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FOREIGN NATIONALS IN THE UNITED STATES WITNESS SECURITY PROGRAM: A REMEDY FOR EVERY WRONG?

Tarik Abdel-Monem*

I. INTRODUCTION

John Harold Mena was a Colombian drug dealer who helped organize the assassination of a journalist in New York City.¹ He was arrested by federal authorities in 1992, and he bargained a life sentence down to eighteen years in a federal prison² by testifying against his Colombian drug mafia bosses.³ As part of his agreement with the Drug Enforcement Administration (DEA), agents allegedly promised Mena that his family members in Colombia would be protected from retaliation.⁴ However, since Mena's testimony, five of his family members have been violently killed. In 1994, his uncle was shot twenty times, and his aunt was shot in the head and killed. His father was killed a year later, and two of his cousins were also murdered.⁵ In addition, there have been other assaults on his family including an attempted kidnapping and a bomb attack.⁶ When one cousin was shot and killed at a restaurant, the assassins reportedly shouted, "[t]his is for that rat Mena!"⁷

In a letter to a federal judge, Mena, currently serving his term in a U.S. prison, wrote that his ex-boss in Colombia "knows that I testified against him and he has vowed revenge against me and my family" and "[h]e has said he will kill every member of my family that he can find."⁸ Speaking before the judge, Mena stated,

* University of Nebraska Public Policy Center. The views expressed in this Article belong solely to the author and should not be attributed to another person or entity. JD/MPH (University of Iowa).

1. William K. Rashbaum, *Jailed Informer Seeks U.S. Aid to Help Family Flee Colombia*, N.Y. TIMES, Aug. 15, 2002, at B1 (stating that the Colombian cartel targeted Manual de Dios Unanue, a former editor of a Spanish language magazine, because Mr. de Dios Unanue disclosed information about the cartel's activities).

2. *Id.* (explaining how John Harold Mena agreed to cooperate with authorities to avoid a life sentence).

3. Kit R. Roane, *And Then There Were None*, U.S. NEWS & WORLD REP., Oct. 7, 2002, at 31 (explaining how Mr. Mena revealed valuable details about the cartel's operations that led to the conviction of a dozen members including that of Guillermo Leon Restrepo Gaviria, a leader in the cartel).

4. Anthony M. DeStefano, *Witness Pleads for DEA to Protect Family*, NEWSDAY, Sept. 5, 2002, at A27 (describing how Mr. Mena pleaded with the judge to force federal officials to honor a promise to protect his family).

5. Roane, *supra* note 3, at 31 (explaining that while the DEA had not made any official comments, U.S. prosecutors stated that the cartel had sent a "hit list" to kill Mena's relatives).

6. *Id.* (describing how some of Mena's family were able to survive).

7. Tom Hays, *DEA Denies Sanctuary for Family of Drug Informant*, ASSOCIATED PRESS, Oct. 1, 2002, LEXIS 10/1/02 APWIRES 16:37:00 (explaining how Mena's father, uncle, aunt, and two cousins were shot to death).

8. Rashbaum, *supra* note 1, at B1 (repeating written statements made by Mr. Mena in a letter dated July 11, 2002).

"I'm just asking the DEA to protect my family . . . [t]hat is the agreement I made."⁹ However, despite the alleged promise made to him, the DEA has formally denied Mena's requests to move eighteen members of his family from Colombia to the United States for protection.¹⁰ As for the five murders, the DEA believes there is no proof that the deaths are related to Mena's testimony.¹¹ However, in the words of one U.S. law enforcement officer, the murders are clearly a "message that even 10 years later we will kill these people and we will get you."¹²

John Harold Mena's predicament should not be surprising. Because of statutory language in the federal witness security law, government agents can make promises to potential witnesses that are unenforceable in the courts. Witnesses have little, if any, recourse to sue in tort or breach of contract because such promises create no legal duties or rights. Foreign national witnesses are particularly vulnerable to consequences associated with unfulfilled promises because of their immigration status and the potential for retaliation in their home country jurisdictions.

This Article focuses on the deficiencies that exist in the Witness Security statute regarding enforcement of promises made to foreign national witnesses. Part II provides an overview of the Witness Security program (WITSEC) from its creation by the Organized Crime Control Act of 1970 through subsequent changes made in the Witness Security Reform Act of 1984. It outlines the purpose and characteristics of the WITSEC program and reviews problems associated with government responsibility for the acts of program participants. Part III highlights the importance of the WITSEC program to the United States in an era of growing international crime and terrorism. As international crime continues to proliferate, foreign witnesses will play an ever more important role in providing U.S. authorities with information and testimony. The WITSEC program is essential to providing protection to foreign witnesses who reside in any number of dangerous home country jurisdictions. Emphasis is placed on organized crime in Colombia and the Commonwealth of Independent States to illustrate this point.

Parts IV, V, and VI provide the bulk of this Article's analysis. Part IV outlines problems specific to foreign national witnesses in the WITSEC program, with particular reference to immigration status. It also discusses congressional recognition that such problems hamper United States policy in terms of creating support among potential foreign witnesses. Part V discusses how the discretionary function exception of the Federal Tort Claims Act (FTCA) bars tort suits against the United

9. Tom Hays, *Drug Informant Seeks Protection for Besieged Family*, ASSOCIATED PRESS, Sept. 4, 2002, LEXIS 9/4/02 APWIRES 17:16:00 (describing how Mr. Mena pleaded with U.S. District Judge Edward Korman to protect his family from Colombian drug dealers).

10. Hays, *supra* note 7 (stating that "a recent 'threat assessment' by the DEA 'concluded that the current violence towards Mena's extended family is not related to his cooperation,' the papers said").

11. Roane, *supra* note 3, at 31 (explaining that while the DEA insists that the murders have nothing to do with Mena's testimony, "other current and former law enforcement agents say no other conclusion can be drawn").

12. *Id.* (interviewing a senior police officer).

States by witnesses and other parties for the unfulfilled promises of federal agents. It reviews case law interpreting the discretionary function exception in the WITSEC context. Part V also examines language in the WITSEC statute that bars breach of contract actions in the federal courts by witness plaintiffs. Part VI concludes this Article with a recommendation that lawmakers consider changes to the WITSEC program to mitigate or eliminate the problem of unenforceable promises being made to witnesses. It proposes recognition of enforceable agreements between the government and witnesses in matters important to witness safety or well-being, and discusses how such agreements would harmoniously coincide with pre-existing law enforcement policies. Such changes would not only be equitable to witnesses who cooperate with U.S. law enforcement agencies, but would also prove valuable in terms of creating greater support and confidence in U.S. law enforcement agencies abroad.

II. THE WITNESS SECURITY PROGRAM

A decade after the federal government began its aggressive campaign against domestic organized crime,¹³ Congress passed the Organized Crime Control Act of 1970 creating the Witness Security program, also known as WITSEC.¹⁴ The program was created because lawmakers were concerned about widespread systematic intimidation of witnesses by organized crime families.¹⁵ Congress intended WITSEC to “provide protection and security by means of relocation”¹⁶ for witnesses testifying against “persons involved in organized criminal activity or other serious offenses.”¹⁷ Thus, an essential pre-requisite for individuals to participate in the WITSEC program is a determination by the Attorney General that a violent crime is “likely to be committed”¹⁸ against a witness for his involvement in trial proceedings. By protecting witnesses who agree to testify against organized crime figures, WITSEC serves as an important tool with which prosecutors can gather incriminating evidence¹⁹ against organized crime leaders, often from members of mafia families themselves.²⁰ At the time of its creation,

13. See VICTOR S. NAVASKY, KENNEDY JUSTICE 49-52 (1971) (discussing how the federal government expanded and toughened its anti-mafia operations during Robert F. Kennedy’s tenure as Attorney General).

14. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 501-04, 84 Stat. 933-34 (prior to 1984 amendments), *amended by* The Witness Security Reform Act of 1984, Pub. L. No. 98-473, § 3521, 98 Stat. 2153-2156 (codified as amended at 18 U.S.C. § 3521 (2000)).

15. COMPTROLLER GENERAL OF THE U.S., U.S. GEN. ACCOUNTING OFFICE, GGD-83-25, CHANGES NEEDED IN WITNESS SECURITY PROGRAM 5 (1983) [hereinafter CHANGES NEEDED IN WITSEC] (noting Congress’s concern about organized crime groups killing and threatening witnesses).

16. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-21.020 (1997) [hereinafter U.S. ATTORNEYS’ MANUAL].

17. *Id.*

18. 18 U.S.C. § 3521(a)(1) (2000).

19. See MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW’S RESPONSE 85-86 (1985) (discussing how the WITSEC program can remedy the pervasive problem of witness intimidation by organized crime groups).

20. See *id.* at 7 (discussing how witness intimidation is an obstacle to convicting criminals).

numerous witnesses were seeking protection from prosecutors against criminal organizations.²¹ Over 7000 witnesses and 9000 family members have participated in the WITSEC program since its creation.²²

The WITSEC program allows the Attorney General to geographically relocate participants and to provide them with new identities,²³ housing,²⁴ a living stipend,²⁵ and even help participants find suitable employment.²⁶ U.S. attorneys or other federal agents first submit applications for individuals to enter the program.²⁷ These applications are confidential and include the applicant's identifying information, a description of the information the witness is believed to have, an assessment of the threat to the witness, and names of dependents who may also seek admission to the program.²⁸ Federal authorities review the application and conduct interviews of the potential applicants.²⁹ The Attorney General must then determine the importance of the prospective participants' testimony, the danger posed to that

21. See PETE EARLEY & GERALD SHUR, WITSEC: INSIDE THE FEDERAL WITNESS PROTECTION PROGRAM 86 (2002) (explaining that "[b]y the start of 1970, an average of one mob witness a week was seeking protection"). The co-author of INSIDE WITSEC, Gerald Shur, directed the WITSEC program for many years and is regarded as its creator. *Id.* at 4-6.

22. U.S. MARSHALS SERVICE, U.S. DEP'T OF JUSTICE, *WITSEC Fact Sheet*, at <http://www.usdoj.gov/marshals/factsheets/witsec.html>. But see Emilie Astell, *Witness Safety Presents Problems: Local Police Lack Resources*, WORCESTER TELEGRAM & GAZETTE, June 2, 2000, at A1 (quoting a WITSEC spokesperson that 16,000 family members of witnesses have been relocated into the program).

23. 18 U.S.C. § 3521(b)(1)(A) (2000) (granting the Attorney General power to provide suitable documents to establish new identities for WITSEC participants).

24. 18 U.S.C. § 3521(b)(1)(B) (2000) (granting the Attorney General power to provide housing for WITSEC participants).

25. 18 U.S.C. § 3521(b)(1)(D) (2000) (granting the Attorney General power to provide money to cover basic living expenses for WITSEC participants).

26. 18 U.S.C. § 3521(b)(1)(E) (2000) (granting the Attorney General power to provide assistance in finding employment for WITSEC participants).

27. CHANGES NEEDED IN WITSEC, *supra* note 15, at 11 (discussing the process required for government attorneys to request admittance of individuals into the program).

28. *Id.* (discussing the applicant's identifying information); GRAHAM, *supra* note 19, at 87 (outlining the procedures for application to the program). The confidential information includes:

[T]he name, address, date, and place of birth, FBI or police numbers of the witness; the importance of the case and the names and importance of prospective defendants; any other federal or state cases in which the witness's testimony may be required; the names of persons connected with the case for whom witness protection has been previously approved and names of others connected with the case who are likely to be placed under the Witness Protection Program; a realistic estimate of the completion date of the trials; the degree of the threat made, the names of those who may threaten or harm the witness, including a report from an investigative agency substantiating the threat; the number of family or household members to be protected including their names, ages, and relationship to the witness; any medical problems of the witness; employment data concerning the witness; whether the witness is receiving or expecting to receive money from other state or federal agencies and how much; and, if the witness is incarcerated, when release can be reasonably anticipated.

Id.

