

# The Burger Court Opinion Writing Database

## *Pillsbury Co. v. Conboy*

459 U.S. 248 (1983)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

November 23, 1982



Personal

~~memo~~

Re: 81-825 - Pillsbury Co. v. Conboy

Dear Lewis:

I am in agreement with your opinion, but I question note 18, page 11. The issue is not before us, and I am loath to invite the questions it would raise.

Do you really need it?

Regards,

A handwritten signature, likely "L. Powell", is written in cursive below the "Regards," text.

Justice Powell

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

CHAMBERS OF  
THE CHIEF JUSTICE

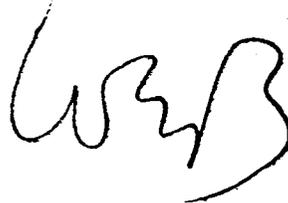
December 17, 1982

Re: No. 81-825, The Pillsbury Co. v. Conboy

Dear Lewis,

This will confirm my informal "join."

Regards,

A handwritten signature in black ink, appearing to be 'WJP', written in a cursive style.

Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

Nov. 18, 1982

Re: Pillsbury v. Conboy, No. 81-825

Dear Harry:

I have read your concurring opinion in the above case. I agree strongly with your general approach to the issue in the case. Like you, I cannot agree with Lewis that "the language of the statute permits either party's interpretation and compels neither." On the contrary, I am in accord with your analysis. Conboy's deposition testimony can be compelled only if (apart from this very compulsion order) it is immune under § 6002 from later criminal use. It is immune only if it is "derived" from the earlier order to testify under § 6003. It is "derived" only if it would be a "fruit" of Conboy's earlier testimony under the Fifth Amendment. And it is not such a fruit. Hence, as you conclude, the immunity statute creates no warrant for compelling this deposition testimony, regardless of the content of the proposed questioning or cross-examination.

I do have some reservations, however, about Part III of your opinion, in which you demonstrate that Conboy's deposition testimony would not be a fruit of his prior

immunized testimony. My concerns are two. First, I would like to find a way to avoid relying on Fourth Amendment cases as setting the standard for the Fifth Amendment fruits doctrine. Second, I think it is unnecessary and possibly harmful to use a factual analysis of the fruits doctrine that leaves open the possibility that the outcome might be different in a future case because of differences in the factual record. I have taken the liberty of attaching a suggested set of alterations to Part III for your consideration.

My first disagreement is more a matter of rhetoric and case citation than of the real substance of your reasoning. Nevertheless, I think it may be worth drawing attention to, because I fear that your present opinion tends to equate the fruits doctrine applicable under the Fifth Amendment to that presently applied under the Fourth.

In Part III of your opinion, you say that the proper test of fruits to apply under the Fifth Amendment is the same as the test of "free will" applied in such Fourth Amendment cases as Wong Sun v. United States, 371 U.S. 471; Brown v. Illinois, 422 U.S. 590; and Rawlings v. Kentucky, 448 U.S. 98. Your statement of this test (pp. 6-7) is a paraphrase of your seminal exposition of the test in Brown, 422 U.S. at 603-04. I agree with your "bottom-line" summary of the test: "In brief, the issue

is whether the speaker has voluntarily chosen to make the later statement, uninfluenced by the fact that prior statements have been compelled." Reliance on Wong Sun and Brown for this conclusion is troubling, however, because of the baggage that those cases carry due to their Fourth Amendment origins.

In Brown, your opinion stressed that the test of the fruits doctrine under the Fourth Amendment is influenced by the deterrent purpose of the exclusionary rule under that Amendment. See 422 U.S. at 599-600. Lewis's concurrence in Brown made this even more explicit: "The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." Id. at 609. This explains why the most heavily stressed factor in the four-part Brown test is "the purpose and flagrancy of the official misconduct". Id., at 604. That factor has only limited relevance to the state of mind of the witness, but it is obviously crucial to the problem of marginal deterrence. See also id. at 609-12 (POWELL, J., concurring); Rawlings, 448 U.S. at 110 (referring to "prophylactic exclusion" due to police misconduct); 3 W. LaFare, Search & Seizure §11.4(a).

