Investigation Versus Prosecution: The Constitutional Limits on Congress's Power to Immunize Witnesses

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INVESTIGATION VERSUS PROSECUTION: THE CONSTITUTIONAL LIMITS ON CONGRESS'S POWER TO IMMUNIZE WITNESSES

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For more than a century, Congress has exercised an unchecked power to immunize any witness it chooses, regardless of the Justice Department's wishes. Howard Sklamberg points out that when Congress grants immunity, it prevents prosecutors from enforcing the law. This interference conflicts with the bedrock principle of separation of power between the legislative and executive branches. Mr. Sklamberg concludes that although Congress occasionally may need to immunize witnesses to uncover important facts, Congress's power to grant immunity must be limited to those cases in which immunizing a witness is critical to a congressional investigation.

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INTRODUCTION

In 1862, Congress launched an investigation into allegations of bribery and corruption in the management of public lands. A House committee granted immunity to two Interior Department clerks who had embezzled government bonds.[1] Although the committee got the testimony it wanted, the witnesses escaped prosecution. An outraged Senator protested: "Here is a man who stole two million in bonds, if you please, out of the Interior Department. What does he do? He gets himself called as a witness before one of the investigating committees and testifies something in relation to that matter, and then he cannot be indicted."[2] The House committee chose testimony over justice.

Congress has granted immunity many times since 1862, and many guilty people have escaped justice. On occasion, the Justice

1. *See* CONG. GLOBE, 37th Cong., 2d Sess. 428–31 (1862); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 798 n.23 (1978).

2. CONG. GLOBE, 37th Cong., 2d Sess. 428 (1862) (statement of Sen. Trumbull); *see also* Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 254 (1967) (quoting Sen. Trumbull).

Department has asked Congress not to immunize a witness, but the choice has been Congress's alone to make. Congress has exercised a unilateral power to immunize whomever it wants, regardless of the Justice Department's wishes.[3]

This Article argues that Congress's authority to grant immunity is much more limited than is commonly presumed. When it immunizes a witness, Congress prevents a prosecutor from enforcing the law. In doing so, Congress impinges upon a basic principle of separation of powers, namely that the legislative branch may not interfere with or play any role in the execution of the law. Even though Congress occasionally must immunize a witness in order to uncover important facts in an investigation, Congress should only have the power to immunize witnesses in those cases in which granting immunity is critical to its investigation.

Part I addresses the consequences of congressional grants of immunity. Congress had hoped that the modern immunity statute would provide witnesses with just enough protection to satisfy the Fifth Amendment, but would not prevent the guilty from being brought to justice.[4] This hope has not been realized. To convict someone who has been immunized by Congress, a prosecutor must show, among other things, that no trial witness has been tainted by immunized congressional testimony.[5] When Congress hears immunized testimony in public session, as it almost always does, a prosecutor rarely will be able to meet this burden. Thus, a congressional grant of immunity makes a subsequent conviction almost impossible.

Part II explores the constitutional implications of this congressional power to derail a prosecution. It discusses four of the Supreme Court's more prominent separation-of-powers cases: *Bowsher v. Synar*,[6] *Morrison v. Olson*,[7] *Buckley v. Valeo*,[8] and *INS v. Chadha*.[9] Although portions of these four opinions are confusing and

3. *See infra* notes 72–74 and accompanying text.

4. *See infra* notes 24–114 and accompanying text.

5. *See* United States v. Poindexter, 951 F.2d 369, 373–77 (D.C. Cir. 1991); United States v. North, 920 F.2d 940, 942 (D.C. Cir. 1990) (per curiam).

6. 478 U.S. 714 (1986); *see also infra* notes 137–43 and accompanying text (discussing *Bowsher*).

7. 487 U.S. 654 (1988); *see also infra* notes 144–50 and accompanying text (discussing *Morrison*).

8. 424 U.S. 1 (1976) (per curiam); *see also infra* notes 151–56 and accompanying text (discussing *Buckley*).

9. 462 U.S. 919 (1983); *see also infra* notes 158–62 and accompanying text (discussing *Chadha*).

circular, they stand for the basic principle that Congress may play no part in enforcing the laws that it passes. When Congress immunizes a witness and prevents a federal prosecutor from bringing a guilty party to justice, it plays a destructive role in the enforcement of our criminal law. The power to grant immunity is, therefore, constitutionally problematic.

Part III considers a counterargument to the notion that granting immunity is unconstitutional. Although the Constitution does not specifically empower Congress to conduct investigations, Congress has exercised this authority since the 1790s.[10] The Supreme Court has upheld this power, reasoning that Congress "cannot legislate wisely or effectively in the absence of information."[11] In recognizing that Congress must have the means to obtain necessary information, the Court has concluded that Congress possesses broad subpoena power.[12] In a sense, granting immunity is like issuing a subpoena—both are necessary for Congress to obtain important evidence. Why, then, should Congress not have a broad power to immunize witnesses?

Part IV answers this question. It shows that courts have curbed Congress's power to investigate when an exercise of that power would encroach on the authority of another branch of government or would otherwise disturb the separation of powers.[13] For example, when Congress demands information protected by executive privilege, it does not enjoy its usual broad subpoena power. Instead, its power is limited to information that is "demonstrably critical" to an investigation.[14]

Part V argues that Congress should have the power to immunize a witness only when doing so is "demonstrably critical" to an investigation. This standard recognizes that Congress may need immunized testimony to obtain important evidence, but that Congress's power to grant immunity is constitutionally problematic and should be limited.[15] This proposed limitation on congressional authority to immunize would have two exceptions: when an immunized witness testifies in secret and when the Attorney General or an independent counsel[16] does not object to a grant of immunity.[17]

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10. *See infra* notes 188–94 and accompanying text.
11. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).
12. *See id.*; *infra* notes 198–206.
13. *See infra* notes 229–47 and accompanying text.
14. *See infra* notes 248–73 and accompanying text.
15. *See infra* notes 274–89 and accompanying text.
16. The statute authorizing the appointment of independent counsels expired on June

In both cases, immunity's separation-of-powers difficulties recede, and Congress's authority to immunize need not be limited. But these exceptions rarely are applicable, and, most of the time, a congressional grant of immunity would have to pass the "demonstrably critical" test.

Part VI discusses how a court would apply the "demonstrably critical" test. Under the modern immunity statute, Congress itself does not have the authority to grant immunity. Instead, it submits an application to a federal district court, which then performs what is now a largely ministerial task of ordering a witness to testify.[18] Under the new test, the court's role would no longer be ministerial because it would apply the "demonstrably critical" test before ordering a witness to testify.[19] The test would not be difficult to administer. It is identical to the standard used to evaluate grand-jury subpoenas that seek information protected by executive privilege. Part VI concludes that the "demonstrably critical" standard is both manageable and justiciable.[20]

I. THE CONSEQUENCES OF A CONGRESSIONAL GRANT OF IMMUNITY

A. *The Origins of the Modern Congressional Immunity Statute*

The Fifth Amendment provides that "no person ... shall be compelled in any criminal case to be a witness against himself."[21] Although the Amendment mentions only criminal cases, a witness may assert the privilege against self-incrimination "in any proceeding,"[22] including a congressional investigation.[23]

30, 1999, but allowed counsels who had already been appointed to continue their investigations. *See* 28 U.S.C.A. § 599 (West 1993 & Supp. 1999) (expired). Because of this grandfather clause and because Congress may, one day, reauthorize the statute, this Article addresses the relationship between congressional grants of immunity and independent counsels. *See infra* note 72.

17. *See infra* notes 290–311 and accompanying text.

18. *See* 18 U.S.C.A. § 6005 (West 1985 & Supp. 1999).

19. *See infra* notes 312–34 and accompanying text.

20. *See infra* notes 335–70 and accompanying text.

21. U.S. CONST. amend. V. For a catalog of the "aspirations furthered by the Fifth Amendment," see *United States v. Balsys*, 524 U.S. 666, 690–91 (1998), and *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

22. Kastigar v. United States, 406 U.S. 441, 444 (1972).

23. *See* Watkins v. United States, 354 U.S. 178, 188 (1957); Emspak v. United States, 349 U.S. 190, 194–95 (1955); Quinn v. United States, 349 U.S. 155, 161 (1955). Congress has long recognized that the privilege against self-incrimination applies to its investigations. In 1834, Nicholas Biddle and other directors of the Bank of the United

To obtain testimony from witnesses who invoke their Fifth Amendment rights, Congress has passed a series of immunity laws.[24] Some of these laws proved defective—either because they provided witnesses with such broad immunity that many guilty people escaped prosecution[25] or because they granted such narrow immunity that they did not adequately protect witnesses' Fifth Amendment rights.[26] When Congress passed the present immunity statute, it hoped to avoid these pitfalls.[27]

Congress enacted the first immunity law in 1857,[28] in response to a report that members of the House of Representatives had asked a *New York Times* correspondent to serve as an intermediary in a vote-selling scheme.[29] The reporter asserted his privilege against self-incrimination and refused to tell a House committee which congressman had approached him.[30] Congress immediately passed a statute that empowered congressional committees to compel witnesses to provide self-incriminating testimony, but guaranteed that "no person examined and testifying before either House . . . shall be held to answer criminally . . . for any fact or act touching [matters on] which he shall be required to testify."[31]

This broad form of immunity, termed "transactional immunity,"[32] proved to be a disaster. Witnesses took "immunity baths," in which they admitted all of their criminal activity and were forever protected from prosecution.[33] Congressional committees became "a kind of

States based their refusal to produce subpoenaed documents to a House committee on the Fifth Amendment's privilege against self-incrimination. *See* TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 193 (1955). Although members of the committee disagreed as to whether Biddle's assertion of the privilege was proper, they agreed that the privilege applied to congressional investigations. *See* H.R. REP. NO. 23-481, at 11 (1834) ("It is a humane rule to be found in criminal law, which declares that no man shall be compelled to criminate himself, and one which the committee would be unwilling under any circumstances to deny."), *cited in* JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE § 4.2[a], at 124 n.54 (1988).

24. *See infra* notes 28–84 and accompanying text.

25. *See infra* notes 28–34, 41–50 and accompanying text.

26. *See infra* notes 35–40 and accompanying text.

27. *See infra* notes 51–56 and accompanying text.

28. *See* Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

29. *See* CONG. GLOBE, 34th Cong., 3d Sess. 426–33 (1857); Strachan, *supra* note 1, at 797 n.22; Jerome A. Murphy, Comment, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 MD. L. REV. 1011, 1014 (1992).

30. *See* Murphy, *supra* note 29, at 1014.

31. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. at 156.

32. *See* Murphy, *supra* note 29, at 1015.

33. *See* Michael Gilbert, Note, *The Future of Congressional Use Immunity After* United States v. North, 30 AM. CRIM. L. REV. 417, 428 (1993).

bargain-basement confessional where easy absolution could be secured."[34]

In 1862, Congress attempted to remedy this flaw by replacing the 1857 Act with a law providing that "the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness."[35] This "simple use immunity" statute permitted prosecutions of immunized congressional witnesses for crimes related to their testimony as long as the government did not use the testimony as evidence at trial.[36]

Although the 1862 statute never came before the Supreme Court, the Court held in *Counselman v. Hitchcock*[37] that a law that provided simple use immunity to grand-jury witnesses violated the Fifth Amendment.[38] The Court noted that the statute only prohibited the government from using immunized testimony at trial, but "afford[ed] no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."[39] The Court concluded that a "statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."[40] Although *Counselman* did not specifically address the constitutionality of the 1862 law, the Court's disapproval of simple use immunity meant that the statute was unconstitutional.