29. CHANGES NEEDED IN WITSEC, *supra* note 15, at 11 (discussing the process for entering the WITSEC program).

individual, and the possibility of obtaining testimony from alternative sources.³⁰

The Office of Enforcement Operations, a branch of the Department of Justice, partially manages WITSEC.³¹ However, the day-to-day administration of the program is conducted by the U.S. Marshals Service—executive branch officers, who technically fall within the Department of Justice, but whose main duties often involve serving as officers of the federal courts.³² For obvious reasons, the daily operations of WITSEC are highly secretive. The service chooses a relocation area for the witness, as well as other family members, and provides transportation assistance to their new locations.³³ It then gives the participants new driver's licenses, birth records, and other materials.³⁴ The Marshals Service maintains elaborate procedures just to facilitate communication among program participants.³⁵ Although the day-to-day security procedures and relocation experience can be difficult for program participants,³⁶ WITSEC has been enormously successful in protecting its participants and aiding prosecutions.³⁷

However, the WITSEC program has encountered a number of problems. Participants in the program, like many informants, often have criminal backgrounds themselves.³⁸ Among a sample of 200 witnesses admitted into the program during the 1970s, some fifteen percent of participants reported having been arrested after entering the program.³⁹ A study conducted by the Marshals Service also found that approximately seventeen percent of participants had developed arrest records after entering WITSEC.⁴⁰ Following pressure from

30. 18 U.S.C. § 3521(c) (2000) (outlining criteria according to which the Attorney General decides to include individuals into the program).

31. CHANGES NEEDED IN WITSEC, *supra* note 15, at 2 (discussing management of the WITSEC program).

32. *Id.* at 1-2 (outlining the history and functions of the United States Marshals Service since its creation in 1789).

33. GRAHAM, *supra* note 19, at 87 (discussing the involvement of the Marshals Service in the WITSEC program).

34. *Id.* (discussing the provision of identity documents to WITSEC participants).

35. See *Federal Witness Security Program and Protection of Foreign Nationals: Hearing Before the House Subcomm. on Government Information, Justice, and Agriculture*, 101st Cong. 1, 10 (1990) [hereinafter *Protection of Foreign Nationals*] (discussing statements made by protected witness, Max Mermelstein, regarding phone patch procedures to facilitate communication between family members in the WITSEC program).

36. See *id.* at 9 (noting the suicide death of one participant due to depression and dissatisfaction with the program's conditions). See generally *Terrorist Defectors: Are We Ready?: Hearing Before the Comm. On Governmental Affairs*, 102d Cong. 7-27 (1992) [hereinafter *Terrorist Defectors*] (discussing statements by Adnan Awad regarding his dissatisfaction with WITSEC, departure from the program, and suit against the federal government under a variety of tort claims); *Awad v. United States*, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001).

37. See EARLEY & SHUR, *supra* note 21, at 3-5 (noting successes in protecting WITSEC participants and the prosecution of John Gotti).

38. See Amanda J. Schreiber, *Dealing With The Devil: An Examination of the FBI's Troubled Relationship With its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 321-37 (2001) (discussing problems that the FBI has experienced with its confidential informants).

39. CHANGES NEEDED IN WITSEC, *supra* note 15, at 17 (noting findings of the Witness Security Program Review Committee in 1978).

40. *Id.* (citing a review by the Marshals service of 1174 witnesses admitted between 1978 and 1982).

Congress, in 1983 the General Accounting Office (GAO) conducted a study of WITSEC operations and concluded that the Marshals Service had not effectively kept track of criminal recidivism among program participants.⁴¹ After admittance into WITSEC, program participants have later committed murders. In one instance, a WITSEC participant with a long criminal record known to authorities entered the program in order to testify against New York City organized crime figures.⁴² A U.S. Attorney moved the witness to Missouri, knowing that his criminal record would not be communicated to local police.⁴³ The witness later robbed a gas station and killed a police officer.⁴⁴ In another case, a convicted felon entered the WITSEC program and later killed his wife.⁴⁵ Local authorities detained and questioned the man as a suspect for the murder, but the U.S. marshal in charge of WITSEC participants in the area did not disclose his prior criminal record and the man was subsequently released.⁴⁶ Several months later he killed another person.⁴⁷

WITSEC participants have also engaged in various forms of fraud. In one instance, a participant with a long record of committing white-collar crimes allegedly defrauded almost one and a half million dollars from a single business.⁴⁸ The 1983 GAO study also concluded that participants' use of their new identities to evade various civil court orders constituted a major problem.⁴⁹ Relocation under new identities easily allows participants to avoid complying with child custody obligations and similar family court orders.⁵⁰ The GAO study noted one case where children were erroneously relocated with a parent who did not have legal custody rights to them.⁵¹ The other parent did not even know the children had entered the program until seven months later and was not reunited with them for

41. *Id.* ("The Department did not effectively track criminal arrests of protected witnesses at the time of our fieldwork. Although the Marshals Service had attempted to establish an 'arrest log,' the log was not very useful because it was not consistently prepared or maintained.").

42. *Bergmann v. United States*, 526 F. Supp. 443, 445-47 (E.D. Mo. 1981) (discussing the case of Benjamin Rosado, the WITSEC participant who later killed the police officer); Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J. CRIM. L. & CRIMINOLOGY 208, 227-30 (1985) (discussing *Bergmann*).

43. Levin, *supra* note 42, at 227-30 (discussing *Bergmann*).

44. *Id.*

45. See *Taitt v. United States*, 770 F.2d 890, 892-93 (10th Cir. 1985) (discussing the case of Marion Pruett, the WITSEC participant who murdered his wife); Levin, *supra* note 42, at 230-35 (discussing *Taitt*).

46. *Taitt*, 770 F.2d at 892 (recounting factual chronology of events).

47. *Id.*

48. *Jet Indus. v. United States*, 603 F. Supp 643, 644 (W.D. Tex. 1984) (discussing allegations that Frederix Peter DeVeau engaged in various fraudulent activities).

49. CHANGES NEEDED IN WITSEC, *supra* note 15, at 14 (discussing how "relocated witnesses often avoid civil obligations" after being relocated under new identities).

50. See Levin, *supra* note 42, at 234-41 (discussing cases in which WITSEC program participants violated child custody orders after being relocated under new identities).

51. CHANGES NEEDED IN WITSEC, *supra* note 15, at 21 (discussing a case where children were relocated with parents and their custody status was unclear).

several years.⁵² Entrance into the WITSEC program also allowed participants to avoid paying massive amounts of debt,⁵³ including fines and taxes owed to the federal government.⁵⁴

With the WITSEC program under scrutiny, Congress revised it in 1984⁵⁵ by passing the Witness Security Reform Act.⁵⁶ The 1984 amendments reflected congressional concern about WITSEC participants using the program to avoid legal obligations such as debts or alimony payments,⁵⁷ and it gave the Attorney General the right to terminate an individual's participation if he fails to disclose information regarding such obligations.⁵⁸ The Reform Act also requires that the Attorney General not allow an individual into the program if the value of his testimony is outweighed by the potential danger of relocating him into a community.⁵⁹ Many of these changes were outlined in 18 U.S.C. § 3521(d), which requires the creation of a "memorandum of agreement" between the future program participant and the Attorney General.⁶⁰ The memorandum outlines the responsibilities of the participant not to commit crimes or avoid outstanding or future legal obligations,⁶¹ and it also states the future participant's agreement to testify in court on behalf of the government,⁶² and the protection that will be

52. *Id.* (noting how the parent actually had to file suit in a federal court to have the children returned to him).

53. *See id.* at 25-26 (discussing the problem of WITSEC participants escaping from various debt obligations such as loans, fines, and taxes).

54. *See id.* at 26:

The types of third parties financially harmed by relocated witnesses were individuals, large companies, and the Government itself. For example, there were doctors seeking to recover money for services rendered, non-relocated parents seeking to collect child support, a woman seeking to recover a personal loan, a stock brokerage firm seeking to recover money from a former employee, and Government agencies seeking to recover unpaid criminal fines (Department of Justice) and taxes (Internal Revenue Service).

55. *See Levin, supra* note 42, at 240-47 (describing congressional attempts to change the program and the 1984 alterations).

56. 18 U.S.C. § 3521(a)(1) (2000).

57. 18 U.S.C. § 3521(d)(1)(D), (G) (2000) (requiring participants to "comply with legal obligations and civil judgments" and "make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation").

58. 18 U.S.C. § 3521(f) (2000) (granting the Attorney General recourse to revoke participation in the program if a participant provides false information regarding child custody and visitation).

59. 18 U.S.C. § 3521(c) (2000) ("The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony.").

60. 18 U.S.C. § 3521(d)(1) (2000) (stating that "the Attorney General shall enter into a memorandum of understanding" with the WITSEC participant).

61. 18 U.S.C. § 3521(d)(1)(B), (D) (2000) (setting forth obligations in which the participant agrees not to commit crimes or avoid legal obligations or civil judgments, at the risk of having protection removed).

62. 18 U.S.C. § 3521(d)(1)(A) (2000) (stating how the memorandum must outline the participant's responsibility to "testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings").

provided by the government to the participant.⁶³ However, it should be noted that the "memorandum of agreement" is not a contract in which the participant retains legally enforceable rights against the Attorney General.⁶⁴

Currently, WITSEC is still perceived as a relatively successful program. Marshals Service spokesmen have claimed that even with thousands of witnesses and family members entering the program since its inception, "[w]e've never lost a witness who adhered to the rules of the program."⁶⁵ There are anecdotal reports, however, that some of the problems that occurred prior to the passage of the Witness Security Reform Act in 1984 still happen.⁶⁶ Even so, the federal WITSEC program is viewed as a model for smaller versions of the program, such as a similar program recently piloted in the District of Columbia.⁶⁷ Florida, California, and Puerto Rico have also created their own witness protection programs.⁶⁸

III. INTERNATIONAL CRIMES AND FOREIGN WITNESSES

The number of foreign national witnesses in WITSEC has grown substantially since U.S. law enforcement agencies began targeting international law breakers on a global stage.⁶⁹ Legal regimes concerning extraterritorial enforcement of U.S. laws are as varied as the types of crimes committed,⁷⁰ whether it be trafficking in humans or the enforcement of intellectual property rights or securities laws. Organized groups participating in violent acts of political terrorism or in the

63. 18 U.S.C. § 3521(d)(1)(I) (2000) ("Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person."). It should be noted that the memorandums of agreement were used prior to the reform act. See CHANGES NEEDED IN WITSEC, *supra* note 15, at 13 (discussing the practice of using memorandums of understanding). However, it was the reform act that codified their use.

64. 18 U.S.C. § 3521(a)(3) (2000) ("The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter."). See *infra* Part V for further elaboration on this important point.

65. Carol Marbin Miller, *Exposed Witness*, BROWARD DAILY BUS. REV., Sept. 1, 1998, at A1.

66. See Moshe Z. Mirsky, *Collecting a Debt From a Person in the Witness Security Program*, 220 N.Y. L.J. 1, 32 (1998) (noting the author's recent experience, in 1998, of collecting a debt from a participant in the WITSEC program). Mirsky implies that the 1984 reforms do at least provide an organized protocol for collecting debts from WITSEC participants. *Id.* at 32; see also Miller, *supra* note 65, at A1 (noting a case of one individual in the WITSEC program, in 1998, whose true identity was revealed in public records). This episode was, according to a Marshals Service spokesperson, possibly the first time a WITSEC participant's true name was placed on the public record. *Id.*

67. See Sam Skolnik, *Witness Protection, D.C.-Style*, LEGAL TIMES (D.C.), Mar. 4, 1996, at 1 (describing the District of Columbia's program and noting that it is largely similar to the national one).

68. Miller, *supra* note 65, at A1.

69. See *Protection of Foreign Nationals*, *supra* note 35, at 69 (statement of Howard Safir, Assoc. Dir. for Operations of U.S. Marshals Service) (testifying to a ninety-two percent increase in foreign witnesses in a three-year period).

70. See Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 297-308 (1996) (discussing variations and inconsistencies in the application of principles of extraterritoriality in the enforcement of U.S. laws).

trafficking of narcotics or other illicit items have benefited from rapid changes in technology and cross-border flows of people and money.⁷¹ Internationally organized criminals have therefore increased their sophistication and abilities to extend operations outside of traditional home bases.⁷² Law enforcement agencies of the United States have been involved in a variety of cooperative and unilateral operations targeting international criminals,⁷³ even going so far as to depose leaders of nations in Panama⁷⁴ and Afghanistan⁷⁵ in the name of fighting international drug trafficking and terrorism. However, customary principles of international law, the most important being the principle of state sovereignty, curtail the activities of U.S. law enforcement agencies abroad.⁷⁶

Nation-states retain the jurisdiction to police activities conducted, or which have substantial effects, within their territorial boundaries.⁷⁷ The principle of sovereignty means that U.S. law enforcement agencies must generally limit their activities in foreign nations to "passive" operations such as surveillance and intelligence collecting.⁷⁸ However, U.S. law enforcement agencies increasingly work with other nations in bilateral operations governed by extradition treaties or Mutual Legal Assistance Agreements (MLAAs), through which the authorities of both nations cooperate to execute searches, locate persons, collect and share evidence, facilitate judicial proceedings, and generally share responsibilities for

71. See Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime: XVI International Congress of Penal Law: Report Submitted by the American National Section*, 44 WAYNE L. REV. 1401, 1402-05 (1998) (discussing the role of the United States in the contemporary, globalized, international crime arena).

