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THE SCOPE OF THE FEDERAL WITNESS IMMUNITY ACT IN THE CONTEXT OF A CIVIL PROCEEDING INVOLVING PRIVATE PLAINTIFFS:
IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION, APPEAL OF CONBOY

The federal government has the authority to compel individuals to testify before courts, grand juries, and federal agencies. This power is limited, however, by a number of testimonial privileges. The most important of these is the fifth amendment privilege against compulsory self-incrimination. Under this constitutional guarantee, an individual cannot be

1. See Kastigar v. United States, 406 U.S. 441, 443-44 (1972). The Kastigar Court stated that the power to compel persons to testify is rooted in the common law principle that the public has a right to every person's evidence. Id. This power to compel testimony and the corresponding duty to testify is recognized in the sixth amendment requirements that those accused be confronted with witnesses against them and be provided with a compulsory process to obtain favorable witnesses. Id. See also Ullman v. United States, 350 U.S. 422, 439 n.15 (1956) (every person is dutybound to give testimony before duly constituted tribunal unless valid legal exemption is invoked); Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 YALE L.J. 1568 (1963) (effective regulation in an ordered society requires that the government have access to a continuous flow of detailed information; testimony of citizenry provides a primary source of this information) [hereinafter cited as Treading the Constitutional Tightrope]. See generally 8 J. Wigmore, Evidence § 2190 (J. McNaughton ed. 1961) [hereinafter cited as Wigmore].

2. See Wigmore supra note 1, § 2197 (testimonial privileges include communications made by persons in a confidential relationship such as those made between husband and wife, attorney and client, fellow jurors, and government and informer).

3. The fifth amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. See Kastigar v. United States, 406 U.S. 441, 444 (1972) (privilege against compulsory self-incrimination reflects fundamental values and marks important advance in development of liberty). Over the years, the greatest significance of this privilege has been in opposing prosecution for offenses such as heresy or political crimes. E. Griswold, The Fifth Amendment Today 7-9 (1955). It is in these areas that the privilege provided protection for freedom of thought and opinion. Id.

By the mid-eighteenth century the privilege against self-incrimination was generally applied in colonial America. Mykkelvedt, To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: The Supreme Court and Federal Grants of Witness Immunity, 30 MERCER L. REV. 633, 635 (1979) [hereinafter cited as Mykkelvedt]. State court opinions during the colonial period construed the right as encompassing a witness' right to refuse to answer questions which would embarrass, disgrace, or incriminate the witness. Id. The self-infamy interpretation, however, was discarded in the United States by the early nineteenth century. Id. at 636. For an in-depth historical discussion of the fifth amendment, see generally L. Levy, Origins of the Fifth Amendment: The Right Against Compulsory Self-Incrimination (1968).

In Counselman v. Hitchcock, 142 U.S. 547 (1892), Justice Blatchford stated that the fifth amendment privilege was limited to criminal matters, and that it represented a personal right
required to testify against himself or herself, irrespective of the
government's need for that testimony.\footnote{4}

The privilege against self-incrimination generally brings into conflict two
competing interests. First, the government's need to compel testimony from
unwilling sources, and second, an individual's fifth amendment guarantee
of protection from self-incrimination. Congress has sought to accommodate
both of these interests through the enactment of witness immunity statutes.\footnote{5}
Witness immunity statutes have generally afforded the government the
power to compel a witness to testify in spite of the self-incriminating nature
of that testimony.\footnote{6} In exchange for the compelled testimony, the govern-
ment is prohibited from obtaining penal sanctions against the witness for
disclosures revealed in the testimony.\footnote{7}

In 1970, Congress enacted the Federal Witness Immunity Act.\footnote{4} This act
which could not be used to protect any individual other than the person claiming the right. \textit{Id.}
at 563-64. Justice Blatchford added that the privilege was intended to protect a person from in-
voluntarily contributing to the development of a criminal case against himself. \textit{Id.} at 562. The
privilege against self-incrimination, however, is not dependent upon the nature of the pro-
ceeding where the testimony is sought. \textit{McCarthy v. Arndstein, 266 U.S.} 34, 40 (1924). The
right applies to civil as well as criminal proceedings whenever a witness' answers might subject
that person to criminal responsibility. \textit{Id.}

\textsection{6002-6003, 14 AM. CRIM. L. REV.} 275 (1976) (privilege against compulsory self-incrimination
cannot be violated no matter how great government's need for witness' testimony) (hereinafter
cited as \textit{Witness Immunity Problems}); \textit{Treading the Constitutional Tightrope, supra} note 1, at
1568 (privilege against self-incrimination curbs government's power to compel testimony in in-
terest of preserving individual liberties).

\textbf{5.} \textit{Witness Immunity Problems, supra} note 4, at 275. The demise of the self-infamy inter-
pretation, see \textit{supra} note 3, made it theoretically possible for the government to compel a
witness to testify by guaranteeing that the testimony would not contribute to a subsequent
criminal prosecution against the witness. \textit{See Mykkelvedt, supra} note 3, at 636. The theory
was that if the criminality was removed, the fifth amendment ceased to apply. \textit{Id.} (citing \textit{Hale
v. Henkel, 201 U.S.} 43, 67 (1906)). Based on this theory, Congress enacted the original federal
immunity statute. \textit{Id.} See \textit{infra} notes 13-14 and accompanying text. For a concise historical
discussion of immunity legislation, see \textit{Kastigar v. United States, 406 U.S.} 441, 445-46 n.13
(1972). See also, \textit{Wigmore, supra} note 1, \textsection{2281-2284}.

Immunity is usually offered as a tool for securing information about criminal activity com-
mitted by those acting in concert with the immunized witnesses. United States v. First W.
State Bank of Minot, 491 F.2d 780, 781 (8th Cir.), \textit{cert. denied sub nom.} Thompson v. United
States, 419 U.S. 825 (1974). Frequently, less important witnesses are granted immunity to
 testify against more culpable offenders who operate at the higher echelons of criminal activity.
\textit{Id.} at 782-83.

\textbf{6.} See \textit{Treading the Constitutional Tightrope, supra} note 1, at 1570 (immunity acts grant
a governmental agent the power to compel a witness to testify despite self-incriminating nature
of that testimony). \textit{Witness Immunity Problems, supra} note 4, at 276 (only way to compel
witness to testify about self-incriminating matters without violating fifth amendment privilege
is to purge testimony of self-incriminatory nature through grant of immunity).

\textbf{7.} \textit{Witness Immunity Problems, supra} note 4, at 276; \textit{Treading the Constitutional
Tightrope, supra} note 1, at 1570. See United States v. Tramunti, 500 F.2d 1334, 1342 (2d Cir.)
(theory of immunity statutes is that in return for surrendering fifth amendment right, witness is
promised that no prosecution based on inculpatory evidence revealed will ensue), \textit{cert. denied},

federal proceedings. It replaces over 50 federal immunity statutes. \textit{H.R. REP. NO.} 1549, 91st
prohibits prosecutorial authorities from using not only the immunized testimony itself, but also any evidence derived from the testimony in a subsequent criminal prosecution against the witness. While the direct use of testimony has been clearly prohibited by the statute, a question remains as to what constitutes derivative use of testimony. Recently, in In re Corrugated Container, Antitrust Litigation, Appeal of Conboy, the Court of Appeals for the Seventh Circuit confronted this issue in terms of whether answers to questions posed in a civil deposition were immunized when the questions asked had been taken from previously immunized grand jury testimony pursuant to a federal criminal investigation. Broadly interpreting the privilege against self-incrimination, the court in Conboy concluded that answers to verbatim questions obtained in prior immunized testimony were not protected by the original grant of immunity, and therefore, the deponent could invoke his fifth amendment privilege to avoid testifying at the civil deposition.

Close examination of the Conboy decision reveals that the court interpreted the scope of the Federal Witness Immunity Act in an unnecessarily narrow manner. This restrictive interpretation of the Act may ultimately lead to the superficial and, thus, inadequate protection of the privilege against self-incrimination. While the court raised significant constitutional and public policy considerations which should be weighed in interpreting the scope of an immunity grant, it is suggested that the court should have limited its holding to the facts presented and, thereafter, distinguished the situations in which these various considerations would have been more appropriately addressed.

