trial.²⁰⁵ In this situation, the prosecutor should be able to certify this evidence under seal before the witness is immunized and, therefore, should encounter little difficulty establishing the independent nature of the evidence at a subsequent prosecution of the witness.²⁰⁶ Moreover, where the prosecutor has not gathered sufficient evidence against the witness at the time the defendant applies for a grant of judicial immunity, it may be able to "sterilize" the witness' immunized testimony and, thus, isolate it from any future evidence uncovered by a subsequent investigation of the witness.²⁰⁷ This procedure would allow for a later prosecution of the witness because the newly discovered evidence could be demonstrated to have an independent source. Finally, there appears to be little reason why the prosecutor would not be able to seek a postponement of the defendant's trial in order that it might complete its investigation of the defense witness who is the subject of the immunity application.²⁰⁸ In short, if the prosecutor could avail itself of any of these options then its interest in opposing the grant of defense witness immunity loses much of its significance and, essentially, reduces itself to a formal concern.²⁰⁹ As the Supreme Court in *Chambers* implicitly recognized, a merely formal interest on the part of the government cannot outweigh a defendant's right to a fair trial.²¹⁰ This reasoning seems equally applicable in the immunity context. Consequently, where the defendant has sustained his threshold burden of showing the material nature of the witness' testimony, the court should accordingly notify the prosecutor and require him to demonstrate a compelling reason why the court should not grant the defendant's application.

To successfully oppose a defendant's motion for a grant of judicial immunity to a defense witness, the prosecutor will have to prove the absence of the second condition of the *Chambers* test. In other words, he will need to demonstrate strong countervailing reasons why, in each case, the defense witness should not be immunized by the court. The mere fact that the witness is an actual or potential target of prosecution should not alone satisfy this burden.²¹¹ Instead, the prosecutor should be required to affirmatively demonstrate why

²⁰⁵ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 973 (3d Cir. 1980). See also Harvard Note, *supra* note 7, at 1274-75.

²⁰⁶ *Id.*

²⁰⁷ *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 973 (3d Cir. 1980). See also Harvard Note, *supra* note 7, at 1277; Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 164 (1976) (Assistant U.S. Attorney General advocates special procedures for handling testimony of immunized witnesses such as strictly controlling transcripts, documenting the people who have access to the isolated testimony, and requesting limited public disclosure of the testimony given at trial).

²⁰⁸ See Harvard Note, *supra* note 7, at 1278-79.

²⁰⁹ See *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 973 (3d Cir. 1980).

²¹⁰ See *Chambers*, 410 U.S. 284, 302 (1973).

²¹¹ This conclusion follows from the availability of safeguards to facilitate the prosecution of immunized witnesses. See text at notes 205-08 *supra*. *Contra*, *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980) (court should summarily reject claims for defense witness immunity whenever witness is an actual or potential target of prosecution).

available procedures to ensure the successful prosecution of the witness at a later date could not be utilized in the particular case.²¹² Absent proof of this nature, the government's action in opposing the defendant's application for defense witness immunity must be viewed as unreasonable and held to be outweighed by the defendant's demonstrated critical need for the witness' testimony. Under these circumstances, the court should grant judicial use immunity to the defense witness in order to effectuate the defendant's due process right to a fair trial.

C. *Rationale for Adopting the Proposal*

In order to understand the rationale for adopting the foregoing proposal, one needs to examine and analyze the frequent criticisms levied against implementing such a remedy.²¹³ On the whole, five principal reasons are given by the courts to deny the provision of defense witness immunity to defendants. Each reason against granting any relief derives from the public interests implicated by a grant of defense witness immunity. The first criticism is that, although the prosecution remains theoretically free under *Kastigar* to prosecute a witness granted use immunity, the obstacles to a successful prosecution can be substantial.²¹⁴ While it is readily conceded that certain procedures are available to reduce these obstacles, it is argued that these safeguards are insufficient to ensure the successful prosecution of the immunized witness in all cases.²¹⁵ Further, it is contended that administering them could result in significant costs to the government in terms of prosecutorial resources.²¹⁶