Congress did not pass another immunity statute for congressional witnesses until 1954.[41] At the insistence of Senator Joseph McCarthy

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34. ALAN BARTH, GOVERNMENT BY INVESTIGATION 131 (1955).
35. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333, 333.
36. *See* Strachan, *supra* note 1, at 798.
37. 142 U.S. 547 (1892).
38. *See id.* at 586.
39. *Id.*
40. *Id.*
41. *See* Immunity Act of 1954, ch. 769, 68 Stat. 745. In 1893, Congress did enact a transactional-immunity statute that applied to witnesses before the Interstate Commerce Commission. *See* Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, 444 (stating that "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" before the Interstate Commerce Commission). In *Brown v. Walker*, 161 U.S. 591 (1896), the Court upheld the statute. It rejected the argument that transactional immunity provided insufficient protection because such immunity did not "shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime." *Id.* at 605. The Court held that the Fifth Amendment was not intended "to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge." *Id.* at 605–06. For a more detailed discussion of *Brown*, see *infra* notes 120–30

and his allies, who wished to immunize witnesses as part of their investigation of perceived threats to national security, Congress enacted a transactional-immunity statute that applied to congressional and grand-jury witnesses.[42] In *Ullman v. United States*,[43] the Supreme Court upheld the contempt conviction of a witness who had been offered transactional immunity under the 1954 statute, but refused to answer grand-jury questions regarding his membership in the Communist Party.[44] The Court rejected the witness's Fifth Amendment[45] and federalism[46] arguments, but never discussed the constitutionality of using the statute in a congressional investigation.

The 1954 law did not last long. Predictably, by the 1960s, the specter of immunity baths began to resurface.[47] Prosecutors thought that transactional immunity afforded witnesses too much protection and asked Congress to pass a statute that would allow the prosecution of witnesses who, under a grant of immunity, admitted to crimes.[48] No alternative, however, appeared to exist. The *Counselman* Court's statement that immunity statutes "must afford absolute immunity against future prosecution for the offence to which the question relates"[49] suggested that only transactional immunity would satisfy the Fifth Amendment. Congress seemed to be left with two unpalatable alternatives—no immunity or immunity baths.[50]

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and accompanying text.

42. *See* Immunity Act of 1954, ch. 769, § 1, 68 Stat. at 745 (stating that no "witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence"); Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 416 (1995).

43. 350 U.S. 422 (1956).

44. *See id.* at 439.

45. The witness argued that transactional immunity provided him with insufficient protection because it left him exposed to a bevy of non-criminal sanctions, including "loss of job, expulsion from labor unions, state registration and investigation statutes, [loss of] passport eligibility, and general public opprobrium." *Id.* at 430. The Court held that " 'the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge.' " *Id.* at 431 (quoting Hale v. Henkel, 201 U.S. 43, 67 (1906)).

46. The statute provided immunity from prosecution in state courts as well as federal courts. *See id.* at 434–35. The witness contended that Congress had no power to grant immunity from state prosecution and that the statute, therefore, unconstitutionally exposed him to criminal prosecution. *See id.* The Court held that it was within Congress's power to immunize a witness from state prosecution. *See id.* at 436–37.

47. *See* Strachan, *supra* note 1, at 801.

48. *See id.*

49. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

50. Professor Strachan, an advocate of transactional immunity, argues that witnesses who receive transactional immunity are not always able to take "immunity baths" because

Murphy v. Waterfront Commission[51] created a third option. At issue in *Murphy* was the extent to which a state grant of immunity protected a witness from federal prosecution. The Court held that the federal government could prosecute the witness for crimes related to his testimony as long as "the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with criminal prosecution against him."[52] This standard, known as "use and derivative-use immunity,"[53] is less protective than transactional immunity, which forbids prosecutions for crimes related to any information contained in immunized testimony. It is, however, more protective than the unconstitutional simple use immunity, which prohibits prosecutors from presenting immunized testimony at a witness's trial, but allows them to use fruits of the testimony, such as investigatory leads.[54]

Six years after the Court decided *Murphy*, Congress passed the modern immunity law, which applies to witnesses before agencies, juries, grand juries, and congressional committees and provides for use and derivative-use immunity.[55] Congress hoped that this new statute would be an effective compromise that would survive Fifth Amendment scrutiny without imperiling prosecutions.[56]

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they are immunized only "for answers responsive to proper questions" and for crimes substantially related to their testimony. Strachan, *supra* note 1, at 803 n.48.

However, Professor Strachan does not deny that a witness who receives transactional immunity is able to escape prosecution for any crimes substantially related to his responsive testimony, no matter how much independently obtained evidence a prosecutor can accumulate. For example, a murderer who testifies about events relating to her crime under a grant of transactional immunity cannot be prosecuted even if the police, who were never exposed to the immunized testimony, independently discover a videotape of the murderer committing her crime.

51. 378 U.S. 52 (1964).

52. *Id.* at 79. In *United States v. Balsys*, 524 U.S. 666 (1998), the Court questioned some of the reasoning in *Murphy*, but, nevertheless, affirmed *Murphy*'s holding. *See id.* at 680–88.

53. Strachan, *supra* note 1, at 802; R.S. Ghio, Note, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 239 (1992).

54. For example, suppose that a witness testified that he had stored five kilograms of cocaine in his basement. If he had testified under a grant of simple use immunity, the government would be able to retrieve the cocaine and use it as evidence against the witness in a criminal trial. If, on the other hand, the witness had received use and derivative-use immunity, the government would not be able to use the drugs against the witness without first showing that the government's recovery of the drugs was "derived from a legitimate source wholly independent of the compelled testimony." Kastigar v. United States, 406 U.S. 441, 460 (1972).

55. *See* 18 U.S.C.A. §§ 6002, 6005 (West 1985 & Supp. 1999).

56. *See* Strachan, *supra* note 1, at 803.

B. *The Modern Immunity Statute in Operation: The Re-emergence of Immunity Baths*

In the context of congressional investigations, Congress's hopes have been dashed. Although the 1970 statute does not violate the Fifth Amendment,[57] convicting an immunized witness who testifies in a public congressional hearing is nearly impossible.

The statute creates a number of procedural requirements that must be met before a witness is immunized. The immunity process begins when the House, Senate, or a congressional committee notifies the Attorney General of its intention to seek an immunity order.[58] This notice requirement is designed to provide "the Department of Justice with 'time to lobby for a change of mind' on the part of [a] congressional committee should the Attorney General object to the grant of immunity" and to give the Attorney General " 'an opportunity to insulate from the immunity grant any incriminating data already in his files prior to the witness' testimony.' "[59] Ten days after the Attorney General receives notice, the House, Senate, or congressional committee may submit a request for immunity to a federal district court.[60] The request must be approved by "two-thirds of the members of [a] full committee"[61] or by "a majority vote of the Members present" in the House or Senate.[62] The Attorney General then may ask the court for an additional twenty days to review the

57. *See Kastigar*, 406 U.S. at 453.

58. *See* 18 U.S.C.A. § 6005(b)(3).

59. *In re* Application of United States Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1236 (D.C. Cir. 1981) (quoting 2 NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, WORKING PAPERS 1406 (1970)). The Attorney General has the option of waiving the statute's notice requirement. *See id.*

60. *See* 18 U.S.C.A. § 6005(b)(3).

61. *Id.* § 6005(b)(2). The requirement of a two-thirds vote by full committees originated in the 1954 immunity statute. *See* Immunity Act of 1954, ch. 769, 68 Stat. 745 (1954). Congress created this requirement "because some members were concerned about single-member subcommittees (consisting of individual Senators or Representatives) holding hearings to expose Communists in important American institutions. Congress as a whole was unwilling to give immunity power to the individual members who were responsible for these abusive proceedings." Wright, *supra* note 42, at 416 (citations omitted).

The two-thirds requirement gives members of the minority party the power to block a committee from granting immunity. For example, in the Senate Banking Committee's investigation of Whitewater, Democrats blocked the Republicans' effort to immunize David Hale, a subsequently convicted Arkansas judge who was thought to have possessed important information about then-Governor Clinton's financial dealings. *See* Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 688 n.271 (1997).

62. 18 U.S.C.A. § 6005(b)(1).

immunity application.[63]

The court plays a largely "ministerial" role in granting the congressional request for immunity.[64] It has no power to assess the wisdom of an immunity application.[65] The court must issue an immunity order as long as the statute's procedural requirements are met,[66] the testimony sought is relevant to an investigation that a congressional committee has the authority to undertake,[67] the testimony is not protected by the First Amendment,[68] and the immunity statute is not being applied in an unconstitutional manner.[69] An immunity order compels testimony by a subpoenaed witness who had previously invoked the Fifth Amendment privilege.[70] The statute guarantees 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, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[71]

The Attorney General[72] has "no veto power" in this process.[73] The House, Senate, or a congressional committee can obtain an immunity order regardless of any objection that the Attorney General may have. In fact, the committees investigating Watergate and the Iran-Contra affair ignored the objections of Special

63. *See id.* § 6005(c).

64. *In re* United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1272 (D.D.C. 1973).

65. *See id.* at 1278.

66. *See id.* at 1275–76.

67. *See id.* at 1278–79.

68. *See id.* at 1279. The First Amendment limits the power of the government to subpoena the membership and contribution lists of organizations. *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963) (forbidding the Florida Legislature, on First Amendment grounds, from subpoenaing the membership and contribution lists of the Miami Branch of the NAACP because Florida had failed to show "a substantial relation between the information sought and a subject of overriding and compelling state interest"). *See generally* GRABOW, *supra* note 23, at 133–36 (discussing the First Amendment limitations on Congress's power to investigate).

69. *See United States Senate Select Comm.*, 361 F. Supp. at 1279.

70. *See* 18 U.S.C.A § 6002 (West 1985 & Supp. 1999) ("[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination.").

71. *Id.*

72. The recently expired independent-counsel statute gave counsels the authority to make "applications to any Federal court for a grant of immunity." 28 U.S.C.A. § 594(a)(7) (West 1993 & Supp. 1999) (expired June 30, 1999). For simplicity's sake, I have used "the Attorney General" as shorthand for "the Attorney General or an independent counsel" when discussing the modern immunity statute.

73. *United States Senate Select Comm.*, 361 F. Supp. at 1276. For a discussion of why Congress did not grant the Attorney General a veto, see *infra* notes 308–10 and accompanying text.

