Notes

Resolving the Circuit Split on Defense Witness Immunity: How the Prosecutorial Misconduct Test Has Failed Defendants and What the Supreme Court Should Do About It*

I. Introduction

This Note discusses the near impossibility of obtaining immunity for defense witnesses in federal criminal cases. It provides a statistical overview suggesting that the “prosecutorial misconduct” standard used in ten of the twelve circuits fails to provide adequate protection for the accused. The Note then analyzes arguments on both sides of the matter before concluding that the Supreme Court, yet to rule on the issue, should expand a defendant’s right to obtain immunity for essential witnesses.

One of the earliest cases to explore defense witness immunity, Earl v. United States,1 was written by Judge (and later Chief Justice) Warren Burger when he served on the U.S. Court of Appeals for the District of Columbia. Earl was convicted of selling heroin to an undercover policeman.2 During the trial Earl sought to prove his innocence via the testimony of Frank Scott, but when called to the stand Scott invoked the Fifth Amendment.3 Scott, also involved in the heroin sale, would have testified that Earl was not present and that a man resembling Earl was at the sale.4 This testimony would have corroborated the defense theory of mistaken identity.5 Ultimately the trial judge denied Earl’s request to immunize Scott, and on appeal, Earl’s conviction was sustained.6 Judge Burger explained that under the circumstances a court could not grant immunity on its own without authorization from Congress.7

The relevant statute for understanding defense witness immunity is the use-immunity statute, 18 U.S.C. § 6002.8 This statute gives a prosecutor

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* I am grateful to Barry McNeil and Stacy Brainin for their guidance and comments during the writing process. I would also like to thank all of the Texas Law Review editors for their hard work preparing this Note for publication. Most importantly, I thank Erica Batres for her love, support, and encouragement.

1. 361 F.2d 531 (D.C. Cir. 1966).
2. Id. at 532.
3. Id.
4. Id.
5. Id.
6. Id. at 535.
7. Id. at 534.
8. The statute in Earl was an earlier transactional immunity statute, meaning the witness could never be prosecuted for any crimes discussed on the stand. Id. at 533. Section 6002, on the other
broad discretion to grant immunity to a witness, but provides no corresponding right to a defendant.9 Recognizing this imbalance, courts have fashioned two distinct approaches to the issue: (1) directly granting judicial immunity,10 or (2) indirectly requiring immunity by threatening to dismiss the case if the prosecutor refuses to grant immunity.11

This Note explores the need to expand defendants’ rights in federal criminal cases to obtain immunity for their witnesses.12 Part II provides an overview of the current state of defense witness immunity and identifies the split among the courts of appeals. It offers an empirical overview of all the cases on the topic, and details the approaches employed by the circuit courts. Part III highlights the arguments in favor of defense witness immunity, and Part IV shows the weaknesses inherent in the arguments against immunity for defense witnesses. Part V argues that the Supreme Court should adopt the Ninth Circuit’s test for defense witness immunity because that test will best protect a defendant’s due process rights. The Note concludes that the majority approach to defense witness immunity is inadequate and Supreme Court action is necessary to protect defendants’ rights.

hand, does not provide a free pass to the witness, but instead only provides that his or her testimony will not be used against the witness in a future prosecution. 18 U.S.C. § 6002 (2006). While the current statute provides more flexibility for future prosecutions and eliminates many of the concerns of the Earl court, little has changed in how courts analyze requests for immunity by the defense. See, e.g., United States v. Ebbers, 458 F.3d 110, 118–22 (2d Cir. 2006) (denying request for immunity and discussing concerns similar to those expressed in Earl regarding prosecutorial discretion in granting “use immunity” to defense witnesses). When the word “immunity” is used throughout the Note, it refers to use immunity available under this statute. Other types of immunity, such as agreements not to prosecute a witness or reduced sentences for witnesses, are not covered because they are not relevant to defense witnesses.

10. See Gov’t of V.I. v. Smith, 615 F.2d 964, 974 (3d Cir. 1980) (articulating the effective defense theory as requiring defense witness immunity “when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity”). The Third Circuit is the only circuit to take this approach. See FEDERAL PROCEDURE: LAWYERS EDITION § 80:301 (2003) (noting that the effective defense theory has been rejected “by virtually every other court that has considered the issue,” but that “the Sixth Circuit has qualified its rejection”).
11. See, e.g., United States v. Burke, 425 F.3d 400, 411 (7th Cir. 2005) (“[A] federal court cannot order the government to immunize a defense witness, [but] courts can dismiss an indictment where the prosecutor’s refusal to grant immunity has violated the defendant’s right to due process.” (citing United States v. Herrera-Medina, 853 F.2d 564, 568 (7th Cir. 1988)); United States v. Angiulo, 897 F.2d 1169, 1190 (1st Cir. 1990) (discussing two theories through which defendants might be entitled to grants of immunity for their witnesses, including the “prosecutorial misconduct” theory discussed in Burke).
12. The topic of immunity under state law is left for other authors. Some have already written on certain states. See, e.g., Andy Scholl, Note, State v. Belanger and New Mexico’s Lone Stance on Allowing Defense Witness Immunity, 40 N.M. L. REV. 421 (2010) (discussing the expansion of defense witness immunity in New Mexico under Belanger).
II. The Current State of Defense Witness Immunity

Defense witness immunity is a subject that continues to divide both state and federal courts. In the last five years these divisions have only grown greater as jurisdictions such as the Ninth Circuit and the State of New Mexico have expanded a judge’s ability to grant immunity to defense witnesses.\(^{13}\) This Part of the Note provides an overview of the current state of federal law.

A. A Statistical Review of Defense Witness Immunity Cases

Before discussing individual cases, a broad summary of how defendants fare when they seek an immunity grant for a witness is provided in Table A.\(^{14}\) Table A shows the success rate of defendants in obtaining use immunity for defense witnesses.

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\(^{13}\) See United States v. Straub, 538 F.3d 1147, 1166 (9th Cir. 2008) (reversing the district court’s second denial of the defendant’s request to compel use immunity and urging judgment of acquittal unless the prosecution granted use immunity to the defense witness); State v. Belanger, 210 P.3d 783, 792–93 (N.M. 2009) (creating a rule allowing district courts to grant use immunity with or without the prosecutor’s agreement and amending the rules of criminal procedure to reflect this change).

\(^{14}\) On March 12, 2012 a search was run on WestlawNext for “‘defense witness’ /s immunity,” “defense witness immunity,” and “immunity to defense witnesses.” These searches returned a total of 424 cases, of which 335 were on topic. The other 89 cases were false positives. For example, a case may have been dismissed on procedural grounds that had nothing to do with defense witness immunity, or may have discussed the issue in passing without deciding it.

The results in Table A are not all-inclusive. There are unreported cases where immunity was granted that do not show up in these results. One notable example is from the Broadcom trial where Judge Carney granted immunity because prosecutorial misconduct distorted the fact-finding process such that it compromised the integrity of the trial. Reporter’s Transcript of Proceedings at 5195–97, United States v. Ruehle, No. SACR 08-001390-CJC, (C.D. Cal. Dec. 15, 2009), available at http://www.jenner.com/system/assets/assets/3768/original/United_States_v._Ruehle.pdf?1319647752.