Application of this Brown-Wong Sun Fourth Amendment rule is inappropriate under the Fifth Amendment because the purposes of the exclusionary rule are different in the two contexts. To be sure, the exclusionary rule does serve a deterrent purpose under the Fifth Amendment. But it is more than that--it is the heart of the constitutional right at stake. Strictly speaking, one has no right not to give incriminating testimony per se. Rather, the object of the Fifth Amendment is "to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his [compelled] disclosure". Brown v. Walker, 161 U.S. 591, 595. Thus, the exclusion of compelled testimony or its fruits is itself part and parcel of the Fifth Amendment right, whether or not the original compulsion was lawful. See also, e.g., Murphy v. Waterfront Comm'n, 378 U.S. 52, 57 n.6; United States v. Kurzer, 534 F.2d 511, 516 (CA2 1976). Hence, I am reluctant to suggest by citation that the Fifth Amendment fruits doctrine is subject to the "diminishing returns" deterrence limitation of Brown.

I do not suggest that we need get into this Fourth/Fifth business in this opinion. Rather, I suggest only a substitution of Fifth Amendment authority. I have attempted this in the first paragraph of the attached.

As for my second reservation, it seems to me that the most important feature about the Court's disposition

in this case is not whether we affirm or reverse, but that we clearly state a bright-line rule for the guidance of persons in Conboy's position. I am reluctant, therefore, to suggest that there might be a different result on slightly variant facts. Yet I fear that your opinion does so, both because the paragraph on pp. 7-8 is limited to the facts of this case, and because of your implications in the following two paragraphs. I have attempted to remedy this in the remainder of my suggested change.

Naturally, I do not mean to impose any change on you, nor do I have my heart set on the particular language in my proposal. Changes along the general lines I have suggested, however, would make it easier for me to join your concurrence. I will welcome your response to my ideas.

Sincerely,

WJB Jr.

Justice Blackmun  
Copy to Justice Powell

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

[December —, 1982]

JUSTICE BRENNAN, concurring in the judgment.

JUSTICE POWELL'S plurality opinion in this case concludes:

"We hold that a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege." *Ante*, at 14.

JUSTICE BLACKMUN'S opinion concurring in the judgment likewise states:

"In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001-6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the Court's conclusion that he may not be forced so to testify." *Post*, at 1.

I understand these to be two statements of the same rule,\*

\*While JUSTICE POWELL'S statement of the holding is formally limited to the situation where a deponent's deposition testimony "closely track[s]"

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 30, 1982

Re: Pillsbury v. Conboy, No. 81-825

Dear Lewis:

Thank you for your letter concerning the above case.

As the enclosed circulation shows, while you and I share some doubts about Harry's concurring opinion, I confess that I am in closer agreement with his general approach to the case than with yours.

Your opinion casts the issue in terms of whether the prior immunity order has already compelled Conboy's privilege with respect to this deposition (p.7). Yet the balance of your opinion does not address the scope of the immunity granted or of the testimony compelled. Instead, you decide the case on a different basis: which answer to the question produces a better result for the protection of the Government's and the witness's interests. While this sort of black-box statutory construction is often all we have to go on, I prefer to avoid it where possible; it is dependent on factual analyses that range from the empirical to the hypothetical (as your debate with John's dissent illustrates). I prefer the more direct approach I have

suggested to Harry in my previous letter to him and in the enclosed letter to him.

I agree that it would be preferable to have a majority opinion in this case. I have tried, in my separate opinion, to make it clear that your bottom-line holding, at least, commands the support of a majority that includes me.

Sincerely,



WJB, Jr.

Justice Powell  
Copy to Justice Blackmun

P.S.: I am also particularly distressed by the first sentence of your footnote 21 (p.13). I would have thought it settled beyond any possible speculation that wrongfully compelled evidence must always be excluded in a subsequent criminal prosecution.

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 30, 1982

Re: Pillsbury v. Conboy, No. 81-825

Dear Harry:

Thank you for your latest letter explaining the revisions in your concurring opinion in the above case. I appreciate your prompt response.

I am still uncomfortable with your fruits analysis in Part III, and that is why I have found it necessary to file the enclosed circulation. I have touched before on the problem of Fourth versus Fifth Amendment authority, and I will not trouble you with it again. Even aside from that, however, I cannot agree that the test stated in Brown v. Illinois is particularly apposite or useful as applied in a case such as the present one. Your analysis focuses on Conboy's actual state of mind and concludes that his choice to testify, had he made such a choice, would have been voluntary and independent. Yet this is to hypothesize that Conboy made precisely the opposite choice from the one he made. If, ex hypothesi, Conboy had chosen to testify, may we assume that his state of mind would have been the same? I fear that your opinion is vulnerable to the charge John makes against it

in his footnote 7--that the existence of the privilege is somehow made to depend on the willingness to assert it.

