NOTES AND COMMENTS

THE FEDERAL WITNESS IMMUNITY ACTS IN THEORY AND PRACTICE: TREADING THE CONSTITUTIONAL TIGHTROPE

Among the powers of the federal government is the power to compel residents to testify in court or before grand juries or agencies. Enforcement of the corresponding duty of the resident to testify in official proceedings is particularly important to the continued functioning of the federal government in its regulatory roles. Effective regulation requires a continuous flow of detailed information; the testimony of the citizenry is one of the government's primary sources of information. The importance of information-gathering to an ordered society suggests that exercise of the power should be free and, correspondingly, that the scope of the duty should be broad.1

Yet the duty to testify is an onerous one: at best, it subjects the citizen to a minor inconvenience; at worst, it may result in severe deprivations. That the duty to testify is not coextensive with the possible range of government inquiry, is a recognition of values which override government interests in obtaining information. Among these values is the privilege of any person not to incriminate himself. Thus, as in other areas of government action, government powers, and the duties which correspond to them, are curbed in the interest of preserving individual liberties.

The privilege against self-incrimination, long a part of English law, is protected in this country by the fifth amendment.2 The first influential construction of the privilege, made by Chief Justice John Marshall on circuit, gave it a broad scope:

Many links frequently compose that chain of testimony, which is necessary to convict any individual of a crime. It appears to be the true sense

1. The power and corresponding duty are recognized in the sixth amendment's requirements that defendants be confronted with adverse witnesses and that they have the right to subpoena witnesses on their own behalf. U.S. Const. amend. VI. The duty was recognized by the first Congress in the Judiciary Act of 1789, which made provision for the compulsion of the attendance of witnesses in the federal courts. 1 Stat. 73, 88 (1789).

Commentators who have analyzed this duty to testify have found it to be essential to our legal system.

Onerous and even oppressive as this duty to testify may be, yet without the power to compel testimony, the courts, upon whom the ultimate responsibility for an orderly society rests, would be unable to function. . .

Only the absolute necessity of compelling testimony to adjudicate conflicting private rights could possibly justify the imposition of such a troublesome duty.

Lilienthal, The Power of Governmental Agencies to Compel Testimony, 39 Harv. L. Rev. 694-95 (1926). See also Blair v. United States, 250 U.S. 273, 281 (1919); 8 Wigmore, Evidence §§ 2190-93 (McNaughton Rev. 1961) [hereinafter cited as Wigmore].

2. "No person . . . shall be compelled in any criminal case to be a witness against himself. . ." U.S. Const. amend. V.
of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. . . . The rule which declares, that no man is compelled to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description.3

Although not available to non-natural persons,4 such as corporations, the privilege is otherwise subject to few limitations. It can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory.5 The privilege has been held to be "personal,"6 in the sense that it must be claimed by the witness and may be claimed only for his own self-protection.7 A claim will be overruled only if a judge, without questioning the witness, finds there is no reasonable possibility that any answer to the question may form a link in the chain of evidence necessary to subject the witness to a criminal sanction.8

Because it is so broadly available, the privilege can present a most significant

3. 1 BURR'S TRIAL 244 (1808).
4. See notes 67-68 infra.
5. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.

McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) ; see also United States v. The Saline Bank, 26 U.S. (1 Pet.) 100 (1828).

6. Rogers v. United States, 340 U.S. 367 (1951) (privilege cannot be claimed to protect another); Hale v. Henkel, 201 U.S. 43, 69-70 (1906); 8 WIGMORE § 2259.
7. The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113 (1927). See 8 WIGMORE § 2270.
8. It is the province of the court to judge, whether any direct answer to the question, which may be proposed, will furnish evidence against the witness.

If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction.

In such a case, the witness must himself judge, what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer.

1 BURR'S TRIAL 245 (1808).

The trial court determines, within its sound discretion, if the witness is legitimately relying on the privilege. If it finds he is not, it may compel him to answer. Its decision will not, in the absence of manifest error, be overruled. Mason v. United States, 244 U.S. 362 (1917). But cf. Hoffman v. United States, 341 U.S. 479 (1951).
formal barrier to the government in its attempts to obtain information often felt to be necessary for regulation. The magnitude of the impediment can best be understood by considering the interplay between the wide range of federal regulatory measures and the interlocking network of criminal statutes—the latter operating as complements and/or supplements to the regulatory process. For example, the use of false advertising is controlled by both civil remedies—cease and desist orders issued by the FTC—and criminal sanctions. Because of this dual regulation, the answer of a patent medicine manufacturer, to a question about the ingredients of his product asked him in a civil proceeding in which the FTC is attempting to terminate his present form of advertising, might tend to incriminate him: therefore, he could claim the privilege when questioned and thus frustrate regulatory activity.

Legislators, finding unwanted obstacles to the flow of information in the privilege's effect, have made various attempts to curtail its impact. In 1885, Congress authorized federal courts to compel individuals involved in revenue cases to produce private papers; but since the act failed to recognize the privilege as a defense to compelled information production, it was held by the Supreme Court to be unconstitutional when utilized in suits for penalties or forfeitures. Other means of dealing with the problem of obtaining privileged information have, however, proved more artful. During the past century Congress has hurdled the self-incrimination barrier to information acquisition through frequent resort to passage of immunity acts.

An immunity act is an act which grants an agent of the government the power to compel a witness to testify about any matter, despite the self-incriminating nature of the testimony. But in exchange for the testimony, the government is disabled from obtaining penal sanctions against the witness for matters revealed by his testimony. With these protections, presumably, the fifth amendment proscription loses its force; and within the constitutional sense what was formerly self-incriminating no longer is so. The beauty of this technique has resulted in its multiple application. Over forty immunity acts—varying somewhat in language but identical in their incorporation of these basic provisions—can now be found within the confines of the United States Code. They are in force in connection with a large part of the regulatory activities of the federal government. To assess the impact of immunity acts, this Comment will probe the history of the growth of immunity acts, examine when they attach, and in what circumstances, and discuss their operations in relation to the activities of selected federal agencies.

12. All of the federal witness immunity acts currently in force are collected in Appendix A.
HISTORY

The first immunity act passed demonstrates a pattern common to all of the early immunity acts: it was general legislation enacted in response to a specific, current situation. In January 1857, the New York Times' Washington correspondent reported that members of the House of Representatives had requested that he act as an intermediary in a vote selling scheme. When questioned by a House committee he refused, on the ground of his privilege against self-incrimination, to name the members who had approached him. In response, an unsophisticated immunity act was passed, which, although intended to compel this particular reporter to testify, gave all witnesses before all congressional committees immunity from criminal penalties in relation to any matter concerning which they testified.

13. Actually, an immunity act was first passed in England in 1710. The act, directed against gambling, provided that a loser could sue a winner to recover his losses, and that the winner could be compelled to answer the loser's charges. But, after the winner had responded and had returned the loser's money, he was to "be acquitted, indemnified, and discharged from any further or other punishment, forfeiture, or penalty." 9 Anne, c. 19, s. 1-3 (1710), repealed by the Gaming Act of 1845, 8 & 9 Vict. c. 109, s. 15. This act, though not adopted by any American legislature, was held to be in effect in this country. United States v. Dixon, 25 Fed. Cas. 872, 873 (No. 14,970) (C.C.D.C. 1830).


15. Despite doubts as to the need for general legislation of this type and questions as to its constitutional validity, the act was passed by Congress two days after its introduction. The debate in Congress centered on the investigation then in progress and the relationship of the bill to that investigation. See, e.g., 34 Cong. Globe 34th Cong., 3d Sess. 426-27 (1857) (remarks of Reps. Grow and Davis). Some members of the House, attempting to defeat the bill, or at least to slow down its passage, moved to commit it to committee; this motion was defeated, 132-71. The bill was then passed, 183-12. Id. at 433.

The Senate debate provides evidence of the pressures surrounding the bill.

I think I saw by the papers ... that threats have been thrown out of this sort: "We will put the bill on its passage, and let us see who will dare oppose it. ..."

I say, that under no circumstances will I consent to pass a bill which I believe to contain a vicious principle, under the pressure of the existing circumstances that now surround Congress. Id. at 435 (remarks of Sen. Hale). Despite these protests, the Senate gave only summary consideration to the bill—it was considered for only ten minutes in the Committee on the Judiciary, id. at 436 (remarks of Sen. Hale)—and then passed it by a vote of 46-3. Id. at 445.

The act provides:

§ 2. Than (sic) no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee ... as to which he shall have testified whether before or after the date of this act, and that no statement made or paper produced by any witness before either House ... or before any committee ..., shall be competent testimony in ... any court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined ..., for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him or otherwise render him infamous....

As a consequence of the procedural permissiveness and broad scope of the 1857 Act, the committee rooms of Congress were soon converted into confessionals to which the criminals of the land rushed to wash away their sins. The large numbers of these “immunity baths” stimulated Congress to restrict the protection offered by the 1857 Act. In 1862, it was amended to limit the witness’ protection to the exclusion of the actual testimony given, rather than to the barring of prosecutions based upon the testimony.

In 1868, another incident led Congress to extend to court-given testimony the immunity protection previously supplied testimony before congressional committees. The government had brought suit in England in an attempt to recover from English banks certain assets deposited there by the dead Confederacy. An agent of the Confederate government refused to testify, claiming that to do so would subject him to a forfeiture of property he owned in this country. To obtain this testimony, an immunity act was passed with essentially the same immunity and compulsory testimony provisions as the 1862 Act, but attaching immunity to testimony in “any judicial proceeding.”

Although the passage of the 1868 Act created a situation in which immunity powers were available to the government in all congressional and judicial proceedings, these powers were not used as a means of compelling testimony for the next two decades; concomitantly, legislative authority to enact such

16. One such “immunity bath” was in large part responsible for the movement to amend the act. See 42 CONG. GLOBE 37th Cong., 2d Sess. 364 (remarks of Rep. Wilson). Messrs. Russell and Floyd, two clerks in the Department of the Interior, embezzled $2,000,000 in government bonds, and then arranged to testify before a House committee, where they disclosed their misdeed. When the government attempted to prosecute, the court dismissed the case, holding that Russell and Floyd had gained immunity.

An attempt was made in the Senate to strike out the compulsory testimony section of the act, but was defeated by a vote of 19 for, 21 against. Id. at 431.

17. 12 Stat. 333 (1862).

18. Now, I do not know that there is any mystery about this matter. I suggested that there were reasons of state for the passage of the bill. Perhaps I may be allowed to state upon this floor [the House of Representatives] that there are cases pending in other countries. There is one pending in England, at the instance of the Government, in reference to the assets of the dead confederacy, where the testimony of parties who acted as agents of that Government, and owning property here, is necessary to make out the base. . . . It was pleaded by the party holding this relation that being a citizen of the United States he would be subject to forfeiture under acts of Congress. . . . It was decided. . . . that the party could not be held to answer. This testimony is important, and this bill is to put the party in such position that he shall be relieved from the liability to which he is now subject.

49 CONG. GLOBE, 40th Cong., 2d Sess. 1334 (1868) (remarks of Rep. Williams). The case referred to is United States v. McRae, 3 L.R. 79 (Ch. 1867).

19. 15 Stat. 37 (1868). The McRae case, supra note 18, provides the explanation for the otherwise inexplicable provision extending immunity to testimony given in proceedings “in this or any foreign country.”

20. There is only one reported case, during this period, in which the act was used to compel testimony. United States v. McCarthy, 18 Fed. 87 (C.C.S.D.N.Y. 1883). But cf. United States v. Smith, 47 Fed. 501 (C.C.D.N.H. 1891).
measures remained undefined by the courts. But passage of the Interstate Commerce Act 21 in 1887 presaged new dependence on information, now required for the complexities of economic regulation, and, hence, increased reliance on immunity provisions. Soon afterwards, a witness before a grand jury investigating alleged violations of this Act refused to answer, claiming his privilege. He was directed to testify, in accordance with the Act of 1868, but continued his refusal, and was consequently adjudged to be in contempt of court.22 He eventually appealed to the Supreme Court, thus bringing a case involving an immunity act—Counselman v. Hitchcock 23—before that body for the first time. The Court reasoned that unless the protection afforded by an immunity statute is coextensive with that afforded by the fifth amendment, the statute is clearly unconstitutional. The privilege against self-incrimination was defined in language similar to that used by Marshall:

It is a reasonable construction, we think, of the constitutional provision, that the witness is protected from being compelled to disclose the circumstances of his offence, the source from which or the means by which . . . evidence of its commission, or of his connection with it, may be obtained . . . or made effectual for his conviction . . . without using his answers as direct admissions against him.24

Finding the protection offered by the act narrower than this, since the act left it possible for the government to use a witness' compelled testimony to obtain other evidence upon which he might then be convicted, the Court held the act invalid. In finding it to be unconstitutional, the Court might have gone further, and taken the position that the protection afforded by the fifth amendment is not liable to circumvention by any statute in the nature of an immunity act. But through a suggestive bit of dicta, the Court strongly indicated quite the opposite: namely, that an immunity act, if properly framed, would be valid.25

Congress was quick to follow this cue. Sixteen days after the decision was announced, a new immunity bill was introduced by Senator Cullom.26 When the bill was objected to as violating rights protected by the Constitution, Cullom replied that the Counselman decision had been followed in drafting it.27

Seemingly under pressure to facilitate the enforcement of the Commerce Act,

22. In re Counselman, 44 Fed. 268 (C.C.N.D. Ill. 1890).
23. 142 U.S. 547 (1892).
24. Id. at 585. Compare text accompanying note 3 supra.
25. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.
26. Counselman was handed down on Jan. 11, 1892; the new bill was introduced on Jan. 27. 23 Cong. Rec. 573 (1892).
27. Id. at 6333.
Congress passed the bill in considerable haste. The 1893 act provided for the compulsion of, and attached immunity from penal sanctions to, evidence in all matters presented before the ICC or in proceedings brought under the Interstate Commerce Act. In limiting the act to one statute, Congress departed from its pattern of passing general immunity acts and established a precedent that has been followed in all subsequent immunity legislation.

