Judicial Enforcement of Nonstatutory Immunity Grants: Abrogation by Analogy

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JUDICIAL ENFORCEMENT OF NONSTATUTORY "IMMUNITY GRANTS": ABROGATION BY ANALOGY

In the federal system, the United States attorney has an almost unlimited power to negotiate plea agreements with defendants, subject only to the requirement that all pleas of guilty resulting therefrom be voluntarily made. In the process of granting immunity, however, the power of the prosecuting attorney is severely constrained, subject both to legislative (i.e. statutory) requirements and to judicial interpretation. This distinction is grounded in the recognition that "[o]nly the strongest circumstances can justify compelling a confession of crime," and, thus, that a thorough system of safeguards is necessary to protect a person's Fifth Amendment rights. Nonetheless, a curious hybrid has developed in what may be called the informal prosecutorial grant of immunity. Although such "immunity" is not statutorily authorized and does not fulfill traditional statutory requirements, there is little doubt that it is considered both common and necessary to effective law enforcement.

In United States v. Carter, the Court of Appeals for the Fourth Circuit faced the problem of the enforceability of just such a promise. In that case, the defendant pleaded guilty to one misdemeanor charge and incriminated himself and others on the basis of his understanding of a prosecutor's promise of absolute immunity from future prosecutions. The primary question raised by the facts in Carter was whether the prosecuting attorney, on his own, should ever be allowed to make a binding grant of full transactional immunity; and, if not, what remedies would be available to a defendant who relied to his detriment on a prosecutorial promise to do so. Unfortunately, the Fourth Circuit

1. See text accompanying notes 15-54 infra.
2. See text accompanying notes 55-98 infra.
3. In re Bart, 304 F.2d 631, 635 (D.C. Cir. 1962); cf. In re Grand Jury Investigation, 317 F. Supp. 792, 796-97 (E.D. Pa. 1970). The point here is compulsion. Although a guilty plea also involves an admission of guilt, such an admission is voluntary.
5. 454 F.2d 426 (4th Cir. 1972).
largely ignored this question and based its decision instead on "[s]ound reasons of public policy"; thus, the court held that the promise, made by a U.S. attorney in one district, would be binding on a U.S. attorney in another district so long as the defendant relied on it in giving the incriminating testimony. In so deciding, the court aligned itself with the recent trend toward judicial enforcement of prosecutorial promises where the defendant has performed his part of the bargain and where the promise in question was made as an inducement for the plea of guilty.\(^7\)

Although the result reached in the \textit{Carter} case is clearly equitable, the court's failure to address itself to the distinctions between plea bargains and immunity agreements, and its failure to confront the important issue of the prosecutor's authority to make binding grants of immunity leads to two inevitable results: unauthorized judicial expansion of the prosecutorial powers of the U.S. attorney, and effective emasculation of the legislative safeguards built into statutory grants of immunity. Thus, despite the apparent fairness of the court's final remedy, the holding of the Fourth Circuit is not legally sound in that the reliance it places on recent plea bargaining decisions ignores the primary questions raised by the case itself, and leads to possibly deleterious consequences which far outweigh the favorable result. This criticism is particularly valid in view of the fact that a more equitable and legally preceded solution to the problem before the court could readily have been fashioned. After a discussion of the relationship between plea bargains and immunity agreements, and an examination of the implications and ramifications of the decision in \textit{Carter}, this note will suggest an alternative solution more consonant with sound legal authority.

\textbf{The Factual Background of Carter}

In 1968, William Eugene Carter was arrested by agents of the Federal Bureau of Investigation in Washington, D.C., while Carter was attempting to sell \$156,000 in stolen government checks, part of a \$250,000 purchase from the actual thief. Through an agreement with the Assistant United States Attorney for the District of Columbia handling the case, Carter pleaded guilty to one misdemeanor charge of possession of stolen government property, a violation of the District of Columbia code; in return for the reduced charge, he agreed to furnish information concerning the theft, including the identity of the principal thief. This was done, to the satisfaction of the F.B.I. agents in charge of the case, on Carter's understanding that he would not be

\^6\ Id. at 428.

prosecuted for any other crimes concerning the checks which he might divulge. On the basis of information supplied by Carter, the principal thief was arrested and convicted; Carter was placed upon one year's probation in recognition of the extent of his cooperation.

After his conviction in the District of Columbia, Carter was arrested and convicted in the Eastern District of Virginia on ten counts of forgery\(^8\) and conspiracy,\(^9\) and sentenced to a total of sixteen years in prison. The gravamen of the Virginia prosecution was the forging and uttering of some of the original $250,000 in checks.\(^{10}\) The defendant appealed his conviction on the ground that the prosecution was barred by the promise made to him in the prior District of Columbia prosecution. The Court of Appeals agreed that Carter was entitled to receive the benefit of his bargain and remanded for an evidentiary hearing to determine whether a promise had been made and, if so, the scope of that promise.

The court's apparent willingness to enforce the agreement as made raises the threshold question of the relationship between immunity agreements and plea bargains. In the abstract, there seems to be little similarity between these two concepts. The former is a procedure whereby a person is compelled to give testimony regarding criminal activities of which he may be aware. In return, his constitutional privilege against self-incrimination\(^{11}\) is preserved by a guarantee of immunity from prosecution for crimes which he might reveal. In the plea bargaining process, a defendant, through an agreement with the prosecuting attorney, concedes to a waiver of his right to a trial on the merits\(^{12}\) by pleading guilty to some specific charge (or charges). In consideration of the plea, the prosecutor confers some benefit on the defendant, generally in the form of a promise to charge the defendant with a lesser offense than the facts actually warrant, to drop other charges pending against him, or to recommend leniency to the judge.\(^{13}\)

In practice, however, the two may coalesce, as they did in \textit{Carter}, when a prosecuting attorney allows a defendant to plead guilty to a re-

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\item \textit{9.} \textit{Id.} §§ 2, 371 (1970).
\item \textit{10.} There is disagreement in the majority and dissenting opinions as to the identity of the checks which were the subject of the Virginia prosecution. According to the majority, "some of [the checks] were the object of [the] earlier prosecution . . . in the District of Columbia." 454 F.2d at 427. Judge Boreman in his dissent, however, indicates that the checks were "other than those he was attempting to sell at the time of his arrest in the District of Columbia" and refers to the majority's statement to the contrary as "somewhat misleading." \textit{Id.} at 429 & n.2.
\item \textit{11.} U.S. Const. amend. V.
\item \textit{12.} \textit{Id.} amend. VI.
\item \textit{13.} For a discussion of the types of concessions and the policies underlying them, see D. Newman, \textit{Conviction: The Determination of Guilt or Innocence without Trial} 97-98 (1966) [hereinafter cited as D. Newman].
\end{itemize}
duced charge and offers him immunity from prosecution in return for his testimony concerning criminal activities. This practice is not un-
common, but it does present special problems for the courts since the two procedures involve essentially different considerations. It is these differences which the Carter court failed to analyze and which must, therefore, be examined at the outset of this note.

Judicial Treatment of Plea Bargaining

It has been estimated that as many as 95 percent of all convictions are based on pleas of guilty, with the figure running as high as 85 percent for felony convictions. The bulk of these guilty pleas are the result of negotiations between the prosecutor and the defendant, and it is not unreasonable to assume that if such bargains were not commonly offered, there would be little incentive for defendants to plead guilty. Absent this high rate of guilty pleas the processes of criminal justice would simply be unable to function; most courts could not begin to give full trials to the myriad of cases coming before them.

