Trial Judiciary Note

A View from the Bench: Immunizing Witnesses

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Introduction

Immunizing witnesses in courts-martial can provide benefits to both the prosecution and the defense. Immunizing a member of a criminal conspiracy is sometimes the only means of obtaining evidence that can be used against other conspirators. It may also provide important evidence for defense counsel representing another conspirator. However, once immunity is granted, it may be difficult or impossible to prosecute the immunized witness.[1]

This note will examine the purpose and history of immunity grants. It will then look at the types of immunity and the effects that each has on future prosecution. It will also discuss defense requests for grants of immunity and provide advice for both prosecutors and defense counsel seeking to immunize witnesses.

Purpose and History

The Fifth Amendment to the U.S. Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[2] Recognizing the need to obtain self-incriminating statements to break up criminal conspiracies, Congress enacted statutes authorizing grants of immunity to overcome the constitutional privilege.[3] The courts have long recognized that immunity could overcome the privilege: a properly immunized witness may be compelled to answer incriminating statements. Initially, case law suggested that the only way to overcome the privilege against self incrimination was a grant of "transactional immunity" which protects the witness from any future prosecution.[4] In 1972 the Supreme Court ruled that the privilege could be overcome by "testimonial" or "use" immunity which only protects the witness from direct and derivative use of the immunized testimony.[5]

The privilege against self-incrimination has long been a part of military law.[6] The military has also long recognized the authority to overcome the privilege through grants of immunity.[7] The current military authority to grant immunity is codified in Rule for Courts-Martial 704.[8] Although this authority is not based on statute, the courts have recognized the validity of military grants of immunity.[9]

Formal Grants of Immunity

The *Manual for Courts-Martial* provides for two types of immunity: "transactional" immunity and "testimonial" immunity.[10] Transactional immunity protects the witness from future prosecution for the offenses that are the subject of the grant.[11] Testimonial immunity, also known as use immunity, does not provide this type of protection from future prosecution; it only protects the witness against the direct and derivative use of the immunized statements in a subsequent prosecution.[12] Because it does not provide as broad protection, testimonial immunity is the preferred type

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 704(a) discussion (2008) [hereinafter MCM].

[2] U.S. CONST. amend. V.

[3] The current federal immunity statute is 18 U.S.C. §§ 6002–6005 (2006).

[4] *See* Counselman v. Hitchcock, 142 U.S. 547, 585–86 (1892) ("No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States ").

[5] Kastigar v. United States, 406 U.S. 441, 452–53 (1972). The Court did not overrule *Counselman*, but held the broad language in that opinion to be dicta. *Id.* at 453–54.

[6] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 196–97, 345–46 (2d ed. 1920), *available at* http://www.loc.gov/rr/frd/Military_Law/historical_items.html. The military privilege against self-incrimination is currently codified in Article 31, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 831 (2006).

[7] MANUAL FOR COURTS-MARTIAL, U.S. ARMY ¶ 216 (1917), *available at* http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html ("The fact that an accomplice turns state's evidence does not guarantee him immunity from trial, unless immunity has been promised him by the authority competent to order his trial . . .").

[8] MCM, *supra* note 1, R.C.M. 704.

[9] United States v. Kirsch, 35 C.M.R. 56, 67 (C.M.A. 1964). *But see* Captain Herbert Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1, 25–27, 34 (1971), *available at* http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/1971.htm (critiquing *Kirsch* and proposing that Congress enact a plain statutory authorization for military grants of immunity).

[10] MCM, *supra* note 1, R.C.M. 704(a).

[11] *Id.* R.C.M. 704(a)(1).

[12] *Id.* R.C.M. 704(a)(2).

of immunity.[13] Testimonial immunity is sufficient to overcome the military privilege against self-incrimination.[14]

If the Government plans to prosecute a witness who has been granted testimonial immunity, it is best to complete the prosecution before the witness testifies.[15] Once the witness testifies, the Government bears the heavy burden of affirmatively showing in any subsequent prosecution of the immunized witness that it made no direct or derivative use of the immunized testimony.[16]

An accused's immunized statements may not be used to obtain additional witnesses, evidence or investigative leads for use in the accused's subsequent prosecution. For example, if an accused's immunized testimony implicating a co-accused induces the co-accused to testify against the accused, the prosecution is prohibited from using the co-accused's testimony in the accused's court-martial.[17] Similarly, if an accused's immunized testimony leads prosecutors to other witnesses, the prosecution is prohibited from using the testimony of these witnesses against the accused.[18] To successfully prosecute an immunized accused, the Government must affirmatively show that any new witnesses or evidence were derived through means independent of the accused's immunized statements.[19]

Immunized statements also may not be used in deciding to whether to prosecute immunized witnesses. For example, decisions to prosecute witnesses made after they provide immunized testimony are usually held to be improper.[20] To successfully prosecute an immunized witness the Government must affirmatively show that the decision to prosecute was not based on immunized statements.[21]

Before prosecuting an immunized witness, the Government should catalogue or "freeze" its evidence at the moment immunity is granted.[22] The Government must also detail a different prosecution team to the trial of the immunized witness and create a "Chinese wall" between this team and the prosecutors who are exposed to the immunized testimony.[23] This will help the Government meet its burden of showing that its evidence and decision to prosecute were based on evidence independent of the immunized statements.