Your analysis is better fitted, I feel, to a case where a person such as Conboy has already testified and is seeking to suppress his deposition testimony at some later stage. In that case, under either Brown or Harrison, the focus must be on the witness's subjective reasons for testifying. In the present case, however, where the inquiry is whether the witness remains under the immunizing and compulsive effect of a prior immunity order, surely the primary focus must be on the scope of the original compulsion to testify.

I hope I have taken sufficient steps in my brief opinion to assure that litigants will understand that there is a majority behind the rule announced by you and Lewis, notwithstanding the absence of a majority opinion.

Sincerely,

  
WJB, Jr.

Justice Blackmun  
Copy to Justice Powell

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: 12/9/82

P. 1

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-825

THE PILLSBURY COMPANY ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE BRENNAN, concurring in the judgment.

JUSTICE POWELL's plurality opinion in this case concludes:

"We hold that a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege." *Ante*, at 14.

JUSTICE BLACKMUN's opinion concurring in the judgment likewise states:

"In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001-6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the plurality's conclusion that he may not be forced so to testify." *Post*, at 1.

I understand these to be two statements of the same rule,\*

---

\*While JUSTICE POWELL's statement of the holding is formally limited to the situation where a deponent's deposition testimony "closely track[s]

To: The Chief Justice  
Justice White  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1983]

JUSTICE BRENNAN, concurring in the judgment.

The Court today holds:

“We hold that a deponent’s civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002, and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege.” *Ante*, at 15 (footnote omitted).

JUSTICE BLACKMUN’s opinion concurring in the judgment likewise states:

“In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001-6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination.

I agree with the Court’s conclusion that he may not be forced so to testify.” *Post*, at 1.

I understand these to be two statements of the same rule,\*

\*While the majority’s statement of the holding is formally limited to the

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 9, 1982

81-825 - The Pillsbury Company v. Conboy

Dear Lewis,

I agree.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 22, 1982

Re: 81-825 - The Pillsbury Company  
v. Conboy

Dear Lewis,

I am still with you.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Marshall**

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Recirculated: ~~DEC 1 1982~~

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

[December —, 1982]

JUSTICE MARSHALL, concurring in the judgment.

I agree with the plurality that "courts may not compel testimony over the assertion of a valid Fifth Amendment privilege, in the absence of an operative grant of immunity under [18 U. S. C.] §6002." *Ante*, at 13, n. 20. I concur in the judgment even though, in my view, if respondent had answered questions based on his prior immunized testimony, his answers could not properly have been used against him in a subsequent criminal trial. I write to explain why Conboy retained his Fifth Amendment privilege even though his answers could not properly be used against him.

If Conboy had voluntarily answered petitioners' deposition questions, his answers would have been "directly or indirectly derived from" his prior testimony before the grand jury. The questions were based solely on the transcript of respondent's grand jury testimony. There is no suggestion that the same or similar questions would have been asked had petitioners' attorneys not obtained a transcript of the grand jury testimony. Thus, if respondent had answered the questions, his answers would not have been "derived from a legitimate source wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U. S. 441, 460 (1972).

The admission of such answers at a subsequent criminal prosecution would represent a substantial departure from the

pp. 1, 5, 6, 8

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY ET AL., PETITIONERS v.  
JOHN CONBOY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

[December —, 1982]

JUSTICE MARSHALL, concurring.

I join the Court's decision that a witness who has given immunized testimony may invoke the Fifth Amendment privilege at a later proceeding in response to questions based on his immunized testimony. Permitting a civil litigant to rely on prior immunized testimony to defeat an otherwise valid claim of privilege would be inconsistent with the purposes of the use-immunity statute, regardless of whether, had the witness answered voluntarily, his answers could have been used against him in a later criminal trial. The Court's decision today does not reach the question whether such answers could later be admitted against the witness. In his dissenting opinion, JUSTICE STEVENS argues that Conboy may not assert the Fifth Amendment privilege precisely because his answers could not properly be used against him in a later criminal trial. Because I agree with JUSTICE STEVENS that such answers could *not* be properly used in a subsequent criminal trial, I write separately to explain why I believe respondent nevertheless retained his Fifth Amendment privilege.