72. See CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 53-54 (2000) (discussing recent concerns over the growth of international crime in an increasingly globalized world).

73. See Zagaris, *supra* note 71, at 1411-23 (outlining activities of U.S. law enforcement agencies in South and Central America, Europe, and Asia).

74. See Sherri L. Burr, *From Noriega to Pinochet: Is there an International Moral and Legal Right to Kidnap Individuals Accused of Gross Human Rights Violations?*, 29 DENV. J. INT'L L. & POL'Y 101, 107-08 (2001) (discussing the case of General Noriega, who was sentenced to prison in Florida).

75. See Ruth Wedgwood, *Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002) (discussing the events of September 11, 2001, as being either a crime or an act of war, and the subsequent U.S. military invasion of Afghanistan and prosecution of terrorists).

76. See Jonathon W. Leeds, *United States International Law Enforcement Cooperation: A Case Study in Thailand*, 7 DETROIT COLL. L.J. INT'L L. & PRAC. 1, 6 (1998) (discussing the sovereignty and effects doctrine).

77. See Zagaris, *supra* note 71, at 1405-07 (discussing the principle of territorial jurisdiction). Zagaris also notes four other theories of jurisdiction in international criminal activities: (1) the nationality principle, which asserts that a state retains jurisdiction over activities of a person based on his nationality, not location; (2) the protection principle, which asserts that a state retains jurisdiction over persons who threatens that state's well-being regardless of location or nationality; (3) the passive personality principle, which asserts that a state retains jurisdiction over crimes committed against persons from that state; and (4) the universality principle, which asserts that states retain jurisdiction over particularly egregious crimes, regardless of location or nationality of perpetrator or victim. *Id.*

78. See Leeds, *supra* note 76, at 6-7 (noting that the principle of sovereignty does not allow nations to assert their jurisdiction within other nations to aggressively investigate and apprehend criminals).

apprehending and prosecuting persons.⁷⁹ The United States first signed an MLAA with Switzerland in 1973,⁸⁰ and it has since joined other agreements with a variety of other nations.⁸¹ MLAAAs provide specific agreements on procedures for cooperation between authorities in two nations and have succeeded to varying degrees for U.S. law enforcement agencies.⁸²

However, despite formal cooperation between the United States and foreign authorities, significant problems can derail effective law enforcement operations with regard to identifying and protecting witnesses willing to testify against international criminal bodies. For instance, U.S. efforts to successfully prosecute international criminals with the help of foreign national witnesses may be hampered if those witnesses reside in nations with weak or corrupt law enforcement infrastructures. Success may prove entirely elusive in situations where the state in question is considered a "rogue nation" or "sponsor of terrorism." In such situations, successfully soliciting cooperative witnesses in the face of potential intimidation can be very difficult. In a number of nations, formal institutions are undermined by corruption, violence, or other factors that counteract efforts of law enforcement authorities.

An in-depth look at Colombia and the Commonwealth of Independent States (CIS) illustrates this point. Both Colombia and the CIS are plagued by various forms of criminal activity, crimes which ultimately have or may have serious implications for the United States, such as the international narcotics or weapons trades. At the same time, both Colombia and the CIS face enormous obstacles in fighting crime within their respective jurisdictions, and they each have difficulty maintaining an effective justice system. In such situations, it may be extremely important for the United States to be able to effectively protect and work with witnesses who reside in those jurisdictions, and potentially to bring them into the WITSEC program.

A. Colombia

The amount of political and criminal violence in modern Colombia has brought the nation "to the precipice of anarchy and disintegration."⁸³ The intentional and organized use of violence as a political instrument in Colombia can be traced to the

79. See *id.* at 6-9 (discussing the "Principle of Sovereignty," MLAAAs, and the Thai-U.S. joint law enforcement agreement).

80. See *id.* at 7-9 (outlining the brief history of MLAAAs and the first U.S. MLAA with Switzerland).

81. See *id.* at 8 (discussing obligations to provide assistance in the U.S.-Thai MLAA); Eugene Solomonov, *U.S.-Russian Mutual Legal Assistance Treaty: Is There a Way to Control Russian Organized Crime?*, 23 FORDHAM INT'L L.J. 165, 202-12 (1999) (discussing MLAAAs between the United States and Israel, Italy, Hungary, and Russia).

82. See Guymon, *supra* note 72, at 81-85 (discussing and noting experiences in several MLAAAs involving the United States and other nations).

83. Luz Estella Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 FORDHAM INT'L L.J. 1235, 1281 (2000).

nineteenth century.⁸⁴ Violence linked to political and class affiliations, or just plain banditry, erupted on a wide scale throughout the mid-1940s to early 1950s, resulting in the deaths of 100,000 to 200,000 people during that period.⁸⁵ Marxist, peasant-based organizations developed in the 1960s as major anti-government movements, the most well known being the FARC (the Revolutionary Armed Forces of Colombia), the ELN (Army of National Liberation), and M-19 (the April 19th Movement).⁸⁶ These groups evolved into significant military armies devoted to peasant land ownership and empowerment, yet they also developed pragmatic alliances with the country's burgeoning organized narcotics families in some rural areas.⁸⁷

Leftist forces retain tremendous influence in the country, with FARC currently in de facto control of over one quarter of Colombia.⁸⁸ This has led to the perception that some of these insurgent movements are "narco-guerrillas" because they maintain control over land where coca is harvested, but organized drug families also maintain strong ties with some right-wing forces and corrupt government and military officials.⁸⁹ In one notorious incident indicating drug and military ties, U.S. authorities seized a Colombian Air Force C-130 containing 1639 pounds of cocaine at a Florida airport.⁹⁰ The continuing violence between the military and Marxist armies has created a vacuum in which wealthy, organized drug families have flourished, unchecked by law enforcement.⁹¹

The lack of apparent state authority and rule of law⁹² has created an environment where criminals use violence to further illegal enterprises with little fear of

84. See FRANK SAFFORD & MARIO PALACIOS, *COLOMBIA: FRAGMENTED LAND, DIVIDED SOCIETY* 351-53 (2002) (describing conflicts over land, economic enterprises, and local power in rural Colombia).

85. See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA* 205-07 (1993) (discussing the era of *Violencia* and the violent, partisan conflict between Liberal and Conservative factions); SAFFORD & PALACIOS, *supra* note 84, at 345-51 (discussing the *Violencia* and noting higher estimates of up to 400,000 deaths).

86. See BUSHNELL, *supra* note 85, at 243-46 (outlining the development of armed Marxist organizations in Colombia in the 1960s and 1970s).

87. See SAFFORD & PALACIOS, *supra* note 84, at 354-57 (discussing the FARC's origins and its developing relationship with crime organizations).

88. See Nagle, *supra* note 83, at 1280 (noting that the FARC control "nearly forty percent of Colombia").

89. See JENNY PEARCE, *COLOMBIA: INSIDE THE LABYRINTH* 256 (1990) (noting that ties between the insurgents and drug families are pragmatic in nature, with the latter being more associated with right-wing forces).

90. See BERT RUIZ, *THE COLOMBIAN CIVIL WAR* 134-35 (2001) (describing the seizure of the plane on November 10, 1998, and subsequent embarrassment to the Colombian government).

91. See FRANCISCO E. THOUMI, *POLITICAL ECONOMY AND ILLEGAL DRUGS IN COLOMBIA* 172-73 (1995) (discussing how the weakened and "delegitimized" Colombian state, and political culture of violence, has driven the country's drug industry).

92. At one point, members of the leftist M-19 movement took over the Palace of Justice by force, and the military responded with an assault. Half of the Colombian Supreme Court was killed in the process. BUSHNELL, *supra* note 85, at 254. Earley and Shur assert that the takeover, which resulted in the deaths of eleven justices, was done after Pablo Escobar of the Medellin cartel paid M-19 one million dollars. EARLEY & SHUR, *supra* note 21, at 278. See also Nagle, *supra* note 83, at 1287 (arguing that the Marxist FARC may have maneuvered the outcome of presidential elections in Colombia). Nagle suggests that FARC threatened people, preventing them from voting for an opposition candidate in exchange for cooperation from President Pastrana. *Id.*

substantive retribution by authorities. Homicide rates in Colombia have tripled in the past few decades, to a rate of almost one in one thousand persons murdered per year.⁹³ Drug trafficking heads, such as Pablo Escobar of the Medellin cartel, have used their wealth⁹⁴ to influence law enforcement and judicial employees and organize high-level assassinations. Escobar is believed to have ordered the killing of presidential candidates and cabinet members, the kidnapping of family members of journalists and government officials, and the bombing of newspaper offices.⁹⁵ Over fifty judges, family members of judges, and several Ministers of Justice have been killed or targeted by drug families.⁹⁶ At one point, drug families announced that ten judges would be killed for every mafia member extradited to the United States.⁹⁷

Members of Colombian drug mafias have planned or conducted numerous assassinations in the United States. In 1986, assassins in Baton Rouge killed an ex-Green Beret drug smuggler for Pablo Escobar because he became a DEA/CIA informant.⁹⁸ Numerous witnesses have been murdered, and international drug traffickers have also been charged with conspiring to kill an assistant U.S. attorney and a government witness's children.⁹⁹ Witnesses against the drug cartels have received threats that they, their wives, and their entire families would be "wiped off the face of the Earth" if they cooperated with the U.S. government.¹⁰⁰ In one year, there were an estimated fifty-five drug-related hits by Colombian assassins in

93. See SAFFORD & PALACIOS, *supra* note 84, at 360:

From 1960 to end of the 1970s Colombia had very high rates of homicide, but in a range similar to those of other countries like Brazil, Mexico, Nicaragua, or Panama. But between 1980 and 1993 Colombia's rates of homicide tripled. Between 1960 and 1980, the rates varied in a range between 20 and 39 deaths per 100,000 people; however, by 1985 homicide rates had reached 57 per 100,000; in 1990 they were at 86, and in 1993 at 95.

94. See BUSHNELL, *supra* note 85, at 262 (citing a 1987 *Forbes* article calling Pablo Escobar the wealthiest man in Latin America).

95. See SAFFORD & PALACIOS, *supra* note 84, at 368 (describing alleged activities of Pablo Escobar); Luz Estella Nagle, *Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition?*, 61 U. PITT. L. REV. 881, 900-13 (2000) (outlining acts of political and narcotics-related violence in Colombia in the late 1980s and early 1990s, including killings of judges, journalists, politicians, witnesses in trials, peasants, and indiscriminate bombings of buildings).

96. See PEARCE, *supra* note 89, at 268-69 (describing rampant incidents of violence and lack of authority of the Colombian justice system).

97. *Id.* at 269.

98. See EARLEY & SHUR, *supra* note 21, at 275-81 (discussing events leading up to the assassination of Barry Seal).

99. See *Protection of Foreign Nationals*, *supra* note 35, at 2 (statement of Chairman Rep. Robert Wise of West Virginia) (discussing the seriousness of violence directed by Colombian drug cartels in the United States and noting how members of a drug smuggling ring were recently "charged with conspiring to kill an Assistant States Attorney, a government witness and the witness' children in retaliation of their roles in a successful prosecution against the traffickers").

100. See *id.* at 8 (statement of Max Mermelstein, protected witness) (discussing threats made against him and his wife if he cooperated with U.S. law enforcement against Colombian drug cartels).

Queens, New York.¹⁰¹ The power and reach of the drug cartels is well recognized by U.S. law enforcement agencies. At one point, U.S. authorities were so concerned about the safety of an ex-associate of Pablo Escobar's organization that he was kept at an army base in Florida and transported to court aboard an armed Blackhawk helicopter.¹⁰²

Because of the levels of violence and assassinations associated with Colombian narcotics traffickers, it is important that witnesses be protected adequately. Yet, since the ability of the Colombian justice system to protect witnesses is stunted by such violence, the important role of the United States' WITSEC program becomes clearer in the international campaign against narcotics traffickers.

