The Fate of Congressional Business Inquiry - U.S. v. Welden

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American business activities during the past century have expanded greatly in magnitude and complexity. To meet the problems occasioned by modern corporate enterprise expansion, Congress has enacted encompassing legislation to regulate the course and conduct of American business. In 1890, Congress enacted the first antitrust statute — The Sherman Act.¹ This Act:

"was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."²

To supplement the broad general Sherman Act prohibitions, Congress has enacted various antitrust and trade regulatory laws embodying a more definitive regulation of business conduct.³ In a sentence it may be stated that the antitrust laws are intended to protect and promote free and fair competition in business.

Congressional committees and subcommittees conduct inquiries and subpoena witnesses and documents for the purpose of gathering information to assist Congress in enacting, amending, repealing and modifying legislation. A continuous flow of reliable current information is essential to Congress. Testimony and documents of private

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citizens and corporations are a primary source of this necessary information. In the public interest a citizen may be compelled to testify and produce documents, even though it subjects him to painful inconvenience, and possibly embarrassment or notoriety. The power to compel testimony from a witness is a valuable instrument in obtaining essential information, but to protect against abuse of that power, the Fifth Amendment safeguards the individual against, among other things, self-incrimination.

Congress, recognizing the fundamental importance of the testimony of private citizens, has in turn acted by passing legislation that compels a witness to testify in exchange for immunity from subsequent prosecution. By enacting immunity statutes Congress has taken away the privilege of silence conferred by the Fifth Amendment and furnished immunity as a substitute. However, the efforts of Congress to gain access to essential information through the use of immunity statutes has been severely hampered by the Supreme Court’s decision in United States v. Welden, decided April 20, 1964. The Court in answering a question involving one of the earliest federal witness immunity acts, The Act of February 25, 1903, held that an immunity provision of that Act, providing that no person shall be prosecuted “on account of any transaction, matter, or thing” to which he testifies “in any proceeding, suit, or prosecution”, applied only to persons testifying in judicial proceedings. Since the Act of February 25, 1903 applies only to witnesses testifying in judicial proceedings and not to witnesses testifying in nonjudicial proceedings. Welden, a witness before a subcommittee of the House Select Committee on Small Business was not immunized from subsequent prosecution arising from his testimony before that committee.

Any comprehensive examination of the Welden decision necessitates a discussion of the privilege against self-incrimination and warrants a review of the legislative history of relevant federal witness immunity acts and judicial developments involving those enactments. In examining the Welden opinion this article confines its detailed analysis primarily to federal antitrust witness immunity statutes and decisions.

5. U.S. Const. amend. V. In part this guarantees that “no person . . . shall be compelled in any criminal case to be a witness against himself. . . .”

“No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1–7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8–11 of this title: Provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.”

This was amended by the Act of June 30, 1906, 34 Stat. 798 (1906), 15 U.S.C. § 33 (1958), which provides:

“Under the immunity provisions in section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.”
THE PRIVILEGE AGAINST SELF-INCrimINATION

Proclaimed as "one of the great landmarks in man's struggle to make himself civilized," protection against self-incrimination has become a part of our legal heritage. At common law no distinction was drawn as to the type of proceeding in which the privilege was applicable. It could be invoked in equity proceedings and common law civil cases as well as in criminal prosecutions. Despite the fact that the Fifth Amendment specifically provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," the Supreme Court has refused to confine the privilege to criminal prosecutions. The privilege may be invoked in any proceeding, be it criminal or civil, administrative or judicial, adjudicatory or investigatory. Since the privilege is not ordinarily dependent upon the nature of the proceedings in which testimony is sought or is to be used, it may be claimed wherever the answer to a question might tend to expose the person to criminal responsibility or where the answer would furnish a link in the chain of evidence needed to prosecute. A real danger of subsequent conviction must exist to justify a claim of the privilege. Remote contingencies will not be sustained under the Fifth Amendment. It is for the court to determine whether silence is justified. Purely personal, the privilege may not be used to protect others from punishment and it is not available to a corporation.

10. U.S. Const. amend. V.
In the case of Counselman v. Hitchcock, 142 U.S. 547, 562 (1892), the Supreme Court rejected an argument that the privilege is confined to defendants in criminal prosecutions and said: "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." See also Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1 (1930).
12. Specific proceedings, other than criminal, where the privilege has been held to be applicable are congressional investigations, Quinn v. United States, 349 U.S. 155 (1955); grand jury proceedings, Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547 (1892); bankruptcy proceedings, McCarthy v. Arndstein, 266 U.S. 34 (1924); preliminary hearings, Wood v. United States, 128 F.2d 265 (1942) (preliminary hearing in Police Court); and administrative proceedings, Graham v. United States, 99 F.2d 746 (1938) (before Inspector of the U.S. Immigration and Naturalization Service), Brown v. Walker, 161 U.S. 591 (1896).
14. In Hoffman v. United States, 341 U.S. 479, 486 (1951), the Court stated: "The privilege afforded not only extends to answers that would in themselves support a conviction, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . ."
17. In Hale v. Henkel, 201 U.S. 43 (1906), it was argued that the protections of the Fifth Amendment and the 1903 immunity statute were applicable to a corporation. The
The Fifth Amendment does not prohibit asking incriminating questions, but provides only that a witness cannot be compelled to answer unless a full substitute for the constitutional privilege is given. Over a hundred years ago Congress, fully cognizant that a person could impede the securing of necessary information by invoking the Fifth Amendment privilege and refusing to answer questions essential for a determination by a fact finding body, provided witnesses with statutory immunity from subsequent prosecution in exchange for their testimony. Immunity acts have as their purpose not a gift of amnesty but a method of making “evidence available and compulsory that otherwise could not be got.”

