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WITNESS IMMUNITY STATUTES IN ILLINOIS — TIME FOR A CHANGE

INTRODUCTION

The ability to determine, with some degree of certainty, the rules by which an individual must govern his conduct is deemed to be a fundamental right. Such certainty is guaranteed by due process requirements¹ and the reason is obvious. Unless a person can determine the duties imposed by a given law, he cannot proceed upon any course of conduct with assurance of the legal ramifications of such conduct. Applying this reasoning to the history of the myriad of federal witness immunity statutes — and unfortunately, present day practice in most of the states, including Illinois — one wonders why they have not been subject to numerous due process attacks. The reason is that much of the uncertainty as to the requirements of any given immunity provision has resulted from prior judicial treatment of other similar provisions. Judicial construction has been conflicting and often does not reflect the apparent meaning of the statute being construed.² The confusion is heightened by the fact that there are numerous variations in language among immunity provisions which were apparently intended to accomplish the same effect — all within the same jurisdiction.³

STATUTORY IMMUNITY GENERALLY

The fifth amendment guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . .” However, it was early recognized that this right was not to be applied literally,⁴ and thus, whenever the danger at which this protection is directed is removed — that of being forced to convict oneself out of his own mouth — the bar against compul-

¹ Statutes which are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application, have uniformly been declared unconstitutional as denying due process. . . . For a statute to be held valid the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. *People ex rel. Duffy v. Hurley*, 402 Ill. 562, 567, 85 N.E.2d 26, 28-9 (1949).

² As where the requirement of claim of privilege is implied by the court. See note 65 *infra* and accompanying text.

³ For variations in Illinois, see note 16 *infra*.

⁴ In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Supreme Court ruled on the validity of a witness immunity statute for the first time. The Court struck down a statute which barred only the use of compelled testimony in a subsequent criminal proceeding against the witness. In dictum, however, the Court recognized that the government could by statutory authority compel self-incriminating testimony, if the statute barred prosecution of the witness for any matter about which he may have testified. Such a statute was later upheld in *Brown v. Walker*, 161 U.S. 591 (1896).

sion is also removed.⁵ Witness immunity statutes have as their purpose the removal of this danger, so that the government may compel testimony over claims of the privilege against self-incrimination. The constitutional test of the validity of such a statute is that it be coextensive with the scope of the privilege.⁶ Anything less and the statute will fall as unconstitutional, or in the few instances where it is saved, will fall short of its purpose of compelling testimony.⁷

In 1972, the supposed requirement of transactional immunity — that an individual be given complete protection from prosecution for a matter about which he is compelled to testify or produce evidence⁸ — yielded to a use and derivative use standard which affords much narrower protection.⁹ In *Kastigar v. United States*,¹⁰ the Supreme Court held that it was constitutionally permissible for a witness to be convicted for a matter about which he has been compelled to testify, the only limitation being that the Government may not use the compelled evidence or evidence derived therefrom for his prosecution.¹¹

The wisdom of this change of protection — wrought by the 1970 Federal Act¹² which *Kastigar* upheld — is outside the scope of this article.¹³ Rather, the improvement in federal immunity

⁵ In *Hale v. Henkel*, 201 U.S. 43 (1906), the Court, in upholding the validity of an immunity statute, stated:

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, — in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.

Id. at 67. Thus, also, where prosecution is barred by the statute of limitations, pardon, or double jeopardy, the privilege does not apply. See MCCORMICK, EVIDENCE § 121 (2d ed. 1972).

⁶ That the statute leave "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

⁷ See note 91 *infra* and accompanying text.

⁸ *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See note 4 *supra*.

⁹ See Note, *Kastigar v. United States: Compulsory Witness Immunity and the Fifth Amendment*, 6 JOHN MAR. J. PRAC. & PROC. 120 (1972), for a discussion as to the change in requirements for a valid immunity statute and the background that preceded that change.

¹⁰ 406 U.S. 441 (1972).

¹¹ This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Id. at 460.

The burden is substantial and it would be wise for the government to certify their evidence against a witness before compelling him to testify. *Goldberg v. United States*, 472 F.2d 513 (2d Cir. 1973). See Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 YALE L.J. 171 (1972), cited in the latter case, for a recommended procedure.

¹² The Organized Crime Control Act, Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 STAT. 926, added Part V (§§ 6001-6005), Immunity of Witnesses, to Title 18, United States Code [hereinafter cited as the Federal Act].

¹³ Criticism has focused on the lesser protection afforded the witness and the opportunity for government abuse. *E.g.*, *Kastigar v. United States*,

law which the Federal Act effected will serve as the backdrop for an exploration of the present ambiguous state of Illinois immunity law.

THE FEDERAL ACT AND ITS BACKGROUND

The Federal Act wiped away more than fifty separate immunity statutes under which various units of the federal government had previously operated.¹⁴ The superficial benefit of a unified single system of immunity is obvious. When one considers the utter lack of conformity among federal statutes prior to this Act and still in effect in most states, the improvement is better appreciated. Some statutes were *self-executing* (no court order required); others were not. Some were *automatic* (the witness need not first claim his privilege); some (the *claim acts*) were not. In some oath and/or subpoena were requisites to immunity; in others, one or the other was not. Further, there were requirements as to the type of proceeding and subject matter of the investigation under each provision. The confusion was accentuated by incidents of vague language in the statutes as to whether oath, subpoena, claim of privilege, or particular proceedings were required, and the resultant conflicting judicial holdings on each of these points.