B. Commonwealth of Independent States

Organized crime has flourished in the post-communist, ex-Soviet states due to vast amounts of governmental corruption and a variety of new private enterprise opportunities.¹⁰³ Although popularly dubbed the "Russian Mafia" by the Western press, the term is used generically to refer to organized crime in the Commonwealth of Independent States (CIS) and surrounding nations committed by a variety of organizations based on ethnicity or other forms of association.¹⁰⁴ The concept and use of the term "mafia" differs from that traditionally associated with the Italian organized crime tradition.¹⁰⁵ Whereas the Italian "mafia" refers to a family-based criminal organization with disciplined and controlled membership, Soviet-era "mafia" referred to corrupt individuals with power or connections either within or outside of the government bureaucracy who could influence the distribution of goods or services.¹⁰⁶ Much of post-Soviet organized crime is a continuation of activities related to the control and dissemination of goods, property, or

101. See Tom Morganthau et al., *Cocaine's 'Dirty 300': The Cartels in America*, NEWSWEEK, Nov. 13, 1989, at 36, 41 (discussing the activities of Colombian assassins in the United States).

102. See EARLEY & SHUR, *supra* note 21, at 282-83 (discussing protection of ex-cartel member Carlos Ledher Rivas, who once "bragged about how he was using cocaine like a 'Latin American atom bomb' to destroy the United States from within").

103. See *The Threat From Russian Organized Crime: Hearing Before the House Comm. on Int'l Relations*, 104th Cong. 5-6 (1996) [hereinafter *Threat from Russian Organized Crime*] (statement of CIA Director John Deutch) (outlining reasons for the growth of organized crime since the end of the Soviet era).

104. See GRENNAN ET AL., *GANGS: AN INTERNATIONAL APPROACH* 340-41 (2000) (describing organized crime in Russia, Uzbekistan, Georgia, Azerbaijan, Chechnya, and the Ukraine); FEDERICO VARESE, *THE RUSSIAN MAFIA: PRIVATE PROTECTION IN A NEW MARKET ECONOMY* 178-79 (2001) (discussing rivalries between Russian organized crime and Chechnyan and Cossack groups).

105. See JAMES O. FINCKENAUER & ELIN J. WARING, *RUSSIAN MAFIA IN AMERICA: IMMIGRATION, CULTURE, AND CRIME* 93-94 (1998) (noting popular use of the term "mafia" in the Soviet Union).

106. See *id.* at 94 ("The term *mafia* was well known in the Soviet Union from movies and books. It was associated with organized criminality and included all sorts of organized violations, or perceived violations, of the law. *Mafia* became the catchall characterization for persons who controlled various goods and services of all kinds."); *id.* at 96 ("As a result of this abuse and exploitation, the real organized crime figures in the U.S.S.R. were officials occupying key positions in the state bureaucracy.").

services, via corrupt bureaucrats.¹⁰⁷ Ethnic associations and lower-level street criminals in small gangs compose other forms of criminal organizations in the CIS.¹⁰⁸

Because of the amorphous definition of organized crime in post-Soviet Russia and other states in the CIS, numerical estimates of those involved in criminal enterprises vary widely depending on definitional assumptions, with one estimation citing up to one million individuals in the CIS involved in such activities.¹⁰⁹ However, there is agreement on the breadth and seriousness of criminal activities conducted by criminal bodies. Organized crime has benefited from the transition to free market economics and the lack of central oversight by moving into a variety of business sectors.¹¹⁰ This includes exerting influence in lucrative market opportunities, such as the metal export industry, and establishing ties to an estimated 35,000 Russian businesses and 400 banks.¹¹¹ Particularly ruthless gangs participate in the systematic killings of elderly people to obtain ownership of their property¹¹² and kidnapping children to remove their organs and sell them abroad.¹¹³ Crime in general has increased dramatically in the CIS, much of it possibly due to the activities of organized criminals.¹¹⁴ This includes a doubling or tripling of the homicide rate and a sharp increase in other violent crimes.¹¹⁵ Of particular concern to U.S. law enforcement agencies is organized crime involvement in international

107. See GRENNAN ET AL., *supra* note 104, at 343-44 (discussing formations of organized crime and criminal enterprises modeled after "dishonest ex-soviet [sic] officials who worked in various government positions under the old communist regime").

108. See *id.* at 344 (describing various associations of criminal organizations in the CIS).

109. See *Russian Organized Crime in the United States: Hearing Before the Permanent Subcomm. on Investigations*, 104th Cong. 24 (1996) [hereinafter *Russian Organized Crime in the U.S.*] (statement of Deputy Minister of the Russian Ministry of Interior Affairs Igor Nikolayevich Kozhevnikov) (noting that Russian authorities had identified 22,000 groups and 94,000 members in a three-year period); GRENNAN ET AL., *supra* note 104, at 340-41 (noting estimates of 200,000 to 1,000,000 members involved in organized crime).

110. See *Threat From Russian Organized Crime*, *supra* note 103, at 6 (noting that organized crime has moved into "energy, metallurgy, construction, banking, retail trade, and transportation").

111. See GRENNAN ET AL., *supra* note 104, at 346-47 (outlining reports on the activities and reach of criminal groups in business operations).

112. See FINCKENAUER & WARING, *supra* note 105, at 128 (describing the practice by which gangsters murder elderly in order to obtain control of their apartments).

113. See GRENNAN ET AL., *supra* note 104, at 347 (describing criminal activities in the human organ black market).

114. See *Russian Organized Crime in the U.S.*, *supra* note 109, at 22-23 (discussing increasing rates of armed robberies and drug-related crimes); GRENNAN ET AL., *supra* note 104, at 346 (citing increasing rates in murder, rape and robbery); STEPHEN HANDELMAN, *COMRADE CRIMINAL: RUSSIA'S NEW MAFIA* 3 (1995) (describing crime as "the first post-Soviet growth industry"); VARESE, *supra* note 104, at 19 tbl.1.1 (showing increases in crime in Russia from 1985 to 1998).

115. See GRENNAN ET AL., *supra* note 104, at 346 tbl.12-1 (showing an increase in reported murders in Russia from 9199 in 1987 to 29,200 in 1993); HANDELMAN, *supra* note 114, at 283 (noting that Russian officials claimed the on-duty death rate among Russian police in 1992 was eight times that of the United States); VARESE, *supra* note 104, at 21 tbl.1.2 (showing an increase in homicides in the Soviet Union/Russia from 9.8 per 100,000 in 1988 to 30.6 per 100,000 in 1995, in contrast with the United States' rate of 8.6 per 100,000 in 1995).

narcotics¹¹⁶ and weapons trafficking with the involvement of the Russian military.¹¹⁷ Illegal trafficking in materials used for making nuclear weapons has also been reported. By 1992, there were almost one hundred reported attempts to smuggle Russian uranium in Germany.¹¹⁸ German authorities captured one man with over ten ounces of plutonium after he arrived in Germany on a flight from Russia.¹¹⁹

Organized crime in Russia and the CIS has flourished due to high levels of corruption in the local justice systems.¹²⁰ Criminal groups are believed to be composed of many ex-KGB and ex-military members.¹²¹ Corruption among police forces is disturbingly high. In 1992, 2000 Russian police were charged with committing crimes, many involving collusion with organized crime groups.¹²² The more powerful organizations have the resources to influence politics, and they are alleged to have ties in the national legislature.¹²³ On local levels, individuals with criminal ties maintain political positions in municipalities or run as independent candidates.¹²⁴ Vladimir Zhirinovskiy's nationalist and populist Russian Liberal Democratic Party has actually made open calls inviting those with criminal ties to support or join his party.¹²⁵ The amount of corruption is so widespread, that public perception of the police and government institutions is profoundly negative. A 1995 survey found that seventy percent of those sampled did not expect fair treatment if they came to the police with grievances.¹²⁶ In a 1993-94 study, sixty-seven percent of those sampled did not expect fair treatment in daily affairs

116. See *Russian Organized Crime in the U.S.*, *supra* note 109, at 3, 23 (discussing Russian organized crime groups cooperating with Asian and Colombian organizations in moving heroin, cocaine and opium).

117. See *Threat From Russian Organized Crime*, *supra* note 103, at 6:

Russian organized crimes are extensively engaged in arms trafficking. Most of the activity apparently involves the Russian military, which is also plagued by corruption. Poor living conditions in the military, recurring wage arrears have been exploited by organized crime groups to lead to the theft and illegal sales of weapons and other military stocks, and this has become a routine practice in the Russian armed forces.

118. See HANDELMAN, *supra* note 114, at 225 (citing "ninety-five separate attempts to smuggle Russian uranium" reported by Germany by the end of 1992).

119. See *id.* (discussing the case of Justiniano Torres, who was apprehended with the plutonium).

120. See *Threat From Russian Organized Crime*, *supra* note 103, at 5 (statement of CIA Director John Deutch) (noting how corruption among officials and the poor legal infrastructure of the Russian government has contributed to the growth of organized crime).

121. See *id.* at 16 (noting presence of ex-security service members in organized crime).

122. See HANDELMAN, *supra* note 114, at 287 (noting corruption among Russian police and the involvement of senior law enforcement officials with gangs).

123. See FINCKENAUER & WARING, *supra* note 105, at 121 (discussing political corruption and organized crime involvement).

124. See VARESE, *supra* note 104, at 183 (noting examples of criminal ties to local politics).

125. See *id.* at 182-83 (discussing the Russian Liberal Democratic Party's stance towards the "shadow economy" and ties with known criminals).

126. See *id.* at 39 tbl.2.1 (citing a study on public perceptions of social institutions).

with Russian government officials.¹²⁷

The amount of official corruption within the CIS, and the increase of international narcotics and weapons trafficking emanating from the region, makes protecting witnesses to such activities a matter of concern for U.S. authorities. A particularly important concern is the possibility of black market trade and smuggling of material that could be used for the creation of weapons of mass destruction.¹²⁸ The United States' WITSEC program may play a key role in this aspect of the continuing campaign against international terrorism.

IV. PROBLEMS FACING FOREIGN NATIONAL PARTICIPANTS IN WITSEC

As international crimes and terrorism continue to proliferate, U.S. policies toward foreign national witnesses should be closely examined, particularly in regard to what protections can be provided to them in exchange for their cooperation. Obviously, it is foreign nationals who often will be the witnesses testifying in proceedings against international criminal organizations operating in foreign countries.¹²⁹ Without witnesses, successful prosecutions are difficult, if not impossible. This problem is highlighted when the foreign jurisdictions in question are plagued by violence or corruption, such as in Colombia or Russia. In such situations, intimidation by organized criminal groups can effectively silence potential witnesses, allowing such groups to continue their activities without fear of reprisal.¹³⁰

U.S. policy makers have already recognized witness intimidation as a serious domestic problem for several decades.¹³¹ Indeed, the WITSEC program was created specifically to address congressional concern about witness intimidation by domestic organized crime elements in the 1960s.¹³² However, the needs of foreign nationals placed within the WITSEC program involve more than just protection from intimidation. Immigration status is an important component of foreign nationals' livelihoods in the United States. Promises made to foreign national witnesses about immigration status, if unfulfilled, can have materially

127. See *id.* at 39-40 (citing a study on public perceptions of government officials).

128. See *The Greater Nuclear Danger*, Editorial, N.Y. TIMES, Sept. 27, 2002, at A30 (stating concerns about nuclear weapons material in ex-Soviet nations).

129. See 136 CONG. REC. E2666-02 (daily ed. Aug. 3, 1990) (statement of Rep. Alfred McCandless of California) ("Today, almost 80 percent of all WITSEC cases are related to narcotics prosecutions. These prosecutions often require the use of foreign national witnesses.").

130. See Tara C. Kowalski, *Alvarado v. Superior Court: A Death Sentence for Government Witnesses*, 35 U.C. DAVIS L. REV. 207, 224 (2001) (asserting that witness intimidation by organized crime is a powerful tool allowing such groups to survive).

131. See GRAHAM, *supra* note 19, at 9-10 (outlining attention to witness intimidation in the 1960s and 1970s). Following the creation of the WITSEC program, Congress later passed the Victim and Witness Protection Act of 1982, which criminalizes intimidation of witnesses. See generally 18 U.S.C. § 1512 (1994).

132. See CHANGES NEEDED IN WITSEC, *supra* note 15, at 5-6 (discussing congressional concern about organized criminals murdering and threatening witnesses and their negative impact on law enforcement).

adverse consequences. In 1990, the House Government Information, Justice, and Agriculture Subcommittee examined problems associated with the WITSEC program and foreign witnesses within the context of the "war on drugs."¹³³ The Senate Governmental Affairs Committee also examined the issue within the context of international terrorism in 1992.¹³⁴ These hearings revealed a number of problems involving foreign national witnesses in the program.