Informal Immunity

Officers who make unauthorized promises of immunity to their soldiers may create *de facto* immunity. Only the general court-martial convening authority is authorized to grant immunity.[24] When lower-level commanders or staff officers make unauthorized promises of immunity, the courts may provide the accused *de facto* transactional immunity,

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[13] *Id*. R.C.M. 704(a) discussion.

[14] *Id*. MIL. R. EVID. 301(c)(1).

[15] *Id*. R.C.M. 704(a) discussion ("[I]f it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.").

[16] Kastigar v. United States, 406 U.S. 441, 460–62 (1972) (prosecution bears heavy burden to affirmatively demonstrate its evidence is derived from legitimate source wholly independent of immunized testimony).

[17] United States v. Mapes, 59 M.J. 60, 68 (2003) (where co-accused implicated accused only after accused gave immunized testimony against co-accused, Government failed to meet burden of showing its evidence was derived from source wholly independent of immunized testimony); United States v. Rivera, 1 M.J. 107, 110–11 (C.M.A. 1975) (Government made improper use of accused's immunized testimony because it assisted Government in obtaining co-accused's testimony against accused).

[18] United States v. Boyd, 27 M.J. 82, 83–86 (C.M.A. 1988) (when accused was immunized and testified against co-accused and co-accused and another witness subsequently implicated accused, Government failed to meet burden of showing new evidence was developed wholly independently of immunized testimony). *See* Captain Jeffrey J. Fleming, DAD Note, *Revenge by a Co-Accused—A Derivative Use of Immunized Testimony*, ARMY LAW., May 1989, at 20 (reporting on *Boyd* and its implications).

[19] United States v. Allen, 59 M.J. 478, 482–83 (2004) (accused made immunized statements under state law; Government met burden of showing the accused's subsequent confession to military investigator was not derived from the immunized statements).

[20] United States v. Olivero, 39 M.J. 246, 248–51 (C.M.A. 1994) (Accused was granted immunity and initially admitted using marijuana with co-accused and then denied such use. Government did not meet burden to show decision to prosecute was based on evidence wholly independent of immunized statements because decision to prosecute was made after accused's denial. Government bore burden of proving, by a preponderance of the evidence, that its decision to prosecute was "untainted" by immunized evidence); United States v. Eastman, 2 M.J. 417, 419 (A.C.M.R. 1975) (forbidden use of immunized testimony includes the "decision to initiate prosecution"; in this case the Government failed to meet this burden where immunized testimony was read by the Article 32 investigating officer, the drafter of the pretrial advice and the staff judge advocate (SJA) who provided the pretrial advice.); *Boyd*, 27 M.J. at 85–86 (where decision to withdraw administrative discharge and proceed with court-martial was made after accused was immunized and testified against co-accused, Government failed to meet burden of showing decision to prosecute was made wholly independently of immunized testimony).

[21] United States v. England, 33 M.J. 37, 39 (C.M.A. 1991) (although decision to prosecute was made after accused's immunized testimony was given, the Government met its burden of showing that it did not affect the decision to prosecute because the testimony did not relate to the accused and provided prosecutors with no new information). Prior case law held that a convening authority who immunized a witness was disqualified from taking post-trial action on the case; this is no longer the case. United States v. Newman, 14 M.J. 474, 481–82 (C.M.A. 1983).

[22] United States v. Gardner, 22 M.J. 28, 31 n.4 (C.M.A. 1986) (government can meet burden of showing accused's trial was not tainted by immunized testimony in part by preserving investigatory file assembled prior to the testimony). *See* Captain A. Jason Neff, *Getting to Court: Trial Practice in a Deployed Environment*, ARMY LAW., Jan. 2009, at 50, 54.

[23] United States v. Mapes, 59 M.J. 60, 69 (2003) (Chinese wall inadequate where SJA, convening authority, and principal CID investigator all knew about immunized testimony); United States v. Gardner, 22 M.J. 28, 31 (C.M.A. 1986) (military judge properly disqualified assistant trial counsel who was exposed to immunized testimony where trial counsel had not been exposed to testimony in any way). *See* Neff, *supra* note 22 at 54 (discussing challenge of maintaining "Chinese wall" in deployed environment, where privacy is limited).