Although this criticism is not without some validity, it cannot be used as a basis for a court's refusal to grant judicial immunity across the board. Rather, the risk that the utilization of these safeguards may not guarantee the subsequent conviction of a particular immunized defense witness should be one factor in the court's determination whether to provide relief to a specific defendant. Where the prosecutor can make a good faith demonstration that it will not be able to meet its burden under *Kastigar*, the court would be justified in refusing to grant defense witness immunity in that case. The fact that there may be some situations where employing these safeguards will not ensure satisfaction of the prosecutor's burden to show lack of taint, however, does not necessarily

²¹² This proof may include as a factor the severity of the crime of which the witness is charged, but only if it is relevant to a demonstration why the safeguards discussed in this note could not be employed with reasonable success. Under the concept of due process, a defendant's right to the immunized testimony of his witnesses cannot be made to depend on the circumstance whether the witness is suspected of a serious as opposed to a non-serious offense.

²¹³ These criticisms have been summed up in a recent Second Circuit decision. See *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980).

²¹⁴ *Id.* at 775.

²¹⁵ *Id.*

²¹⁶ *Id.*

mean that they will be insufficient in every case. In many instances, the investigation of the prospective defense witness may be sufficiently complete so that use of these safeguards would permit prosecution of the immunized witness. A grant of defense witness immunity in this situation results in minimal cost to the government. Moreover, the argument that additional prosecutorial resources will have to be expended in implementing these safeguards is not convincing. Economy in the administration of criminal justice should not be an important consideration where constitutional rights are at stake. Additionally, the prosecutor will have to sustain these costs only in the limited instance where the immunized witness' testimony is crucial to the defendant's defense. Thus, the requirement that the defendant demonstrate the material nature of the witness' testimony before the court will grant judicial immunity avoids needlessly subjecting the prosecutor to shouldering the burden under *Kastigar*. Compelling the prosecutor to pay these costs where necessary to protect a defendant's right to a fair trial, therefore, imposes only a small burden on the government.

The second criticism is that the immunized defense witness might attempt to give himself an immunity bath by allowing his testimony to range widely during examination.²¹⁷ This criticism is entirely unpersuasive. Immunity baths of this kind would be impossible because only the witness' answers which are directly responsive to the questions put forth acquire the protection of the immunity grant.²¹⁸ Thus, a witness would be unable to lessen the likelihood of any subsequent successful prosecution by giving fulsome answers or the stand. In any event, as one commentator has noted, "[i]t would require a view of criminals as coolly calculating and not averse to substantial risk to envision them flocking into court to receive use immunity . . . in the hope that the government might not be able to prove lack of taint in the later prosecution."²¹⁹ Not only would such defense witnesses not obtain the benefits of transactional immunity, but they would also run the risk of triggering an immediate investigation against them by drawing attention to the criminal nature of their acts.²²⁰

The third criticism similarly stems from an apprehension that defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among criminals. It is argued that co-defendants could secure use immunity for each other and each immunized witness could then exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense.²²¹ Further, it is contended that the threat of a perjury conviction, with penalties fre-

²¹⁷ *Id.*

²¹⁸ *See* *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972) (immunity may properly be denied to unresponsive answers).

²¹⁹ Harvard Note, *supra* note 7, at 1278 n.76.

²²⁰ *Id.*

²²¹ *See* *United States v. Turkish*, 623 F.2d 769, 775 (2d Cir. 1980).

quently far below substantive offenses, by itself, could not be relied upon to prevent such tactics.²²²

Although this criticism seems appealing, the safeguards previously discussed could be employed to prevent such a result. Typically, the prosecutor's case against all co-defendants is fully prepared before they are brought to trial. Under these circumstances, the prosecutor can seal and certify all available evidence against the co-defendant-witness prior to a grant of judicial immunity to him. This procedure would reduce, if not totally eliminate, the burden of proving lack of taint in the prosecution of the co-defendant. Moreover, the threat of a perjury conviction in addition to the strong likelihood that the witness may be successfully prosecuted for the substantive offense should serve to restrain such tactics. Finally, insofar as these tactics might still be used to abuse a grant of defense witness immunity, this would be a factor for a court to consider in determining whether to grant relief. The mere possibility for abuse, however, should not lead the courts to deny judicial immunity in every case.

