10-1979

United States v. Apfelbaum

Lewis F. Powell Jr.

Response waived

Discuss
Probably Grant
The immunity was for use as to past crimes, not for a crime committed after the immunity was granted

Resp testified before a G/Jury only after given use immunity. He testified falsely & was indicted, tried & convicted for perjury. His G/Jury testimony was internally conflicting & Resp objected to its use. CA 3 Reversed, holding that the testimony had been immunized. There is a conflict

PRELIMINARY MEMORANDUM (CA 3 & 7 vs. CA 2 & 1

March 16
~~January 19~~, 1979 Conference
List 1, Sheet A 2

- Two cases are old.

No. 78-972

UNITED STATES — Cert. to CA 3 (Adams, Weis, Garth)

v.

APFELBAUM (fed. crim. def.) — Federal/Criminal — Timely

SUMMARY: The government challenges the Third Circuit's holding that immunized grand jury testimony may only be used to prove the corpus delicti in a subsequent perjury prosecution arising out of the grand jury testimony.

FACTS AND DECISION BELOW: Respondent was called to testify before a federal grand jury. He asserted his privilege from self-incrimination and was granted use immunity. During his statement he knowingly made two false statements relating to

Please see back.

material facts. The grand jury returned a two count indictment for perjury setting forth one of the false statements in each count.

A trial, respondent did not object to the government's use of the transcript of his grand jury testimony to prove that he made the statements which were alleged to be false. However, he objected when the government introduced other portions of his grand jury testimony to prove that the statements were false and that he knew that they were false. Respondent was convicted on both counts.

The Court of Appeals reversed. It held that the exception to use immunity which permits perjury prosecutions on account of false immunized testimony only allows use of the immunized testimony to prove that the defendant made the statement charged in the indictment. It expressly rejected the government's argument that the immunized testimony was admissible for all purposes because it probably was false.

CONTENTIONS: The government contends that the holding below is contrary to this Court's decision in Cameron v. United States, 231 U.S. 710, 720-21 (1914). Further, it contends that it is inconsistent with the rule that the scope of use immunity is the same as the scope of the privilege for which it substitutes. Thus, respondent was required to forego his fifth amendment privilege only with respect to crimes which he committed prior to his testimony, and indeed possessed no

such privilege with respect to a crime he had not yet committed. Finally, the government observes that the immunity statute authorizes use of immunized testimony in perjury prosecutions on account of the testimony, without limiting the purposes for which the testimony may be used.

The government asserts that this issue has produced disagreement among the Courts of Appeals. The Seventh Circuit agrees with the decision below. The Second and Tenth Circuits hold that false testimony may be used for any purpose at subsequent perjury prosecutions, but that truthful statements may not be used for any purpose. In pre-World War I decisions, the Sixth and Eighth Circuits held that all parts of the immunized testimony can be used for all purposes at a subsequent perjury prosecution.

Finally, the government notes that this Court recently has granted review in two use immunity cases, New Jersey v. Portash, No. 77-1489, argued December 5, 1978, and Dunn v. United States, No. 77-6949, cert. granted, December 11, 1978. The government suggests that this case be heard in tandem with Dunn, and offers to file briefs on an expedited basis to allow this.

Response has been waived.

DISCUSSION: There is no square conflict with authority from this Court. The Cameron decision, relied on by the government, is 65 years old. Its statement that immunized testimony may be

used for any purpose in proving perjury is dictum uttered in passing, in a single sentence, preparatory to the main discussion in which the Court reversed the conviction because immunized testimony in one proceeding was used to show perjury in another proceeding.

The other two immunity cases in which review has recently been granted have no bearing on this case. In Portash the Conference voted to hold that the fifth amendment forbids use of immunized testimony for purposes of impeachment in a trial on charges arising from the subject matter of the grand jury investigation. Dunn concerns the propriety of proving perjury by showing that the defendant made inconsistent statements, one in immunized testimony and the other in nonimmune testimony.

This is a perplexing issue. The decision below is consistent with the theory that immune testimony may be made the basis of a perjury conviction because the immunity is not a license to lie. On the other hand, it seems inconsistent with the theory that the scope of the immunity is measured by the scope of the privilege it replaces, because the privilege which the immunity replaces relates to the criminal conduct which occurred before the testimony.

Response has been waived.

1/8/79 Lacy Opn in petn

ea 2-28-79

Deems could Grant

See memo attached.

SUPPLEMENTAL MEMORANDUM

March 16, 1979 Conference

No. 78-972

Cert to CA 3 (Adams, Weiss, Garth)

UNITED STATES

v.

APFELBAUM

Federal/Criminal

Timely

The requested response has been received. Resp argues that no court of appeals has held that truthful immunized testimony may be used for any purpose. He fails to mention the old decisions from CA 6 and CA 8 relied upon by the government, however.

He also claims that the holding in this case is consistent with 18 U.S.C. § 6002 and the Fifth Amendment. But petr does not squarely answer the government's contentions that § 6002 appears to permit the use of all immunized testimony, not just the portions that are false, in a subsequent perjury prosecution, and that the immunity pertains only to past crimes, not those committed at present or in the future.

Petr claims that the decision below is not contrary to Cameron v. United States, 231 U.S. 710 (1914), relied upon by the government. He doesn't distinguish this case well, but Lacy's memo points out that Cameron is not that strong in favor of the government's position.

Petr also says that the evidence against him was overwhelming, and that the government simply didn't need to introduce the truthful portions of his immnized testimony in order to obtain his perjury conviction!

Nothing in the response does much to shore up the opinion of CA 3 in this case.

$\Sigma_{1,2}$

March 16, 1979

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on ....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 78-972

UNITED STATES

VS.