Supreme Court reasoned that the Fifth Amendment privilege was purely personal to the witness and not intended to be available to corporations. The Court declared: “The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and if he cannot set up the privilege of a third person he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti-Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress.”

For a general discussion of the privilege as applicable to corporations, see Annot., Privilege Against Self-Incrimination, 120 A.L.R. 1102 (1939).

By analogy the courts have extended the doctrine of corporate ineligibility to compel the custodian of an unincorporated association’s records to produce such association’s books and records, even though their production might incriminate the association or the custodian personally. United States v. White, 322 U.S. 694 (1944) (union records). Courts have been reluctant, however, to extend the White doctrine to compel partners to produce the records of a partnership. Generally, these records are protected by the privilege. United States v. Linen Service Council, 141 F. Supp. 511 (D.N.J. 1956); United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y. 1953); In re Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948); United States v. Brasley, 268 F. 59 (W.D. Pa. 1920). Contra, United States v. Onassis, 133 F. Supp. 327 (S.D.N.Y. 1955).

Federal and state governments may require certain businesses and professions to make and keep records and reports of their activities. A list of some of the federal regulatory statutes including such a record-keeping requirement may be found in Shapiro v. United States, 335 U.S. 1, 6 n.4 (1948). These “private” records and reports are not within the protection of the Fifth Amendment when the duty to keep them has been validly imposed, and thus they are subject to compulsory production. Shapiro v. United States, 335 U.S. 1, 17 (1948).

As a general rule, the witness immunity statute to come before the Supreme Court was invalidated by this decision. A shipper refused to answer a grand jury’s questions concerning his dealings with certain railroads on the ground that his answers might incriminate him. The Act of 1887, 24 Stat. 379 (1887), contained an immunity provision. The Supreme Court reversed a contempt conviction, holding the statute unconstitutional because it did not afford the witness the complete protection guaranteed by the Constitution.


Immunity once gained grants no license to violate the law perpetually. United States v. Swift, 186 F. 1002 (N.D. Ill. 1911), cited with approval in United States
The immunity acts must furnish something coextensive with the privilege displaced, but they need not be broader. Congress has enacted over 40 federal witness immunity acts and "every State, without exception, has one or more immunity acts pertaining to certain offenses or legislative investigations." The first Supreme Court decision sustaining the constitutionality of a federal witness immunity act was Brown v. Walker, decided in 1896. Examining the Compulsory Testimony Act of 1893, the Court announced that, "in view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates. The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify." Thus it is clear nothing short of absolute immunity will justify compelling a witness to testify if he has claimed the privilege. Unless the immunity granted is coextensive with the constitutional privilege a witness may invoke the Fifth Amendment and refuse to give self-incriminating testimony. Ever since Brown the Compulsory Testimony


The grant of immunity does not preclude punishment for perjury committed in the course of the compelled testimony. Glickstein v. United States, 222 U.S. 139, 142 (1911); see notes 36 and 41 infra, for examples of immunity statutes which include provision for non-exemption from prosecution and punishment for perjury committed when a witness testifies.


24. 161 U.S. 591 (1896). Brown, an auditor for a railroad company, had been subpoenaed to testify before a grand jury investigating charges that officers and agents of the company had violated the Interstate Commerce Act. Brown invoked the privilege against self-incrimination and refused to answer questions concerning the operations and rebate policy of the railroad. On being adjudged in contempt Brown appealed to the Supreme Court contending that the 1893 immunity statute was unconstitutional. The Court in rejecting Brown's arguments said: "While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer. . . ." 161 U.S. at 610.

25. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958). This Act provides: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." 26. 161 U.S. at 594.
Act of 1893 has been part of our constitutional fabric and has been included in substantially the same terms in almost all of the major federal regulatory enactments.  

Brown not only resolved any doubts Congress may have had concerning the constitutionality of federal witness immunity acts, but also assured Congress of the Supreme Court's agreement that immunity acts are essential for the enforcement of federal regulatory measures. With these doubts resolved, Congress moved rapidly to enact additional immunity acts, modeled after The Compulsory Testimony Act of 1893 provision applicable to proceedings under the Interstate Commerce Act. Congress, in February, 1903, as part of the legislative program for the correction of corporate abuses, enacted three separate measures that included similar immunity provisions: (1) the General Appropriation Act of February 25, 1903, providing for the compulsion of testimony in all proceedings brought under the antitrust laws; (2) the Act of February 14, 1903, establishing the Department of Commerce and Labor, and conferring upon the Commissioner of Corporations the same investigatory powers possessed by the Interstate Commerce Commission, and specifically incorporating by reference the immunity provisions of The Compulsory Testimony Act of February 11, 1893; and (3) the Elkins amendment of February 19, 1903, to the Interstate Commerce Act.

