JUDICIALLY CONFERRED DEFENSE IMMUNITY IN THE THIRD CIRCUIT: HELP OR HINDRANCE TO CRIMINAL DEFENDANTS?

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I. INTRODUCTION

In *Government of the Virgin Islands v. Smith*,[1] a panel of the United States Court of Appeals for the Third Circuit[2] reached a conclusion never before reached, and never since agreed with or applied by a federal court. Ignoring its own precedent[3] as well as the unanimous decisions of other courts of appeals,[4] the Third Circuit held that district courts have "inherent authority to effectuate [a] defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense."[5] This holding has been subject to a storm of scholarly[6] and judicial[7] criticism. More significantly, almost a decade later, *Smith* continues to stand alone, scorned by every other court of appeals,[8] severely limited by subsequent decisions of the Third Circuit,[9] and so strictly applied by the district courts of this Circuit that the remedy it created has

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1 615 F.2d 964 (3d Cir. 1980).

2 Judges Gibbons, Weis and Garth sat on the *Smith* Panel, Judge Garth writing the opinion of the court.

3 *See* United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978), *cert. denied*, 439 U.S. 980 (1978); United States v. Morrison, 535 F.2d 223, 228-229 (3d Cir. 1976); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973).

4 Prior to *Smith*, other courts of appeals considering whether a defendant could successfully demand a grant of immunity for a potential defense witness held that they lacked the power to do so. *See, e.g.*, United States v. Klauber, 611 F.2d 512, 517-20 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

5 615 F.2d at 969 (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

6 *See, e.g.*, Flanagan, *Compelled Immunity For Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME LAW. 447 (1981).

7 *See infra* note 175 and accompanying text.

8 *See infra* notes 175-79 and accompanying text.

9 *See* text accompanying *infra* notes 115-48.

yet to be invoked in print.[10]

This article seeks to explain the remarkable lack of generative power of *Smith*, which has resulted not only in an uninvoked remedy, but also in an unvindicated right. Indeed, while *Smith* purported to be solicitous and protective of defendant's rights, its effect has been to curtail those rights. Stated simply, criminal defendants would have been better off without *Smith*.

In seeking to explain this anomalous result, this article first outlines the problem that *Smith* sought to solve, second traces the genesis of that decision and third explores other courts' response to it. Ultimately it seeks to explain why *Smith* has been so devoid of precedential weight and to explore the comparative effect of this weakness. Underlying this analysis is the concern that in this area as in others, the Third Circuit has protected criminal defendants' rights less than it purports to, as well as less than it should.[11]

II. THE PROBLEM: COMPULSORY PROCESS VS. SEPARATION OF POWERS

Consider the plight of the criminal defendant, charged with a serious federal offense, whose only exculpatory witness will not testify for fear of incriminating herself. At first blush, the case presents a difficult if common conflict between the defendant's sixth amendment[12] right "to have compulsory process for obtaining witnesses in his favor" and the witness' fifth amendment[13]

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10 *See* text accompanying *infra* notes 149-74.

11 *See also* Marino, *Outrageous Conduct: The Third Circuit's Treatment of the Due Process Defense*, 19 SETON HALL L. REV. 606 (1989).

12 The sixth amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. VI.

13 The fifth amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due pro-

right not to incriminate herself.[14]

This conflict, however, would easily be resolved by a grant of immunity like that provided for in the federal immunity statute.[15] The defendant would obtain the benefit of the witness' testimony, for once granted immunity, the witness would be required to testify or face imprisonment until the conclusion of the court proceeding.[16] The witness, on the other hand, would be fully protected since neither her testimony nor its fruits could be used against her in any criminal case.[17] The scope of her immunity is precisely co-extensive with her fifth amendment privilege and would thus suffice to supplant it.[18]

Attractive as this solution may be, until *Government of the Virgin Islands v. Smith*,[19] it was not available to defendants or courts seeking to accommodate these competing constitutional concerns. That is because immunity is purely a creature of statute and the statute governing grants of immunity for purposes of grand jury or trial testimony empowers only a United States Attorney "with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General" to seek an order granting a witness immunity.[20] While such an order should be granted only when the testimony sought "may be necessary to the public interest"[21] and when the witness "has refused or is likely to refuse to testify . . . on the basis of his privilege against self-incrimination,"[22] these are matters left to

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cess of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

14 This is not the only scenario in which fifth and sixth amendment rights clash. Where, for example, a defendant requires the testimony of a co-defendant who wishes to exercise his fifth amendment right not to testify, the Third Circuit has consistently held that a severance may be necessary. *See* United States v. Dickens, 695 F.2d 765, 779 n.19 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983); United States v. Provenzano, 688 F.2d 194, 198-99 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982); United States v. Boscia, 573 F.2d 827, 832 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978); United States v. Rosa, 560 F.2d 149, 155-56 (3d Cir.), *cert. denied.*, 434 U.S. 862 (1977).

15 18 U.S.C. §§ 6002-6003 (1982).

16 28 U.S.C. § 1826(a)(1) (1982).

17 18 U.S.C. § 6002 (1982).

18 *See* United States v. Apfelbaum, 445 U.S. 115, 123 & n.10 (1980). *See also* Kastigar v. United States, 406 U.S. 441 (1972).

19 615 F.2d 964 (3d Cir. 1980).

20 18 U.S.C. § 6003(b) (1982).

21 18 U.S.C. § 6003(b)(1) (1982).

22 18 U.S.C. § 6003(b)(2) (1982).

the "judgment" of the United States Attorney.[23]

Thus, it is up to the executive branch to determine whether "gaining the witness' testimony outweighs the loss of the opportunity for criminal prosecution of that witness."[24] The role of the judicial branch in overseeing this process is accordingly limited and is best described as "ministerial."[25] The district court's function is merely to determine whether the executive has complied with the requirements of the statute,[26] and "to find the facts on which the order is predicated."[27] Indeed, district courts lack the power to deny properly presented applications for statutory immunity.[28]

The question presented in *Smith* was whether courts could grant immunity absent an executive request. Prior to *Smith*, courts had unanimously held that such independent judicial grants of defense witness immunity would violate the separation of powers doctrine.[29] Hence, although "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,"[30] such sixth amendment compulsory process right was left unvindicated by the limitations of the federal statute. In *Smith*, the Third Circuit attempted to rectify this problem in dramatic fashion.

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23 18 U.S.C. § 6003(b) (1982).

24 Pillsbury Co. v. Conboy, 459 U.S. 248, 261 (1983).

25 *See, e.g.*, United States v. Pearce, 792 F.2d 397, 402 (3d Cir. 1986) (citing *In re* Grand Jury Investigation, 486 F.2d 1013, 1016 (3d Cir. 1973)); United States v. Taylor, 728 F.2d 930, 934 (7th Cir. 1984); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973).

26 *See* Ullmann v. United States, 350 U.S. 422, 434 (1956).

27 *Pillsbury Co.*, 459 U.S. at 254 n.11 (citations omitted).

28 *See, e.g.*, *Ullmann*, 350 U.S. at 432-33 ("A fair reading of [the predecessor to 18 U.S.C. § 6003(b)] does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not warrant it."); *In re* Grand Jury Investigation, 657 F.2d 88, 90-91 (6th Cir. 1981); Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

29 *See supra* notes 3 and 4.

30 Taylor v. Illinois, 108 S. Ct. 646, 652 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). Compulsory process rights are to be balanced against and do not "invariably outweigh countervailing public interests." *Id.* at 655. Thus, just last term, the Supreme Court held that a defendant's sixth amendment right to compulsory process was not violated where a defense witness was barred from testifying because his identity had not been previously disclosed, as required. *Id.* at 657. In performing the mandated balancing, "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must be [weighed]." *Id.* at 655.

III. THE EVOLUTION OF *SMITH* IN THE THIRD CIRCUIT: THE ESTABLISHED PRECEDENT FROM WHICH *SMITH* DEPARTED

The Third Circuit's decision in *Smith* was particularly extreme given the background from which it emerged. For notwithstanding the court's protestations to the contrary, *Smith* involved an obvious rejection of prior case law. Although the vitality of that precedent had been questioned a little over a year before,[31] *Smith* nonetheless ventured where the court never before had been, and where no other court, even those bound by its precedent, has followed.

The Third Circuit first addressed a defendant's request for defense witness immunity in *United States v. Berrigan*.[32] In *Berrigan*, the district court denied an immunity request made during trial for unspecified witnesses,[33] ruling that it had "no authority to grant such immunity or to demand that the government seek immunity for defense witnesses."[34] On appeal, the Third Circuit[35] addressed that point summarily, writing only, "[w]e agree [with the district court]," and citing cases from three other circuits holding that such authority did not exist.[36] Initially, then, the court rejected both the argument that courts can grant immunity to potential defense witnesses and the contention that courts can order the government to do so.

The first of these two propositions survived three subsequent decisions of the court. In *United States v. Morrison*,[37] the Third Circuit unambiguously ruled that "courts have invariably held that they lack power to grant immunity except on request of the Government."[38] In *United States v. Niederberger*,[39] the court

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[31] *See* United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

[32] 482 F.2d 171 (3d Cir. 1973).

[33] *Id.* at 190. The *Smith* Court distinguished *Berrigan* on this ground, though it was not the basis for the *Berrigan* Court's decision. *Smith*, 615 F.2d at 972 n.11.

[34] *Berrigan*, 482 F.2d at 190.

[35] Judges Van Dusen, Aldisert and Rosenn sat on the panel. *Id.* at 173. Judge Aldisert authored the opinion of the court.

[36] *Id.* at 190 (citing United States v. Smith, 436 F.2d 787 (5th Cir. 1971), *cert. denied*, 402 U.S. 976 (1971); United States v. Lyon, 397 F.2d 505 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968); Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967)).

[37] 535 F.2d 223 (3d Cir. 1976).

[38] *Id.* at 229 (citing United States v. Berrigan, 482 F.2d 171, 195 (3d Cir. 1973); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975)).

wrote: "The rule in this Circuit is clear; a trial court has no authority to provide use immunity for a defense witness."[40] And, in *United States v. Rocco*,[41] the court quoted the above passage, concluding also that "it has been uniformly accepted that the grant or denial of immunity is within the sole discretion of the executive branch of government and thus, neither the courts nor defense counsel may force the prosecutor to compel the testimony of a defense witness."[42] Thus, as of November 14, 1978,[43] the Third Circuit was in step with the nation's other courts of appeals:[44] judges had no authority to grant immunity to potential defense witnesses.

