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Whose Truth Is It, Anyway?

Commentary: A case for judicial grants of defense witness immunity

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Imagine a situation where prosecutors have spent years investigating their case -- they have their theory, and the trial is underway. A defense witness exists who is available to testify and would completely undercut the prosecution's theory. But he is too afraid to testify because the prosecutors might retaliate by bringing charges against him. No problem -- just get the witness to use immunity so he can tell the truth at trial, right? Wrong.

Unfortunately, the same prosecutor who holds the sword of Damocles over the witness's head has the sole power to grant immunity for that witness. And, not surprisingly, that prosecutor often does not want to help the defendant.

This scenario replays itself in courtrooms all over America -- and there is no reason for it. Judges who routinely make decisions on matters, both large and small, are certainly equipped to decide what witnesses should testify at trial to ensure due process and a fair trial. The law needs to be changed.

Most criminal defense attorneys needing witnesses who are reluctant to testify begin case preparation pessimistically because decades of case law state that the power to grant immunity rests almost exclusively with prosecutors.¹ The time for reconsideration and reform has come. If we cringe to think

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that a prosecutor could use a physically coerced confession and we agree that illegally seized evidence is not admissible, then why accept a system where exculpatory evidence of a defendant's innocence can be (and often is) kept out at trial at the sole discretion of an adversary party claiming to represent the government's interests in a fair trial?

Trials, particularly criminal ones where a person's liberty is at stake, are supposed to be forums for seeking the truth. However, given the government's immunity power under the current statutes, prosecutors often "encourage" potential defense witnesses not to testify by declaring that their investigation is ongoing and that the witnesses may someday be charged. This has the potential for enormous abuse as, in many cases, that "future" prosecution never occurs, and all that has resulted was that a key defense witness has been kept off the stand.

The issue of defense witness immunity has risen to the forefront in several recent high-profile white-collar cases. It is a principle issue on appeal in the case of Bernard Ebbers, the former WorldCom president and CEO convicted of securities fraud and conspiracy charges and sentenced to 25 years imprisonment.

In another recent four-month federal jury trial, a Mississippi plaintiffs attorney (whom Chadbourne & Parke represented) was accused of corruptly influencing judges who presided over his cases. He sought to call two attorneys in his law firm who tried the cases in question to show their merits. Right up until the moment the defense case began, the prosecutors kept waffling about the status of these attorneys (targets or not) and whether they would be given immunity, which never occurred. Under the circumstances, the attorneys refused to testify. The

real shame was that the court's inherent and nondelegable power to ensure due process was usurped by the prosecutors' actions (which, luckily for this defendant, did not result in conviction).

In another case, this one pending in Virginia, two pro-Israel foreign policy lobbyists stand accused of the illegal disclosure of classified defense information. The defendants (one of whom Chadbourne & Parke represents) has tried to secure the trial testimony of various government officials and private citizens in the foreign policy arena. Some of these potential witnesses have provided favorable statements in the media about the defendants' innocence. Yet, as trial approaches, all have raised the concern of prosecutorial retaliation and believe that, without a grant of immunity, they do not want to testify where prosecutors are threatening to make legitimate lobbying into a crime. Even individuals whose actions are more than 20 years old are wary because of prosecutors' statements to them about "ongoing conspiracies."

In a system that is supposed to be fair and concerned about truth, why should it be the prosecutor rather than the court who gets to shape what truth is told? And despite this clearly inequitable system, there is little a federal judge can do about a prosecutor's prerogative to deny a defense witness immunity. Judges traditionally tend to give wide latitude to this area of prosecutorial discretion, except where the prosecutorial misconduct is readily apparent and outrageously egregious.

Several circuits hold that federal district court judges have no power to challenge a prosecution's decision to deny a defense witness immunity.² Other circuits, like the 2nd and D.C. Circuits, have held that federal courts can review a prosecutor's decision not to grant a defense witness immunity - but only where there is clear prosecutorial misconduct (e.g., hiding exculpatory evidence from the court or engaging in blatant witness intimidation) and such testimony is material, exculpatory, noncumulative and available from no other source. Even under these circumstances, however, the court's ability to remedy this conduct is limited and the bar for the defense to prove such misconduct is set very high.³

The best remedy is to amend the federal statutory law of immunity to accommodate the search for truth and justice. The provisions of 18 U.S.C. § 6000 et seq. can easily be changed to allow a defendant to make a pre-trial application to a court (or during trial for good cause shown) requesting immunity for a witness. The request, just like requests for severance in order to

secure the testimony of a co-defendant,⁴ would have to be specific, state what the testimony would be and state why their interests of justice outweigh allowing the testimony to be stifled. This balancing is no more difficult than literally hundreds of considerations trial judges weigh every day.

Judicial grants of defense witness immunity serve to facilitate the truth-seeking process that is the bedrock for our rule of law. It should be the courts -- not the prosecutors -- who should have the ultimate authority in deciding what constitutes fair play and whether a defense witness should be given immunity. Otherwise, whose truth is it, anyway?

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(1) The decision to grant a witness immunity lies solely within the executive branch, i.e., it rests with the prosecutor. See 18 U.S.C. §§ 6002 -2003 (2005); see also *United States v. Castro*, 129 F.3d 226, 232 (1st Cir. 1997).

(2) See *Castro*, 129 F.3d at 232 (finding courts lack inherent authority to grant immunity); *United States v. Lahue*, 261 F.3d 993, 1014 (10th Cir. 2001) (same); *In re Grand Jury Proceedings*, 995 F.2d 1013, 1017 (11th Cir. 1993) (same); *United States v. Quintanilla*, 2 F.3d 1469, 1483 (7th Cir. 1993) (same).

(3) See, e.g., *Carter v. United States*, 684 A.2d 331 (D.C. 1996) (en banc) (requiring prosecution to choose between immunizing critical defense witnesses or to face dismissal of the indictment in case where court finds prosecutorial distortion of fact-finding process); *United States v. Chitty*, 760 F.2d 425 (2d Cir. 1985) (holding due process requires granting of defense witness immunity to safeguard defendant's right to essential exculpatory testimony); *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) (holding judicial immunity for defense witness only where the witness is available, testimony is clearly exculpatory and essential, and the government does not have a strong countervailing interest against granting immunity); *United States v. De Palma*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (vacating conviction finding prosecution's reliance on immunized testimony in its case-in-chief while denying immunity to defense witnesses denied defendant fair trial).

(4) See *Zafiro v. United States*, 506 U.S. 534 (1993) (holding that Rule 14 severance rests solely with the district court judge); *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990) (granting severance upon finding that co-defendant was the government's "best witness against the other co-defendants"); *United States v. Green*, 324 F. Supp. 2d 311 (D. Mass. 2004) (holding severance necessary in case where co-defendant's counsel acting as second prosecutor against defendant).