

THE SCOPE OF THE USE IMMUNITY STATUTE AND ITS
PERJURY EXCEPTION: CAN IMMUNIZED EVIDENCE BE
USED TO PROSECUTE PERJURY OR CRIMES
COMMITTED *AFTER* AN IMMUNIZED PROCEEDING?

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INTRODUCTION

Joe Defendant, a peripheral participant in a RICO scheme, is subpoenaed to appear before the grand jury in relation to the investigation of that scheme.¹ He appears but refuses to provide testimony based upon his Fifth Amendment right to protect himself against compulsory self-incrimination. Under 18 U.S.C. § 6002, the court grants Joe Defendant use immunity, a written assurance that Joe Defendant's statements will not be used against him in any subsequent criminal proceeding, and compels him to provide grand jury testimony regarding his involvement in the RICO scheme. Shortly after Joe Defendant takes the stand, the court explains that Joe's immunized testimony, and any information directly or indirectly derived from that testimony, "may not be used against [him] in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."² Joe Defendant testifies before the grand jury, and although he claims to forget or not know somewhat obvious pieces of information, the government cannot demonstrate and has no reason to believe that he has perjured himself during the immunized proceeding.

Two years later, in relation to a separate investigation of the racketeering activities of two individuals known to Joe Defendant, the government uses four lines, verbatim, of Joe Defendant's immunized grand jury testimony to obtain search warrants and wire taps against the two individuals. The immunized testimony used does not implicate Joe Defendant but merely describes the illegal actions of the two targets of the current investigation. Through the tapping of various phone lines and executed searches, the government subsequently determines that Joe Defendant made false statements—namely that he grossly understated his personal income and

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¹ Joe Defendant is involved in organized crime and racketeering activities falling under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. §§ 1961-68 (2000).

² 18 U.S.C. § 6002 (2000).

claimed non-existent dependents on his federal tax and federal student loan application³—to the government *after* he gave the immunized testimony. The government charges Joe Defendant with perjury⁴ based upon the subsequent false statements Joe Defendant made to the Internal Revenue Service and the U.S. Department of Education. Joe Defendant contests the use of all evidence derived from his immunized testimony to prosecute him, claiming the government has violated his Fifth Amendment privilege against self-incrimination and the terms of the use immunity statute.

To determine whether the government violated Joe Defendant's constitutional privileges and the terms of his immunity, we must ask two questions. First, does the government's use of evidence derived from Joe Defendant's immune testimony fall within the use immunity statute's perjury exception? Second, since the tax and student loan violations were not committed or conceived of at the time Joe's testimony was taken, does the use immunity grant ordered by the court bar the government's use of Joe's immune testimony altogether?

Congress created the modern form of statutory use and derivative use immunity, 18 U.S.C. § 6002, in October 1970.⁵ Under 18 U.S.C. § 6002, courts may grant a witness use immunity, through an order, when a witness refuses to testify and claims his Fifth Amendment right to protect against compulsory self-incrimination.⁶ A witness who receives statutory use immunity is required to testify; however, the use immunity statute assures that

³ Through the searches and wire taps, federal law enforcement authorities obtain documents and intercept phone conversations which refer to Joe Defendant's personal income and family make-up. This evidence demonstrates Joe Defendant made significant amounts of cash income, highly inconsistent with those personal income amounts reported on both his 1040A federal income form and his Free Application for Federal Student Aid ("FAFSA"). The records and phone conversations also indicate Joe Defendant does not have nor financially support two children, which he claimed as dependents on both his 1040A tax return and his FAFSA.

⁴ Perjury constitutes a federal crime punishable by up to five years imprisonment under 18 U.S.C. § 1621, which reads:

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1621 (2000).

⁵ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 927 (codified as amended at 18 U.S.C. § 6002 (2000)).

⁶ *Id.* Note, however, that 18 U.S.C. § 6003 governs the process by which a prosecutor must request and the court may issue an immunity grant per § 6002. 18 U.S.C. § 6003 (2000).

his immunized testimony will not be used—directly or indirectly—against him in any criminal case.⁷ Use immunity, thus, both enables the government to obtain sought testimony and protects the witness against self-incrimination. But, as the court explained to our Joe Defendant, statutory use immunity is not absolute. 18 U.S.C. § 6002 has various exceptions, including a perjury exception.⁸ Under this exception, the government may use a witness’s immunized testimony to prove that the witness perjured himself or made false statements.⁹ Neither case law nor the language of 18 U.S.C. § 6002 clearly define the limits of the perjury exception or the time limitations of the use immunity.¹⁰

This Comment analyzes the temporal scope of the use immunity statute and its perjury exception, concluding that: (1) false statements made *after*, rather than during, the immunized proceeding do not fall under the perjury exception; and (2) under relevant Supreme Court precedent, an immunity grant does not bar the government’s use of immunized statements to prosecute crimes committed *after* such statements are made. Thus, under the hypothetical presented above, the government could still use information derived from Joe Defendant’s testimony to prosecute him for false statements made on federal tax returns and student loan applications. Although federal appellate courts are divided with respect to the latter point,¹¹ this Comment advocates an interpretation of 18 U.S.C. § 6002 that more closely conforms to the primary intended purpose of the statute.

Part I briefly discusses the historical context of the use immunity statute, its constitutionality, and what constitutes derivative use. Part II analyzes the durational scope of the use immunity perjury exception, finding that the exception likely only applies to perjury committed during the actual taking of the immune testimony. Part III then considers whether statutory use immunity bars use of immunized evidence to prosecute a witness for crimes he commits after an immunized proceeding, concluding that courts have gradually accepted that immunized testimony may be used to prosecute crimes conceived of and committed after immune testimony is taken. Part IV offers a normative analysis of use immunity and its perjury excep-

⁷ 18 U.S.C. § 6002. When granted use immunity under 18 U.S.C. § 6002, the witness’s Fifth Amendment privileges are displaced and the witness loses the privilege not to answer. H.R. REP. NO. 91-1188, at 7 (1970). Failure to answer under the protections of the use immunity order may be sanctioned through charging the witness with contempt. *Id.* at 12.

⁸ 18 U.S.C. § 6002.

⁹ *Id.* (stating that testimony taken under a § 6002 immunity order may not be used against the witness in any criminal proceeding *except* to prosecute him for “perjury, giving a false statement, or otherwise failing to comply with the order”).

¹⁰ See *infra* Parts II-III.

¹¹ See *infra* Part III.

tion, arguing that legislative clarification is needed to reconcile inconsistent interpretations of statutory use immunity and its exceptions.¹²

I. BACKGROUND—USE IMMUNITY

In analyzing whether the government seeks to violate Joe Defendant's constitutional rights or the terms of 18 U.S.C. § 6002, it is important to first understand the origins and purpose of statutory use immunity, the constitutional privilege against compulsory self-incrimination, and the "derivative use" limitation within use immunity. This Part briefly discusses the language, genesis, and intended purpose of both modern statutory use immunity and the Fifth Amendment protections that use immunity is meant to replace. Next, this Part explores the meaning of use or derivative use within the context of use immunity, clarifying that the government, in fact, did derivatively use Joe Defendant's immunized testimony to obtain the evidence it currently offers to support Joe Defendant's prosecution for perjury and tax evasion.

A. *The Use Immunity Statute*

Early Anglo-American society adopted from its British predecessors the firmly held belief that government must have the right to compel individuals to testify before grand juries.¹³ Like its British parent, the young United States of America subscribed to the principle that "the public has a right to every man's evidence."¹⁴ Congress passed the first American use immunity statute in 1862,¹⁵ which it revised and expanded in 1868.¹⁶ The

¹² Note that this paper does not seek to, and will not, specifically address whether false income tax statements or false statements made to the United States Department of Education in a student loan application actually constitute "perjury" or "false statements" such as to fall definitely within the use immunity perjury exception. While this question is both interesting and potentially relevant to our Joe Defendant's outcome, the forthcoming analysis will focus on how the timeframe of the use immunity and its perjury exception impact the government's ability to use Joe Defendant's immunized testimony in relation to future instances of perjury or false swearing. Thus, for the purposes of this analysis, this Comment assumes that false tax return or federal student loan application information are examples of future instances of "perjury" or "false statements."

¹³ *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (stating that the British power to compel witness testimony was created as early as 1562 through the Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562)).

¹⁴ *Id.* at 443 (1972) (citing parliamentary remarks by the Duke of Argyle and Lord Chancellor Hardwicke).

¹⁵ Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (providing limited immunity within congressional proceedings). This Act was not, however, the first federal compulsory immunity statute enacted in the United States. Just five years earlier, in 1857, Congress adopted a compulsory transactional immunity statute, which the 1862 act replaced. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

revised statute “provided that ‘no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness . . . shall be given in evidence, or in any manner used against such party or witness . . . in any court of the United States . . . , in respect to any crime.’”¹⁷ This early statute provided a narrow form of immunity, barring all use of specific materials rather than universally barring prosecution for a witness’s participation in those crimes revealed through his testimony.¹⁸

America’s first use immunity statute, however, was short-lived.¹⁹ In 1892, the United States Supreme Court, in its review of *Counselman v. Hitchcock*, determined that use immunity provided under the Act of February 25, 1868, was invalid because it was not coextensive with Fifth Amendment privileges.²⁰ The court observed that the use immunity statute allowed the government to use a witness’s immunized statements to unearth other incriminating evidence against that witness.²¹ The statute, thus, required a witness to provide the government with the means of incriminating himself, effectively “supplanting the privilege [against self-incrimination] conferred by the Constitution of the United States.”²² The Supreme Court refused to uphold the statute as it failed to protect the witness from derivative or indirect use of his incriminating testimony.²³

In 1893, in response to *Counselman*, Congress abandoned its prior focus on use immunity and enacted a series of statutes that granted witnesses complete transactional immunity for any crime revealed during compelled testimony.²⁴ While Congress could have amended the use immunity statute

¹⁶ Act of Feb. 25, 1868, ch. 13 § 1, 15 Stat. 37 (broadening prior concept of use immunity to cover judicial proceedings).

¹⁷ *Pillsbury v. Conboy*, 459 U.S. 248, 274 (1983) (Blackmun, J., concurring) (quoting the Act of Feb. 25, 1868, ch. 13 § 1, 15 Stat. 37).

¹⁸ H.R. REP. NO. 91-1188, at 9 (1970). Congress later explained, by use of the following example, the distinction between use and transactional immunity. *Id.* If a witness in a narcotics grand jury investigation receives a transactional immunity grant and discusses the murder of an informant, the government may not prosecute that witness for the discussed murder, even if an eye witness provided wholly independent evidence to support a murder conviction. Alternatively, under a use immunity grant, the same grand jury witness’s actual statements could not be used against him in *any* prosecution, but the government could use the wholly independent testimony of the eyewitness to prosecute the witness for murder or any other relevant crime. *Id.*

¹⁹ Use immunity granted under the Act of Feb. 25, 1868, was invalidated by the United States Supreme Court less than 30 years after the statute was enacted. *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892), *superseded by statute*, Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.

²⁰ *Id.* at 585-86.

²¹ *Id.* at 564.

²² *Id.* at 585.

²³ *Id.* at 585-86.

²⁴ Congress quickly responded to *Counselman* by enacting the Immunity Act of 1893, which granted immunity from prosecution rather than immunity from use of testimony. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. *See also* H.R. REP. NO. 91-1188, at 10 (1970) (describing the series of congress-

to prohibit all derivative use of immunized testimony,²⁵ it appeared to not have considered this possibility and opted instead for a more drastic change in the legislation.²⁶ In its reading of *Counselman*, Congress, like many lower federal courts, felt broad transactional immunity was the only form of immunity that would comply with the Fifth Amendment.²⁷ This wholesale rejection of use-based immunity persisted within the United States for almost eighty years.²⁸

U.S. immunity statutes remained entirely transactional in nature until 1970,²⁹ when Congress passed a new use immunity statute, 18 U.S.C. § 6002 (“§ 6002”).³⁰ Enacted as part of the Organized Crime Control Act,³¹ this statute did not entirely eliminate the existence of transactional immunity, but rather created an additional form of immunity that was narrower in scope than its transactional counterpart.³² Like the immunity established

sional reactions to *Counselman*). Unlike use immunity, which allows the government to prosecute a witness as long as it does not use his compelled testimony, transactional immunity protects a witness from prosecution for those offenses to which his compelled testimony pertains. *See* *United States v. Nanni*, 59 F.3d 1425, 1431 (2d Cir. 1995).