In 1914, Congress created the Federal Trade Commission to cope with the then evident inadequacy of the federal courts' enforcement of the Sherman Act. Under Section 9 of the Federal Trade Com-

27. Ullmann v. United States, 350 U.S. 422, 438 (1956); Shapiro v. United States, 335 U.S. 1, 6 (1948).
28. See Note, 72 YALE L.J. 1568, supra note 19, at 1575: "Congress, interpreting this decision [Brown] as laying to rest any doubts as to the constitutionality of immunity acts and as indicating the Court's agreement that such acts are essential to the enforcement of regulatory legislation, moved to adopt immunity legislation in connection with other federal regulatory activities."
29. 8 Wigmore, EVIDENCE §§ 2190-93 (3d ed., rev. 1961); Lilienthal, supra note 22.
32. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958); see n.25 supra.
34. See, e.g., 51 CONG. REC. 13047 (1914); 51 CONG. REC. 8977 (1914). For a discussion of the background of the Federal Trade Commission, see Henderson, THE FEDERAL TRADE COMMISSION, chs. I, VI (1924); Rublee, THE ORIGINAL PLAN AND EARLY HISTORY OF THE FEDERAL TRADE COMMISSION, 11 ACADEMY OF POLICY SCI. PROCS. 666 (1926); THE FIFTIETH ANNIVERSARY OF THE FEDERAL TRADE COMMISSION, 64 COL. L. REV. 385-618 (1964); FEDERAL TRADE COMMISSION SILVER ANNIVERSARY ISSUE, 8 GEO. WASH. L. REV. 249-748 (1940). See also F.T.C. v. Gratz, 253 U.S. 421, 432 (1920) (dissenting opinion of Mr. Justice Brandeis). See also Dixon, Practice and Procedure Before the Federal Trade Commission, 9 NEW YORK LAW FORUM 31 (1963) at p. 43:

"Like many other administrative agencies, the Federal Trade Commission performs functions that run through the entire spectrum of investigative, prosecutive, and adjudicative duties. It receives complaints from members of the public as to alleged violations of the statutes it administers; initiates investigations; issues formal complaints charging named parties with violations of law; causes adjudicative hearings to be held in which witnesses are heard and other evidence is received (by independent 'hearing examiners') in support of, and against, the charges in the complaints; hears appeals from the hearing examiners' initial decisions as to whether or not the law has been violated; issues orders commanding the named parties to 'cease and desist' from the violations found; and seeks enforcement of those orders in the courts."
mission Act, the Commission was granted a right of access to records of companies being investigated and the power to compel by subpoena testimony of witnesses and the production of documentary evidence. In connection with the latter provision, immunity is provided for witnesses testifying in Commission proceedings. The immunity formula worked out in Brown v. Walker served as a model for Section 9.

The judicial decisions examining the federal antitrust witness immunity acts have established the boundaries of immunity and have further emphasized the important part the immunity acts play in obtaining essential information that would otherwise be unavailable. In 1906, the Act of February 25, 1903, was before the Supreme Court for construction for the first time in Hale v. Henkel. A federal grand jury investigating alleged Sherman Act violations subpoenaed Hale, the secretary and treasurer of Mac Andrews & Forbes Company, but he declined to answer questions concerning the company's business, the location of its office, or the firm's agreements with other companies. Witness Hale was advised of the 1903 immunity statute provision by the Assistant District Attorney, but he still refused to answer questions. Thereupon contempt proceedings were initiated. The Supreme Court

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35. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958). Section 9 of the Federal Trade Commission Act is an automatic type immunity act. Under Section 9, a witness must be testifying in obedience to a subpoena and while under oath before immunity from subsequent prosecution is conferred. It is unnecessary for a witness to claim his privilege before the Commission to obtain the immunity granted by Section 9. U.S. v. Monia, 317 U.S. 424 (1943).

Section 9 immunity will not apply to an officer of a corporation required to produce books and records of the corporation, whether the records were kept by him or by another, United States v. Frontier Asthma Co., 69 F. Supp. 994, 996 (W.D. N.Y. 1947), for it is well settled that the privilege against self-incrimination does not extend to a corporation. Hale v. Henkel, 201 U.S. 43 (1906), note 17 supra. Even though these records may incriminate the corporate officer who presents them, he has no constitutional immunity in regard to such documents, Shapiro v. United States, 335 U.S. 1, 17 (1948).

36. For the purpose of examination, the Commission or its agents are provided access to, and the right to copy any documentary evidence of any corporation being investigated or proceeded against. Hale v. Henkel, 201 U.S. 43 (1906), note 17 supra. More than any other case formed the "raw material from which the Congress of 1914 molded the 'access' provision of the [Federal Trade Commission] Act." Mueller, Access to Corporate Papers Under the FTC Act, 11 KAN. L. REV. 77, 93 (1962).


"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."


39. 201 U.S. 43 (1906).

40. "Contempt can be generally defined as an act of disobedience or disrespect toward a judicial or legislative body of government, or interference with its orderly process, for which a summary punishment is exacted. In a broader, more general view, it is a power assumed by governmental bodies to coerce cooperation, and
sustained the lower court's ruling of contempt and construed the language in the Act of 1903 covering "proceedings, suits, and prosecutions" to include testimony before a grand jury:

"While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a 'proceeding' within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them."\(^41\) (Emphasis added.)

*United States v. Armour & Co.*,\(^42\) decided shortly after *Hale*, further shaped the profile of the Act of 1906. The Secretary of Commerce and Labor, in discharge of his statutory obligation to conduct special investigations\(^43\) and in obedience to a House resolution, directed the Commissioner of Corporations to investigate the low prices of beef cattle. During a conference with officers of packing corporations the Commissioner explained the purpose of the investigation, informing the officers that he was acting independently and not in cooperation with the Department of Justice Sherman Act investigation of the "Beef Trust". The Commissioner's agents examined the books and papers of the packing corporations. Subsequently, a grand jury indicted Armour & Co. and its officers for Sherman Act violations. Defendants pleaded immunity from prosecution on the ground that the supplying of information to the Commissioner of Corporations brought into operation the immunity provision of the Act of February 25, 1903. Judge Humphrey granted the individual defendants immunity despite the fact that the testimony had been furnished voluntarily, unsubpoenaed and unsworn to in a nonjudicial investigation by the Commissioner of Corporations.\(^44\) This decision was a severe blow to President Theodore Roosevelt's trust busting program.\(^45\) Congress, reacting swiftly to President Roosevelt's concern over the Armour holding, enacted the 1906 Immunity Act, which provides in part: "Under the immunity provisions in section 32 of this title, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."\(^46\)

\(^{40}\) See Message of the President, H.R. Doc. No. 706, 59th Cong., 1st Sess., p. 2. See also remarks of Sen. Knox supporting the 1906 bill: "... the whole purpose of this bill is to define the right of the witness ... that the immunity shall only extend to witnesses who have been subpoenaed to produce books and papers or subpoenaed to give testimony...," 40 Cong. Rec. 7657, 7658 (1906).