In 1894, the case of Brown v. Walker brought the new act before the Supreme Court. Brown had refused, both before and after ordered to do so by a court, to answer certain questions put to him by a grand jury. On appeal of his contempt conviction, the Supreme Court upheld the act by a 5-4 vote. Both the majority and the dissents primarily discussed the scope of the fifth amendment privilege. The majority rejected the propositions that the privilege conveys an absolute right to remain silent or that it is designed to protect the good name of the witness; rather, it held that the privilege protects a witness only from being compelled to furnish evidence that could result in his being subjected to a criminal sanction. The argument that may well have tipped the balance, however, was not one of constitutional interpretation, but one of expediency—the need for such legislation to effectuate the enforcement of the Commerce Act. For, after supporting their interpretation of the privilege on historical grounds, the majority nailed down its holding with the observation that,

... [if] witnesses standing in Brown's position were at liberty to set up immunity from testifying, the enforcement of the Interstate Commerce

28. [U]nless some such bill can be passed both the Interstate Commerce Commission and the courts will be entirely unable to enforce the law upon the statute books in reference to interstate commerce.

Ibid. (remarks of Sen. Cullom).


30. 161 U.S. 591 (1896). The act first came before the courts in 1894 in United States v. James, 60 Fed. 257 (D.N.D. Ill. 1894). James had refused to answer certain questions put to him by a grand jury investigating violations of the Commerce Act. When the grand jurors applied to the district court for an order compelling James to answer, the judge responded by holding the new immunity act invalid. He construed the fifth amendment as granting witnesses an absolute right to remain silent, and concluded that the immunity act was invalid as an attempt to abridge that protection. In the alternative, he analogized the immunity offered by the Act to a pardon, thus reaching the conclusion that even if the Act were constitutional, the witness would have a right to refuse the immunity in the same manner as he could refuse a pardon. This decision was not appealed.

31. It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace and opprobrium attaching to the exposure of his crime; but... the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secures legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good.

161 U.S. at 605-06.
Law, or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible.\textsuperscript{32}

Congress, interpreting this decision as laying to rest any doubts as to the constitutionality of immunity acts and as indicating the Court's agreement that such acts are essential to the enforcement of regulatory legislation, moved to adopt immunity legislation in connection with other federal regulatory activities. A cluster of three immunity acts was passed in 1903. The most significant provided for the compulsion of testimony in all proceedings brought under the antitrust acts.\textsuperscript{33} The Supreme Court held this immunity act constitutional in \textit{Hale v. Henkel},\textsuperscript{34} a case involving the refusal of a witness to testify before a grand jury investigating alleged antitrust violations. The Court rested its decision largely on \textit{Brown v. Walker}, but once again the argument of expediency was mentioned.

As the combinations or conspiracies provided against by the Sherman Anti-Trust Act can ordinarily be proved only by the testimony of parties thereof, in the person or their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare those combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject.\textsuperscript{35}

With the validity of immunity acts thus affirmed, complications in its application moved to the fore. In \textit{United States v. Armour & Co.},\textsuperscript{36} problems of unwarranted and unwanted grants of immunity under the new acts were raised. The Commissioner of Corporations, who had been granted immunity powers, had had informal discussions with officers of Armour concerning activities of that company and of the beef trust. When an indictment was brought, the officers claimed immunity as a result of those discussions. The district court held that immunity had been conferred despite the fact that the witnesses

\textsuperscript{32} \textit{Id.} at 610. The dissenters opposed this appeal to expediency: Much stress was laid in the argument on the supposed importance of the provision in enabling the commission and the courts to enforce the salutary provisions of the Interstate Commerce Act. This, at the best, is a dangerous argument, and should not be listened to by a court, to the detriment of the constitutional rights of the citizen. \textit{Id.} at 627 (Shiras, J., dissenting).

\textsuperscript{33} 32 \textit{Stat.} 904 (1903), 15 \textit{U.S.C.} § 32, 49 \textit{U.S.C.} § 47 (1958). This act was adopted as a rider to an appropriation of $500,000 to the Attorney General for the purpose of enforcing the antitrust law. The debate in the House made little reference to the immunity measure; it consisted almost entirely of partisan statements alleging that one party or the other had the greatest interest in enforcing the antitrust laws. 36 \textit{Cong. Rec.} 411-19 (1902). There was no discussion of the immunity bill on the floor of the Senate. \textit{Id.} at 989-90.

The two other acts are 32 \textit{Stat.} 828 (1903), relating to the Commissioner of Corporations, and \textit{Id.} at 848, 49 \textit{U.S.C.} § 43 (1958), relating to additions to the Interstate Commerce Act.

\textsuperscript{34} 201 \textit{U.S.} 43 (1906).

\textsuperscript{35} \textit{Id.} at 70.

\textsuperscript{36} 142 \textit{Fed.} 808 (D.N.D. Ill. 1906).
had been neither subpoenaed nor placed under oath. A bill was enacted limiting the grant of immunity, under the acts then in force, to natural persons, and then only when they testified or produced evidence in response to a subpoena and under oath.

In the five decades between the Armour case and the 1950's, immunity acts were passed with hardly a word of dissent. As the scope of federal government regulation burgeoned—afflicting agriculture, finance, communications and labor relations among others—an immunity provision was included in almost every major regulatory measure passed.

It was not until 1954 that Congress again gave full consideration to the matter of immunity legislation. The Kefauver investigations of organized crime had recently caused a stir, and Senator Joseph McCarthy was at the apex of his power. The minds of Congress and the nation were filled with memories of witnesses claiming the protection of the fifth amendment before congressional committees. A bill was proposed granting immunity powers to all such committees; the Justice Department was agitating for an immunity bill including all judicial proceedings and requiring congressional committees to secure the approval of the Attorney General before granting of immunity.

37. In reaching this conclusion, the court construed the grant of immunity powers as having an informative function.

It is clear to my mind that the primary purpose of the commerce and labor act was to enable Congress, by information secured through the work of officers charged with the execution of that law, to pass such remedial legislation as might be found necessary. Congress wanted to know how the laws with regard to corporations were operating, how they were being evaded, how to strengthen them, in case they needed strengthening.

38. See 40 Cong. Rec. 7657 (1906) (remarks of Sen. Knox supporting the new bill). Voices were also raised in Congress arguing that the country might benefit most by having all the immunity acts repealed. Ibid. (remarks of Sen. Daniel).


Typical of the congressional consideration given to immunity in this period is the following statement, made in relation to the Fair Labor Standards Act:

Section 15 contains the usual administrative provisions authorizing the Board to conduct investigations, subpoena witnesses, and compel testimony.


41. The Act of 1862 was still on the books; though—because of Counselman—it had no teeth in terms of granting power to compel testimony, see United States v. Jaffe, 98 F. Supp. 191, 196 (D.D.C. 1951); Commissioner's Note, Model State Witness Immunity Act, 9C U.L.A. 186, 199 (1957). It retained enough bite in terms of granting immunity, however, to have caused some mischief over the years. See, e.g., Adams v. Maryland, 347 U.S. 179 (1954), discussed in text accompanying notes 97-99 infra.

42. 99 Cong. Rec. 4578-79 (1953).

43. See Brownell, Immunity From Prosecution Versus Privilege Against Self-Incrimination, 28 Tul. L. Rev. 1 (1953).
Concern was expressed that a widespread extension of immunity powers might have undesirable results—principally that congressional committees might grant immunity to persons whom the Justice Department wished to prosecute, and that such an extensive grant of immunity powers might upset the fifth amendment balance between the state and the individual. After a great deal of debate, a bill was passed granting the power to compel testimony and grant immunity to congressional committees and U.S. attorneys. But the 1954 act only applies to matters relating to internal security; and, as the Department of Justice desired, immunity can only be granted with the express approval of the Attorney General.

The 1954 act was upheld by the Supreme Court in *Ullmann v. United States*. Ullmann had refused to testify, both before and after being ordered by the court to do so, before a grand jury investigating an alleged wartime spy ring involving Harry Dexter White. Upon conviction for contempt, he appealed. Ullmann contended that this act was distinguishable from other immunity acts in that if testimony were compelled under this act, the witness would almost certainly be subjected to disabilities against which the act did not offer him protection—"loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium." He strengthened this argument by referring to the history of

44. In support of the measure, it was argued:

[L]egislation of this nature is urgently needed, especially in connection with investigations conducted by the Senate Internal Security Subcommittee, dealing with national security and the threat of the Communist conspiracy. If this bill becomes law, it will go a long way . . . to help expose the Communist conspiracy in this country.


Some opponents of the bill felt that it would result in the Congress usurping the law enforcement function of the executive branch. *Id.* at 8342-43 (remarks of Sen. Lehman). And many of those who supported the bill felt it should be passed only if strong procedural safeguards were incorporated into it. See, e.g., *id.* at 4738 (remarks of Sen. Kefauver). Other opponents of the bill, perhaps objecting to those advocating the bill more than to the bill itself, made the following argument.

We cannot legislate outside of the context of our climate of opinion. There is presently an unbecoming shrillness, fed into hysteria by political would-be saviors, in our approach to problems of internal communism. It is our legislative responsibility to bring this problem back into focus into its proper dimensions, free of exaggerations and obsessiveness. S. 16 is a denial of that responsibility.


When, for reasons of expediency or emergency, we weaken these individual rights and give inordinate powers or emergency powers to any branch of our Government, it is the record of history that at last that power will be used wrongfully, will be used unwisely, or against innocent individuals.


46. 350 U.S. 422 (1956).

the privilege, which indicates that the privilege was orginally created to pro-
tect political and religious deviants, and was only later extended to protect
those accused of other crimes. Consequently, Ullmann asserted, to compel
testimony in relation to political beliefs is to strike at the very heart of the
protection offered by the privilege, particularly since as to political deviants,
the thrust of the protection is more often against disclosure than against
punishment. Over the dissent of Justices Douglas and Black, the Court,
speaking through Justice Frankfurter, rejected this argument, holding that the
protection afforded by the statute was sufficient to fulfill the guarantees of the
fifth amendment. It based its holding in large part on Brown v. Walker, stating
that that case has become "part of our constitutional fabric."

The Meaning of "Immunity"

Immunity acts are useful only to compel testimony protected by the fifth
amendment; a grant of immunity cannot be used to compel the testimony of a
witness who bases his refusal to testify either on another evidentiary privi-
lege or on his first amendment right to silence. When an immunity act is
used to compel testimony protected by the privilege, the protection offered by
the act must be as broad as the protection offered by the privilege. If it is not,
the act is unconstitutional. And, concurrently, if the practices or procedures
used in conjunction with a valid immunity act have the effect of making the

Picture Industry, 6 Stan. L. Rev. 438 (1954); Note, 33 St. John's L. Rev. 330, 338
(1959):

If the privilege and its attendant witness immunity statute only become weapons
to "get" witnesses, . . . then our system of jurisprudence is approaching the totali-
tarian form of government which we so rightly and vigorously condemn.

In contrast to the effects that run from a confession of subversive affiliations, it has been
alleged that, in very respectable quarters, admission of or indictment for antitrust violations
serves as a status elevation ceremony. Interview with private attorney in Washington,
D.C., January 1963. (All interviews hereinafter cited took place in Washington, D.C., in
January 1963, unless otherwise noted.)

48. See 8 Wigmore § 2250 (1940).
49. See Rogge, Compelling the Testimony of Political Deviants, 55 Mich. L. Rev. 163,
375 (1956-57).
50. 350 U.S. at 440.
51. Id. at 438.