²⁵ The *Counselman* court found that the use immunity statute was flawed in that it failed to prohibit derivative use of compelled testimony. Note, *Kastigar v. United States: The Required Scope of Immunity*, 58 VA. L. REV. 1099, 1105 (1972) (stating that the *Counselman* opinion’s initial portion, viewed alone, suggests that use and derivative use immunity would satisfy constitutional privilege requirements).

²⁶ Later in its opinion, the *Counselman* court undermined its initial inferential support of use and derivative use immunity. *Id.* Instead, the Court spoke in absolute terms, implying that transactional, or absolute, immunity was a constitutional minimum. *Id.*; *see also* William J. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, 67 J. CRIM. L. & CRIMINOLOGY 143, 145 (1976).

²⁷ *Pillsbury v. Conboy*, 459 U.S. 248, 274 (1983).

²⁸ Statutory immunities granted within the United States between the late 1890s and 1970 were transactional in nature, prohibiting prosecution for certain crimes rather than use of the immunized material. Note, *supra* note 25, at 1106 (stating that in the years following *Counselman* Congress enacted over fifty statutes containing transactional use immunity provisions).

²⁹ *Id.* (citing 116 CONG. REC. 577-78 (1970) and listing more than fifty transactional immunity provisions included within federal acts between the *Counselman* and *Kastigar* decisions.).

³⁰ Congress enacted 18 U.S.C. §§ 6001-05, the Immunity of Witnesses Act, as part of a President Nixon driven effort to enable law enforcement authorities to curb organized crime activities within the United States. H.R. REP. NO. 91-1549, 8 (1970).

³¹ Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 201(a), 84 Stat. 922, 927 (codified as amended at 18 U.S.C. §§ 6001-05 (2000)).

³² Although Congress did not universally do away with transactional immunity, the Immunity of Witnesses Act, of which § 6002 is a part, did actively replace transactional immunity with use immunity in a large number of federal statutes. H.R. REP. NO. 91-1188, at 13-16 (1970) (listing those statutes that the Immunity of Witnesses Act was meant to amend or repeal). Thus, the act served to make use immunity the predominant form of immunity within the United States. Bauer, *supra* note 26, at 146 n.38 (noting that it is unclear whether the Immunity of Witnesses Act repealed all statutes containing transactional immunity provisions). The Eleventh Circuit, however, has indicated that “[a]lthough federal law no longer provides for formal, statutory grants of transactional immunity, a prosecutor may . . . infor-

under the pre-*Counselman* Act of February 25, 1868, 18 U.S.C. § 6002 allowed the government to criminally prosecute a witness as long as it made no use of his immunized testimony.³³ However, unlike the nation's first use immunity statute, § 6002 created an explicit bar on not only use but also on *derivative* use of a defendant's testimony.³⁴ In banning derivative use, the statute ensured that all fruits of or information derived from the immunized testimony could not be used against the witness in a criminal proceeding.³⁵ Thus, the witness's testimony itself could not serve as a tool to incriminate the witness.³⁶ This more comprehensive approach to use preclusion under § 6002 resolved the *Counselman* objections to use immunity and enabled the statute to be constitutional where its predecessor was not.³⁷

18 U.S.C. § 6002 was largely the product of Congressional reaction to the Supreme Court findings in *Murphy v. Waterfront* and *Gardner v. Broderick*.³⁸ In both cases,³⁹ the Court suggested that use immunity would be constitutional as long as it complied with the "fruits" doctrine established by the Ninth Circuit in *Wong Sun v. United States*.⁴⁰ The "fruits" doctrine holds that any information derived from a tainted source is also tainted.⁴¹

With this tainted-source doctrine and *Counselman's* rejection of derivative use in mind, Justices White and Stewart framed their concurring opinion in *Murphy*, suggesting that transactional immunity was "harmfully and wastefully broader than the privilege against self-incrimination."⁴² Recognizing that the Fifth Amendment "does not convey an absolute right to remain silent," but rather a protection against compulsory provision of in-

mally grant transactional immunity to a witness in return for his cooperation in a criminal case." *United States v. Harvey*, 869 F.2d 1439, 1444 (11th Cir. 1989).

³³ *Kastigar v. United States*, 406 U.S. 441, 461 (1972) ("The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.").

³⁴ 18 U.S.C. § 6002.

³⁵ *Id.* (barring use of "any information directly or indirectly derived" from a witness's compelled testimony to prosecute that witness).

³⁶ *Kastigar*, 406 U.S. 441, 462 (1972).

³⁷ Note, *supra* note 25, at 1105-06 ("The *Kastigar* majority embraced the *Counselman* language supporting use and derivative use immunity as the true holding and asserted that the contrary statement was mere dictum.").

³⁸ *Pillsbury v. Conboy*, 459 U.S. 248, 274-76 (1982) (Blackmun, J., concurring) (describing the Court's holdings in *Gardner* and *Murphy*); Bauer, *supra* note 26, at 145-46; Note, *supra* note 25, at 1107 (identifying *Murphy* as the "first serious challenge to the necessity of affording transactional immunity").

³⁹ *Gardner v. Broderick*, 392 U.S. 273 (1968); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964) (White, J., concurring).

⁴⁰ *Pillsbury*, 459 U.S. 248, 274-77 (1982) (Blackmun, J., concurring) (summarizing the Court's findings in *Gardner* and *Murphy*).

⁴¹ *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1936).

⁴² *Murphy*, 378 U.S. at 107 (1964) (White, J., concurring).

criminary truths, they instead advocated the grant of use immunity.⁴³ To ensure this use immunity was constitutional, White and Stewart advised that it must bar all tainted uses of a witness's immunized testimony.⁴⁴ Thus, use immunity must be based on the premise that any information derived from an immunized source is also immunized.⁴⁵

Following *Murphy*, Congress carefully crafted the language of § 6002 to immunize “any information directly or indirectly derived from such testimony or other information.”⁴⁶ The text of the statute left little room for confusion as to whether the statute complied with the fruits doctrine.⁴⁷ Relevant Congressional Reports state that § 6002 “is intended to be as broad as, but no broader than, the privilege against self-incrimination. . . . It is designed to reflect the use-restriction immunity concept of *Murphy* . . . rather [than] the transactional immunity concept of *Counselman*.”⁴⁸

Title 18 U.S.C. § 6002 provides that:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

1. a court or grand jury of the United States,
2. an agency of the United States, or
3. either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no 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, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.⁴⁹

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 18 U.S.C. § 6002 (2000).

⁴⁷ *Pillsbury v. Conboy*, 459 U.S. 248, 276-79 (1983) (Blackmun, J., concurring) (citing *Wong Sun v. United States*, 371 U.S. 471 (1936)). Note that congressional reports explaining the Immunity of Witnesses Act specifically indicate that Congress rejects the pre-*Murphy v. Waterfront Commission* concept that immunity must be transactional to be constitutional. H.R. REP. NO. 91-1188, at 11 (1970) (stating that “[a]pparently this approach is not required.”).

⁴⁸ *Pillsbury*, 459 U.S. 248, 276 (1983) (Blackmun, J., concurring) (quoting S. REP. NO. 91-1549, at 145 (1970); H.R. REP. NO. 91-1549, at 42 (1970) and H.R. REP. NO. 91-1188, at 12).

⁴⁹ 18 U.S.C. § 6002 (2000).

Use immunity is granted sparingly through a judicially and executively controlled process.⁵⁰ Only judges may grant § 6002 use immunity by an order.⁵¹ Additionally, before applying for such an order, federal prosecutors must obtain prior authorization from the Attorney General or an appropriate designated Department of Justice official.⁵² Thus, each immunity order is the product of prosecutor proposal, Department of Justice authorization, and judicial order and is subject to various levels of scrutiny.⁵³ “Every grant of immunity involves a social cost; i.e., an admitted criminal is not prosecuted. Consequently, the decision to immunize should be made in the interest of society as a whole.”⁵⁴ Prosecutors and courts request and grant use immunity orders to suspected criminals,⁵⁵ sacrificing the opportunity to prosecute that individual, only where the government expects to obtain important testimony it could not otherwise obtain.⁵⁶ Immunity within this context helps the government to convict a witness’s fellow criminal participants.⁵⁷

⁵⁰ See DEPT. OF JUSTICE, United States Attorneys’ Manual, § 9-23-000, Witness Immunity (Oct. 1997), *current edition available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/23mcrm.htm [hereinafter *USAM*].

⁵¹ 18 U.S.C. § 6003 (2000) (setting out procedures by which the government may seek and the court may grant an immunity order).

⁵² To obtain Department of Justice authorization to seek an immunity order, federal prosecutors must demonstrate that a particular immunity grant is necessary to the public interest. *USAM*, *supra* note 50. Prosecutors weigh the following factors in determining whether use immunity serves the public interest: (1) the importance of the investigation or prosecution to effective enforcement of criminal laws; (2) the value of the person’s testimony to the investigation or prosecution; (3) the likelihood a witness will fully comply with a compulsion order, and the effectiveness of sanctions if the witness does not comply; (4) the witness’s criminal history and relative culpability in connection with the offense being investigated or prosecuted; (5) whether the witness can successfully be prosecuted before the government compels his testimony; and (6) whether the witness is likely to suffer “adverse collateral consequences” if he testifies under a compulsion order. *Id.* Sections 6003-04 codify the courts’ and the Department of Justice’s role in obtaining or granting use immunity under § 6002.

⁵³ See 18 U.S.C. § 6003-04 (2000); *USAM*, *supra* note 50.

⁵⁴ Bauer, *supra* note 26, at 152.

⁵⁵ *Kastigar v. United States*, 406 U.S. 441, 446 (1972) (stating that § 6002’s existence “reflects the importance of testimony, and the fact that many offenses are of such a character that the only person capable of giving useful testimony are those implicated in the crime”).

⁵⁶ *United States v. Gallo*, 859 F.2d 1078, 1089 (2d Cir. 1988).

⁵⁷ Bauer, *supra* note 26, at 151; *see also* H.R. REP. NO. 91-1188, at 8 (1970) (quoting President Nixon’s view that, under the new Immunity of Witnesses Act, the “[g]overnment should be better able to gather evidence to strike at the leadership of organized crime and not just the rank and file.”).

B. *The Modern Constitutional Debate—Revisiting Fifth Amendment Concerns*

The power to compel testimony, though recognized and highly valued in the United States, “is not absolute.”⁵⁸ A primary exception to this power is the Fifth Amendment privilege against self-incrimination.⁵⁹ The terms of 18 U.S.C. § 6002 recognize this exception and limit the extent to which the government may use a witness’s statements—like those of Joe Defendant—to criminally prosecute the witness.⁶⁰ This Section briefly discusses the language and historical development of the Fifth Amendment privilege against self-incrimination, concluding that § 6002 was created to balance the need for compelled testimony with self-incrimination concerns. Next, this Section explores the leading case which upheld the constitutionality of use immunity under § 6002—*Kastigar v. United States*—identifying the strict *Kastigar* standard the government must meet to use Joe Defendant’s immunized testimony to prove perjury. Finally, this Section explores additional case law upholding the perjury exception as constitutional, finding that Joe Defendant’s false statements cannot be protected under the Fifth Amendment.

1. Origins of the Privilege and Its Relationship to Use Immunity

Although statutory immunity has been in effect within the United States for almost 150 years,⁶¹ recognized individual rights against compulsory self-incrimination predate this country’s formation as a sovereign.⁶² As early Americans adopted the English sense of entitlement to “every man’s evidence,”⁶³ the Constitution’s framers also shaped American individual rights based on their disdain for recent tyrannical British governments.⁶⁴ In fact, the British Parliament’s victory over the Stuart Crown helped to frame Madison’s first draft of the Bill of Rights.⁶⁵

⁵⁸ *Kastigar*, 406 U.S. at 444.

⁵⁹ *Id.*

⁶⁰ 18 U.S.C. § 6002 (2000); H.R. REP. NO. 91-1188, at 7 (specifically identifying the constitutional concerns that § 6002 was meant to displace).

⁶¹ See *supra* notes 17-19 and accompanying text.

⁶² See ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, 3-12 (North-eastern Classics Ed. 1991) (1955) (explaining the influence the Magna Carta and English common law had on Puritan Revolutionary American concepts of individual liberties).