APFELBAUM

Justice Powell's vote was given to the Conference by Justice Rehnquist.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

lfp/ss 9/27/79

MEMORANDUM

TO: My Clerk DATE: Sept. 27, 1979

FROM: Lewis F. Powell, Jr.

78-972 U.S. v. Apfelbaum

Over weekend, I read the briefs in the above case. Respondent was given "use and fruits" immunity under §18 U.S.C. 6002 as the basis for compelling him to testify before a grand jury. He subsequently was indicted and convicted for giving false testimony. The indictment included verbatim the false testimony. At trial, the government introduced additional testimony for the purpose of placing the false statements "in context".

The DC admitted the evidence, but CA3 reversed - holding in effect that all testimony was immunized except the statements alleged to have been perjured "together with no more than that minimal testimony essential to place the charged falsehood into its proper context".

Respondent argues, in a weak brief, that no compelled testimony may be used other than the precise statements alleged to have been false.

The government contends that the immunity extends only to crimes for which the witness might have been

prosecuted at the time immunity was given, and therefore that false testimony subsequent to the granting of immunity justifies a perjury prosecution - as the statute provides - and that any testimony that is "relevant" for purposes of putting the false statements in context, is properly admissible.

I am inclined to agree with the government.* I would welcome my clerk's views, although I am generally familiar with the area and at most a bobtail memo would suffice.

L.F.P., Jr.

ss

* Altho in this case we need not go this far. Here we have a perjury prosecution - which is special.

Reviewed 11/23. Ellen's views:

In this prosecution for perjury before a G/Jury ~~CA3 held~~ by Resp. who had "use" immunity, CA3 held that only the "minimal testimony essential to place the charged falsehood in its proper context" could be introduced.

This was error & case should be reversed. Truthful testimony that is relevant to showing falsity of that averred in indictment should be admitted.

But we need not go as far as SG argues, namely, that all truthful test. as to crimes committed after immunity was granted may be admitted when relevant to any prosecution. This may be a correct view but need not decide.

Here prosecution is for perjury, & strong policy reasons apply in favor of allowing relevant ev.

er 11/16/79

MEMORANDUM

TO: Mr. Justice Powell

FROM: Ellen

DATE: November 16, 1979

RE: No. 78-972 United States v. Apfelbaum

The issue is whether truthful portions of immunized grand jury testimony may be admitted in a prosecution for perjury in order to show that other portions of that testimony were knowingly false and that the false portions were material to the investigation. CA3 held that only "that minimal testimony essential to place the charged falsehood into its proper context" could be admitted.

I agree that the decisions below should be reversed. It seems to me, however, that the government's theory is too broad. If the Court were to hold that the immunity is applicable only in prosecutions for crimes which had been committed at the time immunity was granted, it would decide without full consideration at least two issues considerably more puzzling than this one:

1. Whether immunized testimony may be used to establish an "inconsistent declaration" under 18 U.S.C. § 1623 without any showing that the immunized testimony was itself false? This issue was reserved last term in Dunn v. United States, 99 S.Ct. 2190 (1979).

2. Whether immunized testimony, not alleged to be false, may be used to show prior acts or for impeachment in a prosecution for some future crime not involving perjury? For example, if the grand jury witness admitted complicity in an armed robbery under a grant of immunity and later committed a similar robbery, could his testimony be used at trial for the second robbery to show modus operandi?

If the government's theory is adopted, the answer to all these questions is automatically yes. This may be the right answer, but I would want briefing on those issues before deciding them. And there is no real need to reach out and decide them in this case, because this case involves the well-established exception to immunity statutes for perjury committed while testifying pursuant to a grant of immunity. No one disputes that prosecutions for perjury are essential in these circumstances to maintain the integrity of the truth-seeking process. There is no policy in favor of a "license to lie," and no reason to hamstring the government's efforts to prove perjury. I would hold that the truthful testimony may be admitted to the extent it is relevant to prove perjury. The CA3 has simply erected a new and more stringent concept of relevance it thought was required by the privilege against self-incrimination. Because the

policy against perjury is so strong and is incorporated in the policy of the privilege as effectuated by immunity statutes under long-settled precedents, no such modification of normal relevance rules is necessary.

This holding could be supported by the dictum in Cameron v. United States, 231 U.S. 710, 721 (1913). Although the Court there construed a statute, the statute was of course required to be coextensive with the privilege. There are also numerous other opinions, including separate concurrences by Justice Brennan, strongly condemning the "license to lie" result of condoning perjury pursuant to immunity statutes.

The government's theory, on the other hand, is not as well supported by the authorities as its brief suggests. I do not find United States v. Freed, 401 U.S. 601 (1971) controlling. Although there is strong language that a grant of immunity cannot "suppl[y] insulation for a career of crime about to be launched," the Court gave several reasons why the fear of incrimination was speculative and not real. The decision does not rest exclusively on the "future crimes" rationale, as it could not in light of Marchetti v. United States, 390 U.S. 39 (1968). The "insulation" problem was of course more severe when it was thought that "transactional" rather than "use" immunity might be required - a question reserved in Freed.

Heike v. United States, 227 U.S. 131 (1913), is of no more use to the government. Although the Court there permitted immunized testimony to be used as proof of a crime committed after the testimony was given and unrelated to the crime for which the

privilege was claimed, the opinion painstakingly shows why the petitioner could not have claimed the privilege as to any of the testimony at the time.

Heike may in fact suggest a more appropriate test: At the time of the testimony, could the witness for any reason have refused to testify as to the matters subsequently sought to be introduced? If he could have claimed the privilege because the testimony wold hae implicated him in some past crime, it would seem that the testimony should not be permitted to be used at all, even to support a conviction for a future crime. In this case, the parties have not shown whether the testimony in question was properly privileged at the time. The information sought might well have led to the discovery of past criminal acts and therefore have been privileged. The government's test suggests that even if this is so, it should be admissible to support an inference of future criminal involvement. In some sense the government is trying to impose the boundaries of transactional immunity on the very different protections afforded by use and derivative use immunity. I would not adopt such a broad rule in a case that can rest on narrower - and surer - ground.