HISTORICAL BACKGROUND

The initial federal immunity statute, enacted in 1857, was confined to testimony elicited before congressional proceedings. This statute authorized a grant of transactional immunity which prohibited prosecution of an immunized witness for any crimes disclosed during the compelled testimony.


9. See infra note 30.


11. Id. at 1153.

12. Id. at 1159.

13. Act of Jan. 24, 1857, ch. 19 § 2, 11 Stat. 156. That statute provided, in pertinent part: "[N]o person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify . . . ."

14. Transactional immunity, therefore, affords the witness full protection from prosecution on the crimes about which he testifies. This differs from use immunity which allows the
This method of immunity was often abused as large numbers of criminals who promised sensational disclosures before congressional committees received immunity for their past transgressions.\textsuperscript{15}

As a result of this abuse, Congress adopted a use immunity approach.\textsuperscript{16} Although use immunity statutes were also confined to congressional proceedings, they differed significantly from the transactional approach in that they prohibited the government from using a witness’ compelled testimony against that person in a subsequent criminal prosecution.\textsuperscript{17} Prosecution of the immunized witness was permitted, however, if the evidence introduced was obtained independently of the congressional testimony.\textsuperscript{18}

In 1892, a use immunity statute was struck down by the Supreme Court in \textit{Counselman v. Hitchcock}.\textsuperscript{19} The \textit{Counselman} Court found that the statute failed to protect a witness from indirect use of the compelled testimony to the same extent that the witness would be protected under the fifth amendment privilege because the statute allowed prosecutors to use the testimony as a source for acquiring other evidence.\textsuperscript{20} Consequently, \textit{Counselman} declared the statute unconstitutional on the ground that a witness could not be compelled to testify unless the grant of immunity was coextensive with the scope of the fifth amendment privilege.\textsuperscript{21}

In response to \textit{Counselman}, Congress enacted the Compulsory Testimony Act of 1893,\textsuperscript{22} which facilitated Interstate Commerce Act investigations. By

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\item Witness to be prosecuted for the crimes he discloses if independent evidence is presented. For a discussion of this distinction, see State v. Broady, 41 Ohio App. 2d 17, 21, 321 N.E.2d 890, 894 (1974). See also, Brownell, \textit{Immunity From Prosecution Versus Privilege Against Self-Incrimination}, 28 TUL. L. REV. 1, 2 (1953) (Act granted complete legislative pardon for any fact or act witness was required to testify about); \textit{Witness Immunity Problems}, supra note 4, at 276 (transactional immunity prohibited prosecution of immunized witness for any crime disclosed in compelled testimony). \textit{Cf. Treading the Constitutional Tightrope}, supra note 1 at 1571 (Act gave broad immunity from criminal charges to all criminals testifying before congressional committees).
\item See \textit{Mykkeltvedt}, supra note 3, at 636 (Act was overly generous and afforded motley assortment of persons opportunity for insulation from criminal prosecution); \textit{Treading the Constitutional Tightrope}, supra note 1, at 1572 (because of the Act’s broad scope, committee rooms of Congress were converted into confessionals where criminals washed away their sins).
\item The first use immunity statute was enacted in 1862. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333. The statute provided, in pertinent part: “[T]he testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceedings against such witness in any court of justice . . . .” \textit{Id}. Under the use immunity approach, a witness could be prosecuted for crimes revealed in that person’s testimony, but use of the testimony itself was barred. See 2 \textit{WORKING PAPERS}, supra note 8, at 1407; \textit{Witness Immunity Problems}, supra note 4, at 277. Other use immunity statutes were subsequently enacted to cover specific areas in which grants of immunity were deemed appropriate. See 2 \textit{WORKING PAPERS}, supra note 8, at 1444-45.
\item \textit{Witness Immunity Problems}, supra note 4, at 277.
\item \textit{Id}.
\item 2 \textit{WORKING PAPERS}, supra note 8, at 1407.
\item 142 U.S. 547 (1892).
\item \textit{Id}. at 585.
\item \textit{Id}.
\end{itemize}
limiting the grant of immunity in interstate commerce cases to only one statute, Congress departed from its usual practice of adopting general immunity acts.\textsuperscript{23} The Act of 1893 was broadly phrased to provide for transactional immunity and became the model for subsequent immunity legislation.\textsuperscript{24} In \textit{Brown v. Walker},\textsuperscript{25} the Supreme Court sustained the statute as being coextensive with the fifth amendment privilege against self-incrimination.\textsuperscript{26} Congress interpreted the \textit{Brown} decision as affirming the constitutionality of transactional immunity acts and passed various statutes to enforce other federal regulatory activities.\textsuperscript{27}

In 1970, however, upon recommendation of the National Commission on Reform of Federal Criminal Laws,\textsuperscript{28} Congress departed from this practice and enacted the present witness immunity scheme. Recognizing the need for uniformity and consistency in immunity legislation, Congress repealed all prior statutory grants of transactional immunity and enacted a comprehensive form of use immunity designed to facilitate investigation of all federal criminal violations.\textsuperscript{29}

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\textsuperscript{23} \textit{Treading the Constitutional Tightrope, supra note 1, at 1574.} This practice of limiting grants of immunity to enforcement of one statute was followed until the adoption of the Federal Witness Immunity Act of 1970. 18 U.S.C. §§ 6001-6005 (1976). \textit{See infra} note 29 and accompanying text.
\textsuperscript{24} 2 \textit{Working Papers, supra} note 8, at 1407.
\textsuperscript{25} 161 U.S. 591 (1896).
\textsuperscript{26} \textit{Id.} at 610.
\textsuperscript{27} \textit{Treading the Constitutional Tightrope, supra} note 1, at 1575. For a comprehensive list of these subsequent witness immunity acts, see \textit{Wigmore, supra} note 1, § 2281, at 496; 2 \textit{Working Papers, supra} note 8, at 1444-45. Immunity legislation applicable to congressional investigations was not passed again until 1954 when a bill was enacted which empowered congressional committees and the Department of Justice to compel testimony and grant immunity. 2 \textit{Working Papers, supra} note 8, at 1411; \textit{Treading the Constitutional Tightrope, supra} note 1, at 1577. The Immunity Act of 1954 only applied to national security investigations and, therefore, the bulk of congressional investigations remained unsupported by immunity provisions. Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745, \textit{repealed} by \textit{Organized Crime Control Act of 1970,} cit. II, § 228(a), 84 Stat. 930.
To prevent the possibility of immunity baths, express approval of the Attorney General was required before immunity could be granted. 2 \textit{Working Papers, supra} note 8, at 1408. In \textit{Ullman v. United States,} 350 U.S. 422 (1956), the Court sustained the Immunity Act of 1954 as sufficiently broad to replace the fifth amendment right against self-incrimination. \textit{Id.} at 429-31. Congress subsequently enacted a variety of immunity statutes in support of criminal law enforcement by the Department of Justice. For a list of these statutes, see 2 \textit{Working Papers, supra} note 8, at 1411.
\textsuperscript{28} Congress established the National Commission on Reform of Federal Criminal Laws in 1966 to "undertake a study of the Federal Criminal laws and to recommend improvements." \textit{Hearings on S. 30 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,} 91st Cong., 1st Sess. 280 (1969). The Commission consisted of 12 members: three appointed by the President, three Federal judges appointed by the Chief Justice, three Senators appointed by the President of the Senate, and three members of the House of Representatives appointed by the Speaker of the House. \textit{Id.}
\textsuperscript{29} This new type of immunity is called use-derivative-use immunity because it prohibits the government from using the testimony itself, or any investigatorial leads from the testimony, to develop a criminal case against the witness. \textit{See Mykkelvedt, supra} note 3, at 633. In drafting the new legislation, Congress recognized that prior federal immunity legislation had developed haphazardly through a series of sporadic responses in support of specific
The Federal Witness Immunity Act focuses on immunizing the testimony rather than immunizing the witness and overcomes the objections raised in Counselman by prohibiting both direct and derivative use of compelled testimony.