⁶³ See *Kastigar*, 406 U.S. at 443 & n.5 (citing Parliamentary remarks of the Duke of Argyle and Lord Chancellor Hardwicke).

⁶⁴ See RUTLAND, *supra* note 62, at 6-12.

⁶⁵ THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED SOURCE BOOK OF AMERICAN FREEDOM 3 (Bernard Schwartz ed., 1971) (“All too few people in this country realize the extent to which our

Numerous American colonies—and later states—took early steps to protect their citizens from unrestrained governmental inquisitions.⁶⁶ Virginia led the effort to bar compulsory self-incrimination, becoming the first prominent model for its fellow colonies.⁶⁷ The Virginia Declaration of Rights, drafted by George Mason and largely inspired by the recent works of John Locke,⁶⁸ was widely distributed through public print and private correspondence throughout the American Colonies in 1776.⁶⁹ This Virginia document attracted much attention and, between 1776 and 1790, Delaware, Maryland, New Hampshire, Massachusetts, Vermont, Pennsylvania, and North Carolina each emulated it to some extent, incorporating protections against self-incrimination into their individual constitutions or declarations of rights.⁷⁰ For example, the Massachusetts Constitution of 1780 declared that “[n]o subject shall be . . . compelled to accuse, or furnish evidence against himself.”⁷¹

Though compulsory self-incrimination was widely rejected at the state level, early Americans were divided as to whether a corresponding federal privilege should exist.⁷² During state debates surrounding the federal Constitution’s creation, anti-Federalist political leaders, including Patrick Henry, advocated the need for *federal* guarantees against self-incrimination.⁷³ Other Constitutional framers, alternatively, were still wary of America’s former ties with an overly controlling British Crown and cog-

modern liberties are based upon the crucial battles waged against the seventeenth-century Stuart tyranny.”).

⁶⁶ See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 328-30 (Neil H. Cogan ed., 1997).

⁶⁷ RUTLAND, *supra* note 62, at 44. Note that the Virginia Bill of Rights specifically identifies a privilege against self incrimination. VA. BILL OF RIGHTS § 8 (“nor can he be compelled to give evidence against himself”).

⁶⁸ *Id.* at 35-36.

⁶⁹ *Id.* at 44.

⁷⁰ COGAN, *supra* note 66.

⁷¹ *Id.* at 328 (quoting MASS. CONST. pt. 1, art. XII).

⁷² See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 433 (7th ed. 2004). Many Federalists argued that a federal Bill of Rights would not only be redundant by creating rights that already rested with the citizens of the American states, but that a federal Bill of Rights would unnecessarily involve the federal government in the sphere of state functions. HELEN E. VIET ET AL., CREATING THE BILL OF RIGHTS: A DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, at ix-x (1991). George Mason and other political leaders, however, explained that federal individual rights were necessary even if only to protect individual rights where federal and not state authority extended. See RUTLAND, *supra* note 62, at 109-19 (describing Mason’s efforts at the Constitutional Convention of 1787 to include a federal Bill of Rights within the U.S. Constitution).

⁷³ Patrick Henry, *Against the Federal Constitution* (June 5, 1788), available at <http://www.wfu.edu/~zulick/340/henry.html>; NOWAK & ROTUNDA, *supra* note 72. Alternatively, Federalist leaders such as Alexander Hamilton argued that creation of a federal Bill of Rights was not only unnecessary but also dangerous as such a Bill could be read as an exhaustive list of rights possessed by American citizens, and it would grant to the federal government powers it did not otherwise possess. THE FEDERALIST NO. 84 (Alexander Hamilton).

nizant of Europe's long history of uninhibited political and religious strife.⁷⁴ They felt it imprudent to rely on the "goodness of men" to avoid an American recreation of the circumstances of the Spanish Inquisition.⁷⁵ However, for fear that heated debate on federal liberties would hinder the successful ratification of the federal Constitution; the framers did not incorporate the privilege against self-incrimination into the main body (Article I-VII) of the Constitution.⁷⁶ Instead, the privilege was indoctrinated four years later through the federal Bill of Rights.⁷⁷ The Fifth Amendment, which became effective in December 1791 as part of this Bill of Rights, created the federal equivalent of existing state self-incrimination privileges.⁷⁸ Much like Section 8 of the Virginia Declaration of Rights, the Fifth Amendment states, in part, that, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."⁷⁹

Because Fifth Amendment concerns regarding self-incrimination of witnesses and criminal defendants are deeply entrenched in our criminal judicial system, such concerns factor into the interpretation of modern statutory use immunity. In fact, Fifth Amendment concerns were a driving force behind enactment of the modern use immunity statute.⁸⁰ Congress created 18 U.S.C. § 6002 to serve an express constitutional end: to balance the conflicting needs for government access to otherwise unobtainable evidence and a witness's constitutional privilege against self-incrimination.⁸¹ Scholars, however, have questioned whether immunity granted under 18 U.S.C. § 6002 actually serves its intended goal: to provide a protection that is at least as large as that created under the Fifth Amendment right to protect against self-incrimination.⁸² These questions merely constitute an extension of the ongoing debate initiated by *Counselman* and again raised by

⁷⁴ COGAN, *supra* note 66, at 331 (quoting Abraham Homes's January 30, 1788, comments at the Massachusetts Ratifying Convention).

⁷⁵ *Id.*

⁷⁶ RUTLAND, *supra* note 62, at 106-25 (describing the political divide over the creation of federal personal liberties during the Constitutional Convention of 1787 and the products of such divide).

⁷⁷ VIET, *supra* note 72, at xvi.

⁷⁸ Katharine Hazlett recently emphasized that the Fifth Amendment, as the framers intended it, was rooted in the common law confession rule, a rule centered upon the rights afforded to a criminal defendant. Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 237 (1998). Alternatively, the modern American privilege against self-incrimination more closely resembles a combination of the common law confession rule and witness privilege, covering not only criminal defendants, as originally intended by the framers of the Fifth Amendment, but also witnesses. *Id.* at 237, 241-42.

⁷⁹ U.S. CONST. amend. V.

⁸⁰ H.R. REP. NO. 91-1188, at 7 (1970) (stating that the purpose of the bill was to displace "the privilege against self-incrimination by granting protection coextensive with the privilege").

⁸¹ *See id.*

⁸² *See, e.g.,* Ryan McLellan, *Does Immunity Granted Really Equal Immunity Received?*, 91 J. CRIM. L. & CRIMINOLOGY 469 (2001).

the Supreme Court prior to the enactment of the modern use immunity statute.⁸³

2. The *Kastigar* Doctrine—Statutory Use Immunity Does Not Deprive a Witness of His Fifth Amendment Rights

Shortly after 18 U.S.C. § 6002's enactment, the Supreme Court was asked to test the constitutionality of statutory use immunity in *Kastigar v. United States*.⁸⁴ Here, the Court found that use immunity was, in fact, constitutional and created what has become known as the "*Kastigar* doctrine."⁸⁵ The doctrine holds that the government may not make any use or derivative use of immunized testimony to prosecute a witness for a criminal act, but that the government may prosecute the witness for that criminal act upon *wholly* independent evidence.⁸⁶ The Court, thus, found that transactional immunity afforded a witness protections that were broader than his Fifth Amendment privileges.⁸⁷ *Kastigar* remains good law,⁸⁸ and federal courts continue to find that immunity granted under 18 U.S.C. § 6002 is constitutional based upon the fact that the statute forces the government to comply with the *Wong Sun* fruits doctrine and forego all derivative use of immunized testimony.⁸⁹

3. Upholding the Perjury Exception—The Fifth Amendment Does Not Protect False Statements

Kastigar holds that immunity under 18 U.S.C. § 6002 is constitutional,⁹⁰ but more specifically, courts have found that § 6002's perjury ex-

⁸³ See *supra* Part I.A.

⁸⁴ 406 U.S. 441 (1972).

⁸⁵ *Id.* at 461-62. Under this doctrine, in a subsequent criminal prosecution, the government must affirmatively prove that evidence it seeks to use is derived from a legitimate source entirely independent of the immunized testimony. This burden showing process has been labeled a "*Kastigar* hearing." See, e.g., *United States v. Smith*, 452 F.3d 323, 336 (4th Cir. 2006) (referring to the "*Kastigar* hearing"), *cert. denied* 127 S. Ct. 694 (2006).

⁸⁶ *Kastigar*, 406 U.S. at 460-61.

⁸⁷ *Id.* at 453. Not only is transactional immunity overly broad, but, importantly, it is not automatically conferred to a witness by the Fifth Amendment. *United States v. Nanni*, 59 F.3d 1425, 1431 (2d Cir. 1995) ("The Fifth Amendment itself does not confer transactional immunity, thus an immunity statute need not confer transactional immunity in order to pass constitutional muster.").

⁸⁸ *United States v. Apfelbaum*, 445 U.S. 115, 131-32 (1980).

⁸⁹ See, e.g., *United States v. DeSalvo*, 26 F.3d 1216, 1220 (2d Cir. 1994); *United States v. Seltzer*, 794 F.2d 1114, 1120 (6th Cir. 1986); *United States v. Tramunti*, 500 F.2d 1334, 1343-44 (2d Cir. 1974); *United States v. Sasson*, 334 F. Supp. 2d 347, 369-70 (E.D.N.Y. 2004).

⁹⁰ *Kastigar*, 406 U.S. at 458-59.

ception is constitutional.⁹¹ In doing so, courts reject the frequently raised argument that the right to remain silent is broader in scope than use immunity protections.⁹² For example, in *United States v. Apfelbaum*, the United States Supreme Court explained that the perjury exception is consistent with the rights afforded an individual under the Fifth Amendment of the Constitution.⁹³ The Court reasoned that because statutory use immunity protects only truthful statements, and because the Fifth Amendment protects a person from revealing truthful incriminating information, not false information, the two were not in conflict.⁹⁴ Similarly, in *United States v. Seltzer*, the Sixth Circuit found that proper application of the constitutional privilege against self-incrimination enables a witness to remain silent but not to perjure himself.⁹⁵ According to this and other judicial precedent, the immunity grant need not place the witness in the exact same position he would be had he remained silent.⁹⁶

Statutory use immunity must only prohibit use or indirect use of a witness's true incriminating statements to parallel constitutional privileges.⁹⁷ Courts reason that false statements are not constitutionally privileged.⁹⁸ The Fifth Amendment does not sanction an individual to lie or perjure himself.⁹⁹ Consequently, when a witness's testimony contains any false information, that witness cannot rely on the protections of the Fifth Amendment.¹⁰⁰ Thus, 18 U.S.C. § 6002 is constitutionally coextensive with the Fifth Amendment,

⁹¹ See *Apfelbaum*, 445 U.S. at 131-32.

⁹² *Id.* at 126; *Seltzer*, 794 F.2d at 1120.

⁹³ *Apfelbaum*, 445 U.S. at 135 (Brennan, J., concurring) (“The [Fifth Amendment] privilege operates only to protect the witness from compulsion of *truthful* testimony of an incriminatory nature. Perjury or the making of false statements under a grant of immunity thus violates a basic assumption upon which the privilege and hence the immunity depend.”).

⁹⁴ See *id.* at 126-27 (majority opinion).

⁹⁵ *Seltzer*, 794 F.2d at 1120.

⁹⁶ See, e.g., *Apfelbaum*, 445 U.S. at 124-26 (finding that the government need not treat an immunized witness as though he had remained silent to render the witness's immunity coextensive with Fifth Amendment privileges).

⁹⁷ Note, however, that once a witness perjures himself, he waives his Fifth Amendment protections with respect to all true and false statements made under a § 6002 immunity order. *Apfelbaum*, 445 U.S. at 123 (“In light of the language and legislative history of § 6002, the conclusion is inescapable that Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony if such use was not prohibited by the Fifth Amendment.”).

⁹⁸ See *id.* at 135 (Blackmun, J., concurring); see also *United States v. Mandujano*, 425 U.S. 564, 609 (1976) (Stewart, J., concurring) (“[T]he Fifth Amendment privilege against self-incrimination provides no protection for the commission of perjury.”).

⁹⁹ *United States v. Sessions*, No. 00-1756, 2000 U.S. App. LEXIS 24878, at *2-3 (8th Cir. Oct. 2, 2000) (citing *Brogan v. United States*, 522 U.S. 398 (1998)).