Notwithstanding the manifest importance of the plea bargaining system, for many years the practice was shrouded in secrecy. Courts pretended that the practice did not exist, and defendants cooperated in sustaining this illusion for fear that judges would invalidate pleas based on such bargains. The problem with such secrecy, of course, was that it left the defendant remediless in case of a breach by the prosecuting attorney; having testified under oath to the voluntariness of his plea, a defendant could not later claim the breach of a promise made to him as an inducement for the plea of guilty.

In recent years, the courts have come to realize that the defendant

16. See Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964); The Challenge of Crime in a Free Society, supra note 4, at 134.
20. Cases are numerous where a defendant denied the existence of a plea bargain, even though subsequent events showed conclusively that such an agreement had occurred. See, e.g., Walters v. Harris, 460 F.2d 988 (4th Cir. 1972); White v. Gaffney, 435 F.2d 1241 (10th Cir. 1970); Jones v. United States, 423 F.2d 252 (9th Cir. 1970). For many years such a denial was sufficient to establish the voluntariness of the plea, but a more realistic view of the situation now prevails, and a defendant's statement that no promises were made to him is no longer conclusive. See Hilliard v. Beto, 465 F.2d 829 (5th Cir. 1972); Walters v. Harris, 460 F.2d 988 (4th Cir. 1972).
21. See United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); Alvereze v. United States, 427 F.2d 1150 (5th Cir. 1970).
must be offered more extensive protection. For this reason, and in recognition of the vital role that guilty pleas and, thus, plea bargains play in modern criminal trials, the courts have held that not only is there nothing wrong with honest plea bargaining, but that such bargains are to be encouraged, so long as the rights of the defendant are fully protected. In short, there is no longer any doubt that plea agreements are considered "an essential, indeed indispensable, part of the administration of justice."

The "Voluntariness" Requirement—The Court's Role

The primary requirement of all pleas of guilty is that they be voluntarily made. The Federal Rules of Criminal Procedure go even further and require that the judge personally address the defendant to determine that the plea is made voluntarily, with a full understanding of the nature of the charge and the consequences of the plea. There are two main considerations which dictate that the guilty plea be subjected to such careful scrutiny. One is that the plea of guilty involves the waiver of three fundamental constitutional guarantees: the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. Secondly, like the verdict of a jury, the plea of guilty is conclusive: following such a plea, "the court has nothing to do but give judgment and sentence." For these reasons, it is absolutely imperative that the defendant fully understand

22. The court in State ex rel. Clancy v. Colner succinctly and accurately formulated the issue when it stated: "In this day of crowded criminal court dockets the speedy dispatch of litigation is essential if justice is to be done." 179 S.E.2d 726, 733 (W. Va. 1971).
28. Fed. R. Crim. P. 11. The rule requires not only that the judge personally address the defendant as to voluntariness, but also that he determine that there is a factual basis for the plea. Id. In McCarthy v. United States, the Court held that a plea of guilty made without such a determination is invalid and entitles the defendant to a new hearing at which he may plead anew. 394 U.S. 459 (1969).
what his plea entails;\textsuperscript{31} and the safeguards embodied in Rule 11 ensure that he will.\textsuperscript{32}

It was reliance upon this principle of voluntariness which first enabled the courts to deal effectively with the problem of the enforceability of plea bargains. Not wanting to eliminate the practice altogether, yet aware of the potential for abuse inherent in the nature of plea bargaining, the United States Supreme Court ruled in Machibroda \textit{v. United States}\textsuperscript{38} that "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."\textsuperscript{34} Hence, any conviction based on such a plea was likewise void and subject to collateral attack.\textsuperscript{35} This does not mean, of course, that all pleas of guilty based on promises by the prosecuting attorney are invalid.\textsuperscript{36} As long as the agreement is fairly secured, and the rights of the accused protected, the plea bargain will be upheld.\textsuperscript{37}

The difficulty arises in determining when a promise made by a prosecutor renders the defendant's plea involuntary. In general, the test has been whether the prosecutor's promise has been fulfilled; when it has not, the plea has been considered improperly induced.\textsuperscript{38} Thus, when a plea of guilty "rests in any significant degree" on a bargain or promise made by the prosecuting attorney to the defendant "so that it can be said to be part of the inducement or consideration" for the plea,\textsuperscript{39} the defendant is entitled to relief if the government reneges on its part of the agreement.\textsuperscript{40} The most common form of relief is to allow the defendant to withdraw his guilty plea,\textsuperscript{41} a remedy which is clearly

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\item \textsuperscript{31} See Brady \textit{v. United States}, 397 U.S. 742, 748 (1970). In \textit{McCarthy \textit{v. United States}}, the Court reasoned that since the waiver of constitutional rights must be voluntarily and intelligently made to be valid under the due process clause, a guilty plea, which involves the waiver of three such rights, must be equally voluntary and knowing. If not, it has been obtained in violation of due process considerations and is void. 394 U.S. 439, 466 (1969); accord, Boykin \textit{v. Alabama}, 395 U.S. 238, 242-43 (1969).
\item \textsuperscript{32} See \textit{McCarthy \textit{v. United States}}, 394 U.S. 459 (1969).
\item \textsuperscript{33} 368 U.S. 487 (1962).
\item \textsuperscript{34} Id. at 493.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} See \textit{Lupo \textit{v. United States}}, 435 F.2d 519, 525 (8th Cir. 1970); Cooper \textit{v. Holman}, 356 F.2d 82, 85 (5th Cir.), \textit{cert. denied}, 385 U.S. 855 (1966).
\item \textsuperscript{38} See \textit{Machibroda \textit{v. United States}}, 368 U.S. 487 (1962). See D. Newman, \textit{supra} note 13, at 36, however, which states that such reasoning is "misleading."
\item \textsuperscript{39} \textit{Santobello \textit{v. New York}}, 404 U.S. 257, 262 (1971).
\item \textsuperscript{40} \textit{Gallegos \textit{v. United States}}, 466 F.2d 740, 741 (5th Cir. 1972); \textit{see \textit{Santobello \textit{v. New York}}}, 404 U.S. 257 (1971); \textit{Machibroda \textit{v. United States}}, 368 U.S. 487 (1962).
\item \textsuperscript{41} \textit{See, e.g.,} Schoultz \textit{v. Hocker}, 469 F.2d 681 (9th Cir. 1972); Hilliard \textit{v. Beto}, 465 F.2d 829 (5th Cir. 1972).
\end{itemize}
sanctioned by the Federal Rules of Criminal Procedure. The significance of this remedy lies in the fact that the relief afforded is complete: after withdrawal of the plea, the defendant is allowed to replead and proceed to a trial on the merits. His earlier plea is not allowed as evidence at trial, and the defendant is left in a virtually unprejudiced position.

The Prosecution Function

Even though it is within the ambit of the powers of the court to administer relief to a defendant once the breach of a plea bargain is proved, the authority to strike such bargains originally rests solely with the prosecuting attorney. At the federal level, this power derives from the statute which vests authority in the U.S. attorney to prosecute all offenses against the United States. Significantly, however, he is not bound to prosecute all such offenses; rather, a qualified duty is imposed upon him, and he is vested with broad discretion to determine whether there shall be a prosecution and, if so, on what charges. In making his determination, the prosecutor is able to consider all relevant factors; if one such factor is the willingness of the defendant to plead guilty in return for some concession, the plea bargain is born.