The constitutionality of the Federal Witness Immunity Act was sustained in Kastigar v. United States. The Kastigar Court determined that direct

statutory programs. 2 WORKING PAPERS, supra note 8, at 1411. Therefore, when it enacted the Witness Immunity Act of 1970, 18 U.S.C. §§ 6001-6005 (1976), Congress sought to accommodate two considerations to ensure uniformity. First, Congress sought to restrict all prospective grants of immunity to use-derivative-use immunity. See Federal Immunity of Witness Act: Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary, House of Representatives, 91st Cong., 1st Sess. 59-60 (1969) (statement of Prof. Robert G. Dixon, Jr., National Law Center of George Washington University, and Consultant to the National Commission on Reform of the Federal Criminal Laws). In addition, the Act was intended to require the witness to assert the privilege against self-incrimination at all times before immunity would be granted. Witness Immunity Problems, supra note 4, at 302. The new statute was tailored to prevent undesirable automatic grants of immunity that had existed under some previous federal statutes. Id.

Section 6002 of the Federal Witness Immunity Act provides, in pertinent part: "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1976).

Section 6002 authorizes the basic grant of immunity. This provision governs proceedings before or ancillary to grand juries, courts, United States agencies, either House of Congress, joint committees, committees, or subcommittees. See H.R. REP. No. 1549, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007, 4017. The section provides that a witness must claim his privilege against self-incrimination before immunity will be granted. Refusal to testify after a grant of immunity has been provided can result in contempt proceedings. Once the immunity is granted, no testimony or other information obtained from a witness can be used against him or her in any criminal proceeding. Id.

Section 6003 of the Act provides, in pertinent part:

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.


Section 6003 also provides for the procedure to be followed in court and grand jury proceedings. H.R. REP. NO. 1549, 91st Cong., 2d Sess., reprinted in 2 U.S. CODE CONG. & AD. NEWS 4007, 4018 (1970). A United States Attorney may seek a grant of immunity with the approval of the Attorney General, Deputy Attorney General, or an Assistant Attorney General designated by the Attorney General. The authority seeking the grant must be satisfied that the public interest necessitates the testimony. Id.

31. Witness Immunity Problems, supra note 4, at 279. The Federal Witness Immunity Act differs from the prior transactional immunity statutes because it does not create a defense to a specific criminal charge. In re Kilgo, 484 F.2d 1215, 1220 (4th Cir. 1973). Instead, the Act provides a ground for suppressing direct or indirect use of compelled evidence, but permits the prosecution to go forward on independent evidence. Id.

32. 406 U.S. 441 (1972). See also Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972). In Zicarelli, a companion case to Kastigar, a New Jersey statute which
and derivative use immunity was coextensive with the scope of the privilege against self-incrimination and that transactional immunity had actually provided more protection than the fifth amendment required. The Supreme Court emphasized that under the Federal Witness Immunity Act the government had the burden of proving, in a subsequent criminal proceeding, that evidence used against a former witness was obtained from a source independent of prior immunized testimony. Since the Kastigar decision, courts have discussed but not formulated a consistent definition of the derivative use and independent source concepts. The issue of delineating

33. 406 U.S. at 462. The Supreme Court's decisions in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), and Malloy v. Hogan, 378 U.S. 1 (1964), provided the first indication that use-derivative-use immunity would be constitutionally sufficient. In Murphy, the defendants had been granted immunity from prosecution under New Jersey and New York law. 378 U.S. at 53. The defendants, however, refused to answer questions on the ground that their answers could incriminate them under federal law. Id. at 53-54. The Court stated that the federal government was prohibited from making use of the compelled "testimony and its fruits." Id. at 79. Malloy made the fifth amendment privilege against self-incrimination applicable to the states through the due process clause of the fourteenth amendment. 378 U.S. at 8. See generally Mykkeltvedt, supra note 3 (discussing the adequacy of derivative-use immunity grants in supplanting the guarantee against self-incrimination).

Additionally, the Kastigar Court stressed that direct and derivative-use immunity prohibits prosecutorial use of compelled testimony in any respect. 406 U.S. at 453. The Federal Witness Immunity Act's proscription against the use of compelled testimony bars use of the testimony as an investigatory lead. In addition, use of any evidence obtained by focusing investigation on a witness which results from the compelled disclosures is a derivative use of testimony. Id. at 460. Thus any knowledge or sources of information which are obtained from the compelled testimony is derived from that testimony. Id. at 454. See also United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973) (use of testimony could include assistance in focusing investigation, deciding to prosecute, refusing to plea-bargain, interpreting evidence, planning cross-examination, and planning trial strategy).

34. 406 U.S. at 453-55.

35. Id. The Kastigar Court stated that the burden of proof was not limited to negating the taint. Instead, the prosecution had an affirmative duty to prove that any evidence it intended to use was derived from a legitimate source that was wholly independent from the compelled testimony. Id. at 460. See United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977) (only by affirmatively proving that evidence comes from sources independent of immunized testimony can prosecution assure that witness is in the same position he or she would have enjoyed had self-incrimination privilege not been displaced by use immunity). Grants of statutory witness immunity under the Federal Witness Immunity Act are implemented by the United States Attorney for the district where the proceeding is held. 18 U.S.C. § 6003(a) (1976).

36. See United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977) (government did not satisfy burden of showing evidence was derived from sources independent of immunized grand jury testimony by merely denying federal officials had seen or used such immunized testimony); United States v. Kurzer, 534 F.2d 517, 517 (2d Cir. 1976) (witness' testimony could be derived, directly or indirectly, from defendant's immunized testimony if defendant's giving of information contributed to witness' motivation to testify); Patrick v. United States, 524 F.2d 1109, 1120 (7th Cir. 1975) (because testimony revealed in later tax proceeding could only be elicited when grand jury testimony served as a basis for the assessment, such later testimony would be indirectly derived from the original immunity grant); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973) (even though FBI reports prior to commencement of grand jury pro-
the extent of derivative use and the scope of the independent source concept recently surfaced in the case of *In re Corrugated Container Antitrust Litigation, Appeal of Conboy.*

### THE CONBOY DECISION

#### Factual Background and Holding

John Conboy was an immunized grand jury witness in a criminal investigation that led to the indictment of fourteen companies and twenty-six individuals for participation in a nationwide conspiracy to fix prices in the corrugated container industry. Following the termination of the criminal trial, several civil actions were brought against the major corrugated container manufacturers involved, including Conboy’s former employer, Weyerhauser Company. In connection with these civil actions, Conboy and other previously immunized grand jury witnesses were subpoenaed for deposition testimony and production of documents. At one such deposition, proceedings may have afforded proof of an independent source, such reports fail to satisfy the government’s burden of proving that the United States Attorney, who read defendant’s immunized grand jury testimony prior to indictments, did not use testimony in some significant way short of introducing tainted evidence; *In re Folding Carton Antitrust Litigation,* 465 F. Supp. 618, 628 (N.D. Ill.) (even assuming a release of prior immunized testimony was ordered and plaintiffs were confined to asking questions actually asked under the immunity grant, court could not prevent deponent from testifying at greater length and detail about incriminating transactions revealed in prior immunized testimony, and thus, prior authorized immunity would be erroneously broadened), rev’d on other grounds sub nom. *Appeal of Brown,* 609 F.2d 867 (7th Cir. 1979); United States v. Thanasouras, 368 F. Supp. 534, 536-37 (N.D. Ill. 1973) (government did not violate defendant’s grant of use immunity where quality and quantity of information contained in government’s indictment far exceeded quality of defendant’s answers). See also infra notes 75-100 and accompanying text.