¹⁰⁰ *Id.*

despite the fact that the former does not treat a witness as though he had remained silent.¹⁰¹

C. *Derivative Use Defined—Joe Defendant’s Immunized Testimony Has Been Derivatively Used Against Him*

Because 18 U.S.C. § 6002 precludes both the government’s direct and derivative use of a witness’s immunized statements to prosecute that witness, in addressing the scope of Joe Defendant’s use immunity, it is important to briefly identify what constitutes derivative use.¹⁰² Interpretation of the Congressional motivation that prompted creation of the statute helps to define those derivative uses barred by 18 U.S.C. § 6002. House of Representatives reports indicate that the use immunity statute was meant to create a form of witness immunity that was narrower than transactional immunity and that complied with the requirements of *Wong Sun*’s “fruits” doctrine.¹⁰³ The fruits doctrine itself, thus, sets the standard for what amounts to a derivative use.¹⁰⁴ Under the doctrine, not all evidence is considered the “fruit of the poisonous tree” solely because the government would not have found it but for tainted government actions.¹⁰⁵ The doctrine instead focuses on whether the evidence allegedly derived from the tainted testimony has been located “by means sufficiently distinguishable to be purged of the primary taint.”¹⁰⁶

In the context of use immunity, courts have found that derivative use occurs when: (1) but for the use of immunized testimony, the government could not have located the evidence in question; and (2) the government did not use means wholly independent of the immunized testimony to locate the evidence in question.¹⁰⁷ As explained by the Supreme Court, the prosecution must prove it derived the evidence it seeks to introduce from a source entirely independent of the compelled testimony.¹⁰⁸ Where the government fails to meet this affirmative burden of proof, it may not use the evidence in question, because such use would be “derivative” and impermissible.¹⁰⁹ For

¹⁰¹ Courts, thus, reject the argument that a witness compelled to testify must be in no worse a position after testifying—regardless of whether his compelled statements are truthful—than he would have been had remained silent. *Apfelbaum*, 445 U.S. at 126-27. The Supreme Court has cautioned that the *effects* of the Fifth Amendment privilege must not be confused with underlying protections the self-incrimination privilege was designed to guarantee. *Id.* at 124.

¹⁰² See *United States v. Lipkis*, 770 F.2d 1447, 1450 (9th Cir. 1985).

¹⁰³ See *supra* Part I.A.

¹⁰⁴ See *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

¹⁰⁵ *Id.* at 471, 487-88.

¹⁰⁶ *Id.* at 488.

¹⁰⁷ See *Kastigar v. United States*, 406 U.S. 441, 460 (1972); *Wong Sun*, 371 U.S. at 487-88.

¹⁰⁸ *Kastigar*, 406 U.S. at 460.

¹⁰⁹ See *United States v. Gallo*, 859 F.2d 1078, 1082 (2d Cir. 1988).

example, in *United States v. Gallo*, the government's "inadvertent"¹¹⁰ inclusion of a witness's testimony in an electronic surveillance application constituted derivative use.¹¹¹ Although the court ultimately deemed the use a harmless error because the government had ample information to obtain the wiretap order absent use of the immunized testimony, all evidence the government obtained through the tainted surveillance was derivative immunized evidence.¹¹²

Applying the *Wong Sun* "fruits" doctrine and the *Gallo* court's definition of derivative use, the government's present use of Joe Defendant's testimony to obtain search warrants and wire taps clearly amounts to derivative use. The government currently relies upon evidence it obtained in response to a search application that contained a verbatim portion of Joe Defendant's immunized testimony. Law enforcement authorities did not obtain evidence of Joe Defendant's false statements by means wholly independent of his immunized testimony or other means "sufficiently distinguishable"¹¹³ to purge the taint. Much like in *Gallo*, any information or material resulting from those wire taps or searches may be considered the "fruit" of Joe Defendant's immune testimony.¹¹⁴ Thus, to use such information in a perjury prosecution of Joe Defendant, the government must establish at least one of the following: (1) the perjury exception extends beyond the immediate time limits of when the immune testimony was taken; or (2) statutory use immunity does not preclude use or derivative use of immune testimony in relation to prosecution of crimes not yet committed or conceived of at the time the immune testimony was taken.

II. NARROWLY PROSPECTIVE—THE PERJURY EXCEPTION DOES NOT ENCOMPASS FUTURE FALSE STATEMENTS

When Congress created 18 U.S.C. § 6002, it did not intend for use immunity to universally preclude the government's use of a witness's compelled testimony.¹¹⁵ Congress, instead, inserted the perjury exception in the statute.¹¹⁶ This Part reviews the perjury exception and concludes that the exception likely does not encompass false statements a witness makes *after*

¹¹⁰ Note that Judge Winter indicates the use was "inadvertent." *Id.* at 1079. The facts of the case, however, indicate that the government deliberately used the immunized statements, not knowing that they were protected under a use immunity order. *Id.* at 1080. Thus, it is more accurate to characterize the potential violation of § 6002, rather than the government use of the testimony, as inadvertent.

¹¹¹ *See id.* at 1082.

¹¹² *Id.* at 1083.

¹¹³ *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

¹¹⁴ *See Gallo*, 859 F.2d at 1082-83.

¹¹⁵ *See* 18 U.S.C. § 6002 (2000); H.R. REP. NO. 91-1188, at 12 (1970) (describing the statute's perjury exception).

¹¹⁶ *See* 18 U.S.C. § 6002.

the immunized proceeding. Section A discusses the intended purpose of the perjury exception and the factors that led Congress to include the exception in the use immunity statute. Section B then demonstrates the perjury exception does have time limitations: it is prospective, *not* retrospective in nature. Thus, the exception bars use of immunized testimony to prove perjury committed prior to the immunized proceeding. Finally, Section C explores how prospective the exception is, finding that Supreme Court precedent and 18 U.S.C. § 6002's text likely carve out a perjury exception that does not encompass perjury committed after the immunized proceeding.

A. *Legislative Intent*

18 U.S.C. § 6002's perjury exception entails that, "no 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, *except* a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."¹¹⁷ According to House Report on the Immunity of Witnesses Act, however, Congress included the perjury exception out of caution rather than necessity.¹¹⁸ Consistent with its approach to prior transactional immunity statutes, Congress did not intend the term, "any criminal case"—contained within § 6002—to encompass a criminal proceeding for false swearing or perjury within the context of use immunity grants.¹¹⁹ Thus, the use immunity perjury exception served a role much like its transactional perjury exception predecessors, as a "superfluous caution."¹²⁰ Congress felt perjury was such a fundamental crime that immunized testimony could be used to prove perjury even absent the inclusion of a written exception in the statute's text.¹²¹ This view that a perjury exception was inherent or automatic to use immunity relied upon the underlying logic of *United States v. Orta*.¹²² In *Orta*, the Fifth Circuit held the government's failure to inform an individual of his Fifth Amendment privilege against self-incrimination did not render the government's use of his "perjurious testimony" illegal.¹²³ This argument

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ H.R. REP. NO. 91-1188, at 12-13 (1970).

¹¹⁹ *United States v. Bryan*, 339 U.S. 323, 342 (1950) (citing *United States v. Glickstein*, 149 F. 636, 643-44 (8th Cir. 1906)); *Heike v. United States*, 227 U.S. 131, 141 (1913).

¹²⁰ *Bryan*, 339 U.S. at 342 (quoting *Heike*, 227 U.S. at 141).

¹²¹ See H.R. REP. NO. 91-1188, at 12-13 (1970) (stating that the exception for perjury is "probably unnecessary" and is "included out of caution").

¹²² *Id.* (citing *United States v. Orta*, 253 F.2d 312, 315 (5th Cir. 1958)).

¹²³ *Orta*, 253 F.2d at 315.

turns on both the social stigma attached to perjury and the principle that lies are not constitutionally protected material.¹²⁴

The fact that Congress included a perjury exception in the statute, even though it believed the exception was automatic, demonstrates the importance of that exception and the legislative commitment to ensuring the existence of the exception. Subsequently, courts have inferred from the perjury exception's unnecessary inclusion within the statute that "Congress intended the perjury and false-declarations exception to be interpreted as broadly as constitutionally permissible."¹²⁵

The legislative goal of the use immunity statute makes clear the perjury exception's function and the reason the exception was considered essential to § 6002: "to provide the criminal justice system with the necessary tools to . . . strengthe[n] the evidence gathering process and insure the evidence will then be available and admissible at trial."¹²⁶ In furtherance of this goal, the perjury exception provides a witness with strong incentives to testify truthfully.¹²⁷ Thus, the exception serves as a check on the quality and truthfulness of the immunized statements.¹²⁸ Truthful statements remain immunized and protected from subsequent use, whereas false statements receive no protection.¹²⁹ Without this check, there would be little incentive for a witness to testify truthfully under a grant of use immunity, and information provided under such a grant would be highly unreliable. Use of immunized statements to prove perjury, "is but a 'narrow exception' carved out to preserve the integrity of the truth seeking process."¹³⁰ The perjury exception, thus, enables use immunity to serve its goal: to better facilitate the exchange of witness immunity for reliable information about criminal activities.¹³¹

Inclusion of a perjury exception within 18 U.S.C. § 6002 was not a novel concept. On the contrary, the first American use immunity statute, Section 860 of the Act of February 25, 1868, stated that use immunity created under the section, "shall not exempt any party or witness from prosecution and punishment for perjury committed . . ."¹³² Courts have ruled that

¹²⁴ *Id.* ("Perjury is one of the most elemental of all crimes. Every sane person from the beginning of time has recognized its moral iniquity. No one can fail to know that any civilized system of laws must denounce perjury because it pollutes the very fountainhead of justice.")

¹²⁵ *See, e.g.,* *United States v. Apfelbaum*, 445 U.S. 115, 122 (1980).

¹²⁶ *United States v. Mahler*, 567 F. Supp. 82, 84 (M.D. Pa. 1983) (quoting *Pillsbury v. Conboy*, 459 U.S. 248, 255 (1983)).

¹²⁷ *Bauer, supra* note 26, at 149.

¹²⁸ *Id.*

¹²⁹ *United States v. Sessions*, No. 00-1756, 2000 U.S. App. LEXIS 24878, at *2-3 (8th Cir. Oct. 2, 2000) (citing *Brogan v. United States*, 522 U.S. 398 (1998)).

¹³⁰ *Apfelbaum*, 445 U.S. at 124.

¹³¹ *Mahler*, 567 F. Supp. at 84.

¹³² *Counselman v. Hitchcock*, 142 U.S. 547, 560-61 (1892).

immunity grants in general require some guarantee of truthfulness.¹³³ As the Supreme Court stated, “it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful.”¹³⁴ Congress, through adding the perjury exception to 18 U.S.C. § 6002, reinforced the long-held legislative view that use immunity should afford a witness protection only where he does not make false statements.

B. *No Retroactive Application*

The perjury exception is not without time boundaries, as it has a defined starting point.¹³⁵ Courts have determined that the perjury exception clearly applies only to perjury that does not pre-date the grant of immunity.¹³⁶ Accordingly, statutory use immunity does not enable the government to use immunized testimony in a perjury or false statements prosecution for false statements made *prior* to the grant of immunity.

Both the legislative intention and the judicial interpretation of 18 U.S.C. § 6002 demonstrate the perjury exception is prospective in nature. The Seventh Circuit articulated in *United States v. Watkins* that, “[t]he [perjury] exception refers to future perjury, future false statements or future failure to comply with the immunity order, rather than previous acts.”¹³⁷ Other federal courts frequently cite *Watkins*, and reject witness concerns regarding self-incrimination for past perjurious acts, claiming that no such threat of incrimination exists under a grant of use immunity.¹³⁸ For example, the Middle District of Pennsylvania found a witness’s fear of incrimination for past false statements was baseless given “[i]t is well established that the exception under the immunity statute, 18 U.S.C. § 6002, which authorizes prosecution for perjury, . . . forecloses the government from prosecuting an immunized witness for perjury based upon *prior* false statements.”¹³⁹ Under this view, if a witness testifies truthfully under an immunity grant, that witness cannot be prosecuted for perjury based on prior in-

¹³³ *Glickstein v. United States*, 222 U.S. 139, 142 (1911) (referring to use immunity granted under a federal bankruptcy statute).

¹³⁴ *Id.*

¹³⁵ The perjury exception does not allow use of immunized testimony to prosecute a witness for perjury or false statements made prior to the immunized proceeding. *See Mahler*, 567 F. Supp. at 86 (quoting *In re Grand Jury Proceedings*, 644 F.2d 348, 350 (5th Cir. 1981)).