If Conboy had voluntarily answered petitioners' deposition questions, his answers would have been "directly or indirectly derived from" his prior testimony before the grand jury. The questions were based solely on the transcript of

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 17, 1982

Re: No. 81-825 - The Pillsbury Co. v. Conboy

Dear Lewis:

Please join me.

Sincerely,

T.M.  
T.M.

Justice Powell

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

[November —, 1982]

**JUSTICE BLACKMUN**, concurring in the judgment.

In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001-6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the Court's conclusion that he may not be forced so to testify. Because I reach this conclusion only by a different route, I cannot join the Court's opinion.

I

The statute authorizing grants of use immunity, 18 U. S. C. § 6002, provides that a witness may be ordered to testify despite his claim of a Fifth Amendment privilege, 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. . . ." The Court recognizes that the question before us is necessarily whether the respondent's deposition testimony in this case "is 'information' so 'directly or indirectly derived from [the immunized testimony]' that it cannot be used against the witness in a subsequent criminal prosecution." *Ante*, at 1. The Court

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11  
          

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pp. 1, 6, 7

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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[November —, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

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11/23  
Wait...

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 24, 1932

Re: No. 81-825 - Pillsbury Co. v. Conboy

Dear Bill:

A revision of my concurrence is now necessary in view of the changes Lewis has made in his second draft. I have sent my revisions to the printer, and it should be ready for circulation on Friday.

I am making some word changes in the next to the last paragraph of my concurrence. These are directed to your second reservation. Whether they will be satisfactory to you, I do not know. As to your first reservation and the substitute language you propose, I am somewhat hesitant. I agree that the Fourth and Fifth Amendments' fruits doctrines are not necessarily coextensive. The Harrison case, however, which is the only Fifth Amendment fruits case of which I am aware, provides no standard. It simply says that some type of fruits doctrine applies. But it also cites several Fourth Amendment cases on this point, including Wong Sun. Furthermore, I believe that Congress relied on Fourth Amendment fruits cases when it enacted § 6002. I have added a new footnote 2 which bears upon this problem.

This, indeed, is a difficult and obviously important case.

Sincerely,



Justice Brennan

cc: Justice Powell

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-825

THE PILLSBURY COMPANY, ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[November —, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

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pp. 2, 6, 7, 8

To: The Chief Justice  
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Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Blackmun

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Pages: 1-3, 7, 8, 9-10  
New Footnotes 1 and 6

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

THE PILLSBURY COMPANY, ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

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I

The statute authorizing grants of use immunity, 18 U. S. C. § 6002, provides that a witness may be ordered to testify despite his claim of a Fifth Amendment privilege, 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" (with stated limited exceptions). The plurality notes that the parties in this case "make their arguments in terms tracking those of the statute—whether the deposition testimony is 'derived from' the prior testimony." *Ante*, at 8. In the plurality's view, however, "the crux of their dispute is whether the earlier grant of

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P. 2

To: The Chief Justice  
Justice Brennan  
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Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

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6th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1983]

JUSTICE BLACKMUN, concurring in the judgment.

In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001-6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the Court's conclusion that he may not be forced so to testify. Because I reach this conclusion only by a different route, I write separately to explain my views.

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"Plurality" changed to "Court"  
and page 2.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: JAN 5 1983

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1983]

JUSTICE BLACKMUN, concurring in the judgment.

In this case, we are asked to decide whether a witness who has testified before a federal grand jury pursuant to a grant of use immunity, 18 U. S. C. §§ 6001-6005, may be forced to testify about the same events in a subsequent civil deposition, despite his assertion of his Fifth Amendment privilege against self-incrimination. I agree with the Court's conclusion that he may not be forced so to testify. Because I reach this conclusion only by a different route, I write separately to explain my views.