Witnesses confronted by these statutes had to proceed with the greatest caution, the burden in most instances falling on the witness — not the Government — to insure strict compliance with the statute. Failure to do so resulted in no protection for testimony given, while compliance often required the witness to subject himself to contempt proceedings. Occasionally, a witness who had followed all procedures set out in the immunity provision found himself without immunity because the court implied additional requirements of which the provision itself made no mention. Particularly dangerous was relying on assurances of immunity or succumbing to threats of punishment for contempt where a government attorney, armed with some immunity provision, confronted the unwilling witness. The immunity statute can be a potent prosecutorial weapon, capable

406 U.S. 441, 462 (1972) (dissenting opinion): Lewis, *The Practical Defender: On Use Immunity*, FOR THE DEFENSE, Nov. 1972, Vol. 7, No. 4; and Note cited in note 9 *supra*.

Similarly, the thrust of the attack on immunity statutes prior to *Kastigar* had been based on the deprivation against self-incrimination. Justice Douglas' view is that it is "beyond the power of Congress to *compel* anyone to confess his crimes." *Ullman v. United States*, 350 U.S. 442, 445 (1956) (dissenting opinion).

¹⁴ For a detailed breakdown of federal immunity provisions, as outlined immediately below, and a comprehensive discussion of federal immunity law prior to the Federal Act, see Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

of abuse, where its requirements are not clear. Against this background — which persists under Illinois law — the Federal Act, while not perfect, is notable for its clarity of procedural requirements which the witness must meet before immunity will attach.¹⁵

IMMUNITY IN ILLINOIS

Illinois has no such clear, uniform immunity procedure¹⁶ — Illinois law being comparable to that which existed under prior federal law with all its attendant uncertainty. There has been little litigation concerning immunity statutes in Illinois. However, the recent case of *People v. Crawford Distributing Co.*¹⁷ emphasizes many of the problems of a haphazard system of vague immunity provisions and is indicative of a narrow judicial view toward grants of immunity.

In *Crawford* the Illinois Supreme Court had before it the

¹⁵ § 6002, Immunity Generally, provides:

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

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

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .

Thus, claim of privilege and an order thereafter are the requisites to immunity. Subpoena and oath are irrelevant.

¹⁶ There are no less than 19 separate immunity provisions in Illinois. All but one, ILL. REV. STAT. ch. 38, § 60-7.7 (1971), which will be analyzed in detail *infra*, grant transactional immunity. The others are listed below according to their *express* requirements.

The following provisions require oath and subpoena: ILL. REV. STAT. ch. 5, §158 (Marketing Fresh Fruits and Vegetables); ch. 43, §163d (Liquor Control Act); ch. 67½, §173 (State Housing Act); ch. 67½, §278 (Neighborhood Redevelopment Corporation Act); ch. 111½, §65 (Illinois Commerce Commission); ch. 120, §9-915 (Income Tax Act); ch. 120, §448 (Retailers' Occupation Tax Act); ch. 120, §453.10a (Cigarette Tax Act); ch. 120, §453.49 (Cigarette Use Tax Act); ch. 120, §467.9 (Messages Tax Act); ch. 120, §467.24 (Gas Revenue Tax Act); ch. 120, §476 (Public Utilities Revenue Act).

The following requires oath, subpoena, and claim of privilege: ch. 48, §501 (Unemployment Compensation Act).

The following requires claim of privilege and court order: ch. 63, §315 (Legislative Investigating Commission Act).

The following requires claim of privilege: ch. 73, §1040 (Insurance Code).

The following requires court order: ch. 38, §106 (Grand Jury investigations and trial court).

The following requires oath: ch. 100½, §4 (Public Nuisance — answering interrogatories).

The following requires that testimony or production of documents be "compelled": ch. 73, §765 (Insurance Code).

¹⁷ 53 Ill. 2d 332, 291 N.E.2d 648 (1973).

immunity provision of the Illinois Antitrust Act,¹⁸ which in relevant part provides:

In any investigation brought by the Attorney General pursuant to this Act, no individual shall be excused from attending, testifying or producing documentary material, objects or tangible things in obedience to a subpoena or under order of the court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty. No individual shall be criminally prosecuted or subjected to any criminal penalty under this Act for or on account of any testimony given by him in any investigation brought by the Attorney General pursuant to this Act; provided no individual so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.¹⁹

The Act further gives the Attorney General authority prior to the commencement of any judicial action, to subpoena witnesses and documents.²⁰ If a witness refuses to obey the subpoena or give testimony pursuant thereto, the Attorney General may petition the court for an order requiring compliance under threat of contempt proceedings.²¹

Involved in *Crawford* was a subpoena duces tecum which had been directed to seven corporations, ordering the production of corporate documents in an investigation under the Antitrust Act. The subpoenas stated that neither personal appearance of corporate officers nor their testimony was required. The officers complied, and some made unsworn statements in answer to questions put by representatives of the Attorney General. Later, the corporations and six of their officers were indicted for antitrust violations. The trial court, interpreting the statute as granting

¹⁸ ILL. REV. STAT. ch. 38, §§ 60-1 *et seq.* (1971) [hereinafter cited as the Antitrust Act].

¹⁹ *Id.* § 60-7.7.

²⁰ *Id.* § 60-7.2, Investigation by Attorney General, provides:

Whenever it appears to the Attorney General that any person has engaged in, is engaging in, or is about to engage in any act or practice prohibited by this Act, or that any person has assisted or participated in any agreement or combination of the nature described herein, he may, in his discretion, conduct an investigation as he deems necessary in connection with the matter and has the authority prior to the commencement of any civil or criminal action as provided for in the Act to subpoena witnesses, compel their attendance, examine them under oath, or require the production of any books, documents, records, writings or tangible things hereafter referred to as 'documentary material' which the Attorney General deems relevant or material to his investigation

²¹ *Id.* § 60-7.6, Failure or Refusal to Obey Subpoena, provides:

In the event a witness served with a subpoena by the Attorney General under this Act fails or refuses to obey same or produce documentary material as provided herein, or to give testimony, relevant or material, to the investigation being conducted, the Attorney General may petition the Circuit Court of Sangamon or Cook County, or the county wherein the witness resides for an order requiring said witness to attend and testify or produce the documentary material demanded; thereafter, any failure or refusal on the part of the witness to obey such order of court may be punishable by the court as a contempt thereof.