Nor did the Court blaze or purport to blaze a new path in *United States v. Morrison*.[45] In *Morrison*, the Assistant United States Attorney prosecuting the case subjected a potential defense witness to a "barrage of warnings" regarding the possible conse-

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39 580 F.2d 63 (3d Cir. 1978), *cert. denied*, 439 U.S. 980 (1978). Judges Rosenn, Higginbotham and Barlow presided, with Judge Barlow, a district judge sitting by designation, writing the opinion of the court.

40 *Id.* at 67 (citing United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973)). In a footnote, the court reasoned that "[t]he function of the trial court is limited to determining whether a request for immunity made by the government is in accord with the statutory procedure." *Id.* at 67 n.7 (citing Ullmann v. United States, 350 U.S. 422, 433-34 (1956)).

41 587 F.2d 144 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979). Judge Adams wrote the opinion of the court and was joined by Chief Judge Seitz and Judge Rosenn.

42 *Id.* at 147 and n.10. In *Rocco*, the district court had ruled that "if a court did find that the testimony of a witness invoking privilege would exculpate a defendant, and the government withheld the immunity which would make the testimony available to the defendant even while insisting on continuing to prosecute him, a Sixth Amendment breach would occur." United States v. La Duca, 447 F. Supp. 779, 787 (D.N.J.), *aff'd sub nom.* United States v. Rocco, 587 F.2d 144 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979). In such circumstances, if the defendant could not receive a fair trial, a district court could dismiss an indictment. *LaDuca*, 447 F. Supp. at 787. In so holding, the district court relied entirely upon law review articles, recognizing that the case law was to the contrary. *See id.* at 787 n.8 (citing Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 166-70 (1974); Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953, 956 n.19 (1967); Comment, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 79 (1972); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978)). The Court of Appeals disagreed with the district court's reasoning, but affirmed on other grounds. *Rocco*, 587 F.2d at 148.

43 *Rocco* was decided on November 14, 1978. Its holding, however, survived less than a week, for on November 17, 1978, the court decided United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). *See* text accompanying *infra* notes 54-81.

44 *See supra* notes 4, 36, 38. *See also infra* note 180.

45 535 F.2d 223 (3d Cir. 1976).

quences of her testimony,[46] culminating in a "highly intimidating personal interview."[47] As a result, she refused to answer a number of questions while on the stand, "thus depriving [the defendant] of much of the evidence he had expected to place before the jury."[48] Finding the prosecutor's actions to be "completely unnecessary" and "bizarre," the Third Circuit ordered a new trial for the defendant.[49] Concerned that such trial be a fair one, but lacking the power to itself grant immunity to the witness, Judge Forman declared:

> There are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness. Such a circumstance was created in this case when prosecutorial misconduct caused the defendant's principal witness to withhold out of fear of self-incrimination testimony which would otherwise allegedly have been available to the defendant.
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> At the new trial, in the event that the defendant calls Sally Bell as a witness, if she invokes her Fifth Amendment right not to testify, a judgment of acquittal shall be entered unless the Government, pursuant to [federal statute], requests use immunity for her testimony.[50]

Thus, *Morrison* stands for the proposition that under circumstances evidencing prosecutorial misconduct, the government may be required to choose between immunizing a defense witness or dismissing an indictment. It authorizes a district court neither to grant immunity to a defense witness nor to order the government to do so. Accordingly, it has been limited to never-again-seen instances of prosecutorial misconduct,[51] or at least, to "extraordinary circumstances."[52]

Thus, as of the *Rocco* decision, the Third Circuit had precluded district courts from either granting immunity to prospective defense

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46 *Id.* at 225-26.

47 *Id.*

48 *Id.* at 226.

49 *Id.* at 227-28.

50 *Id.* at 229 (citations omitted). Judge Rosenn dissented on the ground that the witness was not in fact, intimidated, and the defendant therefore received a fair trial. *Id.* at 229-31 (Rosenn, J., dissenting).

51 *See* United States v. Bazzano, 712 F.2d 826, 840 (3d Cir. 1982) (per curiam) (en banc); Government of the Virgin Islands v. Smith, 615 F.2d 964, 968 (3d Cir. 1980); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979); United States v. Rocco, 587 F.2d 144, 147 n.10 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979).

52 United States v. Niederberger, 580 F.2d 63, 67 (3d Cir. 1978), *cert. denied*, 439 U.S. 980 (1978). This vague term has been neither the subject of further judicial explication, nor the basis of relief to any defendant.

witnesses or from ordering the government to do so. Indeed, even where prosecutorial misconduct was involved, it had left the choice of whether to grant such immunity to the government, which also was required to bear the consequences of its choice. Three days later, however, the court began a course of evolution that was neither presaged by nor grounded upon established Third Circuit precedent.

IV. THE BREAKDOWN OF ESTABLISHED PRECEDENT: *HERMAN* AND ITS PROGENY

The erosion of established precedent regarding defense witness immunity began on November 17, 1978, only three days after the Third Circuit reaffirmed such precedent in *United States v. Rocco*.[53] On that date, the court decided *United States v. Herman*[54] in an opinion containing its most comprehensive discussion of defense witness immunity. Although it approved the trial court's refusal to grant immunity to certain potential defense witnesses, the *Herman* court for the first time questioned whether courts might have "inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense."[55] Finding, however, that the question had not been raised in either the district court or Court of Appeals, the Third Circuit reserved decision on the issue.[56]

In *Herman*, two Pennsylvania state court magistrates appealed from their convictions for violating the Racketeer Influenced and Corrupt Organization Act (RICO) by accepting bribes or kickbacks from a bail bonding firm in return for referring bail bond business to the firm and, for example, accepting invalid bonds as bail.[57] In his defense, Magistrate Herman sought to introduce the testimony of four constables who purportedly would have testified that they split certain monies collected from the bail bonding firm among themselves, never passing them along

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53 587 F.2d 144 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979).

54 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). Judges Gibbons, Hunter and Garth sat on the *Herman* panel, with Judge Gibbons writing the majority opinion. Judge Garth concurred in part and dissented in part, arguing that the federal immunity statute should be construed to allow judicial review of the decision of a United States Attorney not to seek immunity for defense witnesses. *Id.* at 1205-14.

55 *Id.* at 1204.

56 *Id.* at 1204-05.

57 *Id.* at 1194-95.

to Herman. The constables asserted their privilege against self-incrimination and the district court denied defendant Herman's application "that the government and the court grant them immunity . . . or in the alternative that the indictment . . . be dismissed."[58]

On appeal, the Court of Appeals for the Third Circuit first held that in the absence of prosecutorial misconduct, the holding of *United States v. Morrison*[59] did not apply. The court thus rejected the argument that under *Morrison*, "defendants have a general sixth amendment right to demand that witnesses of their choice be immunized or that their indictments be dismissed."[60] Rather, the court adhered to the precedent in its own and other circuits refusing to find such a right.[61] Accordingly, it denied the defendant's sixth amendment claim.

The Court also rejected defendants' argument that there is a statutory basis for reviewing a federal prosecutor's decision not to grant immunity to a prospective witness. Holding that such argument "raises grave issues of separation of powers,"[62] the court reaffirmed the judiciary's limited role in reviewing immunity applications. It concluded that the separation of powers concerns that bar judicial review of a prosecutor's application for a grant of immunity "apply with equal force to a court order requiring such a grant."[63] Moreover, the court held that the Administrative Procedure Act (APA)[64] did not provide for review of a prosecutor's refusal to grant immunity to a prospective defense witness. Insofar as the immunity statutes and their legislative history evidenced no intent to benefit criminal defendants, explained the court, such defendants lacked standing to proceed under the APA.[65]

Finally, the court also rejected a due process challenge to the prosecution's failure to grant defense witnesses immunity in a case in which several of its own witnesses had testified under grants of immunity. In light of "our governmental system's strong tradition of deference to prosecutorial discretion, and of the necessary tendency of the executive branch to exercise that

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58 *Id.* at 1199.
59 535 F.2d 223 (3d Cir. 1976).
60 *Herman*, 589 F.2d at 1199-1200.
61 *Id.* at 1200.
62 *Id.*
63 *Id.*
64 *See* 5 U.S.C. §§ 700-706 (1982).
65 *Herman*, 589 F.2d at 1202-03.

discretion in ways that make it more likely that defendants will be convicted,"[66] the court held that a defendant could not prevail on a claim that a prosecutor had improperly denied immunity to prospective defense witnesses unless he showed "that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process."[67] The court concluded that absent a showing of unconstitutional abuse, district courts lack the power to order remedial grants of statutory immunity to a defense witness.

The Third Circuit thus rejected each of defendant Herman's arguments. In dictum, however, it speculated that "a case might be made that the court has inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense."[68] Finding precedent for such authority in the judicially created immunity available to defendants litigating certain pretrial issues,[69] as well as in defendants' due process right to have clearly exculpatory evidence presented to the jury,[70] the court questioned why these principles "would not provide the basis for a grant of immunity in the proper circumstances."[71] Conceding that the existence and application of such a grant might "raise a host of difficult issues,"[72] and that prior Third Circuit case law "may well be regarded as at least *sub silentio* rejections of this rationale,"[73] the court left the issue for a day when it was properly presented to the Court, perhaps sitting *en banc*.[74]

Judge Garth dissented on two grounds. First, he disagreed with the majority's formulation of the constitutional standard to be applied in reviewing the government's failure to grant immu-

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66 *Id.* at 1203-04 (citations omitted).

67 *Id.* at 1204.

68 *Id.*

69 *Id.* In particular, the court cited the Supreme Court's decision in Simmons v. United States, 390 U.S. 377 (1968) (immunizing a defendant's testimony at a suppression hearing), its own decisions in United States v. Inmon, 568 F.2d 326 (3d Cir. 1977)(immunizing defendant's testimony in support of a double jeopardy claim), *cert. denied*, 444 U.S. 859 (1979), and *In re* Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978) (immunizing defendant's testimony in support of speech or debate Clause claim). *Herman*, 589 F.2d at 1204.