In exercising his discretionary power, the U.S. attorney is acting as an officer of the executive branch of government and the doctrine of separation of powers precludes the courts from interfering in any way with his decision. In fact, the judge is specifically prohibited from entering into the process of plea bargaining:

When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. . . . Intentionally or otherwise, and no matter how well motivated the judge

42. Indeed, the Federal Rules of Criminal Procedure even allow withdrawal of the guilty plea after sentencing in order to avoid "manifest injustice." Fed. R. Crim. P. 32(d).


48. Id.
may be, the accused is subjected to a subtle but powerful influence. . . . A plea entered upon a bargain agreement between a judge and an accused cannot be squared with due process requirements of the Fourteenth Amendment.49

Thus, unable to influence what charges shall be brought against a defendant, and barred from entering into the actual bargaining process, the court has only the power to ensure that the rights of the defendant are safeguarded. This protection is guaranteed by satisfying the court that the guilty plea, no matter why it is made, is voluntary.

The New Approach—Enforcement Per Se

Recently, however, courts have begun to move away from this voluntariness test and have begun to base their decisions on the existence of the plea bargain itself.50 That is, once the plea bargain is proved, the court has the duty either to insist on its enforcement or to allow withdrawal of the guilty plea.51 In many instances the result under either test would be the same, especially in view of the judicial tendency to find pleas of guilty based on unfulfilled promises to be involuntarily made. The significance of the new test, however, lies in the fact that it is an absolute judicial recognition of the existence of plea bargaining, and that it avoids any possibility of strained interpretation occasioned by artificial speculation on the relationship between the offered bargain and the voluntariness of the resulting plea. While such a trend portends greater protection for defendants, the basically informal and unstructured character of the plea bargain arrangement still places defendants at a serious disadvantage. For this reason, many commentators have proposed reforms of the plea bargaining process,52 the main feature of which is generally some type of formal struc-


51. Santobello v. New York, 404 U.S. 257, 263 (1971); Johnson v. Beto, 466 F.2d 478, 479-80 (5th Cir. 1972). In his concurring opinion in Santobello, Justice Douglas went further and suggested that the defendant's preference of remedy should be given "considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." 404 U.S. at 267.

ture, including recording of the plea in open court. Until such time as these reforms are instituted, however, the primary administration of the plea bargaining process will remain with the prosecutor. The judiciary will only be able to exercise that limited control afforded by its supervisory powers, and the potential for abuse will remain.

Form and Function of Immunity Agreements

The history of immunity agreements, unlike that of plea bargains, has been rife with litigation. Statutes granting immunity from prosecution in return for incriminating testimony have existed in the United States since 1857, and the courts have been faced with the task of interpreting such statutes ever since. Prior to 1954, all such statutes were self-executing, immunity being automatically obtained whenever a witness testified in a proceeding covered by an immunity act. Thus, in order to escape prosecution a criminal merely had to arrange to testify regarding his past criminal activity; the immunity acts barred any future prosecution.

The legislative response to such automatic immunity came in 1954. Fearful that the lack of procedural safeguards too often resulted in "immunity baths," Congress in that year adopted an immunity provision which included several requirements which had to be met before immunity could be granted. These fundamental requirements are now considered conditions precedent to a grant of immunity; with-

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53. To date, only one state has unequivocally required that all plea bargains be disclosed to the court. See People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 383 (1970). However, at the federal level, the Fourth Circuit has suggested an expansion of the Rule 11 inquiry designed to apprise the judge of any promise made to the defendant. See Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972). Such a procedure is also recognized by the President's Commission on Law Enforcement and Administration of Justice which has made the following recommendations: (1) "If a negotiated agreement to plead guilty is reached, care should be taken by prosecutor and defense counsel to state explicitly all its terms"; and (2) "Upon the plea of guilty in open court the terms of the agreement should be fully stated on the record and, in serious or complicated cases, reduced to writing." The Challenge of Crime in a Free Society, supra note 4, at 136.

54. See text accompanying notes 109-113 infra.


out them, the grant is considered void. Since any analysis of modern procedure regarding immunity grants must necessarily include a discussion of these requirements, treatment of them at the outset will serve to focus the investigation.

The Formal Requirements

In cases before a grand jury or a court, the United States attorney must first determine that the public interest will best be served by immunizing the witness. This determination then must be submitted to the attorney general, and he, in turn, must approve it. Finally, there must be a showing that the crimes under investigation—that is, the ones to which the application relates—are among those to which immunity is available, as specifically authorized by statute. Once these three conditions are met, the court must issue an order compelling the required testimony. Not until this time is a grant of immunity in order, and only then may a witness be compelled to testify against himself.

The effectiveness of this four-part statutory prerequisite to immunity lies in the fact that three different people are involved, each of whom must make an independent determination of the circumstances surrounding the proposed grant of immunity. At the outset, the U.S. attorney must determine whether the public interest is best served by granting immunity from prosecution to a witness or by attempting to proceed to trial. In making his determination, the prosecuting attorney will most likely consider such factors as the probability of conviction, the magnitude of the offense, and the culpability of the witness in relation to all others who may be involved. The attorney general focuses on substantially the same considerations, weighing the evidence of the witness' possible involvement against the likelihood that the information he may reveal will ultimately be of greater significance than his conviction. It can be assumed that where the proof and punishment of an offense may be difficult because all witnesses or leads are somehow involved in the crime, the application for immunity generally will be approved. However, where the U.S. attorney proposes to grant immunity to a witness when the evidence against him strongly suggests his possible involvement in a serious crime, or where it appears that the witness has little information of importance to impart, the application for immunity should be denied by the attorney gen-

62. See Bursey v. United States, 466 F.2d 1059, 1074-75 (9th Cir. 1972).
63. Cf. 8 Wigmore, Evidence § 2281 (McNaughton rev. 1961).
eral. Thus, from the outset, there is built into the statute a system of safeguards whereby the ostensible detachment of the attorney general is allowed to serve as a check on the authority of an overzealous prosecutor.

Once the application for immunity has been approved by the attorney general, it is channeled to the court which seeks to determine, upon careful analysis of the application, whether or not the crimes involved are covered by the terms of the statute. Significantly, this is the only determination the court is authorized to make; in ruling on an application for immunity, the court is "confined to an examination of the application . . . for the purpose only of deciding whether or not the application meets the procedural and substantive requirements of the authorizing statute." The court is thus precluded from inquiring into the assertion that the testimony being sought is necessary to the public interest; this determination having already been made by two members of the executive branch of government. This division is in keeping with the doctrine of separation of powers, since the grant of immunity initially involves the prosecutor's discretion to determine for what crimes, if any, a defendant will be tried. By limiting the judge's role to one of determining whether the application for immunity complies with the provisions of the statute, the legislature has clearly avoided the possibility of judicial encroachment into executive powers. However, it is important to note that where the procedural and substantive requirements have not been met, the judge is obligated to deny the immunity order.

Preservation of the Fifth Amendment Privilege: Transactional Versus Use Immunity

Before a witness can be compelled to testify against himself under a grant of immunity, he must have claimed his Fifth Amendment privilege against self-incrimination. It is reasoned that if a witness testifies voluntarily, he waives his privilege against self-incrimination and thereafter may be tried for any crime which he might reveal. The purpose of the immunity statute is to compel testimony from an un-
willing witness; where no Fifth Amendment privilege is raised, compulsion is unnecessary. Further, by claiming his privilege, the witness puts the investigating body on notice that "a serious and important decision has been placed upon them. There is then the opportunity to acquire the necessary background and facts upon which to predicate a wise decision as to whether or not immunity should be granted."70 Thus, the witness' claim of privilege serves to delineate clearly those areas which he feels may incriminate him and avoids the problems of "automatic" immunity which might arise if he gave revealing answers to questions which the interrogating authority had no way of knowing might be incriminating.