38. 661 F.2d at 1147. Conboy first submitted to an interview by Justice Department attorneys relying on a promise of immunity from the Justice Department. The attorney extensively questioned him on his knowledge and participation in the conspiracy. Conboy was subsequently given a formal grant of use immunity and testified before the grand jury on the same subject matter. *Id.*

39. *Id.* Most of the cases were consolidated as a class action in *In re Corrugated Container Antitrust Litigation,* MDL 310 (S.D. Tex. May 20, 1981). 661 F.2d at 1147. Eighteen opt-out cases, however, remained pending before the district court. *Id.*

40. 661 F.2d at 1147. The civil parties had received transcripts of the immunized Department of Justice and grand jury testimony. *Id.* at 1147 n.1. *In re Corrugated Container Antitrust Litigation,* Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980), cert. denied sub nom. Adams Extract Co. v. Franey, 449 U.S. 1102 (1981), arose out of the same antitrust litigation as *Conboy.* The Franey court noted that the district court had ordered the government to disclose transcripts of several grand jury witnesses to the plaintiff class in February, 1980. The propriety of that order was on appeal in a separate proceeding. *Id.* at 1089 n.2. The *Conboy* court did not address this issue because Conboy did not raise it on appeal. 661 F.2d at 1147 n.1. Transcripts of Conboy’s immunized testimony from the Justice Department interview and the grand jury proceeding were produced for plaintiffs and defendants pursuant to an order of Judge Singleton, dated January 25, 1980, based on a showing of “compelling and particularized
tion, Conboy was asked to confirm that he had previously testified before the grand jury, to identify the transcripts from that testimony, and to state whether his answers before the grand jury had been true. Conboy asserted his fifth amendment privilege against self-incrimination and refused to answer these questions and any other questions relating to his prior immunized testimony. The federal district judge, who was presiding over the civil action pursuant to a special jurisdictional statute, ordered Conboy to answer all questions that had been asked in the grand jury proceeding. Conboy persisted in his refusal to answer by asserting his fifth amendment privilege and, as a result, the judge held him in civil contempt.

Conboy appealed to the Court of Appeals for the Seventh Circuit, but a majority of the panel affirmed the contempt order. The court concluded that because the deposition questions were taken verbatim or closely tracked the immunized testimony, the deposition answers were derived from the prior testimony and, thus, were unavailable for use in a subsequent criminal case against him. The majority reasoned that because these statements could not subsequently be used against Conboy, he could not invoke his fifth amendment privilege against self-incrimination.

On a rehearing en banc, however, the Seventh Circuit found that the use immunity statute afforded no protection for compelling Conboy's civil deposition because the deposition testimony constituted a new and independent source of evidence that could be used against him in a subsequent criminal need.

41. 661 F.2d at 1147. Conboy first testified about the dates and general nature of his employment with Weyerhauser Company. Plaintiff's Petition for a Writ of Certiorari at 5, In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145 (7th Cir. 1981).

42. 661 F.2d at 1147.

43. See 28 U.S.C. § 1407(b) (1976). Section (b) of this statute provides in pertinent part that judges to whom pretrial proceedings are assigned, "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions . . . ." Id.

44. 661 F.2d at 1148.

45. Id. Judge Singleton fined Conboy $5,000 and imposed a six-month term of imprisonment, but stayed execution of the contempt order pending appeal. Brief for Respondent in Opposition to Petition for Certiorari at 5, In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145 (7th Cir. 1981).

46. In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 655 F.2d 748, 751 (7th Cir. 1981). Conboy appealed pursuant to the Recalcitrant Witness Statute, 28 U.S.C. § 1826 (1976), which applies to any proceeding before or ancillary to a court or grand jury where a witness has refused to testify or produce other requested information. The statute provides: "Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." Id.

47. 655 F.2d at 751.
As a result, the court permitted Conboy to assert his privilege against self-incrimination and the contempt charge was reversed.

The Court’s Rationale

The Conboy court initially addressed the issue of whether Conboy would face a risk of prosecution if he was compelled to answer the questions at the deposition.\(^\text{49}\) The court stressed that the fifth amendment is basic to the country’s adversary judicial system and must be broadly construed.\(^\text{50}\) Any doubt as to the likelihood of prosecution must, therefore, be resolved in favor of a witness asserting the privilege in order to avoid a violation of the privilege against self-incrimination.\(^\text{51}\)

Although the district court had determined that Conboy could not face federal criminal charges for his activities because the antitrust statute of limitations had expired,\(^\text{52}\) the appeals court found this conclusion to be erroneous.\(^\text{53}\) The appellate court stated that even though the federal antitrust statute of limitations had run, the federal statute of limitations for conspiracy did not begin to run until a defendant committed the last act in furtherance of the conspiracy.\(^\text{54}\) Consequently, due to his knowledge of alleged price fixing in the corrugated container industry, the court concluded that Conboy would harbor a reasonable fear of prosecution for federal antitrust conspiracy until 1983.\(^\text{55}\)

In addition to the possibility of federal prosecution, the majority also determined that Conboy might be subject to charges in the state of Ohio

48. 661 F.2d at 1153.
49. Id. at 1159.
50. Id. at 1149. The Conboy court stated that a preliminary consideration was whether answers to the questions in issue would have a tendency to reveal that Conboy was engaged in criminal activity. Id. at 1149 n.7.
51. Id. at 1149-50.
52. Id. at 1151.
53. Id.
54. Id.
55. Id. See also United States v. Consolidated Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978) (once conspiracy is established, even single act may be sufficient to draw defendant within ambit of conspiracy where act infers intent to participate in unlawful activity).
56. 661 F.2d at 1147, 1152. In addition, the majority stated that the Justice Department’s assurances that it had no intention of prosecuting a previously immunized witness did not eviscerate the fear of prosecution Conboy might harbor for federal antitrust conspiracy. Id. See also United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958) (no justification exists for limiting historic protections of fifth amendment by creating exception to general rule which would nullify the privilege when it appears government would not undertake to prosecute). The Conboy court explained that the validity of the privilege could not rest on a district court’s prediction of the prosecution because the decisions of prosecutorial authorities were discretionary and were not therefore an accurate index of the risk of criminal prosecution. 661 F.2d at 1151. The central standard for determining whether the privilege applies is whether the claimant is confronted with substantial and real, as opposed to merely trifling or imaginary, hazards of incrimination. See Marchetti v. United States, 390 U.S. 39, 53 (1968); Rogers v. United States, 340 U.S. 367, 374 (1951); Brown v. Walker, 161 U.S. 591, 600 (1896).
where antitrust actions were not barred by a statute of limitations. Because the fifth amendment privilege is applicable as long as there is any possibility of prosecution, the court reasoned that Conboy was entitled to avoid answering the incriminating questions, regardless of the likelihood of a subsequent prosecution.

After analyzing the risk of prosecution issue, the Seventh Circuit examined whether Conboy's new answers to questions that he had previously answered under the grant of immunity were derived from prior immunized testimony and, therefore, inadmissible in a subsequent criminal proceeding. The Conboy court interpreted the previously formulated constitutional requirement—that immunity provide protection coextensive with the fifth amendment privilege—as requiring that the immunity protect only the source and not the substance of the information. Emphasizing that a grant of immunity in one proceeding does not necessarily protect self-incriminating information revealed in another proceeding, the majority stated that repetition of testimony in an independent proceeding could constitute an independent source of evidence and, therefore, could be used against the witness. Consequently, although the questions asked at the subsequent proceeding may have been directly or indirectly derived from the immunized testimony, the answers were derived from the witness' current, independent recollection of events.

The court buttressed this conclusion with constitutional and public policy considerations. First, the court asserted that if new answers to questions asked during previously immunized testimony were treated as being derived from the immunized testimony, improper de facto immunity grants which exceeded the scope of judicial authority would result. Second, the Seventh Circuit was concerned that if Conboy strayed from the transcripts of his earlier testimony he might be found to have waived his constitutional protections. Finally, if Conboy’s compelled answers were inconsistent with his

57. 661 F.2d at 1152. The fact that neither Conboy nor plaintiff’s counsel knew of any state grand jury sitting in Ohio which was investigating the corrugated container industry did not eviscerate Conboy’s fifth amendment protections. Id.

58. Id. at 1153.

59. Id. The court stated: “[W]e must consider whether new answers to questions based on the earlier immunized testimony are, as a matter of law, necessarily themselves immunized.” Id. (emphasis in original). The Conboy court explained that the fifth amendment privilege against self-incrimination could be asserted by a party or witness in a civil proceeding, at discovery or at trial. Id. at 1154. In certain instances, however, the privilege could be supplanted by a grant of immunity pursuant to the Federal Witness Immunity Act. Id.

60. Id.

61. Id.

62. Id. at 1155. The court reinforced its conclusion by reiterating the government’s policy of seeking specific grants of immunity for each proceeding in which a witness testified. Id. at 1155 n.14.