70 *Herman*, 589 F.2d at 1204 & n.13 (citing Chambers v. Mississippi, 410 U.S. 284 (1973)).

71 *Id.* at 1204.

72 *Id.* For example, the court feared that grants of immunity such as those it was suggesting "would on some occasions unduly interfere with important interests of the prosecution." *Id.*

73 *Id.*

74 *Id.* at 1204-05.

nity to a defense witness. Specifically, he rejected the majority's requirement of a demonstration of prosecutorial bad faith in favor of a standard whereby due process is deemed to be violated by an unfair distortion of the fact finding process, whether or not intended by the government.[75] In addition, he argued that the government's decision not to grant immunity to a defense witness is reviewable for abuse of discretion under the APA.[76] If an abuse of discretion is found, according to Judge Garth, the government should have the choice of either seeking immunity for the defense witness at issue or having a judgment of acquittal entered.[77] In no event, Judge Garth concluded, should federal courts have the power to grant immunity to trial witnesses.[78]

The effect of *Herman* was to cloud an otherwise clear picture. Though the *Herman* court professed to adhere to the pre-existing doctrine that courts were not empowered by statute or the Constitution to grant defense witness immunity, it concluded that "inherent authority" might exist to do so. Nevertheless, presented with a case in which the defense sought immunity for witnesses who would offer important exculpatory evidence, the Court refused to reach the issue. It thus left the question of defense witness immunity for the future, its contours and rationale uncertain and even the procedure by which it would be formulated—"perhaps by the court sitting in banc"[79]—up in the air. Finally, and perhaps most significantly, while purporting to expand defendant's rights, the *Herman* court's narrow construction of *Morrison* in fact decreased the circumstances under which defendants deprived of witnesses by the government's actions could obtain relief. For although *Morrison* had explicitly disclaimed reliance on the prosecutor's bad faith,[80] the *Herman* court required a showing "that the government's decisions were made

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75 *Id.* at 1206-07 (Garth, J., concurring in part and dissenting in part).

76 *Id.* at 1208-13 (Garth, J., concurring in part and dissenting in part).

77 *Id.* at 1213 (Garth, J., concurring in part and dissenting in part).

78 *Id.* (citing United States v. Garcia, 544 F.2d 681 (3d Cir. 1976); United States v. Housand, 550 F.2d 818 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977)).

79 *Id.* at 1205.

80 *See Morrison*, 535 F.2d at 227. The *Morrison* court stated:

> The good faith of the Assistant United States Attorney would be relevant if *he* were charged with [a] violation of 18 U.S.C. § 1503 which makes the intimidation of a federal witness a criminal offense. It is not, however, relevant to an inquiry into whether a *defendant* was denied his constitutional right.

Id. (Emphasis in original). Judge Garth quoted this passage in his dissent in *Herman*. *See Herman*, 589 F.2d at 1207 n.3 (Garth, J., concurring in part and dissenting in part)).

with the deliberate intention of distorting the judicial fact finding process."[81] Hence, for the short term, *Herman* proved both conservative and confusing.

Indeed, the one relevant case decided by the Third Circuit between *Herman* and *Smith* demonstrated both of these shortcomings. In *United States v. Bacheler*,[82] the court affirmed the trial court's denial of immunity for an undisclosed "prospective defense witness."[83] This result was based on a jumble of overlapping and poorly delineated rationales: that courts have no statutory authority to immunize defense witnesses;[84] that prosecutorial threats or vindictiveness were not present in the case;[85] and that defendants had failed to establish

> that this was a case in which it would be appropriate to consider the application of a judicially fashioned immunity within the parameters advanced by this court in *United States v. Herman* for circumstances in which the "government's decisions [regarding immunity grants] were made with the deliberate intention of distorting the judicial fact finding process" or when "clearly exculpatory testimony" will be excluded because of a witness' assertion of the fifth amendment privilege.[86]

The court concluded that the *Herman* decision did not provide for relief based upon the simple unfairness inherent in the prosecution's use of immunized testimony not available to the defense.[87]

The *Bacheler* court thus revealed the uncertainty into which *Herman* had cast the debate: it recognized its lack of statutory authority to grant immunity to defense witnesses, but suggested that there might be cases in which it would so act. It found no prosecutorial misconduct, already a basis for relief under *Morrison*, but then said that in the absence thereof, the use of judicially fashioned immunity ought not be considered. It confused the rationale for defense witness immunity—that the Constitution required the admission of "clearly exculpatory evidence"—with the standards governing

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81 *Herman*, 589 F.2d at 1204.

82 611 F.2d 443 (3d Cir. 1979). Judge Sloviter wrote the unanimous opinion of the court in *Bacheler*, for a panel including Chief Judge Seitz and Judge Gibbons, who had authored the opinion of the court in *Herman*.

83 *Id.* at 449.

84 *Id.* at 449-50 (citing United States v. Rocco, 587 F.2d 144, 147 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); United States v. Niederberger, 580 F.2d 63, 67 (3d Cir.), *cert. denied*, 434 U.S. 980 (1978)). Notably, neither *Rocco* nor *Niederberger* limits its discussion to statutory authority; both speak in more general terms of the courts' lack of power to confer defense witness immunity.

85 *Id.* at 450 (citing United States v. Morrison, 535 F.2d 223 (3d Cir. 1976)).

86 *Id.* (citations omitted).

87 *Id.*

grants of immunity, standards which had not yet been formulated. In sum, it bore witness to the flux in which *Herman* had left matters. Three months later, *Smith* engendered the court's attempt to answer these nagging questions. The novel and radical way in which it did so has not, however, had the salutary effect it anticipated.

V. THE BREAKTHROUGH: *GOVERNMENT OF THE VIRGIN ISLANDS V. SMITH*

Government of the Virgin Islands v. Smith[88] accomplished three things: it clarified Third Circuit law regarding defense immunity; it applied the holding of *Morrison* to a rather compelling set of facts; and, in what can only be described as *dictum*, it authorized district courts to themselves immunize potential defense witnesses under certain circumstances.

The impact of the third accomplishment of *Smith* was so dramatic that it far overshadowed the first two, which represent the performance of functions far more typical of, and far more befitting the judiciary. Ironically, had the court again declined to decide the issue of courts' authority to grant defense witness immunity, *Smith* nonetheless would have been an important case, and one far more protective of defendants' rights and generative of progressive judicial decisions. It is, therefore, necessary to examine *Smith* in its entirety.

First, the *Smith* court made sense of *Herman* by explaining that, after that decision, there were "two possible situations in which the due process clause might compel the granting of immunity to defense witnesses."[89] The first was the *Morrison* situation, "where government actions denying use immunity to defendants were undertaken with the 'deliberate intention of distorting the judicial fact finding process.' "[90] When this occurs, the court stated, courts are to "order acquittal unless on retrial the government grants statutory immunity."[91] Second, courts have "inherent authority to effectuate the defendant's compulsory process right by conferring a *judicially* fashioned immunity upon a witness whose testimony is essential to an effective de-

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88 615 F.2d 964 (3d Cir. 1980). Judge Garth, who had dissented in *Herman*, wrote the opinion of the court for Judges Weis and Gibbons.

89 *Id.* at 966.

90 *Id.* (citing United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

91 *Id.* (citing United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

fense."[92] Thus, the court clarified that there are two distinct remedies available to defendants. It then went on to explore the contours of each.

With respect to the first, the court reiterated and adopted as doctrine the position of the *Herman* court on the burden which defendants must bear in order to avail themselves of what it described as "extraordinary relief."[93] Accordingly, a defendant must make an "evidentiary showing" that the government's decision not to provide immunity to a defense witness was made "with the deliberate intention of distorting the judicial factfinding process."[94] The court then concluded that a *prima facie* showing of such intention had been made in the case at bar.[95]

Smith was a prosecution of four defendants for the robbery of Roy Phipps, who was "slightly retarded" and a poor witness.[96] Phipps' assailants were members of a group whose precise identities were disputed at trial. Three defendants sought to introduce the testimony of Ernesto Sanchez, who had admitted his own involvement in the offense, but offered direct testimony exculpating them. Sanchez, however, asserted his fifth amendment privilege. Although the juvenile authorities responsible for prosecuting him agreed to grant him use immunity, the United States Attorney never agreed to do so. The Court of Appeals found that this failure constituted a prima facie showing of a deliberate intention to distort the judicial factfinding process, and remanded for an evidentiary hearing on this issue.[97] This finding was based upon the prosecution's knowledge of the weakness of its case; its efforts to resist the admission of Sanchez's statement to police, having refused to grant him immunity; and its lack of justification for refusing to grant such immunity, given the immunity offered by the authorities who were solely responsibile for prosecuting him.[98]

While the *Smith* court thus reiterated the high standard re-

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92 *Id.* (emphasis in original) (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

93 *Id.* at 968 (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

94 *Id.* (quoting United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)).

95 *Id.*

96 *Id.* at 969 n.6.

97 *Id.* at 969. The court did not define "prima facie" but indicated that the record revealed "government action that might well fall within the guidelines of *Morrison* or *Herman*." *Id.*

98 *Id.*

quired to demonstrate prosecutorial misconduct giving rise to the type of relief allowed in *Morrison*, it also set a very low threshold for the showing necessary to obtain an evidentiary hearing on this issue. A prosecution case rendered vulnerable by evidence which would be inadmissible but for a grant of immunity is not rare. Similarly, the scope of statutory immunity always reduces the government's interest in resisting immunity. Thus, *Smith* made *Morrison* hearings easy to come by. Moreover, it also made clear that "[i]mmunity granted under this theory need not be predicated upon a finding that witness' testimony is clearly exculpatory or otherwise essential to the defendant's case."[99] Rather, it need only be relevant,[100] a much lower standard. Hence, the court also eased the requirements for prevailing on this type of claim.

This beneficial change, however, was overshadowed by the blockbuster aspect of *Smith*: that courts could grant judicially fashioned immunity to a witness whose testimony is essential to an effective defense. Having already remanded on another ground, the court need not even have addressed that issue, particularly since, as in *Herman*, the parties had not included it in their initial submissions to the court.[101] Nevertheless, the court reached out to create a new and unique rule of law.