When immunity from prosecution is granted, the privilege against self-incrimination is not waived; instead, "the privilege is preserved by the immunity granted."71 Since the privilege against self-incrimination operates only as a protection against the legal consequences of conduct (i.e. the punishment), where the possibility of punishment has been removed, there is no longer any basis upon which to invoke the privilege.72 In short, a grant of immunity from prosecution supplantes a witness' Fifth Amendment protection against self-incrimination and renders such protection unnecessary.

For this reason, courts have been unanimous in declaring that the scope of the protection offered by an immunity statute must be coextensive with the witness' privilege against self-incrimination.73 Unfortunately, application of this principle has been considerably more difficult than mere declaration;74 from earliest times the courts have been faced with the task of determining whether the requisite scope of protection is offered by "transactional" or "use" immunity.

The distinction between the two forms of immunity rests on what effect the compelled testimony has on future prosecutions, a distinction which has been characterized as follows:

The phrase "use immunity" is shorthand used to describe a statute under which the grant of immunity to the witness guarantees only that his testimony (or other information derived from that

70. H.R. REP. NO. 2606, supra note 58, at 3064.
72. Cf. Ullmann v. United States, 350 U.S. 422, 431 (1956). The Court in Hale v. Henkel formulated this concept in slightly different terms: "The interdiction of the Fifth Amendment operates only where a witness is asked to . . . expose himself to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply." 201 U.S. 43, 67 (1906).
testimony) will not be *used* against him in any future criminal prosecution. Use immunity statutes do not, however, prohibit future criminal prosecutions. If independent evidence of guilt is found by the government, the witness can be tried and convicted of the crime about which he was questioned under the grant of immunity. Transactional immunity statutes, on the other hand, grant an absolute immunity from any future prosecution for crimes arising from any transaction about which the witness is questioned and testifies.\textsuperscript{75}

*Counselman v. Hitchcock: The Origin of Transactional Immunity*

The question of the proper scope of immunity statutes was first considered by the Supreme Court in the case of *Counselman v. Hitchcock*.\textsuperscript{76} There, the protection of an immunity statute\textsuperscript{77} was tested and found constitutionally defective. In relevant part, the statute provided:

\[\text{[No] evidence obtained from a party or witness by means of a judicial proceeding \ldots shall be given in evidence, or in any manner used against him \ldots in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture \ldots.}\textsuperscript{78}\]

In analyzing the statute, the Court found it to be clearly insufficient to supplant the witness' privilege against self-incrimination, but in so doing it set out what appear to be two different bases of decision. The broadest interpretation, and the one most commonly cited as the holding of the case, seems to require full transactional immunity.\textsuperscript{79} The second standard, articulated earlier in the opinion, appears to indicate that the statute was too narrow only because it did not guard against the derivative use of the compelled testimony.\textsuperscript{80} For most

\textsuperscript{75} United States v. Cropper, 454 F.2d 215, 216 n.1 (5th Cir. 1971), rev'd, 406 U.S 952 (1972).
\textsuperscript{76} 142 U.S. 547 (1892).
\textsuperscript{77} Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.
\textsuperscript{78} Id. § 860.
\textsuperscript{79} "We are clearly of [the] opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege [against self-incrimination] conferred by the Constitution of the United States. \ldots In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892) (emphasis added).
\textsuperscript{80} "[The statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding \ldots. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." Id. at 564. This same standard is enunciated again later in the opinion: "Section 860 \ldots affords no
practical purposes, however, any confusion engendered by the Counselman decision was cleared up by amended statutory language which specifically required that immunity extend to "any transaction, matter, or thing" concerning which a witness may testify. Such language was specifically included in most major federal immunity statutes prior to 1970, and these statutes consistently withstood constitutional attack on grounds of inadequate protection.

Kastigar v. United States: The Emergence of Use Immunity

In 1970, Congress enacted the Organized Crime Control Act which included an immunity provision requiring only use immunity. Previously, the proper scope of immunity had been presumed to be full transactional immunity, and early cases dealing with the new provision found it to be constitutionally defective. However, in Kastigar v. United States, the United States Supreme Court reversed this trend and found the protection offered to be sufficient, declaring that "[t]ransactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege."

protection against the use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." Id. at 586.

86. 18 U.S.C. § 6002 (1973 Supp.). This section provides: "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ."
89. Id. at 453.
Explaining that an immunity provision need only be as broad as the Fifth Amendment privilege it displaces, the Court held:

Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.90

Thus, so long as a prosecutor can affirmatively establish an independent source for information leading to the conviction of a person previously compelled to testify about crimes for which he is subsequently convicted, the conviction will be upheld.

In upholding the constitutionality of use immunity, the Kastigar court relied heavily on the earlier decision of Murphy v. Waterfront Commission.91 There, the question before the Court was whether the scope of a state immunity statute was unconstitutionally narrow since it did not prohibit the witness' later prosecution under federal law. Holding that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law,"92 the Court in Murphy articulated the constitutional rule as follows:

[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. . . . [I]n order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.93

The significance of the Murphy decision has been interpreted in two distinct ways. One view holds that it gave general approval to the limited scope of protection offered by use immunity provisions, and it is on this interpretation that the Court in Kastigar appears to have relied.94 The other is that Murphy in no way narrowed the necessary scope of protection required by the Fifth Amendment, but rather that it expanded the protection by barring the use of compelled testimony even in jurisdictions which may never have contemplated immunity.95

90. Id.
92. Id. at 77-78.
93. Id. at 79.
94. 406 U.S. at 458.
In one respect, however, there is agreement between the two interpretations: the direct or indirect use of compelled testimony in any jurisdiction is absolutely prohibited.

As a necessary corollary of this prohibition, a prosecutor attempting to convict a defendant for crimes about which he previously gave testimony under a grant of use immunity must be able to prove affirmatively that the evidence on which the conviction is based has a source \textit{wholly independent} of the prior testimony.\footnote{Kastigar v. United States, 406 U.S. 441, 460 (1972); Murphy v. Waterfront Comm’n, 378 U.S. 52, 79 n.18 (1964).}

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an “investigatory lead,” and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.\footnote{Kastigar v. United States, 406 U.S. 441, 460 (1972) (footnote omitted).}

Only when the prosecutor has met this heavy burden of proof will the conviction be allowed to stand, for only then can the defendant be said to be left in “substantially the same position as if [he] had claimed his privilege...”\footnote{Murphy v. Waterfront Comm’n, 378 U.S. 52, 79 (1964).}

\section*{The Carter Decision—A Case of Misplaced Reliance}

By compelling a person to testify under a grant of immunity, the investigating body is able to obtain critical information which might otherwise be unavailable due to its potentially incriminating nature. Such information is vital to the work of grand juries and congressional investigating committees.\footnote{See H.R. REP. No. 2606, supra note 58, at 3059.} Through a negotiated plea of guilty, the prosecutor is able to ensure a conviction,\footnote{See Kercheval v. United States, 274 U.S. 220, 223 (1927).} thereby eliminating the burdens of a jury trial and consequently disposing of the case in the most efficient manner.\footnote{See generally \textit{Guilty Plea Bargaining}, supra note 46, at 865.} Furthermore, such agreements allow for the individualization of the criminal justice process and the amelioration of potentially harsh punishments.\footnote{See D. NEWMAN, supra note 13, at chs. 7 and 8. \textit{See also} the discussion in the Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 424-25 (Prelim. Draft 1971) and the authorities cited therein.}

Thus, beyond the fact that each is a necessary procedure frequently used to aid in the task of effective law enforcement, plea bargains and immunity agreements appear to bear little relationship to each other, either in form or function. It is for this reason that the hybridization of the two concepts raises such serious problems and leads to the ultimate question of whether a prosecuting attorney, acting alone, should ever be deemed to have made an enforceable grant of immunity.
The Supreme Court first resolved this issue in United States v. Ford, a case which is factually similar to Carter. In that case, the prosecuting attorney promised to withhold prosecution of all but one offense if the defendant would agree to give testimony incriminating his accomplices. The defendant complied, and the prosecutor subsequently attempted to institute charges against him. The defendant pleaded the earlier promise as a bar to the subsequent prosecution, and a judgment was rendered in his favor. On appeal, the Supreme Court held that although the general rule was that "if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed," such cooperation did not create an absolute bar to prosecution, but rather "merely an equitable title to the mercy of the executive."