Prosecutor Archibald Cox and Independent Counsel Lawrence Walsh and took public immunized testimony from a number of important witnesses.[74]

The Supreme Court has never ruled on the constitutionality of immunizing a congressional witness under this or any previous law.[75] In *Kastigar v. United States*,[76] the Court did reject a Fifth Amendment challenge to the application of the modern immunity statute to grand-jury witnesses. It stated that "a grant of immunity must afford protection commensurate with that afforded by the privilege; it need not be broader."[77] The Court reaffirmed its earlier holding in *Counselman* that simple use immunity statutes are unconstitutional,[78] but held that the 1970 statute's use and derivative-use immunity "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege."[79] The *Kastigar* Court observed that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."[80] The Court rejected the argument that use and derivative-use immunity does not prevent the prosecutor from obtaining "leads, names of witnesses, or other information not otherwise available that might result in a

74. Senator Sam Ervin's Select Committee on Presidential Campaign Activities immunized 28 witnesses, *see* Wright, *supra* note 42, at 431, including important figures such as John Dean and Jeb Stuart Magruder. *See* George W. Van Cleve & Charles W. Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43, 53 (1990). Special Prosecutor Archibald Cox objected to these grants of immunity because Congress would not take steps to limit public exposure to the witnesses' testimony. *See United States Senate Select Comm.*, 361 F. Supp. at 1272, 1279–80. The House and Senate committees investigating Iran-Contra immunized 26 witnesses, *see* Wright, *supra* note 42, at 431, most notably Oliver North and John Poindexter. *See infra* notes 91–99 and accompanying text. Independent Counsel Lawrence Walsh opposed all grants of immunity to witnesses then under criminal investigation. *See* Van Cleve & Tiefer, *supra*, at 55; Gilbert, *supra* note 33, at 423.

75. *Cf.* Ullman v. United States 350 U.S. 422, 436 (1956) (upholding a grant of immunity to a grand-jury witness); Brown v. Walker, 161 U.S. 591, 599 (1896) (upholding a grant of immunity to a witness who testified before the Interstate Commerce Commission); Counselman v. Hitchcock, 142 U.S. 547, 586 (1892) (reversing the contempt conviction of a grand-jury witness).

76. 406 U.S. 441 (1972).

77. *Id.* at 453.

78. *See id.* at 453–54 ("The *Counselman* statute, as construed by the Court, was plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony.").

79. *Id.* at 453.

80. *Id.*

prosecution."[81] The statute's "total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing [an] investigation on a witness as a result of his compelled disclosures."[82] To ensure that this safeguard is effective, if an immunized witness is tried for a crime related to his testimony, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[83] In spite of the statute's broad protection, the Court confidently asserted that "[t]he statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources."[84]

Prosecutors have been successful in convicting defendants who previously provided immunized grand-jury testimony.[85] To prove that no evidence at trial, including testimony by prosecution witnesses, is derived from immunized testimony, prosecutors keep "careful records of the independent source leading to each witness, and to each planned line of questioning on direct and cross-examination [and] 'can' the testimony—that is, record the witness's testimony before the defendant receives immunity to testify."[86] Prosecutors also present proof that neither they nor other officials participating in a

81. *Id.* at 459.

82. *Id.* at 460.

83. *Id.*

84. *Id.* at 461. *Kastigar* left a number of questions unanswered. For example, although *Kastigar* clearly states that prosecutors may not use immunized testimony to "focus[] [their] investigation on a witness as a result of his compelled disclosure" or as an "investigatory lead," *id.* at 460, lower courts disagree about whether a prosecutor may use immunized testimony for non-evidentiary purposes, such as " 'deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.' " United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989) (quoting United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973)). *Compare* United States v. Schmidgall, 25 F.3d 1523, 1529 (11th Cir. 1994) (prohibiting non-evidentiary uses of immunized testimony), United States v. Pantone, 634 F.2d 716, 721–22 (3d Cir. 1980) (same), *and McDaniel*, 482 F.2d at 311 (same), *with* United States v. Velasco, 953 F.2d 1467, 1474 (7th Cir. 1992) (permitting non-evidentiary uses), United States v. Rivieccio, 919 F.2d 812, 815 (2d Cir. 1990) (same), *and Serrano*, 870 F.2d at 17 (rejecting the "notion that all nonevidentiary use necessarily violates the Fifth Amendment," but declining to decide whether "certain nonevidentiary uses ... may so prejudice the defendant as to warrant dismissal of the indictment"). For a discussion of other issues *Kastigar* failed to settle, see Wright, *supra* note 42, at 419–23.

85. *See, e.g.*, United States v. France, 164 F.3d 203 (4th Cir. 1998); United States v. Lacey, 86 F.3d 956 (10th Cir. 1996); United States v. Bolton, 977 F.2d 1196 (7th Cir. 1992).

86. Wright, *supra* note 42, at 422.

trial have been exposed to immunized grand-jury testimony.[87] The government's ability to insulate members of the prosecution team from immunized testimony is facilitated by the secrecy of grand-jury proceedings.[88] If the government takes proper precautions, the only people who need be exposed to immunized grand-jury testimony are the grand jurors, the witness, a prosecutor, and the court reporter. The government can then erect a "fire wall" to ensure that these tainted individuals play no part in any subsequent prosecution of the grand-jury witness.[89]

A prosecutor seeking to convict an immunized congressional witness faces a much more difficult task. Generally, the testimony of such a witness is public and receives a substantial amount of media coverage.[90] Insulating the prosecution team from this testimony is a Herculean task. The Iran-Contra prosecutions of Admiral John Poindexter and Lieutenant Colonel Oliver North illustrate these difficulties.[91] The Independent Counsel went so far as to order prosecutors to read only redacted newspapers and to avoid exposure to any television or radio broadcast that was potentially related to the immunized testimony.[92]

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87. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-23.400 (1997) (Sup. Docs. No. J1.8:AT 84/2/997).

88. *See* FED. R. CRIM. P. 6(e) (requiring, with few exceptions, that matters occurring before the grand jury be kept secret).

89. *See* United States v. Schwimmer, 882 F.2d 22, 26 (2d Cir. 1989).

90. *See* Wright, *supra* note 42, at 428. Congressional committees can, and sometimes do, meet in executive session. *See* Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 816 (1985). If an immunized witness testifies in closed session, it is easier to insulate the testimony and subsequently prosecute the witness. As Part V explains, keeping immunized congressional testimony secret would minimize the constitutional problems created by a congressional grant of immunity. *See infra* notes 290–97 and accompanying text. One of the reasons for launching a congressional investigation, however, is to inform the public about the misconduct of public officials or about the need for legislation. Congressional investigations are, therefore, almost always conducted in open session. *See infra* notes 298–303 and accompanying text.

91. The Watergate prosecutions do not provide as clear an illustration. Although the Ervin Committee immunized 28 witnesses in its investigation of Watergate, *see supra* note 74, prosecutors were not forced to test whether it is possible to convict a witness who has provided immunized congressional testimony. All but one of the 28 who were indicted pleaded guilty. *See* Strachan, *supra* note 1, at 814. As Professor Strachan explains, prosecutors moved to dismiss the charges against her husband, Gordon Strachan, the one immunized witness who did not plead guilty, because "[w]ide dissemination of his compelled testimony by national television, radio, and other news media cast the problem of prohibited use of immunized testimony in a uniquely aggravated posture." *Id.* at 819.

92. *See* United States v. Poindexter, 698 F. Supp. 300, 312–13 (D.D.C. 1988), *rev'd on other grounds*, 951 F.2d 369 (D.C. Cir. 1991). To protect the Independent Counsel and his associate counsel from exposure to immunized testimony,

The Independent Counsel succeeded in convicting Poindexter and North.[93] While the Poindexter and North appeals were pending, two commentators observed that the Independent Counsel had "taken most, if not all, of the precautions which could reasonably have been taken to protect against taint. If [these] actions do not meet the *Kastigar* requirements, Congress should probably conclude that its grants of immunity in major investigations will likely preclude subsequent prosecution of immunized individuals."[94]

The United States Court of Appeals for the D.C. Circuit reversed the North and Poindexter convictions.[95] The *North II* court held that the *Kastigar* standard is not met merely by showing that the prosecution insulated itself from immunized testimony.[96] *Kastigar* "is instead violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how or by whom* he was exposed to that compelled testimony."[97] In *North I*, the Independent Counsel had failed to prove that former National Security Adviser Robert McFarlane had not used North's testimony to refresh his recollection of events.[98] In *Poindexter*, the principal tainted witness was none other than Oliver North, who had been exposed to Poindexter's congressional testimony.[99] Together, these cases establish that a defendant's Fifth Amendment rights are violated if a grand-jury or trial witness's

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> [p]rosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily newspaper clippings and transcripts of testimony before the Select Committees were redacted by non-prosecuting "tainted" personnel to avoid direct and explicit references to immunized testimony. Prosecutors, and those immediately associated with them, were confined to reading these redacted materials. In addition, they were instructed to shut off television or radio broadcasts that even approached discussion of the immunized testimony.... In order to monitor the matter, all inadvertent exposures were to be reported for review of their possible significance.

See id. The Iran-Contra Committees also tried to accommodate the Independent Counsel by postponing Oliver North's testimony to give prosecutors enough time to "can" their evidence against North. *See* Ghio, *supra* note 53, at 247.

93. *See Poindexter*, 951 F.2d at 371; United States v. North ("North I"), 910 F.2d 843, 851 (D.C. Cir. 1990) (per curiam), *modified by* United States v. North ("North II"), 920 F.2d 940 (D.C. Cir. 1990) (per curiam).

94. Van Cleve & Tiefer, *supra* note 74, at 53 n.40 (internal citations omitted). George Van Cleve and Charles Tiefer served, respectively, as Chief Minority Counsel and Special Deputy Chief Counsel on the House's Iran-Contra Committee. *See id.* at 43 nn.*, **.

95. *See Poindexter*, 951 F.2d at 371; *North II*, 920 F.2d at 942.

96. *North II*, 920 F.2d at 942.

97. *Id.*

98. *North I*, 910 F.2d at 864.

99. *See Poindexter*, 951 F.2d at 373–77.

recollection is refreshed by immunized testimony.

When the government seeks to prosecute someone who has provided immunized grand-jury testimony, it can prove that potential trial testimony has not been tainted by "canning" that testimony.[100] When it comes to prosecuting immunized congressional witnesses, however, canning is ineffective for several reasons.[101] For one thing, criminal investigations and prosecutions often move much more slowly than congressional inquiries. When a committee grants immunity, a prosecutor may not yet have identified key trial witnesses.[102] Even if witnesses are identified, prosecutors will have a difficult time canning testimony because prosecutors will not yet have full knowledge of the facts.[103] More fundamentally, *North II*'s holding that a witness is tainted "regardless of *how or by whom* he was exposed to . . . compelled testimony"[104] requires prosecutors to ensure that witnesses do not watch the testimony on television, read about it in a newspaper, or hear about it from a friend. Prosecutors are not equipped to meet this burden. Even if immunized testimony is not broadcast on television, prospective witnesses will likely know about the defendant's testimony and understandably will be curious to learn about it. Also, a witness friendly with a defendant could try to thwart a prosecution by deliberately exposing herself to immunized testimony, and prosecutors would be powerless to stop her.[105]

During the Iran-Contra hearings, Independent Counsel Lawrence Walsh unsuccessfully tried to overcome these difficulties. Although many prospective trial witnesses testified before the grand jury or were interviewed by the FBI prior to North's and Poindexter's congressional appearances, the Independent Counsel was unable to can the testimony of other witnesses.[106] Walsh also asked witnesses to

100. For a description of "canning," see *supra* note 86 and accompanying text.

101. *See North II*, 920 F.2d at 951–52 (Wald, C.J., dissenting in part); Miller, *supra* note 61, at 688; Wright, *supra* note 42, at 426.