63. Id. at 1155.

64. Id. at 1156-57. See infra notes 101-09 and accompanying text.

65. Id. at 1158. See infra notes 110-12 and accompanying text.
earlier immunized testimony he could be subject to prosecution for
perjury.\textsuperscript{66} Thus, the court concluded that Conboy's new answers were not
derived from the immunized testimony and Conboy was allowed to assert
the privilege against self-incrimination.\textsuperscript{67}

**CRITIQUE OF THE CONBOY DECISION**

Conboy is the first appellate court decision to delineate comprehensively
the limitations of a grant of immunity and the corresponding scope of the
privilege against self-incrimination in a civil deposition where a witness' prior
immunized testimony had been made available to private plaintiffs.\textsuperscript{68}

\textsuperscript{66} Id. See infra notes 113-15 and accompanying text. The Conboy majority also stated
that the district court order which compelled Conboy's testimony may have been unnecessary.
Rule 804 of the Federal Rules of Evidence is an exception to the hearsay rule which, under certain
conditions, permits prior testimony to be introduced when the declarant is unavailable as a
witness. FED. R. EVID. 804(b) provides:

(b) Hearsay exceptions — The following are not excluded by the hearsay rule if the
declarant is unavailable as a witness:

(1) Former testimony — Testimony given as a witness at another hearing of the
same or a different proceeding, or in a deposition taken in compliance with law
in the course of the same or another proceeding, if the party against whom the
testimony is now offered, or, in a civil action or proceeding, a predecessor in
interest, had an opportunity and similar motive to develop the testimony by
direct, cross, or redirect examination.

Id.

The principle factor which guarantees reliability of prior testimony is that the testimony has
been subject to cross-examination. The prior testimony should be admissible as long as the tribunal
compelled cross-examination or was empowered to compel cross-examination. C. McCormick,
**Handbook of the Law of Evidence** § 258 at 622 (2d ed. 1972). See Note, **Affidavits, Deposi-
tions and Prior Testimony**, 46 IOWA L. REV. 356, 358 (1961) (actual cross-examination is not
mandatory as long as a reasonable opportunity to cross-examine was available). But if the op-
portunity for cross-examination was not available, the former testimony must be excluded. 4 J.
Weinstein & M. Berger, **Weinstein's Evidence** ¶ 804(b)(1)[02], at 804-58 (1981) [hereinafter
cited as Weinstein]. Although it is not necessary that all the issues in the two proceedings be
identical, the presence of additional issues may affect the motive for cross-examination, especially when additional parties are involved. Id. ¶ 804(b)(1)[04], at 804-66. Thus, if a party
in the former suit had an adequate opportunity and a similar motive to develop the declarant's
testimony, then the testimony can be received in evidence against the witness. Id. Under these
rules it is immaterial that the grand jury testimony was taken in the context of a criminal in-
vestigation and the present case involved a civil trial.

Rule 804 provides that when a witness asserts the privilege against self-incrimination that
294, 305, 63 N.W.2d 681, 687 (1954) (witness who was previously granted immunity at
preliminary hearing and has subsequently invoked the privilege against self-incrimination is
unavailable); State v. Herrera, 32 Or. App. 397, 574 P.2d 1130 (1978) (when state revoked
conditional immunity agreement and witness asserted privilege against self-incrimination,
warn was unavailable and former testimony taken at preliminary hearing was admissible).
Because Conboy asserted his fifth amendment privilege, the only question that remained was
whether the requirements ensuring reliability of the testimony had been met. 661 F.2d at 1158.
67. 661 F.2d at 1159.

68. Compare Brief of Respondent in Opposition to Petition for Certiorari at 7, In re Cor-
rugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145 (7th Cir. 1981) (ad-
Although the Conboy court attempted to afford the witness broad protection of his privilege against self-incrimination, the decision may have a contrary effect. The majority's strict statutory construction of the scope of immunity may result in the statute providing only superficial, and therefore, inadequate protection of the privilege against self-incrimination.69

The Supreme Court has stressed that a grant of immunity must be commensurate with the protection that results from invoking the fifth amendment privilege.70 The Federal Witness Immunity Act provides this degree of protection by ensuring that the compelled testimony does not lead to the imposition of criminal liability.71 Both the immunity statute and the fifth amendment, however, permit the government to prosecute individuals based on evidence derived from an independent source.72 Relying on this independent source concept, Conboy concluded that an immunity grant protected the source and not the substance of the information.73 Although repetition of testimony in an independent proceeding can constitute an independent source of evidence,74 the Conboy court's application of the independent source theory rested on a misconception of the term derivative use.

Conboy noted that a conflict existed among the federal circuit courts regarding the interpretation of derivative use of immunized testimony.75 Two circuits had previously held that new answers to questions taken from earlier immunized testimony were derived from the prior testimony and, dressed practical problems of perjury and waiver in context of civil proceeding where prior immunized transcripts were relied on to compel testimony) with In re Corrugated Container Antitrust Litigation, Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980) (no discussion of perjury and waiver) and In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker, 644 F.2d 70, 75 n.7 (2d Cir. 1981) (because Fleischacker never claimed he feared perjury prosecution before district court, issue was not properly before the court on appeal).

69. 661 F.2d at 1160-61 (Cummings, C.J., dissenting).


71. Id. at 461. See supra notes 30-31 and accompanying text.

72. Id. See infra note 74.

73. 661 F.2d at 1154.

74. See United States v. Kuehn, 562 F.2d 427, 432 (7th Cir. 1977) (by talking to newspaper reporter defendant created independent source of evidence which could be used by state prosecutor); United States v. First W. State Bank of Minot, 491 F.2d 780, 785 (8th Cir.) (federal government can use same evidence defendants testified to before grand jury if it demonstrates that evidence used came from source wholly independent from compelled testimony), cert. denied sub nom. Thompson v. United States, 419 U.S. 825 (1974); United States v. Thanassouras, 368 F. Supp. 534, 536-37 (N.D. Ill. 1973) (government did not violate grant where unindicted co-conspirator provided independent source of evidence).

75. 661 F.2d at 1153. Compare In re Corrugated Container Antitrust Litigation, Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980) (verbatim questions from prior testimony were not protected by the original immunity grant) with In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker, 644 F.2d 70 (2d Cir. 1981) (subsequent testimony protected where its source was previous immunized testimony); In re Appeal of Starkey, 600 F.2d 1043 (8th Cir. 1979) (where later testimony is within realm of prior immunized testimony, later testimony is also protected).
therefore, were immunized. In In re Appeal of Starkey, the Eighth Circuit stated that where the civil deposition testimony was "within the confines" of the immunized testimony, the deposition testimony was tainted because it was derived from the grand jury testimony. Similarly, in the case of In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker, the Second Circuit concluded that once a court had determined that immunized testimony provided the source of questions asked, any responsive answers were necessarily derived from the immunized testimony. By liberally interpreting the term derivative use, these courts broadly interpreted the scope of an immunity grant under the Federal Witness Immunity Act.

Although these appeals courts arrived at the same result, they did so via different analyses. The Starkey court asserted that the previously immunized witness testifying at a civil deposition could be required to answer questions which covered the same period of time and the same geographical and substantive framework as the prior immunized testimony covered. Under the reasoning of Starkey, a witness would be free to reveal any new incriminating leads or details in subsequent testimony providing that the information disclosed arose in the same time period or geographical and substantive framework as the grand jury testimony. If the information compelled pursuant to the civil deposition extended beyond the scope of the original grant of immunity, however, the witness would be compelled to

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76. See In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker, 644 F.2d 70, 77 (2d Cir. 1981); In re Appeal of Starkey, 600 F.2d 1043, 1046 (8th Cir. 1979). See also infra notes 77-87 and accompanying text. Accord Little Rock School Dist. v. Borden, Inc., 632 F.2d 700, 705 (8th Cir. 1980) (since grand jury testimony was touchstone from which compelled testimony was elicited, civil testimony fell under protective shield of immunity originally granted in grand jury). The Conboy court, however, considered the Fifth Circuit's In re Corrugated Container Antitrust Litigation, Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981), opinion to be persuasive. The Franey court held that the immunity statute did not grant the court the power to compel Franey's testimony because compelled testimony would be derived from prior immunized testimony. Id. at 1093. The trilogy of Conboy, Fleischacker, and Franey arose out of the same corrugated container antitrust litigation. Brief of Respondent in Opposition to Petition for Certiorari at 9-10, In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145 (7th Cir. 1981).