I

The statute authorizing grants of use immunity, 18 U. S. C. § 6002, provides that a witness may be ordered to testify despite his claim of a Fifth Amendment privilege, 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" (with stated limited exceptions). The Court notes that the parties in this case "make their arguments in terms tracking those of the statute—whether the deposition testimony is 'derived from' the prior testimony." *Ante*, at 8. In the Court's view, however, "the crux of their dispute is whether the earlier grant of immunity

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: NOV 8 1982

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-825

THE PILLSBURY COMPANY, ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[November —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001-6005 (1976), a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "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. . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is "information" so "directly or indirectly derived from [the immunized] testimony" that it cannot be used against the witness in a subsequent criminal prosecution.

### I

Respondent John Conboy is a former executive of a defendant in the *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

NOV 19 1982

Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: NOV 22 1982

Changes: 1, 8-14  
9

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

[November —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001-6005 (1976), a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "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. . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is immunized "information" that can be compelled over the valid assertion of his Fifth Amendment privilege.

I

Respondent John Conboy is a former executive of a defendant in the *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 24, 1982

81-825 Pillsbury v. Conboy

Dear Bill:

Thank you for sending me a copy of your letter to Harry, together with your suggested revision of Part III of his concurring opinion.

I must say that, unless I misread your views, they do not seem to differ substantially from my own. I agree that this is a Fifth Amendment case, and I have relied in my second draft only on Fifth Amendment principles and authorities.

Perhaps more fundamentally, I agree that it is important to state clearly "a bright-line rule" for the guidance of persons in Conboy's position. In light of the way that I restated the issue in my second draft (p. 1), and the quite specific holding in the concluding paragraph (p. 14), a bright-line would be established.

To be sure, I do undertake - as is customary in a Court opinion - to address and answer petitioner's arguments. I also consider and address interests of the government, the witness and the civil plaintiffs. But I see no fundamental difference between the views of the three of us. I would be happy to consider any specific suggestions that either you or Harry may have.

There would be less likelihood of confusion as to where this Court stands if there is a Court opinion.

Sincerely,



Justice Brennan

lfp/ss

cc: Justice Blackmun

NOV 23 1982

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: NOV 29 1982

7-10, 12-14  
Substantive changes: [redacted]  
technical changes: 1, 8-14  
(footnote renumbered,  
etc.)

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001-6005 (1976), a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "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. . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is immunized "information" that can be compelled over the valid assertion of his Fifth Amendment privilege.

I

Respondent John Conboy is a former executive of a defendant in the *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 8, 1982

81-825 Pillsbury v. Conboy

Dear Byron and Bill:

Here is a fourth draft with changes made to reconcile Thurgood's separate opinion with ours. I see no substantive difference between our views.

He has now helpfully agreed to join this opinion, filing his as a concurrence. Unless you have some objection, I will recirculate. The Chief has indicated he also will join.

Sincerely,



Justice White  
Justice Rehnquist

lfp/ss

cc: Justice Marshall

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

Changes: 1, 2, 8-9, 12-15  
2

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: DEC 8 1982

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001-6005 (1976), a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "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. . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is immunized "information" that can be compelled over the valid assertion of his Fifth Amendment privilege.

I

Respondent John Conboy is a former executive of a defendant in the *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_

DEC 14 1982

Recirculated: \_\_\_\_\_

DEC 15 1982

Changes: 1, 2, 7-9, 12-16

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-825

THE PILLSBURY COMPANY, ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001-6005 (1976), a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "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. . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is immunized "testimony" that can be compelled over the valid assertion of his Fifth Amendment privilege.

I

Respondent John Conboy is a former executive of a defendant in the *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

December 17, 1982

PERSONAL

81-825 The Pillsbury Co. v. Conboy

Dear Chief:

After extended "negotiations", my fourth draft now has the approval of BRW, TM and WHR.

Although you have indicated an intension to join, I do not yet have a formal join note.

This is a case in which HAB circulated an opinion almost immediately that concurs only in the judgment. Bill Brennan has a much shorter opinion concurring in the judgment, and John has a dissent in which Sandra has joined. We need you for a Court.

Sincerely,

The Chief Justice

LFP/vde

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

Changed: 8, 10, 12, 15

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JAN 5 1983

JAN 5 1983

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY, ET AL., PETITIONERS v.  
JOHN CONBOY**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT**

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

Pursuant to the federal use immunity provisions, 18 U. S. C. §§ 6001-6005 (1976), a United States Attorney may request an order from a federal court compelling a witness to testify even though he has asserted his privilege against self-incrimination. Section 6002 provides, however, that "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. . . ." The issue presented in this case is whether a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is immunized "testimony" that can be compelled over the valid assertion of his Fifth Amendment privilege.