transactional immunity, dismissed the indictments as to the officers based upon a claim of immunity.²²

On direct appeal, the Illinois Supreme Court reversed the trial court, declaring that the Act grants only use and derivative use immunity, and confers no immunity on witnesses who produce corporate documents *or* who make unsworn statements to Attorney General's representatives aside from judicial proceedings. The court did not rest its decision on any specific grounds; it is apparent that the court was in no way restricted in its holding by the facts of the case. Nevertheless, *Crawford* indicates a judicial policy to restrict as much as is constitutionally possible the extent of immunity granted in exchange for self-incriminating testimony,²³ and at the same time appears to place every possible obstacle in the way of a person's obtaining any protection. As such, it is indicative of the uncertainty a witness faces when confronted with an unclear immunity provision.

The *Crawford* opinion is also troublesome because of its ambiguity as to exactly what is required of a witness in order for immunity to attach and its failure to relate the language of the statute under consideration to the facts of the case — instead relying on federal cases which dealt with substantially different statutes. Typically, the problem is complicated by the fact that the immunity provision of the Antitrust Act differs from the immunity provisions of all other Illinois statutes. Reading the opinion and statute together it would seem that:

1. In no case does the production of documents entitle an individual to immunity.
2. Strict compliance with the statute is necessary for immunity to attach, and the burden is on the witness to inquire into and insist upon the regularity of the proceedings.
3. A witness must assert his privilege against self-incrimination after being subpoenaed, and then be ordered by the court to testify.

As was the case under prior federal law, other ambiguities

²² The trial court also held the statute invalid as violative of separation of powers in that it vested in the executive branch the power to issue subpoenas aside from judicial proceedings. The Illinois Supreme Court found no merit in this point. See Annot., 27 A.L.R.2d 1208 (1953).

²³ The Antitrust Act states that "[n]o individual shall be criminally prosecuted . . . on account of any testimony given by him . . ." while other Illinois immunity provisions state "on account of any transaction . . . concerning which he may testify." In view of the difference in language, the court was on firm ground in its interpretation of the antitrust provision as granting narrower protection.

However, it is noteworthy that the Illinois provision was enacted prior to the Federal Act and *Kastigar*, and comments subsequent to its passage indicate that it could be interpreted as granting transactional immunity. ILL. REV. STAT. ch. 38, § 60-7.7 (Smith-Hurd Annot. ed. 1973).

are inherent in the Act itself. Though not touched upon by the *Crawford* opinion, they are vitally important to the witness in view of the court's cautious attitude toward granting immunity. These problems are:

1. Whether only questions relevant to the antitrust investigation and responsive answers thereto by the witness invoke the immunity provided.
2. At what point in the procedures outlined in the Act may the witness step forward to protect himself.
3. Whether immunity extends only to violations of the Antitrust Act.²⁴

Documentary Evidence

That the defendants in *Crawford* could not sustain their claim of immunity on the basis of production of corporate documents is not a very startling proposition.²⁵ It is traditional doctrine that production of such documents will not activate an immunity provision.²⁶ This is so even in the face of broad statutory language (not present in this case) providing that no person shall be prosecuted on account of any documentary evidence he has been compelled to produce. Such holdings proceed from the premise that immunity statutes are to be construed, so far as their words permit, as coterminous with what otherwise would have been the privilege of the person concerned.²⁷

The privilege against self-incrimination extends only to the compelled production of private papers or papers in one's possession in a purely personal capacity.²⁸ Corporations have no such privilege.²⁹ Nor does a corporate officer as to corporate documents in his custody, even though he has made the incrimi-

²⁴ It is to be emphasized that most of these problems are equally applicable to other Illinois immunity provisions and will be discussed in that context below. The discussion centers on *Crawford* and the Antitrust Act since it is the only recent Illinois case dealing with the problems, and the case appears to indicate a narrower view of immunity than prior cases — Illinois or federal.

²⁵ One of the defendants in *Crawford* claimed immunity on the basis that he had presented personal records with the corporate records required by subpoena. The court dismissed the argument since the personal records were neither identified as such nor called for, and therefore were to be considered as corporate records. 53 Ill. 2d at 343, 291 N.E.2d at 654. To the same effect, see *United States v. Consumers Ice Co.*, 84 F. Supp. 46 (W.D. La. 1949).

²⁶ *Wilson v. United States*, 221 U.S. 361 (1911).

²⁷ *Heike v. United States*, 227 U.S. 131, 142 (1913). Such would seem to be a fair description of the attitude of the *Crawford* court with regard to all aspects of immunity. However, the United States Supreme Court refused to extend this reasoning to other aspects of immunity statutes in *United States v. Monia*, 317 U.S. 424 (1943). See note 62 *infra* and accompanying text.

²⁸ *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911); *cf. Boyd v. United States*, 116 U.S. 616 (1886).

²⁹ *Hale v. Henkel*, 201 U.S. 43 (1906).

nating entries; the justification being that with respect to corporate matters, an officer cannot be said to hold the records in any personal capacity.³⁰

This rather elementary point is examined here for two reasons. First, the only Illinois decision on the point took a very broad view of immunity for the production of nonprivileged material. In *People v. Finkelstein*³¹ the Illinois Appellate Court had before it a statute which provided immunity "for, or on account of, any transaction made or thing concerning which he may testify or produce evidence, documentary or otherwise. . . ."³² The court first stated that immunity statutes are to be liberally construed in favor of the witness,³³ and then concluded that the statute was "so plain and unambiguous that it requires no judicial interpretation," — defendants were entitled to immunity.³⁴

This case appears to be one of a kind. In view of the great body of better reasoned authority contra,³⁵ *Finkelstein* will probably never be followed.