\(^41\) Hale v. Henkel, 201 U.S. 43, 66 (1906).

\(^42\) 142 Fed. 808 (N.D. Ill. 1906).


\(^44\) In deciding this case, the court examined Congress' purpose in enacting the Commerce and Labor Act. The court determined after this analysis that unsubpoenaed and unsworn testimony came within "the purposes of Congress in passing the commerce and labor act," and thus defendants were entitled to immunity from subsequent prosecution. 142 Fed. 819 et seq.

\(^45\) See message of the President, H.R. Doc. 706, 59th Cong., 1st Sess., p. 2.

Congress has in most instances included a provision in the immunity acts, that no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence.\textsuperscript{47} When a person after testifying is indicted and claims immunity, the court must analyze whether the testimony given was substantially connected with the crime for which immunity was claimed. A witness obtains immunity if his testimony concerned any transaction, matter, or thing for which he was subsequently indicted, but he is not protected from indictments which involve unrelated crimes of which he may be guilty at the time he is compelled to testify. This qualification limiting the scope of immunity statutes was plainly established in \textit{Heike v. United States}.\textsuperscript{48}

In that case, petitioner in response to a government subpoena testified and produced documentary evidence before a federal grand jury investigating transactions of the American Sugar Refining Company for violation of the Sherman Act. Subsequently, after petitioner was indicted for revenue frauds, he claimed exemption from liability by virtue of the Act of February 25, 1903, as amended by the Act of June 30, 1906.\textsuperscript{49} The Supreme Court, per Holmes, J., held that petitioner's evidence before the grand jury did not concern the present revenue frauds. Mr. Justice Holmes reasoned that "not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof. . . ."\textsuperscript{50} In considering whether the evidence furnished had an incriminating effect on petitioner, Mr. Justice Holmes announced: "When the statute speaks of testimony concerning a matter it means concerning it in a \textit{substantial way}, just as the constitutional protection is confined to real danger and does not extend to remove possibilities out of the ordinary course of law."\textsuperscript{51}

Justice Holmes enunciated a standard for the construction of statutory immunity provisos in discussing the Act of 1903, that has been followed in later decisions:

"... the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy

\textsuperscript{47} See notes 7 and 25 supra for examples of that language.
\textsuperscript{48} 227 U.S. 131 (1913).
\textsuperscript{49} The same immunity provisions are involved in United States v. Welden, 377 U.S. 95 (1964), note 7 supra.
\textsuperscript{50} 227 U.S. at 143.
\textsuperscript{51} Id. at 144. (Emphasis added.) The qualification requiring substantial danger of conviction from the evidence furnished has been followed in Hoffman v. United States, 341 U.S. 479, 486 (1951); Rogers v. United States, 340 U.S. 367, 372-73 (1951); Blau v. United States, 340 U.S. 159, 161 (1950); United States v. Cusson, 132 F.2d 413, 414 (2d Cir. 1942).
to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443. . . .”52

Unlike most federal witness immunity acts passed by Congress, the immunity provisions under the antitrust laws ordinarily do not require a witness to claim his privilege against self-incrimination.53 Immunity is automatically gained by a witness for all evidence produced in obedience to a subpoena and while under oath. This type of immunity act provision, one of two basic types, is referred to as an “automatic” act. The other type, a “claim” act, confers immunity only after a witness has asserted his privilege and is directed to testify.54

Prior to 1933, immunity provisions enacted by Congress did not require a witness desiring immunity to expressly assert his constitutional privilege prerequisite to establishing immunity. Beginning with the Securities Act of 1933,55 and in subsequent regulatory measures containing immunity from prosecution provisions, Congress inserted a requirement that a witness in addition to being subpoenaed and sworn must specifically assert his constitutional privilege.56 By adding this specific claim requirement, Congress has plainly demonstrated an intention to insure against immunity being conferred automatically, as in earlier immunity act provisions.

After a court has considered and determined that immunity can be conferred under the particular immunity act in question it next looks at the immunity act provision for the answer whether immunity has in fact accrued to the witness. Even though many federal courts had been sharply divided on the question whether statutory immunity may be gained by a witness without his first asserting the constitutional privilege,57 the question did not reach the Supreme Court until 1943 in United States v. Monia.58

In that case a witness in response to a subpoena appeared and testified before a grand jury inquiring into alleged Sherman Act violations. At no time during the grand jury proceedings was the constitutional privilege asserted by the witness. Later, when a Sherman Act indictment relating substantially to transactions and matters testi-