Following Ford, a number of lower federal courts refused to overturn convictions obtained after promises of immunity had been made by prosecutors or other governmental officials. In each case, the reason given was the same: in the absence of statutory authority, no binding agreement could be made. While this principle was recognized in Carter, the court nonetheless reached a contrary result, placing its emphasis on the honor of the government and the defendant's reliance. The promise of immunity was therefore found enforceable. In so holding, the court relied heavily on United States v. Paiva, a case which appears to offer substantial authority for the decision in Carter but which, in reality, stands for a different principle of law.

The Supervisory Power of the Court

In Paiva, a U.S. attorney promised the defendant that if he would plead guilty to four specific charges and cooperate with the government in administratively closing other cases then pending against him, he would not be prosecuted for any of these other crimes. Paiva agreed, on the condition that he would not be required to inform on his

103. 99 U.S. 594 (1878) (also known as the "Whiskey Cases").
104. Id. at 595.
105. Id. at 596.
107. "We recognize . . . that ordinarily immunity in the federal system may be granted only with the approval of the court pursuant to express statutory authorization." 454 F.2d at 427.
accomplices. As a result of this agreement, Paiva pleaded guilty to four felonies and gave information to the Secret Service relating to the other crimes. When the Secret Service pressed him for information concerning his accomplices, however, Paiva refused to testify; an indictment issued as a result of this refusal.

In dismissing the indictment, the Paiva court dealt primarily with the issuance of the improper and retaliatory indictment. Noting that "[o]n other facts it has been held that the judiciary may exercise supervisory powers which affect the executive," the court stated:

[W]hen the conduct of an officer of the executive branch becomes enmeshed in the judicial process, the courts have the power and resulting duty to supervise that conduct to the extent it uses the judicial administration of criminal justice.

The court’s dismissal of the indictment was not the result of a desire to enforce the prosecutor’s promise of immunity, but rather of the need to “deter blatant government misconduct.” This type of “supervisory immunity” is well recognized in many areas of the law, and is probably the primary control the courts have over potentially abusive conduct by members of the executive branch. That immunity from prosecution was the effect of the remedy offered in Paiva should not necessarily be taken as indicative of a policy in favor of upholding prosecutorial immunity agreements; such immunity is solely the result of the court’s refusal to sanction the government’s misconduct (the retaliatory breach of the agreement), and is in no way dependent on the particular facts of the case. That is, the “immunity” here arises solely as a necessary consequence of the court’s exercise of its supervisory powers and not as a means of specifically enforcing the prosecutor’s promise. Because the immunity offered is not dependent on the promise made to the defendant, the scope of such immunity extends only to the use and derivative use of the testimony, for such a prohibition is sufficient to ensure the protection of the defendant’s rights. Were the court to offer more extensive protection, it would no longer merely be exercising its supervisory power, but instead would be actually granting immunity itself, a step which it is clearly unauthorized to take.

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109. Id. at 746.
112. See, e.g., United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (prohibiting arrests made to harass workers in a voter registration drive); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965) (prohibiting testimony of a contingent fee informer). It is important to note that in each of these cases, the defendant was guilty. In these instances, the guilt or innocence of the defendant is considered of secondary importance to the necessity for supervision.
It is for this reason that the *Carter* court's reliance on *Paiva* as authority for enforcing the immunity agreement is faulty. In the *Carter* decision, there was no discussion of potential government misconduct, although Carter alleged that the prosecution in Virginia was initiated only after he "refused further cooperation with a Secret Service Agent who was annoyed at the manner in which the F.B.I. had handled the case." There is no indication in the opinion, however, that his refusal to testify was justified or that the agent's questioning was beyond the bounds of Carter's agreement. If no such misconduct is present, the court has no legal basis on which to exercise its supervisory power, and any attempt to enforce the agreement must be based on principles applicable to the enforceability of plea bargains. *Carter*, in fact, appears to have been decided on plea bargaining principles, thereby establishing a novel—and potentially dangerous—precedent.

**More Than a Plea Bargain**

A significant distinction has developed in the evolving law of plea bargains: bargains involving promises to drop charges, promises to recommend leniency, and promises to charge lesser included offenses at the trial stage are treated quite differently than promises involving immunity from prosecution. Although this distinction may initially have been grounded in the early prohibition of binding prosecutorial grants of immunity found in *Ford*, subsequent questioning of the soundness of that case suggests that there must be a more compelling basis of differentiation.

In the first place, the prosecuting attorney is unable to make a binding promise of leniency or charge reduction. In either case, he submits his proposal to the judge, who is then free to accept or reject it. (This does not mean, of course, that the prosecutor cannot make a binding promise. On the contrary, he may promise to *recommend* leniency or reduction of charges, and this promise is specifically enforceable between the parties to the agreement.) Thus, in these types of bargains, there is built into the procedure a safeguard to protect both the defendant and the government from an unwise agreement on the part of the prosecutor. In the agreement not to prosecute, however, there is no such protection, since this is a matter solely within the discretion of the prosecuting attorney.

Secondly, in the former type of agreement, the gravamen of the

114. 454 F.2d at 427.
117. For a discussion of the ramifications of this procedure, see D. Newman, *supra* note 13, at 97-98.
118. Gallegos v. United States, 466 F.2d 740, 741 (5th Cir. 1972).
defendant's promise is the waiver of his Sixth Amendment rights, a waiver which is easily remedied in the event of a breach by the prosecutor by a withdrawal of the guilty plea and a new trial on the merits. In the immunity situation, the defendant waives not only his Sixth Amendment rights, but is required to testify in lieu of claiming his Fifth Amendment privilege. The remedy in case of a breach in this situation is not so easily fashioned: \(^{119}\) to withdraw the guilty plea is impossible since the defendant has already incriminated himself, yet to deem the promise binding ignores the dangers which originally led to the formulation of the statutory safeguards surrounding "normal" grants of immunity and allows the prosecutor to do indirectly that which he cannot do directly. Therefore, although there appears to be a definite trend in modern courts to enforce plea bargains when made, it is apparent that this policy extends only to bargains involving waiver of Sixth Amendment rights, and not to those which include the waiver of Fifth Amendment rights as well. By extending this policy to include nonstatutory prosecutorial grants of immunity, the _Carter_ decision clears the way for increasing noncompliance with the safeguards embodied in the immunity statutes and virtually eliminates the protection they offer.