The second reason for exploring the area of nonprivileged documents is that *Crawford* cannot, strictly speaking, be said to have overruled *Finkelstein*. The Antitrust Act by its terms extends immunity only to testimony and confers no immunity for the production of documentary evidence.³⁶ In this regard it is different from all other Illinois statutes and immunity provisions generally, including the Federal Act.

Such a change in the government's power to reach incriminating evidence through a grant of immunity is at once an aid and a hindrance, and illustrates the competing factors involved in providing for statutory immunity. On the one hand, the power to investigate is obviously restricted. But on the other, this restriction prevents any unexpected grants of immunity to the producing witness. This last consideration has less force where a use and derivative use provision is involved and seems somewhat inconsistent in that all other Illinois provisions grant

³⁰ *Wilson v. United States*, 221 U.S. 361 (1911). The principle also applies to any records required to be kept by law. *Id.* It has also been extended to impersonal, unincorporated organizations, such as labor unions. *United States v. White*, 322 U.S. 694 (1944). But not to partnerships. *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N.D. Cal. 1948).

³¹ 299 Ill. App. 363, 20 N.E.2d 290 (1939), *rev'd on other grounds*, 372 Ill. 186, 23 N.E.2d 34 (1939).

³² ILL. REV. STAT. ch. 120, § 448 (1971).

³³ This statement appears often in the cases but is seldom applied.

³⁴ 299 Ill. App. at 381, 20 N.E.2d at 297.

³⁵ *E.g.*, see notes 26-30 *supra*.

³⁶ See Antitrust Act. § 60-7.7, note 19 *supra* and accompanying text. Further, the Attorney General has no authority to subpoena privileged documents. *Id.* § 60-7.2.

transactional immunity, while giving the government power to subpoena privileged documentary evidence.³⁷

Procedural Formalities — Witness Beware!

The immunity provision of the Antitrust Act provides that “[n]o individual shall be criminally prosecuted . . . on account of any testimony given by him in any investigation . . . pursuant to this Act. . . .”³⁸ Another provision of the Act requires that:

The examination of all witnesses under this section shall be conducted by the Attorney General or by an assistant attorney general designated by him before an officer authorized to administer oaths in this State. The testimony . . . shall be transcribed.³⁹

Thus, reading these two provisions together, it could be concluded that testimony under oath is a prerequisite to immunity. On the other hand, the immunity provision itself (§ 60-7.7) does not explicitly require oath or other procedural formalities, and thus could easily mislead the witness. In effect, the question is whether the procedural formalities required are restrictions on the government or the witness. Therefore, it would be as reasonable (and fairer to the witness) to place the burden of enforcing formalities not expressed in the immunity provision itself on the government. Such was the result of a federal case under similar circumstances,⁴⁰ which prompted Congress in the same year to amend federal provisions to expressly require that no witness could qualify for immunity absent oath and subpoena.⁴¹ The *Crawford* opinion fails to detail the court’s reasoning in arriving at its conclusion on this matter, nor does it analyze provisions of the Antitrust Act. Instead, the court relies on three federal decisions, in none of which was the issue of sworn testimony presented, and in each of which the relevant statute expressly required oath and subpoena.⁴²

Implicit in *Crawford’s* holding is the requirement that the burden of insuring that all procedural requirements are met before the witness answers any questions falls solely on the witness and not the government. This is so even though the requirements may be scattered throughout the act which contains the immunity provision, and therefore may not seem to be requisites to immunity, and though the government is in a much better position

³⁷ One question at this point whether the provision was intended to grant only use and derivative use immunity.

³⁸ § 60-7.7, set out in full at note 19 *supra* (emphasis added).

³⁹ § 60-7.4.

⁴⁰ *United States v. Armour & Co.*, 142 F. 808 (N.D. Ill. 1902).

⁴¹ Act of Feb. 25, 1903, ch. 3920, 34 Stat. 798.

⁴² *United States v. Monia*, 317 U.S. 424 (1943); see note 62 *infra* and accompanying text for a discussion of this case. *Sherwin v. United States*, 268 U.S. 369 (1924); see note 48 *infra* and accompanying text. *United States v. Welden*, 377 U.S. 95 (1964); see note 46 *infra* and accompanying text.

to know and implement these requirements. The theory which underlies the insistence upon strict compliance with all statutory formalities is that absent such compliance, there is simply no jurisdiction to confer immunity. Thus, the question which the court must decide becomes not upon whom the burden of meeting these formalities rests, but what formalities are conditions precedent to immunity.

The cautious witness, therefore, must survey the act as a whole, and not rely on the immunity provision within that act. In addition to subpoena and oath, it would seem that under the Antitrust Act the witness should insist that his testimony be officially transcribed.⁴³ Of course, even if not required, a record of his testimony in some form will be necessary for the witness to prevail when he later asserts his claim of immunity. Further, all immunity provisions contemplate some specific type of proceeding, such as an administrative hearing or a court or grand jury proceeding. Under the Antitrust Act, it is necessary that the official conducting the examination be the Attorney General or an assistant attorney general designated by him.⁴⁴ Thus, the witness may even have to be certain of the authority of his investigators.

The consequences of failing to insist upon strict compliance with formalities, though such are not clearly specified in the immunity provision itself, are reflected in the federal cases also.⁴⁵ In *United States v. Welden*⁴⁶ defendants testified before a congressional committee in obedience to subpoena and were later indicated for matters concerning their testimony. The Court held that the immunity provision of the Sherman Antitrust Act,⁴⁷ which granted immunity without court order for testimony given in any proceeding under the Act, was inapplicable since that act contemplated only *judicial proceedings*.

In *Sherwin v. United States*⁴⁸ the defendants furnished information to an agent of the Federal Trade Commission. The Commission had previously written letters requesting information and upon the defendants' refusal to comply, the agent insisted that failure to furnish the information would subject the defendants to criminal penalties under the immunity provisions of the Federal Trade Commission Act.⁴⁹ Defendants furnished

⁴³ See note 39 *supra* and accompanying text.