52. Heike v. United States, 227 U.S. 131, at 142 (1913).
54. See Note, 72 YALR L.J. 1568, 1590-94, supra note 19.
56. Beginning with the 14th of the 17 regulatory measures including immunity provisions enacted in 1933, Congress added the requirement that immunity shall be conferred only after a witness has asserted his privilege against self-incrimination and is instructed to testify. For a discussion of immunity provisions contained in various statutes establishing governmental agencies both before and after the passage of the 1903 Act, see United States v. Monia, 317 U.S. 424, 442-45 (1943) (dissenting opinion of Mr. Justice Frankfurter).
fied to was returned by the grand jury, witness Monia claimed immunity under the 1903 Immunity Act, as amended by the Act of 1906. After the District Court for Northern Illinois overruled the Government's demurrer, direct appeal was taken to the Supreme Court. In affirming the District Court, Mr. Justice Roberts speaking for the Court, with Justices Frankfurter and Douglas dissenting, took the position that under an immunity statute typified by the 1893 Interstate Commerce Act, as modified in 1906, a claim of the privilege against self-incrimination is not necessary to obtain immunity so long as the formal requirements (i.e., subpoena, oath and testimony) of the Act of 1906 are met.

Mr. Justice Roberts, commenting on the Congressional intention not to require a claim by the witness under the 1903 immunity statute, as amended in 1906, noted:

"The legislation involved in the instant case is plain in its terms and, on its face, means to the laymen that if he is subpoenaed, and sworn, and testifies, he is to have immunity. . . . That Congress did not intend, or by the statutes in issue provide, that, in addition, the witness must claim his privilege, seems clear. It is not for us to add to the legislation what Congress pretermitted."60

After a detailed historical analysis examining statutes and decisions involving federal witness immunity, Mr. Justice Frankfurter in his dissenting opinion appealed to an exchange theory of Congressional intent:

"There never has been a privilege to disregard the duty to which a subpoena calls. And when Congress turned to the device of immunity legislation, therefore, it did not provide a 'substitute' for the performance of the universal duty to appear as a witness — it did not undertake to give something for nothing. It was the refusal to give incriminating testimony for which Congress bargained, and not the refusal to give any testimony. And it was only in exchange for the self-incriminating testimony which 'otherwise could not be got' (Heike v. United States, 227 U.S. 131, 142) because of the witness's invocation of his constitutional rights that Congress conferred immunity against the use of such testimony."61

Mr. Justice Holmes in Heike enunciated the same theory. Under this theory, instead of presuming an intention on the part of the witness to assert his privilege, Justice Frankfurter would require a valid claim to establish the privilege. To Mr. Justice Frankfurter,

"an appearance in response to a subpoena does not of itself confer immunity from prosecution for anything that a witness so responding may testify. There must be conscious surrender of the privilege.

59. See note 25 supra.
60. 317 U.S. at 430.
61. Id. at 433.
of silence in the course of a testimonial inquiry. Of course no form of words is necessary to claim one's privilege. Circumstances may establish such a claim. But there must be some manifestation of surrender of the privilege."\(^{62}\)

After *United States v. Monia* in 1943, the Supreme Court did not again have an immunity question involving the Act of February 25, 1903, as amended in 1906,\(^{68}\) before it until *United States v. Welden*.

A subcommittee of the House Select Committee on Small Business investigating practices in the dairy industry subpoenaed William C. Welden to testify and produce documents belonging to a corporation, H. P. Hood & Sons, Inc., of which he was an officer.\(^{64}\) In obedience to the subpoena Welden testified before the subcommittee on February 18 and 19, 1960. Subsequently, on September 6, 1960, Welden and four other individuals and three corporations, including H. P. Hood & Sons, Inc., were indicted on charges of conspiring to fix milk prices and to defraud the United States, in violation of the Sherman Act\(^{65}\) and the Conspiracy Act.\(^{66}\) Welden moved to dismiss on the ground, *inter alia*, that prosecution was barred under the immunity provision of the Act of February 25, 1903,\(^{67}\) because his testimony previously given before the House subcommittee concerned transactions, matters, and things covered by the indictment. The United States District Court, District of Massachusetts, in Memorandum and Order held that the immunity provision of 15 U.S.C. §32 barred prosecution of Welden.\(^{68}\) The Government's position, that testimony before a congressional committee is not given in "a proceeding . . . under (the antitrust laws)" within the meaning of the immunity provision of the 1903 statute and extends only to judicial proceedings, was rejected. The District Court Judge reasoned that to hold otherwise "would fly in the face of traditional American notion of fair play . . . and subject a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional Subcommittee."\(^{69}\) On direct appeal to the Supreme Court,\(^{70}\) the District Court was reversed, with Justices Black and Douglas dissenting.\(^{71}\)

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\(^{62}\)Id. at 446-47.

\(^{63}\)See note 7 supra.

\(^{64}\)The Select Committee had been authorized by the House to study and investigate the problems of all types of small business (H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785) and its chairman appointed the Special Subcommittee to study the problems of small business in the dairy industry (H.R. REP. 714, 86th Cong., 1st Sess.). Welden's testimony is set forth in Hearings before the Special Subcommittee of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess., Part IV, pp. 665-701.


\(^{69}\)Id. at 657.