To complete this interweaving into our constitutional cloth, an act granting immunity
powers in relation to an area of the federal government's purely criminal jurisdiction—
521, 10 C.M.R. 19 (1953).
53. This right is recognized in Barenblatt v. United States, 360 U.S. 109 (1959), though
in that case the governmental interest involved was held to override the witness' rights.
In Ullmann, the court refused to consider a claim of privilege based upon the first amend-
ment because of the stage in the case at which it was first asserted. 350 U.S. at 439 n.15.
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protection afforded by the act narrower than the protection offered by the privilege, the act becomes unconstitutional as applied. Most immunity acts grant immunity broadly, stating that "no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may [be compelled to] testify, or produce evidence." In the case of Heike v. United States, Mr. Justice Holmes indicated that this protection has some inherent limits:

[T]he obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity for crime. It should be construed, so far as its words fairly allow the construction, as coterminus with what would otherwise have been the privilege of the person concerned.

Subsequent case law has led to further clarification of the protection offered. A witness obtains immunity only for those crimes to which his testimony relates, not for all crimes of which he may be guilty at the time he is compelled to testify. Furthermore, the connection between the matter testified to and the crime for which immunity is claimed must be substantial. Since there have been few borderline cases in this area, the limits of substantiality have not been clearly established. Generally, if testimony was compelled about one of the elements of a crime, or testimony was capable of materially assisting the government in either detecting a crime or procuring evidence with which to prove a crime, the witness has immunity for that crime. If the connection is frivolous, however, the witness does not have immunity. Thus, a union officer compelled to testify about the conduct of union meetings was held not to have immunity when he was indicted on charges of conspiring with poultry dealers to fix the prices of live poultry.

When a substantial connection does exist, the witness is entitled to immunity even though his testimony relates to events that are lawful in themselves. In United States v. Lumber Products Ass'n, Ryan, a union officer, appeared before a grand jury investigating possible antitrust violations and was compelled to identify his signature on a contract, describe the circumstances under which the contract was negotiated, and state that he was a party to those negotiations. When Ryan was among those later indicted by the grand jury, he entered a plea of immunity based on his testimony before that body. The trial court held that his testimony related solely to legitimate activities of a
union, "was, therefore, in no way incriminating," and that Ryan was therefore not entitled to immunity. On appeal, his conviction was reversed by the Ninth Circuit:

When an individual is required to answer whether he participated in the negotiations of a contract a clause of which is subsequently set forth in an indictment found against him ..., it cannot be said that his testimony had no substantial bearing on a transaction. ... Proof of this portion of the contract was treated by the government as one of the vital links in the chain of evidence summing up the existence of a conspiracy to restrain trade. ... That the contract on its face may have been unlawful ... cannot be said to destroy his immunity as an individual. ...

Similarly, the fact that a witness has testified untruthfully about a matter does not deprive him of immunity, though it does leave him liable to a conviction for perjury.

The protection given by immunity is retrospective in effect only—a witness cannot, because he has been granted immunity for a crime, continue to commit that crime in the future. Thus, in 1910, the officers of Armour & Co., who had been held to have had immunity five years earlier, were again indicted for antitrust violations. They again pleaded immunity, based on their conversations with the Commissioner of Corporations in 1905, but this time their plea was of no avail. The court held that their testimony before the Commissioner related only to crimes that they had committed before they testified and that the indictment was for crimes committed subsequent to that date.

Since immunity is granted only where the fifth amendment privilege exists, it does not attach to unprotected evidence. The books and records of corporations and labor unions have been held by the Supreme Court to be public papers without the safeguard of the fifth amendment; their production can be compelled even though they incriminate either the organization or some individual. Consequently, neither the organization nor any individual gains

62. 42 F. Supp. at 916.
63. 144 F.2d at 553.
64. See note 113 infra; cf. notes 165-66 infra and accompanying text.
65. United States v. Swift, 186 Fed. 1002 (N.D. Ill. 1911); see notes 36-37 supra and accompanying text.
immunity as a result of producing such books and records.\textsuperscript{67} By extension of this reasoning, when the government required private individuals to keep records for purposes of wartime regulation, immunity did not accrue to those individuals when they were compelled to produce their records.\textsuperscript{68}

A more difficult problem concerning books and records is faced when the government attempts to compel the production of a partnership's papers. Such papers are generally held privileged.\textsuperscript{69} But if immunity powers were to be used to compel one partner to produce partnership books, only he among the partners would have a valid case of immunity in relation to their contents. In \textit{In re Subpoena Duces Tecum},\textsuperscript{70} all of the partners of a firm moved to quash a subpoena for the partnership books directed to one of them. The court examined the motives of the government and said:

\begin{quote}
It is obvious, and it was not denied at the hearing upon the motion, that the subpoena . . . is an adroit maneuver of the Antitrust Division to avoid subpoenaing all of the partners, and thus to close the door to their possible claim to immunity. . . .
\end{quote}

The court then granted the motion to quash the subpoena, holding that the government could compel the production of the partnership's papers only by directing a subpoena at (and consequently granting immunity to) all of the partners.

When a witness is basing a plea of immunity not upon records that he produced, but upon testimony that he gave, he may occasionally have difficulty in proving his case. Immunity is often acquired by a witness as a result of testimony before a grand jury or in an \textit{in camera} administrative proceeding. Since the records of these proceedings are usually kept secret, it may be difficult for a person on trial for a crime to produce the evidence necessary to prove that he has immunity in relation to the acts with which he is charged. Where the


\textsuperscript{68} It has been held, however, that when an individual charged with keeping unprivileged records fails to produce them in response to a subpoena and refuses to testify, on grounds of self-incrimination, concerning their whereabouts, he can neither be convicted of contempt solely on this basis nor compelled to testify unless given adequate immunity. Curcio v. United States, 354 U.S. 118 (1957). The opportunity is thereby open to corporation officers and union officials, for example, to avoid incriminating themselves on the basis of what is contained in their organizations' papers, by not producing those papers and claiming the privilege when questioned about their failure to produce them. Of course, if the government could prove that they deliberately concealed those papers, they could be convicted of criminal contempt.

\textsuperscript{69} Shapiro v. United States, 335 U.S. 1 (1948).


\textsuperscript{71} 81 F. Supp. 418 (N.D. Cal. 1948).
principal evidence in support of a defendant's *prima facie* valid plea of immunity is a secret transcript, constitutional considerations would seem to require the court to order the production of the relevant part of the transcript. If testimony is compelled, and the witness is then prevented from obtaining the means of proving his immunity, the protection of the fifth amendment is in effect denied.\textsuperscript{72}

In cases such as this, a procedure might be adopted similar to that followed in civil suits in which the government wishes to keep material evidence secret. There, the government has the option of producing the evidence or of suffering an adverse finding on the issues to which it is relevant.\textsuperscript{73} In immunity cases, the choices offered to the government need not necessarily be so stark. If the government so requests, the privilege of examining the transcript could initially be granted only to the court. But if the court, after examining the record, denies a plea of immunity, the claimant should be allowed examination. For, if examination is limited to the court, the witness is foreclosed from discovering omissions in the record and from demonstrating that a section of his testimony has a substantial but hidden linkage to the crime for which he is indicted. If the government does not wish to allow the defendant this examination, dismissal should be required.

Essentially this procedure was followed in *Edwards v. United States.*\textsuperscript{74} The defendant claimed that he had appeared before an SEC investigator, and that, after producing the books of his corporation, he had testified to matters relating to the crime for which he was under indictment. He entered a plea in bar to the indictment, and moved to have the transcript of the hearing produced. The government opposed both of these pleas, offering in support an affidavit of the SEC investigator. The court denied Edwards' motions. On appeal, the Supreme Court reversed, ruling that since Edwards' plea was good on its face, the trial judge should have required the SEC to show cause why the hearing transcript must be kept secret.\textsuperscript{75}

\textsuperscript{72} Mr. Justice Shiras, dissenting in *Brown v. Walker*, 161 U.S. 591 (1896), argued that since immunity must be proved as a defense, and since there is the possibility that the evidence supporting a plea of immunity will become unavailable, immunity acts must violate the protection of the fifth amendment. *Id.* at 621-22. The possibility that evidence will be unavailable for the reasons suggested by Justice Shiras are minimal, but denial of access to the evidence necessary to prove such a plea would seem to produce, in a very real sense, the unconstitutional result with which Justice Shiras was concerned.

\textsuperscript{73} See *United States v. Reynolds*, 345 U.S. 1 (1953).

\textsuperscript{74} 312 U.S. 473 (1941).

\textsuperscript{75} Edwards was retried; his plea of immunity was again denied and he was again found guilty. His conviction was affirmed on appeal. *Edwards v. United States*, 131 F.2d 198 (10th Cir.), *cert. denied*, 317 U.S. 659 (1942), discussed in text accompanying note 121 infra.

In another case involving the denial of access to privileged papers, the opposite result occurred. Three labor union officers, all of whom had testified before a grand jury investigating antitrust violations, were indicted as alleged members of a conspiracy that had violated the Sherman Act. At their original trial, they moved to have the grand jury record produced. The judge denied this motion, but agreed to examine that record on his own.
"Penal" v. "Remedial"

Once the matters in relation to which a person has immunity are established, the inquiry becomes from what sanctions is he safeguarded. Most immunity acts provide that "no person shall be prosecuted or subjected to any penalty or forfeiture." Given that there exists some hard core of sanctions penal in the constitutional sense, a restrictive, Holmesian view of the immunity acts' protection would interpret the statutes to apply only where constitutionally necessary. This view would equate the test of penalty for the purposes of immunity statutes with the test of penalty to determine whether criminal safeguards must be available in trials. Although the courts have tended to adopt this interpretation, they occasionally have extended these acts' protection beyond what would appear to be the minimum standards established by the Constitution, perhaps out of respect for the harshness of many "remedial" sanctions.

This occasional inclination toward a "constitutional plus" definition of penalty for immunity act purposes seems the better view. The penal-remedial distinction should not be viewed entirely apart from its function. In the determination of penalty for the purpose of deciding which procedures must be followed before a given sanction can be invoked, classification of the sanction as remedial involves few black-and-white consequences; the individual is still afforded a hearing with its attendant procedural safeguards. The reverse is

After examining it, he denied the defendants' pleas of immunity. United States v. Lumber Prods. Ass'n, 42 F. Supp. 910 (N.D. Cal. 1942). The Ninth Circuit, on appeal, found that the defendants should have been allowed to examine the grand jury minutes.

It is not contended that the transcript of the testimony of the appellants before the Grand Jury contains facts which now should be suppressed for purposes of justice.... We can see no reason why the testimony of the appellants given before the Grand Jury... should not be made a part of the record on appeal.

Ryan v. United States, 128 F.2d 551, 553 (9th Cir. 1942). In a subsequent appeal on the merits, the defendants' pleas of immunity were upheld. Lumber Prods. Ass'n v. United States, 144 F.2d 346 (9th Cir. 1944), discussed in text accompanying notes 61-63 supra.

The question of whether a person can successfully petition for habeas corpus on the basis of immunity, when he failed to enter a plea of immunity at his trial, remains unsettled. See Pandolfo v. Biddle, 8 F.2d 142 (8th Cir. 1925).


77. It is hornbook law that administrative agencies cannot constitutionally dispense punishment. The Constitution requires that certain safeguards be present in criminal trials—a jury, for example—and the agencies do not offer those safeguards. See 1 Davis, ADMINISTRATIVE LAW TREATISE § 2.13 (1958).

true where immunity is concerned. By requiring immunity as a condition of compelling testimony, a compromise is reached, intended to ensure that the privilege of non-self-incrimination is kept intact. But if sanctions virtually penal in character can be considered without the pale of immunity protection, the statutory system is sorely imbalanced. This all-or-nothing consequence of finding a given sanction unaffected by the grant of immunity argues for a broad reading of what sanctions should be included within the meaning of "penalty and forfeiture." In cases where the issue is whether a person has immunity to a sanction, a finding that a sanction is remedial leaves the witness in a virtually impossible dilemma. He may refuse to testify and consequently be adjudged in contempt of court or may provide the government with information that will cause it to invoke a sanction which, albeit "remedial," may work a severe deprivation.\(^7\)

A broad reading of the "penalty and forfeiture" clause, moreover, harmonizes with policy goals of the privilege other than sparing an individual this Hobson's-choice construction of immunity acts. Running through the law are strong feelings that the witness should be protected from a zealous prosecutor who is attempting to wring out a confession of guilt and that the privilege helps to maintain a fair balance between the state and the individual—the individual must be left alone until the state, through its own efforts, can make a case against him.\(^8\)

To say that the clause defining sanctions should be interpreted to include the constitutional core plus some penumbral area is not enough. Further definition of the clause is required because of the wide variety of sanctions available to agencies operating under an immunity act. And this task requires, first, an analysis of the constructions which have been placed upon the clause.

The grant of immunity has been held not to protect the recipient from injunctive relief; remedies of this type are prospective in operation and are therefore described as purely remedial and preventive.\(^81\) Neither does immunity presently provide protection against actions for civil damages prosecuted by private parties.\(^82\) Treble damages, given their punitive effect, might seem to fall

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79. The courts have allowed the administrative agencies to administer many sanctions that appear to be quite severe. See, e.g., United States v. Costello, 144 F. Supp. 779 (S.D. N.Y. 1956) (deportation); Wright v. SEC, 112 F.2d 89 (2d Cir. 1940) (expulsion from stock exchanges); L. P. Steuart & Bro. v. Bowles, 322 U.S. 398 (1944) (OPA withholding of rationed materials).