The Third Circuit based its departure from established precedent on authority previewed in *Herman*. First, it found a constitutional right emanating from *Chambers v. Mississippi*[102] to have exculpatory evidence presented to the jury; this in turn emanated from the "basic constitutional doctrine—that the right to present an effective defense inheres in the guarantee of a fair trial."[103] Second, it based the remedy necessary to the vindication of this right—defense witness immunity—on prior cases in which courts granted witnesses immunity in order to effectuate an otherwise

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99 *Id.* at 969 n.7.

100 *Id.* (citing United States v. Morrison, 535 F.2d at 223, 228 (3d Cir. 1976)).

101 *Id.* at 970 n.8. The court had ordered supplemental briefs on this issue. *Id.*

102 410 U.S. 284 (1973). In *Chambers*, the Supreme Court held that Mississippi's strict adherence to archaic rules of evidence denied the defendant a fair trial where they prevented him from introducing trustworthy, exculpatory evidence without furthering any particular state interest. *Id.* at 294-303.

103 *Smith*, 615 F.2d at 971 (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (right to fair trial requires that an indigent defendant be appointed counsel to represent him); Roviaro v. United States, 353 U.S. 53 (1957) (identity of government informants must be disclosed where necessary to a fair trial); Brady v. Maryland, 373 U.S. 83 (1963) (prosecution must disclose exculpatory evidence to the defense to assure a fair trial)).

meaningless constitutional right.[104]

Having established the existence of this right and the remedy for it, the court recognized that "the unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers" required that "grants of immunity to defense witnesses . . . be bounded by special safeguards and . . . be made subject to special conditions."[105] In particular, the court explained that:

> immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.[106]

The court proceeded to elaborate on those requirements, emphasizing that the evidence must be "both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses."[107] On the other hand, if the defense makes the appropriate showing, the government's burden[108] of demonstrating countervailing interests will be difficult to meet, given the many options available to the prosecution.[109]

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104 *Id.* To this effect, the court cited the following authority: Simmons v. United States, 390 U.S. 377, 394 (1968) (defendant's testimony at a pretrial suppression hearing, to establish standing under the fourth amendment, cannot be introduced against him at trial); *In re* Grand Jury Investigation, 587 F.2d 589, 597 (3d Cir. 1978) (defendant's testimony predicate to speech and debate clause defense may not be used against him at trial); and United States v. Inmon, 568 F.2d 326, 332-33 (3d Cir. 1978) (defendant's testimony predicate to double jeopardy claim may not be used against him at a subsequent trial). *See also* United States v. Perry, 788 F.2d 100, 115 (3d Cir. 1986) (defendant's testimony at pretrial detention hearing may not be used against him at trial).

Notably, while all of these cases involve judicially created immunity, none involve a grant of immunity to witnesses other than the defendant himself. Their precedential value should accordingly have been limited.

105 *Smith*, 615 F.2d at 971-72.

106 *Id.* at 972 (footnote omitted).

107 *Id.* (footnote omitted).

108 The *Smith* court required the defendant to make application to the district court and to satisfy the court that the witness was available and that his testimony would be clearly exculpatory and essential to the defense. *Id.* at 972. At that point, the burden would shift to the government to persuade the court of the existence of countervailing interests, if any. *Id.* at 973.

109 *Id.* Thus, because the immunity to be granted would be use immunity only, it would have no impact upon a potential prosecution of a witness against whom the evidence already has been assembled or will be assembled independent of the witness' testimony. As to witnesses against whom the evidence has not been assembled, the government could seek to postpone the defendant's trial until after that of

The Third Circuit remanded the case to the district court for determination of the two possible claims for immunity, each of which was found to be sufficiently colorable to require an evidentiary hearing.[110] Nonetheless, *Smith* has been viewed as noteworthy both within[111] and outside of the Third Circuit[112] primarily for the second type of immunity it made available. Though it claimed to be in line with precedent established by the Third Circuit[113] and elsewhere,[114] *Smith* involved an important break in the law. Indeed, on its face it established a right and remedy of significance to criminal defendants. In practice, however, its impact has been minimal, if not deleterious to persons accused of crimes. That impact, and the reasons for it, are traced in the section that follows.

VI. THE IMPACT OF *SMITH*

A. In The Third Circuit

The Third Circuit has adhered to *Smith* although it has limited its scope and refused to apply it to the benefit of even a single criminal defendant: no reported cases have resulted in reversals for the failure to grant immunity where it should have been granted. Rather, since *Smith*, there have been only three reported Third Circuit decisions addressing the scope of defense witness immunity. Each has restricted rather than expanded it.

Thus, in *United States v. Lowell*,[115] the Court of Appeals was first presented with an opportunity to define and expand the scope of *Smith*. *Lowell* involved allegations of bribery of General Services Administration (GSA) officials by officers of a government paint supplier who desired to perform their own quality

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the witness. Given these options, "[a]ny interest the government may have in withholding immunity . . . would be purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity." *Id.* (footnote omitted).

110 *Id.* at 974.

111 *See* text accompanying *infra* notes 115-74.

112 *See* text accompanying *infra* notes 175-205.

113 *Smith*, 615 F.2d at 972 n.11. The court claimed that "[p]rior cases in this circuit do not preclude this form of judicial immunity." *Id.* (citing United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973)). That conclusion, however, proceeds from an excessively narrow reading of *Berrigan*, *Rocco* and *Niederberger*. Indeed, the latter two discussed more than mere statutory immunity, while *Berrigan* undoubtedly would have rejected immunity for "any defense witness," even one satisfying the *Smith* criteria.

114 *Id.* at 972-73 n.13 (citing United States v. Klauber, 611 F.2d 512 (4th Cir. 1979); United States v. Wright, 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979)).

115 649 F.2d 950 (3d Cir. 1981).

control.[116] The defense wished to call one such GSA official who had been indicted but pleaded guilty to reduced charges in separate proceedings.[117] Apparently, the substance of the witness' proffered testimony was that he received payments from a person other than defendant Lowell.[118] This testimony would have served both to discredit the testimony of the government's key witness[119] and independently to exculpate defendant Lowell of the charges against him.[120]

Nonetheless, the district court and the Third Circuit denied defendant's request for immunity. In so doing, the latter[121] construed *Smith* narrowly, and to defendants' detriment, in three significant ways. First, although the propriety of granting defense witness immunity involves the application of established law to facts, and thus would ordinarily warrant plenary review,[122] the court indicated its intention to defer to the judgment of district courts as long as the latter had had "an opportunity to apply the [*Smith*] rule to the evidence."[123] Mere application of the *Smith* criteria, apparently, insulated district courts from careful review; indeed the decision in *Smith* itself was explained by the fact that "the district court order vacated in *Smith* was entered without the benefit of *Herman*'s immunity discussion."[124]

Second, the *Lowell* court held that, because the government

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116 *Id.* at 952-53. For a detailed account of the facts, see United States v. Lowell, 490 F. Supp. 897, 900 (D.N.J. 1980), *aff'd*, 649 F.2d 950 (3d Cir. 1981).

117 *Lowell*, 649 F.2d at 953, 955. The GSA official, Joe Montalbano, was permitted to plead guilty to a single conspiracy count. *Lowell*, 490 F. Supp. at 905. Apparently, violations of the Travel Act with which he was originally charged were dismissed. *Lowell*, 649 F.2d at 953 n.1.

118 *Lowell*, 649 F.2d at 955. Montalbano would have testified that he received payments from a different company official, Thomas Accamonda. *Id.* at 955, 961.

119 *See id.* at 953-55. This witness, Dennis Tepperman, testified that he personally gave defendant Lowell money with which to bribe Mr. Montalbano. *Id.* at 954. Mr. Tepperman's testimony was the sole basis for linking defendant Lowell to the conspiracy. *Id.* at 953-54. To the extent that Lowell did not personally bribe Montalbano, Tepperman's testimony would appear to be discredited by Montalbano's proffer. *Id.* at 954-55.

120 Obviously, the evidence against Lowell would be far weaker if he did not pay the bribe monies at issue.

121 Judge Rosenn wrote the opinion of the court for a panel that also included Chief Judge Seitz and Judge Sloviter. *Id.* at 951-52.

122 *See, e.g.*, United States v. Terselich, No. 88-3687, slip op. at 5 (3d Cir. Sept. 1, 1989) (citing Dent v. Cunningham, 786 F.2d 173, 175 (3d. Cir. 1986)); McCandless v. Beyer, 835 F.2d 58, 60 (3d Cir. 1987) (citing United States v. Adams, 759 F.2d 1099, 1106 (3d Cir. 1985), *cert. denied*, 474 U.S. 906 (1986)); Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102-03 (3d Cir. 1981).

123 *Lowell*, 649 F.2d at 964-65.

124 *Id.* at 964 n.23. Thus viewed, *Smith* loses much of its precedential impact.

"may yet prosecute Montalbano [the prospective defense witness],"[125] its failure to grant him immunity could not be viewed as evidencing a "deliberate intention of distorting the fact finding process."[126] Yet, the likelihood of prosecuting Montalbano further was in fact very minimal: the defense proposed to ask him questions limited to a scheme as to which he had already pleaded guilty, and there was no evidence that he had engaged in other illegalities for which he might be charged.[127] Rather, Montalbano's potential exposure came from the unrealistic possibilities that he would either be prosecuted for tax evasion,[128] or some other yet uncharged offense in another jurisdiction, or that he would withdraw his guilty plea at some later point.[129] Entirely hypothetical, neither of these unrealistic concerns has justified a governmental decision not to grant immunity to an important defense witness. Moreover, they should not have sufficed to demonstrate the "state's countervailing interests" necessary to overcome a legitimate claim for defense witness immunity under *Smith*. Hence, the court's decision in *Lowell* dramatically reduced the burden that must be borne by the government in opposing a *Smith* claim.

Finally, and perhaps most significantly, the *Lowell* court held that defendant's *Smith* claim should be denied because the testimony to be offered by defense witness Montalbano "would not *in itself* exonerate Lowell," as Sanchez's testimony in *Smith* would have exonerated the defendants therein.[130] The court thus de-

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125 *Id.* at 965.