For a discussion and analysis of the case by the attorneys who worked on it, see generally Richard Marmaro & Matthew E. Sloan, Obtaining Defense Witness Immunity: Lessons from the Broadcom Trial, LITIGATION, Spring 2011, at 21. Because some cases are unreported, it is impossible to catalogue all decisions relevant to defense witness immunity. Table A should be used to compare results between circuits, thereby holding constant any issues related to unreported cases. While most circuit-level cases are appeals by the defendant, the government also has the opportunity to appeal before trial if defense witness immunity has been granted, United States v. Horwitz, 622 F.2d 1101, 1104 (2d Cir. 1980) (citing 18 U.S.C. § 3731), so both types of cases are seen on appeal.
Immunity Grants to Defense Witnesses by Circuit

<table>
<thead>
<tr>
<th>Circuit</th>
<th>District Court Level</th>
<th>Circuit Court Level</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>0/3</td>
<td>0/9</td>
<td>0/12</td>
</tr>
<tr>
<td>Second</td>
<td>1/23</td>
<td>0/36</td>
<td>1/59 (1.69%)</td>
</tr>
<tr>
<td>Third</td>
<td>2/25</td>
<td>3/21</td>
<td>5/46 (10.87%)</td>
</tr>
<tr>
<td>Fourth</td>
<td>0/1</td>
<td>0/14</td>
<td>0/15</td>
</tr>
<tr>
<td>Fifth</td>
<td>0/5</td>
<td>0/17</td>
<td>0/22</td>
</tr>
<tr>
<td>Sixth</td>
<td>0/3</td>
<td>0/12</td>
<td>0/15</td>
</tr>
<tr>
<td>Seventh</td>
<td>0/7</td>
<td>0/18</td>
<td>0/25</td>
</tr>
<tr>
<td>Eighth</td>
<td>0/3</td>
<td>0/12</td>
<td>0/15</td>
</tr>
<tr>
<td>Ninth</td>
<td>1/33</td>
<td>5/64</td>
<td>6/97 (6.19%)</td>
</tr>
<tr>
<td>Tenth</td>
<td>0/4</td>
<td>0/9</td>
<td>0/13</td>
</tr>
<tr>
<td>Eleventh</td>
<td>0/3</td>
<td>0/7</td>
<td>0/10</td>
</tr>
<tr>
<td>D.C.</td>
<td>0/1</td>
<td>0/5</td>
<td>0/6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4/111 (3.60%)</strong></td>
<td><strong>8/224 (3.57%)</strong></td>
<td><strong>12/335 (3.58%)</strong></td>
</tr>
</tbody>
</table>

Table A.

The first number in each box is how many requests for immunity were granted, and the second number is how many requests were made. Thus, at the district court level, one hundred eleven requests were made, and only four were granted (3.6%). Noticeably, in nine of the twelve circuits, defense witness immunity has never been granted. Overall, there were three hundred thirty-five cases in which defense witness immunity was at issue, and only twelve times was the request granted by the court. Six of these cases came from the Ninth Circuit, five from the Third Circuit, and one from the Second Circuit.15 This works out to a 6.19% success rate in the Ninth Circuit and a 10.87% rate in the Third Circuit.16 Although three-fourths of the circuits have never granted defense witness immunity, every circuit has held that such immunity is available in limited circumstances when it is necessary to protect a defendant’s right to a fair trial.

15. The only case from the search results where defense witness immunity was granted in the Second Circuit, United States v. De Palma, 476 F. Supp. 775, 776 (S.D.N.Y. 1979), occurred before that circuit decided United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980), a case that set out a stricter standard for granting immunity. See Horwitz, 622 F.2d at 1101, 1105 (decided two days after Turkish).

16. It cannot be assumed from these raw numbers that too many or too few defendants had their requests for immunity granted by the courts. Each situation is unique, and it is difficult, if not impossible, to describe a set of circumstances that will automatically trigger a grant of immunity. What is clear from reviewing the cases is that if the tests developed by the Third and Ninth Circuits were used nationwide, the number of defendants receiving immunity for their witnesses would be substantially higher.
B. The Supreme Court

The Supreme Court has upheld the constitutionality of immunity statutes on several occasions. The Court, however, has yet to decide under what circumstances, if any, a defendant is entitled to receive immunity for his or her witnesses. Whenever the Court has been presented with the opportunity to clarify the issue, it has declined the opportunity. This has occurred in two death penalty cases, where Justice Thurgood Marshall dissented from the decisions not to hear the appeals. In his dissent from Autry v. McKaskle, Justice Marshall pointed out the circuit split on defense witness immunity. It should be noted that the Fifth Circuit in Autry stated that “[d]ifferences among the circuits are here a strawman because [the defendant] fails all their tests.” This fact may have made it less appealing for the Court to use the case as a vehicle for settling the circuit split.

C. The Circuit Split

Since Autry was denied certiorari by the Court in 1984, the split between the circuits has grown. Most notably, in 2008 the Ninth Circuit decided United States v. Straub and joined the Third Circuit in holding that affirmative prosecutorial misconduct is not a requirement for the granting of defense witness immunity. Straub, subsequent cases in the Ninth Circuit expanding the ability of courts to grant defense witness immunity, and the New Mexico Supreme Court’s decision in State v. Belanger all provide new reasons why the Court should hear this issue.

23. Autry was also a death penalty case and if the Court had decided to hear the issues on appeal it would have required staying the execution. Autry, 465 U.S. at 1086 (Marshall, J., dissenting from denial of writ of certiorari). One of Marshall’s complaints about the Court’s decision was that “the Court has shown an unseemly desire to bring litigation in a capital case to a fast and irrevocable end.” Id. at 1085. In fact, the defendant was executed the day after Marshall’s dissent was published, and was the second person executed in Texas since the reinstatement of the death penalty. Executed Offenders, T EX. DEP’T CRIM. JUST., http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last updated Aug. 8, 2012).
24. 538 F.3d 1147 (9th Cir. 2008).
25. Id. at 1162.
26. See, e.g., Marmaro & Sloan, supra note 14, at 26 (discussing United States v. Ruehle and stating that “Judge Carney’s ruling in Ruehle suggests that to fulfill a defendant’s rights to the compulsory process of witnesses and due process of law, Straub must be expanded”).
27. 210 P.3d 783 (N.M. 2009).
Every court of appeals has ruled on the issue of defense witness immunity, and several approaches have emerged. One approach is the “effective defense” theory, which originated in the Third Circuit around 1980. No other court of appeals has adopted this approach. Ten of the twelve circuits entertain the possibility of defense witness immunity only when the prosecutor has abused his or her discretion in granting immunity—the prosecutorial misconduct approach. Despite the language in these cases, however, it is rare in most circuits for a defendant to secure immunized testimony from key witnesses. The Ninth Circuit offers the most hope, as it tends to allow a more lenient version of prosecutorial misconduct.

1. The Effective Defense Approach.—As previously mentioned, the effective defense theory is used in the Third Circuit and was first clearly established in Government of Virgin Islands v. Smith. Smith recognized that strict rules that withhold exculpatory facts from the jury violate a defendant’s due process rights. However, accepting that opportunities for judicial grants of immunity are very limited, Smith laid out five conditions that must be met before immunity can be granted by a court:

[1] immunity must be properly sought in the district court; [2] the defense witness must be available to testify; [3] the proffered testimony must be clearly exculpatory; [4] the testimony must be

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28. Throughout this Note, “court of appeals” or “circuits court” refers to the twelve courts of appeals listed in Table A, and excludes other courts of appeals such as the Court of Appeals for the Federal Circuit.