⁴⁴ *Id.*

⁴⁵ See also *United States v. Brennan*, 214 F.2d 268 (D.C. Cir. 1954) and *Phelps v. United States*, 160 F.2d 858 (8th Cir. 1947), *cert. denied*, 334 U.S. 860 (1948).

⁴⁶ 377 U.S. 95 (1964).

⁴⁷ Act of Feb. 25, 1903, 32 Stat. 854, 904.

⁴⁸ 268 U.S. 369 (1925).

⁴⁹ Act of Sept. 26, 1914, ch. 311, § 10, 38 Stat. 717, 723.

the requested information, and the court held that they were not entitled to immunity in that they had not testified before the Commission itself in obedience to subpoena, as provided by the Act.

Occasionally, the witness has been afforded a measure of protection where government attorneys have, by their affirmative conduct, misled the witness.⁵⁰ In *Cannan v. United States*,⁵¹ on facts almost identical to those of *Sherwin* set out above,⁵² the court disallowed defendant's claim of immunity (citing *Sherwin*), but excluded the evidence which formed the basis of defendant's immunity plea. The court stated:

The documents furnished under these circumstances were in the nature of confessions, and were relied on by the government to prove defendant's guilt. The question whether these documentary confessions were voluntary is not influenced by the immunity provision of the statute, but is to be determined by the ordinary rule of evidence applicable to confessions in criminal cases. The threat was made by an official body that had power and authority to institute a prosecution.

No confession induced by official threat of prosecution [for contempt] is voluntary.⁵³

Further, in Illinois, if the conduct of the prosecutor (state's attorney⁵⁴) can be construed as a promise of immunity, the courts will enforce that promise.⁵⁵ This is true notwithstanding the rule that authority to remove the privilege in exchange for a grant of immunity lies solely in legislative enactment.⁵⁶ The enforceability of the promise is grounded on a policy that it would not be in the state's best interest to ignore the promise where the witness proceeded to give evidence in reliance upon

⁵⁰ Such cases are difficult to find in the context of immunity statutes. Further, establishing a coerced confession so as to invoke the exclusionary rule is, of course, practically more difficult than sustaining a proper immunity plea under statute; and the protection afforded by the exclusionary rule falls far short of transactional immunity, which still predominates in Illinois.

⁵¹ 19 F.2d 823 (5th Cir. 1927).

⁵² The only difference, as reported in the cases, is that in *Sherwin* the threat of prosecution was oral and not written.

⁵³ 19 F.2d at 824. In *People v. Heide*, 302 Ill. 624, 135 N.E. 77 (1922), the court said:

The rule is that a confession obtained under any promise or hope of immunity is not admissible in evidence. Such a confession is not voluntary, where any degree of influence is used to obtain it by a person having authority over the crime charged . . . [A] confession becomes incompetent whenever any degree of influence has been exerted by any person having authority over the charge against the prisoner or over his person, tending to cause duress or hope of leniency, for the reason that the law presumes that such confession was prompted by that influence. *Id.* at 627-28, 135 N.E. at 78-9.

⁵⁴ With respect to prosecutions under the Antitrust Act, the Attorney General has all powers that a state's attorney has generally. § 60-6.

⁵⁵ Illinois is in the minority on this point. *E.g.*, *Whiskey Cases*, 99 U.S. 594 (1878); *McCORMICK, EVIDENCE* § 143 (2d ed. 1972).

⁵⁶ *People v. English*, 31 Ill. 2d 301, 201 N.E.2d 455 (1964); *People v. Rockola*, 339 Ill. 474, 171 N.E. 559, 69 A.L.R. 852 (1930).

it.⁵⁷ However, given the cautious judicial attitude toward grants of immunity, it is difficult to see how the witness could successfully establish his reliance on the prosecutor's promise or on his misleading conduct, where the latter had asserted his authority to grant immunity based on statute. More likely, the court would find reliance on the statute, which would necessitate strict compliance with its requirements.

Even assuming that the witness may obtain a measure of protection in circumstances where some affirmative conduct on the part of the government has led the witness astray, he nevertheless remains in a difficult position. The government is free to stand by and let the witness make his own mistakes when faced with some vague immunity provision. There are good reasons to insist on compliance with all procedural requirements before immunity attach, lest a witness attempt to confer immunity on himself by voluntarily appearing and answering questions in some investigation. There is no reason short of an intention to mislead the witness or sloppy draftsmanship to disguise the requirements and spatter them throughout the statute. Further, the reason behind insisting on strict compliance with the formalities loses its force where the witness is first required to assert his privilege against self-incrimination, thus putting the government on notice that the witness will not testify without a grant of immunity.⁵⁸

To Claim or Not To Claim?

The most troublesome and ambiguous aspect of *Crawford* and of immunity provisions generally lies in the degree of legal compulsion needed to invoke the immunity provisions. *Crawford* indicated that immunity will not attach aside from judicial proceedings. The only provision of the Antitrust Act which calls for judicial involvement lies in the Attorney General's power to petition the court for an order requiring a witness who has refused to obey a subpoena or give testimony to do so under threat of contempt.⁵⁹ Thus, it seems that absent a witness's refusal to obey a subpoena — *presumably* on grounds of self-incrimination — and then being ordered by the court to comply, the witness could acquire no immunity, since there had been no judicial proceeding.

Such a construction strains, if not changes, the plain mean-

⁵⁷ *People v. Bogolowski*, 326 Ill. 253, 157 N.E. 181 (1927).

⁵⁸ Generally, the federal cases reflect an insistence upon strict compliance with procedural formalities only when dealing with statutes which do not require claim of privilege. See Note cited at note 11 *supra*; Comment, *Automatic Witness Immunity Statutes and the Inadvertent Frustration of Criminal Prosecutions: A Call for Congressional Action*, 55 GEO. L.J. 656 (1967).