¹³⁶ *See United States v. DeSalvo*, 26 F.3d 1216, 1221 (2d Cir. 1994); *In re Grand Jury Proceedings*, 509 F.2d 1349, 1351-52 (5th Cir. 1975); *United States v. Watkins*, 505 F.2d 545, 546 (7th Cir. 1974); *Mahler*, 567 F. Supp. at 86-87.

¹³⁷ *Watkins*, 505 F.2d at 546.

¹³⁸ *See DeSalvo*, 26 F.3d at 1222-23; *In re Grand Jury Proceedings*, 644 F.2d 348, 350 (5th Cir. 1981); *United States v. Leyva*, 513 F.2d 774, 777 (5th Cir. 1975); *Mahler*, 567 F. Supp. at 86.

¹³⁹ *Mahler*, 567 F. Supp. at 86 (citing *In Re Grand Jury Proceedings*, 644 F.2d at 350).

consistent or false statements.¹⁴⁰ According to courts, 18 U.S.C. § 6002 clearly and universally bars governmental use of truthful use-immunized testimony to prove *prior* perjury or false statements made by the witness.¹⁴¹

This forward-looking approach to the perjury exception is consistent with the purpose of the use immunity statute. In fact, a converse approach to the perjury exception's scope would undermine the very Fifth Amendment Constitutional privileges with which use immunity was designed to be coextensive.¹⁴² Perjury is a crime.¹⁴³ The Fifth Amendment demands that the government not compel any individual, "in any criminal case to be a witness against himself."¹⁴⁴ To afford a witness his Fifth Amendment privileges, use immunity must allow a witness to protect himself against compulsory provision of truthful facts that inculcate him of any criminal activity, including perjury.¹⁴⁵ The perjury exception, therefore, cannot logically extend to past instances of perjury. Such a policy would undermine the constitutionally legitimate role of 18 U.S.C. § 6002 by requiring a witness to inculcate himself of past perjurious acts.

C. *Future Application—The Court and the Legislature Fail to Define When the "Future" Ends Within a Narrowly Defined Perjury Exception*

As discussed above, judicial interpretation of 18 U.S.C. § 6002 and the purpose of the statute clearly demonstrate that the perjury exception has a defined starting point in time. The question remains whether the perjury exception's application also has a defined end point, or whether the exception applies indefinitely after immunized testimony is taken. The text of the statute and the comments that accompany it are silent on this matter.¹⁴⁶ Similarly, case law provides little guidance. Although judicial interpretation and legislative intent dictate that the perjury exception is prospective rather than retrospective in nature, neither does more than hint at whether the forward reach of the perjury exception is limited in any way. This Section ex-

¹⁴⁰ *Id.*; see also *SEC v. Micro-Therapeutics*, No. 78 Civ. 893, 1981 U.S. Dist. LEXIS 13034, at *4 (S.D.N.Y. 1981).

¹⁴¹ See *DeSalvo*, 26 F.3d at 1221; *In re Grand Jury Proceedings*, 509 F.2d at 1351-52; *Watkins*, 505 F.2d at 546; *Mahler*, 567 F. Supp. at 86-87.

¹⁴² If the perjury exception allowed government use of a person's immunized statements to prosecute that person for past acts of perjury, § 6002 would effectively enable the government to compel a person to act as a witness against himself in a criminal proceeding for acts already committed. Such an expansive approach clearly conflicts with the terms of the Fifth Amendment, and thus, is unconstitutional. See U.S. CONST. amend. V.

¹⁴³ 18 U.S.C. § 1621 (2000).

¹⁴⁴ U.S. CONST. amend. V.

¹⁴⁵ *Id.*

¹⁴⁶ See 18 U.S.C. § 6002 (2000).

amines the judicial interpretation of and legislative intent behind 18 U.S.C. § 6002 to determine how prospective the perjury exception is, concluding that the exception encompasses only those false statements made during the course of an immunized proceeding.

1. Case Law

Because no more than a few cases address the potential future applicability of the perjury exception, this discussion is focused on the diverging suggestions posed in the United States Supreme Court opinion *United States v. Apfelbaum*.¹⁴⁷ Although *Apfelbaum* is the leading Supreme Court case regarding the applicability of the perjury exception to future crimes, interestingly, the majority does not specifically discuss this issue.¹⁴⁸ The majority, rather, frames a broad rule, under which future perjury arguably falls within the perjury exception.¹⁴⁹ The concurring opinion and the majority in *Apfelbaum* collectively raise the issue of whether the time limitations of the perjury exception must be narrowly or widely applied.¹⁵⁰

In *Apfelbaum*, the Court granted use immunity to an assistant to the Philadelphia District Attorney under 18 U.S.C. § 6002 and compelled him to testify about his alleged peripheral involvement in aiding and abetting a staged robbery of a local auto dealership.¹⁵¹ The witness provided false responses to several questions during the course of the immunized testimony.¹⁵² Shortly thereafter, the government used portions of the witness's truthful *and* false immunized statements to support a prosecution for perjury.¹⁵³ The Court upheld the government's use of the immunized statements, holding that 18 U.S.C. § 6002 creates a "blanket exemption" to the bar on use of immunized testimony in cases in which a witness is prosecuted for committing perjury.¹⁵⁴ Under this blanket exemption, the government may use both truthful and false immunized statements alike in a subsequent prosecution for perjury, as long as the statements used conform to otherwise applicable evidentiary rules.¹⁵⁵

Although the majority recognized the perjury exception was narrow, it also found, through interpreting legislative history, that Congress intended the perjury exception to be interpreted as broadly as constitutionally allowable: "The exception of a perjury prosecution from the prohibition against

¹⁴⁷ 445 U.S. 115 (1980).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 117-18.

¹⁵² *Id.* at 118.

¹⁵³ *Apfelbaum*, 445 U.S. at 119.

¹⁵⁴ *Id.* at 122.

¹⁵⁵ *Id.* at 122, 131.

the use of immunized testimony may be a narrow one, but it is also a complete one.”¹⁵⁶ The majority further rejected any concept of “anticipatory perjury,” holding that any *future* intention to commit perjury or make false statements would not sufficiently trigger a Fifth Amendment self-incrimination claim.¹⁵⁷ Because the requirement to provide testimony could not create the requisite “substantial and real hazard” of incrimination where a criminal act has not yet been carried out or conceived of by the witness, the Fifth Amendment may not be invoked to cover subsequent perjurious acts.¹⁵⁸

Though the majority opinion did not indicate that any time boundaries on the perjury exception exist, Justices Brennan and Blackmun, in their two concurring opinions, suggest that the perjury exception might not encompass false swearing that occurs after the immunized testimony rather than during the course of it. The concurrences vary in their approaches: Brennan outright suggests the perjury exception does not extend to false statements,¹⁵⁹ while Blackmun is merely hesitant to assume the perjury exception is forward-reaching absent further development in this area of the law.¹⁶⁰

Each concurring opinion, however, to some extent, questions whether the majority’s holding is broader than necessary. Although each Justice found the *Apfelbaum* rule was appropriate in the instant circumstances to prove contemporaneous false statements made *during* the course of the immunized testimony, Justice Blackmun was concerned that “there is no occasion to determine whether the immunized testimony could have been used to prove perjury or false statements occurring at some other time.”¹⁶¹ Blackmun was uncertain that a broad perjury exception was appropriate and was hesitant to endorse a sweeping perjury exception absent “further developments.”¹⁶² Brennan was even more convinced that a forward reaching perjury exception was not appropriate, stating that he was, “by no means persuaded that the result here would be correct were this a prosecution for false swearing occurring after the immunized testimony rather than in the course of it.”¹⁶³

Importantly, neither Justice Brennan nor Justice Blackmun framed his reluctance regarding the applicability of the perjury exception to future perjury in absolute terms.¹⁶⁴ Neither Justice outwardly rejected a forward reaching perjury exception. Instead, they couched their reluctance in terms

¹⁵⁶ *Id.* at 131-32.

¹⁵⁷ *Id.* 132.

¹⁵⁸ *Id.* at 131.

¹⁵⁹ *Apfelbaum*, 445 U.S. at 133 (Brennan, J., concurring).

¹⁶⁰ *Id.* (Blackmun, J., concurring).

¹⁶¹ *Id.*

¹⁶² *Id.* at 134.

¹⁶³ *Id.* at 133 (1980) (Brennan, J., concurring).

¹⁶⁴ *Id.* at 132-33; *id.* at 133-35 (Blackmun, J., concurring).

such as, “I am by no means persuaded”¹⁶⁵ or “[a]t the moment, I am not prepared to go so far.”¹⁶⁶ Although the language of their concurring opinions clearly demonstrates that each Justice doubts that perjury committed outside the context of the actual immunized testimony falls within the perjury exception, Brennan and Blackmun express hesitance rather than firm rejection of such a view.¹⁶⁷

Apfelbaum’s concurring opinions invite further debate on the perjury exception’s applicability to future crimes. The concurrences hint at the need for definition of the perjury exception’s temporal scope.¹⁶⁸ Courts, however, have not pursued such a debate.¹⁶⁹ Thus, post-*Apfelbaum*, courts have not resolved whether the majority’s unlimited view or the concurrences’ potentially narrow view of the perjury exception is correct.¹⁷⁰ As courts have not addressed the concerns of Justices Brennan and Blackmun, judicial interpretation of the perjury exception’s scope leaves us without a well-defined rule.

2. Statutory Language and Intent Hint that the Perjury Exception Does Not Apply to Perjury Committed After the Immunized Proceeding

The United States House of Representatives amended 18 U.S.C. § 6002 prior to enacting the statute, “to make clear that the testimony of a witness may be used against him in a prosecution for perjury committed in response to an order to testify.”¹⁷¹ Although Congress made it abundantly clear that false statements and perjury made *during* the taking of immunized testimony would trigger the perjury exception,¹⁷² it did not exert similar efforts to indicate how far in time the perjury exception may be applied.¹⁷³ The goal of Congressional amendments need not, however, be read as the outward limit of the exception’s scope. Rather, they could be viewed as a Congressional effort to ensure, *at a minimum*, that statements made under oath and pursuant to an immunity order must be truthful. Congress

¹⁶⁵ *Apfelbaum*, 445 U.S. at 133 (Brennan, J., concurring).

¹⁶⁶ *Id.* at 133 (Blackmun, J., concurring).

¹⁶⁷ *See id.* at 133-34 (Brennan, J., concurring); *id.* at 133-35 (Blackmun, J., concurring).

¹⁶⁸ *See id.* at 133-34 (Brennan, J., concurring); *id.* at 133-35 (Blackmun, J., concurring).

¹⁶⁹ No court has directly resolved whether the perjury exception does apply. If courts have had occasion to do so, it has not risen beyond the trial court level. *Apfelbaum* remains the final contribution to debate on the perjury exception’s future applicability.

¹⁷⁰ There is a dearth of cases that directly involve instances of perjury committed after the immunized proceeding.

¹⁷¹ H.R. REP. NO. 91-1188, at 7 (1970).

¹⁷² *Id.*

¹⁷³ 18 U.S.C. § 6002 (2000) (lacking express language regarding any defined end point for use restrictions associated with a use immunity grant).

did not literally spell out the prospective nature of the perjury exception in the text of 18 U.S.C. § 6002.¹⁷⁴ Thus, the statutory text and accompanying amendment notes might logically be read as inclusive rather than exclusive in nature. Application of the perjury exception to perjury committed after the taking of the immune testimony is not, therefore, ruled out based upon the construction of the statute or the legislative notes justifying its creation and content.¹⁷⁵

Although the text of 18 U.S.C. § 6002 and the legislative comments regarding the statute's purpose do not entirely foreclose the possibility that the perjury exception includes perjury committed after the taking of immunized testimony, they render the possibility highly unlikely.¹⁷⁶ Empowering the government to prosecute for future false statements does not incentivize a witness to testify truthfully under an immunity grant. Thus, it does little, if anything, to improve the government's investigative capabilities during the taking of immunized testimony. Congress likely did not intend to expand the perjury exception in such a way that did not serve the end-goals of the use immunity statute.