77. 600 F.2d 1043 (8th Cir. 1979).
78. Id. at 1046.
79. 644 F.2d 70 (2d Cir. 1981).
80. Id. at 78.
81. The courts in Conboy and Franey, by contrast, concluded that the new answers were not protected by the original grant of immunity. The Conboy majority stated that while the questions were directly or indirectly derived from the immunized grand jury testimony or interview transcripts, the answers were not. 661 F.2d at 1155. The Franey court asserted that the immunity statute did not confer upon the court the power to compel Franey to testify because the compelled testimony would have been derived from the prior immunized testimony. 620 F.2d at 1093. Both of these courts based their analysis on a narrow construction of the term derivative use.
82. 600 F.2d at 1048.
testify on potentially incriminating matters which were not specifically immunized. Consequently, the witness' fifth amendment privilege would be violated.84

The Fleischacker opinion rejected the Starkey standard as being overbroad and recognized the potential for that analysis to interfere with criminal prosecutions.85 Where the subject matter of the questions in the civil deposition exceeded the scope of immunized testimony, Fleischacker determined that the witness should not be compelled to testify under the protection of the original grant of immunity. Rather, the witness should be allowed to assert his fifth amendment privilege, thereby ensuring that the scope of the immunity grant would not be erroneously extended.86 This position would appear to best effectuate the Supreme Court’s mandate that the scope of immunity be coextensive with the privilege against self-incrimination.87

Although the Starkey opinion appears overbroad in that information can be elicited which extends beyond the original grant of immunity, the approach taken by the court in Conboy was unnecessarily narrow. The better approach appears to be the one adopted in Fleischacker. In neither Fleischacker nor Conboy did the subject matter of the questions exceed the scope of the immunized testimony. The Fleischacker court concluded that the witness' new answers were derived from the prior testimony, and therefore, the witness' testimony could be compelled.88 Conversely, the Conboy court stated that the new answers were not derived from prior testimony, thus, the witness could assert his fifth amendment privilege.89 The witness in Conboy, however, was not ordered to give different or more detailed answers than those provided in the original testimony.90 In addi-

84. Id. at 78 n.13, 79. The Fleischacker court noted that such evidence would be rendered inadmissible pursuant to the exclusionary rule. Id.
85. Id. at 79. The court was concerned that unwarranted grants of immunity would impede the government's ability to prosecute in a subsequent criminal proceeding. Id.
86. Id. at 80. The Fleischacker court stated that because some questions went beyond the specific subject covered in the immunized testimony, the portion of the order holding Fleischacker in contempt for refusing to respond to those questions was vacated. Id.
88. 644 F.2d at 78-79.
89. 661 F.2d at 1159. Conboy involved the situation where the compelled questions were taken nearly verbatim from immunized grand jury testimony. Memorandum in Opposition to the Petition for Rehearing and Suggestion for [En Banc Consideration of Deponent-Appellant John A. Conboy at 8, In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145 (7th Cir. 1981).
90. Reply Brief of Appellees, Opt-Out Plaintiffs at 10, In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145 (7th Cir. 1981). The witness was not asked to expand upon, qualify, or otherwise change his previously sworn immunized answers. Id. at 3. In addition, examining counsel limited questions to those taken verbatim from, or as close as grammatically possible to, the immunized transcripts. 661 F.2d at 1147-48 n.2. The interrogation proceeded in the following manner: (1) a question from the transcript was asked; (2)
tion, Conboy and his counsel were both provided with copies of the transcripts which insured that the examiner could not overstep the four corners of the transcripts.

Because during the compelled testimony the witness was provided with transcripts and was asked questions which merely incorporated his previous answers, it is difficult to understand how the Conboy court concluded that the new answers were not derived from the original testimony. As the Fleischacker court stated, permitting a prosecutor to use evidence which a nonprosecutor has developed from immunized testimony would violate the constitutional requirement that a witness' compelled testimony cannot lead to the imposition of criminal penalties. Because the civil plaintiffs had access to the immunized testimony and the transcripts were relied on verbatim to elicit the deposition answers, any subsequent prosecutorial use of the deposition testimony would constitute, at a minimum, an indirect use of previously immunized testimony. Permitting such a use would violate the Federal Witness Immunity Act which expressly prohibits prosecutorial use of any information that is directly or indirectly derived from immunized testimony.

Thus, although the Conboy court appears to have adequately protected the witness' privilege against self-incrimination, the court's narrow interpretation of derivative use is contrary to the Supreme Court's mandate that the scope of immunity be coextensive with the privilege against self-incrimination. This privilege can only be protected by prohibiting both the direct and derivative use of immunized testimony. Extending Conboy to its logical conclusion, any new answers to questions taken verbatim from immunized transcripts would be viewed as being derived from the witness' current recollection of events and, thus, beyond the scope of the immunized

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then the question was rephrased in order to include the transcript answer; and (3) Conboy was asked if he had "so testified" in his interview. An example of this three-question pattern is as follows:

Q. Who did you have price communications with at Alton Box Board?

... .

Q. Is it not the fact that you had price communications with Fred Renshaw and Dick Hermans . . . at Alton Box Board?

... .

Q. Did you not so testify in your government interview statement of January 10, 1978?

Id.


92. Id.

93. Id. at 10.

94. 644 F.2d at 76 (citing Kastigar v. United States, 406 U.S. 441, 461 (1972)).

95. United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977) (prosecutor's burden not satisfied by mere demonstration that he had no direct or indirect access to grand jury minutes).

96. 644 F.2d at 77. See also supra note 30.

97. See supra note 87 and accompanying text.

testimony. This result clearly was not contemplated by the Federal Witness Immunity Act. The Seventh Circuit protected Conboy's privilege against self-incrimination based on its conclusion that he harbored a reasonable fear of prosecution. Because the deposition testimony was derived from the prior immunized testimony, however, the court should have compelled him to testify. This result would have protected Conboy's privilege against self-incrimination because the deposition testimony fell within the scope of the original grant of immunity. The ultimate result of the Conboy court's analysis is that the Federal Witness Immunity Act will provide inadequate protection for the privilege against self-incrimination.

A SUGGESTED APPROACH

The Conboy decision addressed serious constitutional and public policy considerations which should be weighed in determining the scope of an immunity grant and the corresponding privilege against self-incrimination. The Conboy court's reliance upon these considerations, however, is misplaced when immunized testimony is used verbatim to elicit testimony at a subsequent civil deposition. The court could have reached a holding limited to the facts presented and then distinguished those situations where the various policy and constitutional concerns would more appropriately apply.

A major consideration of the Conboy decision was that if subsequent testimony based on questions from previously immunized testimony was necessarily immunized, the courts would improperly be granting de facto immunity. An improper grant of de facto immunity occurs when evidence becomes tainted, or derived from immunized testimony due to an unwarranted use of a witness' prior immunized testimony. In such a case, the district court, by eliciting the civil testimony, would be expanding the scope of the immunity statute beyond its intended purpose and erroneously extending the scope of the original grant to cover the civil deposition.

99. The Federal Witness Immunity Act was designed to prevent undesirable automatic grants of immunity that had existed under some previous federal statutes. Witness Immunity Problems, supra note 4, at 302.
100. 661 F.2d at 1159.
101. Id. at 1156. The term de facto literally means in fact or actually and can be contrasted with de jure which means by law or right. Balsbaugh v. Rowland, 447 Pa. 423, 434 n.6, 290 A.2d 85, 91 n.6 (1972).
102. 661 F.2d at 1156-57. See In re Corrugated Container Antitrust Litigation, Appeal of Franey, 620 F.2d 1086, 1094 (5th Cir. 1980) (by ruling that the subsequent deposition testimony would be derived from immunized testimony, the district court, in effect, granted immunity of its own accord), cert. denied, 449 U.S. 1102 (1981). See also Witness Immunity Problems, supra note 4, at 283 (tainted evidence is evidence obtained through impermissible derivative use of prior immunized testimony).
103. The unwarranted use of a witness' prior immunized testimony is not the only manner by which a district court could create de facto immunity. Both the Conboy majority and the Fifth Circuit Franey opinion were concerned that if the district court erroneously determined that the subsequent civil testimony was derived from immunized testimony, the witness' privilege against self-incrimination would have been violated and the exclusionary rule would
The resulting proliferation of unwarranted immunized testimony could make it impossible for the government in a subsequent criminal proceeding to prove that its evidence was derived from an independent source and was, therefore, untainted. Erroneously immunized testimony, however, could only occur where the questions asked exceed the four corners of the transcript. When questions are taken verbatim from the original transcripts, as in Conboy, de facto immunity concerns are unwarranted because there is no greater potential for interference with subsequent criminal prosecutions than that which exists following the original grant of immunity.

render the subsequent testimony inadmissible. 661 F.2d at 1156; 620 F.2d at 1093. See In re Folding Carton Antitrust Litigation, Appeal of Brown, 609 F.2d 867, 872 n.11 (7th Cir. 1979) (if district court errs in ruling on fifth amendment privilege, after-the-fact exclusionary rule applies preventing evidence from being used against witness, but exclusionary rule is solely remedial and cannot be used as rationale to support decision which contravenes fifth amendment); Wigmore, supra note 1, § 2270, at 417-19 (where witness has properly made claim of privilege which was erroneously overruled, evidence of witness' testimony is inadmissible against witness in subsequent proceeding).

