by Parliament in 1710[234] and it was widely copied in the colonies. The first federal immunity statute was enacted in 1857, and immunized any person who testified before a congressional committee from prosecution for any matter "touching which" he had testified.[235]

Revised in 1862 so as merely to prevent the use of the congressional testimony at a subsequent prosecution of any congressional witness,[236] the statute was soon rendered unenforceable by the ruling in *Counselman v. Hitchcock*[237] that an analogous limited immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. *Counselman* was ambiguous with regard to its grounds because it identified two faults in the statute: it did not proscribe "derivative" evidence[238] and it prohibited only future use of the compelled testimony.[239] The latter language accentuated a division between adherents of "transactional" immunity and of "use" immunity which has continued to the present.[240] In any event, following *Counselman*, Congress enacted a statute that conferred transactional immunity as the price for being able to compel testimony,[241] and the Court sustained this law in a five-to-four decision.[242]

"The 1893 statute has become part of our constitutional fabric and has been included 'in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Govern-

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[234] 9 Anne, c. 14, 3–4 (1710). *See* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

[235] Ch. 19, 11 Stat. 155 (1857). There was an exception for perjury committed while testifying before Congress.

[236] Ch. 11, 12 Stat. 333 (1862).

[237] 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

[238] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892). *See also* id. at 586.

[239] 142 U.S. at 585–86.

[240] "Transactional" immunity means that once a witness has been compelled to testify about an offense, he may never be prosecuted for that offense, no matter how much independent evidence might come to light; "use" immunity means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense.

[241] Ch. 83, 27 Stat. 443 (1893).

[242] Brown v. Walker, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run or if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, because the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, id. at 610, and that a witness was protected against infamy and disparagement as much as prosecution. Id. at 628.