Just as judicial interpretation of the perjury exception's scope, although inconclusive, suggests a narrow interpretation, the language of the statute hints that perjury must be committed during the actual testimony to trigger the exception.¹⁷⁷ The use of the term, "or *otherwise* failing to comply with the order," limits the scope of what constitutes a violation under the perjury exception.¹⁷⁸ The Ninth Circuit, in *United States v. Alter*, adopted this view, finding that the term "otherwise" modifies the phrase, "except a prosecution for perjury [or] giving a false statement."¹⁷⁹ As it applied to the defendant, the Ninth Circuit held that any testimony the defendant would give under the immunity grant could not be used against him in any prosecution for any false statements made outside the grand jury.¹⁸⁰ Note that the court points out that it accepted its construction of 18 U.S.C. § 6002 "as it applies to *Alter*," the defendant in this particular case.¹⁸¹ The Ninth Circuit does not specify whether it would have been willing to accept a broader interpretation of the perjury exception had the fear of incrimination not related to prior incidents of perjury.¹⁸² In other words, the Ninth

¹⁷⁴ *Id.*

¹⁷⁵ See H.R. REP. NO. 91-1188 (1970) (neither expressly nor impliedly ruling out the possibility that the perjury exception encompasses perjury committed after the immunized proceedings).

¹⁷⁶ See 18 U.S.C. § 6002; H.R. REP. NO. 91-1188, at 10.

¹⁷⁷ 18 U.S.C. § 6002.

¹⁷⁸ *Id.*

¹⁷⁹ *United States v. Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973) (quoting and accepting the government's construction of § 6002).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² The defendant, *Alter*, committed perjury prior to giving immunized testimony. *Id.* at 1019. The limiting language of the court's opinion, thus leaves open to speculation whether the court would have

Circuit's interpretation of the statute's text, to some extent, may be limited by the circumstances of this particular case.

No evidence suggests that *Alter*'s narrow interpretation of the perjury exception is assumed within *Apfelbaum* and other later Supreme Court cases. On the contrary, Justices Blackmun and Brennan do not appear to believe *Alter*'s reading of the statute governs, each indicating the *Apfelbaum* rule does not necessarily exclude future false statements from falling under the purview of the perjury exception.¹⁸³ If either justice thought that 18 U.S.C. § 6002's use of the word "otherwise" inherently and narrowly limited the perjury exception, he would not have gone to the trouble of thoroughly articulating his concern that future perjury should not fall within the exception.¹⁸⁴

With little consistent judicial or legislative clarity as to whether the perjury exception definitely encompasses future false statements, this analysis seeks to find the policy that is most predominant and most logically convincing. In light of *Alter*'s generally accepted reading of § 6002 and the fact that neither the statute nor the legislative comments surrounding its creation mention the possible application of the exception to perjury committed after the immunized proceeding, the exception is likely meant to be limited in nature. Thus, to use the fruits of Joe Defendant's testimony against him in a criminal proceeding, the government must either provide ample information to refute the *Alter* analysis, or, alternatively, show that § 6002 does not extend protections with respect to prosecution for future crimes. The latter appears to be the more feasible approach.

III. DOES USE IMMUNITY EVEN APPLY TO FUTURE CRIMES?

As explained above, although 18 U.S.C. § 6002's perjury exception likely does not encompass perjury committed *after* an immunized proceeding, the government in our hypothetical posed above is not necessarily barred from using Joe Defendant's immunized statements to prove his false tax and educational loan statements. An alternative justification of such use may exist: even if § 6002 does not specifically allow for such use under the perjury exception, it may generally do so if the statute, as a whole, was not intended to cover future crimes. Thus, this Comment next analyzes whether 18 U.S.C. § 6002 applies to crimes committed after an immunized proceeding.

produced the same holding, as applied to Joe Defendant, a witness who lied *after* rather than before the immunized proceeding. *Id.* at 1028.

¹⁸³ *United States v. Apfelbaum*, 445 U.S. 115, 133 (1980) (Brennan, J., concurring); *id.* at 133-35 (Blackman, J., concurring).

¹⁸⁴ *See id.* at 133-34 (Brennan, J., concurring); *id.* at 133-35 (Blackmun, J., concurring).

If statutory use immunity, in its current form, applied only to criminal acts that occurred during or prior to the taking of immunized testimony, such a backward focused approach to immunity would be far from novel. In *United States v. Bryan*, the United States Supreme Court articulated that under 18 U.S.C. § 6002's predecessor statute, immunity was intended "to apply only to *past* criminal acts."¹⁸⁵ This retrospective approach was, of course, associated with transactional immunity.¹⁸⁶ For two principal reasons, however, it is highly unlikely that the framers of 18 U.S.C. § 6002 intended to abandon the retrospective application of immunity when they largely replaced transactional immunity through the 1970 Federal Immunity of Witnesses Act. First, the goal of 18 U.S.C. § 6002 was to improve federal investigatory power by providing a witness with the barest of protections required by the Fifth Amendment.¹⁸⁷ Extension of use immunity protections to future crimes would actually provide broader rather than narrower protections than afforded under transactional immunity, completely undermining the primary function of the statute.¹⁸⁸ Second, application of use immunity to future crimes would directly counter the manner in which courts have interpreted and applied Fifth Amendment privileges under other federal laws.¹⁸⁹

This Part analyzes the scope of statutory use immunity and the Fifth Amendment's general relationship to future crimes, as applied outside of the context of statutory use immunity, finding that Fifth Amendment privileges do not encompass future criminal actions. Building upon this conclusion, this Part, then, identifies the divergent federal court interpretations of the Supreme Court's *Apfelbaum* decision and explains why the Sixth Circuit finding that statements made under the protection of a use immunity order may be used to prosecute future crimes best conforms to the underlying purpose of 18 U.S.C. § 6002.

A. *A Retrospective Fifth Amendment—The Privilege Against Self-Incrimination Does Not Shield A Witness from the Ramifications of his Future Criminal Transgressions*

Shortly after the enactment of 18 U.S.C. § 6002, the Supreme Court declared that Fifth Amendment protections were not applicable to future criminal "transgressions."¹⁹⁰ The Court laid the foundation for this finding

¹⁸⁵ *United States v. Bryan*, 339 U.S. 323, 340 (1950).

¹⁸⁶ The statute in question in *Bryan* was R.S. § 859, then codified at 18 U.S.C. § 3486, an immunity statute enforced after *Counselman* and prior to § 6002's enactment. *Id.* at 323.

¹⁸⁷ H.R. REP. NO. 91-1188, at 7 (1970).

¹⁸⁸ *See infra* Part III.C.

¹⁸⁹ *See infra* Part III.A.

¹⁹⁰ *United States v. Freed*, 401 U.S. 601, 607 (1971).

in *United States v. Marchetti*, establishing the “substantial hazard” test.¹⁹¹ Under this test, the Fifth Amendment privilege applied if “the claimant [wa]s confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.”¹⁹² Importantly, although the court stated that most prospective crimes would involve only “speculative or insubstantial risks of incrimination,” the Court refused to establish a rigid chronological test that Fifth Amendment privileges did not extend to any future crimes.¹⁹³

Just several years later, however, the Court adopted this chronological approach in *United States v. Freed*, stating that a witness could not face a real and substantial hazard of incrimination regarding crimes he had not yet committed.¹⁹⁴ Specifically, the court found that the registration requirement of the National Firearms Act did not violate the Fifth Amendment based on the fact that it required a transferee of a firearm to disclose information connected to offenses he might commit in the future.¹⁹⁵ The Court flatly rejected the appellant’s arguments, which assumed that the Fifth Amendment Self-Incrimination Clause, at its outer limits, protected a person not only against past and present, but also future criminal transgressions.¹⁹⁶ Alternatively, the Court found that the Self-Incrimination Clause must be given a less “expansive” interpretation to avoid providing an immunized witness with, “insulation for a career of crime about to be launched.”¹⁹⁷ *Freed*, thus, espouses that a substantial hazard may only result from past or ongoing crimes.¹⁹⁸

B. *Case Law Suggests Use Immunity Does Not Apply to Crimes Not Yet Committed*

The nature of testimony compelled under statutory use immunity is not so distinguishable from information compelled under the National Firearms Act that it merits a different approach to extension of Fifth Amendment privileges to future crimes. In fact, courts have frequently cited *Freed* in a use immunity context, in some instances without distinguishing its rule or surrounding circumstances.¹⁹⁹ Although differences do exist between the

¹⁹¹ *Marchetti v. United States*, 390 U.S. 39, 54, 60-61 (1968).

¹⁹² *Id.* at 53.

¹⁹³ *Id.* at 54.

¹⁹⁴ *Freed*, 401 U.S. at 607.

¹⁹⁵ *Id.* at 606-07.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 607.

¹⁹⁸ *Id.* at 606-07.

¹⁹⁹ See *United States v. Apfelbaum*, 445 U.S. 115, 130 (1980); *United States v. Sasson*, 334 F. Supp. 2d 347, 369 (E.D.N.Y. 2004). Note, however, that the Second Circuit distinguished the circum-

two statutes,²⁰⁰ the *Freed* rule that the Fifth Amendment does not provide criminal insulation to individuals may and has been applied to interpret the boundaries of use immunity.²⁰¹ Courts have both hinted and expressly stated that use immunity does not apply to crimes not committed or conceived at the time immunized testimony is taken.²⁰² However, support for this approach to statutory use immunity is not shared among all courts.²⁰³ Rather, lower federal courts split on this matter, leaving us with an inconsistent rule.²⁰⁴

1. The United States Supreme Court Invites Conflicting Applications of § 6002

According to lower federal court interpretation, the Supreme Court approach to whether use immunity applies to future crimes is housed in the *United States v. Kastigar* and *United States v. Apfelbaum* opinions.²⁰⁵ These cases tell lower federal courts that: (1) the Fifth Amendment does not require immunity statutes to bar *all* use of immunized testimony; and (2) immunized testimony “remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant.”²⁰⁶ This precedent, however, does not indicate whether immunized testimony is admissible for offenses committed *after* the immunized proceeding.²⁰⁷ The Second and Sixth Circuits have raised this very question, producing inconsistent responses between 1988 and the present date.²⁰⁸

stances of *Freed* from those surrounding a use immunity grant. *United States v. Gallo*, 859 F.2d 1078, 1082 (2d Cir. 1988).

²⁰⁰ Compare 26 U.S.C. §§ 5812, 5841(b), 5861(d) (2000) with 18 U.S.C. § 6002 (2000).

²⁰¹ *Apfelbaum*, 445 U.S. at 130 (Brennan, J., concurring) (concluding that in light of *Freed* “the Fifth Amendment does not prevent the use of respondent’s immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give”).

²⁰² See, e.g., *id.*; *United States v. Seltzer*, 794 F.2d 1114, 1120 (6th Cir. 1986); *Sasson*, 334 F. Supp. 2d 347, 369 (E.D.N.Y. 2004).

²⁰³ *Gallo*, 859 F.2d at 1082.

²⁰⁴ See *infra* Part III.B.2-3.

²⁰⁵ See *Gallo*, 859 F.2d at 1084 (citing *Kastigar*); *Seltzer*, 794 F.2d at 1122 (citing *Kastigar* and *Apfelbaum*); *Sasson*, 334 F. Supp. 2d at 363-64 (E.D.N.Y. 2004) (citing, quoting, and discussing *Apfelbaum* and *Kastigar*).

²⁰⁶ *Apfelbaum*, 445 U.S. at 128; *Kastigar v. United States*, 406 U.S. 441, 461 (1972).

²⁰⁷ See H.R. REP. NO. 91-1188 (1970) (neither expressly nor impliedly ruling out the possibility that the perjury exception encompasses perjury committed after the immunized proceedings).

²⁰⁸ See *supra* Part III.B.2.