Ellen

78-972 U.S. v. APPLEBAUM Argued 12/3/79

On prosecution of an immunized G/J witness for perjury before G/J, CA 3 held that only the alleged false testimony, & testimony directly related to it, may be admitted. Test. mmt, CA 3 held, be "severely limited".

. But prevention of perjury before G/J is an important interest. Add truthful test. that is relevant to prove the perjury, is admissible.

Bell

Bryson (W of J tells)

Test. as to future crimes – i.e. crimes committed after immunity was given – is not protected by fruits immunity.

Slominski (Resh)

Govt can't use any truthful testimony to buttress a prosecution for perjury.

78-972 U.S. v. Apfelbaum Conf. 12/5/79

The Chief Justice Reverse

Mr. Justice Brennan Reverse

Mr. Justice Stewart Reverse

Issue is narrow one: whether can be used to prove perjury where witness has been given immunity.

Mr. Justice White Reverse

Govt's proposed rule would apply to all future crimes. (Did not say whether we should go this far)

Mr. Justice Marshall Reverse

Mr. Justice Blackmun Reverse

SG takes chronological approach. Resp. says grant of immunity is equivalent to silence.

SG's approach has appeal, but would take a middle course By failing to give truthful test. the witness forfeited right to immunity as to perjury.

Mr. Justice Powell Reverse

Truthful test. What is relevant to proof of perjury should have been admitted

We need not go all way with SG. ~~Grand~~ Write as a perjury case only – but don't foreclose different view in future.

Mr. Justice Rehnquist Reverse

We should get back to basics. Language in Kastigar & other cases (Counselman) would compel affirmance.

But

Mr. Justice Stevens Reverse

Need not buy SG – full argument.

Agree with Harry as to forfeiture of immunity as to perjury

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 29 JAN 1980

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-972

United States, Petitioner, v. Stanley Apfelbaum. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Apfelbaum invoked his privilege against compulsory self-incrimination while being questioned before a grand jury in the Eastern District of Pennsylvania. The government then granted him immunity in accordance with 18 U. S. C. § 6002, and he answered the questions propounded to him. He was then charged with and convicted of making false statements in the course of those answers.[1] The Court of Appeals reversed the conviction, however, because the District Court had admitted into evidence relevant portions of respondent's grand jury testimony that had not been alleged in the indictment to constitute the *"corpus delicti"* or "core" of the false statement's offense. Because proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely, we hold that neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements in violation of 18 U. S. C. § 1623 (a). We therefore reverse the judgment of the Court of Appeals.

[1] Title 18 U. S. C. § 1623 (a) provides in pertinent part:

"Whoever under oath in any proceeding before . . . [a] grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Join P.S. ~~BRW~~ JPS C.J. BRW

a Court.

Received 2/3

Although not entirely pleased with this, I read it as applying on to pending prosecutions

LFP

I

The grand jury had been investigating alleged criminal activities in connection with an automobile dealership located in the Chestnut Hill section of Philadelphia. The investigation focused on a robbery of $175,000 in cash that occurred at the dealership on April 16, 1975, and on allegations that two officers of the dealership staged the robbery in order to repay loanshark debts.[2] The grand jury also heard testimony that the officers were making extortionate extensions of credit through the Chestnut Hill Lincoln-Mercury dealership.

In 1976, respondent Apfelbaum, then an Administrative Assistant to the District Attorney in Philadelphia, was called to testify because it was thought likely that he was an aider or abettor or an accessory after the fact to the allegedly staged robbery. When the grand jury first sought to question him about his relationship with the two dealership officials suspected of the staged robbery, he claimed his Fifth Amendment privilege against compulsory self-incrimination and refused to testify. The District Judge entered an order pursuant to 18 U. S. C. § 6002 granting him immunity and compelling him to testify.[3] Respondent ultimately complied with this order to testify.[4]

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[2] One of the officers was subsequently convicted of collecting extensions of credit by extortionate means in violation of 18 U. S. C. § 894, mail fraud in violation of 18 U. S. C. § 1341, racketeering in violation of 18 U. S. C. § 1962, and conspiracy in violation of 18 U. S. C. § 371.

[3] Title 18 U. S. C. § 6002 provides:

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

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

"and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply

[*Footnote 4 is on p. 3*]

During the course of his grand-jury testimony, respondent made two series of statements that served as the basis for his subsequent indictment and conviction for false swearing. The first series was made in response to questions concerning whether respondent had attempted to locate Harry Brown, one of the two dealership officials, while on a "fishing trip" in Ft. Lauderdale, Fla., during the month of December 1975. Respondent testified that he was "positive" he had not attempted to locate Brown, who was also apparently in the Ft. Lauderdale area at the time. In a second series of statements, respondent denied that he had told FBI agents that he had lent $10,000 to Brown. The grand jury later indicted respondent pursuant to 18 U. S. C. § 1623 for making these statements, charging that the two series of statements were false and that respondent knew they were false.

At trial the government introduced into evidence portions of respondent's grand-jury testimony in order to put the charged statements in context and to show that respondent knew they were false. The excerpts concerned respondent's relationship with Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had financial dealings with the automobile dealership in Philadelphia or had cosigned a loan for Brown. Respondent objected to the use of all the immunized testimony except the portions charged in the indictment as false. The District Court overruled the objection and admitted the excerpts into evidence on the ground that they

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with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

[4] After the issuance of the immunity order, respondent had still refused to testify before the grand jury. He agreed to testify after being held in civil contempt under 18 U. S. C. § 1826 and confined for six days.

were relevant to prove that respondent had knowingly made the charged false statements. The jury found respondent guilty on both counts of the indictment.