102. *See* Wright, *supra* note 42, at 426.

103. *See North II*, 920 F.2d at 952 (Wald, C.J., dissenting in part).

104. *Id.* at 942.

105. *See* Murphy, *supra* note 29, at 1050. In theory, a prosecutor could bring obstruction-of-justice charges against a witness who intentionally watched or read about immunized testimony. *See* 18 U.S.C.A. § 1503 (West 1984 & Supp. 1999) (declaring that obstruction of justice occurs when someone "corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice"). As Professor Wright explains, however, "it would be most difficult for a prosecutor to prove that the defendant witness exposed himself or herself to the testimony with the purpose of obstructing the criminal proceedings. Most witnesses will have many legitimate reasons, including the curiosity shared by most citizens, for listening to the congressional testimony." Wright, *supra* note 42, at 427.

106. *See* Wright, *supra* note 42, at 425.

insulate themselves from immunized testimony, but most refused.[107] In short, as former Whitewater Special Counsel Robert Fiske[108] and a number of others[109] have concluded, the Iran-Contra prosecutions show that an attempt to convict someone who provides public immunized testimony to a congressional committee almost certainly will fail.[110]

Unfortunately, this problem has no easy solution. Changing the immunity standard is not an option. The *Kastigar-North-Poindexter* requirements are based on the Fifth Amendment, and *Kastigar* made it quite clear that moving to a more relaxed immunity standard, such as simple use immunity, would be unconstitutional.[111] A congressional committee could hear immunized testimony in

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107. *See id.*

108. *See* John van Loben Sels, Note, *From Watergate to Whitewater: Congressional Use Immunity and Its Impact on the Independent Counsel*, 83 GEO. L.J. 2385, 2394 (1995) (recounting an interview with Special Counsel Fiske). The author goes on to argue that, whenever possible, Congress should postpone immunity grants until after the prosecution has had time to pursue its investigation. *See id.* at 2403–05.

109. *See, e.g.*, *North II*, 920 F.2d at 951–52 (Wald, C.J., dissenting in part); Miller, *supra* note 61, at 688; Wright, *supra* note 42, at 426.

110. Congress has become increasingly aware of this fact and, since the *North* and *Poindexter* decisions, has become much more cautious in granting immunity. For example, in the Senate Governmental Affairs Committee's recent campaign-finance investigation, the Committee refused to immunize John Huang, who was a central figure in its investigation. *See* SENATE COMM. ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167, at 4841 (1998) (Sup. Docs. No. Y1.1/5:105-167/V.4) [hereinafter CAMPAIGN-FINANCE REPORT]; *see also* Wright, *supra* note 42, at 431–33 (surveying anecdotal and statistical evidence of Congress's increasing reluctance to grant immunity). The Governmental Affairs Committee did, however, immunize nine other witnesses. *See* CAMPAIGN-FINANCE REPORT, *supra*, at 17. In a separate campaign-finance investigation, the House Committee on Government Reform and Oversight immunized seven witnesses. *See* Howard Kurtz, *No-Camera Option Under House GOP Fire*, WASH. POST, Nov. 7, 1997, at A18; George Lardner, Jr., *House Panel Closes Ranks; Money Probe Immunizes Four*, WASH. POST, June 24, 1998, at A2.

111. Kastigar v. United States, 406 U.S. 441, 453–54 (1972). Professor Akhil Amar argues that the Supreme Court should overrule *Kastigar* and hold that the Fifth Amendment requires only simple use immunity. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 77–82 (1997). *But see* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1623–35 (1996) (criticizing Professor Amar's interpretation of the Fifth Amendment); Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 954–80 (1995) (same). The Supreme Court has shown no signs of adopting Professor Amar's suggestion. *See* United States v. Balsys, 524 U.S. 666, 692 (1998) (noting that if the government "is ready to provide the *requisite use and derivative use immunity* . . . no claim of [Fifth Amendment] privilege will avail" (citing Lefkowitz v. Turley, 414 U.S. 70, 84 (1973); *Kastigar*, 406 U.S. at 453) (emphasis added)).

executive session[112] or postpone hearing immunized testimony until after the prosecution has had time to pursue its investigation,[113] thereby minimizing the chance that prospective grand-jury and trial witnesses would be tainted. But, as Part V explains, a congressional committee often will consider bringing the guilty individual to justice less important than holding a public hearing that promptly informs citizens about corruption in government or about the need for new legislation.

Although transactional immunity is no longer the law, the 1970 statute nonetheless allows a congressional committee to place a witness in an immunity bath. Because the court exercises only a "ministerial" duty in granting congressional immunity requests,[114] and because the Attorney General or an independent counsel is powerless to intervene, Congress possesses unfettered power to immunize witnesses. The statute's creation of this unilateral congressional power to derail a prosecution raises serious constitutional questions.

II. CONSTITUTIONAL QUESTIONS RAISED BY CONGRESSIONAL GRANTS OF IMMUNITY

A. Two Critical Questions

The debate over the constitutionality of immunity statutes has centered almost exclusively on the Fifth Amendment. In *Counselman*, *Ullman*, and *Kastigar*, witnesses claimed that particular immunity statutes violated the Fifth Amendment by permitting the government to use their testimony against them. In each of these cases, the Court recognized that the Fifth Amendment did not prohibit the government from compelling testimony as long as the witness received adequate immunity.[115] As the Court explained more recently, "[t]he practice of exchanging silence for immunity is ... presumably invulnerable" from Fifth Amendment attack.[116]

The Fifth Amendment is not, however, the only constitutional ground on which an immunity statute may be challenged. Like any other federal law, an immunity statute not only must comply with the Bill of Rights, but also must be consistent with separation of

112. *See* Wright, *supra* note 42, at 449.

113. *See* van Loben Sels, *supra* note 108, at 2403–05.

114. *In re* United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1272 (D.D.C. 1973).

115. *See supra* notes 37–40, 43–46, 76–84 and accompanying text.

116. *Balsys*, 524 U.S. at 692 n.13.

powers.[117]

As with any constitutional question, the place to begin examining the separation-of-powers constraints on congressional grants of immunity is the text of the Constitution. The word "immunity" does not appear in the Constitution. The only constitutional provision that explicitly grants a government actor the authority to release someone from criminal liability is the Pardons Clause, which gives the President the "[p]ower to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[118] Indeed, one could argue that because the Pardons Clause does not mention Congress, the power to prevent someone from being punished belongs exclusively to the President.[119] Under this line of reasoning, a congressional grant of immunity would encroach on the President's authority.

The Supreme Court rejected this argument in the only case in which it has considered whether an immunity statute transgressed the separation of powers. In *Brown v. Walker*,[120] the Supreme Court upheld an 1893 statute that authorized the Interstate Commerce Commission (ICC) to grant witnesses transactional immunity. The Court characterized "[t]he act of Congress in question securing to witnesses immunity from prosecution [as] virtually an act of general amnesty."[121] The *Brown* Court held that, although the President possesses the power to pardon, Congress has a concurrent power "to pass acts of general amnesty" and that this authority " 'extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or

117. *See* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (explaining that liberty is protected not only by the Bill of Rights and the Fourteenth Amendment but also by the "principles of separation of powers and federalism").

118. U.S. CONST. art. II, § 2, cl. 1. The Supreme Court has interpreted this presidential power quite broadly. For example, a pardon may be conditional or absolute, *see* Schick v. Reed, 419 U.S. 256, 266 (1974); *Ex parte* Wells, 59 U.S. (18 How.) 307, 314–15 (1856), and "cannot be modified, abridged, or diminished by the Congress," *Schick*, 419 U.S. at 26. *See generally* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 265 (1994) (noting that "it has become well-settled that the President has essentially unbridled discretion" in the use of the pardon power). The President may pardon just one person or confer amnesty to a whole class of individuals. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147–48 (1871).

119. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 521–24 (1977) (outlining the case for an exclusive presidential power to pardon).

120. 161 U.S. 591 (1896).

121. *Id.* at 601 (citation omitted).

during their pendency, or after conviction and judgment.' "[122] The Court then concluded that Congress could delegate the power to grant amnesty or immunity to the ICC.[123] The *Brown* Court relied heavily on *The Laura*,[124] an 1885 case in which the Court had held that Congress had the authority to delegate to the Secretary of the Treasury the power to "remit or mitigate any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment, or of removal from office."[125]

Although *Brown* put to rest the argument that the Pardons Clause prevents Congress or a part of Congress from immunizing a witness, the case raises two critical questions.

The law upheld in *Brown*, as well as the statutes, or portions of statutes, upheld in *Ullman* and *Kastigar*,[126] did not give Congress or a part of Congress the discretion to immunize a witness. Instead, the statute in *Brown* gave that power to the ICC, an independent administrative agency. Thus, the first critical question raised by *Brown* is: if Congress may delegate immunity-granting power to a non-congressional body like the ICC, may it also delegate this power to itself?

Unfortunately, *Brown v. Walker*, which predates modern separation-of-powers jurisprudence, provides no guidance in determining whether Congress can delegate the power to immunize to itself or to a unit within Congress. *Brown* simply cites *The Laura*, whose holding that Congress could delegate amnesty power to the

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122. *Id.* (quoting *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867)). The Court also explained that the "distinction between amnesty and pardon is of no practical importance.... '[T]he Constitution does not use the word "amnesty," and, except that the term is generally applied where pardon is extended to whole classes or communities ... the distinction between them is one rather of philological interest than of legal importance.' " *Id.* (quoting Knote v. United States, 95 U.S. 149, 152 (1877)). The Court later elaborated on this distinction:

> [T]here are incidental differences of importance [between amnesty and pardon]. They are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State.

Burdick v. United States, 236 U.S. 79, 94–95 (1915).

123. *See Brown*, 161 U.S. at 601.

124. 114 U.S. 411 (1885).

125. *Id.* at 412 (internal quotation marks omitted).

126. *Ullman* and *Kastigar*, cases which upheld statutes providing immunity to grand-jury witnesses, dealt only with Fifth Amendment and federalism challenges to these laws. *See supra* notes 43–46, 76–84 and accompanying text.

Secretary of the Treasury is based solely on the fact that the Secretary's exercise of this power had been "observed and acquiesced in for nearly a century."[127] Neither *Brown* nor *The Laura* provides any guidance as to whether Congress can give itself the power to grant immunity.

The second unanswered question involves Congress's power to pass general amnesty laws. An act of general amnesty is a statute that pardons " 'whole classes or communities.' "[128] Like all other statutes, amnesty acts must be passed by both Houses of Congress and presented for signature to the President.[129] In contrast, under the modern immunity statute, one House of Congress or a congressional committee has the unilateral power to choose whom to immunize. If, as *Brown* held, immunizing a witness is analogous to "an act of general amnesty,"[130] and if Congress may pass an amnesty statute that both the House and Senate have agreed to and have presented for signature to the President, may one House of Congress or a congressional committee unilaterally decide whom to immunize?

B. The Executive Power-Legislative Power Box

The Supreme Court's modern separation-of-powers cases establish two interrelated principles relevant to the two questions raised by *Brown v. Walker*. First, although Congress may determine which executive agency or independent agency has the authority to decide how a law is to be executed,[131] Congress may not delegate to itself any role in executing a law.[132] Second, the only constitutional

127. *The Laura*, 114 U.S. at 414. The appellant had asserted that the President's authority to pardon "is in its nature exclusive; and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the constitutional prerogatives of the President." *Id.* at 413. The Court's exclusive reliance on historical practice to reject this argument has caused at least one commentator to describe *The Laura* as "not well reasoned." Duker, *supra* note 119, at 524.