29. See Gov’t of V.I. v. Smith, 615 F.2d 964, 969–74 (3d Cir. 1980) (articulating the effective defense theory of defense witness immunity).

30. See FEDERAL PROCEDURE, supra note 10, § 80:301 (2003) (noting that the effective defense theory has been rejected “by virtually every other court that has considered the issue,” but that “the Sixth Circuit has qualified its rejection”).

31. See id. § 80:302 (citing circuit court decisions entertaining the possibility of defense witness immunity).

32. For example, while the Fifth Circuit technically provides defendants with a limited right to defense witness immunity, a 2010 case from the U.S. District Court for the Southern District of Texas was “unable to locate a decision within the Fifth Circuit where a court found that the government used its immunity privilege to unfairly skew the fact-finding process or where due process or other extraordinary circumstances required the court to grant use immunity to a defense witness.” United States v. Davidson, Criminal No. H-10-201-3S, 2010 WL 3521726, at *4 (S.D. Tex. Sept. 8, 2010) (denying defendant’s request for defense witness immunity). Davidson further held that “the fact that the government has immunized approximately ten government witnesses while refusing to immunize one defense witness is not so extraordinary to require the court’s intervention.” Id. The unavailability of defense witness immunity in the Fifth Circuit and others is also shown in Table A, supra.

33. See infra subsection II(C)(2)(b).

34. 615 F.2d 964, 969–74 (3d Cir. 1980). Smith was decided four months before the Second Circuit’s Turkish decision, the basis for the prosecutorial misconduct theory discussed in the next section. See infra subsection II(C)(2)(a).

35. Smith, 615 F.2d at 970.
essential; and [5] there must be no strong governmental interests which countervail against a grant of immunity.36

These requirements have proved quite difficult to meet.37 This is shown not only in each individual case,38 but also in the aggregate where only five of the forty-six reported decisions from the Third Circuit sided with the defense.39

While the situations requiring immunity for defense witnesses may be rare, Smith shows the importance of expanding immunity rights to achieve a fair trial. In Smith, four young men were accused of robbery, but the identities of the assailants were in dispute.40 Three of the defendants sought to call Ernesto Sanchez, who had previously admitted that he and three others were the assailants.41 The three others named by Ernesto Sanchez included the fourth defendant at trial.42 Sanchez’s testimony would therefore have exculpated three of the defendants.43 When called as a witness, Sanchez invoked the Fifth Amendment.44 Even though the juvenile authority with jurisdiction over Sanchez was amenable to a use-immunity grant, the U.S. Attorney refused the request, and the trial judge declined to judicially grant immunity to Sanchez.45 On appeal, the Third Circuit remanded for an evidentiary hearing to determine if the failure to immunize Sanchez violated the defendants’ due process rights, stressing that judicial immunity is “triggered, not by prosecutorial misconduct or intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case.”46

2. The Prosecutorial Misconduct Approach.—Each court of appeals recognizes at least the limited availability of defense witness immunity if prosecutorial misconduct can be shown.47 For example, the Sixth Circuit has

36. Id. at 972.
38. See, e.g., id.
39. See supra Table A.
40. Smith, 615 F.2d at 966.
41. Id. at 966–67.
42. Id. at 967.
43. Id.
44. Id.
45. Id.
46. Id. at 969.
47. See, e.g., United States v. Stapleton, 297 F. App’x 413, 432 (6th Cir. 2008) (recognizing prosecutorial misconduct exception but finding no prosecutorial misconduct); United States v. Duran, 189 F.3d 1071, 1087 (9th Cir. 1999) (same); Curtis v. Duval, 124 F.3d 1, 9 (1st Cir. 1997) (same); United States v. Dierling, 131 F.3d 722, 732–33 (8th Cir. 1997) (same); United States v. Abbas, 74 F.3d 506, 512 (4th Cir. 1996) (same); Blissett v. Lefevre, 924 F.2d 434, 441–42 (2d Cir. 1991) (same); United States v. Hooks, 848 F.2d 785, 799 (7th Cir. 1988) (same); United States v. Chalan, 812 F.2d 1302, 1310 (10th Cir. 1987) (same); United States v. Gottesman, 724 F.2d 1517,
made it explicit that while “[n]o court has authority to immunize a witness” because the immunity statute gives this power to the executive, one narrow exception exists: where a defendant can show prosecutorial misconduct that deliberately distorts the fact-finding process. Not surprisingly, the Sixth Circuit (like most others) has never found a situation meeting these requirements.

a. The Majority Approach.—The majority approach to prosecutorial misconduct traces its roots to United States v. Turkish, but is better exemplified by a 2006 decision from the Second Circuit, United States v. Ebbers, where the court set out the relevant considerations:

[a decision to grant immunity to a defense witness] requires consideration whether “(1) the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment; and (2) the witness’ testimony will be material, exculpatory and not cumulative and is not obtainable from any other source.”

Courts using this approach essentially demand foul play on the part of the prosecution to meet the first prong of the test. Foul play may occur in either of two ways. The first is if the prosecution granted immunity to its witnesses while denying it to defense witnesses with the intention of distorting the fact-finding process. The second option is if the prosecutor makes repeated threats or warnings that the witness will be tried for perjury or otherwise prosecuted if he or she testifies. Without a showing of governmental abuse exemplified by one of these options, circuit courts have held that “the immunity decision requires a balancing of public interests

1524 n.9 (11th Cir. 1984) (same), abrogated on other grounds by Dowling v. United States, 473 U.S. 207 (1985).

48. Stapleton, 297 F. App’x at 432 (quoting Pillsbury Co. v. Conboy, 459 U.S. 248, 261 (1983)).

49. Id.; see also United States v. Burke, 425 F.3d 400, 411 (7th Cir. 2005) (“Although a federal court cannot order the government to immunize a defense witness, courts can dismiss an indictment where the prosecutor’s refusal to grant immunity has violated the defendant’s right to due process.”).

50. See supra Table A (showing immunity for defense witnesses granted in zero of the fifteen Sixth Circuit cases).

51. 623 F.2d 769 (2d Cir. 1980). Other courts have followed the analysis of the Turkish court and adopted the prosecutorial misconduct approach, see, for example, Carter v. United States, 684 A.2d 331, 339 (D.C. 1996) (en banc).

52. 458 F.3d 110 (2d Cir. 2006).