One witness who had testified in a narcotics-related case involving the Cuban government, Johnny Crump, was allegedly promised permanent resident status and entered the WITSEC program.¹³⁵ However, despite the promises made to him, the Immigration and Naturalization Service (INS) had no procedures to grant him or his family such status.¹³⁶ At that time, the INS would normally grant I-94 parole status to individuals like Mr. Crump, which had to be renewed annually, but did not grant permanent residency.¹³⁷ To obtain permanent residency, one would have to participate in a hearing before an immigration judge, requiring revelation of one's real name and background.¹³⁸ This would obviously place certain witnesses in jeopardy. Mr. Crump eventually left the WITSEC program voluntarily.¹³⁹

A different situation involved Adnan Awad, whom Senator Joseph Lieberman hailed as "one of the true heroes in the international battle against terrorism."¹⁴⁰ Mr. Awad was a Palestinian living in Iraq, and in 1982, a terrorist organization gave him a bomb to detonate in a Swiss hotel.¹⁴¹ Mr. Awad traveled to Switzerland and voluntarily informed police of the plan.¹⁴² In return for his cooperation, the Swiss government gave Awad both Swiss and Lebanese passports.¹⁴³ In 1984, U.S. law enforcement agents asked him to travel to the United States, enter the WITSEC program, and subsequently testify against Middle Eastern terror organizations, which he later did.¹⁴⁴ U.S. attorneys told Awad that he would be given

133. See *Protection of Foreign Nationals*, *supra* note 35, at 2 (statement of Rep. Wise) (recognizing that the war on drugs "requires a new set of insider witnesses," many of whom will be foreign nationals).

134. See *Terrorist Defectors*, *supra* note 36, at 1 (statement of Sen. Joseph Lieberman of Connecticut) (recognizing the need to review "efforts to attract terrorist defectors and to gain the cooperation of people with information about past and future terrorist acts").

135. See *Protection of Foreign Nationals*, *supra* note 35, at 23-24 (statement of Donald Bierman, defense attorney) (discussing the situation of Johnny Crump).

136. *Id.* at 24 (statement of Donald Bierman, defense attorney) (quoting testimony about Johnny Crump's situation that "[t]hey acknowledge and everyone knows, he was promised permanent residency but the Immigration and Naturalization Service says we can't find someplace in our regulations to give him permanent residency. Therefore, too bad").

137. See *id.* at 49 (statement of Howard Safir) (discussing INS procedures for foreign participants in WITSEC).

138. *Id.* at 24.

139. *Id.*

140. *Terrorist Defectors*, *supra* note 36, at 1 (statement of Sen. Lieberman).

141. See *id.* at 8-12 (testimony of Adnan Awad) (describing events leading up to Awad's entrance into the WITSEC program).

142. *Id.*

143. *Id.* at 12.

144. *Id.* at 13-16.

U.S. citizenship and a U.S. passport.¹⁴⁵ He was also asked to give his Swiss and Lebanese passports to the U.S. government, and he was allegedly promised that if he did not like WITSEC he could leave the program and those documents would be returned to him so he could return to Switzerland or Lebanon.¹⁴⁶ Mr. Awad left the program in 1986 after a number of unsatisfactory experiences with WITSEC, but his travel documents were not returned to him; consequently, he could not return to Switzerland or Lebanon, or even leave the U.S. at all.¹⁴⁷ Nor was Mr. Awad given U.S. citizenship and a passport until 2000, sixteen years after U.S. attorneys had promised.¹⁴⁸ He later sued the federal government for false imprisonment and breach of contract.¹⁴⁹

The lack of special INS procedures for foreign nationals in the WITSEC program was emphasized during the congressional hearings.¹⁵⁰ A principal problem was that foreign nationals with temporary documents could not apply for permanent residency without disclosing their real names and backgrounds.¹⁵¹ The foreign WITSEC participant was thus "exiled to an eternal limbo. . . . He cannot return home, because in most instances, he will be killed,"¹⁵² yet at the same time, he could not obtain permanent residency or citizenship and the benefits such status confer. This created hardships and frustration not only for the protected witness, but for his family members as well.¹⁵³ After hearing Adnan Awad's testimony, Senator Lieberman recognized that the deficiencies in regulatory procedures for foreign national witnesses could be costly in terms of gaining support from potential informants:

145. See *Awad v. United States*, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *3 (N.D. Miss. Apr. 27, 2001) (noting a promise by a U.S. attorney and Department of Justice attorney to give Awad U.S. citizenship).

146. *Terrorist Defectors*, *supra* note 36, at 15.

147. *Id.* at 20 (quoting Adnan Awad as saying: "I love this country. But if they don't want to give it to me, or give me any papers to move, I am a hostage. I can't go anywhere. I have lost 10 years. I can't go anywhere").

148. See *Awad*, 2001 U.S. Dist. LEXIS 8989, at *3 n.2 (noting that Awad received his citizenship and passport years after he was promised by the government, and mainly because of his own efforts and without government assistance).

149. *Id.* at *1 (documenting initiation of suit under the Federal Tort Claims Act).

150. See *Protection of Foreign Nationals*, *supra* note 35, at 25 (statement of Donald Bierman, defense attorney) (noting assertions that, "Immigration has to be able to provide [foreign WITSEC participants] with some special status. . . . That sometimes is most difficult. Again, as I say, that is a problem with interagency coordination, which is very difficult").

151. See *id.* at 24 (statement of Donald Bierman) (discussing case of Johnny Crump).

152. *Id.* at 49 (statement of Donald Bierman) (describing hardships endured by foreign nationals as a result of their lack of immigrant status).

153. See *id.* at 24 (statement of Donald Bierman). Bierman illustrates:

Another daughter [of a protected witness] planned to be a stewardess with an international airline, and can't get travel papers. It's very embarrassing if you are working for Pan American and you are supposed to fly between Miami and London and you return and Immigration says it is very nice but you can't come back into the country because they don't have immigration papers. This is a very, very severe problem that needs to be addressed.

Id.

[I]t seems to me that the ability to break through the normal immigration bureaucracy in order to give appropriate status in this country to a defector, an informant or their family members, is critical to people's lives. It seems like a small bureaucratic matter but, as you well know because this is what you devote yourself to, it may be just enough to entice a would-be terrorist to defect and come to this country as opposed to killing people.¹⁵⁴

At the same hearing, the FBI also emphasized the need to create immigration incentives for potential witnesses. As stated by one high-ranking FBI official:

[T]he FBI has found the U.S. Marshals Witness Security Program to be of extreme value to its investigative mission.

... However, it has been our experience that the safety and security of family members are as critical a consideration for a potential witness.

... The ability to issue a permanent resident alien card in a timely fashion would significantly enhance the FBI's counterterrorism mission. In some instances it would be a critical advantage to be able to offer permanent residency in the United States to aliens who provide extraordinary service to the United States in an investigation of a terrorist incident involving U.S. citizens. It would be most unfortunate and unacceptable to have key witnesses lost and as a result, critical evidence and information withheld, due simply to the time it takes to procure permanent resident alien status for these individuals.

....

To this end, we need to be responsive to the individual needs of critical witnesses. We must ensure that we are offering the best possible incentives to them since they are such a valuable asset to counterterrorism investigations.¹⁵⁵

These hearings highlighted congressional concern about the need to expedite immigration procedures for foreign national witnesses and their family members. As a matter of policy, such procedures would create incentives for individuals, who would otherwise be intimidated by violence in their foreign jurisdictions, to provide critical information about international crime or terrorism. Expediting the process would also keep participants within the WITSEC program. Because applying for permanent residency required disclosure of real names and backgrounds, a witness literally put his or her life at risk.¹⁵⁶ Finally, the inability to procure permanent resident status unfairly penalized not only the witness, but also his children and other family members.¹⁵⁷

154. *Terrorist Defectors*, *supra* note 36, at 33 (addressing the ability to bring in terrorist defectors under current laws).

155. *Id.* at 28-29 (statement of FBI Chief of Counter-Terrorism Neil J. Gallagher).

156. *See Protection of Foreign Nationals*, *supra* note 35, at 24 (statement of Donald Bierman, defense attorney) (noting how a hearing before an immigration judge requires revelation of full background, and both former and new names).

157. *See id.* (describing problems encountered by the family members of Johnny Crump due to lack of permanent resident status).

In response to some of these problems, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994,¹⁵⁸ amending the immigration code to grant special status to alien witnesses who cooperate with U.S. law enforcement agencies.¹⁵⁹ The 1994 Act gives the Attorney General, or the Attorney General working with the Department of State, the ability to grant aliens and family members S-visas that allow them eventually to apply for permanent resident status.¹⁶⁰ To acquire an S-visa, a foreign national must possess "critical reliable information concerning a criminal organization"¹⁶¹ or "terrorist organization,"¹⁶² and he must be willing to provide that information to federal government authorities. However, INS procedures related to acquiring permanent residency from S-visa status have recently been criticized as being too slow due to internal policies.¹⁶³ Because of such delays, it is asserted that "the government will lose potential witnesses . . . and Congress' intent [to expedite immigration procedures for important foreign witnesses] will not be implemented fully."¹⁶⁴

Undoubtedly, streamlining immigration procedures for foreign national witnesses would be a significant benefit for them. However, the experiences of individuals such as Mena, Crump, and Awad are not solely a function of procedural immigration issues. The larger problem is that the WITSEC program, as it currently stands, effectively allows government agents to make promises to witnesses and not fulfill them.

When government promises are not kept, the foreign national witness bears the brunt of hardships resulting from the subsequent circumstances that follow. For Adnan Awad, it was the U.S. attorneys who made the broken promise to grant him U.S. citizenship or return his foreign travel documents to him if he left WITSEC.¹⁶⁵ Because he did not receive citizenship until sixteen years after the original promise, and his other travel documents were not returned to him, Awad was unable to leave the country and visit relatives for several years.¹⁶⁶ Not surprisingly, Awad testified: "If you can't give me my own passport, the Swiss government—give me something to leave this country. I can't move—no papers, no name . . . I

158. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

159. See 8 U.S.C. § 1101(a)(15)(S) (2000) (new provisions).

160. See generally Comment, Christina M. Ceballos, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75 (1999) (explaining the enactment and effects of the S-visa and related procedures).

161. 8 U.S.C. § 1101(a)(15)(S)(i)(I) (2000).

162. 8 U.S.C. § 1101(a)(15)(S)(ii)(I) (2000).

163. See Ceballos, *supra* note 160, at 86-92 (criticizing the INS's three-year waiting period for adjustment of status applications).

164. *Id.* at 96.

165. See *Awad v. United States*, No. 1:93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *3 n.2 (N.D. Miss. Apr. 27, 2001) (discussing promises made to Awad by U.S. authorities).

166. See *Terrorist Defectors*, *supra* note 36, at 24 ("I miss my family. Some of them have died. Some of them have children. Some of them got married. I want to see them. I can't see them. They can't come here, and I can't go there.").

feel that I am a hostage in this country.”¹⁶⁷ Effectively, he was trapped in the United States and could not leave. His situation prompted Senator Lieberman to postulate that “we have let him down . . . [and] not provided him with what we should have.”¹⁶⁸ Even more disturbing is the case of John Harold Mena.¹⁶⁹ By offering a promise that family members will be protected in exchange for witness testimony, that witness is placing his confidence in United States authorities to protect his family members. By making such promises and not fulfilling them, innocent family members are literally left to fend for themselves in situations where they can be killed in retaliation.

It should be noted that the WITSEC program is designed primarily to keep witnesses safe and secure from criminal retaliation for their cooperation with authorities and is not an immigration or “social service” program.¹⁷⁰ However, inducing potential foreign witnesses into cooperating with U.S. law enforcement agencies and entering WITSEC with promises that are not fulfilled is unjust. The experiences of Mr. Mena and Mr. Awad highlight the need to create binding obligations for promises made by government officials to potential participants in the WITSEC program. The decision to enter the WITSEC program and cooperate with law enforcement agencies obviously has major implications on the livelihoods of the witnesses and their family members. The foreign national is confronted with serious choices about personal safety and survival, safety and survival of family members, identity changes, changes in citizenship, and radical changes in lifestyle. Promises made to potential WITSEC participants about protecting the lives of family members, or granting citizenship, serve as important inducements to individuals contemplating cooperation with U.S. law enforcement agencies and entering the WITSEC program. However, enforcing such promises is difficult.

V. THE BAR ON TORT AND BREACH OF CONTRACT CLAIMS

Several obstacles bar plaintiffs from obtaining the relief necessary to enforce promises made in the context of WITSEC participation. A fundamental obstacle is the longstanding doctrine of sovereign immunity: “the King can do no wrong.”¹⁷¹ Sovereign immunity has evolved into a bar on many forms of tort and breach of contract claims against the government. The continuing applicability of the

167. *Id.* at 18.