80. See 8 Wigmore, Evidence § 2251 (1961); McCormick, Evidence § 136 (1954). It would seem that all of these policies apply to severe sanctions of any nature, not just to criminal prosecutions.


82. See Perkins Oil Well Cementing Co. v. Owen, 293 Fed. 759 (S.D. Cal. 1923).
within the rubric of "penalties and forfeitures," yet the courts that have considered this question have not so ruled. Thus one court has held:

The enforcement provisions and sanctions provided for in the Act were for the primary purpose of effectuating the public policy of the Act and securing compliance therewith, and not mainly for the purpose of punishing those who violated its provisions. Considering the declared purposes of the Act and the interest of the government in its enforcement, an action for the imposition of the sanctions authorized [treble damages] is remedial and not penal in nature, and the immunity granted by the Fifth Amendment does not therefore come into play.

In resolving the problem of determining the character of a sanction for immunity act purposes the policy of the CAB in regard to the suspension and revocation of personnel licenses provides a good illustration of an intelligent attitude. The initial authority to revoke or suspend a license lies with the Federal Aviation Administrator. If he does suspend or revoke a license, the licensee has a right to appeal this determination to the CAB. On appeal, the Administrator has the burden of justifying the imposition of the sanction. The CAB has ruled that suspensions, which are levied in cases of careless or negligent conduct, are penal in nature, and that revocations, which are issued when incompetence is demonstrated, are remedial. Thus, the Board has held that when immunity powers have been used to compel a licensee to testify about an event, he is immune to having his license suspended a result of that event.

But not all determinations on this issue are so foresighted or sensitive to the implications a given sanction will have for the one-time witness. In Pfitzinger v. Civil Service Comm'n, the defendant was called before the Commission to answer questions concerning his alleged violation of the Hatch Act. A section of that Act provides that no witness shall be excused from testifying on grounds of self-incrimination; however, no provision for immunity is made. Pfitzinger appeared and, without claiming the privilege, admitted that he had violated the Hatch Act. He was dismissed from his government job, and appealed his dismissal. The district judge first stated that failure to assert the privilege constitutes a waiver. Pfitzinger had argued that a claim of privilege


84. In Lee v. CAB, 225 F.2d 950 (D.C. Cir. 1955), the Administrators appealed one such determination by the Board. Two judges of the District of Columbia Circuit ruled that the Administrator did not have standing and dismissed the action. Judge Prettyman, dissenting, id. at 952, argued that the Administrator did have standing. Proceeding to the merits of the case, he stated that the determination of the Board—holding suspension to be a punitive sanction against which the licensee had immunity—was correct and should be affirmed.


would have been futile, since the statute quite clearly forbade it, that consequently waiver could not be implied, and that he was therefore dismissed as a result of compelled testimony. The judge replied that Pfitzinger should have construed the statute as coextensive with the fifth amendment, and thereby, despite the statute's language, should not have assumed that he was in fact deprived of his privilege and compelled to testify. The judge avoided ultimate reliance on this rather strained statutory construction by holding that dismissal from government employment is merely a "remedial sanction"\textsuperscript{87} against which Pfitzinger had no right to claim his privilege. Thus, even if the Act had provided for a grant of immunity, it must be assumed that the decision of the Commission would have been affirmed.

In spite of the extreme theoretical difficulties and confusions associated with the question, there have developed some criteria to guide the courts on the classification of sanctions for the purpose of the immunity act. Certain disabilities, the loss of the right to vote for example, have traditionally been associated with criminal punishment; their presence or absence in relation to the sanction involved should be noted.\textsuperscript{88} But, in keeping with the policies behind a broad reading, tests which go beyond the constitutional bounds should be considered. The CAB inquiry into the relationship between the sanction and the event for which it is being levied may be relevant. The fact that the sanction is levied for a deliberate or careless disregard of established standards would suggest that it is penal in character. If the sanction is brought on by demonstrations of incompetence or of inability to meet established standards, it is probably remedial.\textsuperscript{89} Additionally, legislative intent, insofar as that phrase has meaning in this context, ought be considered. For example, if there is evidence that the authorities involved in the creation and invocation of the

\begin{itemize}
\item \textsuperscript{87} 96 F. Supp. at 3.
\item \textsuperscript{88} In Rusk v. Cort, 372 U.S. 144, 174 (1963), Justice Goldberg, writing for the majority, suggested in addition to the primary inquiry of plain legislative purpose the following criteria as minimum constitutional guidelines relevant to this determination:
\begin{quote}
Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of \textit{scienter}, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.
\end{quote}
Whatever their analytical value, which is not a question within present analysis, these criteria do indicate a minimum area within which all sanctions must be classified as "penalties" and "forfeitures." Consider, in their light, N.Y. \textit{Election Law} \textsection{} 152 (right to vote); N.Y. \textit{Education Law} \textsection{} 6502 (practice of medicine), \textsection{} 7607 (practice of psychology); N.Y. \textit{Judiciary Law} \textsection{} 90 (practice of law).
\item \textsuperscript{89} For example, fining a person or suspending his drivers license because he has been found guilty of speeding is a penal sanction. Revoking his license because he has lost his depth perception and can, therefore, no longer safely operate an automobile, is a remedial measure.
\end{itemize}
sanction intended to inflict retribution, the sanction should be labelled penal.\textsuperscript{60} Two other criteria can be suggested. The severity of the sanction, though providing an unclear referrent, strikes closest to the desirability of ensuring that the grant of immunity proffers an honest shield to subsequent governmental action.\textsuperscript{61} And finally, an analogy can be made to the sanction of damages. Courts hearing civil suits have traditionally awarded damages that are proportioned to the amount of harm that has been done. Thus, where a sanction is finely attuned to the amount of harm done, that sanction should be considered remedial.

These criteria, however, will not present a solution when the harm complained of is the attachment of a hurtful social stigma. This is no "sanction," penal or remedial; it is not imposed formally by government, and thus can hardly be avoided by a plea in bar. Formal governmental sanctions are the only objects of immunity protection.

The fifth amendment, however, does provide a degree of protection against social embarrassment in one special circumstance. Though a witness can be compelled to testify under an immunity act, it has been held that he cannot constitutionally be compelled to testify by granting him a prior pardon in relation to the matters under investigation. The reason this distinction has been made is that a pardon contains an imputation of guilt, whereas a grant of immunity is constitutional because it is "non-committal."\textsuperscript{62} That is, the fifth amendment does not bar the compulsion of testimony, but neither does it allow the person who is compelled to testify to be branded with a formal onus of guilt.

This distinction between pardons and statutory immunity would seem to argue strongly for changing the present procedure for dealing with pleas of immunity. When a witness testifies under the auspices of an immunity act, the immunity he gets does not secure him from indictment. Rather, it operates as an affirmative defense that, when proved, is an absolute bar to prosecution. Denial of a plea, however, is not treated as a final judgment for purposes of appeal, so that if a plea of immunity is denied, the case goes to trial.\textsuperscript{63} But,

\textsuperscript{60} In the past, the courts have demonstrated a propensity to base their classifications entirely on this intent, and to disregard other criteria. This has led, in many cases, to a circular mode of judicial reasoning: the court finds that the legislature intended the sanction to be remedial in nature, and that procedures attached to the sanction would be unconstitutional unless it is absolutely necessary, they reason, the conclusion must be reached that the sanction in question is remedial in nature. See, e.g., Helvering v. Mitchell, 303 U.S. 391 (1938); Shapiro v. United States, 335 U.S. 1, 7 (1948).

\textsuperscript{61} It seems inequitable to compel a man to testify about an event, to grant him "immunity" in relation to his testimony, and then to leave him liable to severe sanctions as a result of that event. Even a tribunal bound by the penal–nonpenal dichotomy should not, in its application of that dichotomy, be unmoved by such equitable considerations. The totality of policy arguments supporting the privilege would also seem to support a policy of not levying severe sanctions for matters concerning which a person has immunity.

\textsuperscript{62} Burdick v. United States, 236 U.S. 79, 94 (1915) (reversing a contempt conviction of witness for continuing to rely on the privilege, after President Wilson had issued a pardon to him for all crimes concerning which he would testify; cf. Ex parte Irvine, 74 Fed. 954 (C.C.S.D. Ohio 1896).

\textsuperscript{63} Heike v. United States, 217 U.S. 423 (1910).
if a person has a valid plea of immunity denied by a trial court, is found guilty of the crime involved (perhaps as a result of his compelled testimony), and later has the conviction reversed by an appellate court, the granted immunity is no longer non-commital. The defendant has been adjudged guilty beyond a reasonable doubt. Thus, to bring the whole procedure of immunity within the already established limits of the fifth amendment, it would seem necessary to abandon the present procedure and to allow an appeal from the denial of a plea of immunity before the case is tried on its merits.0

Assuming that the set of sanctions from which immunity is granted is defined, what sovereigns will be prevented from acting by the grant of immunity? It is not clearly established whether a federal grant of immunity protects a witness against state criminal prosecutions.5 Since no case has ever arisen in

94. There are considerations of judicial efficiency that both support and oppose this practice. On one side, if the plea of immunity is upheld on appeal, there would be no need for a trial on the merits. An unsuccessful appeal, however, would only add a proceeding dealing with issues that could be dealt with, and that might again be raised (if the evidence at trial demonstrated a connection with compelled testimony that could not have been seen just from the indictment), on an appeal of a judgment on the merits. Furthermore, there is also the possibility that the trial on the merits would result in a finding of no guilt, rendering moot an appeal on the issue of immunity.

The standard rule is that "final judgment in a criminal case means sentencing;" Berman v. United States, 302 U.S. 211, 212 (1937). The courts have been reluctant to extend the grounds for appeal in criminal cases. Thus, where a motion to suppress evidence was made by a person under indictment, the denial of that motion was treated as an interlocutory judgment. See Nelson v. United States, 208 F.2d 505 (D.C. Cir. 1953). When a person is convicted on the basis of illegally obtained evidence, however, his constitutional rights are not infringed so long as he can have the conviction reversed. The denial of rights in such a case is the illegal search and seizure, not the use of the evidence. In cases where the denial of a preliminary motion works an infringement of an individual's constitutional rights, the courts have allowed that judgment to be appealed. In United States v. Foster, 278 F.2d 567 (2d Cir. 1960), the defendant alleged that the trial court had infringed his rights by setting territorial limits on his bail that were unreasonable. The court allowed the appeal to be heard on its merits, though acknowledging the general rule, holding that,

... in the rare case where the movant contends that denial of the motion is an arbitrary exercise of discretion and violates his constitutional rights, we believe the order should be appealable.

Id. at 569 (emphasis added).

So, too, denial of a valid plea of immunity works an infringement upon the protected rights of the defendant. The holding of Burdick v. United States, supra note 92, that immunity acts are valid because of the neutral nature of the protection they offer, operates to reverse the decision of the Court in Heike v. United States, supra note 93, that denial of a plea of immunity is not a final judgment for purposes of appeal.

95. The question was raised, but not decided, in Brown v. Walker, 161 U.S. 591 (1896). In Jack v. Kansas, 199 U.S. 372 (1905), the defendant had been convicted of contempt of court for refusing to testify under a state immunity act. He argued that the Kansas act was unconstitutional—that the state did not have the power to grant him immunity from federal prosecution, and that, absent such power, it could not compel him to testify. The Supreme Court accepted his first contention, but rejected his second. The grounds upon which the Court based its decision are, however, unclear. First, it stated that Jack was in no real danger of being prosecuted by the federal government so that his claim of privilege in re-
which a person has been convicted in a state court for a crime for which he
would have immunity in the federal courts, this question has never been direct-
ly ruled upon. Holmes' interpretation of the scope of the protection afforded
by the immunity acts would seem to indicate that a witness would not be pro-
tected from state prosecutions, since the Court has held that the privilege does
not protect a witness in a federal tribunal against incriminating himself under
the law of the states. This position finds support in Murdock v. United
States, 96 decided in 1931, in which the Court held valid a federal immunity
act which granted immunity from federal prosecution only.

Yet more recent case law strongly indicates that the immunity granted under
most federal acts does extend to state prosecutions. In Adams v. Maryland, 97
testimony of the defendant before a Senate Committee had been used as evi-
dence by the state in a successful criminal prosecution. The old congressional
immunity act, prohibiting, without distinction as to state or federal proceed-
ings, the use of any testimony given before a congressional committee, had
been in effect when Adams testified. The Supreme Court held that Congress
had the power to prohibit the use of such testimony in state courts, and re-
versed Adams' conviction. In Ullmann v. United States and Reina v. United
States, 98 the issue of whether the immunity acts concerning internal security
and narcotics, respectively, granted immunity from state prosecutions, was col-
laterally before the Court. In both cases, the appellants, who had been con-
victed of contempt for refusing to answer, contended that in the alternative
the acts did not grant immunity from state prosecution and that such immunity
was necessary to make the acts constitutional or, that if such a grant of im-
munity was intended, it was beyond the constitutional power of Congress to
grant immunity to state prosecutions. The Court avoided the question of
whether immunity to state prosecutions is constitutionally required by holding
that Congress had the power to, and did grant immunity to state prosecutions.
By so holding, the Court gave strong indication that, as a matter of statutory
interpretation, all federal immunity acts now in force would be interpreted to
protect witnesses from state prosecutions. 99

96. 284 U.S. 141 (1931).
99. See Marcus v. United States, 310 F.2d 143, 147 (1962), cert. denied, 372 U.S. 944
(1963).