53. Id. at 118 (quoting United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982)).

54. Id. at 119.

55. Id. This line of misconduct stems from the Supreme Court’s holding in Webb v. Texas, 409 U.S. 95, 96 (1972) (per curiam), where a judge repeatedly warned a witness about the dangers of perjury, causing him to invoke his Fifth Amendment rights. See Carter, 684 A.2d at 340–41 (discussing Webb and its relation to prosecutorial misconduct).
which should be left to the executive branch.\textsuperscript{56} The second prong needed for an immunity grant under this theory—that the testimony is “material, exculpatory and not cumulative and is not obtainable from any other source”\textsuperscript{57}—is likewise difficult.\textsuperscript{58}

Under this approach, even if a witness has clearly exculpatory information that is not available from any other source, more is required.\textsuperscript{59} The prosecutor must have also acted in a deliberate and discriminatory fashion.\textsuperscript{60}

\textit{b. The Ninth Circuit Approach.}—The most significant recent decision on defense witness immunity is \textit{United States v. Straub}.\textsuperscript{61} Prior to \textit{Straub}, it was not settled in the Ninth Circuit whether a defendant requesting immunity must show that the prosecutor’s \textit{purpose} was to distort the fact-finding process, or whether prosecutorial actions that had the \textit{effect} of distortion were enough to trigger immunity.\textsuperscript{62}

In \textit{Straub}, the Ninth Circuit faced a troubling set of facts. Defendant Straub was part of a gang and participated in a wide-ranging conspiracy to distribute methamphetamines and marijuana.\textsuperscript{63} Straub was charged with shooting Garrett, another drug dealer, during a robbery attempt.\textsuperscript{64} The only witness that could testify Straub fired the gun, named Adams, received immunity from the government.\textsuperscript{65} All told, eleven of the twelve government

\textsuperscript{56} Autry v. Estelle, 706 F.2d 1394, 1401 (5th Cir. 1983) (quoting United States v. Thevis, 665 F.2d 616, 639–40 (5th Cir. 1982), \textit{overruled on other grounds by} FED. R. EVID. 804(b)(6)).

\textsuperscript{57} Ebbers, 458 F.3d at 118 (quoting \textit{Burns}, 684 F.2d at 1077).

\textsuperscript{58} See, \textit{e.g.}, United States v. Cuthel, 903 F.2d 1381, 1384 (11th Cir. 1990) (finding that the testimony was arguably available from two other witnesses who were not called to testify). For both prongs of the prosecutorial misconduct approach, the defense must make a showing at trial so the district court judge can make an informed ruling on the motion. Such a showing generally requires a proffer providing details as to the expected testimony. \textit{E.g.}, United States v. LaHue, 261 F.3d 993, 1015 n.26 (10th Cir. 2001). While the Ninth Circuit has shown itself willing to remand for an evidentiary hearing to gather evidence of prosecutorial misconduct—for example, United States v. Straub, 224 F. App’x 633, 635 (9th Cir. 2007) and United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983)—other circuits will dismiss if there is no evidence in the record. \textit{LaHue}, 261 F.3d at 1015; \textit{Cuthel}, 903 F.2d at 1384.

\textsuperscript{59} See, \textit{e.g.}, United States v. Gottesman, 724 F.2d 1517, 1524 (11th Cir. 1984) (“[D]istrict courts may not grant immunity to a defense witness simply because that witness possesses essential exculpatory information unavailable from other sources.”); \textit{Autry}, 706 F.2d at 1401 (rejecting the view of the Third Circuit that judicial immunity could be triggered when the defendant “is prevented from presenting exculpatory evidence which is crucial to his case” (quoting Gov’t of V.I. v. Smith, 615 F.2d 964, 969 (3d Cir. 1980))).

\textsuperscript{60} Ebbers, 458 F.3d at 119.

\textsuperscript{61} 538 F.3d 1147 (9th Cir. 2008).

\textsuperscript{62} \textit{Id.} at 1156–62.

\textsuperscript{63} \textit{Id.} at 1149.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 1149–50.
witnesses who testified against Straub received immunity, and some also received sentence reductions or cash payments related to their testimony.

At trial, Straub offered testimony that Adams told a third party that Adams was the one who shot Garrett. When called to testify, the third party invoked the Fifth Amendment because of concerns that his gang membership would be used against him in subsequent prosecutions. Straub could not allege prosecutorial misconduct to the extent that it required a finding of intent to distort the fact-finding process, but he argued that broad grants of immunity to eleven prosecution witnesses while denying immunity to the one person who could contradict a government eyewitness had the effect of distorting the trial and violating his constitutional rights.

On appeal the Ninth Circuit remanded the case and instructed that unless, at a new trial, the prosecution either did not use Adams’s testimony or granted use immunity to the defendant’s proposed witness, the district court was to enter a judgment of acquittal on the charges related to the shooting. In doing so, the court created a new test for defense witness immunity in the Ninth Circuit:

1. the defense witness’s testimony was relevant; and
2. either (a) the prosecution intentionally caused the defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process; or (b) the prosecution granted immunity to a government witness in order to obtain that witness’s testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial.

The Ninth Circuit has continued to enforce this new test, remanding a 2011 case for an evidentiary hearing on whether the actions of the prosecutor had the effect of distorting the fact-finding process so as to deny the defendant the right to a fair trial.

Along with expanding the notion of prosecutorial misconduct, the Ninth Circuit’s test is also more lenient regarding the first prong. While the prosecutorial misconduct test employed by the majority of circuits requires that “the witness’ testimony will be material, exculpatory and not cumulative

66. Id. at 1152.
67. Id. at 1164.
68. Id. at 1153.
69. Id. at 1150.
70. Id. at 1162. This is the standard required by all circuits except for the Third and Ninth Circuits, and, as shown in Table A, supra, has never been met.
71. Id. at 1151. The conviction on this additional charge lengthened Straub’s sentence by ten years, from thirteen to twenty-three years in prison. Id. at 1154.
72. Id. at 1166.
73. Id. at 1162.
74. United States v. Wilkes, 662 F.3d 524, 550 (9th Cir. 2011).
and is not obtainable from any other source,” 75 the Ninth Circuit only requires that the testimony is “relevant.” 76 The Ninth Circuit has clarified that “a defendant need not show that the testimony sought was either ‘clearly exculpatory’ or ‘essential to the defense’; the testimony need be only relevant.” 77

III. Arguments for Defense Witness Immunity

While many arguments have been advanced on behalf of defense witness immunity, three themes capture their essence: (1) protecting constitutional rights, (2) ensuring truth and justice, and (3) equalizing power between the defense and the prosecution.

A. Required by a Defendant’s Constitutional Rights

The right to a fair trial has long been a pillar of the American justice system. 78 The Sixth Amendment provides that an accused has the right “to have compulsory process for obtaining witnesses in his favor.” 79 The right to call witnesses is broad. As the Supreme Court stated in Washington v. Texas, 80 “[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.” 81 When a desired defense witness invokes the Fifth Amendment, the defendant’s Sixth Amendment rights are implicated. And, as the Supreme Court has made clear, the Sixth Amendment protects more than a basic right to subpoena witnesses: it can mandate the overturning of state laws that conflict with a defendant’s right to present his or her side of the story. 82

Defense witness immunity also finds support under the Due Process Clause, 83 and another Supreme Court case illustrates its potential application. In Chambers v. Mississippi, 84 defendant Chambers was convicted of