The Court of Appeals for the Third Circuit reversed, holding that because the immunized testimony did not constitute "the *corpus delicti* or core of a defendant's false swearing indictment" it could not be introduced. Petition, p. 2a. We granted certiorari because of the importance of the issue and because of a difference in approach to it among the Courts of Appeals.[5]

The differing views that this question has elicited from the Courts of Appeals are not surprising, because there are considered statements in one line of cases from this Court, and both statements and actual holdings in another line of cases, that as a matter of strict and literal reading cannot be wholly reconciled.[6] Though most of the decisions of the Courts of

[5] The Seventh Circuit agrees with the Court of Appeals below that the government may introduce into evidence so much of the witness's testimony as is essential to establish the *corpus delicti* of the offense of perjury. *United States* v. *Patrick*, 542 F. 2d 381, 385 (CA7 1976). The Second and Tenth Circuits have held that false immunized testimony is admissible, but truthful immunized testimony is not, in a subsequent prosecution for perjury. *United States* v. *Dunn*, 577 F. 2d 119, 125–126 (CA10 1978), reversed on other grounds, — U. S. — (1979); *United States* v. *Berardelli*, 565 F. 2d 24, 28 (CA2 1977); *United States* v. *Moss*, 562 F. 2d 155, 165 (CA2 1977), cert. denied, 435 U. S. 914 (1978); *United States* v. *Housand*, 550 F. 2d 818, 822 (CA2 1977); *United States* v. *Kurzer*, 534 F. 2d 511, 518 (CA2 1976). The Sixth and Eighth Circuits have held that immunized testimony may be used for any purpose in such a prosecution. *Daniels* v. *United States*, 196 F. 459, 462–463 (CA6 1912); *Edelstein* v. *United States*, 149 F. 636, 642–644 (CA8 1906).

[6] A principal reason for this divergence in approach is the statement in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892), that an immunity statute "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." This language was reiterated only last Term in *New Jersey* v. *Portash*, 47 U. S. L. W. 4271, 4273 (1979).

As discussed in Part III, *infra*, strictly speaking even a "transactional" immunity statute, to say nothing of a "use" immunity statute, does not

Appeals turn on the interaction between perjury and immunity statutes enacted by Congress and the privilege against compulsory self-incrimination conferred by the Fifth Amendment to the United States Constitution, it is of course our first duty to decide whether the statute relied upon in this case to sustain the conviction of respondent may properly be interpreted to do so. We turn now to decision of that question.

II

Did Congress intend the Federal Immunity Statute, 18 U. S. C. § 6002, to limit the use of a witness's immunized grand

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conform to this definition: The mere grant of immunity and consequent compulsion to testify places a witness asserting his Fifth Amendment privilege in the dilemma of having to decide whether to answer the questions truthfully or falsely, a dilemma he never would have faced had he simply been permitted to remain silent upon the invocation of his privilege. Yet properly drawn immunity statutes have long been recognized as valid in this country. *Infra*, at —. And it is likewise well established that one may be prosecuted for making false statements while giving immunized testimony. *Infra*, at —.

A source of further difficulty for the Courts of Appeals is language from our recent decisions that, if taken literally, would preclude the introduction of immunized testimony even for the purpose of establishing the "*corpus delicti*" or core of the perjury offense. In *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972), in which we upheld the constitutionality of this immunity statute against a challenge that it did not provide protection coextensive with the Fifth Amendment, we said that it "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." And in *New Jersey* v. *Portash*, 47 U. S. L. W., at 4273, we stated that under the Fifth and Fourteenth Amendments "a defendant's compelled statements . . . may not be put to any testimonial use whatever against him in a criminal trial. . . . '[A]ny criminal trial use against a defendant of his *involuntary* statements is a denial of due process of law.'" (Emphasis in original.)

Doubtless as a result of these divergent holdings and statements none of the Court of Appeals decisions referred to in footnote 5, *ante*, holds that *false* immunized testimony may not form the basis for a prosecution for perjury or false swearing, but they differ as to how much of the relevant immunized testimony other than that asserted by the government to be false may be introduced in such a prosecution.

jury testimony in a subsequent prosecution of the witness for false statements made at the grand jury proceeding? Respondent contends that while § 6002 permits the use of a witness's false statements in a prosecution for perjury or for making false declarations, it establishes an absolute prohibition against the use of truthful immunized testimony in such prosecutions. But this contention is wholly at odds with the explicit language of the statute, and finds no support even in its legislative history.

It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language. Here 18 U. S. C. § 6002 provides that when a witness is compelled to testify over his claim of a Fifth Amendment privilege, "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.*" (Emphasis added.) The statute thus makes no distinction between truthful and untruthful statements made during the course of the immunized testimony. Rather it creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements.

The legislative history of § 6002 shows that Congress intended the perjury and false declarations exception to be interpreted as broadly as constitutionally permissible. The present statute was enacted as a part of the Organized Crime Control Act of 1970,[7] after a re-examination of the broad transactional

[7] Pub. L. No. 91-452, § 201 (a), 84 Stat. 927. The purpose of the Act was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923.

immunity statute enacted in response to this Court's decision in *Counselman* v. *Hitchcock, supra*, 142 U. S. 547. See *Kastigar* v. *United States, supra*, 406 U. S., at 452, and n. 36. Its design was not only to bring about uniformity in the operation of immunity grants within the federal system,[8] but also to restrict the grant of immunity to that required by the United States Constitution. Thus, the statute derives from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws, which proposed a general use immunity statute under which "the immunity conferred would be confined to the scope required by the Fifth Amendment." [9] And as stated in both the Senate and House Reports on the proposed legislation:

> "This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. . . . It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892)." [10]

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[8] See, *e. g.*, Measures Relating to Organized Crime, Hearings on S. 30, Etc., before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 282–284 (remarks of Representative Poff and Senator McClellan). At the time the new statute was being considered, there were more than 50 separate federal immunity statutes. *Id.*, at 282.