168. *Id.* at 29.

169. *See supra* notes 1-12 for discussion of John Harold Mena’s situation.

170. *See Protection of Foreign Nationals, supra* note 35, at 21 (statement of Richard Gregorie, former U.S. Attorney) (asserting that witnesses entering the WITSEC program are “not going to find a rose garden”).

171. *Cf. Alfred Hill, In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 488 (2001) (discussing frequent criticisms raised about the doctrine of sovereign immunity, such its ability to bar constitutional claims at times, and the inappropriateness of applying it to the American context when it originated as an English doctrine).

doctrine has been a source of analysis and debate among scholars for some time.¹⁷² This includes literature on the historical origins of sovereign immunity,¹⁷³ and much contention over the Eleventh Amendment and the issue of state sovereignty.¹⁷⁴

Drawing from the English sovereign immunity tradition, American participants in the federal Constitution's drafting process espoused the view that their new governments should not be exposed to a private party's claim.¹⁷⁵ Little opposition to this general principle existed during the nation's formative years,¹⁷⁶ and private citizens had little recourse to sue the state or federal governments in a court of law.¹⁷⁷ The government's immunity was taken as an unquestioned assumption by courts. As Justice Holmes noted:

Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.¹⁷⁸

The Federal Tort Claims Act of 1946 (FTCA) re-structured the doctrine of federal sovereign immunity by generally waiving immunity for the negligent and wrong-

172. See *id.* (summarizing criticisms of the doctrine of sovereign immunity).

173. See, e.g., Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002) (analyzing the historical context of the doctrine in the founding years of the United States and outlining general theories about its history and the views of the constitutional drafters).

174. See generally Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and Its Progeny*, 45 HOW. L.J. 77 (2001) (outlining debate on Eleventh Amendment cases); Matthew Mustokoff, *Sovereign Immunity and the Crisis of Constitutional Absolutism: Interpreting the Eleventh Amendment After Alden v. Maine*, 53 ME. L. REV. 81 (2001) (same); Mark Strasser, *Chisholm, the Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605 (2001) (same).

175. See Hill, *supra* note 171, at 493-94 (quoting statements by Alexander Hamilton in reference to sovereign immunity from suit).

176. See *id.* at 494 (discussing some opposition to the principle of sovereign immunity on the basis that it was a British concept with little application to a constitutional government, but noting that such opposition was not largely shared). But see James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 926-99 (1997) (arguing that the Americans did not "unthinkingly" adopt a British concept of blanket sovereign immunity). See generally *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (reaffirming the sovereign immunity of the states).

177. See Brian R. Levey, *Tortious Government Conduct and the Government Contract: Tort, Breach of Contract, or Both?*, 42 CATH. U. L. REV. 1, 6-8 (1992) (discussing the historical adoption of the principle of sovereign immunity and noting little recourse for private plaintiffs suing the government). But see *id.* at 7 (noting that Congress did grant relief in the form of private bills).

178. *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907) (holding that Hawaii had sovereign immunity in a foreclosure action).

ful acts¹⁷⁹ of the United States.¹⁸⁰ The FTCA officially codified the ability for private citizens to sue the government in areas to which it consents. Yet the FTCA also created a number of well-defined exemptions to liability for some functions, such as those related to the actions of the Tennessee Valley Authority¹⁸¹ or Panama Canal Company.¹⁸² However, acts or omissions performed as a “discretionary function” were comprehensively exempted from claims.¹⁸³ Commentators refer to this exception as “unclear and broad.”¹⁸⁴ The purpose of this exception was to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy”¹⁸⁵ and free the federal government “from liability that would seriously handicap efficient government operations.”¹⁸⁶

The Supreme Court first spoke to the boundaries of the discretionary function exception in *Dalehite v. United States*.¹⁸⁷ In *Dalehite*, the Court created a very broad space for the discretion exception: “Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.”¹⁸⁸ The Court later narrowed this “absolutist”¹⁸⁹ interpretation of the discretionary function exception in a very short and cryptic opinion in *Indian Towing Co. v. United States*.¹⁹⁰ In that case, a divided Court held that the

179. 28 U.S.C. § 1346(b)(1) (2000) (outlining jurisdiction for claims against federal government employees).

180. 28 U.S.C. § 2674 (2000) (stating that “the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances”).

181. 28 U.S.C. § 2680(l) (2000).

182. 28 U.S.C. § 2680(m) (2000).

183. 28 U.S.C. § 2680(a) (2000):

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

184. Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, 700-01 (1997) (observing that, in reference to the discretionary function exception, “[m]ost of the exceptions are fairly clear and narrow. The most important exception, however, is unclear and broad”).

185. *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (holding discretionary function exception to FTCA precluded tort actions based on Federal Aviation Administration’s alleged negligence in failing to check certain specific items in course of certifying certain aircraft for use in commercial aviation).

186. *United States v. Muniz*, 374 U.S. 150, 163 (1963) (holding that suits by federal prisoners against the United States under the FTCA will not be barred by laws of state immunity).

187. 346 U.S. 15 (1953) (holding FTCA requires a clear disclosure of relinquishment of sovereign immunity in order to give jurisdiction for tort action).

188. *Id.* at 36.

189. Levin, *supra* note 42, at 225.

190. 350 U.S. 61 (1955) (holding federal government liable for failure to uphold standard of due care).

federal government was liable for failing to uphold a standard of due care in its operation of a Coast Guard lighthouse.¹⁹¹

In *Berkovitz v. United States*,¹⁹² the Court developed a more specific test for determining the boundaries of the discretionary function exception. In *Berkovitz*, the plaintiff sued the National Institutes of Health and the Food and Drug Administration for approving the release of a polio vaccine that led to the paralysis of a two-month old infant.¹⁹³ The Court offered a two-part analysis for identifying discretion in government conduct. At the outset, a "court must first consider whether the action is a matter of choice for the acting employee."¹⁹⁴ An action that was proscribed or directed by statute or regulation with no room for choice was thus not a discretionary act because it involved no choice. Second, if there was choice or discretion on the part of a governmental actor, it must have been based on "considerations of public policy"¹⁹⁵ to be deemed a discretionary function. As a result, the discretionary function exception protects the government only "if the action challenged in the case involves the permissible exercise of policy judgment."¹⁹⁶ *Berkovitz* therefore made the applicability of the discretionary function exception turn on the question of whether or not the government act or omission involved "judgements of policy." The *Berkovitz* test still stands today as the majority rule.¹⁹⁷

The seminal court of appeals case applying the *Berkovitz* test to the witness protection context was *Piechowicz v. United States*.¹⁹⁸ In *Piechowicz*, Anthony Grandison was charged with violating federal drug and firearm laws.¹⁹⁹ David Piechowicz was the manager of a hotel where Grandison had been staying.²⁰⁰ He inadvertently discovered Grandison's bags, which contained narcotics.²⁰¹ Federal agents later subpoenaed David Piechowicz and his wife Cheryl Piechowicz to testify against Grandison.²⁰² Grandison's wife later approached and he told her, "If

191. *Id.* at 69.

192. *Berkovitz v. United States*, 486 U.S. 531 (1988) (holding that the government is protected by the discretionary function exception only if policy judgment is involved).

193. *Id.* at 533.

194. *Id.* at 536.

195. *Id.* at 537.

196. *Id.*

197. See generally *O'Toole v. United States*, 295 F.3d 1029 (9th Cir. 2002) (recognizing *Berkovitz* standard as the applicable discretionary function test); *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001) (same); *Audio Odyssey v. United States*, 255 F.3d 512 (8th Cir. 2001) (same); *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000) (same); *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997) (same); *Rich v. United States*, 119 F.3d 447 (6th Cir. 1997) (same); *Rothrock v. United States*, 62 F.3d 196 (7th Cir. 1995) (same); *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990) (same); *In re Joint E. & S. Dist. Asbestos Litigation*, 891 F.2d 31 (2d Cir. 1989) (same).

198. 885 F.2d 1207 (4th Cir. 1989).

199. *Piechowicz v. United States*, 685 F. Supp. 486, 488 (D. Md. 1988).

200. *Piechowicz*, 885 F.2d at 1210.

201. *Id.*

202. *Id.*

I were you I'd say I never saw him [Grandison] before in my life."²⁰³ Cheryl told the federal agents in charge of Grandison's prosecution about the threat, but no offer of protection was made.²⁰⁴ Several weeks later, David Piechowicz and another bystander were "gunned down gangland style"²⁰⁵ at their hotel by an assassin with a silenced machine gun.²⁰⁶ Cheryl Piechowicz and other relatives sued the federal government for failing to warn and failing to protect David and the other bystander, and the government subsequently asserted immunity under the discretionary function exception and moved for summary judgment in its favor.²⁰⁷

Relying on the two-part *Berkovitz* test, the Fourth Circuit first considered whether the decision by law enforcement agencies not to provide protection to the victims constituted an act of discretion.²⁰⁸ The court looked specifically to the U.S. Attorneys' Manual of the criminal division, and found that under those guidelines, U.S. Attorneys did have the option of extending protection to witnesses if a threatening element of danger existed, but there was no directive requiring them to do so.²⁰⁹ The court specifically emphasized language stating that "a witness may be considered for the Witness Security Program . . . where there is clear evidence that the life of the witness or a family member is in immediate jeopardy."²¹⁰ The court also noted that the procedures outlined in the manual did not create any substantive or procedural rights,²¹¹ such as any right of witnesses to receive protection upon demand.

The court also found that the second prong of the *Berkovitz* standard was met. Because the decision whether to offer protection to witnesses involves determinations of their importance to a government investigation or prosecution and of potential threats to their safety, the discretion implicates government policies regarding crime.²¹² Therefore, the plaintiffs' tort suit against the United States was

203. *Id.*

204. *Id.*

205. *Piechowicz v. United States*, 685 F. Supp. 486, 489 (D. Mass. 1988).

206. *Piechowicz v. United States*, 885 F.2d 1207, 1210 (4th Cir. 1989).

207. *Piechowicz*, 685 F. Supp. at 493-94.

208. See R. Jeffrey Harris, *Whither the Witness? The Federal Government's Special Duty of Protection in Criminal Proceedings After Piechowicz v. United States*, 76 CORNELL L. REV. 1285, 1307-10 (1991) (analyzing *Piechowicz* holding at circuit court level).

209. See *Piechowicz*, 885 F.2d at 1212-13 (discussing the importance of the U.S. Attorneys' Manual in determining if there was an element of choice as to whether protection should be provided to witnesses).

210. *Id.* at 1212-13. The language in the manual has since changed to: "A witness may be considered for acceptance into the Witness Security Program if they are an essential witness in a specific case . . . for which a witness may provide testimony that may subject the witness to retaliation by violence or threats of violence." U.S. ATTORNEYS' MANUAL 9-21.100. Under this section, a U.S. attorney also may provide protection for witnesses involved in a variety of other federal and state offenses, as well as civil and administrative proceedings. *Id.*

211. See *Piechowicz v. United States*, 885 F.2d 1207, 1213 (4th Cir. 1989) (noting further language in the manual).

212. See *id.* (discussing policy implications of federal agents' discretion to protect witnesses).

barred by the discretionary function exception of the FTCA.²¹³

Piechowicz and other circuit court cases illustrate a majority rule that the determination of whether or not to offer protection to witnesses is a matter of discretion on the part of federal agents and that the determination consequently falls within the discretionary function exception of the FTCA.²¹⁴ There is, however, a line of lower court cases which alludes to a common law duty imposed upon state entities to protect witnesses if knowledge exists or should exist that their safety is jeopardized.²¹⁵ These cases have provoked commentary criticizing the carte blanche immunity the United States enjoys in its handling of situations involving the safety of witnesses and arguing for greater degrees of accountability for law enforcement agencies responsible for protecting witnesses.²¹⁶ This line of reasoning implies the existence of a governmental duty to protect individuals whom it has placed in danger, such as when it subpoenas witnesses' testimony in a criminal trial.²¹⁷ Such a duty is heightened when the government knows or should know that a threat exists to those individuals.²¹⁸ However, *Piechowicz* and associated circuit court cases suggest that such breach of duty claims will not be entertained.²¹⁹

In addition to the FTCA's barring of tort claims against the United States, breach of contract actions against the federal government for not fulfilling promises made to WITSEC participants also are likely to fail. The Tucker Act of 1887 waived sovereign immunity for breach of contract claims against the government and created jurisdiction for breach of contract actions in the federal Court of Claims.²²⁰

213. The plaintiffs also sued the two agents individually under a deprivation of Fifth Amendment rights argument, but they lost on those claims as well. *See id.* at 1213-15.