**The Jurisdictional Issue**

Even assuming _arguendo_ that _Paiva_ stands for the proposition that immunity from prosecution plea bargains are binding and enforceable per se, the court should have distinguished _Carter_ on other grounds. In _Paiva_, the agreement was breached in the same judicial district in which it was made; in _Carter_, separate districts were involved. Dismissing this as "a distinction without a difference," \(^{120}\) the majority in _Carter_ noted:

> The United States government is the United States government throughout all of the states and districts. If the United States government in the District of Columbia . . . promised that the sole prosecution against defendant would be the misdemeanor charge in that jurisdiction . . . we will not permit the United States government in the Eastern District of Virginia to breach the promise.\(^ {121}\)

While there is no question that the "United States government is the United States government throughout all of its states and districts," it is equally clear that Congress specifically limited the duties and authority of the United States attorney to the judicial district to which he was appointed. \(^ {122}\) Further, the U.S. attorney "in a particular dis-

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119. This problem was explicitly recognized by Judge Boreman in his dissent in _Carter_, although he did not attempt to offer a solution. 454 F.2d at 431.
120. _Id._ at 428.
121. _Id._
122. 28 U.S.C. § 547: "[E]ach United States attorney, within his district, shall
District represents the United States in that district and nobody else could be given that authority...”123 Given such clear declarations of a legislative intention to prohibit one U.S. attorney from acting beyond the bounds of his own district, the Carter court’s rationale for ignoring that principle is unconvincing.

Reinforcing the proposition that a prosecuting attorney is the spokesman for his own district, the United States Supreme Court in Santobello v. New York124 recently held that a promise made by one attorney in a state prosecutor’s office will be binding on all prosecutors within that office. Noting that “[t]he staff lawyers in a prosecutor’s office have the burden of ‘letting the left hand know what the right hand is doing’ or has done,”125 the Court refused to allow a prosecutor to make a sentence recommendation to the judge in breach of an earlier agreement made with the defendant by another prosecutor, irrespective of the fact that the second prosecutor was wholly unaware of the agreement and that there was strong evidence that that judge would have imposed the maximum sentence on the defendant anyway. In Giglio v. United States,126 the Court was presented with a similar problem in the federal context, and it was held that a promise made by one member of the office was binding on all members equally:

The prosecutor’s office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.127

Although these are the first cases to bind a third person to a negotiated plea agreement, they must not be seen as sanctioning an extension of the powers of the prosecuting attorney, but rather as mere corollaries of the doctrine which limits such authority to the prosecutor’s own district. That is, although the U.S. attorney is limited by statute to acting only for the judicial district in which he serves, once he undertakes to act he becomes the spokesman for his entire office. It is important in this respect to note that in both Santobello and Giglio, the third person bound by the agreement was a representative of the same judicial district to which the powers of the origi-
nal prosecutor extended. In neither case is there any language to indicate that the Court would sanction an extension beyond the original prosecutor's own jurisdiction. On the contrary, each Court based its decision in part on the fact that the prosecutor's office should be seen as a unified whole which can assume the burden created by the Court's ruling through the creation of "procedures and regulations . . . to insure communication of all relevant information on each case to every lawyer who deals with it."\textsuperscript{128} This statement strongly suggests that, as a practical matter, further expansion would be impossible.\textsuperscript{129}

**Santobello Distinguished**

For these reasons, the *Carter* court's characterization of the *Santobello* decision as "additional support for the result we reach"\textsuperscript{130} is somewhat confusing. Not only is Santobello distinguishable in that the breach of the agreement was committed in the same district in which the agreement was made, but the agreement in question was also a straightforward plea bargain with none of the additional problems raised by a promise of immunity. Even before Santobello, there was no question that the prosecutor had the power to make such agreements; and the *Carter* court's reliance on Santobello was appropriate only if it was dealing with the District of Columbia agreement in terms of traditional plea bargain notions. This conclusion also explains the basis on which the court felt competent to dismiss the Virginia indictment. As stated in Santobello, there are two types of relief available to the defendant when a bargain is breached: withdrawal of the guilty plea or specific performance of the promise.\textsuperscript{131} In each case, the relief afforded must be based on the totality of circumstances surrounding the agreement. Since withdrawal of the guilty plea is impossible once incriminating testimony has been given, the only possible remedy in *Carter* would be specific performance of the promise, \textit{i.e.} full transactional immunity. Unfortunately, for the reasons set out above, neither the underlying principles nor the remedy espoused in Santobello is applicable to the facts presented in *Carter*; thus, the court's reference to that case as authority for its overly broad remedy is singularly inappropriate.

It cannot be denied that Santobello is the most far-reaching decision in the field of plea bargains, and that it could conceivably be inter-

\textsuperscript{128} Giglio v. United States, 405 U.S. 150, 154 (1972).
\textsuperscript{129} While such an undertaking may be possible within one prosecutorial office, the feasibility of such communication becomes increasingly remote as the bounds of the Court's statement are extended beyond these confines. Thus, to the extent that the Court's holding is based on this rationale, construction of the cited language to include jurisdictions other than the prosecutor's own seems highly unsound.
\textsuperscript{130} 454 F.2d at 429.
\textsuperscript{131} 404 U.S. at 263.
interpreted as sanctioning the enforceability of all plea bargains, including those involving promises of immunity from prosecution. Even if this were the case, it is still clear that such promises are enforceable only to the extent of the prosecutor's power to make them in the first place. Thus, while the Assistant U.S. Attorney in *Carter* might have been able to make a binding grant of immunity from prosecution in the District of Columbia, an attempt to go beyond those geographical bounds and to prohibit prosecution in the Eastern District of Virginia would be in direct violation of his statutory authority. Similarly, it would be an unwarranted assumption of the powers of the Virginia prosecutor which the court would simply be unauthorized to permit. Indeed, even in *In re Kelly*, a recent decision which cites *Carter* and which appears to favor the enforceability of prosecutorial promises of immunity, the court based this part of its ruling on the fact that such immunity "derives from inherent prosecutorial discretion as exercised daily." Since, as has already been discussed, such discretion does not extend beyond the limits of the prosecutor's jurisdiction, by implication this statement confines the court's holding to the prosecutor's own district. Thus, it does not represent the judicial expansion of the prosecutor's powers effectuated by the *Carter* case.

Although this precise issue had never been decided previously in the federal courts, an analogous situation has arisen twice at the state level. In each case, the question was whether an immunity agreement made by a state attorney in one judicial circuit could be held binding on another judicial circuit within the state. After reviewing the statutory limits of the prosecutor's powers, each court held that the agreement was not binding, as the attorney had no power to make such an all-encompassing agreement: "[The state attorney] had not the authority of the state as a prosecuting officer, outside of his own jurisdiction (except in matters originating therein), either to speak or act for the state." Following similar reasoning, the agreement in *Carter* could be enforced, if at all, only to prohibit prosecution in the District of Columbia; and since this issue never arose, the court had no authority to enforce the agreement at all. The decision of the *Carter* court to uphold the agreement anyway, in spite of the specific statutory limitations and case law to the contrary, is unprecedented and seems to warrant a more thoughtful discussion than the mere conclusory statement that "[t]he solution does not lie in formalisms about the express, 132. 350 F. Supp. 1198 (E.D. Ark. 1972).
133. Id. at 1200.
134. See text accompanying notes 122-123 supra.
136. Allers v. State, 144 Md. 75, 80, 124 A. 399, 400 (1923).
implied or apparent authority of one United States Attorney . . . to bind another United States Attorney. . . .” 137

The Scope of the Agreement

Having established that the scope of any agreement made by the District of Columbia prosecutor had to be restricted to crimes originating in his own district, it remains to be seen whether the crimes involved in the Virginia prosecution could be so characterized. If so, and if Santobello and Paiva require enforcement of all immunity from prosecution agreements, then the decision of the Carter case is correct, albeit poorly reasoned. Unfortunately, there is some disagreement about this aspect of the case; the majority indicated that there was some connection between the crimes, whereas the dissent insisted that they were “separate and wholly different.” 138

If the nature of the crimes is investigated, it quickly becomes apparent that there was no connection between the Virginia forgeries and the sale in the District of Columbia. Since the Virginia prosecution was based on checks forged prior to the $156,000 sale in the District of Columbia, it is physically impossible that the same checks could have been involved. Further, since the Virginia crimes preceded the crime committed in the District of Columbia, it is likewise impossible that the crimes for which Carter was prosecuted in Virginia could have originated in the District of Columbia. Indeed, the only connection between the crimes is that they all involved stolen government checks bought by Carter in one lot. This connection is far too tenuous to require that the crimes be characterized as having arisen in the District of Columbia. Hence, the problem arises in this case not because the Virginia court attempted to institute an unauthorized prosecution, but because the defendant unfortunately relied on an overbroad and wholly unauthorized agreement.