[24] MCM, *supra* note 1, R.C.M. 704(c).

barring the Government from future prosecution.[25] At the very least, statements made in response to such promises may not be used against the recipient of the promise.[26] Prosecutors should ensure that the commanders and staff officers they advise do not inadvertently immunize service members suspected of criminal offenses.

The pretrial agreement process may provide a result similar to a grant of immunity. A promise to testify truthfully in the trial of a co-accused is a permissible pretrial agreement term.[27] However, such promises must be made voluntarily, since an accused may not be forced to enter into a pretrial agreement.[28] The protections for the accused are not the same as those provided through immunity. The Government can withdraw from a pretrial agreement before the accused begins performance.[29] In addition, pretrial agreements made with lower-level convening authorities may not preclude later prosecution by higher-level convening authorities.[30] Defense counsel who are negotiating pretrial agreements should always consider including terms promising testimony against co-accused. Defense counsel should also ensure that their clients understand the limited protections such terms provide.

Defense Requests for Immunity

Often, servicemembers accused of crimes will want others allegedly involved in their misconduct to provide exculpatory evidence on their behalf. Although the defense may ask that a witness be immunized, the decision to grant immunity is within the sole discretion of the general court-martial convening authority.[31] However, if the Government has engaged in discriminatory use of immunity to obtain a tactical advantage or, through overreaching, has forced a witness to invoke the privilege against self-incrimination, the defense may be able to obtain a remedy. In such cases, a military judge may abate the proceedings if the defense can show that the witness will invoke the privilege against self-incrimination and that the witness' testimony is material, clearly exculpatory and not cumulative or obtainable from some other source.[32]

Defense counsel representing clients suspected of engaging in criminal activity with other service members should consider requesting immunity, in appropriate situations. Although such requests are rarely granted, they may provide critical evidence for the defense. Defense counsel should also be alert to the discriminatory use of immunity by the Government.

Procedures

A grant of immunity must be made in writing and signed by the general court-martial convening authority who issues it. The grant must identify the matters to which it extends.[33] Defense counsel representing an immunized witness should carefully examine the written grant of immunity and ensure the client understands the limits of the grant, and the point beyond which the client should invoke the privilege against self-incrimination.

The Government is required to notify the accused when a prosecution witness has been granted immunity or leniency.[34] When an immunized witness testifies at trial, defense counsel should be prepared to cross examine the witness regarding the grant of immunity and consider

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[25] United States v. Kimble, 33 M.J. 284, 289–91 (C.M.A. 1991) (promise by accused's reporting official and special court-martial convening authority that there would be no court-martial if accused successfully completed civilian diversionary program amounted to *de facto* transactional immunity); Cooke v. Orser, 12 M.J. 335, 337–38, 345–46 (C.M.A. 1982) (trial court held that promise of immunity by SJA, though unauthorized by general court-martial convening authority, required suppression of statements and derived evidence; appellate court found a due process violation and dismissed charges with prejudice); United States v. Churnovic, 22 M.J. 401, 408 (C.M.A. 1986) (promise by petty officer, under instructions from executive officer, that accused "wouldn't get in trouble" if he revealed the location of hidden hashish, was "enforceable for much the same reasons that apply to promises of transactional immunity"). *But see* United States v. Caliendo, 32 C.M.R. 405, 410 (C.M.A. 1960) (promise by accused's civilian supervisor and noncommissioned officer in charge that no action would be taken if stolen property was returned did not amount to *de facto* immunity or require suppression of subsequent acts and statements; court reasoned that it could have done so, but that trial court had made appropriate factual conclusions to the contrary, in particular that subsequent admissions were not made in reliance on this promise).

[26] Cunningham v. Gilevich, 36 M.J. 94, 100–02 (C.M.A. 1992) (statement by accused's commander encouraging them to testify did not amount to *de facto* immunity, but did amount to unlawful influence making accused's subsequent statements inadmissible under Article 31); United States v. Thompson, 29 C.M.R. 68, 70–71 (C.M.A. 1960) (alleged promise by squadron commander not to prosecute accused if he revealed all he knew about thefts did not amount to *de facto* immunity, but would bar admission of statements made in response to promise).

[27] MCM, *supra* note 1, R.C.M. 705(c)(2)(B).

[28] *Id.* R.C.M. 705(c)(1)(A).

[29] *Id.* R.C.M. 705(d)(4)(B); Shepardson v. Roberts, 14 M.J. 354, 357–58 (1983).