214. *See generally* *Jet Indus. v. United States*, 777 F.2d 303 (5th Cir. 1985) (recognizing provision of protection for witnesses as matter of discretion); *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985) (same); *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982) (same).

215. *See generally* *Miller v. United States*, 561 F. Supp. 1129 (E.D. Pa. 1983) (suggesting common law duty of state entities and law enforcement entities to protect witnesses); *Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970) (same); *Schuster v. New York*, 154 N.E.2d 534 (N.Y. 1958) (same).

216. *See* William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 55 (1993) (arguing generally for a heightened focus on courts' ability to elucidate the meaning of discretionary functions); *Harris, supra* note 208, at 1292-1306 (arguing for a common law duty for the federal government to protect witnesses in particular circumstances). *Harris* offers a comprehensive review of case law in support of his argument. *Id.*

217. *See Harris, supra* note 208, at 1299 ("Principles of reciprocity dictate that both parties in a government-witness relationship assume equal but unique responsibilities. The witness's duty to testify honestly gives rise to a reciprocal governmental duty to protect the witness. This duty of protection when breached supports an actionable claim.").

218. *See id.* at 1302-04 (citing *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 340 (Cal. 1976), as support for a duty to protect or warn threatened witnesses).

219. *See supra* note 185 for cases supporting the discretionary function exception in witness protection situations.

220. Act of Mar. 3, ch. 359, 24 Stat. 505 (1887) ("[T]he Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon . . . any contract, express or implied, with the Government of the United States. . . .").

Tort actions which evolve out of alleged breaches of contract in regards to the WITSEC program will therefore not be adjudicated under FTCA tort jurisdiction²²¹ but will instead be heard under the breach of contract jurisdiction of the Court of Claims.²²²

For instance, Adnan Awad sued the United States on a variety of tort claims several years after leaving WITSEC.²²³ His tort claims resulted from promises that federal agents made to him (and failed to fulfill) regarding U.S. citizenship and the return of his Swiss and Lebanese passports. The district court held that both his false imprisonment and intentional infliction of emotional distress claims arose from the government's alleged breach of contract.²²⁴ Therefore, the district court moved Awad's case to the Court of Claims, ominously noting that "[i]n order to prevail on any of his claims, Awad must show an express or implied contract between himself and the government, and a breach of those contracts. Whether the government faces potential liability for its actions, therefore, depends upon the terms and conditions of the purported contracts."²²⁵

Awad appealed the decision to the United States Court of Appeals for the Federal Circuit.²²⁶ The court recognized that federal attorneys "told Mr. Awad that, in return for his testimony against Rashid [leader of the May 15 terror organization], he would receive U.S. citizenship and a U.S. passport."²²⁷ The court also recognized that Awad was presented with and signed a written memorandum of understanding that outlined the "obligations of both Mr. Awad and the Marshals Service."²²⁸ The memorandum stated:

The witness acknowledges that it is necessary to place in safekeeping with the Marshals Service all identification documents (driver's license, credit cards, etc.) that reveal his/her true identity for reasons of security. The Marshals Service agrees to retain these documents indefinitely, and will return the documents to the witness should he/she desire to revert to his/her true identity.²²⁹

The court also recognized that Awad only obtained a U.S. passport sixteen years after he was promised one, largely of his own efforts, and it noted that his Swiss

221. See Levey, *supra* note 177, at 21-22 (discussing jurisdiction over tort claims emanating from alleged breaches of contract).

222. See *Doe v. Civiletti*, 635 F.2d 88, 95 (2d Cir. 1980) (recognizing Court of Claims jurisdiction over Doe's action involving an alleged breach of a WITSEC memorandum of understanding).

223. *Awad v. United States*, No.1: 93CV376-D-D, 2001 U.S. Dist. LEXIS 8989 (N.D. Miss. Apr. 27, 2001).

224. See *id.* at *13, *16 (stating that each of these tort claims "turns solely on his alleged contractual relationship" or was "inextricably intertwined with the government's supposed breach of contracts").

225. *Id.* at *25.

226. *Awad v. United States*, 301 F.3d 1367 (Fed. Cir. 2002).

227. *Id.* at 1369.

228. *Id.*

229. *Id.*

and Lebanese passports were never returned.²³⁰ Apparently, the federal authorities could not return the passports because they had given them back to the Swiss government.²³¹ The court then affirmed the district court's ruling to move Awad's case to the United States Court of Federal Claims because there were no independent tort claims outside of his breach of contract argument.²³²

However, any breach of contract claim Awad may argue in the Court of Claims will likely fail, because promises made by government representatives related to the WITSEC program cannot currently be enforced as express or implied contracts. This paradox is illustrated in *Austin v. United States*.²³³ The plaintiff in *Austin* previously had worked as an undercover FBI informant and was moved into the WITSEC program following his grand jury testimony.²³⁴ The plaintiff alleged that the Marshals Service had promised to provide him with various expenses related to family visits and travel expenses.²³⁵ However, because the witness security statute gives the attorney general broad discretion to provide protection and related services to witnesses, but does not require him to exercise that discretion, "no contractual obligation, express or implied, can ever arise out of a promise made in connection with [WITSEC]."²³⁶ Nor does it matter if the promise is conveyed orally or in the form of a written memorandum of understanding.²³⁷ This conclusion finds explicit support in statutory language which states that "[t]he United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter."²³⁸ In addition, the United States Attorneys' Manual declares that:

Investigative agents and government trial attorneys are not authorized to make representations to witnesses regarding funding, protection, or other Witness Security Program services . . . Representations or agreements, including those contained in plea agreements, concerning the Program are not authorized and

230. *Id.* at 1370.

231. *See Terrorist Defectors*, *supra* note 36, at 15:

Mr. Awad: I said, "OK. Now I don't want it, I don't like it. I want to go back to Switzerland."
 Senator Cohen: That's 1986.
 Mr. Awad: Yes, sir. And they said, "We can't give you those papers because we sent them back to the Swiss Government." I said, "Where do you want me to go? I have no papers, no money, no income." They said, "This is the program system. If you don't do what the program says, we can't do anything about it."

232. *Awad v. United States*, 301 F.3d 1367, 1373-74 (Fed. Cir. 2002) (holding that Awad's false imprisonment, intentional infliction of emotional distress, and negligence claims arose out of the agreement he had with federal authorities).

233. 51 Fed. Cl. 718 (2002).

234. *See id.* at 719 (discussing Austin's relationship with the FBI as an undercover informant).

235. *See id.* (noting Austin's claim that he was promised child visitation rights, reimbursement for property damage, living expenses, and a monthly stipend when he entered WITSEC).

236. *Id.*

237. *Id.* at 720

238. 18 U.S.C. § 3521(a)(3) (2000).

will not be honored without specific authorization from [the Office of Enforcement Operations].²³⁹

The *Austin* conclusion that no contractual rights can be created out of the WITSEC program and no liability can exist for unfulfilled promises made by federal agents is well supported in other Court of Claims cases.²⁴⁰

The result in *Austin* and similar case law has not gone uncriticized. Courts have acknowledged in dicta the harsh results created when federal agents make promises to witnesses, who rely on such promises only to discover later that the promises are not binding. For example, after holding that a WITSEC participant had no breach of contract claim against the government in *Doe v. Civiletti*,²⁴¹ the court noted that:

Although we hold for the United States in this case, our decision should not be construed to approve the Government's actions here. We sympathize with [the plaintiff's] chagrin at the refusal of the Marshals Service to honor promises allegedly made by other United States officials, and we understand her confusion at divisions of authority within the Justice Department. But effective law enforcement requires that the Attorney General be allowed to exercise his broad discretion to administer the Witness Protection Program unimpeded by the unauthorized acts of his subordinates. Were the law otherwise, the lowliest bureaucrat could frustrate important criminal investigations.²⁴²

In *Austin* and similar cases, the courts' refusal to create binding rights from promises made by federal agents essentially flows from the long-held "actual authority" doctrine first recognized in the famous *Federal Crop Insurance Corp. v. Merrill* decision.²⁴³ In *Merrill*, the Supreme Court held that a promise made by a government representative was not binding because it was not properly authorized by regulations.²⁴⁴ Even though an individual may rely on statements made by a federal government employee, which later may be revealed as erroneous, that individual "takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."²⁴⁵ In this sense, the Court effectively held that a private individual has no right to expect a

239. U.S. ATTORNEYS' MANUAL 9-21.310.

240. See generally *Moon v. United States*, 227 Ct. Cl. 750 (1981) (unpublished opinion) (recognizing that no binding contractual obligations can arise out of WITSEC participation); *Propst v. United States*, 226 Ct. Cl. 535 (1980) (unpublished decision) (same); *Festa v. United States*, 225 Ct. Cl. 661 (1980) (unpublished decision) (same); *Doe v. United States*, 224 Ct. Cl. 632 (1980) (unpublished decision) (same).

241. *Doe v. Civiletti*, 635 F.2d 88 (2d Cir. 1980).

242. *Id.* at 97.

243. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

244. See *id.* at 382 (discussing plaintiff's reliance on statements made by a federal government agent which were not authorized by regulations).

245. *Id.* at 384.

government agency to fulfill an erroneous promise made by an employee.²⁴⁶ In dissent, Justice Jackson recognized the patent unfairness of such a result.²⁴⁷ But, as suggested by the court in *Doe*, affixing liability for the mistakes of government employees would hamper government operations with endless grievances and civil suits brought by private parties.

VI. THE NEED TO RECONSIDER PROTECTING THE INTERESTS OF FOREIGN NATIONAL WITNESSES

The civil immunity shielding federal agents from both tort and breach of contract claims leaves WITSEC participants with little if any recourse to obtain legal or equitable relief for unfulfilled government promises. Particularly in the context of foreign national participants in the WITSEC program, the lack of any enforceable agreement can have extremely harsh results. Essentially, federal agents are allowed to make promises to witnesses to induce them to cooperate with law enforcement agencies and enter the WITSEC program, but such promises cannot be enforced.²⁴⁸ As in Adnan Awad's case, a promise can be made to provide an individual with U.S. citizenship, but never be carried out, resulting in an inability to travel outside of the country and other hardships associated with non-citizenship status. Or, as illustrated by the case of John Harold Mena, a promise to protect family members abroad by transporting them to the United States may remain unfulfilled. As a consequence, family members are left vulnerable to forms of retaliation that could very well result in their deaths. The foreign national witness is placed in an extremely precarious and vulnerable position with minimal bargaining power. With little knowledge of the U.S. legal system, but with the realization that U.S. law enforcement agencies may be the only entities with the ability to offer protection, foreign national witnesses are left only with the promises of federal agents on which to rely. Yet the cloak of government immunity allows government representatives to make unauthorized promises to such individuals.

246. L. Harold Levinson, *The Legitimate Expectation That Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549, 565 (1998) (discussing the holding of *Merrill*).

247. See *Merrill*, 332 U.S. at 387-88 (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.").

248. I am not suggesting that federal agents would intentionally deceive potential witnesses with promises that they know cannot be fulfilled. Indeed, some testimony of participants in WITSEC suggest that generally U.S. Marshals and other federal agents are highly competent and honest brokers when interacting with participants. See *Protection of Foreign Nationals*, *supra* note 35, at 14 (testimony of Max Mermelstein) ("I definitely feel like the Marshals Service has bent over backward to take care of us in every way that they possibly can that they are allowed to under the law."); *Terrorist Defectors*, *supra* note 36, at 19 (testimony of Adnan Awad) ("Every person I talked to was nice; they tried to help me, every one. I met maybe 300 or 400 different kinds of American officials. All of them were nice people . . ."). However, the immunity granted to federal agents within the context of the WITSEC program leaves them free to mistakenly make promises to participants who rely on such representations and join the program.