Even assuming that the Assistant U.S. Attorney had the power to make such a sweeping grant of immunity, sufficient to cover all possible crimes arising from the checks which Carter had purchased, there is doubt expressed in the case as to whether he actually did so. The sworn statement of Carter’s counsel in an affidavit was that the prosecutor promised Carter “that [he] would not be prosecuted anywhere else for anything having to do with the stolen checks,” 139 an allegation he attempted to prove by pointing to the fact that an F.B.I. agent who participated in the plea negotiations, upon learning of the Virginia prosecution, termed it “‘unfair’ in the light of the previous

137. 454 F.2d at 428.
138. Id. at 431. See note 10 & accompanying text supra.
139. 454 F.2d at 427.
agreement." Without further discussion of this point, the court concluded that "[i]f the promise was made, relied upon and breached as alleged, the indictment should be dismissed ..." The dissent, however, quoting from the record at the hearing on Carter's motion to dismiss the indictment, effectively showed that no such broad agreement was expressly made, and correctly assessed the problem as centering on the fact that "while the scope of the agreement reached during the plea bargaining was never precisely delineated," Carter's counsel "understood" that it reached all of the crimes arising from all of the stolen checks.

If the intention of the majority was to uphold the bargain based on the understanding of Carter (or his counsel) alone—an issue which, as the dissent points out, the majority opinion does not reach—it is nonetheless clear that such an understanding would have to be based upon some reasonable grounds. That the existence (and, by analogy, the scope) of a bargain must be determined by objective standards has recently been given explicit expression by the Fifth Circuit:

[P]lea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective, not subjective, standards.

In assessing the reasonableness of the reliance, one important factor is the likelihood that the bargain could be consummated as made. Thus, a defendant cannot rely on a promise by a prosecutor to reduce a sentence or on inaccurate representations made to him by his own attorney. Similarly, in the usual case, an experienced counsel would not presume the unequivocal power of a prosecuting attorney to prohibit prosecution in another judicial district. This fact, coupled with the possibility that the scope of the agreement was never given explicit expression, raises doubts as to the reasonableness of Carter's reliance in this case. Therefore, even barring the problems of authority or jurisdiction raised by the case, it is quite likely that the agreement could not withstand attack on grounds of reliance.

140. Id. at n.1.
141. Id. at 428.
142. Id. at 430.
143. Id. at 431.
145. See United States v. Frontero, 452 F.2d 406, 411 (5th Cir. 1971).
146. See Haller v. Robbins, 409 F.2d 857, 858 n.1 (1st Cir. 1969); United States v. Lester, 247 F.2d 496, 501 (2d Cir. 1957).
147. See Holland v. United States, 406 F.2d 213 (5th Cir. 1969).
Summary

Looking at the case as a whole, it is clear that the court in *Carter* could have arrived at its decision only by making at least three assumptions:

1. That a prosecutorial promise of freedom from prosecution can be enforced on principles relevant to other types of plea bargains.
2. That such a promise, even if enforceable in its own jurisdiction, could be extended to include prosecutions in other districts.
3. That the particular promise in this case was sufficiently explicit to warrant enforcement; or, in the alternative, that the defendant's understanding of the promise was reasonably susceptible of such broad interpretation.

Not only is each of these assumptions highly questionable in itself, but their effect is cumulative; *i.e.*, each requires the full acceptance of the preceding assumption before it, in turn, can be accepted. Thus, by the time the court reached the final step, the validity of the entire premise was weakened threefold. Significantly, the court never confronted any of these issues directly, and the important questions they raised were dismissed in the most offhand manner. In sum, this decision represents a policy decision based on the realization that to reach any other conclusion would be manifestly unfair to a cooperative defendant. It also gives explicit recognition to the fear that allowing a second prosecution might adversely affect the willingness of future defendants to be similarly cooperative:

> There is more at stake here than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government.\(^1\)

**An Alternative Solution**

The desire of the *Carter* court to reach a solution which would serve the ends both of this particular defendant and of the "fair administration of justice" is certainly understandable. However, even if the agreement here was not susceptible of analysis in terms of more traditional plea bargain principles, and even if the prosecutor had no authority to make the agreement he did, the fact remains that the bargain was made and that Carter relied on it, whether reasonably or not, in incriminating himself and others. While enforcing the agreement itself is unwise for the reasons previously discussed, merely holding that the prosecution was powerless to make such an agreement and, thus upholding the Virginia conviction, presents an equally intolerable situation.

In his dissenting opinion, Judge Boreman recognized the gravity

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148. 454 F.2d at 428.
of this problem, but erroneously concluded that Carter's only remedy was to move for a reduction of his sentence or to apply for executive clemency. These remedies are clearly inadequate, for neither provides any assurance that Carter would not be forced to spend time in prison as a result of his cooperation with the District of Columbia officials. What is needed is a solution which would achieve the result reached by the majority, while not engendering the problems occasioned by its imprecise reasoning. It is submitted that if the court had viewed the agreement in terms of immunity principles rather than plea bargain notions, such an answer could have been found.

In *Murphy v. Waterfront Commission*, the Supreme Court held that a witness testifying under a state statutory grant of immunity would be absolutely protected from a later federal prosecution based on the use of that "testimony or its fruits." Significantly, this holding was not based on any statutory (legislative) power of the state to prohibit such use, but rather on purely constitutional grounds. The case of *Malloy v. Hogan*, decided immediately prior to *Murphy*, held that the protection of the Fifth Amendment was applicable to state prosecutions via the due process clause of the Fourteenth Amendment. Under this reasoning, the decision in *Murphy* was necessarily and correctly reached. As articulated in *Adams v. Maryland*, "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give.... The Fifth Amendment takes care of that without a statute." The effect of the *Murphy* decision was thus to create an exclusionary rule based on the Fifth Amendment, analogous to similar rules of evidence based on violations of the Fourth Amendment, which operates as a complete bar to any use of the compelled testimony by any jurisdiction.

The applicability of *Murphy* to the situation in *Carter* lies in the fact that the exclusion was constitutionally required. Since the "immunity" granted was not based on any statute, the fact that the prosecutor originally had no power to make such a binding promise is irrelevant; the court had the supervisory power to prohibit the use of the tainted evidence. Further, the very fact that the prosecutor's promise was unauthorized presents an even more compelling argument for prohibiting its use at a subsequent trial: since the initial grant of immunity

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149. "It is entirely possible that an entirely equitable judicial solution may not be found on the facts of this case." *Id.* at 431.
151. See text accompanying notes 91-98 *supra*.
154. *Id.* at 181. It should be noted that although the initial choice of whether or not to make the bargain is voluntary, once the bargain is made, the defendant is compelled to testify to all matters within the scope of the bargain.
was unauthorized, the testimony itself was compelled in derogation of Carter's Fifth Amendment privilege against self-incrimination. There is little doubt that the court has not only the power, but the duty, to suppress any evidence acquired in violation of a defendant's Fifth Amendment rights,\(^ {155}\) and the *Murphy* decision specifically extends this holding to prohibit the use of testimony obtained as a result of an immunity agreement.