\(^{71}\)The Supreme Court reversed the District Court's judgment dismissing the indictment against Welden and remanded the case. On remand, Welden pleaded *nolo contendere* and was fined $2,500.00.
The Supreme Court majority disagreed with the District Court's decision that the immunity provision of the 1903 statute is applicable to persons testifying before congressional committees and subcommittees. Petitioner argued that the immunity provision of the Act of 1903 was amended by implication by the Act of 1906 to extend immunity to persons testifying in nonjudicial proceedings. This interpretation was unanimously rejected by the Court. Mr. Justice Goldberg, writing for the majority, examined the legislative history of the 1903 statute, as amended in 1906, and applicable decisions, and held that the statute granted immunity only to persons testifying in judicial proceedings brought under specific acts, such as the Sherman Act. The Court concluded, "that the 1906 statute did not, either expressly or implicitly, extend the immunity provision of the Act of February 25, 1903, to include nonjudicial proceedings. The 1906 Act simply limited immunity to persons testifying under oath and in response to subpoena." Justice Goldberg emphasized that:

"Congress has extended immunity, with careful safeguards, to persons testifying before congressional committees in certain limited situations not here involved. Where Congress, however, has limited immunity to persons testifying in judicial proceedings, as it has plainly done here, it is not for the courts to extend the scope of the immunity."  

Justice Black, in his dissenting opinion, agreed that the Act of 1906 did not enlarge the reach of the Act of February 25, 1903, to include nonjudicial proceedings. However, he viewed the Act of 1903 as applying to nonjudicial proceedings without enlargement of its scope. In reaching this conclusion, Justice Black referred to the Senate debates on the 1906 immunity act:

"... in the Senate debate on the 1906 amendment, Senator Daniel expressed an understanding which no one questioned:

'I suppose that the bill under consideration as it reads now applies only to persons who testify in a judicial proceeding or to those who are responding to some body such as a Congressional committee that has the right to enforce an answer from a witness.'

Senator Knox, manager of the amendment in the Senate, thereupon explained the bill to Senator Daniel in detail, never contradicting what Senator Daniel had said on this point. ... From that day until this no one seems ever to have doubted that this reading of the 1903 Antitrust Immunity Act was correct."  

Mr. Justice Black felt that a "narrow and grudging interpretation of the Act is ... not justified by either the language or the history

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73. Id. at 107.
74. Id. at 113.
Moreover, in harmony with his views set forth in prior dissenting opinions, he considered the Government under an obligation not to breach a solemn promise of immunity protection conferred upon individuals by Congress pursuant to 15 U.S.C. §32.

Mr. Justice Douglas' dissent attacked the evils and harmful individual indignities of "legislative trials". He declared:

"Congressional investigations as they have evolved, are in practice 'proceedings' of a grave nature so far as individual liberties are concerned. Not all committee hearings are 'trials' of the witness; not all committee hearings are televised or broadcast; and so far as appear this witness was not subjected to any such ordeal. . . .

But courts, knowing the manner in which committees often operate, are properly alert either in denying legal effect to what has been done or in taking other steps protective of the rights of the accused. . . . That is one reason why I would not import any ambiguities into this Immunity Act to this disadvantage of the accused."77

In conclusion, Mr. Justice Douglas stated:

"Some may see wisdom in this modern kind of 'trial by committee,' so to speak, with committees and prosecutors competing for victims. But the more I see of the awesome power of government to ruin people, to drive them from public life, to brand them forever as undesirable, the deeper I feel that protective measures are needed. I speak now not of constitutional power, but of the manner in which a statute should be read. I therefore incline to construe the Immunity Act freely to hold that he who runs the gantlet of a committee cannot be 'tried' again."78

With an examination of the Welden decision completed it is now appropriate to focus attention on two Supreme Court decisions decided since Welden involving the privilege against self-incrimination and state witness immunity acts. Implications of these two decisions, Malloy v. Hogan79 and Murphy v. Waterfront Commission of New York Harbor,80 have a substantial effect on the dual enforcement of the antitrust laws when considered in light of Welden.

Malloy firmly established that the privilege against self-incrimination is safeguarded from Federal encroachment by the Fifth Amendment and insulated against state invasion by the Fourteenth. Ad-

75. Id. at 108.
78. Id. at 123.
79. 378 U.S. 1 (1964). The Court as per Breman, J., reconsidered prior decisions holding that the privilege against self-incrimination is not protected against state action by the Fourteenth Amendment. This was a 5-4 decision.
ditionally, availability of the privilege to a witness in state inquiries is determined by the same standard applicable in federal proceedings.\textsuperscript{81}

The Supreme Court, on the same day as the \textit{Malloy} decision, held in \textit{Murphy v. Waterfront Commission of New York Harbor} that where a witness has been given a statutory grant of immunity from prosecution under the laws of a state sovereignty, he cannot be prosecuted on the basis of his testimony (or its fruits) under the federal laws.\textsuperscript{82} As an obvious corollary to this decision, a state would be barred from using testimony (or its fruits) which has been federally immunized as a basis for a subsequent state prosecution.

Mr. Justice Goldberg, writing for the majority in \textit{Murphy}, considered the policies of the Fifth Amendment protection and then reviewed prior English and American decisions.\textsuperscript{83} Many of these early decisions were based upon the principle that the state and federal governments operate as separate and distinct sovereignties and each acts independently of the other. Thus, immunity granted by state statute depends only on whether that statute confers complete protection against prosecution in the state courts. If it does, refusal to answer on the ground of self-incrimination does not exist. In concluding, Mr. Justice Goldberg declared: "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."\textsuperscript{84}

Applying \textit{Malloy v. Hogan} to this case, Mr. Justice Goldberg stated:

"[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."\textsuperscript{85}

The federal antitrust laws had their antecedents in the early decisions of the state courts and the enactments of state legislatures.\textsuperscript{86} Most states have enacted antitrust laws with the same general objectives as the federal antitrust laws.\textsuperscript{87} Because of the overlapping juris-