⁵⁹ § 60-7.6, set out in full at note 21 *supra*.

ing of the Act's immunity provision — that “no individual shall be excused from . . . testifying . . . in obedience to subpoena or under order of the court” on grounds of self-incrimination, and that “no individual shall be criminally prosecuted . . . on account of *any* testimony given by him in *any* investigation brought . . . pursuant to this Act. . . .”⁶⁰ In response to a federal statute,⁶¹ which, like the Antitrust Act, did not mention any necessity to claim privilege, the United States Supreme Court held in *United States v. Monia*⁶² that the terms of immunity were clear and no refusal to testify on grounds of self-incrimination was required. The *Monia* Court further stated that an opposite interpretation would in effect be a trap to the witness.⁶³ In so holding, *Monia* resolved a conflict of authority among the federal circuits, several of which had held that claim of privilege was necessary.⁶⁴ Their reasoning was that immunity provisions were to be interpreted as coterminous with the scope of the privilege, and of course, the privilege must be asserted or it is deemed waived.⁶⁵

There are cogent reasons for requiring the witness to claim his privilege before immunity may attach, though there may be no good reason not to set this out clearly in the statute. If a statute is automatic, the prosecutor is at an obvious disadvantage, since he may not know whether or to what extent a witness may have participated in a crime, and thus runs the risk of unintentionally conferring immunity. And thus, provided the witness knows of a claim requirement, it is not unfair to require him to assert his privilege and thereby put the prosecutor on notice that if he insists upon testimony, the witness will obtain immunity.⁶⁶

Immunity for All Testimony?

The immunity provision of the Antitrust Act, and immunity provisions generally,⁶⁷ present another serious problem

⁶⁰ § 60-7.7, set out in text accompanying note 19 *supra* (emphasis added).

⁶¹ Act of Feb. 25, 1903, ch. 755, 32 Stat. 854, 904.

⁶² 317 U.S. 424 (1943).

⁶³ *Id.* at 430.

⁶⁴ A list of these holdings appears in *Monia*. *Id.* at 425, n.2.

⁶⁵ Thus, if *Crawford* does in fact require claim of privilege, its holding is not without some support. However, it should be reemphasized that the requirement of claim is only implicit in the court's express holding that there is no immunity for testimony aside from judicial proceedings. Perhaps the court meant only that a witness must comply strictly with procedural formalities — oath, subpoena, transcription, etc. Such is “judicial-like” and may have been what the court had in mind. However, to so interpret the court's holding would require assigning a strained definition to “judicial proceedings.” Further, in dealing with another issue in the case, the court clearly used the term as synonymous with “court proceeding.” See note 22 *supra*.

⁶⁶ See *United States v. Monia*, 317 U.S. at 427. H.R. REP. NO. 2606, 83d Cong., 2d Sess. (1954), U.S. CONG. CODE AND AD. NEWS at 3059.

⁶⁷ All immunity provisions in Illinois relate to a distinct type of investigation. See note 16 *supra*.

for an individual seeking to bring himself within the scope of immunity. Though *Crawford* did not reach the problem, it merits discussion as another hidden trap for the witness, especially in light of the court's narrow interpretation of immunity. Once the witness has otherwise met all the procedural formalities — oath, subpoena, proper proceeding, claim — he still may find his testimony has not activated an immunity provision if it strays too far from the proper subject matter of the investigation. This is a three-pronged problem. First, the investigation itself must be within the subject matter of the relevant statute. Second, questions asked by the government in a proper investigation must relate to that investigation. Third, the witness's answers must be responsive to the questions.⁶⁸

Subject Matter of the Investigation

Under the Antitrust Act, the Attorney General has authority to bring an investigation concerning only violations of that Act.⁶⁹ Thus, if the investigation fails to meet this subject matter requirement, the immunity provision is inapplicable.⁷⁰ This is so even though a court has issued an order upon petition of the Attorney General directing the witness to testify⁷¹ — the reason being that the court has no jurisdiction to issue an immunity order without statutory authority, and the order must therefore

⁶⁸ Clearly a witness's answers must relate to the question asked, and he is not permitted to immunize himself by volunteering testimony. See *Marcus v. United States*, 310 F.2d 143 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *cf.* *People v. Crawford Distributing Co.*, 53 Ill. 2d 332, 291 N.E.2d 648 (1973).

Only one Illinois immunity provision expressly requires responsive answers: ILL. REV. STAT. ch. 100½, §. 4 (1971).

In *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972), the Supreme Court upheld the validity of an immunity statute which by its terms conferred immunity only as to "responsive" testimony. Appellant contended that the responsiveness limitation was so vague as to be violative of due process. The Court held that the term, as construed by the Supreme Court of New Jersey to protect the witness against answers he in good faith believed were demanded, was valid. The Court also stated: "The responsiveness limitation is not a trap for the unwary; rather it is a barrier to those who would intentionally tender information not sought in an effort to frustrate and prevent criminal prosecution." *Id.* at 477.

⁶⁹ § 60-7.2, set out in full at note 20 *supra*. All Illinois provisions (see note 16 *supra*) relate to some specific type of investigation or proceeding, and thus are similarly restrictive.

⁷⁰ *E.g.*, *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971); *In re Vericker*, 446 F.2d 244 (2d Cir. 1971); *Marcus v. United States*, 310 F.2d 143 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963); *People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924).

⁷¹ In *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924), the court in construing a statute which granted immunity in bribery investigations, stated:

If the prosecution is for some offense other than the charge of bribery the statute does not give the court authority to grant the witness immunity. An immunity order entered pursuant to the statute would not protect the witness from prosecution for offenses revealed which were in no way connected with the charge of bribery being investigated.