Lawmakers should reconsider the conflicting policies facing foreign national witnesses in the WITSEC program. The courts have long adhered to the principle of sovereign immunity, and the Supreme Court probably will not strip Congress of its ability to define when and where the federal government can waive its immunity and consent to being sued. Certainly, strong policy arguments support the doctrine that the government should not be liable for the mistakes of its employees—namely, that such liability would open the litigation floodgates and impede the work of government.²⁴⁹ A particular concern for the government in the WITSEC context is possible exposure to liability based on the criminal actions of witnesses.²⁵⁰

However, there are important considerations that favor recognizing some form of legal obligation regarding agreements made between the federal government and foreign witnesses. On a general level, it could be argued that the government has a duty to protect and safeguard witnesses who cooperate with law enforcement agencies.²⁵¹ Lawmakers should also recognize that participation in the WITSEC program often places the witness's family members in predicaments beyond their control or responsibility. A foreign national witness and his family may be relocated to the United States following a promise of U.S. citizenship, but if citizenship is not subsequently provided, not only the witness, but also his entire family, may experience hardships associated with non-citizenship.²⁵² This problem is heightened when family members are threatened with retaliation or even death. Congress should prohibit law enforcement from breaking promises that family members of witnesses will be protected. This rule should apply especially if the government has knowledge that family members face physical threats or even death because they reside in hostile jurisdictions.²⁵³ Not only is such a situation unconscionable, but if repeated often enough it could undermine U.S. law enforcement efforts abroad and the integrity of U.S. law enforcement agencies in general.

249. See *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981) (following "actual authority" doctrine stated in *Merrill* by holding that an SSA field representative's erroneous statements did not estop the denial of benefits not applied for in writing, as required by regulation); *Phelps v. FEMA*, 785 F.2d 13, 17-18 (1st Cir. 1986) (following "actual authority" doctrine stated in *Merrill* by holding that FEMA can raise defense of insured's failure to comply with written proof of loss requirement even though agency misrepresentations caused the failure); *Cohen v. Federal Ins. Admin.*, 565 F. Supp. 823, 827 (E.D.N.Y. 1983) (following "actual authority" doctrine stated in *Merrill* by holding that agent broker was not authorized under regulations to accept proof of loss and that the plaintiff was responsible for knowledge of this lack of authority).

250. See generally *Taitt v. United States*, 770 F.2d 890 (10th Cir. 1985) (WITSEC participant murders wife); *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982) (refusing to find government liability in Federal Tort Claims Act case brought by parents of son murdered by WITSEC participant).

251. See *Harris*, *supra* note 208, at 1285 (arguing generally for the recognition of a special governmental duty to protect witnesses in criminal prosecutions).

252. See *Protection of Foreign Nationals*, *supra* note 35, at 23-24 (discussing the situation of Johnny Crump's family members and problems they have encountered because of an inability to obtain the permanent residency status originally promised them).

253. See *Harris*, *supra* note 208, at 1302-06 (arguing that government knowledge of dangers to witnesses creates heightened a duty to protect them).

This is not to say that federal agents of the WITSEC program and associated agencies should lose all forms of immunity, or that potential participants should have legal rights to obtain everything they request. However, lawmakers should consider recognizing certain baseline principles when it comes to the government's negotiations with foreign national witnesses. At a minimum, new procedures should be created and codified in relevant regulations or in the witness security statute itself requiring agents to determine the feasibility of any proposed actions before they are communicated to witnesses as promises. Failing to adhere to such regulations should effectively amount to a violation, thus weakening immunity for the agency involved.²⁵⁴ Such regulations should prohibit government representatives from promising individuals that family members will be protected when in fact those representatives have not inquired into the feasibility of providing such protection. If an agent offers such protection, the law should hold the government accountable for its promise and the damages resulting if it is broken. Such an exception to governmental immunity is necessary particularly in those instances where substantial physical harm or deaths result from the government's failure to fulfill promises of protection made to witnesses. This exception would not implicate liability for actions of witnesses where government discretion is attenuated by the intentional acts of witnesses towards third parties.

Such legally enforceable promises, if limited to agreements involving particularly important aspects of witnesses' lives and their family members' safety or well-being, should coincide with already existing common law principles and law enforcement policy. The government has long engaged in the practice of providing witnesses compensation for information or testimony in criminal affairs. In *Hoffa v. United States*,²⁵⁵ the Supreme Court rejected a constitutional argument by a defendant that the use of a paid informer's testimony violated the Fifth Amendment.²⁵⁶ Although recognizing the potential that government compensation to witnesses could unjustly influence testimony, the Court noted that the use of informants' testimony is proper if adequate measures are taken at trial.²⁵⁷

The courts have adhered to the *Hoffa* position with respect to the use of testimony by government informants. In *United States v. Levenite*,²⁵⁸ the Fourth Circuit upheld as constitutional the use of testimony by an informant who had signed a written agreement with the FBI to receive monthly payments for his cooperation and a potential bonus amount of \$100,000 if the operation proved

254. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1042 (5th ed. 1984) (discussing immunity and administrative procedural standards).

255. 385 U.S. 293 (1966).

256. See *id.* at 310-11 (rejecting as "without historical foundation" a general argument against government use of informants).

257. See *id.* at 311 (noting that the witness challenged by the plaintiff was rigorously cross-examined at trial).

258. *United States v. Levenite*, 277 F.3d 454 (4th Cir. 2002).

successful.²⁵⁹ The FBI paid the witness \$2,000 dollars per month for “his services” and an additional \$1,300 a month in expense money, bought him a motorcycle, and finally placed him in the WITSEC program, before giving him even more money.²⁶⁰ The court held that such an arrangement was proper and constitutionally permissible because the testimony was subject to cross-examination and scrutiny by the jury, there was no evidence that the FBI intended to suborn perjury, and that payments are a proper incentive to induce witness cooperation.²⁶¹

Federal courts also have held that arrangements in which the government promises witnesses various forms of compensation, immunity, or leniency do not violate any statutory provisions and generally further successful law enforcement operations. Government use of plea-bargaining to reduce sentences for co-defendants occurs regularly in criminal prosecutions; such long-practiced techniques are often considered “essential to the enforcement of law and the promotion of justice.”²⁶² Criminal defendants have used the federal anti-bribery statute to challenge witness testimony induced through plea-bargaining or similar practices. The statute prohibits “directly or indirectly, giv[ing], offer[ing], or promis[ing] anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court.”²⁶³ However, federal courts have consistently held that the anti-bribery statute is not violated by agreements providing sentencing leniency or financial compensation for government witnesses.²⁶⁴

Courts have reached this conclusion because, if the anti-bribery statute did cover the activities of the government, it would “deprive the sovereign of a recognized or established prerogative” and prohibit prosecutors’ use of plea-bargaining techniques.²⁶⁵ As stated by the Sixth Circuit in *United States v. Ware*,²⁶⁶ such a result is tenable given that the “prosecutorial prerogative to recommend leniency in exchange for testimony dates back to the common law in England and has been

259. *See id.* at 458-59 (describing payments made to an informant and an agreement giving the FBI the option of an additional \$100,000 bonus payment contingent on effective cooperation).

260. *See id.* (describing payments made to the informant).

261. *See id.* at 462-64 (holding that the arrangement was proper, and that adequate safeguards had been used at the trial to protect the defendant from improperly influenced witness testimony).

262. *United States v. Anty*, 203 F.3d 305, 308-09 (4th Cir. 2000).

263. 18 U.S.C. § 201(c)(2) (2000).

264. *See United States v. Levenite*, 277 F.3d 454, 463-64 (4th Cir. 2002) (holding that payments made to informant, including agreement to potentially pay a \$100,000 bonus contingent on effective cooperation, did not violate either the Constitution or the federal anti-bribery statute); *United States v. Blassingame*, 197 F.3d 271, 285 (7th Cir. 1999) (holding reduced sentence, granting of immunity, and provision of security and expenses to witness did not violate federal anti-bribery statute); *United States v. Albanese*, 195 F.3d 389, 394-95 (8th Cir. 1999) (holding promise of leniency in criminal matters and payments of over \$60,000 to witness did not violate federal anti-bribery statute).

265. *See Anty*, 203 F.3d at 308 (quoting *Nardone v. United States*, 302 U.S. 379, 383-84 (1937), in concluding that the federal anti-bribery statute was not meant to preclude the government from bargaining with witnesses to further law enforcement efforts).

266. 161 F.3d 414 (6th Cir. 1998).

recognized and approved by Congress, the courts, and the Sentencing Commission of the United States.”²⁶⁷ Particularly relevant to foreign national witnesses, federal courts have noted that government provision of immigration assistance to non-citizen witnesses may also be permissible.²⁶⁸ In *United States v. Feng*,²⁶⁹ the Ninth Circuit recently confronted a challenge by four defendants to the testimony of foreign national witnesses who had received letters from the government recommending grants of asylum.²⁷⁰ The government had reason to believe that the witnesses and family members, who were testifying against a human-smuggling ring, would face danger if they testified and were then deported back to China.²⁷¹ The court held that the government’s granting of immigration benefits to the witnesses was acceptable because it was no different than promises of sentencing leniency for criminal co-defendants, and the asylum recommendations did not therefore amount to a form of graft prohibited by the anti-bribery statute.²⁷²

As a matter of congressional intent, the anti-bribery statute does, in a superficial sense, seem to prohibit the giving of “anything of value” to a witness in exchange for testimony.²⁷³ However, as articulated by the Fourth Circuit in *United States v. Anty*,²⁷⁴ the law’s specific purpose was to target the provision of “anything of value” that would unjustly influence or encourage false testimony, and not to prohibit incentives that promote cooperation with the government.²⁷⁵ Besides the common law acceptance of plea bargaining and provision of compensation as discussed above, a number of federal statutes codify the government’s prerogative to provide material incentives to witnesses in criminal affairs. The WITSEC statute itself allows for the provision of housing and expenses to its participants.²⁷⁶ Congress amended the immigration code to provide special immigration status to non-citizen witnesses who cooperate with law enforcement authorities.²⁷⁷ The federal government can offer monetary awards for information concerning terrorist acts and espionage.²⁷⁸ The Secretary of State also may authorize financial rewards for those who provide information leading to the arrest of international

267. *Id.* at 419.

268. *See United States v. Murphy*, 193 F.3d 1, 9 (1st Cir. 1999) (noting that some forms of immigration assistance, such as forestalling deportation, may also be given to witnesses without violating the anti-bribery statute).

269. 277 F.3d 1151 (9th Cir. 2002).

270. *See id.* at 1153-54 (discussing immigration assistance given to witnesses in exchange for testimony).

271. *Id.*

272. *Id.*

273. *See* 18 U.S.C. § 201(c)(2) (2000) (prohibiting the provision of “anything of value” in exchange for testimony).

274. *United States v. Anty*, 203 F.3d 305, 311 (4th Cir. 2000).

275. *See id.* at 311 n.4 (“Even though the language of 18 U.S.C. § 201(c)(2) is remarkably broad, to make sense of it, the prohibition must be understood to address efforts to corrupt or influence testimony. The statute itself exempts any payment of ‘witness fees’ and expenses ‘provided by law.’”).

276. 18 U.S.C. § 3521(b)(1) (2000).

277. 8 U.S.C. § 1101(a)(15)(S) (2000).

278. 18 U.S.C. § 3071 (2000).

terrorists or narcotics traffickers.²⁷⁹ In addition, the FBI has openly encouraged the use of such reward incentives in international efforts to combat terrorism.²⁸⁰

As the federal courts and statutes have recognized both the appropriateness and importance of providing incentives, financial or otherwise, to witnesses who cooperate with law enforcement efforts, it is high time that Congress also give force to promises made to foreign witnesses and their families pertaining to their safety and well-being. If agreements to pay informants \$100,000 contingent on successful sting operations²⁸¹ or to recommend asylum for non-citizens facing threats upon deportation²⁸² are allowable, then the law should also recognize and enforce promises to protect family members from assassination.

Such changes would not only be equitable, but they would also facilitate law enforcement efforts by encouraging foreign witnesses to cooperate with U.S. law enforcement agencies. In an era when international organized crime and terrorism continues to proliferate, there is an ever-increasing need to create confidence in and respect for U.S. law enforcement agencies abroad. By failing to fulfill its promises to foreign nationals willing to cooperate with the United States, U.S. law enforcement agencies create mistrust and lack of confidence in their abilities and intentions. Whenever assassins murder one of John Harold Mena's family in Colombia, potential witnesses understand that retaliation against family members is still likely, and deadly. It effectively broadcasts a message that one should never cooperate with U.S. law enforcement agencies.

279. 22 U.S.C. § 2708(a), (b) (2000).

280. *See Terrorist Defectors*, *supra* note 36, at 28 (testimony of Neil Gallagher) ("The FBI has promoted and strongly supports the Reward for Terrorism Information Program initiated by the U.S. Department of State. Financial remuneration to witnesses has typically served to encourage witnesses to cooperate.").

281. *United States v. Levenite*, 277 F.3d 454, 457-58 (4th Cir. 2002) (describing government offers of compensation to an informant).

282. *United States v. Feng*, 277 F.3d 1151, 1153 (9th Cir. 2002) (noting how aliens were "offered immigration benefits in exchange for their testimony" against human traffickers).