[9] Measures Relating to Organized Crime, Hearings on S. 30, Etc., before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 292 (1969). (Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1979). See also *id.*, at 15, 326; National Commission on Reform of Federal Criminal Laws, Working Papers, 1405 (1970).

[10] S. Rep. No. 91–617, 91st Cong., 1st Sess., 145 (1969); H. R. Rep. No. 91-1549, 91st Cong., 2d Sess., 42 (1970). Representative Poff, the bill's chief sponsor in the House, quoted MR. JUSTICE WHITE's observation in *Murphy* v. *Waterfront Commission*, *supra*, 378 U. S., at 107, that " 'Immunity must be as broad as, but not harmfully and wastefully broader

In light of the language and legislative history of § 6002, the conclusion is inescapable that Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony if such use was not prohibited by the Fifth Amendment.

III

The limitation placed on the use of relevant evidence by the Court of Appeals may be justified, then, only if required by the Fifth Amendment. Respondent contends that his conviction was properly reversed because under the Fifth Amendment his truthful immunized statements were inadmissible at his perjury trial, and the government never met its burden of showing that the immunized statements it introduced into evidence were not truthful. The Court of Appeals, as noted above, concluded that the Fifth Amendment prohibited the use of all immunized testimony except the "*corpus delicti*" or "core" of the false swearing indictment.

In reaching its conclusion, the Court of Appeals initially observed that a grant of immunity must be coextensive with the Fifth Amendment. *Kastigar* v. *United States, supra,* 406 U. S., at 440. It then reasoned that had respondent not been granted immunity, he would have been entitled under the Fifth Amendment to remain silent. And if he had remained silent, he would not have answered any questions, truthfully or falsely. There consequently would have been no testimony whatsoever to use against him. A prosecution for perjury committed at the immunized proceeding, the Court of Appeals continued, must be permitted because "as a practical matter, if immunity constituted a license to lie, the purpose of immunity would be defeated." Such a prosecution is but a "narrow exception" carved out to preserve the integrity of the truth-seeking process. But the subsequent use of statements made at the immunized proceeding, other than those alleged in

than, the privilege against self-incrimination.'" 116 Cong. Rec. 35291 (1970).

the indictment to be false, is impermissible because the introduction of such statements cannot be reconciled with the privilege against self-incrimination. Petition, pp. 11a–16a.

A

There is more than one flaw in this reasoning. Initially, it presumes that in order for a grant of immunity to be "coextensive with the Fifth Amendment privilege," the witness must be treated as if he had remained silent. This presumption focuses on the *effect* of the assertion of the Fifth Amendment privilege, rather than on the *protection* the privilege is designed to confer. In so doing, it calls into question the constitutionality of all immunity statutes, including "transactional" immunity statutes as well as "use" immunity statutes such as § 6002. Such grants of immunity would not provide a full and complete substitute for a witness's silence because, for example, they do not bar the use of the witness's statements in civil proceedings. Indeed, they fail to prevent the use of such statements for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution.

Good point

This Court has never held, however, that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony. Such a requirement would be inconsistent with the principle that the privilege does not extend to consequences of a noncriminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment. See, *e. g., Brown* v. *Walker,* 161 U. S. 591, 605–606 (1896); *Smith* v. *United States,* 337 U. S. 137, 147 (1949); *Ullmann* v. *United States,* 350 U. S. 422, 430–431 (1956); *Uniformed Sanitation Men Assn'n* v. *Commissioner of Sanitation,* 392 U. S. 280, 284–285 (1968); *Gardner* v. *Broderick,* 392 U. S. 273, 279 (1968).

And this Court has repeatedly recognized the validity of immunity statutes. *Kastigar* v. *United States, supra,* 406 U. S., at 449 (1972), acknowledged that Congress included

immunity statutes in many of the regulatory measures adopted in the first half of this century, and that at the time of the enactment of 18 U. S. C. § 6002, the statute under which this prosecution was brought, there were in force over 50 federal immunity statutes as well as similar laws in every State of the Union. 406 U. S., at 448. This Court in *Ullmann* v. *United States, supra,* 350 U. S. 422, stated that such statutes have "become part of our constitutional fabric." *Id.,* at 438. And the validity of such statutes may be traced in our decisions at least as far back as *Brown* v. *Walker, supra,* 161 U. S. 591.

These cases also establish that a strict and literal reading of language in cases such as *Counselman* v. *Hitchcock, supra,* 142 U. S. 547—that an immunity statute "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect"—does not require the sort of "but for" analysis used by the Court of Appeals in order to enable it to survive attack as being violative of the privilege against compulsory self-incrimination. Indeed, in *Brown* v. *Walker, supra,* 161 U. S., at 600, this Court stated that "[t]he danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify." And in *Kastigar* v. *United States, supra,* 406 U. S. 454, we concluded that "[t]he broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority." *Id.,* at 454–455. *Kastigar* also expressly declined a request by the petitioner to reconsider and overrule *Brown* v. *Walker, supra,* and *Ullmann* v. *United States, supra,* and went on to expressly reaffirm the validity of those decisions.