Id. at 631, 144 N.E. at 340.

be void.⁷² Where a subject matter problem arises, the witness has several options. He may move to quash the subpoena; intervene in the Attorney General's petition for a court order; or await contempt proceedings for failure to comply with an order.⁷³ The subject matter problem is not likely to arise⁷⁴ but a closely related problem is.

Relevancy of Questioning

It is clear that just as the Attorney General (or other government official or agency under other statutes) has no authority to bring an investigation not within the subject matter prescribed by statute, he also has no power to demand answers to questions not related to the investigation.⁷⁵ In effect, the burden of relevancy is thrown upon the witness and he must weigh each question and determine whether it shows any relation to a violation under the Act. If not, and his answer may be incriminating, he must assert his privilege and refuse to answer. If instead, the witness answers, he is entitled to no protection as to that answer.⁷⁶

The witness, once having refused to answer on grounds of irrelevancy (that is, on grounds of self-incrimination since immunity does not attach to irrelevant testimony), must subject himself to contempt proceedings to prove his point if the Attorney General disagrees with his analysis of the question.⁷⁷

There is federal authority to the effect that immunity attaches to any testimony responsive to questions asked, and that it is the task of the government attorneys to ensure that the witness is not given immunity any broader than necessary.⁷⁸ These cases proceed upon the premise that the witness cannot

⁷² To the effect that a court order to testify over witness's objection is grounds for exclusion of the evidence subsequently revealed and its fruits, see note 83 *infra* and accompanying text.

⁷³ See notes 80-89 *infra* and accompanying text for procedures available to the witness.

⁷⁴ Primarily, the problem arose under federal statutes granting automatic immunity (no claim of privilege required). There was such a statute for practically every federal agency, and witnesses who testified before one of these agencies and were later prosecuted often attempted to invoke one of the statutes as an "afterthought." Today, the problem may arise in a wide ranging grand jury investigation.

⁷⁵ *People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924). See language of Antitrust Act, § 60-7.2, note 20 *supra*.

⁷⁶ *People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924).

⁷⁷ This contemplates that the witness has already been ordered by the court to testify.

⁷⁸ *Marcus v. United States*, 310 F.2d 143 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963). See *In re Grand Jury Investigation of Giancana*, 352 F.2d 921 (7th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965); *cf. United States v. Weinberg*, 65 F.2d 394 (2d Cir. 1933), *cert. denied*, 290 U.S. 675 (1933). *Contra, Bursley v. United States*, 466 F.2d 1059 (9th Cir. 1972). In *Marcus* the court stated:

[S]o soon as he testifies, under compulsion of the Court's order, he will

control the scope of the investigation or challenge the relevancy of questions, which proposition clearly has no support in Illinois.⁷⁹ Nevertheless, placing the burden on the government to control the scope and relevancy of the investigation, so that any testimony responsive to the government's inquiries will activate an immunity provision, seems only fair. The fact that theoretically the legislature has granted no authority to confer immunity where questioning strays from the required subject matter of the investigation need not be controlling. Such theory is a result of judicial construction. Thus, the courts could instead construe immunity provisions as granting authority to confer immunity once the general "subject matter of the investigation" requirement is met.

When Must a Witness Assert His Objections?

The question remains at what point in the proceedings a witness may raise his objections. The Antitrust Act and immunity provisions generally specify no set procedure, but do specify two points at which the courts become involved — on petition for an order seeking compliance, and contempt proceedings. If, at the outset, the witness has claimed his privilege and forced the Attorney General to obtain a court order, any subsequent refusal to answer questions will potentially subject him to contempt proceedings.⁸⁰ At this point he may assert his objections as to the subject matter of the investigation or to the relevancy of questions asked.⁸¹ If the court sustains his objections, he will avoid a citation for contempt. If the court rules adversely, finding him in contempt, his choice is not so clear. Illinois decisions suggest that the witness must appeal and cannot rely on the lower court's ruling as to relevancy; if the ruling is erroneous, immunity will not attach.⁸² Such a result, while

automatically receive immunity . . . so long as his testimony is not volunteered but is elicited by questions which the Court has ordered him to answer. . . . It is of course the task of the government attorneys to ensure that the witness is not given an immunity broader than is necessary
310 F.2d at 148.

⁷⁹ *People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924).

⁸⁰ Whatever right the witness may have needs no more protection than that afforded by the court where the witness refuses to answer and contempt proceedings are brought. *Burse v. United States*, 466 F.2d 1059, 1073 (9th Cir. 1972); *In re Bart*, 304 F.2d 631, 637, n.18 (D.C. Cir. 1962); *In re McElrath*, 248 F.2d 612, 617 (D.C. Cir. 1957); *cf. Cobbledick v. United States*, 309 U.S. 323, 328 (1940).

⁸¹ *People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924).

⁸² *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924). *See People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924).

consistent with the idea that the court has no authority to confer immunity aside from legislative enactment, seems harsh.

One federal appellate court circumvented the problem. In *Ellis v. United States*⁸³ the trial judge had erroneously overruled a witness's claim of privilege, and the witness then testified to avoid being found in contempt. The *Ellis* court, citing dicta from a United States Supreme Court case,⁸⁴ held that whenever testimony is elicited over the witness' objection under threat of contempt proceedings, neither that evidence nor its fruits may constitutionally be admitted into evidence.⁸⁵ Such exclusion, however, is unlikely to be an acceptable alternative to the witness testifying under a transactional immunity provision.

As to other opportunities to be heard, two federal cases hold that the witness has an opportunity to be heard on objections to the subject matter of the investigation upon the court's hearing of the Government's request for a court order.⁸⁶ In one the court held the witness was entitled to notice and an opportunity to be heard as a matter of due process,⁸⁷ while the other proceeded on the basis of right of intervention under statute.⁸⁸ Both cases indicated, however, that the only question at this hearing was as to procedural regularity of the Government's

⁸³ 416 F.2d 791 (D.C. Cir. 1969).