[30] United States v. McKeel, 63 M.J. 81, 83–85 (2006) (pretrial agreement with special court-martial convening authority not to refer charges to court-martial if accused accepted non-judicial punishment and waived administrative separation board did not preclude later referral of court-martial charges by general court-martial convening authority; remedy for improper promises extended only to accused's detrimental reliance on the improper promise, and trial court had suppressed statements made during nonjudicial punishment).

[31] MCM, *supra* note 1, R.C.M. 704(e).

[32] *Id.*; *see also* Major Steven W. Myhre, *Defense Witness Immunity and the Due Process Standard: A Proposed Amendment to the Manual for Courts-Martial*, 136 MIL. L. REV. 69, 72–74 (1992) (discussing, among other things, normal process for defense witness immunity).

[33] MCM, *supra* note 1, R.C.M. 704(d).

[34] *Id.* MIL. R. EVID. 301(c)(2). The notice must be made before arraignment or within a reasonable time before the witness testifies.

requesting an instruction on the limited credibility of such testimony.[35]

Military grants of immunity will bar use of the immunized statements by other jurisdictions.[36] Similarly, grants of immunity in other jurisdictions will bar use of the immunized testimony in military courts-martial.[37] Defense counsel should be vigilant to ensure the Government makes no direct or derivative use of immunized testimony their clients provide in state or federal court.

Military grants of immunity are usually made to service members subject to the Uniform Code of Military Justice.[38] When the subject of a military grant of immunity relates to federal offenses which could result in prosecution of a service member in U.S. District court, coordination with the Department of Justice is required.[39] Military prosecutors must ensure this coordination is completed before a grant of immunity is issued. Military grants of immunity can be made to civilians only when specifically authorized by the Attorney General of the United States.[40]

Grants of immunity should not specify the contents of the testimony the witness is expected to give.[41] Grants of immunity that require witnesses to testify in accordance with a written statement, or otherwise specify what the content of the testimony must be, may encourage them to be untruthful, making them incompetent as witnesses.[42] Prosecutors and defense counsel must be vigilant to ensure grants of immunity are not too specific in this regard.

Grants of immunity will not shield witnesses from subsequent prosecutions for perjury or making a false statement.[43] A person who refuses to testify despite a valid grant of immunity may be prosecuted for the refusal to testify.[44] Prosecutors who determine that an immunized witness has lied, either to investigators or in court, or has refused to testify should consider bringing appropriate charges against the witness. Such prosecutions should be completely separate from any prosecution for the underlying misconduct.[45]

Conclusion

Grants of immunity can be useful tools for both the Government and the defense. However, they can raise many legal problems. Before immunity is granted, the Government should carefully plan out any future prosecution of the witness to be immunized. The Government should catalogue the evidence it has at the time of the grant of immunity and should create a new prosecution team for the case against the witness that is separated from the prosecutors exposed to the immunized testimony. Defense counsel should understand the implications of grants of immunity issued to their clients. Defense counsel should also consider alternatives to formal grants of immunity, such as a pretrial agreement term offering testimony against a co-accused.

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[35] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-19 (1 Jan. 2010). Defense counsel should also consider requesting an accomplice instruction. *Id.* para. 7-10.

[36] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79–80 (1964) (holding that state grant of immunity from prosecution is binding on the federal government; after grant of immunity witness and government should be left in substantially the same position as if the witness had invoked his right to silence).

[37] United States v. Allen, 59 M.J. 478, 482–84 (2004) (holding that state grant of immunity is binding on courts-martial, but that court-martial was not tainted by evidence obtained under state grant under particular facts of the case).

[38] MCM, *supra* note 1, R.C.M. 704(c)(1).

[39] *Id.*; U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE (DOJ) AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES encl. 2, para. E, Supplemental DOD Guidance (18 June 2007) (command authority to issue grants of immunity extends only to trial by court-martial, so coordination must be made with civilian authorities when offenses might lead to prosecution in civilian court).

[40] MCM, *supra* note 1, R.C.M. 704(c)(2).

[41] *Id.* R.C.M. 704(d) discussion.

[42] United States v. Stoltz, 34 C.M.R. 241, 244–45 (C.M.A. 1964) (grant of immunity that required witness to testify in conformity with pretrial statement rendered witness incompetent to testify); United States v. Conway, 42 C.M.R. 291, 293–94 (C.M.A. 1970) (co-accused was incompetent as witness when he understood his informal agreement with SJA required him to testify in strict accordance with his statement to trial counsel).

[43] Glickstein v. United States, 222 U.S. 139, 142 (1911).

[44] MCM, *supra* note 1, R.C.M. 704(d) discussion.

[45] United States v. Eastman, 2 M.J. 417, 419 (A.C.M.R. 1975).