The reasoning of the Court of Appeals is also internally inconsistent in that logically it would not permit a prosecution for perjury or false swearing committed during the course of the immunized testimony. If a witness must be treated as if he had remained silent, the mere requirement that he answer questions, thereby subjecting himself to the possibility of being subsequently prosecuted for perjury or false swearing, places him in a position that is substantially different than that he would have been in had he been permitted to remain silent.

All of the Courts of Appeals, however, have recognized that the statutory provision in 18 U. S. C. § 6002 allowing prosecutions for perjury in answering questions following a grant of immunity does not violate the Fifth Amendment privilege against compulsory self-incrimination. And we ourselves have repeatedly held that perjury prosecutions are permissible for false answers to questions following the grant of immunity. See, *e. g.*, *United States* v. *Wong,* 431 U. S. 174 (1977); *United States* v. *Mandujano,* 425 U. S. 564 (1976) (plurality opinion); *id.*, at 584–585 (BRENNAN, J., concurring); *id.*, at 609 (STEWART and BLACKMUN, JJ., concurring).

It is therefore analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege—protections that may be invoked with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege. For a grant of immunity to provide protection "coextensive" with that of the Fifth Amendment, it need not treat the witness as if he had remained silent. Such a conclusion, as noted above, is belied by the fact that immunity statutes and prosecutions for perjury committed during the course of immunized testimony are permissible at all.

B

The principle that the Fifth Amendment privilege against compulsory self-incrimination provides no protection for the

commission of perjury has frequently been cited without any elaboration as to its underlying rationale. See, *e. g., Bryson* v. *United States,* 396 U. S. 64, 72 (1969); *United States* v. *Knox,* 396 U. S. 77, 82 (1969). Its doctrinal foundation, as relied on in both *Wong* and *Mandujano,* is traceable to *Glickstein* v. *United States,* 222 U. S. 139, 142 (1911). *Glickstein* stated that the Fifth Amendment "does not endow the person who testifies with a license to commit perjury," *id.,* at 142, and that statement has been so often repeated in our cases as to be firmly established constitutional law. But just as we have refused to read literally the broad *dicta* of *Counselman, supra,* we are likewise unwilling to decide this case solely upon an epigram contained in *Glickstein, supra.* Thus, even if, as the Court of Appeals said, a perjury prosecution is but a "narrow exception" to the principle that a witness should be treated as if he had remained silent, it does not follow that the Court of Appeals was correct in its view of the question before us now.

Perjury prosecutions based on immunized testimony, even if they be but a "narrow exception" to the principle that a witness should be treated as if he had remained silent after invoking the Fifth Amendment privilege, *are* permitted by our cases. And so long as they are, there is no principle or decision that limits the admissibility of evidence in a manner peculiar only to them. To so hold would not be an exercise in the balancing of competing constitutional rights, but in a comparison of apples and oranges.[11] For even if both truthful and untruthful testimony from the immunized proceeding are admissible in a subsequent perjury prosecution, the exception

[11] Thus, the Court of Appeals' position is basically a halfway house that does not withstand logical analysis. If the rule is that a witness who is granted immunity may be placed in no worse a position than if he had been permitted to remain silent, the principle that the Fifth Amendment does not protect false statements serves merely as a piece of a legal mosaic justified solely by *stare decisis,* rather than as part of a doctrinally consistent view of that Amendment.

surely would still be properly regarded as "narrow," once it is recognized that the testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant.

While the application of the Fifth Amendment privilege to various types of claims has changed in some respects over the past three decades, the basic test reaffirmed in each case has been the same.

> "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination. *Rogers* v. *United States*, 340 U. S. 367, 374; *Brown* v. *Walker*, 161 U. S. 591, 600." *Marchetti* v. *United States*, 390 U. S. 39, 53 (1968).

Marchetti, *supra*, which overruled earlier decisions of this Court in *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955), invalidated the federal wagering statutes at issue in *Kahriger* and *Lewis* on the ground that they contravened the petitioner's Fifth Amendment right against compulsory self-incrimination. The practical effect of the requirements of those statutes was to compel petitioner, a professional gambler engaged in ongoing gambling activities that he had commenced and was likely to continue, to choose between openly exposing himself as acting in violation of state and federal gambling laws and risking federal prosecution for tax avoidance.[12] The Court held that peti-

[12] Thus, the Court observed:

"Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." 390 U. S., at 48.

And "[e]very aspect of petitioner's wagering activities," the Court continued, "subjected him to possible state or federal prosecution," and the

tioner was entitled to assert his Fifth Amendment privilege in these circumstances. But it also observed that "prospective acts will doubtless ordinarily involve speculative and insubstantial risks of incrimination." 390 U. S., at 54. Thus, although *Marchetti* rejected "the rigid chronological distinction adopted in *Kahriger* and *Lewis*," *id.*, at 53, that distinction does not aid respondent here.

In *United States* v. *Freed*, 401 U. S. 601 (1971), this Court rejected the argument that a registration requirement of the National Firearms Act violated the Fifth Amendment because the information disclosed could be used in connection with offenses that the transferee of the firearm might commit in the future. In so doing, the Court stated:

> "Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation." *Id.*, at 606–607.

And MR. JUSTICE BRENNAN in his concurring opinion added:

> "I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm." *Id.*, at 611.

In light of these decisions, we conclude that the Fifth Amendment does not prevent the use of respondent's immu-

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"[i]nformation obtained as a consequence of the federal wagering tax laws is readily available to assist efforts of state and federal authorities to enforce those penalties." 390 U. S., at 47.

nized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give. Respondent's assertion of his Fifth Amendment privilege arose from his claim that the questions relating to his connection with the Chestnut Hill auto dealership would tend to incriminate him. The government consequently granted him "use" immunity under § 6002, which prevents the use and derivative use of his testimony with respect to any subsequent criminal case except prosecutions for perjury and false swearing offenses, in exchange for his compelled testimony.