I

Respondent John Conboy is a former executive of a defendant in the *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.). In January 1978, United States Department of Justice attorneys interviewed Conboy following a promise of use immunity. Conboy subsequently appeared before a grand jury investigating price-fixing activities and, pursuant to 18 U. S. C. § 6002, was granted formal use immunity for his testimony.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 22, 1982

Re: No. 81-825 Pillsbury v. Conboy

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 9, 1982

Re: No. 81-825 Pillsbury v. Conboy

Dear Lewis:

I am sufficiently troubled by the paragraph beginning on page 13 and carrying over to page 14 in your fourth draft that I cannot at present continue to join the opinion if this paragraph remains in it. I will ponder the matter further.

Sincerely,



Justice Powell

cc: Justice White  
Justice Marshall

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 15, 1982

Re: No. 81-825 The Pillsbury Co. v. Conboy

Dear Lewis:

I am "still with you" on your fourth draft circulated December 14th.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 8, 1982

Re: 81-825 - The Pillsbury Co. v. Conboy

Dear Lewis:

In due course I shall circulate a dissent.

Respectfully,



Justice Powell

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: NOV 23 '82

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-825

THE PILLSBURY COMPANY, ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[November —, 1982]

JUSTICE STEVENS, dissenting.

A witness cannot be compelled to incriminate himself. If a truthful response to a question could be used against the witness in a subsequent criminal proceeding, the witness has a constitutional right to remain silent. But if his response could not be so used, the witness has a duty to answer. An important federal statute allows a witness to be compelled to give self-incriminating testimony by replacing his constitutional right with a statutory prohibition against using the testimony, or any information derived from it, against the witness in a subsequent criminal proceeding. This case concerns the scope of that statutory prohibition. The Court today holds that a witness who is required to surrender his constitutional privilege and give testimony before a grand jury retains no statutory protection when he is asked to ratify that testimony. If he does not wish to speak in a manner that can be used against him in a criminal prosecution, according to the Court, he must stand on his constitutional privilege. In my opinion, this holding disregards the plain language of an act of Congress, is grossly unfair to witnesses who may be lulled into believing that the statute means what it says, and disserves the public interest in effective law enforcement.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1, 2, 6

From: Justice Stevens

Circulated: \_\_\_\_\_

NOV 29 '82

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-825

THE PILLSBURY COMPANY, ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[November —, 1982]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins,  
dissenting.

A witness cannot be compelled to incriminate himself. If a truthful response to a question could be used against the witness in a subsequent criminal proceeding, the witness has a constitutional right to remain silent. But if his response could not be so used, the witness has a duty to answer. An important federal statute allows a witness to be compelled to give self-incriminating testimony by replacing his constitutional right with a statutory prohibition against using the testimony, or any information derived from it, against the witness in a subsequent criminal proceeding. This case concerns the scope of that statutory prohibition. The Court today holds that a witness who is required to surrender his constitutional privilege and give testimony before a grand jury retains no statutory protection when he is asked to ratify that testimony. If he does not wish to speak in a manner that can be used against him in a criminal prosecution, according to the Court, he must stand on his constitutional privilege. In my opinion, this holding disregards the plain language of an act of Congress, is grossly unfair to witnesses who may be lulled into believing that the statute means what it says, and disserves the public interest in effective law enforcement.

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 77. 13-15

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: DEC 5 '82

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

THE PILLSBURY COMPANY ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins,  
dissenting.

A witness cannot be compelled to incriminate himself. If a truthful response to a question could be used against the witness in a subsequent criminal proceeding, the witness has a constitutional right to remain silent. But if his response could not be so used, the witness has a duty to answer. An important federal statute allows a witness to be compelled to give self-incriminating testimony by replacing his constitutional right with a statutory prohibition against using the testimony, or any information derived from it, against the witness in a subsequent criminal proceeding. This case concerns the scope of that statutory prohibition. The plurality today holds that a witness who is required to surrender his constitutional privilege and give testimony before a grand jury retains no statutory protection when he is asked to ratify that testimony. If he does not wish to speak in a manner that can be used against him in a criminal prosecution, according to the plurality, he must stand on his constitutional privilege. In my opinion, this holding disregards the plain language of an act of Congress, is grossly unfair to witnesses who may be lulled into believing that the statute means what it says, and disserves the public interest in effective law enforcement.