\textsuperscript{81} 378 U.S. 1 (1964).
\textsuperscript{82} 378 U.S. 52 (1964). States have enacted immunity acts to obtain testimony that otherwise would not be available under the constitutional privilege. Similar to the federal immunity acts, the state immunity statutes involve all proceedings where testimony of a witness might serve to incriminate him.
\textsuperscript{83} \textit{Id.} at 55-77. Whereas in the \textit{Welden} decision Mr. Justice Goldberg did not examine the Fifth Amendment safeguard in writing the majority opinion, in this decision he referred at length to the principles underlying the constitutional protection.
\textsuperscript{84} \textit{Id.} at 77-78.
\textsuperscript{85} \textit{Id.} at 79.
\textsuperscript{86} Wilson, \textit{The State Antitrust Laws}, 47 A.B.A.J. 160 (1961) ; see also address by Commissioner E. MacIntyre before House of Representatives, State of Hawaii, on Federal-State Cooperation Regarding Antitrust and Trade Regulation, August, 1962.
diction in the enforcement of these laws, the Antitrust Division of the Department of Justice and the Federal Trade Commission, as representatives of the federal government, have encouraged state agencies to cooperate in the over-all enforcement of the antitrust laws. 88

In light of the Murphy case, it may be said that congressional immunity grants bar the use of that testimony or its fruit in subsequent federal or state prosecutions. The federal authorities may prosecute following such testimony only after they have met "the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 89

The congressional subcommittee examining Welden did not have statutory authority to confer immunity upon him. The 1903 Immunity Act applies only to persons testifying and judicial proceedings, and not to persons giving testimony before congressional committees. 90 Therefore under the Welden situation a witness who testifies is subject to either federal or state prosecution. A witness in such a position is justified in refusing to answer any questions because of the chance of exposing himself to the hazards of prosecution by federal or state enforcement agencies.

There is little doubt that the Welden decision will impair future congressional committees investigating business practices. Similarly, the value to the Antitrust Division of the Department of Justice of the testimony of congressional witnesses has been seriously diminished. A corporate witness summoned by a committee to answer questions concerning his company's business practices is not likely to waive his constitutional privilege, where his disclosures may lead to his self-incrimination. Instead, the corporate witness will assert his privilege against self-incrimination and remain silent rather than chance subsequent prosecution.

As a result of Welden the Antitrust Division may well be forced to rely mainly on its own investigation techniques without further assistance from testimony before congressional committees. In the past the Antitrust Division has made the most significant use of the federal antitrust witness immunity acts. This is attributable to the fact that the immunity acts involved in all federal judicial proceedings under the antitrust laws are automatic in character. 91 A detailed procedure for considering whether a person should be granted immunity has been formulated by the Division. Generally, immunity grants

88. Sieker, The Role of the States in Antitrust Law Enforcement — Some Views and Observations, 39 Tex. L. Rev. 873 (1961). An example of a step recently made to encourage state antitrust activity was the policy under Assistant Attorney General Robert A. Bicks of facilitating prosecution of damage claims based upon collusive bidding to governmental agencies by refusing to acquiesce in nolo contendere pleas and refusing to enter into consent decrees without a provision restraining defendants from denying their violations in a civil damage suit brought by a public agency, based upon the same violation which is the subject of the prosecution. The effect of this "Asphalt Clause" is that injured public litigants can use the consent decree as they would a guilty plea as prima facie proof of guilt. United States v. Lake Asphalt and Petroleum Co., 1960 Trade Cas. ¶ 69,835 (D. Mass. 1960).
89. 378 U.S. 52, 79 n.18 (1964).
91. See note 53 supra.
are avoided for persons primarily responsible for antitrust violations.\textsuperscript{92} Since immunity is automatic under the antitrust acts, the Government on occasion will ask a witness to waive his immunity prior to his appearance before the grand jury. Agreeing to such waiver is rarely advantageous to a witness.\textsuperscript{93}

The Division is also involved in proceedings before other regulatory agencies whose actions may have an impact upon the enforcement of the antitrust laws.\textsuperscript{94} Because of the overlapping jurisdiction of the Antitrust Division and the Federal Trade Commission in the enforcement of the antitrust laws, a working arrangement exists between the two agencies.\textsuperscript{95}

The \textit{Welden} decision is not expected to affect the availability of corporate records and papers to congressional committees. It is well settled that the privilege against self-incrimination does not extend to corporations. Consequently, a corporate officer summoned by a congressional committee to produce corporate records and papers has no constitutional immunity as to those records even though they may incriminate him, and thus the officer may not refuse to produce the records for the committee. However, the officer may invoke the constitutional privilege against self-incrimination when the committee seeks

\begin{itemize}
  \item \textsuperscript{93} See Address by George D. Reycraft, Former Chief of Section Operations, Antitrust Division, Department of Justice, delivered at the 1963 N.Y. State Bar Association Antitrust Law Symposium, reprinted by CCH Trade Cases, p. 73 (1963).
  \item \textsuperscript{94} See Address by William H. Orrick, Jr., August 12, 1963, before the Antitrust Section of the American Bar Association.
  \item \textsuperscript{95} Recently, Antitrust Division investigative tools were implemented by legislation authorizing the use of a civil investigative demand under the Antitrust Civil Process Act of 1962, 76 Stat. 548-551 (1962), 15 U.S.C. §§ 1311-14 (1962). The Attorney General or Assistant Attorney General in charge of the Antitrust Division may serve a civil demand on any corporation, association, partnership or other legal entity not a natural person for the production of documentary evidence relating to investigations of suspected civil antitrust violations. It is similar to a subpoena and its validity is determined under the rules applicable to a subpoena \textit{duces tecum} served in a grand jury investigation. H.R. Rep. No. 1386 (S. 167), 87th Cong., 2d Sess. It may be enforced by compulsory court procedure.