126 *Id.*

127 *See id.* at 959-61. The district court noted that Montalbano's testimony "might well have subjected him to additional federal prosecution on other counts or to state prosecution for offenses arising from the same series of transactions." *Lowell*, 490 F. Supp. at 905. The Court of Appeals agreed. *Lowell*, 647 F.2d at 961 ("[O]f course, Montalbano may have been indictable for any [other] pay off schemes he may have participated in . . ., with or without the participation of Lowell."). While this hypothetical may, as the court concluded, justify finding that Montalbano retained a fifth amendment privilege, the "generous" standard applicable to that inquiry is not an appropriate basis upon which to deny *Smith* immunity. *Id.* at 963 (citation omitted). For that, the government must demonstrate its "countervailing interests," which lie in an intended and not merely a potential prosecution. *See id.* at 963-64. Montalbano's plea, as a practical matter, made further prosecution of him unlikely.

128 *Id.* at 955, 961. Montalbano's exposure to tax-related charges stemmed from boilerplate language in every plea agreement to the effect that such agreement does not include this type of charges within its scope. Nonetheless, such charges are rarely brought.

129 *See Lowell*, 490 F. Supp. at 905.

130 *Lowell*, 649 F.2d at 965 (emphasis in original).

fined the term "clearly exculpatory" in a radically limited manner. Such a definition was not supported by the rule stated in *Smith*, which omitted ambiguous or cumulative testimony, as well as testimony relating *only* to the credibility of a government witness.[131] Nor is it supported by the facts of *Smith*: Sanchez's testimony might not have been believed[132] and was not in itself exculpatory absent additional testimony that the defendants did not have the nicknames of the persons alleged by Sanchez to be involved.[133] Indeed, the *Lowell* decision is unsupported by any case law and restricts the *Smith* rule to that rare case where a single witness comes forward to exculpate a defendant who would otherwise be found guilty. Though this may occur in episodes of Perry Mason, it does not ring true in real life.

Lowell invokes the "unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers" in "declin[ing] to extend further the rule announced in *Smith*."[134] Far from an extension, *Lowell* heralds a retreat from the letter and spirit of *Smith*. In subsequent cases, this retreat has continued apace.

Thus, in *United States v. Steele*,[135] the Third Circuit further contracted the definition of "clearly exculpatory" by finding "ambiguous" a proffer of defense testimony which would have "vitiat[ed] the relevance of the government's evidence."[136] Hence, while the government was attempting to prove that the course of dealing between two persons constituted commercial bribery,[137] the proposed defense witness[138] could have testified

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131 *Id.* at 964 (citing Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980)). *Smith* makes clear that evidence must be "both clearly exculpatory and essential to the defendant's case." Evidence that is "ambiguous, not clearly exculpatory, cumulative or . . . found to relate only to the credibility of the government's witnesses" fails this test. *Id.*

132 Indeed, the *Lowell* court itself expressed concern that co-conspirators will "whitewash" each other through the use of testimony unchallengeable for one reason or another. *Id.* at 962 (citing United States v. Turkish, 623 F.2d 769, 775-76 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); United States v. LaDuca, 447 F. Supp. 779, 783 (D.N.J.), *aff'd sub nom.* United States v. Rocco, 587 F.2d 144 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979)). Why this concern applied to Montalbano but not Sanchez was left unexplored by the court.

133 *Smith*, 615 F.2d at 966-67.

134 *Lowell*, 649 F.2d at 965 (quoting Government of the Virgin Islands v. Smith, 615 F.2d 964, 971 (3d Cir. 1980)).

135 685 F.2d 793 (3d Cir.), *cert. denied*, 459 U.S. 908 (1982). The opinion of the court in *Steele* was written by Judge Aldisert, for a panel also including Judges Weis and Becker. *Id.* at 797.

136 *Id.* at 808.

137 *Steele* was, in essence, a bid-rigging case. The defendants were charged with

that, in fact those parties "had entered into other transactions,"[139] which were legitimate. Holding that because "[t]he defendant's proffer did not indicate that [the witness] would directly connect the payments in question to any other transaction," it was "ambiguous and not clearly exculpatory,"[140] the Court of Appeals effectively prevented the defendants from building a circumstantial defense. In this sense, *Steele* too constricted *Smith*, if only slightly. The trend, however, is both unmistakable and disturbing.

Finally, the Court of Appeals, while declining the opportunity to overrule *Smith* in an *en banc* hearing, refused yet a third time to apply it in favor of a defendant. Thus, in *United States v. Bazzano*,[141] the court affirmed a district court's denial of defense witness immunity for two prospective witnesses who could have directly exculpated a defendant charged with gambling, in violation of his probation.[142] First, the Court held that "[t]here was no evidence of any attempt on the part of the prosecution to distort the facts of the case by keeping [witnesses] Stagno and Fimmano from testifying."[143] Hence, although their testimony would have been uniquely probative, and no reason was given for the government's decision not to immunize them,[144] the *Bazzano* court upheld the district court's determination that *Morrison* immunity was inappropriate. In so doing, however, it refused to apply the analysis adopted in *Smith*. Instead, the court construed prosecutorial misconduct not to include the misconduct specifically emanating from the failure to grant immunity and thus re-

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mail and wire fraud, among other offenses, for their participation in a scheme to insure that General Electric would receive the contract for a Puerto Rico Water Resources Authority project. *Id.* at 797-801.

138 *Id.* The witness, Charles Mothon, was actually a named defendant in the case. It is puzzling that this was not the basis for the court's opinion, as it evidences the government's actual intention to prosecute Mothon, and a correspondingly compelling reason not to grant him immunity. Indeed, severance appears to have been the relief necessary and preliminary to any defense witness immunity argument. *Id.* *See supra* note 14.

139 *Id.* at 808.

140 *Id.*

141 712 F.2d 826 (3d Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1078 (1984).

142 The residence where the evidence of defendant's gambling activity was seized was that of one witness, Donna Stagno. *Id.* The other witness, Jerry Fimmano, also lived there. *Id.* at 828. They were thus uniquely situated to exculpate the defendant, Primo V. Mollica. *Id.* Indeed, the handwriting on the betting slips seized was apparently Fimmano's. *Id.* at 840 n.6.

143 *Id.* at 840 (footnote omitted).

144 No prosecution of either Fimmano or Stagno appears to have been contemplated and there is no record of one having occurred.

quired a type of misconduct that was neither required in *Smith* nor proven in *Morrison*.[145] Secondly, notwithstanding the submission of an affidavit asserting that witness Fimmano would have exculpated the defendant, the court held that the defendant "clearly failed to make 'an application . . . to the district court naming the proposed witness and specifying the particulars of the witness' testimony.' "[146] Hence, it invoked a procedural barrier to the type of relief afforded by *Smith*.

While perhaps not unjustified, the court's action in *Bazzano* revealed its determination to limit *Smith* as narrowly as possible and perhaps even to leave it a toothless remedy. Indeed, at least one Third Circuit judge questioned the continued vitality of *Smith*, arguing that, in light of the Supreme Court's decision in *Pillsbury Co. v. Conboy*,[147] *Smith* may have "expanded judicial power too far."[148] Rather than overruling it, however, the court left *Smith* emasculated and vulnerable both to attack and to conservative interpretation. That interpretation, or attack, inevitably followed, in the district courts of the Circuit as well as in other Courts of Appeals.

B. In the District Courts of The Third Circuit

Another measure of *Smith*'s weakness as precedent is the manner in which it has been viewed by lower courts bound by law to adhere to its mandates. Thus, *Smith*'s lack of generative power is evident when viewed through the lens of published decisions[149] of the United States District Courts in the Third Circuit. These cases fail to elaborate the requirements of *Smith* or to develop its doctrine further. At times, they ignore the decision.[150]

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145 *Id.*

146 *Id.* (citation omitted).

147 459 U.S. 248 (1983).

148 712 F.2d at 851 (Adams, J., dissenting) (citing Pillbury Co. v. Conboy, 459 U.S. 248, 261 (1983)). In *Bazzano*, Judge Garth argued that in the event a violation of probation hearing predates a criminal trial regarding the same charges, the probationer ought to be granted use immunity to testify in the former. *Id.* at 838 (Garth, J., dissenting). A majority of the court declined to adopt this rule, calling into further question the generative power of *Smith*. *See id.* at 829 nn.2-3. *But see* United States v. Perry, 788 F.2d 100, 115 (3d Cir.), *cert. denied*, 479 U.S. 869 (1986).

149 Of course, published decisions may or may not reflect typical district court decision-making. They are, however, the body of data available. Moreover, to the extent that they represent district court efforts to elaborate or extend judicial doctrine, their paucity in this area reveals how little *Smith* has been elaborated or extended.

150 *See* United States v. Osticco, 580 F. Supp. 484, 487-88 (M.D. Pa.), *aff'd*, 738 F.2d 426 (3d Cir. 1984).

Unanimously, they reject defense arguments in favor of immunity.[151] Seizing upon one or another of *Smith*'s rigorous requirements, they reveal how very little *Smith* changed the law.[152] Where they attempt to expand *Smith*, they are quickly disciplined by the Court of Appeals. In sum, *Smith* has simply not taken hold.

In part, it has not taken hold because of district courts' continuing unfamiliarity with *Smith*. Thus, as recently as 1984, a federal district court in the Middle District of Pennsylvania stated that "no conclusory decision from the Third Circuit has been forthcoming on whether the government must immunize a co-defendant who has invoked his fifth amendment privilege on the witness stand."[153] Although this question is related to that addressed by *Smith* and is clearly addressed by *Smith*'s progeny,[154] it was not subjected to *Smith*'s analysis.[155] This type of treatment casts doubt on the weight and importance of the *Smith* decision.

More frequently, district courts interpret *Smith* stringently. Defense applications are routinely denied for failure to specify the content of proposed exculpatory evidence in sufficient detail,[156] or to obtain a proffer in the proper form.[157] The termi-

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[151] *See* United States v. Sampson, 661 F. Supp. 514 (W.D. Pa. 1987); United States v. Osticco, 580 F. Supp. 484 (M.D. Pa.), *aff'd*, 738 F.2d 426 (3d Cir. 1984); United States v. Nolan, 523 F. Supp. 1235 (W.D. Pa. 1981); United States v. Stout, 499 F. Supp. 605 (E.D. Pa. 1980); United States v. Shober, 489 F. Supp. 412 (E.D. Pa. 1980).