By these decisions, the Court also avoided the possibility of subjecting a witness in a

The When of Immunity

With the scope of immunity defined, the question of when a person gets immunity—what events trigger the accrual of immunity—remains. There are two basic types of immunity acts—automatic acts and claim acts. Under an automatic act, a witness gains immunity in relation to all evidence that he presents in response to a subpoena and while under oath. Under a claim act, immunity accrues only after a witness asserts the privilege and is then directed to testify. Most of the immunity acts passed prior to 1930 are of the automatic type. From that date onward, however, the majority of the immunity acts have been claim acts. Prior to 1943, some of the lower federal courts treated the two acts as if they were equivalent, requiring a claim of privilege before they held that immunity had been granted under either type of act. In United States v. Monia, decided in that year, the Supreme Court ruled that under the automatic acts immunity was granted regardless of whether the witness had claimed his privilege.

Though there need be no claim under an automatic act, the witness must be testifying under oath and pursuant to a subpoena to qualify for immunity, and courts have been quite rigid in requiring that these two conditions be met. Cannan v. United States is one example of this attitude. Cannan had received a letter from the FTC requesting that he answer an enclosed questionnaire. The letter set forth the penalties for failure to comply with this request. He answered the questionnaire, and subsequently testified, under oath but not in response to a subpoena, before an FTC investigator. The court held that, since he had not been subpoenaed, Cannan did not have immunity.

Although the wording of the automatic acts seems to foreclose any possibility of the courts construing those acts as granting immunity in situations

federal tribunal to the Hobson's choice between a federal contempt conviction if he refused to be compelled to answer under an immunity act and a state prosecution if he responded. At the same time, the Court implicitly impressed upon federal officials the obligation of considering the possible effect upon state law enforcement activities when granting immunity to a witness.

100. The federal immunity acts currently in force are collected and classified in Appendix A.
104. 317 U.S. 424 (1943).
105. Shortly after Monia was announced, a bill amending the automatic acts to require a claim of privilege was proposed in a letter by the Attorney General, 89 Cong. Rec. 3260 (1943), and introduced by Senator Van Nuys, id. at 3765, as S. 1048, 78th Cong., 1st Sess. (1943). The measure was not reported from committee.
106. 19 F.2d 823 (5th Cir. 1927).
107. See also Sherwin v. United States, 268 U.S. 369 (1925), where the defendants received a letter from the FTC requesting that they produce certain documents for ex-
like Cannan,\textsuperscript{108} this seems an unfortunate result. An individual testifying before an investigative proceeding which normally operates under an automatic act may rely on the apparent automaticity of the immunity extension to forebear claiming the privilege. Denying immunity on the technical ground of the lack of subpoena seems a harsh result under the circumstances of such reliance. Permitting procedural sidestepping of the immunity acts, moreover, might well encourage the government to extend its use of informal investigative procedures that may be coercive in character.\textsuperscript{109} Despite the statutory command, however, courts can react to these results and exercise a degree of control by examining the facts of the case and determining whether the evidence invoked can be excluded as a coerced confession. Indeed, this is just what the court did in Cannan.\textsuperscript{110}

When dealing with automatic acts, the courts have also consistently limited grants of immunity to situations where evidence protected by the privilege was presented. Thus, a witness is not entitled to immunity by merely producing and identifying a corporation's or a union's books. However, if a witness, in the course of identifying those books, should testify about other matters, he would receive immunity in relation to that additional testimony. Since such testimony may be given inadvertently, or in fact may result from a witness' attempt to convert the proceedings into something closely resembling the "immunity baths" of olden days, a potentially difficult situation is presented when a person to whom the government has no desire to grant immunity appears to identify books called for by a subpoena \textit{duces tecum}.\textsuperscript{111} When these cases

\textsuperscript{111} Such cases arise frequently. See, \textit{e.g.}, United States v. Maine Lobstermen's Ass'n,
arise, the job of preventing an inadvertent or undesired grant of immunity must fall primarily on the government attorney. In one case the following exchange occurred when Morgan, the president of a company being investigated for possible antitrust violations, appeared in response to a subpoena for the books of that company:

Q. “[Did you bring] all price lists and records of prices of ice?”
A. “Well, we only have two prices. . . .”
Q. “We are not asking you to testify, Mr. Morgan, unless you want to sign a waiver of immunity, as to what transpired in your business. We are merely asking you for the corporation records.”

Here the government attorney was successful in preventing the witness from giving any substantial testimony. Morgan was subsequently indicted for violating the antitrust laws and entered a plea of immunity. However, his attempt to gain immunity through his appearance before the grand jury was futile; his plea was denied.

In deciding these cases of surreptitious attempts to obtain immunity, the courts could assist in protecting the government interest in obtaining information unprotected by the privilege, without granting immunity to those who produce that information, by carefully scrutinizing the testimony upon which the claim of immunity is based and the circumstances in which that testimony was given. If it appears that the government attorney questioned the witness about his personal connection to the subject matter of the inquiry, or even that the witness volunteered substantial testimony about the matters in relation to which he is claiming immunity and that the government attorney did not attempt to prevent such statements, the court is obliged to hold that the individual involved has immunity. But if the facts warrant it—for instance, if a witness testified to some matters despite the efforts of the government attorney to prevent him from doing so—the courts should look upon such a claim with disfavor.

In contrast to their attitude when dealing with claims of immunity arising under the automatic acts, the courts have been quite liberal in finding that the conditions necessary for the accrual of immunity under the claim acts have existed.112 This attitude seems quite appropriate, since the problem under the

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113. An extreme example of this tendency can be found in an unreported case described in an interview with an SEC attorney. An accountant employed by the SEC went to a corporation president’s office to examine the corporation’s books. The president, whom the SEC considered a potential criminal defendant, was wearing a concealed, miniature tape recorder. He had been neither subpoenaed to appear before the accountant nor placed under oath, yet he stated to the accountant that he was claiming his privilege against self-incrimination. The accountant asked him some questions, but told him to determine whether the answers were incriminating and not to answer if they were. The president replied that he would answer notwithstanding his privilege. The accountant then asked him if he had sold certain stocks since a past date (which, in this case, would have been a criminal act);
claim acts is not an inadvertent grant of immunity but rather that a witness may give self-incriminating testimony under the misapprehension that he is being granted immunity. For example, in Smith v. United States,\textsuperscript{114} Smith appeared before an OPA investigator in response to a subpoena. The investigator advised him, erroneously, that he could not be compelled to testify; Smith nevertheless claimed his privilege "as to anything that I say." After he had responded to a question concerning the conduct of his business, the following colloquy took place:

Q. "This is a voluntary statement. You do not claim immunity with respect to that statement?"
A. "No."\textsuperscript{115}

Subsequently Smith was indicted and, despite a plea of immunity, was convicted of violating the Emergency Price Control Act. The case was eventually appealed to the Supreme Court. The government contended that Smith had waived his privilege in the above exchange—that his "No" referred to the latter part of the question. Smith, on the other hand, argued that he had answered "No" to the query: "This is a voluntary statement." The Court, while not necessarily embracing Smith's position, rejected that of the government. It conceded that the privilege, once claimed, could subsequently be waived, but it went on to hold that a waiver of a constitutional right, after that right had been validly asserted, could not be inferred from such "vague and uncertain evidence."\textsuperscript{116} Support for the holding in Smith comes from the reality of the interrogation situation. These investigative proceedings frequently entail the drilling of a witness who is without technical expertise concerning the law and his rights under it, by an interrogator knowledgeable in regard to such problems. And witnesses are not always represented by counsel. As one commentator has observed:

[O]ften these interrogations are long confusing affairs during which an unwary businessman might otherwise lose his privileges before a skillful examiner.\textsuperscript{117}

Smith, however, does not provide all the protection the untutored witness might require. According to Rogers v. United States,\textsuperscript{118} a witness who without

the president answered "No." The president was eventually indicted for violating the Securities Act. He entered a plea of immunity, based on the tape-recorded account of this conversation with the accountant. On that evidence, the district judge held that he had testified, after claiming his privilege, to a transaction involved in the indictment, and that consequently he had immunity.

115. Id. at 144.
116. Id. at 150. The Court went on to say:

The United States had notice that the witness sought protection against prosecution for any facts to which he was compelled to testify. The Government had then to decide whether to pay the price to secure the facts of the suspected criminal operation.

\textit{Ibid.}

claiming the privilege has once incriminated himself by stating his connection with a criminal act, cannot then rely on the privilege to avoid disclosing the details of that act. Thus, a witness who took the fatal first step and disclosed an illegal transaction could then be compelled to discuss it in detail, but would not have to be granted immunity in relation to that compulsion. Thus the burden is initially upon the witness to assert his privilege if he fears self-incrimination; normally, once the privilege has been asserted, the responsibility of deciding whether to continue questioning the witness, at the risk of granting him immunity, is shifted to the interrogator. However, even if the privilege is claimed prior to the witness' testimony, voluntary testimony given before the prosecution begins interrogation, or given in the face of prosecution attempts to avoid an immunity situation, may prevent immunity from accruing.

119. Since the privilege against self-incrimination presupposes a danger of real legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific questions in issue here would not further incriminate her. Disclosure of the fact waives the privilege as to details.

Id. at 373 (Mrs. Rogers had admitted to being a member of the Communist Party).

The Court has been led to uphold claims of privilege asserted against questions about such seemingly innocuous matters as a person's occupation. Hoffman v. United States, 341 U.S. 479 (1951).

120. An example of a court's retroactive allocation of these burdens in this manner, and an illustration of the desirability of such an allocation, can be found in United States v. Eisele, 52 F. Supp. 105 (D.D.C. 1943). Hough, one of the defendants, entered a plea of immunity based upon testimony he had given at an SEC hearing. On the basis of a very ambiguous transcript, the court held that Hough had claimed his privilege in relation to his testimony concerning a certain finance company and granted his plea, The foregoing views are further borne out by the whole tenor of the proceedings. Defendant was subpoenaed as a witness for the Commission in an administrative proceeding before it, and, without warning of any kind, found himself confronted by an inquisition determined to wring from him evidence on which to base a prosecution against him. He was first lulled into believing he was a government witness, and after 50 pages of testimony, suddenly became suspicious or aware that he was a prospective defendant. Any inartificiality or inexactitude in making the claim of privilege should be viewed in the light of these circumstances; and the record might well be construed to support the view that all subsequent questions of a similar character were embraced within the claim unless the defendant is to be held to a rigid formalism. It was the examiner's duty, when defendant claimed this privilege, to determine from the character of the questions asked and the circumstances of the inquiry, whether there was a likelihood that the answers might be incriminating, and whether he wished to exchange immunity for testimony. If he did not wish to do so, he should have stopped further inquiry. He elected to take the other course.

Id. at 108.

See also United States v. Goodner, 35 F. Supp. 286 (D. Colo. 1940); United States v. Armour & Co., 64 F. Supp. 855 (E.D. Pa. 1946), holding that an initial claim of privilege is all that is required.

121. Thus, when a witness testified, after claiming his privilege, first in response to questions asked by his own counsel about certain transactions and then in response to cross-examination by an SEC attorney directed at the same transactions, and later claimed im-
THE WHERE OF IMMUNITY

The problem of when immunity accrues is compounded if the parties do not know for certain what, if any, immunity act governs the proceeding. Thus, if a given proceeding involves two related areas of inquiry, where one area has an immunity act automatic in nature, and the other is included within a claims act, a decision as to which act governs the proceeding would be of vital importance. But the problem may be even more severe. Recent cases indicate a trend toward increasing the definitional area of testimony covered by the immunity acts, leaving its outermost bounds uncertain. Consequently, cases may arise in which the government is asserting that since a given proceeding is covered by an immunity act, the witness must be directed to testify. Similarly, the individual who has testified may advocate a broad reading of an automatic act so that the action in which he testifies will be held to have conferred immunity. On the other hand, the government may urge a narrow reading of an act to avoid unintended protective grants; and an individual may argue for the same result to preserve intact his right to silence.