128. *Brown*, 161 U.S. at 601 (quoting Knote v. United States, 95 U.S. 149, 152 (1877)).

129. *See infra* notes 133, 157–62 and accompanying text.

130. *Brown*, 161 U.S. at 601 (citation omitted).

131. *See, e.g.*, Loving v. United States, 517 U.S. 748, 769–74 (1996) (upholding Congress's delegation to the President of the power to define aggravating factors in a military court-martial); Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding a statute giving the United States Sentencing Commission the power to adopt federal sentencing guidelines); Morrison v. Olson, 487 U.S. 654, 662–63, 693–96 (1988) (upholding a statute that gives an independent counsel the power to enforce criminal law); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 642–43 (1980) (interpreting a statute that gives the Secretary of Labor the authority to set workplace safety standards for toxic substances).

132. *See* Bowsher v. Synar, 478 U.S. 714, 718 (1985) (striking down the Gramm-Rudman-Hollings Act); *infra* notes 137–43 and accompanying text.

way for Congress to exercise legislative power is to pass a statute approved by both Houses of Congress and then to present it for signature to the President.[133] Thus, if granting immunity is an exercise of executive power, Congress may vest that power in the ICC, the Attorney General, or an independent counsel, but it may not assign the power to the House, the Senate, or a committee. If immunizing a witness is an exercise of legislative power, then Congress may pass a statute granting immunity to a particular witness, but neither a House of Congress nor a committee can choose, on its own, whom to immunize.

The roots of these two principles and the answers to the questions raised by *Brown* lie in the Constitution's rejection of a parliamentary form of government in which legislative and executive power are intermingled.[134] The Framers of the Constitution warned that combining executive and legislative power in one entity would lead to tyranny.[135] Montesquieu, on whose writings James Madison relied, explained that "[w]hen the legislative and executive powers are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[136]

Heeding Montesquieu's admonition, the Supreme Court has invalidated statutes that give Congress a role in executing the law. For example, in *Bowsher v. Synar*,[137] the Court struck down the

133. *See* U.S. CONST. art. 1, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become[s] a Law, be presented to the President ...."); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (holding that Congress may not "invest itself or its Members with either executive power or judicial power" and that "when it exercises legislative power, it must follow the single, finely wrought and exhaustively considered, procedures specified in Article I" (citations omitted)); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) (holding that Congress may not "invest itself or its members with either executive power or judicial power").

134. *See* THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (criticizing the British form of government in which "[t]he executive magistrate forms an integral part of the legislative authority"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1238 (1995) (discussing "the parliamentary form of government that the Framers repudiated").

135. *See Metropolitan Wash. Airports Auth.*, 501 U.S. at 272–74 (discussing the Framers' opposition to concentrating legislative and executive power in one body); *Mistretta*, 488 U.S. at 382 (explaining that "the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power").

136. 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 185 (photo. reprint 1984) (1751); *see also* THE FEDERALIST NO. 47, *supra* note 134, at 302–03 (quoting Montesquieu).

137. 478 U.S. 714 (1986).

Gramm-Rudman-Hollings Act,[138] which provided that across-the-board cuts in federal spending would occur if the federal budget deficit exceeded specified levels.[139] The statute gave the Comptroller General, an officer who is removable by Congress,[140] the "ultimate authority" to decide the exact magnitude of these cuts.[141] The Court, drawing on Madison and Montesquieu,[142] held that the Gramm-Rudman-Hollings Act was unconstitutional because it granted executive power to an official who was under congressional control:

> To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.... The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.[143]

Two years later, the Court reaffirmed and distinguished *Bowsher*. In *Morrison v. Olson*,[144] the Court upheld the independent-counsel statute.[145] One ground on which the statute was challenged was that its limitation of the Attorney General's "power to remove the independent counsel to only those instances in which [the Attorney General] can show 'good cause' ... impermissibly interferes with the President's exercise of his constitutionally appointed functions."[146] The *Morrison* Court held that restrictions on the President's authority to remove an official are constitutional as long as they do not "impede the President's ability to perform his constitutional duty."[147] Although Congress enjoys broad authority to

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138. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985).

139. *See Bowsher*, 478 U.S. at 718.

140. *See id.* at 727–28.

141. *Id.* at 733.

142. *See id.* at 721 (quoting THE FEDERALIST NO. 47, *supra* note 134, at 302 (quoting MONTESQUIEU, *supra* note 135, at 185)).

143. *Id.* at 726.

144. 487 U.S. 654 (1988).

145. *See id.* at 697. The independent-counsel statute was codified at 28 U.S.C. §§ 591–599 (Supp. V 1987) (expired 1992). In 1994, Congress reauthorized the independent-counsel statute in amended form. *See* 28 U.S.C. §§ 591–599 (1994). The latter statute expired on June 30, 1999. *See id.* § 599.

146. *Morrison*, 487 U.S. at 685 (quoting 28 U.S.C. § 596(a)(1)).

147. *Id.* at 691. The landmark case establishing Congress's power to limit the President's removal authority is *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In *Humphrey's Executor*, the Court held that with respect to "quasi-legislative" and "quasi-judicial" agencies, *id.* at 627–28, the "authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control ... includes, as an appropriate incident, power to fix the period during which they

limit the President's removal power, the Court quoted *Bowsher* and explained that " 'Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.' "[148] As the Court noted, the Constitution "prevents Congress from 'draw[ing] to itself ... the power to remove or the right to participate in the exercise of that power.' "[149] The independent-counsel statute did not suffer from this constitutional infirmity because it did "not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction."[150]

The Court further delineated the separation of legislative and executive power in *Buckley v. Valeo*.[151] In *Buckley*, the Court considered the constitutionality of the 1974 amendments to the Federal Election Campaign Act of 1971,[152] which created the Federal Election Commission (FEC) to enforce the statute by promulgating rules and bringing civil actions to punish violators.[153] Under this legislation, four of the six FEC commissioners were to be appointed by the Speaker of the House and the President Pro Tempore of the Senate.[154] In *Buckley*, the Court held that this delegation of power violated the Appointments Clause of the Constitution.[155] The Court

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shall continue in office, and to forbid their removal except for cause in the meantime," *id.* at 629. The appellants in *Morrison* argued that *Humphrey's Executor* rested "on a distinction between 'purely executive' officials and officials who exercise 'quasi-legislative' and 'quasi-judicial' powers. In their view, ... the President must have absolute discretion to discharge 'purely' executive officials at will." *Morrison*, 487 U.S. at 688. The Court disagreed with this characterization of *Humphrey's Executor*, observing that its "removal cases [are] designed not to define rigid categories of those officials who may or may not be removed at will by the President." *Id.* at 689. *Morrison* concluded that removal restrictions are constitutional if they do not interfere with the President's ability to accomplish his presidential role. *See id.* at 690. For powerful criticism of the Court's reasoning, see Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 113–17 (1988).

148. *Morrison*, 487 U.S. at 685–86 (quoting *Bowsher*, 478 U.S. at 726).

149. *Id.* at 686 (quoting Myers v. United States, 272 U.S. 52, 161 (1926)).

150. *Id.* The Court's reasoning dictates that "the outcome of [the] case would have been dramatically different had [Olson] been investigated by a prosecutor under congressional control rather than one who was independent under the terms of the Ethics in Government Act." Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 591 (1991).

151. 424 U.S. 1 (1976) (per curiam).

152. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C.A. §§ 431–455 (West 1997 & Supp. 1999)).

153. *See Buckley*, 424 U.S. at 137 (describing the FEC's functions).

154. *See id.* at 126.

155. The Appointments Clause provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court, and all other Officers of

explained that Congress had no power to " 'enforce [laws] or appoint the agents charged with the duty of such enforcement.' "[156]

As *Bowsher*, *Morrison*, and *Buckley* demonstrate, the Court has strictly prohibited Congress from playing any role in executing the law. The Constitution has placed another restriction on Congress—the only way Congress may exercise legislative power is to pass a statute approved by both Houses of Congress and to present it for signature to the President.[157]

The leading case setting forth the latter principle is *INS v. Chadha*.[158] At issue in *Chadha* was a statute that gave the Attorney General the power to suspend deportation of an alien, but permitted either House of Congress to override the Attorney General's decision through a legislative veto.[159] The Attorney General exercised his power to suspend Chadha's deportation, but the House vetoed this decision.[160] The Court held that such a veto is an exercise of legislative power[161] and that the House's action in the case was unconstitutional because it failed to comply with "the Constitution's prescription for legislative action: passage by a majority of *both* Houses and *presentment* to the President."[162]

With the help of these precedents, we are now ready to answer preliminarily the questions posed by *Brown v. Walker*. Under *Brown*, Congress can delegate to a non-congressional body like the ICC the power to grant immunity.[163] If, however, immunizing a witness gives Congress or some part of Congress a role in executing the law, congressional immunity grants would be unconstitutional under *Bowsher*, *Morrison*, and *Buckley*.[164] As to the second question posed by *Brown*, the *Brown* Court held that Congress has the power to pass a statute conferring amnesty on classes of people.[165] If, however,

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the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

156. *Buckley*, 424 U.S. at 139 (quoting Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)).

157. *See* U.S. CONST. art. I, § 7, cl. 2.

158. 462 U.S. 919 (1983).

159. *Id.* at 924–25 (describing the statutory framework).

160. *See id.* at 924–27.

161. *See id.* at 952.

162. *Id.* at 958 (emphasis added).

163. 161 U.S. 591, 610 (1896).

164. *See supra* notes 137–56 and accompanying text.

165. *See Brown*, 161 U.S. at 602.

granting immunity is a legislative act, then under *Chadha*, one House of Congress or a committee could not choose whom to immunize.[166] Each immunity grant would have to be the product of the same process used to pass amnesty statutes—it would have to be approved by both Houses of Congress and presented to the President for signature.

Unfortunately, the Court's definitions of executive and legislative acts are imprecise and overlapping. In *Chadha*, the Court held that the House's veto was an exercise of legislative power because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[167] While the veto was an exercise of legislative power, the Attorney General's decision to suspend Chadha's deportation was "executive action" that only "resemble[d] 'legislative' action in some respects [and was] not subject to the approval of both Houses of Congress and the President."[168] The Court tried to distinguish legislative from executive power by explaining that "[e]xecutive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely."[169]

The Court's distinction between legislative and executive power is unpersuasive. As Professor Strauss has explained, the Attorney General's "executive action" altered legal rights no less than did the House's "legislative action":

> However one might label what the Department of Justice and the House did in considering the cancellation of Mr. Chadha's deportation for compassionate reasons, the action of each seems to have been of the same nature and to have had precisely the same kind of legal effect on Mr. Chadha's rights. Depending on the characterization employed, one could say either that the Department effected a suspension of an individual deportation order which the House canceled, or that, between the two, the conditions for

166. The constitutional problem would remain the same even if both Houses of Congress voted to immunize a witness without submitting the action to the President for signing. *See* United States House of Representatives v. FTC, 463 U.S. 1216, 1216 (1983) (summarily affirming a decision invalidating a bicameral legislative veto).