104. In re Corrugated Container Antitrust Litigation, Appeal of Franey, 620 F.2d 1086, 1094. The possibility of a district court creating de facto immunity by compelling answers which extend beyond the transcript is contrary to the Federal Witness Immunity Act's explicit provisions and underlying policy that only the United States Attorney be given the authority to grant immunity. Id. at 1092, 1094. The legislative history of the Federal Witness Immunity Act reveals that a major purpose of Congress in enacting the 1970 Act was to avoid inadvertent grants of immunity. See National Ass'n of Att'y Gens., Comm. on the Office of Atty. Gen., Witness Immunity at 8 (August, 1978). The new Federal Witness Immunity Act was considered to have the potential for being the most valuable governmental tool in the enforcement of criminal law. See Federal Immunity of Witness Act: Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary, House of Representatives, 91st Cong., 1st Sess. 42 (1969) (statement of Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice). Conboy was concerned that the narrow scope of use immunity available to the government in criminal proceedings could be transformed into an order which empowered civil plaintiffs in a separate proceeding to create a broad grant of transactional immunity. 661 F.2d at 1157.

105. In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker, 644 F.2d 70, 78-79 (2d Cir. 1981). The Fleischacker court also examined the issue of whether a witness could be compelled to answer questions which were broader than those asked in the course of immunized testimony. Id. at 78. In holding that such answers could not be compelled, the Fleischacker court stated that, unlike a prosecutor, a civil litigant is not concerned about interference with subsequent prosecutions. Id. at 79. While a prosecutor often intentionally limits the scope of questioning to avoid rendering a subsequent prosecution of the witness impossible, a civil litigant is not so disposed. Id. at 78, 79. Because immunized testimony can serve as a source for questions intentionally withheld by the prosecutor, courts should not compel witnesses to answer questions which are broader than questions asked in the immunized testimony. Id. at 79. By limiting the questions asked to those taken verbatim from immunized transcripts, courts can prevent subsequent prosecutions from being unduly hampered.

Similar concerns were enunciated in Dunham v. Concrete Prods., 475 F.2d 1241 (5th Cir. 1973). Dunham involved a civil antitrust suit brought under an immunity statute enacted to govern Sherman Act violations. Act of Feb. 25, 1903, ch. 755, 32 Stat. 904, repealed by Organized Crime Control Act of 1970, tit. II, § 209, 84 Stat. 929. Dunham confronted the issue of whether a witness who testified in a civil antitrust suit was entitled to immunity from prosecution. 475 F.2d at 1243. Dunham's analysis centered on the purpose of the immunity statute—to facilitate antitrust enforcement. Id. at 1245. The legislative history revealed that immunity was to be granted solely by government officials and limited to those instances when a
The *Conboy* court also was apprehensive that if Conboy was ordered to testify over his fifth amendment privilege, and de facto immunity was created, the judiciary's power would be extended beyond its intended scope, and problems would result with respect to the separation of powers doctrine.\(^6\) The purpose of the separation of powers doctrine is to isolate and insulate the judiciary's function by making it independent of law-making and law-executing bodies.\(^7\) Determining whether immunity should be granted is a political policy judgment that requires extensive knowledge of the facts and circumstances of each case, as well as a broad perspective regarding how the grant will further the overall pattern of criminal law enforcement.\(^8\) A court's role with respect to immunity has generally been witness testified under oath and pursuant to a subpoena. *Id.* The court held that if private plaintiffs were authorized to provide immunity to antitrust violators, the legislative purpose of strengthening antitrust enforcement initiated by the Attorney General would be impeded. *Id.*

The *Dunham* court enunciated three significant ways in which criminal law enforcement would be hindered if private plaintiffs were authorized to provide immunity to antitrust violators. First, the government's decision whether or not to prosecute criminal violations under antitrust law could be undermined by an overly zealous private plaintiff who could confer immunity from criminal prosecution under the antitrust laws to an entire industry. *Id.* at 1246. Secondly, co-conspirators could use each other to confer immunity, thereby creating the possibility of collusive suits. *Id.* Finally, the government's power to bargain for information in exchange for immunity would be severely limited. *Id.* The Fifth Circuit concluded that a grant of immunity should only be authorized when the executive branch has been actively involved in granting it, otherwise the statute's wording, legislative history, and purpose would be undermined. *Id.* See also United States v. Monia, 317 U.S. 424, 429-30 (1943). In *Monia*, the Court interpreted the 1906 amendment to the 1903 immunity statute. Act of June 30, 1906, ch. 3920, 34 Stat. 798, repealed by Organized Crime Control Act of 1970, tit. II, § 210, 84 Stat. 929. The Court stated that the statute's sole purpose was to limit immunity grants to persons testifying in obedience to a subpoena so that appropriate government officials retained authority to grant or deny immunity, rather than private citizens anticipating indictment. 317 U.S. at 429-30.

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\(^6\) See 661 F.2d at 1157.

\(^7\) See Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 513 (1955) [hereinafter cited as Dixon]. Among the enumerated functions of the judiciary is the rejection of political questions. *Id.* at 514. Professor Dixon stated: "Given the harsh realities of law enforcement work, many of the relevant considerations bearing on advisability of granting immunity would be secret and should remain so. . . . In short, a grant of immunity is an act which is 'political' in the highest sense of the term." *Id.* at 513.

\(^8\) See Dixon, *supra* note 107, at 511, 513. The approval of a grant of immunity has been placed with the Attorney General because the person holding that position will have the necessary perspective to make an informed decision. 2 WORKING PAPERS, *supra* note 8, at 1409, 1434. *Accord In re Daley*, 549 F.2d 469, 478-79 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977). The *Daley* Court reasoned that once the witness raises the privilege against self-incrimination, the decision whether to grant immunity to facilitate a government investigation is a matter of balancing the public necessity for the testimony against the social cost of granting immunity. *Id.* Since the balancing requires an estimated rather than a legal determination, the decision remains solely with executive officials. *Id.*

Section 6003 of the Federal Witness Immunity Act provides that the authority to initiate an immunity order in grand jury and court proceedings is restricted to the United States Attorneys upon approval by the Attorney General. 18 U.S.C. § 6003 (1976). See *supra* note 30. Courts are in agreement that the power to grant immunity lies solely with the executive branch. *Accord United States v. Housand*, 550 F.2d 818, 824 (2d Cir.) (once trial court determines that claim
limited to ascertaining whether the executive branch has complied with the immunity statute's procedural requirements. Consequently, the Conboy court's concern regarding the separation of powers doctrine is meritorious when a witness is compelled to answer questions which extend beyond the prior immunized testimony. In such a case, de facto immunity may occur which would violate the separation of powers doctrine. Where the questions do not exceed the scope of the prior immunized testimony, however, no separation of powers problem arises because there is no judicial extension of immunity. The granting of immunity would, therefore, properly remain within the province of the executive branch.