2. The Second Circuit—Unable to Agree Upon a Sole Application of § 6002

In their 1988 decision in *United States v. Gallo*, Judges Winter, Van Graafeiland, and Altimari of the Second Circuit extracted from *Apfelbaum*, *Kastigar*, and other relevant Supreme Court cases, three distinct interpretations as to whether use immunity bars use of immunized statements to prove future crimes.²⁰⁹ Producing three separate opinions—that of the court, the concurrence, and the dissent—Judge Winter asserted that use immunity protections apply to both past and prospective crimes,²¹⁰ Judge Van Graafeiland argued that the privilege does not apply to future crimes,²¹¹ and Judge Altimari found that use immunity protections apply to a broadly defined category of ongoing, prospective criminal activities.²¹²

The facts of the *Gallo* case are much like those surrounding Joe Defendant. In *Gallo*, a building supply company executive, Miron, provided compelled, immunized testimony regarding former labor official John Cody pursuant to 18 U.S.C. § 6002.²¹³ The government compelled Miron's testimony to acquire information about Cody's suspected ties to organized crime.²¹⁴ Cody was convicted and portions of Miron's statements were used in Cody's pre-sentence report.²¹⁵ Two years later, in a separate investigation of a local organized crime family, the FBI inadvertently included in a wiretap application a paragraph of Miron's immunized testimony as it appeared in Cody's pre-sentence report.²¹⁶ A judge granted the wiretap and the FBI monitored both the telephone calls and the visitors to the crime family's residence, determining that Miron was involved in the large labor payoff scheme being carried out by the crime family.²¹⁷ Based on this evidence, Miron was indicted under Taft-Hartley, racketeering and obstruction of justice charges.²¹⁸ Miron moved to dismiss the indictment, claiming the government's derivative use of his immunized testimony violated his Fifth Amendment privileges.²¹⁹ Judge Winter, writing for the court, found that, although the government had violated the use immunity statute and the Fifth Amendment, the government error was harmless because the judge would have granted the wiretap order absent the paragraph referring to Mi-

²⁰⁹ *Gallo*, 859 F.2d at 1078.

²¹⁰ *Id.* at 1081-82.

²¹¹ *Id.* at 1087-88 (Van Graafeiland, J., concurring).

²¹² *Id.* at 1094-95 (Altimari, J., dissenting).

²¹³ *Id.* at 1079 (majority opinion).

²¹⁴ *Id.*

²¹⁵ *Gallo*, 859 F.2d at 1079-80.

²¹⁶ *Id.* at 1080.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

ron's immunized testimony.²²⁰ Winter outright rejected the government's argument that use of immunized testimony to prove crimes committed *after* the testimony violated neither the use immunity statute nor the Constitution.²²¹

Judge Van Graafeiland, in his concurring opinion, agreed with Winter's assessment that use of the immunized testimony could constitute no more than harmless error.²²² However, Van Graafeiland questioned whether use of the immunized testimony to prove a future crime actually constituted an error.²²³ He explained that *Gallo* "squarely presents the issue whether Justice Powell's broad language in *Kastigar v. United States* . . . was intended to mean that a grant of immunity under § 6002 will provide derivative use immunity for crimes not yet committed or even contemplated when the grant was made."²²⁴ Van Graafeiland looked to the language of *Kastigar* and *Apfelbaum*, finding the Supreme Court did not read statutory use immunity as extending to future crimes.²²⁵ Following the logic of *Apfelbaum*, he held that because a witness cannot reasonably fear inculcating himself of crimes not yet committed or conceived when the witness provides immunized testimony, future crimes cannot be protected by the Fifth Amendment.²²⁶ Alternatively, "the only hazards of incrimination that are likely to be considered substantial and real are those which relate to existing or past misdeeds or a continuing course of criminal activity."²²⁷ Van Graafeiland agreed with the District Court, finding that "the language in *Kastigar* . . . prohibiting the use of compelled testimony 'in any respect' is not to be taken literally."²²⁸

Like Van Graafeiland, Judge Altimari found that prospective continuations of ongoing criminal schemes fell within use immunity protections.²²⁹ Altimari, however, defined these ongoing schemes much more broadly, finding where Van Graafeiland had refused to do so that two sets of criminal actions carried out by Miron in separate decades were part of a common ongoing scheme.²³⁰ Altimari, thus, moved away from his colleagues' treatment of future crimes as either falling entirely within or outside the scope of Fifth Amendment and use immunity protections.²³¹ According to Alti-

²²⁰ *Id.* at 1082-84.

²²¹ *Gallo*, 859 F.2d at 1081 ("I do not discern in relevant Supreme Court decisions such a broad principle.").

²²² *Id.* at 1084 (Van Graafeiland, J., concurring).

²²³ *Id.* at 1086-87.

²²⁴ *Id.* at 1087-88.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Gallo*, 859 F.2d at 1088.

²²⁸ *Id.* at 1090.

²²⁹ *Id.* at 1094 (Altimari, J., dissenting).

²³⁰ *Id.* at 1095.

²³¹ *Id.*

mari, a crime's prospective nature was not enough to determine whether its perpetrator could have faced a substantial hazard of incrimination for that crime when he provided immunized testimony.²³²

Following its disjointed *Gallo* decision, the Second Circuit again attempted to interpret the *Apfelbaum* rule in *United States v. DeSalvo*, readdressing whether it allows use of immunized testimony to prosecute crimes committed *after* the immunized proceeding.²³³ Although the circumstances of this case did not involve future crimes, the court explained that if a witness made three sworn immunized statements, the government could likely use all three statements to prosecute the witness for perjury committed, "*after* the proceeding in which the three sworn statements were given."²³⁴ The court relied on the logic of *Apfelbaum*, stating that the witness was not subject to a "substantial or real hazard" of self-incrimination when he made the three statements prior to his criminal acts.²³⁵ The Second Circuit, thus, rejected the concept of anticipatory perjury or anticipatory criminal self-implication.²³⁶ Importantly, however, in the Court's example, one of the three statements was false.²³⁷ The Court does not indicate whether it would disallow use of entirely true immunized statements, as was the case with our Joe Defendant.²³⁸

DeSalvo's dicta, however, does not reflect the Court's definitive adoption of *Gallo*'s Van Graafeiland opinion. Nor did it serve as an end to the circuit's disjointed application of use immunity protections to future crimes. On the contrary, federal district courts within the Second Circuit have behaved as though they still lack a single circuit rule regarding the use immunity statute's relation to future crimes.²³⁹ Likewise, these lower federal courts have not treated Winter's *Gallo* "majority" opinion as a binding rule.

For example, in *United States v. Sasson*, the Eastern District of New York returned to the applicability of use immunity protections to crimes committed after the taking of the immunized testimony, ruling in line with *DeSalvo*.²⁴⁰ Here, the Court found that the federal government did not violate the Fifth Amendment or 18 U.S.C. § 6002 by using portions of immunized statements made in 1992 by Zakay and Ezra Sasson to obtain a wire-

²³² *Id.*

²³³ 26 F.3d 1216 (2d Cir. 1994).

²³⁴ *Id.* at 1220.

²³⁵ *Id.*

²³⁶ *See id.* at 1221 ("The Fifth Amendment . . . does not permit a witness to invoke the privilege on the ground that he anticipates committing perjury sometime in the future.").

²³⁷ *Id.* at 1220.

²³⁸ *See id.* at 1220-21.

²³⁹ *United States v. Mauro*, 846 F. Supp. 245, 254 (W.D.N.Y. 1994) (endorsing, in dicta, Judge Winter's interpretation of § 6002's scope in *Gallo*); *United States v. Andrelo*, 816 F. Supp. 806, 812 (N.D.N.Y. 1993) (endorsing, in dicta, Van Graafeiland's ruling in *Gallo* that prospective crimes cannot trigger a substantial hazard of incrimination at the time of testimony).

²⁴⁰ *United States v. Sasson*, 334 F. Supp. 2d 347, 354 (E.D.N.Y. 2004).

tap of another individual in 2002.²⁴¹ Although the 2002 wiretap monitored the telephone calls of a drug dealer identified in the Sassons' 1992 statements, the wiretap ultimately revealed the Sassons were also engaging in new drug trafficking and sales activities, ten years after they gave their 1992 immunized statements.²⁴² The court found that the government did not err in derivatively using the Sassons' immunized statements to prosecute the Sassons for the 2002 drug crimes.²⁴³ Additionally, the court stated that any error under the circumstances would have been harmless because the judge would have granted the wiretap order absent the use of the Sassons' statements in the application.²⁴⁴

The *Sasson* opinion rejects the theory that use immunity indefinitely prohibits the use of "fruits of the poisonous tree" in relation to all prosecutions for crimes committed after the immunity proffer sessions, claiming the theory is "such a stretch from the text [of the self-incrimination clause]."²⁴⁵ Chief Judge Korman explains that:

[E]ven if the immunized statements that Sassons provided in 1992 had been meaningfully used, Kastigar would not require [the court] to give the Sassons an immunity bath today because the privilege against self-incrimination would not have prevented the Sassons from being compelled to answer questions about criminal activity they could possibly engage in years later. A contrary holding would create perverse incentives for the testifying witness.²⁴⁶

3. The Sixth Circuit Adopts a Sole Understanding That § 6002 Protections Do Not Apply to Future Crimes

The Sixth Circuit application of the use immunity statute favors the *Sasson* approach rather than that laid out by Judge Winter's majority opinion in *Gallo*. In *United States v. Seltzer*, in 1981 the government granted Edward Seltzer statutory use immunity and compelled him to provide testimony regarding the alleged income tax violations of Seltzer's former employer.²⁴⁷ Seltzer's testimony, however, was not entirely truthful and, subsequent to his grand jury appearance, Seltzer wrote a letter to the grand jury foreman indicating he had perjured himself.²⁴⁸ In 1983, the government called Seltzer before the grand jury a second time, asking him to make any corrections to his prior testimony.²⁴⁹ Again, Seltzer testified untruthfully.²⁵⁰

²⁴¹ *Id.* at 375.

²⁴² *Id.* at 350-51.

²⁴³ *Id.* at 375.

²⁴⁴ *Id.* at 357-58.

²⁴⁵ *Id.* at 359.

²⁴⁶ *Sasson*, 334 F. Supp. 2d at 369-70.

²⁴⁷ *United States v. Seltzer*, 794 F.2d 1114, 1115-16 (6th Cir. 1986).

²⁴⁸ *Id.* at 1116.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1116-17.

The government indicted Seltzer with six counts of perjury.²⁵¹ The trial court judge dismissed the two counts related to Seltzer's 1981 appearance before the grand jury but denied the motion to dismiss the four counts related to the 1983 grand jury appearance.²⁵² The court also ruled that the government was permitted to use Seltzer's relevant 1981 immunized testimony to prove the 1983 offense, recognizing that immunized testimony remains inadmissible only in all prosecutions for offenses committed *prior* to the immunity grant.²⁵³ Relying on *Appelbaum*, the Sixth Circuit likewise found that government use of Seltzer's 1981 immunized statements to support the 1983 offense violated neither the use immunity statute nor the Fifth Amendment.²⁵⁴ "Seltzer here appeal[ed] from a conviction for perjury committed in 1983. His 1981 grand jury testimony therefore was not used in a prosecution for an offense committed prior to the 1981 grant of immunity which would have permitted him to invoke his Fifth Amendment privilege absent the grant."²⁵⁵ Because Seltzer's risk in 1981 of making incriminating statements in 1983 was 'speculative' or 'insubstantial', "at the time [Seltzer] was granted immunity in 1981, the privilege [against self-incrimination] would not have protected him against false testimony he might later decide to give in either 1981 or 1983."²⁵⁶

C. Which Interpretation of the Use Immunity Statute Should Govern?

1. Defining the Circuit Rules

The Second Circuit and the federal district courts below it have applied the use immunity statute inconsistently with respect to future criminal actions of immunized witnesses.²⁵⁷ Because *Gallo* fails to establish a single rule regarding 18 U.S.C. § 6002's relationship to future crimes, it is difficult to argue that *Gallo* remains good, governing law in the Second Circuit.²⁵⁸ Subsequent case law does not remedy *Gallo*'s lack of direction. In fact, the Second Circuit still appears to lack a governing judicial interpretation of 18 U.S.C. § 6002's relation to future crimes.²⁵⁹

²⁵¹ *Id.* at 1117.

²⁵² *Id.*

²⁵³ *Seltzer*, 794 F.2d at 1117.

²⁵⁴ *Id.* at 1120.

²⁵⁵ *Id.* (emphasis omitted).

²⁵⁶ *Id.*

²⁵⁷ *See supra* Part III.B.2.

²⁵⁸ *Gallo* has, to date, not been overturned by the Second Circuit or rendered invalid by the United States Supreme Court.

²⁵⁹ *See supra* Part III.B.2.