[152] The district courts of the Third Circuit had also unanimously rejected claims of defense witness immunity prior to *Smith*. *See* United States v. Kozell, 468 F. Supp. 746, 749 (E.D. Pa. 1979); United States v. Standefer, 452 F. Supp. 1178, 1189-90 (W.D. Pa. 1978); United States v. Panetta, 436 F. Supp. 114, 127 n.27 (E.D. Pa. 1977), *aff'd*, 568 F.2d 771 (3d Cir. 1978); United States v. Jones, 404 F. Supp. 529, 540 (E.D. Pa. 1975), *aff'd*, 538 F.2d 321 (3d Cir. 1976); United States v. Ahmad, 347 F. Supp. 912, 930-31 (M.D. Pa. 1972), *aff'd in part, rev'd in part*, 482 F.2d 171 (3d Cir. 1972).

[153] *Osticco*, 580 F. Supp. at 487.

[154] *See* United States v. Steele, 685 F.2d 793, 808 (3d Cir. 1982), *cert. denied*, 459 U.S. 908 (1982).

[155] In *Osticco*, Judge Caldwell did mention, without citing authority, that he was denying relief at least in part because there had been no showing that "the government's decision not to seek immunity for [the defense witness] resulted from a deliberate intention to frustrate the fact finding process or to prevent testimony that was essential to Osticco's defense." *Osticco*, 580 F. Supp. at 488. However, this was not couched in terms of either type of analysis described in *Smith*.

[156] *See* United States v. Nolan, 523 F. Supp. 1235, 1240 (W.D. Pa. 1981) (motion for defense witness immunity denied because of the generality with which it was made); United States v. Stout, 499 F. Supp. 605, 606 (E.D. Pa. 1980) (motion denied because of conclusory nature of proffer); United States v. Shober, 489 F. Supp. 412, 415 (E.D. Pa. 1980) (testimony of proposed defense witness not "clearly identified").

nology of the *Smith* rule, where interpreted at all,[158] is construed in as narrow a fashion as possible. Thus, in *United States v. Sampson*,[159] Judge Diamond interpreted "clearly exculpatory" so as to include within its scope only such evidence as is reliable enough to render an acquittal "a probable certainty," or at least a "reasonable probability."[160] Similarly, he defined "essential" so as to preclude a grant of immunity for testimony that could be obtained from the defendant herself, notwithstanding her constitutional right not to testify.[161] And he found a governmental interest sufficient to overcome an immunity claim even where such interest was "arguable" or a "mere 'possibility'," irrespective of the necessity of the testimony at issue.[162]

Hence, the terminological interstices left by *Smith* have all too willingly been filled by district courts in a manner that defeats the purpose of the original decision. Moreover, even where trial courts have interpreted the *Smith* decision favorably to defendants, they have nonetheless hesitated to grant the immunity

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157 *See Stout*, 499 F. Supp. at 606 (declaration of counsel insufficient); *Shober*, 489 F. Supp. at 415-16 (declaration of counsel insufficient). *See also Nolan*, 523 F. Supp. at 1240 (written proffer required).

158 *Smith* has been criticized by lower courts for leaving such key terms as "prima facie showing" or "convincing showing" undefined. *See Shober*, 489 F. Supp. at 416. It has also been criticized for failing to specify what is meant by "clearly exculpatory" or "essential." United States v. Sampson, 661 F. Supp. 514, 518 (W.D. Pa. 1987).

159 661 F. Supp. 514 (W.D. Pa. 1987).

160 *Id.* at 519. Judge Diamond derived these definitions from United States v. Lowell, 649 F.2d 950, 965 (3d Cir. 1981) (defendant must show a "probable certainty" that immunized testimony would completely exonerate him) and from Strickland v. Washington, 466 U.S. 668, 693 (1984) (prejudice to a defendant from ineffective assistance of counsel occurs when there is a "reasonable probability" that effective assistance of counsel would have changed the result of the proceeding). *Sampson*, 661 F. Supp. at 519. Whatever the definition, he concluded that the testimony "must be much more than evidence that has some tendency to negate an element of the government's case." *Id.*

In assessing whether it is sufficiently exculpatory, Judge Diamond also required that the reliability of the evidence be evaluated by considering the circumstances under which it comes to light, whether it is corroborated, the credibility of the witness and the relationship between the witness and the defendant. *Id.* at 519-22 (immunity not granted because testimony given by a husband with a prior record on behalf of his wife). *See also* United States v. Stout, 499 F. Supp. 605, 607 (E.D. Pa. 1980) (reliability depends upon the timing of the statement and whether such timing evidences a purpose of obtaining immunity).

161 *Sampson*, 661 F. Supp. at 520 n.4.

162 *Id.* at 520-21. Only governmental interests which are "merely formal" or "possibly suspect" can be disregarded in favor of an immunity grant. Otherwise, strong government interests automatically forbid any grant of judicial immunity. *Id.* at 520 (citing United States v. Turkish, 623 F.2d 769, 776-77 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981)).

sought. Thus, while Judge Teitelbaum, in *United States v. Nolan*,[163] noted that "immunity is generally costless to the government" since "it may be possible to prosecute a witness independently of any testimony actually given,"[164] he denied the defense application, noting that countervailing government interests might arise.[165] And, while Judge Troutman went to great lengths to explicate the constitutional necessity of allowing defendants to move for defense witness immunity pretrial,[166] in *United States v. Shober*,[167] he denied such motion pending the evidence to be adduced at trial.[168] Finally, those interpretations of *Smith* favorable to defendants have, to a great extent been eviscerated by subsequent decisions of the Third Circuit. Judge Troutman's holding, for example, that a particular witness might become clearly exculpatory and essential to the defense depending upon the testimony of a key government witness[169] would seem to fail in the wake of *Lowell*'s mandate that evidence useful to attack the credibility of such a witness does not fall within the scope of *Smith*.[170]

Most significantly, however, the district courts have continually misinterpreted the first prong of *Smith*, emanating from *Morrison*. Universally, the courts have required actual "prosecutorial misconduct," in the form of, for example, interference with access to the witnesses in question.[171] Distracted by *Smith*'s requirement that the defense show prosecutorial actions taken with the deliberate intention of distorting the fact-finding process,[172]

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163 523 F. Supp. 1235 (W.D. Pa. 1981).

164 *Id.* at 1240 (citing Government of Virgin Islands v. Smith, 615 F.2d 964, 973 (3d Cir. 1980)).

165 *Id.* at 1240 n.2. Similarly, while Judge Teitelbaum found that where "the determination of guilt will hinge on the credibility of the defendant," corroborative testimony might be sufficiently "essential" to satisfy that prong of the *Smith* analysis, he would not determine whether certain evidence was essential "until that point in the trial is reached." *Id.* at 1240.

166 United States v. Shober, 489 F. Supp. 412, 417-18 (E.D. Pa. 1980).

167 489 F. Supp. 412 (E.D. Pa. 1980).

168 *Id.* at 418-19.

169 *Id.* In *Shober*, a key government witness' testimony might, depending upon its content, have been contradicted by the defense witness for whom immunity was sought. That witness' testimony would otherwise have been irrelevant to the case. *Id.* Nonetheless, Judge Troutman found that his testimony might become clearly exculpatory and essential to the defense case. *Id.*

170 *See* text accompanying *supra* notes 130-33.

171 *See Shober*, 489 F. Supp. at 416. *See also* United States v. Sampson, 661 F. Supp. 514, 517 n.1 (W.D. Pa. 1987); United States v. Osticco, 580 F. Supp. 484, 488 (M.D. Pa.), *aff'd*, 738 F.2d 426 (3d Cir. 1984); United States v. Nolan, 523 F. Supp. 1235, 1239 (W.D. Pa. 1981).

172 *Osticco*, 580 F. Supp. at 488; *Shober*, 489 F. Supp. at 415.

these courts have failed to focus on the justification for the government's decision not to grant defense witness immunity, which constituted the true basis for the remand in *Smith*.[173] It is, perhaps, in this sense that *Smith* has done the greatest disservice: it has re-focused lower court attention on judicially created immunity at the expense of statutory immunity, and burdened the former with an unfortunately worded,[174] conservative standard.

District court interpretations of *Smith* thus reveal not only the weakness and lack of generative power of that decision, but also demonstrate where the *Smith* court went wrong. This manifest when one sees the direction in which other Circuits, lacking and often renouncing a *Smith*-type decision, have gone. It is to those Circuits that we now turn.

C. *In the Other Circuits*

Finally, *Smith*'s lack of generative power is demonstrated by the fact that it has not been followed in a single other Circuit: no Court of Appeals outside the Third Circuit has held that a court has the authority to grant immunity to prospective defense witnesses. Indeed, of the eleven circuits that have addressed the question subsequent to *Smith*, five have expressly rejected this aspect of the *Smith* holding.[175] Concerned with problems of separation of powers, of appropriate limitation of the judicial role and of potential abuse by defendants or their witnesses, these Circuits have been explicit in their criticism of *Smith* and have expressly

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[173] *See* text accompanying *supra* notes 93-100.

[174] *Smith* went out of its way to emphasize "the unique and affirmative nature of the immunity remedy," *Smith*, 615 F.2d at 971, which it described as "extraordinary relief," *id.* at 968, and mandated be "clearly limited." *Id.* at 972. District courts have seized upon this overly cautious language in denying relief to defendants seeking immunity for prospective witnesses. *See, e.g.*, *Sampson*, 661 F. Supp. at 517-18.