Even though it is to be used only in civil investigations, this does not mean information obtained may not be used in criminal proceedings. Evidence secured from the examination of books and records of a company served with a civil investigative demand can be presented before a grand jury investigating criminal antitrust violations. Under the Antitrust Civil Process Act of 1962 natural persons are specifically exempted. Company books and records are subject to Antitrust Division examination. However, the Act does not authorize oral examination of company officials. Beyond the establishment of the identity and authenticity of the records produced. In the event of questions probing beyond that scope, the official may invoke his constitutional privilege against self-incrimination. Since the purpose of the Act is not designed to compel testimony, no provision for conferring immunity upon a witness was included. Therefore, any responses by company officials may be considered a waiver of the privilege and could expose them to subsequent prosecution.

Prior to the enactment of the Antitrust Civil Process Act of 1962 the Antitrust Division possessed no compulsory method by which information concerning a civil antitrust violation could be obtained. The act thus implements the Division's three principal investigative techniques: the preliminary inquiry by Division attorneys, grand jury proceedings and Federal Bureau of Investigation (FBI) inquiries.

See Petition of Union Oil Co., 225 F. Supp. 486 (S.D. Calif. 1963), \textit{aff'd sub nom} United States v. Union Oil Co., 343 F.2d 29 (9th Cir. 1965); and Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), \textit{aff'd sub nom} Gold Bond Stamp Co. v. United States, 325 F.2d 1018 (8th Cir. 1964).
testimony beyond identification and authentication of the records produced. The committee cannot then compel the officer to answer further questions because immunity from subsequent prosecution cannot be conferred.

**Conclusion**

Availability of accurate current business information is extremely important for the furtherance of legislative surveillance over the antitrust laws and trade regulatory acts. Thus, the free submission to congressional committees of necessary information has been seriously jeopardized as a result of the Supreme Court's decision in *Welden*. Implications of the *Welden* case now particularly impair the working relationship existing between Congress and businessmen witnesses, by discouraging the flow of information from the business community.

Obviously, a witness apprehensive of antitrust act prosecution will not make a conscientious all-out effort to cooperate with Congress. Resort to immunity statutes seems to have proved itself a valuable and satisfactory aid in obtaining reliable information. The *Welden* decision made it clear that a promise of immunity from subsequent prosecution its not available under the Immunity Act of 1903, as amended by the Act of 1906, to subpoenaed witnesses testifying (under oath) in nonjudicial proceedings.

To the dissenters, Black and Douglas, the *Welden* decision presents not only a legal issue but a moral question as well. In fact, it would appear that the majority of the Supreme Court invited Congress to act in this regard when it suggested, "Where Congress, however, has limited immunity to persons testifying in judicial proceedings, as it has plainly done here, it is not for the courts to extend the scope of immunity."\(^9\) Legislation is necessary not only to maintain the effectiveness of the information flowing into Congress, but also in order to correct a departure from our traditions of fair play, enunciated in the District Court opinion in *Welden* and in the Supreme Court dissents.

Absent any legislative correction of the situation resulting from the Supreme Court's *Welden* decision, a congressional committee witness is confronted with these alternatives:

1. Continuing to cooperate fully by testifying before congressional committees: This is unlikely because, if the witness testifies, he runs the risk of having his testimony used or provided as a link in a chain of evidence that may be used against him in a subsequent prosecution by the enforcement agencies.

2. Refusing to cooperate except for producing subpoenaed documents: This would tend to impede the flow of information to Congress. Many witnesses now will assert their constitutional privilege and refuse to testify because immunity cannot be exchanged for evidence that could not otherwise be obtained by the congressional body. Thus Congress would be forced to abandon the attempt to extract information from unwilling witnesses.

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3. Continuing to cooperate fully by testifying after first requesting Congress to promise to recommend to the enforcement agencies that because of a witness' cooperation, the agencies involved not prosecute the witness: This appears impractical. Even if a congressional committee should make such a promise to recommend that no prosecution be made, the agencies are not legally bound and still may in congressional proceedings.

Clearly, none of these alternatives is satisfactory. The only satisfactory remedy to the Welden decision is the enactment of corrective legislation to relieve congressional witnesses testifying before committees investigating business practices of any risk of being subsequently prosecuted for antitrust violations if they should cooperate and testify. To achieve this objective, the 1903 Immunity Act, amended in 1906, should again be amended to provide for witness immunity in Congressional proceedings.

It would appear that the antitrust enforcement agencies really have not gained from the Welden decision. And from a practical working viewpoint, such an amendment to the 1903 Immunity Act will not grant some new cloak of privilege to congressional witnesses, to the disadvantage of the antitrust enforcement agencies. Both the Antitrust Division of the Department of Justice and the Federal Trade Commission presently have available adequate investigative tools for obtaining information and any legislation granting immunity to congressional witnesses does not seem likely to impede their investigative powers.

Enactment of an amendment to the 1903 Immunity Act should recognize and confer immunity only to a witness testifying in response to a subpoena and while under oath before congressional committees inquiring into business practices. Immunity conferred by this amendment should be automatic in character. Thus, before issuance of a subpoena requiring testimony, congressional committees will have to determine whether the information a witness can offer is valuable enough to warrant granting immunity. Relieved of the apprehension of subsequent indictment, private citizens will then be in a position to cooperate with Congress. The working relationship that existed between Congress and the business community will be restored, and Congress may again expect to be the recipient of reliable current information essential for its surveillance over the antitrust laws and trade regulatory acts.