75. United States v. Ebbers, 458 F.3d 110, 118 (2d Cir. 2006) (quoting United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982)).
76. Straub, 538 F.3d at 1157.
77. United States v. Westerdahl, 945 F.2d 1083, 1086 (9th Cir. 1991). This looser relevance standard predates Straub.
78. See Estelle v. Williams, 425 U.S. 501, 503 (1976) (holding that the right to a fair trial is a “fundamental liberty”).
79. U.S. CONST. amend. VI.
80. 388 U.S. 14 (1967).
81. Id. at 19.
83. This includes the Due Process Clause under both the Fifth and Fourteenth Amendments, depending on whether a state or the federal government is the prosecutor.
murdering a policeman despite the fact that another person—Gable McDonald—had confessed to the crime.\textsuperscript{85} McDonald confessed to three different people, but later repudiated his sworn confession.\textsuperscript{86} There was no further investigation into his involvement.\textsuperscript{87} At his trial, Chambers attempted to introduce evidence of McDonald’s confessions, but a strict application of Mississippi’s hearsay rules prevented testimony by third parties about the confessions.\textsuperscript{88} Seeking to cross-examine McDonald about his confessions, Chambers asked the judge that he be allowed to treat McDonald as a hostile witness.\textsuperscript{89} The motion was denied under Mississippi’s rule that a party “vouches” for any witness it calls to the stand.\textsuperscript{90} The Supreme Court found this violated due process and reversed, stating that “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.”\textsuperscript{91}

The reasoning in Chambers supports an argument for expanding the availability of defense witness immunity. Straub provides a great example of the dangers of the prosecutorial misconduct approach used in the majority of the circuits.\textsuperscript{92} While in Straub there appears to be no intent on the part of the prosecutor to distort the fact-finding process, the conduct clearly had that effect.\textsuperscript{93} This lack of intent would doom Straub’s request for immunity under the majority test discussed in subsection II(C)(2)(a), yet it seems clear that without immunity Straub would have been denied his due process right to “defend against the State’s accusations.”\textsuperscript{94}

B. Necessary to Ensure Truth and Justice

The importance of immunity statutes has been emphasized time and again by the Supreme Court, and in 1956 the Court declared that immunity statutes “have become part of our constitutional fabric.”\textsuperscript{95} Such statutes have been enacted in every state, and on the federal level Congress has passed over forty immunity statutes.\textsuperscript{96} Compelled testimony is often crucial

\begin{itemize}
  \item \textsuperscript{85} Id. at 286–87. In fact, the main evidence against Chambers was only that the policeman, after being shot in the back, had turned around and shot Chambers. Id.
  \item \textsuperscript{86} Id. at 287–88.
  \item \textsuperscript{87} Id. at 288.
  \item \textsuperscript{88} Id. at 294.
  \item \textsuperscript{89} Id. at 291.
  \item \textsuperscript{90} Id. at 294.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} See United States v. Straub, 538 F.3d 1147, 1155 (9th Cir. 2008) (referencing the district court’s ruling, which held that if prosecutorial misconduct were a required element, then Straub’s claim would fail).
  \item \textsuperscript{93} Id. at 1157.
  \item \textsuperscript{94} Chambers, 410 U.S. at 294.
  \item \textsuperscript{95} Ullmann v. United States, 350 U.S. 422, 438 (1956).
\end{itemize}
to a successful prosecution. Given its importance, common sense suggests a defendant should have at least a qualified right to compel testimony of his or her own witnesses.

As just one example of the truth-and-justice approach, the prosecution must disclose all exculpatory information in its possession. *Brady v. Maryland* created this obligation based upon the Due Process Clause. As the Court made clear, “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” It is only one additional step to find that when a prosecutor refuses to grant defense witness immunity, relevant evidence is suppressed. *Brady* made clear that intent is not a factor in finding a due process violation, suggesting that the intent requirement in the prosecutorial misconduct approach is misplaced.

In *Turkish*, the Second Circuit addressed the search-for-truth argument and noted that trials have never realized their full fact-finding potential given the various privileges that shield information from discovery. While the Fifth Amendment can be overcome by the granting of immunity, there are other privileges—attorney–client, for example—where an immunity grant cannot bring the truth to light. Therefore, the right to immunity for the defense as a tool for truth cannot be an absolute right, and instead requires balancing between state interests and the rights of the defendant. Courts generally hold that any balancing in this area is best done by the Executive Branch.

On the other hand, the argument that a trial is not a perfect fact-finding operation cannot relieve courts of their duty to ensure a fair trial. Defense witness immunity provides, in limited circumstances, a vital tool for unearthing the truth and preventing innocent defendants from going to jail.

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99. Id. at 87.

100. Id.

101. Id.

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

103. Id.

104. See id. at 776 (noting that balancing the risk to other prosecutions is best done by prosecutors rather than judges).
A good example of the need for immunity comes from United States v. Camacho,105 where defendants’ request for immunity was denied because there was no finding of prosecutorial misconduct.106 In Camacho, two defendants were found guilty of conspiracy to commit murder and attempted murder.107 After the trial, new evidence came to light, and the defendants wanted to present a witness who would testify he was the shooter in the attempted murder, and that the defendants had no involvement.108 For obvious reasons the witness refused to testify unless granted immunity, and the government refused the request.109

While acknowledging that “[d]eny[ing] [defense witness immunity] may mean that evidence potentially demonstrative of the innocence of two men of offenses which could result in life imprisonment may never come to light,” the court found itself bound by the test set forth in Turkish and denied the request for immunity.110 Had this case followed the Ninth Circuit test that looks to effect and not purpose, this case may well have had a different result.111 Assuming for a moment that a future prosecution would have been blocked by the grant of use immunity—which is almost certainly not the case—any balancing between sending two innocent men to jail and letting one guilty man walk free should have been an easy decision. “[B]etter that ten guilty persons escape, than that one innocent suffer.”112 Two relevant concerns, cooperative perjury and impediments to future prosecutions, are discussed in Part IV.

The Department of Justice’s policy also lends some limited support to the argument that defense witness immunity must occasionally be granted to ensure a fair trial. The United States Attorney Manual provides that, “18 U.S.C. § 6002 will not be used to compel the production of testimony or other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information.”113 This is similar to a due

106. Id. at *2–7.
107. Id. at *1.
108. Id. at *2.
109. Id. at *2–3.
110. Id. at *6–7. This is not the only case in the Second Circuit where a defendant may have been falsely convicted of murder, but the witness required to prove innocence would not testify because immunity was denied. In Blissett v. Lefevre, the proposed witness would have testified that a government witness—not the defendant—had killed the victim. 924 F.2d 434, 441 (2d Cir. 1991). In denying the request for immunity as part of a habeas claim, the court found that the prosecutorial misconduct requirements were not satisfied. Id. at 442.
111. See United States v. Straub, 538 F.3d 1147, 1162 (9th Cir. 2008) (establishing the Ninth Circuit’s test); see also supra Table A and note 15 (showing that no case in the Second Circuit has granted immunity to a defense witness).
112. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (Thomas M. Cooley ed., 1871).
process argument, but phrased more generally in terms of fairness. Leaving this choice to the government, however, provides inadequate protection given the adversarial nature of a criminal prosecution.

The Supreme Court made it clear in *Brady v. Maryland* that society’s interest in trials extends beyond convicting the guilty. As it was so simply stated, “our system of the administration of justice suffers when any accused is treated unfairly.” The Court stressed the basic requirement that “criminal trials are fair” so that people have faith in the justice system. These words provide powerful guidance when deciding whether to credit the rights of a defendant or the needs of the government in determining whether defense witness immunity rights should be expanded.