[175] The Second, Fifth, Sixth, Tenth and Eleventh Circuits have expressly rejected *Smith*. *See, e.g.*, United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980) ("[W]e find ourselves in fundamental disagreement with the standards outlined in [*Smith*]."), *cert. denied* 449 U.S. 1077 (1981); Autry v. Estelle, 706 F.2d 1394, 1400-02 (5th Cir. 1983) ("[W]e differ with the Third Circuit . . . in our unwillingness to find judicial authority to immunize witnesses."), *reh'g denied*, 712 F.2d 1416 (5th Cir. 1983); United States v. Pennell, 737 F.2d 521, 527 (6th Cir. 1984) ("Despite the Third Circuit's holding to the contrary, we conclude that federal courts do not have power [to immunize witnesses]."), *cert. denied*, 469 U.S. 1158 (1985); United States v. Hunter, 672 F.2d 815, 818 (10th Cir. 1982) ("[We] conclude that courts have no power to independently fashion witness use immunity."); United States v. Gottesman, 724 F.2d 1517, 1524 n.7 (11th Cir.) (District courts may not grant immunity to a defense witness simply because that witness possesses essential exculpatory information unavailable from other sources.), *reh'g denied*, 729 F.2d 1468 (11th Cir. 1984).

denied applications for judicial grants of defense witness immunity that would have been cognizable under *Smith*.[176] Other Circuits have simply refused to follow *Smith*, rejecting the notion of judicially-created immunity and adopting other doctrinal solutions to the problem while nonetheless acknowledging the existence of *Smith*.[177] Finally, one Circuit has not had the opportunity to address the problem since *Smith*,[178] while another has left the question open in the face of the inapplicability of *Smith* to any facts presented to it.[179]

Hence, *Smith* has had no effect on the jurisprudence of the nation's eleven other Circuit Courts of Appeals and remains a lone voice in the wilderness of defense witness immunity. This does not, however, mean that these courts have not had the opportunity to address the problem confronted by *Smith*. Rather, they have developed their own doctrinal solutions to that problem. Ironically, those solutions are often more favorable to defendants in certain respects than are the standards developed by *Smith*, as they have been interpreted. Moreover, they are more credible and have been applied with more force, because they do not require the departure from precedent and leap of logic contained in *Smith*.

Thus, for example, the Eighth Circuit has adhered to its position established before *Smith*[180] that district courts lack the

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176 This does not mean that relief would necessarily have been granted had these courts adopted *Smith*. *See, e.g.*, *Pennell*, 737 F.2d at 529; *Estelle*, 706 F.2d at 1401; United States v. Flaherty, 668 F.2d 566, 582-83 n.6 (1st Cir. 1981).

177 The District of Columbia, Seventh, Eighth and Ninth Circuits have followed this approach. *See, e.g.*, United States v. Heldt, 668 F.2d 1238, 1283 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), United States v. Herrera-Medina, 853 F.2d 564, 568 (7th Cir. 1988); United States v. Hardrich, 707 F.2d 992, 993-94 (8th Cir. 1983); United States v. Brutzman, 731 F.2d 1449, 1451-52 (9th Cir. 1984).

178 The Fourth Circuit has not published an opinion on the issue of defense immunity since United States v. Klauber, 611 F.2d 512 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980). *Klauber* made clear the Fourth Circuit's position that courts lack the power to confer immunity, but recognized that prosecutorial misconduct attendant to the process of granting immunity might require redress. *Id.* at 517-18 (citing United States v. Morrison, 535 F.2d 223 (3d Cir. 1976); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979) (precluding immunized testimony on behalf of the government unless immunity also made available to prospective defense witnesses)).

179 The First Circuit has repeatedly left open the issue "of when, if ever, due process might require immunization of defense witnesses," while acknowledging that *Smith* sets forth "the most lenient rule regarding court-ordered immunization of defense witnesses." *Flaherty*, 668 F.2d at 582-83 n.6.

180 *See* United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977) (the power to apply for immunity "is the sole prerogative of the Government").

power to grant immunity to prospective defense witnesses.[181] Nonetheless, it has hinted that the failure of the government to grant immunity to a witness whose testimony would be exculpatory might require relief by the court.[182] This standard is far less onerous than that existing in the Third Circuit after *Smith* and its progeny: it requires only that the evidence suppressed by the failure to grant immunity be "clearly exculpatory."[183] Moreover, because it grows out of unfair government action instead of the court's fictitious power to itself grant immunity, it is firmly grounded in constitutional and statutory precedent and will thus likely have a generative power that *Smith* has always lacked.[184]

Other Circuits, proceeding in a similarly gradual manner and focusing on traditional notions of the prosecution's obligations, have nonetheless imposed less burdensome standards upon defendants seeking relief for the failure of the government to grant immunity to defense witnesses than are imposed by the Third Circuit under *Smith* and its progeny. Thus, while *Smith* has had the effect of limiting judicially imposed relief to truly extraordinary circumstances and of almost eliminating the circumstances under which relief stems from prosecutorial misconduct, other Circuits have refused to develop the former but have liberalized the latter. For example, the Second Circuit has held that courts may order the government to immunize defense witnesses where "the government has engaged in discriminatory use of im-

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181 *Graham* has been followed in post-*Smith* cases in the Eighth Circuit. *See* United States v. Eagle Hawk, 815 F.2d 1213, 1217 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 712 (1988); United States v. Hardrich, 707 F.2d 992, 994 (8th Cir.), *cert. denied*, 464 U.S. 991 (1983). *See also* United States v. Doddington, 822 F.2d 818, 821 (8th Cir. 1987) (following *Graham* without citing it).

182 *Hardrich*, 707 F.2d at 994 n.3 ("Nor did failure of the Government to grant immunity [to a defense witness] deprive defendant of a fair trial. Because the testimony was not exculpatory, defendant was not prejudiced by its exclusion."). *Hardrich* evolved, in part, from Judge Bright's dissent in a previous case. *See* United States v. Saettele, 585 F.2d 307, 310-14 (8th Cir. 1978) (Bright, J., dissenting). Judge Bright recognized that "the authority to seek immunity under section 6002 can be exercised only by the *prosecutor*." *Id.* at 312 (Bright, J., dissenting) (emphasis in original). However, he argued that courts should act where that authority is exercised in a one-sided manner, for example, when immunity is granted to government but not defense witnesses, or where there is no reason to deny immunity to the latter. *Id.* at 313 & n.5 (Bright, J., dissenting).

183 *Doddington*, 822 F.2d at 821 n.1; *Eagle Hawk*, 815 F.2d at 1217. These cases speak in terms of "judicial immunity" but their origins, and the exposition in *Doddington*, make clear that the exercise of such power depends upon some form of prosecutorial misconduct, such as selectivity in granting immunity.

184 Neither the Eighth Circuit nor a district court within it has had the opportunity to apply these teachings to a concrete set of facts. Hence, this generative power is purely speculative.

munity to gain a tactical advantage *or*, through its own overreaching has forced the witness to invoke the Fifth Amendment; and . . . the witness' testimony will be material, exculpatory and not cumulative and is not obtainable from any other source.' "[185] Hence, the Second Circuit, while refusing to allow courts to grant immunity on their own,[186] has made clear that one need not show prosecutorial misconduct of the sort demonstrated in *Morrison* to require the government to grant immunity. Rather the "discriminatory use of immunity to gain a tactical advantage," a much lesser showing, will suffice.

The Seventh Circuit standard is more liberal still. While also adhering to the view "that federal courts do not have the power to grant immunity to a witness,"[187] that court has nonetheless held that "[i]n an appropriate case the refusal of the government to immunize a defense witness might be at once so damaging to the defense and so unjustifiable in terms of legitimate governmental objectives that the refusal to grant immunity would be a denial of due process of law to the defendant, and preclude his conviction."[188] The Seventh Circuit has thus evolved its doctrine such that the government intention to distort the judicial fact-finding process required by its earlier cases can be demonstrated simply by failing adequately to justify a refusal to grant immunity. This holding, while not contrary to *Smith*, goes well beyond the law as it now seems to exist in the Third Circuit.[189]

Other Circuits have hinted, if not held, that a showing less than that required under *Smith* might satisfy the "prosecutorial misconduct" prerequisite to relief for the failure to provide defense witness immunity. Thus, the Ninth and Fourth Circuits have hinted that such relief might be available where the government has immunized witnesses for its own benefit but refused

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185 United States v. Shandell, 800 F.2d 322, 324 (2d Cir. 1986) (emphasis added) (quoting United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983)). *See also* United States v. Pinto, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 109 S. Ct. 174 (1988); United States v. Calvente, 722 F.2d 1019, 1025 (2d Cir. 1983), *cert. denied*, 471 U.S. 1021 (1985).

186 *See* United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 499 U.S. 1077 (1981).

187 United States v. Herrera-Medina, 853 F.2d 564, 568 (7th Cir. 1988) (citations omitted). *See also* United States v. Wilson, 715 F.2d 1164, 1173 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983); United States v. Frans, 697 F.2d 188, 191 (7th Cir.), *cert. denied*, 464 U.S. 828 (1983); United States v. Buonos, 693 F.2d 38, 39 (7th Cir. 1982); United States v. Allstate Mortgage Corp., 507 F.2d 492, 494-95 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975)).

188 *Herrera-Medina*, 853 F.2d at 568 (citations omitted).

189 *See* text accompanying *supra* notes 115-74.

defense requests for immunity,[190] a position taken by the District of Columbia Circuit even before *Smith*[191] but never adopted in the Third Circuit. And the Sixth Circuit described the "deliberate intention of distorting the judicial fact-finding process" standard adopted by the Third Circuit as more restrictive perhaps, than the standard it would apply.[192] Hence, these courts, too, while refusing to allow courts to grant defense witness immunity,[193] have nonetheless evolved standards for proper prosecutorial behavior that might benefit defendants more frequently than they are benefitted in the Third Circuit.

Similarly, while the Third Circuit has cut back *Smith* by limiting defense witness immunity to those circumstances in which no conceivable prosecution could be brought against a prospective defense witness,[194] other circuits, in evaluating the prosecution's motives in denying immunity seem to require a far greater showing of government interest. Thus, the District of Columbia and Second Circuits mandate that applications for immunity be denied "whenever the witness for whom immunity is sought is an actual or potential target of prosecution;"[195] "where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defend-

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190 *See, e.g.*, United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984); United States v. Klauber, 611 F.2d 512, 518-19 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980).

Notably, in arriving at his conclusion that prosecutorial misconduct can be inferred from the lack of a governmental interest in refusing defense witness immunity, Judge Posner of the Seventh Circuit relied in part upon two Ninth Circuit cases. *See Herrera-Medina*, 853 F.2d at 568 (citing United States v. Patterson, 819 F.2d 1495, 1506 (9th Cir. 1987); United States v. Lord, 711 F.2d 887, 891-92 (9th Cir. 1983)). While *Lord*, in fact, reversed a conviction on these grounds, neither expressly adopted the liberal standard for which Judge Posner cited it. *Herrera-Medina*, 853 F.2d at 568.