Applying this exclusionary rule to the facts in *Carter*, it becomes evident that the Virginia prosecution was conducted in violation of Carter's privilege against self-incrimination. It is undisputed in the opinion that the Secret Service agent conducting the Virginia investigation gained access to the information given by Carter to the F.B.I. His statement that the evidence used to convict Carter "was gained *substantially* independent of the statement furnished to the F.B.I. by the defendant"\(^ {156}\) is clearly insufficient to meet the "heavy burden of proof" required under the *Murphy* decision and reiterated in *Kastigar*.\(^ {157}\) Similarly, the statement in the dissenting opinion that "it is apparent that independently-gathered evidence would, and did, lead the Secret Service to Carter"\(^ {158}\) is not persuasive in view of the indications to the contrary to be inferred from the agent's testimony.

It is important to note that under the *Murphy* rule, the judicial "immunity" conferred is only use immunity. Thus, had the evidence obtained by the Virginia agent been in fact independent, and had he been able to prove this to the satisfaction of the court, the trial would have been proper. To reach any other conclusion, a court would have to ignore both the function of the rule adopted in the *Murphy* decision and the limitations imposed on the power of the court to uphold immunity grants.

The primary purpose of the exclusionary rule propounded in *Murphy* was to preserve the witness' privilege against self-incrimination while not impairing the ability of the second jurisdiction to carry out law enforcement and investigatory activities. Prohibiting any subsequent use of compelled testimony achieves this objective. Further, the court is authorized to uphold an attempted grant of transactional immunity only when specific statutory requirements have been met.\(^ {159}\) In the absence of such requirements, there is no authority on which the court is empowered to act. However, when the basis of the "immunity" offered is an evidentiary ruling, which the court is clearly authorized to make, no such problem arises. As long as the court re-

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156. 454 F.2d at 427 n.2.
157. See text accompanying notes 96-98 *supra*.
158. 454 F.2d at 430.
159. See text accompanying notes 66-68 *supra*. 

stricts itself to a determination of the evidentiary question, i.e. the use of the previously compelled testimony, no objection may be made that the court has exceeded the bounds of its authority.

In Carter, it seems probable that had the tainted evidence been suppressed, the defendant would never have been convicted. If this is true, then Carter was entitled to relief in the form of a dismissal of the indictment. Significantly, this basis of decision allows for a more liberal interpretation of the facts than does the opinion of the court: whereas the latter requires proof of the scope of the promise made (and, presumably, proof that Carter's "understanding" of a sweeping promise was "reasonable") before the indictment will be dismissed, the exclusionary rule operates irrespective of the scope of the promise made to the defendant. Thus, even if the District of Columbia prosecutor had promised Carter immunity from prosecution for crimes arising out of activities in that district alone, any testimony given as a result thereof would have been subject to the exclusionary rule and absolutely barred from use in a subsequent proceeding. In the instant case, the operation of the exclusionary rule would seem to require the dismissal of the indictment, while a standard based on proof of the existence and scope of the prosecutorial promise might or might not yield the same result.

Conclusion

The decision of the court in United States v. Carter gave effect to two major exceptions to previously well-established principles of law: enforcement of a promise made by a U.S. attorney in one jurisdiction which, by its terms, bound a U.S. attorney in a second jurisdiction; and rejection of the necessity of fulfilling strict statutory requirements as a prerequisite to a grant of immunity. In each instance, the exception arose not from a positive desire on the part of the court to change the law; rather, each was the result of inexplicit reasoning and an apparent failure on the part of the court to contemplate the consequences of its decision. More fundamentally, these exceptions were necessitated by the court's assumption that the facts in Carter required specific performance of the alleged promise made to the defendant. Thus, the problems arise in this case primarily because of the court's failure to recognize the inapplicability of plea bargaining principles to the more complicated factual situation presented by the terms of the agreement between the prosecutor and the defendant.

Before rejecting such exceptions outright, however, it is important to consider their effect on future criminal prosecutions; if they work a substantial positive good, they can be justified on the basis of

160. 454 F.2d at 428.
sound public policy, albeit not clarity of judicial thought. Unfortunately, however, these holdings do not withstand such scrutiny: these exceptions, if followed, place serious obstacles in the path of effective law enforcement and portend a significant limitation on the scope of protection necessary to supplant a witness' privilege against self-incrimination.

One sound justification for limiting the jurisdictional authority of the individual U.S. attorneys is to facilitate the orderly administration of justice by preventing a random and, thus, uncontrollable, system of enforcement of criminal laws. By allowing for the appointment of particular individuals within specifically designated geographical areas to serve as U.S. attorneys for those areas, the legislature established a centralized system of prosecutorial authority over which both supervision and control could be effectively exercised. Further, the limited jurisdictional authority of the U.S. attorney presumably ensures that his discretionary powers, when exercised, will be influenced by the totality of relevant circumstances, including his special perception of local conditions. By extending the scope of this authority, the court in *Carter* ignored any such pragmatic considerations in the interests of what it felt to be sound public policy. In so holding, however, the court also usurped a clear legislative function by allowing a redefinition of the authority of the U.S. attorney in opposition to that specifically delineated by statute.

Of even greater potential harm is the failure of the court to invalidate the unauthorized immunity grant. Clearly, to uphold such grants leaves the door open for the creation of a very permissive and basically unsupervised immunity procedure and subjects the government to the full panoply of abuses existent prior to the 1954 requirements. Equally deleterious, however, is the effect that such a procedure might have on future defendants. From the witness' standpoint, the purpose of the statutory requirements is to ensure that the Fifth Amendment privilege is safeguarded absolutely. By giving the informal immunity agreement the full force and effect of the statutory grant, the court allows for an alternative situation whereby a witness might be compelled to give incriminating testimony under circumstances in which he could not otherwise be constitutionally compelled to do so. The potential harm here arises from two sources. First, the defendant cannot be assured that the court will recognize the informal immunity grant at all. Secondly, since the testimony given is "voluntary" in the sense that the defendant initially had the option of accepting or rejecting the terms of the proffered plea bargain, there exists the possibility that a court might view the Fifth Amendment privilege as waived, rather than supplanted, thereby allowing the use of such testimony in subsequent prosecutions.
could, in fact, have precisely the opposite effect of promoting the violation of a defendant's rights.

The unsoundness of this aspect of the holding is further emphasized by the fact that the court was clearly unauthorized to take such a step. The limitations of the court's power to uphold immunity agreements is strictly confined to those situations in which the grant is formally proper. The court's action here, in direct opposition to those limitations, is a judicial infringement on the power of the executive (the attorney general) to approve all proposed grants of immunity, as well as a violation of a specific legislative mandate.

This note has attempted to suggest an alternative solution to the problems presented in Carter which is both legally sound and socially desirable. Had the court in Carter based its decision on an evidentiary ruling prohibiting the use of compelled testimony in any subsequent proceeding, it could have, within its own authority, adequately protected the defendant's rights while not engendering the possibility of an unwarranted limitation of the protection offered by the Fifth Amendment or establishing an undesirable interference with the effective functioning of law enforcement. Beyond this the court is not authorized to go, and any attempt to do so risks judicial encroachment into executive or legislative powers.

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