C. Necessary to Equalize the Power of the Defense

Some commentators have attributed the origins of the equal-access theory to a footnote in *Earl v. United States*, the opinion by then-Judge Burger discussed in the opening of this Note. There is a surface appeal to making immunity grants open to the defense given their widespread availability to government prosecutors. The vast majority of a trial and its subparts provide balance between the prosecution and the defense. Both sides are allowed peremptory strikes, an opening statement, the right to compel witness testimony via subpoenas, closing statements, and many other procedural rights. The right to compulsory process is an especially relevant example because, like defense witness immunity, it allows a defendant to invoke the power of the state in requiring a witness to be present at trial.

Courts have been quick to dismiss the argument of equalized power as “entirely unpersuasive.” A criminal prosecution is not a symmetrical proceeding because the prosecution has many affirmative obligations—like the burden of proof—and also accepts numerous restrictions such as the inability to comment on a defendant’s decision not to testify. In fact, a defendant can prevail without presenting any evidence at all, while the

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115. Id.
116. Id.
119. See, e.g., FED. R. CRIM. P. 24(b).
120. E.g., United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980); see also United States v. Herman, 589 F.2d 1191, 1203 (3d Cir. 1978) (“Due process has never yet been held to require that the defendant be permitted to marshal precisely the same investigative and legal resources as the prosecution . . . .”).
121. Turkish, 623 F.2d at 774.
prosecution must convince the jury beyond a reasonable doubt of defendant’s guilt. If the defense is extended additional procedural rights such as the right to grant immunity, then an equally valid argument might be available for imposing procedural burdens on the accused to level the playing field with the prosecution.\footnote{122. Cf. id. (“Few would seriously argue that the public interest would be well served either by extending all of [the Government’s law enforcement] powers to those accused of crime or by equalizing the procedural burdens and restrictions of prosecution and defendant at trial.”).}

Despite these counterarguments, the notion of equality cannot be dismissed. There is a basic element of fairness essential to the perception that justice has been done. Regardless of whether it rises to the level of prosecutorial misconduct, there are situations when grants of immunity by the prosecution are so numerous that they belie any notion of fair play. A 2010 case from the Southern District of Texas demonstrates the perceived unfairness when defense witness immunity is denied. In that case, the government immunized ten testifying witnesses and yet the prosecutor and the judge refused to grant immunity to a single witness for the defense who would have testified to negate the intent element of the crime.\footnote{123. United States v. Davidson, Criminal No. H-10-201-3S, 2010 WL 3521726, at *4 (S.D. Tex. Sept. 8, 2010) (denying defendant’s request for defense witness immunity and finding that “the fact that the government has immunized approximately ten government witnesses while refusing to immunize one defense witness is not so extraordinary to require the court’s intervention”).} While this ruling was consistent with—and mandated by—Fifth Circuit precedent,\footnote{124. See id. (citing United States v. Garcia Abrego, 141 F.3d 142, 152 (5th Cir. 1998)).} the question must be asked: did the defendants have a fair trial given the number of immunized government witnesses and the denial of defendants’ request to immunize a single witness?\footnote{125. For an example of when a court came to the opposite conclusion, see generally United States v. Straub, 538 F.3d 1147 (9th Cir. 2008). In Straub, the prosecutor provided immunity grants and cash payments to eleven of the twelve government witnesses while denying immunity to the one witness called by the defense. Id. at 1152–53. The court held that this had the effect of so distorting the fact-finding process that the defendant did not receive a fair trial. Id. at 1164.}

Beyond specific case law or constitutional rights, the Ninth Circuit has summed up this argument for defense witness immunity in a simple hypothetical: “[W]here two eyewitnesses tell conflicting stories, and only the witness testifying for the government is granted immunity, the defendant would be denied ‘any semblance of a fair trial.’”\footnote{126. United States v. Westerdahl, 945 F.2d 1083, 1087 (9th Cir. 1991) (quoting United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984)).}

IV. Arguments Against Defense Witness Immunity

The arguments against defense witness immunity made by courts and the government revolve around three concepts: (1) the immunity decision should be left to the Executive, (2) defense witness immunity will be abused by witnesses practicing cooperative perjury, and (3) the immunity grant will impede a future government prosecution.
A. **Immunity Is Best Left to the Executive Branch**

The argument that immunity is best left to the Executive Branch is based upon the wording of the immunity statute, which provides that a district court judge shall grant immunity "upon the request of the United States attorney for such district." Courts have used this language to conclude that any immunity grant lies solely with the Executive Branch, and that "[w]hile use immunity for defense witnesses may well be desirable, its proponents must address their arguments to Congress, not the courts." The government has gone so far as to argue that these separation-of-powers concerns “effectively insulate” the government from being forced to grant immunity to a defense witness. However, all courts—including those that have never found immunity—have cast aside this argument and made it clear that under certain circumstances the refusal to grant immunity to a defense witness would be an abuse of the discretion provided to the government by the immunity act. The question is really whether such an abuse will ever be found, not whether this is a definitive argument against defense witness immunity.

B. **Cooperative Perjury**

The concern that a witness will lie to secure the acquittal of a friend or fellow gang member has been raised by many courts when defense witness immunity is denied. This is a valid criticism, but it is anticipated by the language of the immunity statute and is not fatal to the argument for defense witness immunity. In a prosecution for perjury it makes no difference whether use immunity was granted. The use-immunity statute has a specific exception for “a prosecution for perjury [or] giving a false statement.” If a witness is granted immunity under the statute and proceeds to lie, the prosecution of the witness for perjury is not impeded by the immunity grant.

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129. United States v. Moussaoui, 365 F.3d 292, 304 (4th Cir. 2004), aff’d in part, vacated in part on other grounds, 382 F.3d 453 (4th Cir. 2004).
130. See e.g., United States v. Washington, 318 F.3d 845, 855 (8th Cir. 2003) (holding that the government may be compelled to grant immunity in certain situations in which the prosecution abuses its discretion); accord United States v. Talley, 164 F.3d 989, 998 (6th Cir. 1999); Blissett v. Lefevere, 924 F.2d 434, 442 (2d Cir. 1991); United States v. Angiulo, 897 F.2d 1169, 1191–92 (1st Cir. 1990); United States v. Hooks, 848 F.2d 785, 799 (7th Cir. 1988); Autry v. Estelle, 706 F.2d 1394, 1402 (5th Cir. 1983); United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978); United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir. 1976).
131. See, e.g., Blissett, 924 F.2d at 441–42 (finding that immunity is best left to the prosecution because doing so “reduces the possibility of cooperative perjury between the defendant and his witness”).
133. See id. (providing an exception to use immunity in perjury prosecutions).
Opponents of defense witness immunity argue that a witness has more incentive to lie when he or she knows the testimony being given cannot be used in a future prosecution. In other words, if the witness testifies that he or she actually was the murderer, the prosecutor cannot use this confession in a subsequent trial. In *Turkish*, the court addressed this and reasoned that “[t]he threat of a perjury conviction, with penalties frequently far below substantive offenses, [cannot] be relied upon to prevent such tactics.”

To illustrate why the grant of immunity is less troublesome, the next few paragraphs explore the two possibilities with respect to exonerating defense witness testimony using an extreme—but very real—example.