191 Earl v. United States, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

192 United States v. Lenz, 616 F.2d 960, 963 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980).

193 The District of Columbia, Fourth, Sixth and Ninth Circuits all continue to deny applications for judicially-created immunity. *See* United States v. Pennell, 737 F.2d 521, 527 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); United States v. Mendia, 731 F.2d 1412, 1414 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Klauber*, 611 F.2d at 517; United States v. Heldt, 668 F.2d 1238, 1283 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

194 *See supra* text accompanying notes 125-29, 144, 162.

195 United States v. Heldt, 668 F.2d 1238, 1283 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) (quoting United States v. Turkish, 623 F.2d 769, 778 (2d Cir. 1980), *cert. denied*, 499 U.S. 1077 (1981)) (footnote omitted). *See also* United States v. Shandell, 800 F.2d 322, 324 (2d Cir. 1986).

ant,"[196] immunity ought to be considered.[197] In this respect too, then, the Third Circuit's more liberal doctrine yields more conservative results.

Finally, no other Circuit has held, as the Third Circuit has, that defense witness immunity requires a showing that the testimony to be offered will, in and of itself, exonerate a defendant.[198] Rather, these Circuits have conditioned such immunity on a showing that such testimony is "clearly exculpatory,"[199] "relevant"[200] or "material, exculpatory and not cumulative,"[201] or that its exclusion will be "so damaging to the defense" as to constitute a denial of due process.[202] Hence, while reversal of a district court's decision in those Circuits might depend upon a showing of prejudice such that the failure to grant immunity was not harmless error,[203] none would require the district court to make that determination in advance. Yet, the Third Circuit does so[204] and in this respect too, undermines its own doctrine and blunts the positive force of *Smith*.

To be sure, there are circuits which have to date rejected any

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196 *Turkish*, 623 F.2d at 778. This determination is necessarily made on a case-by-case basis. *Heldt*, 668 F.2d at 1283 n.85.

197 Significantly, though, these circuits place the burden of showing a potential prosecution on the defendant; the Third Circuit does not. *See* text accompanying *supra* notes 108-09.

198 *See* text accompanying *supra* notes 130-33, 140, 160-61.

199 This is the standard applied in the Eighth Circuit. *See supra* text accompanying notes 180-84. It is also the standard that has been applied, *arguendo*, in the Sixth and First Circuits. *See* United States v. Pennell, 737 F.2d 521, 529 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); United States v. Flaherty, 668 F.2d 566, 582-83 n.6 (1st Cir. 1981). The District of Columbia Circuit seems to apply a "substantially exculpatory" standard. *Heldt*, 668 F.2d at 1284-85.

200 Relevance seems to be the standard adopted in the Ninth Circuit, allowing for immunity even where the evidence to be introduced is merely corroborative. United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983).

201 This is the standard applied in the Second Circuit, *see supra* text accompanying note 185, which also requires that the testimony not be obtainable from any other source. The Ninth and Fourth Circuits appear to agree, at least *arguendo*, that the introduction of cumulative evidence does not justify immunity. *See* United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984); United States v. Klauber, 611 F.2d 512, 519 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980). The District of Columbia Circuit, however, agrees that immunity ought not be granted if the same evidence can be garnered without it. *Heldt*, 668 F.2d at 1286.

202 This is the standard applied in the Seventh Circuit. *See supra* text accompanying note 188.

203 *See generally* Chapman v. California, 386 U.S. 18 (1967). Increasingly, the Supreme Court has utilized a harmess error analysis in determining whether deprivations of Sixth Amendment rights require the reversal of convictions. *See, e.g.*, Satterwhite v. Texas, 108 S. Ct. 1792 (1988) (right to consult with counsel); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (right of confrontation).

204 *See supra* text accompanying notes 130-33, 140, 160-61, 198.

judicial role in the immunity process.[205] These Circuits have not only rejected *Smith*, but have thus far refused to develop any jurisprudence of defense witness immunity. In contrast to these Circuits, the Third has been a progressive voice. In contrast to the others, however, the progressiveness of the Third Circuit seems an illusion: despite the solicitousness of the *Smith* court for the rights of defendants, the more conservative evolution of doctrine in other Circuits has yielded more helpful and less vulnerable results.

VII. CONCLUSION

Defense attorneys had reason to celebrate the decision of the Third Circuit in *Government of the Virgin Islands v. Smith*. On its face, it empowered defendants as they had never been empowered before. By its terms, it created a remedy for the compulsory process rights afforded by the Sixth Amendment which had never existed before.

In practice, however, *Smith* has benefitted criminal defendants but little. No federal case has been reported granting immunity to a prospective defense witness under the rules set forth in *Smith*. The Court of Appeals for the Third Circuit has interpreted *Smith* so conservatively as to render it practically a dead letter. District courts within the circuit have construed its requirements so narrowly as to eviscerate the effect of the decision. And Courts of Appeals elsewhere have rejected *Smith*, either explicitly or by adopting alternative doctrine in the face of *Smith*'s holding.

Why has Smith been so lacking in generative power? In part, the profundity of the problem which *Smith* sought to solve is responsible for its weakness. The conflict addressed by *Smith*, between sixth amendment rights and the separation of powers, is very real and very thorny of resolution. Thus, perhaps, *Smith* has

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[205] The Fifth and Eleventh Circuits have held that, while judicially created immunity does not exist, it might be appropriate in the event of governmental abuse in the handling of the immunity process. Thus far, those courts have declined to articulate what type of abuse would trigger such relief or to explain what relief that would be. *See, e.g.*, United States v. Sawyer, 799 F.2d 1494, 1506-07 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987); United States v. Whittington, 783 F.2d 1210, 1220 (5th Cir.), *cert. denied*, 479 U.S. 882 (1986); United States v. Thevis, 665 F.2d 616, 639 (5th Cir.), *cert. denied*, 465 U.S. 1008 (1982). The Tenth Circuit has also rejected the notion of judicial immunity and has thus far expressed no opinion as to when, if ever, prosecutorial misconduct might require either a grant of immunity to defense witnesses or any related relief. United States v. Hunter, 672 F.2d 815, 818 (10th Cir. 1982).

not been followed simply because reasonable minds can and do differ when it comes to "hard cases." If this is so, then although *Smith* stands alone, we ought nonetheless to applaud the *Smith* court for its courage in attempting to give meaning to our constitutional protections.

The unanimity of the negative response to *Smith*, however, demands further analysis. Courageous decisions, even if controversial, yield some following; rarely is a doctrine that sounds so good rejected so thoroughly. Why has *Smith* been subjected to such obloquy?

First, *Smith* was a radical departure. Though it failed to recognize it, the *Smith* court not only ventured where no other court had been, but in fact, intruded upon territory previously recognized by every court, including the Third Circuit, as off limits. Moreover, it did so without following the appropriate procedures for overruling prior precedent,[206] though it had earlier recognized that *en banc* review would be required. In these respects, the *Smith* court, which was substantively expanding the judicial role beyond established limits, procedurally abandoned its judicial role as well. Flouting principles of stare decisis and mechanisms existing to effectuate those principles, the *Smith* court eschewed the type of incremental change which characterizes a common law system in favor of a giant doctrinal leap. In this sense, *Smith* was built upon a shaky foundation. It is accordingly not surprising that as those responsible for its maintenance have changed, the structure has begun to crumble.

Second, however, disingenuous as its treatment of its precedent may have been, the *Smith* court was honest about the length of the leap it took. Having built a strong case only a few months before against the relief sought by the defendants in *Smith*, the court could not help but recognize the extraordinariness of the step it was taking. Thus, it acknowledged "the unique and affirmative nature" of the "extraordinary relief" which it created. Moreover, it set forth "special safeguards" by which such relief was to be bounded and "special conditions" to which it would be subject. By virtue of the tone of its opinion, the court thus discouraged granting the immunity it was authorizing. By virtue of the content of the rules it promulgated, future courts were left with bases upon which to deny defense applications for such immunity. And by virtue of the language of those rules, the courts were left free to interpret *Smith* to the detriment of the defend-

206 *See* 3d Cir. Internal Operating Proc. Ch. 8(c).

ants whose rights the Third Circuit intended to vindicate. In sum, the Court of Appeals not only departed from its judicial role, but also pointed out that it was doing so; simultaneously, it left courts with the option not to follow its lead.

Third, and most significantly, the holding of *Smith* was unnecessary. *Smith* could and should have been decided based solely upon the impropriety of the government's failure to grant Ernesto Sanchez immunity. A decision along these lines would have been consistent with Third Circuit precedent and harmonious with the law of other circuits as it existed before and has developed since. It would have been substantively consistent with the judicial function of passing on the constitutionality of government action. And it would have been procedurally consistent with the judicial function of respecting precedent and deciding only those issues necessary of resolution.

Moreover, the court could have so decided *Smith* while still expanding defendants' rights. Indeed, the law in other circuits is at least arguably better for defendants than is the holding in *Smith*, as interpreted. In departing from that law, the Third Circuit constricted the availability of relief for this sort of prosecutorial misconduct, requiring a deliberate intention to distort the factfinding process where such a requirement did not exist before. And, although the facts of *Smith* hint at a liberalization of this standard, that portion of the opinion was overshadowed by the spectacular change in the law that emanated from the remainder of the opinion. Subsequent cases have ignored the former and denied relief looking through the lens of the latter.

Smith is perhaps best viewed, then, as a missed opportunity—but an opportunity to expand and clarify *Morrison* rather than to invent new law. *Smith* could have required the government to grant defense witnesses immunity where due process demands it, or risk dismissal, all subject to harmless error analysis upon appellate review. Had it done so, it would have served defendants better by setting standards they could meet. It would have assured that they would sometimes meet those standards by confining them within established jurisprudence, accessible, familiar and comfortable to other courts. And it would have stayed within its judicial role, incrementally changing the law for the better and encouraging, rather than discouraging further doctrinal development along the same lines.

Smith did none of these things. As a result, despite its promise, it changed the law but little. Despite its intent, defendants

remain at a severe disadvantage, some the victims of guilty verdicts though they may be innocent.