IMMUNITY

I. JFK ACT

A. "The Review Board shall be considered to be an agency of the United States for purposes of [18 U.S.C § 6001.]

II. 18 U.S.C. §§ 6001-6005

A. § 6001 Definitions

B. § 6002 Immunity Generally

1. Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to ... (2) an agency of the United States...
2. AND the person presiding ... communicates to the witness an order issued under this part...
3. the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination...
4. but no ... information compelled under the order ... 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.
   a. If the witness refuses to provide information after receiving immunity, s/he may be held in contempt.

C. § 6004 Certain Administrative Proceedings

1. In the case of any individual who [is] called to ... provide ... information at any proceeding before an agency ..., the agency may, **with the approval of the Attorney General**, issue ... an order requiring the individual to ... provide ... information which [s/]he refuses to ... provide on the basis of his[/her] privilege against self-incrimination ....
2. An agency ... may issue an [immunity] order only if in **its**[1] judgment:
   a. the ... information ... may be necessary to the public interest;
      i. see, factors to consider in making the public interest determination at page 9-484 of the DOJ Manual.
   b. and [the] individual has refused or is likely to refuse to ... provide ... information on the basis of his[/her] privilege against self-incrimination.

III. DOJ MANUAL[2]

A. PROCEDURE

1. REQUEST

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[1] In § 6004, the agency that will hearing the testimony or gathering the information is primarily responsible for making the public interest determination. The AG only approves the originating agency's determination. This procedure is different from the procedure under § 6003, where DOJ officials make independent determinations on the public interest determination. Under § 6004, DOJ plays a secondary role, whereas under § 6003, DOJ plays a primary role. FTC v. Foucha, 356 F. Supp. 21 (N.D. Ala. 1973)

[2] Note: this section of the DOJ Manual deals with 18 U.S.C. § 6003, which is the section that covers Court and Grand Jury proceedings. 18 U.S.C. § 6004 covers agency proceedings and the procedures for granting immunity thereunder may be significantly different.

a. Any agency may request authority from the AG to issue an order compelling a witness to testify.
   i. If it were a court case, this request would take the form of an application to the AAG/Criminal Division.
   ii. This request should probably go to the AG's office, with a copy to the AAG/Criminal Division. Criminal Div. gets a copy because they are essentially the clearinghouse for all criminal prosecutions.
      A. In Federal Trade Comm'n v. Foucha, 356 F. Supp. 21, 25 (N.D. Ala. 1973), and In re Sealed Case, 776 F.2d 335, 336 (D.C. Cir. 1985), the agencies requests for approval were properly transmitted to the attention of the AAG/Criminal Division.

b. The request must state:
   i. how the information sought is in the public interest
   ii. that the witness in question has refused or is likely to refuse to provide the information on grounds that it might incriminate him/her.
   iii. If the govt wants to immunize the witness for the act of producing records, the application must state that.

2. AUTHORITY to APPROVE REQUEST
   a. § 6004 gives the **Attorney General** the authority to approve agency requests for authorization to issue an order compelling testimony
      i. AG can delegate this authority to lower DOJ officials, and it has delegated this authority to the AAG/Criminal Division. 28 C.F.R. § 0.175(a) (1984). Federal Trade Comm'n v. Foucha, 356 F. Supp. 21, 24 (N.D. Ala. 1973) (DOJ plays a secondary role to the requesting agency under § 6004).
3. FBI CHECK
   a. Generally, the AAG will turn over the witness' name to the FBI to do a check on the witness.
   b. Not clear that the AAG does this for agency orders.
4. AUTHORIZATION
   a. Once the FBI check comes back, the AAG will send the requesting attorney a written authorization.
   b. Not clear that the AAG does this for agency orders.
5. ORDER
   a. Agency issues an order instructing the witness to testify.
6. COMMUNICATION
   a. The person who "presides over the proceeding" must communicate the grant of immunity to the witness.
7. USE OF COURT SYSTEM
   a. If the witness refuses to provide information even after being granted immunity, the agency should file in the Federal District Court a motion to compel his testimony.
   b. Then, if the witness still refuses, the agency should move the Federal District Court for a civil-contempt order.

IV. IMMUNITY FOR ACT OF PRODUCING RECORDS

A. The act of producing records pursuant to a subpoena may have testimonial

aspects and an incriminating effect, even if the records themselves are not privileged. U.S. v. Doe, 465 U.S. 605 (1984).

1. The act of production concedes that the recrds exist and that the respondent believes that the records are those described in the subpoena.

B. If seek immunity for the act of producing records, the application for immunity must state that.

V. OTHER

A. a grant of federal statutory immunity protects the witness against state and local prosecutions. Murphy v. Waterfront Comm. of New York Harbor, 378 U.S. 52 (1964).

VI. INFORMAL IMMUNITY

A. We should find out if we can grant informal immunity.
   1. I think that only US Attorneys can do these and the agreements only bind the US Attorneys in the federal judicial district in which immunity is granted.
   2. Appropriate where the govt. perceives the witness as having no legit. 5th Am. claim or where the govt. believes the witness has no criminal liability.
   3. We should ask AAG/Criminal Division whether he/she would agree to issue informal immunity for anonymous production of documents. The language could read something like, “All documents produced inthe next 60 days, anonymously or not, are inadmissible in any prosecution of [theft of govt documents/violation of security clearances/non-disclosure agreements].

B. Advantages
   1. May be able to immunize the witness to a greater extent than with statutory immunity.
      a. for examble, could immunize the witness with regard to the contents of documents suppplied to the govt, as well as for oral testimony.
   2. Do not have to follow the procedures mandated by DOJ regs for statutory immunity, including obtaining approval from specified DOJ officials. See, DOJ Manual 1-11.100 et seq.

C. Disadvantages
   1. Will only bind the US Attorneys in the federal judicial district in which immunity is granted.
   2. Will not immunize the witness against state and local prosecution.
   3. Govt. sometimes prosecutes anyway, arguing that the witness did not cooperate fully with the govt.