The government has kept its part of the bargain; this is a perjury prosecution and not any other kind of criminal prosecution. The Court of Appeals agreed that such a prosecution might be maintained, but as noted above severely limited the admissibility of immunized testimony to prove the government's case. We believe that it could not be fairly said that respondent, at the time he asserted his privilege and was consequently granted immunity, was confronted with more than a "trifling or imaginary" hazard of incrimination as a result of the possibility that he might commit perjury during the course of his immunized testimony. In *United States* v. *Bryan*, 339 U. S. 323 (1950), we held that an immunity statute that provided that "[n]o testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony," did not bar the use at respondent's trial for willful default of the testimony given by her before a congressional committee. In so holding, we stated that "[t]here is, in our jurisprudence, no doctrine of 'anticipatory contempt.'" *Id.*, at 341.

We hold here that in our jurisprudence there likewise is no doctrine of "anticipatory perjury." In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally

Perjury only

a perjury prosecution only

I don't think we should assume that a person who has committed other crimes is likely to commit perjury when giving immunized testimony. He stands to benefit

required for an offense to occur.[13] Similarly, a future intention to commit perjury or to make false statements if granted immunity because of a claim of compulsory self-incrimination is not by itself sufficient to create a "substantial and 'real'" hazard that permits invocation of the Fifth Amendment. *Brown* v. *Walker, supra; Rogers* v. *United States, supra.* Therefore, neither the immunity statute nor the Fifth Amendment preclude the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence. The exception of a perjury prosecution from the use that may be made of immunized testimony may be a narrow one, but it is also a complete one. The Court of Appeals having held otherwise, its judgment is accordingly

Reversed.

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[13] As recognized by one commentator, Shakespeare's lines here express sound legal doctrine:

"His acts did not o'ertake his bad intent,
And must be buried but as an intent
That perish'd by the way: Thoughts are no subjects,
Intents but merely thoughts." Measure for Measure, Act V, Scene 1.

Williams, Criminal Law, The General Part (1961) 2.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 29, 1980

Re: No. 78-972, United States v. Apfelbaum

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Read Harlan's op in Marchetti 390/52-54
Discuss with Ellen

er 1/29/80

TO: Mr. Justice Powell

FROM: Ellen

RE: No. 78-972 United States v. Apfelbaum

Mr. Justice Rehnquist's draft opinion attempts to stop somewhere short of the SG's broad "future crimes" theory in this case. But I do not think he succeeds in doing so. Although the opinion purports to apply the rule of Marchetti v. United States, 390 U.S. 39, 52-54 (1968), it appears to me to come close to abandoning any protection for future acts and thus to overrule, sub silentio, Marchetti. But see p 15

Mr. Justice Harlan wrote for the Court in Marchetti that "the premise that the privilege is entirely inapplicable to prospective acts" was erroneous. 390 U.S. 53. Accordingly, the Court overruled United States v. Kahriger and Lewis v. United States, and held that the only test for the privilege's application was "whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Ibid. To be sure, "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." Id., at 54. But in Marchetti, the risk was substantial because gambling registrants could reasonably expect that registration and payment of the occupational tax would significantly enhance the likelihood of their prosecution for future acts, and that it would

registration itself incriminates as to future

readily provide evidence which will facilitate their convictions. Indeed, registration could serve as "decisive evidence."

Mr. Justice Rehnquist applies this test to this case as follows: Here, there was here only "a 'trifling or imaginary' hazard of incrimination as a result of the possibility that [petr] might commit perjury during the course of his immunized testimony." He says that "there . . . is no doctrine of 'anticipatory perjury,'" and concludes that "a future intention to commit perjury . . . if granted immunity because of a claim of compulsory self-incrimination is not by itself sufficient to create a 'substantial and "real"' hazard that permits invocation ot the Fifth Amendment." Slip op. 15-16. He distinguishes Marchetti as a case in which the registrant was "a professional gambler engaged in ongoing gambling activites that he had commenced and was likely to continue." Id., at 13.

The implication is that Marchetti turned on possible incrimination for past and present acts. But that is inaccurate. Mr. Justice Harlan was careful to separate the strands of his analysis. He said that the government's position in Marchetti was wrong on two separate grounds: (i) because it overlooked the hazards of incrimination as to past and present acts, and (ii) "more fundamental[ly]," because it proceeded on the theory that the privilege was inapplicable to prospective acts. It is thus clear that Marchetti turned on two independent alternate grounds. Mr. Justice Rehnquist has taken facts that supported the first ground and used them to eviscerate the holding on the second ground. Even assuming no incrimination as to past and present acts, and assuming

that the registration statute "merely impose[d] on the gambler the initial choice of whether he wishe[d], at the cost of his constitutional privilege, to commence wagering activities," the Court held that the privilege applied.

I do not believe Mr. Justice Rehnquist's "trifling and imaginary" holding here can be reconciled with the second holding of Marchetti. All of the things he says could equally have been said in that case. There certainly is no doctrine of "anticipatory gambling," and a "future intention to gamble" is no less imaginary than a future intention to lie. I suppose Mr. Justice Rehnquist might say that in Marchetti the registration statute applied only if the registrant had a present intention to gamble. But I think it likely that the perjury defendant also had a present intention to - or at least foresaw a substantial possibility that he might - lie on the stand. And I hardly think that the privilege should turn on that subjective inquiry. Nor do I think Mr. Justice Harlan meant the protection for prospective acts to be quite that narrow. Indeed, the analysis in Marchetti did not even mention the likelihood that the registrant would commit the illegal acts in the future; rather, Mr. Justice Harlan focused on the likelihood that the compelled testimony would be used to incriminate him if he did commit those acts. Here, of course, the perjured testimony is the corpus delicti itself. Of course it would "enhance the likelihood of . . . prosecution," "readily provide evidence," and even prove "decisive." 390 U.S., at 54. And if the likelihood of committing the act is a consideration, it is difficult to imagine any situation in which the prospect of illegal future conduct is more immediate and direct.