*United States v. Niarchos* 123 and *United States v. Marcus* 124 provide intimations of the quagmire in which courts may get involved when deciding the issue of what proceedings fall under the immunity act. In *Niarchos*, a defendant, Joseph Casey, entered a plea of immunity; he based his plea upon testimony that he had given before a grand jury investigating matters regulated by the Shipping Act, which contains an automatic immunity provision. The government, on the other hand, alleged that the grand jury was only investigating possible violations of two other statutes and that no immunity act applies to testimony given in proceedings under their auspices. The indictment issued by the grand jury were for alleged conspiracy and false claims

122. One of these cases is *Marcus v. United States*, 310 F.2d 143 (3d Cir. 1962), *cert. denied*, 317 U.S. 689 (1942). Likewise, when a witness claimed the privilege in an SEC hearing, was advised that the government did not wish to compel his testimony at the cost of granting him immunity, and subsequently produced an affidavit voluntarily, his plea of immunity based upon this last, voluntary, production was rejected. *United States v. Cayias*, 200 F. Supp. 790 (S.D. Fla. 1961).

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made to avoid certain provisions of the Shipping Act. The issue was thus joined on whether the grand jury investigation was a "proceeding based upon or growing out" of the Shipping Act. The court found that the subject matter of the investigation was directly related to the Shipping Act, and concluded that immunity had accrued to testimony before the grand jury. The court, therefore, dismissed the case against Casey.

Marcus, the first case reported in which the government's claim that it had immunity powers in an investigation was opposed by a witness, arose out of a grand jury investigation of alleged transmission of gambling information. Marcus was called before the grand jury; when questioned, he refused to answer on grounds of self-incrimination. Government counsel, relying on the immunity provision of the Communications Act, applied for a court order compelling Marcus to testify. The order was issued, but Marcus remained unresponsive, maintaining that the investigation was outside the coverage of the immunity provisions of the Communications Act. Consequently he was convicted of contempt of court, and the Third Circuit affirmed.

In both Niarchos and Marcus the courts attempted to devise some substantiability test to determine whether the subject matter of the proceeding was sufficiently related to the immunity act to bring the witness within its coverage. The better articulation was provided in Niarchos:

The test clearly cannot be that the indictment must be brought under . . . whatever act contains an immunity provision. The result of a special grand jury investigation often indicates violations of different or additional laws than those on which the proceeding was initially "based." The words "growing out of" must be given their common sense meaning. . . . [T]he proper test for determining the nature of the proceeding for the purposes of an immunity provision is the nature of its subject matter.

Niarchos and Marcus, however, are cases in which it was not difficult to establish both the subject matter of the proceeding and the substantiability of the connection between that subject matter and some statute incorporating an immunity provision. Cases are sure to arise in which establishing either or both of these matters will be difficult.

The difficulties inherent in the first problem—determining the subject matter of the proceeding—may be minimized by utilization of the procedure recently set by In re Bart. The question there raised concerned the procedures to be

127. 125 F. Supp. at 220. The investigation (and the indictment) involved alleged irregularities in the purchase of surplus ships from the government after World War II. The Maritime Commission had required that a majority interest in the ships purchased from the government be held by United States citizens. The defendants were accused of conspiring to avoid this requirement and of making false claims in furtherance of that conspiracy.
130. 125 F. Supp. at 220.
131. 304 F.2d 631 (D.C. Cir. 1962).
followed under the 1954 Immunity Act\textsuperscript{132} before an order will issue compelling a witness to testify. Testimony may be compelled under section (c) of that act if the proceeding is one “involving any interference with or endangering of” the national security or defense of the United States.\textsuperscript{133} Judge J. Skelly Wright, in reversing a contempt conviction, suggested what the United States attorney must do to convince the court that the proceeding in issue is within the national security provision. Though Judge Wright agreed that the government should not be expected to provide information sufficient to prove the commission of a crime against the national security, he described the burden as follows:

Suffice it to say that, in addition to stating their own opinion that the grand jury probe effects the national security, government counsel must describe the subject matter of the investigation with enough particularity to enable the judge to determine for himself whether any danger to the national security or defense is involved. . . . In the usual case, given the Congressional declaration that certain activities threaten the nation’s security, a very brief description will do. Other matters, less clearly connected with the national security, may require more.\textsuperscript{134}

If it is possible for the government to show that an investigation, currently in progress, involves activities that are a threat to the national security, surely, it may be argued, it should be equally possible to demonstrate that a criminal investigation involves possible violations of, say, the Federal Trade Commission Act. But in the typical immunity situation ambiguity concerning the facts involved in the pending proceeding is not likely to be the significant barrier. Government counsel should be willing voluntarily to offer affidavits as to the type of questions used and the direction of the investigation. It is the cataloguing of ascertained facts which is the hard problem facing the judge trying the immunity issue.

Cases will also arise in which the subject matter of the proceeding is clearly established, but where its relationship to an area covered by an immunity act is not. How, then, can the question of the scope of the immunity act—of how substantial a connection is necessary—be resolved? Marcus and Niarchos can be harmonized in ways other than their attention to the subject matter of the proceeding. In both cases the party seeking to extend the immunity act was victorious. And more important, viewing the comparative interests of the litigants before the court, in each case the party with the greater interest in the court’s ruling prevailed. Thus, in Niarchos, the hearing on the question of immunity followed the defendant’s testimony. The government, presumably, had obtained the information in which it was interested. On the other hand, the defendant, despite the probability that he relied on the existence of an automatic immunity provision in the Shipping Act, had his criminal liability at stake. Similarly, in Marcus, which arose in a contempt proceeding, the gov-
ernment interest in securing information had not been satisfied, while, in view of the offer of immunity, the interest of the individual was the only sometimes recognized right to protection from social obloquy and non-penal sanctions.

Thus, it may be that in close cases regarding the coverage of an immunity act, the courts should interpret the act expansively. Such an extension of immunity or immunity powers seems justified as a presumption favoring what may be identified as the greater interest involved, at least so long as the witness' right to silence remains in disfavor. To the argument that, in the Marcus-type situation, a congressional interest in limiting the number of proceedings in which powers are available should prevail, it can be answered that Congress' indiscriminate inclusion of immunity provisions in almost all regulatory legislation demonstrates that this interest is, at best, a weak one. To the argument that the government's interest in controlling undesired grants of immunity should be protected in the Niarchos-type situation, two responses are available. First, that the government is in control of such proceedings and should be aware of the statutes therein involved. Second, that if the government finds the situations created by automatic acts to be oppressive, Congress is in a position to modify those acts so as to put the government on notice that a situation exists in which immunity might accrue by requiring a claim of privilege.\textsuperscript{135}

The Immunity Acts in Action

The continued existence of immunity acts can be justified only if the assistance that they provide government organs in obtaining information necessary to the performance of their functions outweighs the possible harm they do to the government—through unintended grants of immunity—and to individuals by subjecting them to social stigma, and perhaps, to painful, "remedial," sanctions. And in specific situations, intentional use of immunity powers must be justified by balancing the value of the information that it is expected will be obtained against the disciplinary value of the sanction whose invocation is likely to be foreclosed.\textsuperscript{136} To evaluate what role immunity acts play in information gathering and how well they are used by various agencies, the use of

\textsuperscript{135} United States v. H. P. Hood & Sons, Inc., 214 F. Supp. 656 (D. Mass. 1963), discussed in note 122 supra, has a peculiar likelihood of stimulating much action. There can be little doubt that the Committee involved there had not considered the possible consequences, in terms of immunity, of calling the witnesses that they did. And, now that the Committee and others are apprised of the necessity of such consideration, they may find themselves greatly hamstrung in making further investigations unless the immunity acts are changed.

\textsuperscript{136} The two following cases, both involving the NLRB, illustrate some of the considerations that must be weighed in making a decision in regard to any immunity act.

In one, the complaint alleged that a company supervisor had broken into the union office and stolen the membership records. The supervisor was under indictment in a state court for breaking and entering, but the town was a company town and the indications were that if the supervisor was prosecuted at all, he would not be subjected to a very severe penalty. The supervisor was called before the examiner and questioned; he claimed his privilege. Upon request of counsel, the trial examiner directed the witness to testify. He had no difficulty in reaching this decision, since the testimony was important to the case and as the
immunity powers by the Civil Aeronautics Board, the Federal Trade Commission, the Securities and Exchange Commission, and three divisions of the Department of Justice—antitrust, internal security, and criminal—will be examined. The following discussion of the utilization of immunity acts by these agencies of the federal government is based upon information gathered in interviews with personnel of the agencies. Since no more than six interviews were conducted in any one agency, this discussion is necessarily limited to generalizations concerning an agency’s policies and to specific examples reflecting, perhaps, the decision procedure of no more than one individual. In regard to each of these agencies, the topics discussed will be the extent to which the immunity powers are used, the administrative structure as it operates.

Probability was that the immunity would not be significant in terms of the sanctions against which it offered the witness protection.

In the second case, an attorney attacking the veracity of a witness asked the witness if he was a Communist. The witness refused to answer, relying on his privilege. The trial examiner, weighing the relative unimportance of the witness’ answer, in terms of ascertaining the facts, against the possible foreclosure of a future Smith Act prosecution against the witness, refused to direct the witness to answer the question. The following question has been suggested as a model to be considered in determining whether to grant immunity:

Is the evidence expected from W (this witness) so important to this proceeding, and is this proceeding so important, that W should now be compelled to give his evidence and so be immunized, in spite of the offense for which he may go unpunished and in spite of the damage his immunity may do to present or future efforts to enforce the criminal laws of this state or to the wider public interest in a just and orderly society?


An outline of the topics discussed in these interviews is set out in Appendix B.

Interviews were also conducted at the National Labor Relations Board, the Federal Communications Commission, and the House Un-American Activities Committee. At the former two, immunity powers are used very infrequently, and no significant information (other than the two NLRB cases discussed in note 136 supra) was obtained. At HUAC, the picture was somewhat more interesting.

If HUAC was to attempt to use its immunity powers to compel a witness to testify, the standards set by In re Bart, discussed in note 167 infra, would probably have to be met. But HUAC has never attempted to compel a witness to testify, a somewhat surprising fact in view of the large number of claims of privilege made before the Committee. Various reasons have been put forward to explain this failure to act. The Committee’s staff director feels that attempting to compel testimony through the act would be futile.

If you’ve got a Communist on the stand, I don’t care what you offer him, he won’t testify.

The Committee itself might have tested this hypothesis by instituting a policy of frequent use of their immunity powers, in conjunction with contempt of Congress prosecutions of all witnesses who then refused to testify. But the Committee has never given serious consideration to implementing its fact-finding task with such a program.

Another possible explanation for HUAC’s failure to utilize its immunity powers is that the Committee has doubts as to the constitutionality of their immunity act. At least one commentator has argued that these sections of the Act are unconstitutional, Rogge, The New Federal Immunity Act and the Judicial Function, 45 Calif. L. Rev. 109, 133 (1957). And, In re McElrath, 248 F.2d 612 (D.C. Cir. 1957), the only case in which the act was
ates in making decisions about immunity, the criteria used in determining whether to grant immunity, and, most importantly, the general posture of the immunity act involved in relation to the function of the agency.

The Department of Justice: Antitrust Division

Of all governmental agencies with immunity powers, the Antitrust Division makes by far the most significant use of those powers. Partly this is attributable to the fact that the immunity act invoked in all proceedings brought under the antitrust laws is automatic in character. Since the appearance of a witness will virtually assure his protection from future prosecution, immunity is an ever-present factor in the government's consideration of what witnesses to call before antitrust grand juries. Even when subpoena, duces tecum are issued, the Division has difficulty preserving the privilege to prosecute. Witnesses, when identifying papers, frequently attempt to inject material sufficient to confer immunity upon their testimony. Claims of immunity are often made in connection with such seemingly innocuous statements as a witness' identifying himself as "Vice-president in charge of sales." Because of the vast importance immunity considerations have, the Antitrust Division has a detailed formal procedure that it uses in considering who is to

Consequently, HUAC does not believe that the statute gives them the right to compel a witness to testify. Rather, it somehow construes the act as merely giving the Committee the power to offer a witness immunity, while granting the witness the right to choose whether to accept immunity in exchange for testifying. HUAC has, on occasion, offered a witness the opportunity to make this exchange, but no witness has ever accepted.

There was one instance in which it appeared that a witness had agreed to testify before HUAC under the immunity act. Ellis Olim appeared before the Committee on December 15, 1955. He was asked if he was acquainted with certain individuals and if he had been a member of the Communist Party. He declined to answer, relying on the privilege. The Committee asked Olim if he would testify if the Committee granted him immunity; after conferring with counsel, he appeared to agree to so testify. *Hearings Before the House Committee on Un-American Activities*, 84th Cong., 1st Sess., pt. 2, at 3102-08 (1955). However, just before the Committee applied for the necessary court order, Olim, through his counsel, informed the Committee that he would not testify even if granted immunity. When he was subsequently called before HUAC to explain this apparent change of heart, he stated that he had misunderstood the question that the Committee had asked him, that he had not agreed to testify if granted immunity, and that he would not testify if immunity were granted to him. *Id.*, 84th Cong., 2d Sess., pt. 6, at 5151-56 (1956). The staff director of HUAC offered the following explanation for Olim's behavior:

I know what happened—the Communists got to him and wouldn't let him testify.

In any event, the Committee did not pursue its efforts to compel Olim to testify.