If a defendant calls a witness who confesses to the crime with which the defendant is charged, there are two possibilities. First, the witness may be telling the truth. This is vital information, and to keep it hidden in the interests of preventing perjury may result in an innocent person being imprisoned. Smothering this evidence by denying immunity and proceeding with the prosecution of the defendant does not serve the interests of justice and undermines the credibility of the judicial system. It is a concern that immunity will impede a future prosecution, but if a defendant is innocent he or she should not go to jail when the identity of the real criminal could be discovered with a grant of use immunity.

On the other hand, the witness in this hypothetical may by lying to secure the acquittal of his or her friend. This is undoubtedly troubling, but also resolvable. The threat of prosecution using the witness’s testimony is not a real threat because if it was a false confession the prosecutor should not use this against the witness. Also, the witness would likely have an alibi and could later deny the truth of the confession on the stand. That again leaves perjury as the deterrent to a lying witness, and as explained a perjury prosecution is not impeded by the use-immunity statute.

If certain criteria are met, such as those set forth by the Third or Ninth Circuits, the evaluation of the proposed defense witness should be left to the jury, with the prosecution spending its energies discrediting the proposed witness, not opposing a grant of immunity. The idea that the decision should be left to the jury has been discussed positively by courts, including those denying defense witness immunity for other reasons. Even if it were true that granting use immunity would be more likely to lead to perjuring

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134. See Christine J. Saverda, Note, *Accomplices in Federal Court: A Case For Increased Evidentiary Standards*, 100 YALE L.J. 785, 787–89 (1990) (arguing that the limited deterrent effect of perjury sanctions is one factor contributing to a witness’s incentive to lie).

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

136. See supra notes 105–10 and accompanying text.

137. See supra section II(C)(1) and subsection II(C)(2)(b).

138. United States v. Mackey, 117 F.3d 24, 28 (1st Cir. 1997) (“One might think that it was a matter for the jury, not the prosecutor, to decide whether testimony seemingly helpful to the defendant was actually false.”).
witnesses, this would be filtered by juries and is outweighed by the due process right of a defendant to present exculpatory evidence at trial.\footnote{139}{For a discussion of this right, see supra subpart III(A).}

\section*{C. Impediment of Future Prosecutions}

A common argument by courts and the government is that granting use immunity to a witness will hamper future prosecutions of the witness.\footnote{140}{United States v. Ebbers, 458 F.3d 110, 118 (2d Cir. 2006).} This argument was especially powerful when transactional immunity was required,\footnote{141}{See supra note 8.} but \textit{Kastigar v. United States}\footnote{142}{406 U.S. 441 (1972).} made it clear that use immunity is sufficient to compel a witness to testify.\footnote{143}{\textit{Id.} at 442; Note, \textit{The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses}, 91 HARV. L. REV. 1266, 1273–74 (1978).} Use immunity is what a defense witness would receive under 18 U.S.C. § 6002. However, the government argues that because of the requirements put forth in \textit{Kastigar}, use immunity may still impede a future prosecution.\footnote{144}{\textit{Ebbers}, 458 F.3d at 118 (“A grant of use immunity may well hamper the government in a future prosecution of a witness.”).} Specifically, the government must show that any subsequent evidence used in prosecuting a witness was not tainted by knowledge gained from the immunized testimony.\footnote{145}{\textit{Kastigar}, 406 U.S. at 460.}

The Supreme Court stated that, theoretically, use immunity “leaves the witness and the prosecutorial authorities in substantially the same position” as if the witness had been allowed to invoke the Fifth Amendment.\footnote{146}{\textit{Id.} at 462.} In some cases, subsequent prosecutions may be difficult because of this taint burden, but in many situations it will make little difference. The Court made it clear that prosecutors have the burden of showing “their evidence is not tainted by establishing that they had an independent, legitimate source” for evidence being used to prosecute a witness who testified under a use-immunity grant.\footnote{147}{Murphy v. Waterfront Comm’n, 378 U.S. 52, 79 n.18 (1964), overruled in part on other grounds by United States v. Balsys, 524 U.S. 666 (1998).} This normally requires the trial court to hold a “\textit{Kastigar} hearing” to give the government the opportunity to show that all of its evidence came from sources independent of the immunized testimony.\footnote{148}{O’SULLIVAN, supra note 113, at 866.} This entails more than a declaration by the prosecutor that he or she did not use the immunized testimony, but just how much of an impediment this burden is to future prosecutions varies by circuit. For example, the Third and Eighth Circuits have concluded that any government agent exposed to immunized testimony is barred from involvement in a future prosecution.\footnote{149}{See United States v. Semkiw, 712 F.2d 891, 895 (3d Cir. 1983) (remanding case where prosecutor had access to immunized testimony for findings of fact on the extent of such access);}
Other circuits, like the Second and Eleventh, have rejected this and only require the government to show an independent source for the evidence.\textsuperscript{150} Although the impeding of future prosecutions weighs against granting immunity in some circumstances, it does not always apply because many times the defense witness is not a prosecution target.\textsuperscript{151} In other situations, the government may have an interest in charging the defense witness, but the later prosecution never occurs.\textsuperscript{152} Ultimately, there are significant differences between attempting to have immunity granted for a codefendant—which would require separate trials and possibly separate prosecutors\textsuperscript{153}—and an immunity request for another witness. While future prosecutions are a consideration, one approach is that taken by the Third Circuit, where the interests of the government are a factor evaluated by the court.\textsuperscript{154} However, one must remember that the interests of the government in a future prosecution should not trump a defendant’s right to a fair trial, and there are solutions that balance these government interests with the rights of the defendant.\textsuperscript{155}

\textsuperscript{149} United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973) (finding that prosecutor’s perusal of immunized testimony constituted impermissible “use”).


\textsuperscript{151} See, e.g., United States v. Straub, 538 F.3d 1147, 1152 (9th Cir. 2008) (granting immunity where the “[defense witness] was not in any way a target of the criminal prosecution”).

\textsuperscript{152} See, e.g., United States v. Mackey, 117 F.3d 24, 27 (1st Cir. 1997) (holding that the government’s refusal to grant immunity to the defense witness because of a concern with immunizing a later prosecution was permissible, even though “the prosecutor did not know of any pending investigation of” the witness).

\textsuperscript{153} See supra notes 149–50 and accompanying text.

\textsuperscript{154} See Gov’t of V.I. v. Smith, 615 F.2d 964, 974 (3d Cir. 1980) (holding that the court may evaluate whether the government has a strong interest in withholding immunity in deciding whether to order the government to grant immunity to the defense witness).

\textsuperscript{155} Id. at 973. The Smith court discussed these options as follows:

In many instances, use immunity, which was all that was sought here and is all that is constitutionally required, is virtually costless to the government. For example, the government may have already assembled all the evidence necessary to prosecute the witness independent of the witness’ testimony. Or the government may be able to “sterilize” the testimony of the immunized witness and so isolate it from any future testimony of the witness that it would not trench upon any of the witness’ constitutional rights if he were subsequently to be prosecuted. Finally, the government may seek a postponement of the defendant’s trial so that it may complete its investigation of the defense witness who is the subject of an immunity application. While these options are not intended to be all inclusive, if any of these options are available to the government, then it would appear to us that the government would have no significant interests which countervail the defendant’s due process rights. Any interest the government may have in withholding immunity in such a situation would be purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity.