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ DEC 10 '82

STYLISTIC CHANGES THROUGHOUT,  
SEE PAGES: 6

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

THE PILLSBURY COMPANY ET AL., PETITIONERS *v.*  
JOHN CONBOY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[December —, 1982]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins,  
dissenting.

A witness cannot be compelled to incriminate himself. If a truthful response to a question could be used against the witness in a subsequent criminal proceeding, the witness has a constitutional right to remain silent. But if his response could not be so used, the witness has a duty to answer. An important federal statute allows a witness to be compelled to give self-incriminating testimony by replacing his constitutional right with a statutory prohibition against using the testimony, or any information derived from it, against the witness in a subsequent criminal proceeding. This case concerns the scope of that statutory prohibition. The plurality today holds that a witness who is required to surrender his constitutional privilege and give testimony before a grand jury retains no statutory protection when he is asked to ratify that testimony. If he does not wish to speak in a manner that can be used against him in a criminal prosecution, according to the plurality, he must stand on his constitutional privilege. In my opinion, this holding disregards the plain language of an act of Congress, is grossly unfair to witnesses who may be lulled into believing that the statute means what it says, and disserves the public interest in effective law enforcement.

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*substantial changes throughout*

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated: JAN 3 '83 \_\_\_\_\_

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1983]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins,  
dissenting.

A witness in a judicial proceeding has a duty to answer proper questions. The witness cannot, however, be compelled to incriminate himself. If a witness believes a truthful response to a question could be used against him in a subsequent criminal proceeding, or might lead to the discovery of incriminating evidence, he may assert his constitutional right to remain silent. When such an assertion is made, a judge must evaluate the asserted risk. If it clearly appears that the answer could not be used against the witness in a subsequent criminal proceeding and could not provide a prosecutor with any information that he does not already have, the witness must speak. This case concerns a witness's refusal to give answers that could not incriminate him.

The Court today holds that the existence of a valid Fifth Amendment privilege does not depend on whether a truthful answer would be incriminating. The Court does not dispute the fact that neither the respondent's answers during the deposition in this case, nor any information discovered on the basis of those answers, could be used against him in a subsequent criminal proceeding. *Ante*, at 9, n. 13, 15-16, n. 24. Nevertheless, the Court holds that the Fifth Amendment empowers the respondent to refuse to testify. The opinion

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*stylistic changes*  
7P. 1, 7.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated:       JAN 7 '83      

6th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-825

**THE PILLSBURY COMPANY ET AL., PETITIONERS v.  
JOHN CONBOY**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1983]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins,  
dissenting.

A witness in a judicial proceeding has a duty to answer proper questions. The witness cannot, however, be compelled to incriminate himself. If a witness believes a truthful response to a question could be used against him in a subsequent criminal proceeding, or might lead to the discovery of incriminating evidence, he may assert his constitutional right to remain silent. When such an assertion is made, a judge must evaluate the asserted risk. If it clearly appears that the answer could not be used against the witness in a subsequent criminal proceeding and could not provide a prosecutor with any information that he does not already have, the witness must speak. This case concerns a witness's refusal to give answers that could not incriminate him.

The Court today holds that the existence of a valid Fifth Amendment privilege does not depend on whether a truthful answer would be incriminating. The Court does not dispute the fact that neither the respondent's answers during the deposition in this case, nor any information discovered on the basis of those answers, could be used against him in a subsequent criminal proceeding. *Ante*, at 9, n. 13. Nevertheless, the Court holds that the Fifth Amendment empowers the respondent to refuse to testify. The opinion of the Court

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

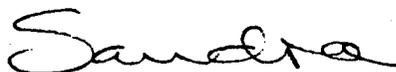
November 9, 1982

No. 81-825 The Pillsbury Co. v. Conboy

Dear Lewis,

I will wait for John's dissent before finally  
deciding whether to join your opinion.

Sincerely,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 24, 1982

No. 81-825 Pillsbury Company v. Conboy

Dear John,

Please join me in your dissent.

Sincerely,

*Sandra*

Justice Stevens

Copies to the Conference