In addition to the de facto immunity concerns, Conboy stressed that when a fact is disclosed, the privilege against self-incrimination is waived as to the details of that fact. The Conboy court was concerned that if a witness repeated his earlier testimony, a subsequent court might find that he waived his right to withhold the details of those communications. As a result, a witness could be compelled to reveal new leads to incriminating matters not disclosed in the prior immunized testimony. Under the Federal Witness Immunity Act, however, a witness has the incentive to pro-

of privilege is proper, judge cannot confer immunity because Congress restricted power to grant immunity to limited group of federal officials who must apply to court to compel witness to testify under immunity), cert. denied, 431 U.S. 970 (1977). See In re Corrugated Container Antitrust Litigation, Appeal of Conboy, 661 F.2d 1145, 1157 (7th Cir. 1981). See also, In re Grand Jury Proceedings United States, 626 F.2d 1051, 1057-58 (1st Cir. 1980) (federal prosecutor had authority under § 6002 and § 6003 to immunize communications to grand jury and court did not have authority to immunize same testimony); United States v. Davis, 623 F.2d 188, 192 (1st Cir. 1980) (power to grant immunity rests solely with the government and trial court has no power to grant immunity to witness); United States v. Lentz, 616 F.2d 960, 962 (6th Cir.) (executive branch of government has sole discretion whether to grant or deny immunity), cert. denied, 447 U.S. 929 (1980).

109. Accord In re Daley, 549 F.2d 469, 479 (7th Cir.) (court may scrutinize record to ascertain that request for immunity is jurisdictionally and procedurally well founded and accompanied by approval of Attorney General), cert. denied, 434 U.S. 829 (1977). See Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir.) (authority to grant immunity delegated solely to executive branch and district court cannot review judgment but may examine record to ascertain whether procedural and jurisdictional requirements were met), cert. denied, 439 U.S. 820 (1978).

110. 661 F.2d at 1158. The principle that disclosure of a fact waives the privilege against self-incrimination as to the details of that fact was enunciated in Rogers v. United States, 340 U.S. 367, 373 (1951). See also Wigmore, supra note 1, § 2276, at 456-57 (reasonable to hold that witness' voluntary disclosure of part of a waiver of related parts where witness is aware of rights, part disclosed is self-incriminating, and distortion created by partial disclosure would incurably prejudice interests of one other than government). While the term waiver is generally defined as an intentional relinquishment of a known right, Johnson v. Zerbt, 304 U.S. 458, 464 (1938), the doctrine, as applied, often falls short of this requirement, and waiver can be found regardless of a witness' intent. See Houghton, Requiring Witnesses to Repeat Themselves, 47 Tex. L. Rev. 266, 269 (1969) [hereinafter cited as Houghton]. Houghton concluded that the purpose and effect of finding that a waiver has occurred is that it compels an unwilling witness to testify more comprehensively. Id. at 268. Therefore, the imposition of a waiver can result in a witness being required to further incriminate himself. Id.

111. 661 F.2d at 1159.
vide comprehensive testimony initially. This is because the more the witness reveals during his immunized testimony, the more difficult it will be for the government to prove that incriminating evidence was procured independent of immunized testimony in a subsequent prosecution. Consequently, because a witness is motivated to provide as many leads and details as possible in a criminal investigation, it is unlikely that a district court would require a more detailed disclosure based on a waiver theory in a subsequent civil deposition where, as in Conboy, the questions asked are taken verbatim from the original transcripts. Even if a more detailed disclosure was compelled, responses which extended beyond those questions found in the transcripts would be inadmissible in a subsequent criminal prosecution because this would create a judicial grant of de facto immunity. Thus, Conboy’s concern with respect to waiver is only meritorious when a witness is compelled to answer questions which extend beyond the four corners of the prior immunized testimony.

Finally, Conboy addressed the problem that a witness could be prosecuted for perjury while under a grant of immunity. Under this principle, when a witness gives perjured testimony either during or subsequent to the immunized testimony, a crime is committed which exceeds the scope of the immunity. Where a witness is asked to respond to questions not found in the prior immunized transcripts or to expand upon, qualify, or otherwise change his previously immunized answers, the possibility of a

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112. The new Federal Witness Immunity Act may have prompted a greater degree of cooperation from witnesses compelled to testify than previous statutory schemes. See Mykkelvedt, supra note 3, at 659 (citing U.S. ATTORNEY GENERAL, GUIDELINES RELATING TO USE OF STATUTORY PROVISIONS TO COMPEL TESTIMONY OR PRODUCTION OF INFORMATION, at 28 (1977)). The Act's effects can be contrasted with earlier transactional immunity statutes which permitted a witness to disclose just enough information to acquire immunity from prosecution and then pretend to remember nothing else. Id.

113. The problem concerning the possibility of perjury was addressed by the Supreme Court in Glickstein v. United States, 222 U.S. 139 (1911). In Glickstein, the Court stated: "it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful." Id. at 142. See generally C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 143 at 308 (2d ed. 1972). The privilege against self-incrimination provides no protection when a witness commits perjury. Bryson v. United States, 396 U.S. 64, 72 (1969); United States v. Knox, 396 U.S. 77, 82 (1969). Consequently, reading an immunity statute as covering perjury committed at a future date would create a grant of immunity which is broader than the privilege against self-incrimination. Hoffman, The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony, 16 CRIM. L. BUL. 421, 437 (1980).

Section 6002 of the Federal Witness Immunity Act provides that when a witness is compelled to testify over a claim of fifth amendment privilege pursuant to an immunity grant, the testimony cannot be used against the witness in a criminal case, unless the prosecution is for perjury, giving a false statement, or failing to comply with the order in some other manner. 18 U.S.C. § 6002 (1976). See supra note 30. The relevant provision covering perjury is 18 U.S.C. § 1623 (1976). Section (c) permits a witness to be prosecuted where two or more statements are inconsistent to the extent that one of them must be false. Id. § 1623(c).

subsequent perjury prosecution is pronounced. The Conboy court could have distinguished these situations, however, from those in which the witness is merely asked to affirm the correctness of his prior answers. Where a witness merely confirms his prior answers, as in the Conboy case, no resulting perjury prosecution could occur because there would be no inconsistencies between the prior and subsequent testimony unless, of course, he lied during the immunized testimony.\textsuperscript{115}

CONCLUSION

Conboy thoroughly analyzed the limitations of immunity granted pursuant to the Federal Witness Immunity Act and the scope of the corresponding privilege against self-incrimination in the context of a civil proceeding involving private plaintiffs. The court’s concerns of de facto immunity, prosecution for perjury, and waiver are meritorious and should be considered where compelled testimony in a subsequent proceeding exceeds or varies from testimony elicited in a prior immunized proceeding. Where there is any variation from the original immunized testimony, a witness should be allowed to assert the privilege against self-incrimination. Because there was no variation from the original immunized testimony, the Conboy court should have reached a holding limited to the facts involved and compelled Conboy’s testimony. Conboy’s concerns do not apply when testimony in a subsequent proceeding is taken verbatim from a prior proceeding’s immunized transcripts.

Because the Federal Witness Immunity Act prohibits the use of any evidence directly or indirectly derived from compelled testimony, Conboy’s question and answer distinction is an unnecessarily strict statutory interpretation. When prior immunized testimony is relied on verbatim to elicit answers in a later proceeding, any subsequent prosecutorial use of these answers would at least amount to an indirect use of prior immunized testimony. The result of Conboy’s interpretation may be that the Federal Witness Immunity Act will afford inadequate protection for fifth amendment rights. This clearly is contrary to the Supreme Court’s mandate that the scope of immunity must be coextensive with the privilege against self-incrimination.

Randi Sue Field

\textsuperscript{115} The Second Circuit in United States v. Housand, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), recognized that inconsistencies in testimony subsequent to a grant of immunity could give rise to a perjury prosecution and, therefore, the court permitted the witness to assert his fifth amendment privilege and refuse to testify. \textit{Id.} at 823. In United States v. Apfelbaum, 445 U.S. 115 (1980), the Supreme Court interpreted the perjury exception to be a blanket exemption from the general rule barring the use of immunized testimony. \textit{Id.} at 122. The respondent contended that the federal witness immunity statute exempted the use of truthful immunized testimony in a subsequent perjury prosecution. \textit{Id.} at 121. The Court rejected this argument stating that the statute did not distinguish between truthful and untruthful statements made during the course of immunized testimony. \textit{Id.} at 122. As a result, the entire immunized testimony was admissible in the perjury prosecution. \textit{Id.} at 130.