140. One trial attorney expressed his attitude toward these problems in the following manner:

You would be surprised at the [nonsense] we have to put up with from people who are aware of the statute.
be given immunity. Naturally, if the documentary evidence available is sufficient to get an indictment, no witness will be called. Primarily to induce caution, the trial attorney who decides to call witnesses is required to submit a memorandum to his section chief identifying witnesses, stating reasons for calling them, and predicting the likelihood of their being revealed as major violators. The section chief, though he generally approves most recommendations, may, however, refuse to allow a witness to be called—at least until the trial attorney is sure that he will need his testimony. Recommendations go, in all cases to the chief of section operations and the first assistant of the division; in some cases, to the Assistant Attorney General; and even, in rare cases, to the Deputy Attorney General or the Attorney General. Above the level of section chief, however, almost all recommendations are accepted. In the rare cases at the upper levels in which a decision is not approved, the trial attorney is usually required to explore other avenues of getting information before calling a witness.\footnote{141}

Generally the government, in deciding whether to grant immunity, tries to avoid shielding from prosecution those people who have primary responsibility for the antitrust violation.\footnote{142} Often, if it appears that a party to a conspiracy was pressured into becoming a member of it, he will be called as a witness, partly because, on a relative scale, he is felt to be less guilty than the other parties.\footnote{143} Similarly, where deterrence is a goal, the officers of a large corpora-

\footnote{141. This formal review procedure was instituted by Attorney General Kennedy. Former Attorneys General gave the trial attorneys a freer hand in relation to immunity.}

\footnote{142. Thus, in a case involving a price-fixing conspiracy in which the sales manager of a corporation was attending the price-fixing meetings but was reporting to and taking orders from a vice-president of the corporation, the sales manager would be given immunity. This illustrates how the decisions as to whom to subpoena as witnesses are, in part, a reflection of a broader Department policy. On the broadest scale, a Department policy of prosecuting individuals, as well as corporations, for antitrust violations will have the effect of constricting the use of immunity. The present administration has adopted a policy of frequently prosecuting individuals for antitrust violations. Also, see generally Kramer, \textit{Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy}, 48 Geo. L. Rev. 530 (1960).

\footnote{143. Such a person is also frequently called as a witness, because it is felt that he will testify expansively. In the \textit{National Electrical Contractors Association} case in Chattanooga, the trial attorney had evidence that out-of-town electrical contractors were being excluded from jobs in Chattanooga through coercion by the local electricians union, that one contractor got all the government jobs, and that all other jobs were apportioned among the other contractors. However, he needed testimony from an insider to complete his case. He heard of a situation in which all of the bids for the electrical work on a hospital were too high, so that the general contractor had negotiated a contract for the electrical work with a young man who had just taken over his father's electrical contracting business. The next day the young man, sounding quite disappointed, had informed the general contractor that he could not take the job. Subsequently, the young man had apparently become a member of the conspiracy, which was made up of electricians' union officials and electrical contractors. The trial attorney subpoenaed the young man as a witness, and he testified fully as to the internal working of the conspiracy.}
tion are more likely to be prosecuted than the officers of a small corporation. So, if a decision has to be made as to whether immunity should be given to an officer of a large or a small corporation, the officer of the small corporation will be called as a witness.

In granting immunity to potential defendants the department also looks to the likelihood that they will testify expansively. Expansiveness may be most realistically expected from an individual pressured into violating the law or a hold-out against or deviant from a price-fixing conspiracy. One case was initiated by the complaint of a distributor who had cut prices and subsequently had most of his supplies cut off. The only manufacturer in the product line still supplying the distributor was subpoenaed, and testified fully concerning meetings that had been held to organize the price-fix and pressure that had been put on those manufacturers who refused to go along.

Immunity does not necessarily open wellsprings of information, however. Recalcitrance is likely since a witness' immunity does not protect his company from criminal prosecution or suits for treble damages. Disclosure of criminal violations may result in severe financial losses to the corporation and, indirectly, to the witness. In antitrust investigations, the government often does not have the details of a conspiracy and hopes to learn them from immunized witnesses. One private attorney who specializes in antitrust cases analyzes the government's dissatisfaction with many witnesses as the result of its inability to get those witnesses to testify either to matters of guess, estimate, and conjecture, or to transactions involving only third parties.144

Despite these problems, the attorneys of the Antitrust Division are unanimous in their opinion that the immunity act is almost essential to the enforcement of the antitrust laws. They are also unanimous in their conclusion that the antitrust immunity act should not be amended to require a claim of privilege. Such a claim they feel, would make it even more difficult to get witnesses to testify freely.

The Federal Trade Commission

Because of its intimate relationship with the Antitrust Division and other sections of the Justice Department, the immunity program of the Federal Trade Commission, which operates under an automatic act,145 illustrates the necessity for intragovernmental liaison regarding immunity grants. For example, restrictive trade practices, dealt with by the FTC, are often violations of the Sherman Act. Since the FTC classifies all of its sanctions as remedial, there is no need for it to consider whom it should call as a witness (and, consequently, to whom it should give immunity) in terms of its own function. However, if immunity were granted indiscriminately, a large obstacle to the

144. Attorneys generally advise their clients to limit their answers before grand juries as much as they truthfully can. Since the government's trial attorney often needs testimony about a conspiracy to fill in details of which he has no direct knowledge, witnesses who restrict their testimony in that manner are of limited use to him.

work of the Department of Justice would be created. To a great extent, the elimination of conflicts relating to immunity has been successful.

The stimulus for an FTC case will come either from an outside complaint, or from within the agency as a result of its watchdog function. If preliminary indications indicate a possible criminal violation, the case will be cleared with Justice before further investigation. And if indications of criminal conduct, new parties, or new charges develop in the course of an investigation, reference is again made to Justice.

Since the FTC is covered by an automatic act, a witness must be testifying in response to a subpoena and while under oath before he can get immunity in FTC proceedings. Investigatory subpoenas are essential to about 25 percent of FTC investigations and, since they trigger a grant of immunity, a great deal of supervision is exercised over their use. The division chief in the home office must approve all investigative subpoenas that are issued; before granting approval he confers with the liaison office. Again, if Justice requests that a witness not be called, this request will be honored.

But despite all this inter-agency consultation, immunity is occasionally granted by the FTC to a person who would otherwise be the subject of a criminal prosecution. Although the number of cases in which this occurs is low, it is impossible to determine how low. Many of the cases prosecuted by Justice in the area of FTC concurrent jurisdiction are originally reported to the Justice Department by the FTC. In cases where a criminal violation is discovered by the FTC, but where wrongdoers have already received immunity through FTC proceedings, referral will not be made. Thus, the existence of a conflict over immunity in a particular case may be unknown to officials in the Department of Justice; it is not likely to be disclosed by FTC personnel.

There are those in the Commission who feel that the immunity provision of the Federal Trade Commission Act should be amended or repealed. The personnel charged with prosecuting cases generally like the immunity act in its present form; they feel that the liaison with Justice has eliminated the problems that the act might cause, and believe that information might be more difficult to obtain if the act were amended. A preference for repeal is based in a disinclination to have the FTC call putative defendants as witnesses. Proponents of amendment would require that the FTC statute be converted to a claims act, so that there would be less likelihood of an inadvertent grant of immunity which could act as a law enforcement barrier.

The Civil Aeronautics Board

The experience of the CAB indicates how the type of proceeding before an agency will influence its attitude toward granting and the witness' attitude toward requesting immunity. The CAB, which operates under a claim act,

146. An attorney in the Department of Justice stated that he had had, and was having, problems in various cases due to immunity derived from the FTC.

has three basic types of proceedings: aircraft accident investigations, section 609 hearings, and economic regulation cases.

Investigations are made of every civil aircraft accident that occurs in the United States. The pilots of the aircraft are usually called in these investigations, and from 1954 to 1958 claims of privilege by the pilots were fairly common. Such claims generally must be sustained; misfeasance in an accident situation is a misdemeanor, though very few criminal actions are brought. Since 1959, however, there have not been any claims of privilege in accident investigations. This change may have resulted from an increased belief among pilots that claiming the privilege had—in terms of the finding as to culpability—an effect substantially the same as an admission of guilt, while by testifying instead of claiming the privilege, a pilot has the chance to prove himself blameless.

The primary purpose of accident investigations is to determine the probable cause of an accident in order to prevent accidents from occurring for the same reasons in the future. In most cases in which there is a claim of privilege, it is possible for the investigator to determine the cause of the accident without compelling testimony. The CAB investigators apparently consider that preserving the opportunity to prosecute a derelict pilot is more important than discovering the cause of an accident. If the privilege is claimed in regard to testimony which seems necessary to discover the cause of an accident, the investigator will only compel the witness to answer, if it does not appear from the facts already gathered that the witness probably will be criminally prosecuted as a result of the accident. The investigators do not feel it is their function, though, to assist the Aviation Administrator in regulating licenses, and the fact that the compulsion of testimony would give a witness immunity from having his license suspended does not play a role in the investigator's considerations. An investigator thus does not confer with the Administrator before compelling testimony. However, the possibility of significant conflicts occurring between the investigators and the Administrator is minimal. In cases where the investigators do compel testimony, there probably would not be enough evidence available to the Administrator to successfully prosecute a license suspension case.

Equally rare are grants of immunity in section 609 hearings—trials de novo of cases in which a licensee is appealing the FAA's suspension or revocation of his license. In these hearings, the Administrator acts as the prosecutor; though he raises the question of compelling testimony in the first instance, the trial examiner has discretion to decide against granting immunity. Immunity questions arise only infrequently; in the Section 609 context each examiner probably deals with no more than one claim of privilege per year. When claims

149. Another explanation, offered by an accident investigator, is that prior to 1959 pilots were generally accompanied by counsel at these hearings, but since 1959 they have appeared with experts from the pilots association.
150. See note 84 supra and accompanying text.
of privilege are made, the trial examiners usually decline to compel testimony. This reluctance stems, in large part, from the probability that a criminal prosecution will be foreclosed by most grants of immunity. Thus only if the examiner feels that the witness is making an invalid claim of privilege, or if the answer to the question seems likely to be very important to the hearing and there is little possibility of a criminal prosecution, will he compel a witness to answer. In addition, if the hearing is in relation to a license suspension, and the witness claiming the privilege is the defendant, his testimony will never be compelled, for—a license suspension being considered "penal" by the CAB—such compulsion would result in the dismissal of the case.\footnote{151. At least one trial examiner has reached the conclusion that the immunity act is completely unnecessary to his function. While he feels that it does not operate to the detriment of the CAB, it may injure the operations of the FAA, and the lack of positive benefits leads him to the conclusion that it should be repealed.}

In economic regulation cases, questions relating to immunity arise infrequently. This is due in large part to the effect of the burden of proof, as demonstrated in the case of \textit{Aero Finance Corp}.\footnote{152. 17 C.A.B. 869 (1953).} Aero had filed applications for an exemption from a requirement of the Board and for a certificate of public convenience and necessity. At the hearing, Aero's primary witness, Averman, submitted to direct examination but claimed his privilege against certain questions on cross-examination. Consequently, the examiner struck his direct testimony and the exhibits which he had sponsored from the record. Then, because of the claimed privilege, Aero failed to meet its burden of proof, and the examiner recommended that the applications be denied. On appeal, the Board affirmed the denial of the application. Its conclusion almost eliminates the possibility that claims of privilege will be made in future economic regulation cases.\footnote{153. Nor does Averman's alleged privilege against self-incrimination relieve Aero in any respect of its obligation of proving its case. A privilege which excuses a person from testifying is not a substitute for proof; it cannot be utilized to satisfy a burden of proof. Assuming, \textit{arguendo} that proof of Aero's case could be made only by incriminating Averman, this is a circumstance which is unfortunate for Aero, but it does not relieve the carrier of its obligation of proving its case. \ldots [W]e cannot, however, conclude this phase of our discussion without observing that it is anomalous for a carrier to apply for affirmative relief and then refuse to prove its case unless the Board grants the witness by which it seeks to do so immunity from criminal prosecution.}

\textbf{The Securities and Exchange Commission}

Immunity is not always granted pursuant to statute. For varying reasons, governmental agencies have found it valuable to confer immunity informally, through a system of private negotiation not unlike plea bargaining. Thus the SEC, which operates under a claims act,\footnote{154. The SEC is endowed with immunity powers in connection with five statutes: 48 Stat. 86 (1933), 15 U.S.C. § 77v(c) (1958) (Securities Act); 48 Stat. 899 (1934), 15} has an agency practice of informally
granting some degree of immunity to witnesses in exchange for testimony. Frequently, in securities fraud cases, some of the insiders in the criminal conspiracy agree to testify as government witnesses after it is clear that the conspiracy has been discovered. People who unknowingly become involved in such conspiracies are usually not prosecuted when they agree to testify as government witnesses, and primary parties to the conspiracy who testify will often have their sentences reduced as a result of the SEC's recommendations to the probation officer.\textsuperscript{165}

This policy is in sharp contrast to the restrictive attitude the SEC takes toward formal claims of privilege and statutory grants of immunity. The Commission's policy is to grant immunity very rarely—about one formal grant is made per year. SEC investigators are directed not to grant immunity on their own discretion, but to first get approval from the Washington office. When an investigator wishes to compel testimony, though, his first reference of the matter to the home office will not be a formal request. Rather, there will be an informal discussion which usually will determine whether a grant of immunity will be formally authorized. Use of immunity powers will be authorized only when the testimony expected to result from compulsion is essential to the successful prosecution of a case considered by the SEC to be of great importance. Commission personnel realize that this restrictive attitude has probably resulted in the failure of some prosecutions that, with the aid of compelled testimony, might have been successful, but they feel that more liberal use of formal immunity powers would operate to the detriment of the Commission's overall criminal enforcement program.\textsuperscript{156} Their reluctance is increased by the realization that a grant of immunity in an SEC case is likely to excuse a person from a very serious felony. This restricts their use of immunity powers in relation to crimes within their jurisdiction; it also causes them to refer to the Justice Department where it is suspected that the immunity granted would run to other crimes as well. Despite the elaborate protective devices of prior conferences and a prepared statement that is to be read whenever a witness


The primary function of the SEC is the civil regulation of the nation's securities markets. Because of the effect of the burden of proof, claims of privilege are rarely made in hearings which the Commission conducts pursuant to this function. However, the SEC also has a criminal enforcement program, and problems relating to immunity do arise there. The Commission, which operates under a claim act, both conducts its own investigations in criminal cases, and participates in grand jury proceedings and criminal trials involving violations of the securities laws; immunity powers, however, have been exerted only in proceedings which the Commission conducts.

