

Slate

EXPLAINER

Witness Immunity 101

How to incriminate yourself on the stand without getting in trouble.

By Harlan J. Protass

Posted Monday, Jan. 14, 2008, at 5:39 PM ET

[Jose Rodriguez](#), the former head of CIA clandestine operations who ordered the destruction of interrogation videos, said through his attorney that he won't testify before Congress on Wednesday unless given immunity.

Similarly, [Brian McNamee](#), former trainer for pitchers Roger Clemens and Andy Pettitte, asked for a grant of immunity ahead of his Feb. 13 congressional testimony. What does it mean to grant immunity to a witness?

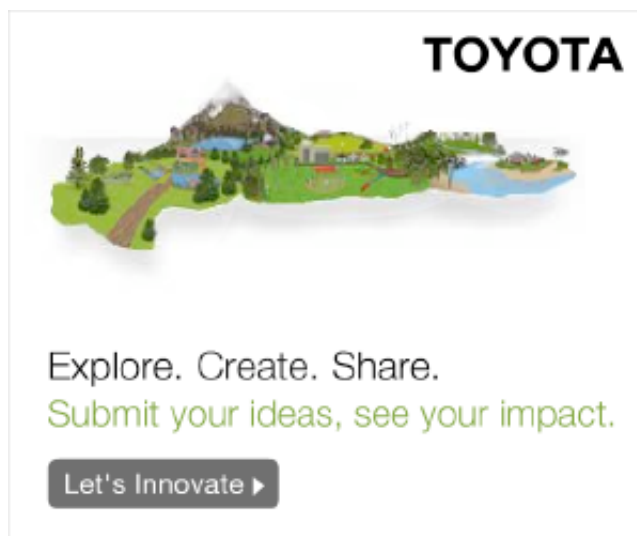
It depends. There are two basic types of immunity: "use" and "transactional." In general, witnesses are granted immunity to balance the government's need to compel testimony with each individual's [Fifth Amendment](#) right against self-incrimination. That is to say, immunity recognizes both the importance of the right and the fact that often the only people knowledgeable about an offense are those involved in it. But the two types of immunity work in different ways.

If the government grants use immunity to a witness, it is prohibited from thereafter prosecuting the witness based on the testimony it compels or anything derived (directly or indirectly) from it. In other words, witnesses who admit to a crime while testifying under use immunity can't have their statements "used" against them in any prosecution for that crime.

The government can, however, still try to prosecute that crime, as long as it uses evidence from other places. Under the Supreme Court's 1972 decision in [Kastigar v. United States](#), prosecutors bear the "heavy burden" of affirmatively establishing that the evidence against an immunized witness is derived from independent and legitimate sources, not the witness. Perhaps the most distressing term a prosecutor can hear is "*Kastigar* hearing," because the proof requirements are so high (especially when immunity is granted early in an investigation) and the potential consequences are so severe (dismissal of charges). Indeed, that's precisely what happened to 1980s anti-hero Oliver North. His conviction on charges related to the Iran-Contra scandal was reversed on appeal, and charges against him were ultimately dismissed, because prosecutors couldn't prove that the evidence used at his trial wasn't derived from his immunized testimony before Congress.

Transactional immunity is broader. It accords complete immunity from prosecution for the offense to which the witness's compelled testimony relates. Grants of transactional immunity are less common and can be narrowly crafted so as to apply only to certain "transactions"—i.e., limited events or time frames.

Of course, a grant of immunity isn't a license to lie. An immunized witness can always be prosecuted for



perjury, for giving a false statement, or for otherwise failing to comply with the terms of an immunity grant.

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Article URL: <http://www.slate.com/id/2182070/>

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