⁸⁴ *Id.* at 796, n.5. *Ellis* cited *Adams v. State of Maryland*, 347 U.S. 179 (1954), wherein the Court stated: "Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Id.* at 181.

⁸⁵ After establishing this point, the court indicated that courts had no authority absent statute to grant immunity. The effect of its ruling, however, is that a court may grant use and derivative use immunity via an erroneous order to testify over witness's claim of privilege. The court admitted that the matter was "not free from doubt" and could cite no case on point. 416 F.2d at 795.

Bursey v. United States, 466 F.2d 1059, 1075 (9th Cir. 1972) and *In re Vericker*, 446 F.2d 244, 247 (2d Cir. 1971), in dictum, both drew the same conclusion as *Ellis* did.

⁸⁶ There are no Illinois decisions on whether the witness has an opportunity to be heard at a hearing where the government requests a court order. In *People v. Burkert*, 7 Ill. 2d 506, 131 N.E.2d 495 (1955), the witness was present at the trial court hearing but was denied counsel. The order was issued and on appeal from a judgment of contempt for witness's refusal to testify, the question raised was whether it was error for the witness to be denied counsel. The supreme court, however, did not decide the question because the witness had been represented by counsel on a subsequent motion to vacate the trial court order.

⁸⁷ *In re Bart*, 304 F.2d 631 (D.C. Cir. 1962). *Contra*, *Licata v. United States*, 429 F.2d 1177 (9th Cir. 1970), *vacated as moot*, 400 U.S. 938 (1970). In *Licata*, the court stated that "issuance of such an order is a ministerial act requiring neither notice nor a hearing." *Id.* at 1179. The court attempted to distinguish *Bart* by the difference in statutes considered by the two courts.

⁸⁸ *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957). The court cited FED. R. Civ. P. 24(a), Intervention of Right, which is similar to ILL. REV. STAT. ch. 110, § 26.1 (1971).

application and that questions as to relevance of specific evidence must be determined at any subsequent contempt proceedings.⁸⁹

To What Crimes Does Immunity Extend?

There is another problem peculiar to the Antitrust Act and not applicable to other Illinois immunity provisions. The Antitrust Act provides that "no individual shall be criminally prosecuted or subjected to any criminal penalty *under this Act*."⁹⁰ Thus, if "under this Act" refers to "criminally prosecuted" a witness is given immunity only as to prosecutions under the Act, and the state is clearly limited in its power to compel answers. The witness may successfully assert his privilege as to testimony which would incriminate him under any other statute since immunity provisions of the Antitrust Act would not be applicable.⁹¹

However, the Act also provides that *no individual shall be excused* on grounds of self-incrimination.⁹² Under such contradictory provisions, the Illinois rule seems to be that unless immunity extends to all prosecutions, an immunity provision would not only be ineffectual, but unconstitutional as requiring self-incrimination where there was no provision for immunity. Therefore, consistent with judicial policy to construe such statutes as valid, if possible, it is held that immunity extends to all prosecutions.⁹³ Curiously, such provisions were once considered as being consistent and the statutes were considered valid, though limited in effect.⁹⁴ Hence, under the *Crawford* policy of limiting immunity, it is not inconceivable that the old rule may once again emerge, and a witness may find himself protected only as to antitrust prosecutions. Under such circumstances a witness would have to carefully weigh each answer to determine whether it may expose him to other prosecutions. If so, he must refuse to answer.

CONCLUSION

In view of the lack of conformity among Illinois immunity provisions, the ambiguity of many of the provisions, the somewhat confusing *Crawford* opinion, and the sanctioning of use and derivative use immunity in *Kastigar*, it seems an appropriate time to review and revise witness immunity statutes in Illinois.

⁸⁹ The questions to be decided at this hearing, of course, vary according to the language of the provision in question.

⁹⁰ § 60-7.7 (see note 19 *supra* and accompanying text) [emphasis added]. All other Illinois immunity provisions extend immunity to any matter concerning which the witness has testified.

⁹¹ *People v. Argo*, 237 Ill. 173, 86 N.E. 679 (1908).

⁹² § 60-7.7, set out in full at note 19 *supra* and accompanying text.

⁹³ *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924).

⁹⁴ *People v. Argo*, 237 Ill. 173, 86 N.E. 679 (1908).

Of primary importance is clearly setting forth in the provision itself all requirements the witness must meet, and making all provisions intended to achieve the same effect, uniform in language.

The following are suggested as essential elements of any immunity provision:

1. *Use and Derivative Use Immunity* — All but one of Illinois' immunity provisions grant transactional immunity. It is recognized that it may be desirable in some instances to encourage the unwilling witness to be more cooperative by granting him transactional immunity. However, as a general proposition, there seems to be no good reason why the state should grant more protection than necessary. Grants of transactional immunity should be limited to grand jury investigations and criminal prosecutions.

2. *Claim of Privilege* — Claim should be expressly required both for the protection of the witness and the government. Its inclusion will prevent surprise of the witness where the court implies the requirement, and surprise of the government where the witness unexpectedly gives incriminating testimony and thereby acquires immunity under a provision which does not require the claim.

3. *Court Order and Hearing* — A hearing, at which the witness will have an opportunity to be heard, should be provided to determine whether an order granting immunity and compelling the witness to testify should issue.

4. *Oath and Subpoena* — Requirement of oath is desirable so that the witness testify under threat of a potential perjury charge. Subpoena is unnecessary where claim of privilege is required. However, given the courts' tendency to require both by reference to other provisions of the statute which contains the immunity provision, it may be best to expressly require both.

Absent statutory revision, however, the witness called upon to testify in an investigation where some immunity provision is applicable faces the danger of unwittingly aiding the government in subsequent prosecutions against him. He can never be too cautious.

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