167. 462 U.S. at 952.

168. *Id.* at 953–54 n.16.

169. *Id.*

cancellation of a deportation order were not met.[170]

As for the fact that the Attorney General's actions were authorized by statute and subject to judicial review, the "House's action was also authorized and limited by a statute, could occur only within its terms, and no doubt was subject to judicial correction if these terms were exceeded."[171]

Rather than focusing on legislative power, *Bowsher* and *Morrison* focused on the definition of executive power. *Bowsher* held that the Comptroller General exercised executive power because "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law. Under [the statute,] the Comptroller General must exercise judgment concerning facts that affect the application of the Act."[172] *Morrison* stated that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."[173]

Imprecise though they are, the Court's definitions of legislative and executive power appear to place congressional grants of immunity in jeopardy. When a committee hears public immunized

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170. Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 797; *see also* E. Donald Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134–38 (criticizing the Court's definition of legislative power); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 9 (1984) (noting that "nearly *all* exercises of delegated authority . . . alter legal rights, duties, and relations, thereby changing the legal status of persons outside the legislative branch in ways that, *without* the challenged delegation, could have been achieved, if at all, only by legislation").

171. Strauss, *supra* note 170, at 799.

172. Bowsher v. Synar, 478 U.S. 714, 733 (1985).

173. Morrison v. Olson, 487 U.S. 654, 691 (1988); *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."); United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

Buckley's discussion of executive power is even less illuminating. The Court held that the FEC's power to sue offenders is an executive function because "a lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' " Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. CONST. art. II, § 3). The FEC's authority to promulgate regulations, issue advisory opinions, and determine the eligibility of candidates for federal funds are "more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress." *Id.* at 140–41.

testimony, it seems to meet the *Chadha* criterion for a legislative act. Just as the House's veto altered Chadha's legal rights by subjecting him to deportation, immunizing a witness alters her legal rights by freeing her from prosecution. At the same time, however, a congressional grant of immunity also seems to qualify as an executive act because it is an exercise of "independent judgment concerning facts that affect the application" of the immunity statute.[174] Also, by making future prosecutions impossible, grants of immunity play a pivotal, destructive role in the executive function of law enforcement.

Congressional grants of immunity thus seem to violate either *Bowsher*, *Morrison*, and *Buckley* on the one hand, or *Chadha* on the other. The Court's diaphanous and overlapping definitions of legislative and executive power make it difficult to choose. However, this difficulty is neither surprising nor troubling because *Chadha* stands for the same broad anti-parliamentary principle that the other three cases do. *Bowsher*, *Morrison*, and *Buckley* make it clear that Congress may not play any role in executing the law. When one House of Congress legislatively vetoes the way in which the executive branch enforces a law, it plays a role in the execution or implementation of that law.[175] *Chadha* provides a good illustration. Instead of deciding that the House's veto was an exercise of legislative power, the Supreme Court could have reasoned that enforcing the immigration law was an executive function and that the House's veto was an attempt to control how the Attorney General exercised this power.[176]

Thus, *Chadha* and *Bowsher*, *Morrison*, and *Buckley* provide two complementary ways of analyzing the congressional power to immunize. One may cite *Buckley*, *Bowsher*, and *Morrison* and analyze an immunity grant as an attempt by a congressional committee to play a role in the executive function of law enforcement. Alternatively, one may cite *Chadha* and analyze this power as a legislative veto over the Executive's authority to prosecute. Either way, the result is the same—congressional grants of immunity appear to be unconstitutional.[177]

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174. *Bowsher*, 478 U.S. at 733.

175. *See* INS v. Chadha, 462 U.S. 919, 954–55 (1983); Tribe, *supra* note 134, at 1238.

176. *See* Tribe, *supra* note 134, at 1238.

177. In *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), the Supreme Court recognized that courts need not choose whether a statute is unconstitutional under *Chadha* or under *Buckley*, *Bowsher*, and *Morrison*. *See id.* at 276. The Court invalidated a statute giving Congress the power to appoint members to a board that exercised veto power over the body that operates the airports of Metropolitan Washington, D.C. *See id.* at 277. It declined to decide whether

There is, however, one possible way of saving the congressional power to immunize. Although the Constitution generally prohibits legislative vetoes and congressional exercises of executive power, the Constitution does authorize Congress or a part of Congress to act unilaterally "to take some actions with effects outside the Legislative Branch."[178] One such unilateral congressional power is the power to investigate.[179] Part III examines the scope of Congress's investigative authority and considers whether it authorizes Congress, in the face of *Bowsher*, *Morrison*, *Buckley*, and *Chadha*, to grant immunity to a witness.

III. CONGRESS'S POWER TO INVESTIGATE

The Constitution does not specifically grant Congress any investigative power. Nevertheless, since the 1790s, Congress has regularly conducted investigations in which it has exercised subpoena power and punished contumacious witnesses.[180] The Supreme Court has broadly defined the subject matters that Congress has authority to investigate and has recognized that Congress possesses subpoena and contempt power to obtain the information it needs to conduct an investigation.

Congress's broad power to investigate traces back to the British Parliament, which had the unchecked power to issue subpoenas for information related to any topic and to punish individuals for contempt.[181] The House of Commons and House of Lords claimed plenary power over policing breaches of parliamentary privilege.[182] Only Parliament "could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge

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the board's power was executive or legislative and held that "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with bicameralism and presentment requirements of Art. I, § 7." *Id.* at 276.

178. *Id.* at 276 n.21. For example, the Constitution authorizes the House alone to impeach the President, U.S. CONST. art. I, § 2, cl. 5, and the Senate alone to convict the President, *id.* art. I, § 3, cl. 6.

179. *See* Buckley v. Valeo, 424 U.S. 1, 137–38 (1976) (per curiam).

180. For brief summaries of the history of congressional investigations, see GRABOW, *supra* note 23, §§ 2.2–.6, at 17–75, and James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 168–221 (1926). The most detailed history of congressional investigations is the multi-volume CONGRESS INVESTIGATES: A DOCUMENTED HISTORY (Arthur M. Schlesinger & Robert Bruns eds., 1975).

181. *See* Watkins v. United States, 354 U.S. 178, 188 (1957).

182. *See id.* at 188; *see also* C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691, 703–04 (1925) (discussing Parliament's authority to punish for contempt).

what conduct constituted a breach of privilege."[183] Parliament interpreted its privileges quite broadly and imposed draconian punishments on private citizens who criticized it or the King.[184] Beginning in the seventeenth century, the House of Commons and House of Lords began to use their contempt power to enforce parliamentary subpoenas.[185] As William Pitt explained in 1742, Parliament was "the Grand Inquest of the Nation, and [had a] duty to inquire into every Step of public management, either Abroad or at Home, in order to see that nothing [had] been done amiss."[186] Parliament had the power to "inquire into every thing which it concerns the public weal for them to know; and they themselves [were] entrusted with the determination of what falls within that category."[187]

Almost from its inception, Congress also has exercised investigative power. At the Constitutional Convention, George Mason declared that members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices."[188] Congress first exercised these "inquisitorial powers" in 1792, when a House committee issued subpoenas in an investigation of a failed military operation.[189] Although early uses of the subpoena power involved only inquiries

183. *Watkins*, 354 U.S. at 188.

184. *See id.* at 189. One of the more notorious examples involved a private individual who was Catholic and who, in a private conversation, "expressed pleasure over the misfortune of the King's Protestant son-in-law and his wife." *Id.* The House of Commons imposed the following punishment:

> Floyd, for uttering a few contemptible expressions, was degraded from his gentility, and to be held an infamous person; his testimony not to be received; to ride from the Fleet to Cheapside on horseback, without a saddle, with his face to the horse's tail, and the tail in his hand, and then to stand two hours in the pillory, and to be branded in the forehead with the letter K; to ride four days afterwards in the same manner to Westminster, and then to stand two hours more in the pillory, with words on a paper in his hat showing his offence; to be whipped at the cart's tail from the Fleet to Westminster Hall; to pay a fine of 5000£; and to be a prisoner in Newgate during his life.

1 JEAN LOUIS DE LOLME, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION 348 (Garland Publishing, Inc. 1978) (1838). The House of Commons vacated this sentence, but the House of Lords subsequently imposed a similar punishment. *See Watkins*, 354 U.S. at 189–90.

185. *See* Landis, *supra* note 180, at 160–64.

186. TAYLOR, *supra* note 23, at 9.

187. Howard v. Gosset, 116 Eng. Rep. 139, 147 (Q.B. 1845); *see also* Landis, *supra* note 180, at 164 (quoting the opinion).

188. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1911).

189. *See* Landis, *supra* note 180, at 170.

into the integrity of senators or representatives and into allegations of corruption in the executive branch,[190] Congress began issuing subpoenas in 1827 to gather facts from private citizens to determine whether it needed to pass new legislation.[191]

Like the British Parliament, Congress also employed an inherent contempt power. Under this power, either House of Congress could order its Sergeant at Arms to arrest an offender, who then would be tried before the House or Senate and face imprisonment in the basement of the Capitol.[192] Congress first exercised its contempt power in 1795, when the House imprisoned a private citizen for attempting to bribe three of its members.[193] The House and Senate also used this inherent contempt power to enforce subpoenas.[194]

Congress's inquisitorial authority, however, differs from Parliament's in one important respect. Whereas Parliament has unchecked power to investigate any subject matter, in *Kilbourn v. Thompson*,[195] the Supreme Court placed a limit on Congress's investigative jurisdiction. A House committee imprisoned Hallet Kilbourn for refusing to answer the questions during a congressional investigation into the failure of a real-estate pool in which he and a federal depository had participated. Recognizing that neither the House nor the Senate "possesses the general power of making inquiry into the private affairs of the citizen,"[196] the Court held that the House inquiry was unconstitutional: it was a "fruitless investigation into the personal affairs of individuals [that] could result in no valid

190. *See id.* at 170–78.

191. *See* Watkins v. United States, 354 U.S. 178, 192 (1957); *see also* Landis, *supra* note 180, at 168–91 (discussing the early history of Congress's subpoena power). On December 31, 1827, the House of Representatives passed a resolution authorizing the Committee on Manufacturers to "send for persons and papers." 4 CONG. DEB. 862 (1827). At the time, the House was debating whether to increase tariff rates and wanted to know what effect such an increase would have on domestic manufacturers. *See Watkins*, 354 U.S. at 192, n.21. The resolution, which passed by the narrow margin of 102–88, was quite controversial. Congressman Wood of New York argued that "the only cases in which the House has a right to send for persons and papers are those of impeachment, and of contested elections." 4 CONG. DEB. 882 (1827). He characterized the proposed investigation as "an inquisition," "odious," and "oppressive." *Id.* at 883.

192. *See* James C. Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 149 (1984).

193. *See* Jurney v. MacCracken, 294 U.S. 125, 148 n.4 (1935); Potts, *supra* note 182, at 719–20. The Senate first exercised its inherent contempt power in 1800. *See* Moreland, *supra* note 2, at 192–94.

194. *See* Hamilton & Grabow, *supra* note 192, at 148–49.

195. 103 U.S. 168 (1880).