The fourth criticism is based upon the belief that the granting of immunity is pre-eminently the function of the Executive Branch.²²³ Inasmuch as this belief pertains to a grant of statutory immunity under the Act of 1970, it is a valid criticism. It is not convincing, however, when applied to a grant of judicial use immunity. The courts have a constitutional responsibility to ensure the fairness of a trial. Conferring judicial immunity to a defense witness permits a court to protect a defendant's right to a fair trial without directly acting in the domain of either the Legislative or the Executive Branch. Indeed, a grant of judicial immunity avoids adding a gloss to the Act of 1970 or forcing the prosecutor to exercise his exclusive statutory discretion. Also, the prosecutor retains final control over the decision whether a defense witness will be granted immunity, statutory or judicial, because it can always drop the charges against the defendant. Consequently, this particular criticism is without validity.

Finally, the last criticism goes to the fundamental capability of the judiciary to implement this proposal. It is contended that a court cannot determine whether to grant judicial immunity without assessing the implications upon the Executive Branch, both those that flow from a grant of immunity and from an adjudication of whether such immunity is appropriate in a particular case.²²⁴ These considerations, it is argued, are matters normally better assessed by prosecutors than by judges.²²⁵

This criticism reflects a concern that, once a court determines the material nature of a defense witness' testimony, it cannot properly evaluate the prosecutor's interest in opposing a grant of judicial immunity to that witness. Yet,

²²² *Id.*

²²³ *Id.* at 776.

²²⁴ See *United States v. Turkish*, 623 F.2d 769, 776 (2d Cir. 1980).

²²⁵ *Id.*

although this evaluation may ultimately prove to be difficult in practice, this fact alone does not absolve the courts of their constitutional responsibility to protect defendants' due process rights. If the courts are willing to accept this responsibility, as they must, then they should be prepared to undertake this difficult inquiry into "unchartered waters."²²⁶ This course will ensure that the determination whether defendants' constitutional rights have been violated will be made by a neutral party rather than a party whose necessary tendency is to exercise its discretion to see that convictions are obtained. Furthermore, only if the courts attempt to make this assessment, can experience be gained which will assist in the development of meaningful standards for future cases. Viewed in this light, the foregoing proposal can serve as a vehicle for analyzing and resolving some of these difficulties.

In conclusion, it is important to realize the underlying rationale for this proposal. The courts have a definite responsibility to protect a defendant's due process right to a fair trial. Where a defendant is able to demonstrate that his inability to compel the testimony of a particular witness will deprive him of clearly exculpatory evidence crucial to his defense and where the prosecutor fails to establish a compelling reason why defense witness immunity should not be granted, a court should exercise its inherent remedial power to provide the defendant with a judicial safeguard to protect his right to due process. It is the position of this Note that such a safeguard should consist of a grant of judicial use immunity to the defense witness.

CONCLUSION

The due process clause of the fifth amendment assures a criminal defendant the right to a fair trial. Up to this point, only a handful of courts have been willing to consider this right to include, under certain circumstances, the ability to compel testimony from defense witnesses by a grant of immunity. In many situations, however, the inability of a defendant to compel testimony on his behalf may mean the difference between a conviction or an acquittal.

Recent statutory and case law developments have facilitated arguments in favor of effectuating the due process guarantee of a fair trial by providing a defendant with defense witness immunity. These developments warrant that it is time the courts assumed responsibility for protecting a defendant's right to a fair trial where his inability to compel testimony violates that right.

This can be accomplished by the courts employing a balancing test to weigh the conflicting interests of the prosecutor and the defendant. Where a court determines that the defendant's need for the witness' testimony outweighs the prosecutor's interest in opposing a grant of defense witness immuni-

²²⁶ *Id.*

ty, it should no longer hesitate to provide the defendant with the relief he seeks. This relief should take the form of a grant of judicial use immunity to the defense witness.

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