Id. (citations and footnotes omitted).
D. The Arguments Against Defense Witness Immunity Cannot Overcome the Rights of a Defendant

Despite the various arguments against defense witness immunity that have been outlined above, none overcome the need to ensure a fair trial for every defendant. While concerns about cooperative perjury and future prosecutions may shape how immunity is granted—for example granting use immunity instead of transactional immunity—these concerns pale in comparison to ensuring that defendants are allowed to present relevant evidence. Defense testimony is especially important when it contradicts an immunized government witness, and this is what the Straub test provides for that the majority’s prosecutorial misconduct test does not.

V. The Supreme Court Should Adopt the Straub Test

The Supreme Court should resolve the circuit split on defense witness immunity by holding that the Ninth Circuit’s Straub test is the proper way of evaluating requests for defense witness immunity. While there are many reasons for expanding defense witness immunity, this section provides three relevant considerations for the Court’s decision.

A. Defense Witness Immunity Should Focus on the Effect of Prosecutorial Actions, Not the Intent of the Prosecutor

The Straub test differs from the majority’s prosecutorial misconduct test in a simple but important aspect. Under Straub, immunity can be granted when prosecutorial actions have the effect of denying the defendant’s right to a fair trial, even if this was not the prosecutor’s intent. This is an important change that should be embraced by the Supreme Court to ensure that a defendant has the ability to present evidence in his or her defense.

The majority’s prosecutorial misconduct approach, which has never concluded a defendant is entitled to immunity for a witness, is not adequate. There are many situations when the majority approach fails to see justice served. The focus on prosecutorial misconduct is misplaced because it misses other situations when a defendant is denied important, potentially exculpatory testimony. By changing the focus from the intent of the prosecutor to the effect of his or her actions, these additional scenarios are accounted for by the Straub test. Straub and Davidson, both discussed above, are examples of how the effects of prosecutorial actions can far exceed any prosecutorial intent. While broader than the majority test,
Still requires that the testimony be relevant and that it directly contradict an immunized government witness. These additional requirements, along with the effect of distorting the fact-finding process, provide reasonable limitations on defense witness immunity.

Another reason for allowing immunity based upon the effect of a prosecutor’s actions is that it eliminates the misconduct portion of the test. Courts are hesitant to find misconduct by federal prosecutors, evidenced by the fact it has never been found under the majority’s test for defense witness immunity. Prosecutorial misconduct should not be a requirement for the granting of immunity. Instead, immunity for defense witnesses should be available so a defendant can present relevant testimony in support of his or her case. This will ensure that a defendant receives his or her full due process protection. The right to due process has been defined by the Supreme Court as follows: “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.”

This right should not depend on the intent of the prosecutor, and should be expanded to include defense witness immunity when the Ninth Circuit’s Straub test is met.

B. Straub Is Superior to the Third Circuit’s Effective Defense Approach

While both the Third and Ninth Circuit tests for defense witness immunity protect the rights of defendants more than the majority approach, there are differences in the tests that make the Ninth Circuit’s Straub test superior. The first is that the Ninth Circuit only requires a witness’s testimony be relevant, while the Third Circuit’s test is not met unless the testimony is “clearly exculpatory” and “essential.” The higher standard in the Third Circuit is too difficult for defendants to meet and does not do enough to protect their rights. For example, in Straub, the defendant could not have met the exculpatory prong of the test because the testimony he proposed only discredited a prosecution witness and provided an alternative scenario. However, the testimony was certainly relevant, and it contradicted the testimony of an immunized prosecution witness. To fall within the “effect” portion of the Straub test, testimony must contradict a government witness who received immunity, which limits the circumstances when immunity must be granted. This strikes a balance between a “clearly

160. Straub, 538 F.3d at 1162.
162. See supra Table A.
163. Compare Straub, 538 F.3d at 1162, with Gov’t of V.I. v. Smith, 615 F.2d 964, 972 (3d Cir. 1980).
164. Straub, 538 F.3d at 1153–54.
165. Id.
166. United States v. Gage, 331 F. App’x 547, 548 (9th Cir. 2009).
exculpatory” requirement and a requirement that requires immunity grants too often.167

The second main difference between the Third and Ninth Circuits is that the Third Circuit allows the consideration of governmental interests that weigh against granting immunity. The government’s interest cannot outweigh a defendant’s constitutional right to a fair trial, and it cannot be used to deny immunity to a defense witness. If this factor is part of the test, then the government can always claim an interest in potentially prosecuting a defense witness, effectively giving a prosecutor the ability to deny immunity. If the government wants to pursue a subsequent prosecution of the defense witness, this is still available because only use immunity is granted.168 The government also has other options, such as not using its own immunized witness, that will prevent a court from requiring a grant of immunity under the Straub test.169 In other words, the government has options to protect its interests without impeding the rights of the defendant.

C. The Supreme Court, and Not Congress, Should Create this Right

The Supreme Court has created many of the most important rights for criminal defendants. Miranda and the right against self-incrimination may be the most prominent example of a right created by the Supreme Court.170 Criminal defendants are not a popular group, and therefore an elected Congress will not represent their interests. The Constitution instead provides the basis for courts to create or enforce protections for these defendants, which are often found in the Due Process Clauses of the Fifth and Fourteenth Amendments.171 While courts have argued that Congress, and not the Judicial Branch, must make any changes to the law on defense witness immunity, this is not a realistic scenario.172 Instead, the Supreme Court has the responsibility to protect a defendant’s due process right to a fair trial, and should take the opportunity when it presents itself.

167. These limitations are consistent with the argument that immunity should be equalized between the prosecutor and the defendant. See supra subpart III(C).
168. See supra note 8.
169. Straub, 538 F.3d at 1166 (On remand, the district court should enter a judgment of acquittal on Counts 3 and 4 unless the prosecution invokes 18 U.S.C. §§ 6002–6003 to grant use immunity to [the defense witness] at a new trial, or tries the case without [the immunized government witness’s] testimony.).
170. See Michigan v. Tucker, 417 U.S. 433, 444 (1974) (asserting that the Miranda warnings are “not themselves rights protected by the Constitution but [are] instead measures to insure that the [Fifth Amendment] right against compulsory self-incrimination [is] protected”).
171. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (“The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.”).
172. See United States v. Lenz, 616 F.2d 960, 963 (6th Cir. 1980) (“While use immunity for defense witnesses may well be desirable its proponents must address their arguments to Congress, not the courts.” (citations omitted)).
VI. Conclusion

This Note argues that despite its accommodating language, the prosecutorial misconduct approach does not provide a defendant with adequate protections. This is evidenced by specific instances where defense witness immunity was denied, and also in the aggregate where it was illustrated that the vast majority of circuits has never granted defense witness immunity. It has further been shown that while the arguments of courts and the government against a more broadly available right to immunity are appealing in the abstract, they do not withstand a more thorough evaluation. These arguments also do not outweigh a defendant’s due process right to present evidence in his or her defense, a right impacted by the denial of defense witness immunity. Ultimately, this Note argues that the Supreme Court should adopt the Ninth Circuit’s Straub test and expand a defendant’s due process right to a fair trial to include immunity for defense witnesses.

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