196. *Id.* at 190.

legislation."[197]

Although the Supreme Court has professed fidelity to the principle that Congress has no general power to investigate into purely private conduct,[198] it has subsequently defined the scope of Congress's investigative jurisdiction so broadly as to render the *Kilbourn* principle almost meaningless. The Court retreated from *Kilbourn* in *McGrain v. Daugherty*,[199] in which it held that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[200] Although acknowledging that Congress has no " 'general' power to inquire into private affairs and compel disclosures,"[201] the Court explained that Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[202] The Court therefore held that Congress has the power to issue subpoenas "to obtain what is needed" to legislate wisely.[203] According to *McGrain*, Congress has subpoena power when the subject of an investigation is "one in which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."[204]

Since then, while theoretically adhering to the *Kilbourn* principle that Congress has "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress,"[205] the Court has built on *McGrain* by defining Congress's power of inquiry as covering

> the whole range of national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and farreaching as the potential power to

197. *Id.* at 195.

198. *See infra* notes 201, 205 and accompanying text. Justice Stephen Field predicted that *Kilbourn* would "stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee." *In re* Pacific Ry. Comm'n, 32 F. 241, 253 (C.C.N.D. Cal. 1887) (Field, Circuit Justice).

199. 273 U.S. 135 (1927).

200. *Id.* at 174.

201. *Id.* at 173–74.

202. *Id.* at 175.

203. *Id.*

204. *Id.* at 177.

205. Watkins v. United States, 354 U.S. 178, 187 (1957).

enact and appropriate under the Constitution.[206]

The Court has also held that, when Congress asserts its power to investigate, courts may not examine Congress's motives for launching an investigation,[207] nor may they hold an investigation unconstitutional because it results in no legislation.[208]

In defining Congress's power to investigate, the Court has also allowed the House and Senate the discretion to delegate inquisitorial authority to committees and subcommittees, which "are endowed with the full power of the Congress to compel testimony."[209] To delegate this power, the House or Senate must pass an authorizing resolution that defines the extent of the committee's jurisdiction.[210] On occasion, the Court has reversed convictions for contempt of a committee subpoena because the authorizing resolution was vague[211] or because the information sought was not pertinent to the investigation that the committee was authorized to undertake.[212] But even an unclear authorizing resolution does not necessarily doom a committee's power to investigate, as the Court has examined a resolution's legislative history,[213] " 'the remarks of the chairman or members of the committee, [and] even the nature of the proceedings themselves' " to cure ambiguities.[214]

In sum, *McGrain* and its progeny have given Congress and its committees the authority to use subpoena power to investigate essentially any subject matter. All that is required to exercise this power is that the House or Senate pass an authorizing resolution and

206. Barenblatt v. United States, 360 U.S. 109, 111 (1958); *see also Watkins*, 354 U.S. at 187 ("[T]he congressional power to investigate encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.").

207. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508 (1975); Wilkinson v. United States, 365 U.S. 399, 412 (1961); *Watkins*, 354 U.S. at 200.

208. *See Eastland*, 421 U.S. at 509 ("Nor is the legitimacy of a congressional inquiry to be defined by what it produces.... To be a valid legislative inquiry there need be no predictable end result.").

209. *Watkins*, 354 U.S. at 201.

210. *See id.*

211. *See id.* at 202–04 (reversing a contempt conviction because the authorizing resolution of the House Un-American Activities Committee was vague and the witness, therefore, could not "reasonably deduce from the [authorizing resolution] the kind of investigation that the Committee was directed to make").

212. *See* Deutch v. United States, 367 U.S. 456, 470 (1961); Sacher v. United States, 356 U.S. 576, 577 (1958) (per curiam); United States v. Rumely, 345 U.S. 41, 47–48 (1953).

213. *See* Barenblatt v. United States, 360 U.S. 109, 118 (1958) (distinguishing *Watkins* by using legislative history to show "that in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country").

214. Wilkinson v. United States, 365 U.S. 399, 408 (1961) (quoting *Watkins*, 354 U.S. at 209).

that the area investigated be one in which Congress may legislate. *Kilbourn* notwithstanding, someone who challenges a congressional subpoena on the ground that Congress does not have the jurisdiction to investigate a particular subject "engages in what is essentially a 'fruitless task.' "[215]

This broad inquisitorial power provides a possible constitutional basis for Congress's power to immunize witnesses. *McGrain* explained that the congressional subpoena power is premised on Congress's need to obtain information required for an investigation.[216] Without the power to immunize witnesses, Congress may not be able to compel critical testimony.[217] Thus, a number of commentators have suggested that Congress must have an inherent

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215. Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 75 n.28 (1986) (quoting Arvo Van Alstyne, *Congressional Investigations*, 15 F.R.D. 471, 478 (1954)). The House Un-American Activities Committee provides a good example of Congress's essentially unlimited investigative jurisdiction. The Committee's main purpose was not to recommend legislation. Rather, as Chairman J. Parnell Thomas explained, " '[t]he chief function of the committee [was] the exposure of unamerican activities.' " 80 CONG. REC. A4277 (1947) (quoting a radio address by Chairman Thomas on Nov. 4, 1947); *see generally Barenblatt*, 360 U.S. at 154–56, 163–66 (Black, J., dissenting) (reviewing the history of the Committee); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 15–19 (1991) (same). To achieve this end, the Committee subpoenaed witnesses and asked them to describe their political beliefs and associations and those of other private citizens. *See* Kreimer, *supra*, at 17. It then publicized the identities of people whom it considered subversives, exposing them to opprobrium and loss of employment. *See Barenblatt*, 360 U.S. at 157–58 (Black, J., dissenting). Civil libertarians strongly opposed the Committee's work. For example, Professor Harry Kalven, an eloquent defender of freedom of association, argued:

> [I]t is surely absurd to assume, as we solemnly appear to have done for years, that [Congress's] best route to legislative insight is to inventory the Communists in the United States one at a time. Whatever the motives of the congressional committee, it has for the past ten years or more been assiduously collecting far more information about the individual case than could possibly be necessary or useful to rational legislative judgment. And these superfluous data have been collected at a considerable price to individual privacy.

Harry Kalven, Jr., *Mr. Alexander Mieklejohn and the* Barenblatt *Opinion*, 27 U. CHI. L. REV. 315, 327 (1960). Nevertheless, because Congress had the power to pass legislation relevant to communism, the Court repeatedly held that the Committee was "pursuing a valid legislative purpose." *Wilkinson*, 365 U.S. at 410; *see also* Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885, 888–92 (1993) (reviewing Supreme Court cases involving the Committee).

216. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

217. *See* Van Cleve & Tiefer, *supra* note 74, at 49 (noting that "many congressional investigations are of offenses which could not be examined effectively" without congressional grants of immunity).

power to immunize witnesses even when doing so would "conflict with the purposes of criminal justice."[218]

The flaw in this argument, however, is that not all congressional investigations are constitutionally alike. Parts IV and V explain that although Congress has the authority to compel testimony related to almost any subject, courts have limited Congress's inquisitorial power when an assertion of that authority would encroach on the authority of another branch of government or would otherwise disturb the separation of powers.[219]

IV. SEPARATION-OF-POWERS LIMITS ON CONGRESS'S INVESTIGATIVE AUTHORITY

A. The Inherent Contempt Power

For Congress to obtain the information it needs for an investigation, it must have subpoena power and a "process to enforce" its subpoenas.[220] Two mechanisms are available to punish witnesses who refuse to comply with subpoenas—statutory contempt and Congress's inherent contempt power.[221] Because the unrestrained use of the inherent contempt authority would subvert the principle of separation of powers, the Supreme Court has placed a special limitation on this authority that does not apply when Congress chooses to use the more conventional statutory contempt procedure.

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218. *Id.*; *see also* Ghio, *supra* note 53, at 236 ("Although the courts have not seriously challenged the authority for congressional grants of immunity, it is, at this point, probably beyond review."); van Loben Sels, *supra* note 108, at 2386 (stating that "neither Congress's inherent power to investigate nor its statutory power to immunize witnesses can be seriously challenged"). Van Cleve and Tiefer acknowledge that "courts have hedged the exercise of the powers to grant immunity and to conduct investigations by insisting that their use not limit the constitutional rights of potential criminal defendants to a fair trial." Van Cleve & Tiefer, *supra* note 74, at 49–50. They conclude, however, that this judicial hedging does not limit the power of Congress to grant immunity. Rather, it means only that Congress should exercise its immunity power prudently. *See id.* at 50.

219. At least two commentators have suggested, without elaboration, that congressional grants of immunity are constitutionally problematic. *See* Miller, *supra* note 61, at 688 n.271 ("[D]eciding which laws to enforce and which individuals to prosecute is an executive function and this allocation of power may limit Congress's ability to unilaterally decide to scuttle a prosecution."); Michael Stokes Paulsen, *Dirty Harry and the Constitution*, 64 U. CHI. L. REV. 1457, 1490 (1997) (reviewing AMAR, *supra* note 111) ("When Congress confers immunity in a legislative hearing or investigation, it impairs the executive's ability to bring a subsequent prosecution. The result may be similar, in practical effect, to a one-House or single committee veto on executive enforcement of the laws.").

220. *McGrain*, 273 U.S. at 174.

221. *See infra* notes 222–40 and accompanying text (discussing inherent contempt); *infra* notes 241–47 and accompanying text (discussing statutory contempt).

Beginning in 1795, both Houses of Congress exercised the inherent power to arrest private citizens, try them for contempt, pronounce them guilty, and imprison them in the Capitol jail—all without a statute[222] or a criminal trial.[223] Although Parliament had exercised a plenary and unreviewable inherent contempt power since the seventeenth century,[224] Congress's use of this authority appears to blend legislative and judicial power in a manner normally prohibited by the Bill of Attainder Clause,[225] which prohibits Congress from passing laws that inflict punishment on a named or described set of individuals.[226] The Clause protects individuals from arbitrary punishment by enforcing "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons."[227] If unchecked, the inherent contempt power, like a bill of attainder, would allow a House of Congress to act as a legislature that could define contempt on an ad hoc basis, as a jury that could determine guilt, and as a judge who could pronounce any sentence she wanted. Unrestrained exercise of the inherent contempt power would concentrate

222. *See supra* notes 192–94 and accompanying text.

223. A prisoner can file a writ of habeas corpus to challenge the legality of her confinement, but the grounds for doing so are quite limited. *See* Kilbourn v. Thompson, 103 U.S. 168, 177 (1880); *cf.* Groppi v. Leslie, 404 U.S. 496, 501 (1972) (noting that "the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings").

224. *See supra* notes 181–87 and accompanying text.

225. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed.").

226. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 472–73 (1977); United States v. Brown, 381 U.S. 437, 456–60 (1965). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-4, at 641–56 (2d ed. 1988) (reviewing Bill of Attainder Clause case law). The Constitution also prohibits states from passing bills of attainder. U.S. CONST. art. I, § 10, cl. 1.

227. *Brown*, 381 U.S. at 445; *cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995) (describing the "sharp necessity to separate the legislative from the judicial power"). The Supreme Court has adopted Professor Cooley's explanation for the need for a Bill of Attainder Clause:

> Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode.