Alternatively, the Sixth Circuit offers, through *Seltzer*, a single rule, finding that immunized evidence may be used to prosecute a witness's future crimes.²⁶⁰ *Seltzer* is undeniably distinguishable from our Joe Defendant hypothetical, in that it involved the future crime of perjury committed during the course of future immunized statements.²⁶¹ This distinction, however, is irrelevant to the underlying justification for the *Seltzer* rule and should not be considered a limiting factor. The core logic which drove the court's allowance of the 1981 statements to prove future false statements easily extends to future false statements made in other contexts because the Sixth Circuit framed its rule in general terms.²⁶² The Court, like the Supreme Court in *Apfelbaum*, made sweeping assertions that Fifth Amendment privileges, and thus immunity protections, do not extend to speculative crimes the witness might commit in the future.²⁶³

2. The Sixth Circuit/Van Graafeiland Interpretation of Use Immunity's Scope Better Effectuates the Legislative Purpose of 18 U.S.C. § 6002

Federal judicial interpretations of the use immunity statute have plainly produced disparate results with respect to use of immunized testimony to prove future crimes.²⁶⁴ These different interpretations of use immunity's scope can be classified in two categories: the approach shared by the Sixth Circuit and Judge Van Graafeiland of the Second Circuit (hereinafter called the "Sixth Circuit/Van Graafeiland" interpretation); and Second Circuit Judge Winter's majority approach in *Gallo* (hereinafter called the "Winter" approach). As seen above, judges advocating the Sixth Circuit/Van Graafeiland and the Winter interpretations of use immunity draw their support largely from the same Supreme Court precedent and analysis of a sole statute's text.²⁶⁵ Supreme Court precedent and the statute's text, however, cannot have two wholly contradictory meanings. Upon close consideration of 18 U.S.C. § 6002's text, its Congressionally intended purpose, and the precedent set forth in *Kastigar*, *Apfelbaum*, *Marchetti*, and *Freed*, the Sixth Circuit/Van Graafeiland application best conforms to the intended purpose of the statute and, therefore, is clearly more appropriate.

Congress enacted 18 U.S.C. § 6002 to create witness protection that was substantially narrower than that granted under transactional immu-

²⁶⁰ *Seltzer*, 794 F.2d at 1120.

²⁶¹ *Id.*

²⁶² *See id.*

²⁶³ *Id.*

²⁶⁴ *See supra* Part III.C.1.

²⁶⁵ *See supra* Part III.B.2-3.

nity.²⁶⁶ Under Judge Winter's approach to statutory use immunity, ironically, a witness is afforded substantially broader protection in some respects than he would be under a transactional immunity grant. Where transactional immunity would previously bar prosecution of a witness only for specific crimes revealed through and committed prior to his immunized testimony, use immunity bars even inadvertent and insignificant derivative use of a witness's immunized testimony to prosecute *any* crime conceived of and committed after the immunized proceeding. For example, had the government granted Joe Defendant transactional immunity, his immunized statements could not be used to prosecute him for his involvement in the original RICO scheme. However, under the transactional immunity grant, the government could use those same immunized statements to prosecute Joe Defendant's criminal actions carried out after and not in relation to the RICO scheme. Transactional immunity, thus, provided the government greater abilities to curb career criminality than the use immunity statute would as applied by the Judge Winter. Under Winter's approach, use immunity would preclude all use of immunized statements, even use to prosecute crimes planned and committed years after and in no relation to the immunized proceeding. Winter's wide interpretation of 18 U.S.C. § 6002, thus, approximates granting an immunized witness the type of "immunity bath" for a future criminal career that Congress and the courts hoped to avoid.²⁶⁷

The merits of the Winter approach, however, are not so decidedly inconsistent with legislative history as to render the approach entirely illogical. It is important to note that the Winter approach does not *preclude* the government from prosecuting future crimes as long as the government satisfies the *Kastigar* doctrine and demonstrates that it arrived at its evidence by means wholly independent of the immunized testimony. Advocates of Judge Winter's use immunity interpretation might highlight that the bar on use of immunized testimony to prove future crimes does not create an immunity bath, but rather forces the government to prosecute based upon untainted evidence. Use immunity, thus, makes the prosecution of future crimes more difficult or less likely, *not* impossible. In effect, the Winter interpretation turns the use immunity statute into a hurdle for prosecutors to overcome, rather than an absolute barrier preventing prosecution of future crimes. Even so, Judge Winter's interpretation suffers from a primary flaw: for a prosecutor attempting to punish a later criminal act, hurdles and barriers share the common feature of making things more difficult, not less. Congress intended the use immunity statute to have the opposite result.²⁶⁸

²⁶⁶ H.R. REP. NO. 91-1188, at 7 (1970).

²⁶⁷ *United States v. Gallo*, 859 F.2d 1078, 1088 (2d Cir. 1988).

²⁶⁸ Expansion of immunized witness protections would counter the spirit of the Organized Crime Control Act of 1970. *See* H.R. REP. NO. 91-1549, at 8.

Upon close consideration of the Sixth Circuit/*Van Graafeiland* interpretation of the use immunity statute, it is clear this approach succeeds in carrying out 18 U.S.C. § 6002's congressional purpose in all the abovementioned areas where its counterpart—the Winter approach—failed to do so. When Congress displaced transactional immunity with use immunity, it likely did not intend to broaden immunity grants to protect all future implications of immunized testimony, minus perjury.²⁶⁹ Such broadening of witness protection would counter Congress' intent in creating 18 U.S.C. § 6002. The Sixth Circuit/*Van Graafeiland* rule addresses this concern by recognizing the Supreme Court precedent that *Freed* applies within the use immunity context.²⁷⁰

Case law also overwhelmingly suggests that an individual cannot reasonably incriminate himself in a crime that he neither has decided to commit nor knows he will commit.²⁷¹ Logically, if Congress created 18 U.S.C. § 6002 to provide only those protections afforded to a witness under the Fifth Amendment,²⁷² then Congress must not have meant for statutory use immunity to bar use of immunized statements to which the Fifth Amendment privilege does not extend. Again, the Sixth Circuit/*Van Graafeiland* rule directly addresses this point. For example, relying on *Apfelbaum*, the *Seltzer* court refused to apply a doctrine of anticipatory perjury, claiming that a future fear of incrimination was too 'speculative' to merit protection under the Constitution or 18 U.S.C. § 6002.²⁷³

Ultimately, the Sixth Circuit/*Van Graafeiland* approach provides an interpretation of 18 U.S.C. § 6002 that affords a witness the very barest protections permitted by the Fifth Amendment and expands socially valuable means of investigating and prosecuting criminal activities. It is, thus, a socially efficient application of the use immunity statute.

IV. LEGISLATIVE AND JUDICIAL DEFINITION OF TIME LIMITATIONS OF USE IMMUNITY AND ITS PERJURY EXCEPTION ARE OVERDUE—A PROPOSAL

Although the plain language of 18 U.S.C. § 6002 and judicial interpretation of the statute indicate that the perjury exception applies only to perjury committed during the immunized proceeding, this indication is not

²⁶⁹ On the contrary, Congress indicated that transactional immunity was broader than necessary. *See id.* at 7. Thus, enactment of the use immunity statute was motivated by Congressional desire to narrow the scope of immunity grants. *See id.*

²⁷⁰ *Apfelbaum* found *Freed* relevant and applicable within the use immunity context. *United States v. Apfelbaum*, 445 U.S. 115, 130 (1980).

²⁷¹ *See supra* Part III.A.

²⁷² *See* H.R. REP. NO. 91-1188, at 7.

²⁷³ *United States v. Seltzer*, 794 F.2d 1114, 1120 (6th Cir. 1986).

conclusive.²⁷⁴ Likewise, the use immunity statute's relation to future crimes is in need of further definition.²⁷⁵ As mentioned previously, courts have discussed the scope of the § 6002 and its perjury exception, but have either blatantly failed to address the questions they pose or created inconsistent rules among the different judicial circuits.²⁷⁶ To eliminate future confusion, Congress or the Supreme Court must clearly define whether the perjury exception encompasses perjury committed after the immunized proceeding or whether use immunity bars use of immunized statements to prosecute future crimes.²⁷⁷

Because Congress created the use immunity statute to serve a specific purpose—to both narrow the scope of immunity and parallel Fifth Amendment protections to the barest possible extent—Congress is the most appropriate entity to clarify the intended scope of 18 U.S.C. § 6002. Thus, to bring the statute closer to its intended function, Congress should amend 18 U.S.C. § 6002's language, clarifying the reach of the protections afforded a witness under the statute.

As discussed above, irrespective of whether the perjury exception was meant to encompass perjury committed outside of the immunized proceeding, 18 U.S.C. § 6002 should allow use of immunized statements to prove future crimes.²⁷⁸ Congress, consequently, should adopt legislative changes to create a comprehensive, unambiguous statute that reads, in part, as follows:

[B]ut no 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 (*involving the witness's criminal activity that occurred during or prior to the immunized proceeding*), except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.²⁷⁹

The above amended statute would effectively create a hybrid form of immunity: one that is both transactional and use-based.²⁸⁰ Immunity under the amended statute would maximize the government's ability to obtain important evidence from witnesses, while providing witnesses the barest protections permissible under the Constitution's Fifth Amendment. This

²⁷⁴ See *supra* Part II.C.

²⁷⁵ See *supra* Part III.

²⁷⁶ See *supra* Parts II.C, III.

²⁷⁷ Note that Congress or the Court need not necessarily address both questions. Rather, they can be viewed in most circumstances as alternatives.

²⁷⁸ See *supra* Part III.C.

²⁷⁹ 18 U.S.C. § 6002 (2000) (author's amended language italicized).

²⁸⁰ The statute would be transactional to the extent that it limits the immunity's applicability to only those criminal transactions carried out prior to the immunity grant and it would be use-based because it precludes all use of immunized statements to prosecute those previously committed criminal transactions.

legislative amendment would bring the products of statutory use immunity in conformity with the intended purpose of 18 U.S.C. § 6002. Additionally, an amended 18 U.S.C. § 6002 need not specify whether the perjury exception encompasses perjury committed after a witness makes immunized statements. Regardless of whether the perjury exception allowed use of immunized testimony to prove future instances of perjury, such use would be allowed under the amended statute because future perjury constitutes a future crime.²⁸¹

CONCLUSION

The government granted Joe Defendant, a RICO scheme participant, statutory use immunity under 18 U.S.C. § 6002 and compelled him to testify. Two years later, using information derived from his immunized testimony, the government has charged Joe Defendant with the wholly unrelated crime of perjury. Joe Defendant contests this derivative use of his testimony, claiming the government has violated his Fifth Amendment privilege against self-incrimination and the terms of the use immunity statute.

To derivatively use Joe Defendant's testimony as it seeks to do, the government must demonstrate either that: (1) the perjury exception encompasses perjury committed during *and* after the immunized proceeding; or (2) that statutory use immunity does not foreclose use or derivative use of immunized testimony to prove crimes not yet committed or conceived of at the time the immune testimony was taken. The government will likely fail to show the first point, whereas, it may demonstrate the second.

Because courts and § 6002's text hint that the perjury exception is limited to perjury committed during an immunized proceeding, use of Joe Defendant's immunized testimony probably does not fall within the realm of the perjury exception. Thus, absent judicial clarification or legislative amendment of use immunity's limitations, the government must prove the alternative: that § 6002 immunity does not extend to future crimes. As demonstrated above, Joe Defendant's success in barring use of his prior immunized statement may depend on where the criminal action against him is pending. Because Joe Defendant's immunized testimony has been derivatively used to prove a crime committed *after* he gave the immunized testimony, such use might be construed as appropriate in the Sixth Circuit and inappropriate by some courts within the Second Circuit. The former ap-

²⁸¹ 18 U.S.C. § 1621 (2000). The proposed, amended § 6002 could include a statement specifying that the perjury exception does or does not extend to perjury outside the immunized proceeding. Such an addition to the statute, however, would operate as a technicality and would not be outcome determinative within the context of the proposed statute.

proach is more consistent with the purpose and legislative history of the use immunity statute.

To foster a uniform national interpretation of 18 U.S.C. § 6002's scope and relationship to future crimes—in this instance of Joe Defendant, future perjury—and to align § 6002 with its intended purpose, the federal judiciary or Congress must expressly state whether the government may make derivative use of immunized testimony to prove future crimes, including false swearing or perjury. Congress is the more appropriate body to clarify its original ambiguous intent. Thus, Congress should amend 18 U.S.C. § 6002 to allow use of immunized statements to prosecute future crimes, bringing the statute in conformity with Congress' intended purpose.