In short, I think the "trifling and imaginary" holding is a subterfuge for overruling Marchetti and returning to the rule of Kahriger and Lewis. If this danger is trifling and imaginary, then no danger of incrimination will ever be "real and substantial." While this might be a desirable result if the Court were writing on a clean slate, the Kahriger - Marchetti - Apfelbaum seesaw can hardly bring credit to the Court.

United States v. Freed, relied on by Mr. Justice Rehnquist, does not erode Marchetti. There, Mr. Justice Douglas wrote for the Court that the danger of incrimination from registering a firearm was not "real and substantial" because there was protection against incrimination for past or concurrent offenses and also because the data was not available, as a matter of administration, to local, state, or other federal agencies. Although Mr. Justice Douglas wrote that the Fifth Amendment does not provide "insulation for a career of crime about to be launched," that dictum was extraneous to the holding of the case. And Mr. Justice Rehnquist's quotation from Mr. Justice Brennan's concurrence in Freed is somewhat misleading. Slip op., at 14. Mr. Justice Brennan wrote that the immunity did not extend to the use of information in connection with crimes other than possession because they were not part of "[t]he relevant class of activities 'permeated with criminal statutes.'" 401 U.S., at 611-612. His reasoning had nothing to do with the distinction between past and future acts.

I don't think the Court need go this far to decide this case, and I think that Mr. Justice Rehnquist's rule would sweep

more broadly than it perhaps should. See Bench Memorandum, at 2. What about prosecutions for "inconsistent statements," one of which was immunized? What about "similar acts" evidence drawn from immunized testimony? The Court more properly could simply decide this case by reference to the well-established exception for perjury. Mr. Justice Rehnquist is quite right that this exception lacks a reasoned rationale, slip op., at 12, and it might be desirable to develop a more consistent approach to this area. But I don't think Mr. Justice Rehnquist's proposed opinion provides a particularly useful approach. Although he rejects the Counselman dicta, he doesn't really put anything in its place. I think it would be better for the Court to reaffirm the perjury exception - even without fully explaining it - than to adopt a new and potentially troublesome rationale that is not logically compelling.

Your conference notes suggest that Mr. Justice Blackmun and Mr. Justice Stevens, at least, would take a narrower view of the case. I have no doubt that Mr. Justice Brennan and Mr. Justice Marshall would prefer that narrower view. I therefore would either await developments from one of these Justices or raise the Marchetti question in a letter to Mr. Justice Rehnquist. Alternatively, of course, we could attempt to work out a draft or a more substantial letter proposing the narrower ground. Although I am unsure what the best course is at this point, I would not recommend joining the Rehnquist draft.

He may joined

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1980

RE: No. 78-972 - U.S. v. Apfelbaum

Dear Bill:

I join.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 5, 1980

Re: 78-972 - United States v. Apfelbaum

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 7, 1980

RE: No. 78-972 - United States v. Apfelbaum

Dear Bill:

My notes from the conference in the above reflect a consensus that the opinion should go off on narrow grounds. More particularly, we were of the view that there was no reason to reach the Government's broad contention that immunized testimony may be used in any trial for conduct occuring after the grant of immunity. The logic of the perjury exception, we felt, was sufficient to decide the present case.

As I read your opinion, it decides the question I had thought reserved. Indeed, in some ways it goes even further. It suggests that the Fifth Amendment has no role at all in determining what immunized testimony may be used in a prosecution for after-occuring conduct. Not only am I not persuaded that all after-occuring conduct should be treated like perjury, but I suspect that the Fifth Amendment might operate as a substantive limit on the uses to which immunized testimony may be put even in a perjury trial. Specifically, I wonder if the wholesale introduction of immunized statements detailing the defendant's participation in other crimes might not raise problems of a constitutional dimension even if such introduction might be permissible under traditional rules of relevance.

Since I do not think it necessary to reach the broad questions you have reached, I cannot join your opinion as written. I do continue to concur in the result and wonder if you would consider retreating to the conference position.

Sincerely,

Bill

Mr. Justice Rehnquist
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 7, 1980

Re: 78-972 - United States v. Apfelbaum

Dear Bill,

Please join me, but I may write separately in concurrence.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 8, 1980

Re: No. 78-972 - United States v. Apfelbaum

Dear Bill:

After receiving your letter of February 7th, I reviewed my Conference notes on this case and found that while the votes for reversal were unanimous, the views expressed were not entirely in accord with one another. As is customary in a situation like that, I simply tried to write an opinion which supported the Conference vote, and was internally consistent and logical. My Conference notes do not indicate that there was a majority for the position you set forth in your letter, though I do show you as adhering to that position. Since my present circulating draft has been joined by four other members of the Court, I am not inclined to retreat to the position which you describe in your letter of February 7th as "the Conference position", but which my notes show to be simply one of several views espoused in support of a unanimous vote for reversal.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

February 12, 1980

78-972 United States v. Apfelbaum

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1980

Re: No. 78-972 - United States v. Apfelbaum

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
							12/8/79	
Join WHR 2/1/80	1st Draft Concurring in judgment 2/27/80	Join WHR 1/29/80	Join UHR 2/7/80	Join TM 2/21/80	will write Concurring opinion 2/13/80 ~~1st draft~~ typed draft Concurring in judgment 2/14/80 1st draft 2/15/80	Join with R 2/11/80	1st Draft 1/28/80 2nd draft 2/4/80	Join WHR 2/5/80
				78-972 U.S.	v. Apfelbaum			