\textsuperscript{155} In the recent United Dye case, for instance, one of the co-conspirators, who served as the principal government witness, was tried separately and received a three-year suspended sentence. See Wall Street Journal, Jan. 23, 1963, p. 32, cols. 1-2.

\textsuperscript{156} One reason behind this belief, according to an SEC attorney, is that "if you grant immunity wholesale, everybody wants immunity."
The Federal Witness Immunity Acts

claims the privilege, SEC investigators have been held by the courts to have conferred immunity on witnesses in several situations in which the compulsion of testimony was inadvertent and undesired. These mistakes have often been made by inexperienced investigators employed because of the increases in the magnitude of the SEC's enforcement program. The other major reason for these inadvertent grants of immunity comes from the wording of the immunity provisions of the acts which the Commission administers and the courts' interpretation of those provisions. The acts provide for immunity in relation to matters concerning which the witness "is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence"; there is no requirement concerning either a subpoena or the oath. Consequently, the courts have held that immunity has accrued in some very informal situations.

The Department of Justice: Internal Security Division

Informal grants of immunity are also important in the Internal Security program. Most prosecutions in this area are made on the basis of the testimony

157. When a witness makes a claim of privilege in response to a question, SEC investigators are directed to read the following statement into the record:

I am not presently authorized by the Commission to compel you to give evidence as to which you claim privilege against self-incrimination and I have no such intention. Any questions that I might hereafter ask you will be with the understanding that, if you claim privilege, you need merely state that you refuse to answer on the ground that your answer may tend to incriminate you or subject you to penalty or forfeiture. In other words, if you answer any question, you are doing so voluntarily. Do you understand that?

SEC INVESTIGATORS HANDBOOK. Compare Basic Manual for Enforcement Investigators of the Office of Price Administration § 820 (1944):

Investigators have no authority to confer immunity upon witnesses. Nor should they act in such a manner that their conduct may be construed by the witness as having compelled him to testify, or to produce, or as a promise of immunity. In order to avoid any chance of conferring immunity, the investigators shall adhere strictly to the procedure contained in Basic Enforcement Memorandum No. 4 . . .

If a claim of privilege is made, . . . the person asking the question or requesting the production of documents or presenting the inspection requirement shall proceed no further in the matter and take no action to compel compliance with the subpoena or other requirement unless and until the Regional Enforcement Executive . . . determines that the need for obtaining information in this manner outweighs the risk or certainty of conferring immunity upon the witness.

158. See statutes cited in note 154 supra.

159. See, e.g., the case described in note 113 supra.

Yet despite the problems the SEC has had with inadvertent grants of immunity and the existence of alternative inducements with which to attain self-incriminating testimony, personnel in the Commission find the immunity provision to be useful. One beneficial effect, they say, is that people claim the privilege less frequently because of the presence of the immunity act. Another is that the immunity powers are available for those few cases in which the success of an important prosecution hangs upon their use.
of defectors from espionage rings. Depending upon the degree of "voluntary-
ness" with which a defector comes forth to testify, he will either not be prose-
cuted or will be prosecuted for a lesser crime. In fact, the Internal Security
Division has used its immunity powers in only three cases—*Ullmann*,^160^ *Bart*,^161^ and *United States v. Fitzgerald*.^162^ Apart from the use of informal
grants, the spare utilization of formal immunity is attributable to the infrequency
with which prosecutions of internal security cases occur and the usual status
of persons who might be granted immunity as potential defendants.

The procedure used in considering immunity questions is similar to that in
the Antitrust Division. But, since the immunity act under which the Internal
Security Division operates requires his approval,*^163^ the Attorney General has
personally considered the use of immunity in all three cases. And, due to the
infrequency with which Internal Security deals with immunity and the con-
troversial nature of the immunity powers as applied to its work, this consider-
ation has been substantial.

The Internal Security Division's immunity policy illustrates another impor-
tant criterion weighed in the use of immunity powers: whether the witness has
information crucial to the case. In *Ullmann*,^164^ for example, a grand jury was
investigating an alleged wartime espionage conspiracy. *Ullmann* was called as
a witness, and he refused to testify on grounds of self-incrimination. Upon
hearing the testimony of other witnesses, the attorneys handling the case con-
cluded that *Ullmann* had more knowledge about the alleged conspiracy than
did any of the other witnesses. Additional testimony was needed to prove the
case, so a decision was made to compel *Ullmann* to testify.

But compelling testimony may not necessarily provide the facts the govern-
ment needed. Thus, in *Ullmann*, the attempted extraction of information was,
in large part, unsuccessful. *Ullmann* continued his refusal to testify and was
convicted of contempt of court. After his conviction was affirmed by the Su-
preme Court, he went before the grand jury to purge himself of the con-
tempt.^[165^] Reportedly, the grand jury was dissatisfied with his answers, and
requested that the court continue to hold him in contempt. The district judge
refused to do this; he held that *Ullmann* had purged himself, and stated that
if the grand jury felt he had committed perjury, they should indict him for
that crime.^[166^]

In the other two cases in which the Division used its immunity powers, it
has had even less success—*Fitzgerald* chose to go to prison for contempt, and

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(1956).
164. The *Ullmann* case is discussed, in another context, in notes 46-51 *supra* and accom-
panying text.
166. *Id.*, June 2, 1956, p. 8, col. 2.
the Bart case is still pending in the Division after the Circuit Court's reversal of Bart's conviction for contempt. Despite this lack of success to date, the attorneys in the Division would oppose repeal of the immunity act. They feel that if it became useful in just one case, it would prove its value. They also find the present form of the act acceptable. They do not believe that the procedural standards established by Bart will prove very burdensome, and they support the requirement of a court order, feeling that it operates to protect the interests of the witness and that, unlike informal grants of immunity, it makes visible their decisions to compel testimony.

The Department of Justice: Criminal Division (Narcotics)

Pinpointing valuable information is also a characteristic of the Criminal Division's use of immunity powers in narcotics cases. The Justice Department's primary aim in narcotics prosecutions is to get at the major source of supply. Thus, a grant of immunity will be authorized in a case in which the witness is a link in a narcotics supply chain, but a grant of immunity will not be authorized in a case in which both the witness and the defendant are of relative insignificance. The administrative structure in relation to narcotics immunity resembles that in other Divisions of the Department. Immunity powers have been used in about twelve cases; approximately four requests for authorization to grant immunity have been denied. In six cases in which immunity was authorized, the witness has maintained his refusal to testify and has been sentenced for contempt of court; in the other cases, the

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167. Apart from the substantive standard, described in notes 131-34 supra and accompanying text, three formal standards were set forth by the court: the United States attorney must file a statement alleging that, in his opinion, the testimony of the witness is necessary to the public interest, and that the Attorney General concurs in this judgment; the witness must be made a party to the proceeding and be given an opportunity to contest the sufficiency of the government's case; and the documents presented by the government must be sworn statements. 304 F.2d at 635, 637.


169. In one case, the Division believed that a man convicted of smuggling marijuana into the country from Mexico knew about the inner workings of the narcotics conspiracy of which he had been a member. He was given immunity, and his compelled testimony implicated a man believed to be the chief of that conspiracy.

170. When a government attorney, in the midst of prosecuting a narcotics case, had his key witness suddenly refuse to testify, he requested that he be authorized to grant immunity to the witness. Both the defendant in the case and the witness were thought to be relatively unimportant underworld figures. Authorization was refused by the Division, based on the belief that a grant of immunity would not be in the public interest in such a case.

compelled testimony, though not startling, has been useful to the Division.

The most interesting facet of the Division's use of immunity in narcotics cases is that the witness compelled to testify is often already in prison for narcotics offenses and is asked questions about the crime for which he was convicted. Hence, while in all the other agencies discussed immunity powers have been used to induce the witness to testify by offering him immunity from prosecution, in these narcotics cases the possibility of future conviction is slight, though the testimony offered may invoke crimes for which the witness has not yet been convicted. But use of immunity powers in these instances may be viewed as an effort to coerce witnesses, through the threat of contempt prosecutions, to testify about crimes for which they are already being punished. Often the witness is afraid to testify. Thus, one witness refused on the following grounds:

Well, I am doing time in the penitentiary. I fear for my life. I fear for the life of my wife, my step-children, and my family. I can't do something like that [testify]. I want to live, too.\footnote{172}

Though some members of the Supreme Court have expressed doubts as to the validity of using the immunity act in this manner, arguing that it violates both the double jeopardy clause and the spirit of "fundamental fairness" guaranteed by the Constitution,\footnote{173} the Court has sustained convictions for contempt of court when witnesses have refused to testify in these cases. And members of the Division feel there are good reasons for continuing to use the immunity acts in this manner, since it allows them to obtain useful information without granting meaningful immunity.

\footnote{172} Piemonte v. United States, supra note 171, at 559. The high percentage of cases—6 out of 12—in which the witnesses have chosen to go to jail rather than testify would seem to indicate that fear of private retribution is often a dominant factor in cases in this area.

\footnote{173} In my opinion, the Government has subjected the petitioner to unjustifiable harassment. The petitioner has been convicted for his admittedly illegal conduct and is presently paying his debt to society for that conduct. However, not being satisfied with this punishment, the Government sought to extract from the petitioner, under the threat of a contempt conviction, testimony which it could not have compelled at the original trial in 1958, and which it knows might endanger petitioner's life and the lives of his loved ones. In my view, the Government's attempt to compel the petitioner to testify about conduct for which he has already been punished, and the District Court's imposition of an additional term in the penitentiary for petitioner's refusal to testify about such conduct represents the type of harassment which violates the spirit of the Double Jeopardy Clause of the Fifth Amendment. ... I think it can fairly be said that the treatment which the petitioner has received from the Government and the District Court falls far short of that fundamental fairness which the Constitution guarantees and to which even the basest prisoner in the penitentiary is entitled.

\textit{Id.} at 564 (Warren, C.J., dissenting) (emphasis added); Reina v. United States, supra note 171, at 515-16 (Black, J., dissenting).
APPENDIX A: FEDERAL WITNESS IMMUNITY ACTS

Automatic acts


Claim acts—subpoena and oath not required


Claim acts—subpoena and oath required


Claim acts—court order required

Miscellaneous immunity acts
2. 18 U.S.C. § 2424(b) (1958) (White Slave Trade Act; immunity limited to federal courts).

APPENDIX B: OUTLINE OF INTERVIEW

I. Introductory
   A. Type of immunity act.
   B. General function of the agency.
   C. Function of various proceedings in which immunity might play a part.
   D. Organization of those proceedings, and who is involved in them.

II. Consideration of Immunity
   A. Who generally is involved in making such a decision, and how many “appeal” levels are there within the agency that considers such decisions.
   B. At what stage of the proceedings is immunity considered—before calling the witness, after refusal to waive immunity, after claim of privilege.
      1. Is the immunity decision considered per se.
      2. Are there formal agency instructions relating to immunity.
   C. What criteria are used in making the decision.
      1. Purpose of agency and of the specific proceeding.
      2. Nature of the information expected and the uses to which it may be put.
      3. The identity of the witness.
      4. The nature of the offenses for which immunity may be granted.
      5. Consultation with other government agencies.
   D. How does the decision to grant immunity affect the posture of the proceeding that follows the decision.

III. General posture of immunity
   A. Is the statute useful to the agency; in what ways?
   B. Has the statute ever proved detrimental to the agency?
   C. Would you like to see the statute modified in any way?
   D. What would be the effect of repealing the statute?