Brown, 381 U.S. at 445 (quoting 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 536–37 (8th ed. 1927)); *see also* TRIBE, *supra* note 226, § 4-9, at 244 (explaining that the Bill of Attainder Clause "prevents Congress from circumventing the checks of the executive and judicial branches by identifying the individuals who are to be burdened by federal statutes").

legislative and judicial power and lead to arbitrary punishment. For this reason, former Solicitor General Rex Lee has observed that "there is an uncomfortable similarity between direct contempt proceedings and a bill of attainder. Both involve the legislative branch in determining whether certain conduct should be punished and what punishment is appropriate."[228]

The Supreme Court has never specifically compared the inherent contempt power to a bill of attainder. The Court, however, has sharply limited Congress's inherent contempt authority because of the dangerous way in which it blends legislative and judicial power. In *Anderson v. Dunn*,[229] the Supreme Court upheld Congress's inherent contempt power, but placed stringent limits on how it may be exercised. The Court noted that the Constitution does not explicitly grant Congress a contempt power,[230] but concluded that such authority is necessary because, without it, Congress would be unable "to guard itself from contempts, and [would be left] exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[231] Nevertheless, the Court observed that the inherent contempt power was "undefined" and had been exercised with "a caprice which has sometimes disgraced legislative assemblies."[232] To "set bounds" guarding against this potential for abuse of power, the Court held that Congress's contempt authority should be limited to "the least possible power adequate to the end proposed"[233]—specifically, "imprisonment [that]

228. Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 254.

229. 19 U.S. (6 Wheat.) 204 (1821).

230. *See id.* at 225.

231. *Id.* at 228. The Court explained:

> That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.

Id. at 228–29; *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 842, at 305 (1833) ("It is remarkable, that no power is conferred to punish for any contempts committed against either house; and yet it is obvious, that, unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions.").

232. *Anderson*, 19 U.S. (6 Wheat.) at 229, 231.

233. *Id.* (emphasis omitted).

must terminate" with the adjournment of the House or Senate.[234] Thus, although the British Parliament enjoyed boundless power to punish witnesses for contempt, Congress's power to do so unilaterally has been limited substantially.

In *Marshall v. Gordon*,[235] the Court reaffirmed and clarified *Anderson*.[236] It noted that the British Parliament's broad inherent contempt power "rested upon an assumed blending of legislative and judicial authority."[237] To give Congress this same broad power "would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution."[238] To maintain the separation of powers, the Court limited the inherent contempt power to " 'the least possible power adequate to the end proposed' "[239] and reaffirmed that "imprisonment may not be extended beyond the session of the body in which the contempt occurred."[240]

Congress responded to the Court's limitations on its inherent contempt power by passing a criminal contempt statute.[241] Under the

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234. *Id.*

235. 243 U.S. 521 (1917).

236. The Court has also recently relied on *Anderson* to limit the judiciary's inherent contempt power. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 801 (1987) (acknowledging that courts have the authority to initiate prosecutions for criminal contempt, but stating that the "exercise of that authority must be restrained by the principle that [in a contempt case only] ' "[t]he least possible power adequate to the end proposed" ' " should be used (quoting United States v. Wilson, 421 U.S. 309, 319 (1975) (quoting *Anderson*, 19 U.S. (6 Wheat.) at 231))).

237. *Marshall*, 243 U.S. at 533.

238. *Id.* at 536.

239. *Id.* at 541 (quoting *Anderson*, 19 U.S. (6 Wheat.) at 231) (emphasis omitted).

240. *Id.* at 542. Based on the facts of the case, the Court held that the House acted unconstitutionally when it imprisoned H. Snowden Marshall for contempt because he had published a "defamatory and insulting" letter about the House. *Id.* at 532. The *Marshall* Court explained that because Congress may only exercise inherent contempt power when it is "the least possible power adequate to the end proposed," *id.* at 541 (emphasis omitted), the power covers only "acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." *Id.* at 542. An insulting letter was not such an act.

In its analysis, the *Marshall* Court did not mention the First Amendment. Obviously, imprisoning someone for criticizing Congress would be flatly inconsistent with the First Amendment. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270, 273 (1964) (describing "the central meaning of the First Amendment" as embodying the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). The Court decided *Marshall* in 1917, well before modern First Amendment jurisprudence had developed.

241. *See* Act of Jan. 24, 1857, ch. 19, 11 Stat. 155 (1857) (codified at 2 U.S.C. §§ 192, 194 (1994)). For a description of the minor modifications to the statue, see *Russell v.*

statute, after the House or Senate certifies that a witness is in contempt of a congressional subpoena, it is the "duty" of the United States Attorney "to bring the matter before the grand jury for its action."[242] Violators may receive a prison term of up to one year.[243] Congress enacted this statute "because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses,"[244] particularly when contempt occurred toward the end of a congressional session.[245]

From a separation-of-powers perspective, the differences between inherent and statutory contempt are dramatic. In statutory contempt cases, courts try witnesses, juries pronounce guilt, and judges sentence those found guilty of contempt. Legislative and judicial authority are not blended.

For our purposes, the comparison between inherent and statutory contempt shows that Congress's investigative authority does not exist in a constitutional vacuum. To conduct an investigation, Congress must be able to issue subpoenas that are enforceable. When Congress blends legislative and judicial authority by employing its inherent contempt power, it may use only " 'the least possible power adequate to the end proposed,' "[246] namely imprisonment until

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United States, 369 U.S. 749, 756 n.8 (1962). In 1897, the Supreme Court upheld the statute. *See In re* Chapman, 166 U.S. 661, 672 (1897).

242. 2 U.S.C. § 194.

243. *See id.* § 192. A civil contempt statute that applies only to the Senate is codified at 2 U.S.C. § 288d (1994) and 28 U.S.C.A. § 1365 (West 1993 & Supp. 1999). The Senate activates the statute by applying to a federal district court for an order compelling a subpoenaed witness to testify. If the witness refuses to comply, he may be held in contempt of court. *See* MORTON ROSENBERG, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY at 15 (CRS Rep. No. 95-464A, 1995).

244. Jurney v. McCracken, 294 U.S. 125, 151 (1935); *see* Brand & Connelly, *supra* note 215, at 74; Moreland, *supra* note 2, at 203–04. The contempt statute is a supplement to, and not a replacement for, the inherent contempt power. *See Jurney*, 294 U.S. at 151; *Chapman*, 166 U.S. at 672. Congress made use of both inherent and statutory contempt until 1945, when it last employed the inherent contempt mechanism. *See* Hamilton & Grabow, *supra* note 192, at 149.

245. *See* Brand & Connelly, *supra* note 215, at 74. For a time, some argued that *Anderson*'s limitation on a contemnor's prison term should not apply to the Senate because the Senate is a continuing body with only one-third of its members elected for each Congress. *See* Moreland, *supra* note 2, at 199 n.31. That argument has not prevailed, though. In 1871, the Senate acquiesced in the applicability of *Anderson*. *See id.* Moreover, although *Marshall* involved the House's use of inherent contempt, the generality of the Court's statement that "imprisonment may not be extended beyond the session of *the body* in which the contempt occurred" suggests that the *Anderson* rule applies to both the Senate and the House. *Marshall*, 243 U.S. at 542 (emphasis added).

246. *Marshall*, 243 U.S. at 541 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

the end of the congressional session. When it employs its inherent contempt power, Congress blends legislative and judicial power by trying a witness, finding him guilty, and pronouncing sentence. In contrast, when Congress makes use of the statutory mechanism that preserves the separation between legislative and judicial power, its contempt authority is not so limited, and it may prescribe longer punishments for contemnors.[247] *Anderson* and *Marshall* demonstrate that Congress's investigative power is curtailed when its exercise would disturb the separation of powers.

B. Executive Privilege

Congressional investigations often focus on the conduct of the executive branch.[248] In these inquiries, the executive branch sometimes responds to congressional demands for information by asserting the constitutionally based doctrine of executive privilege.[249] When Congress subpoenas information that is protected by executive privilege, it does not enjoy the broad subpoena authority described in Part III. Instead, its subpoena power is limited to information that is "demonstrably critical" to an investigation.[250]

Before examining the way in which executive privilege narrows Congress's subpoena power, it is useful to explore the constitutional basis of that privilege. In the leading case on executive privilege, *United States v. Nixon*,[251] the Supreme Court considered President Nixon's assertion of the privilege in response to a federal district court subpoena of taped conversations between the President and his advisors. In holding that presidential communications are " 'presumptively privileged,' "[252] the Court explained that the President enjoys an executive privilege based on "the supremacy of each branch within its own assigned area of constitutional duties"[253] and on "the valid need for protection of communications between

247. Of course, any statutory punishment for contempt would be subject to the Eighth Amendment's prohibition against cruel and unusual punishments. *See generally* Harmelin v. Michigan, 501 U.S. 957 (1991) (discussing the Eighth Amendment's limits on the lengths of prison sentences).

248. *See generally* GRABOW, *supra* note 23, §§ 2.2–.6, at 15–75 (reviewing the history of congressional investigations).

249. *See generally* Miller, *supra* note 61, at 649–69 (reviewing the history of presidential invocations of executive privilege).

250. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

251. 418 U.S. 683 (1974).

252. *Id.* at 708 (quoting Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973)).

253. *Id.* at 705.

high Government officials and those who advise and assist them in the performance of their manifold duties."[254] Nevertheless, the Court recognized that the privilege is not absolute. To "ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or defense."[255] The *Nixon* Court held that "[a] President's acknowledged need for confidentiality in the communications of his office is general in nature"[256] and is outweighed by the "constitutional need for production of relevant evidence" in a specific criminal proceeding.[257]

In a recent case involving the investigation of former Agriculture Secretary Mike Espy ("*Espy*"),[258] the United States Court of Appeals for the District of Columbia Circuit elaborated on the balance struck by *Nixon*. The court held that a "party seeking to overcome a claim of presidential privilege must demonstrate: first, that each discrete group of the subpoenaed materials likely contain important evidence; and second, that this evidence is not available with due diligence elsewhere."[259] This standard applies to both grand-jury and trial subpoenas.[260]

Although the Supreme Court has never ruled on an executive-privilege dispute between the President and Congress,[261] the D.C. Circuit resolved such a claim in *Senate Select Committee on Presidential Campaign Activities v. Nixon* ("*Senate Select Committee*").[262] President Nixon had asserted executive privilege

254. *Id.*

255. *Id.* at 709.

256. *Id.* at 712–13.

257. *Id.* at 713.

258. *In re* Sealed Case ("Espy"), 121 F.3d 729 (D.C. Cir. 1997). Secretary Espy was eventually tried and acquitted of illegally accepting gifts from entities that were regulated by the Department of Agriculture. *See* Bill Miller, *Espy Acquitted in Gifts Case; Jury Clears Ex-USDA Chief on Thirty Counts Brought by Independent Counsel*, WASH. POST, Dec. 3, 1998, at A1.

259. *Espy*, 121 F.3d. at 754.

260. *See id.* at 756.

261. *See Nixon*, 418 U.S. at 712 n.19 ("We are not here concerned with the balance between [executive privilege] and congressional demands for information."); *Espy*, 121 F.3d at 739 n.10; Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 471 (1987).

262. 498 F.2d 725 (D.C. Cir. 1974) (en banc). *Senate Select Committee* is the only case in which a court has resolved a dispute between the executive branch and Congress regarding a congressional subpoena. In two other such disputes, the court declined to reach the merits.

In *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), the Ford administration sought to enjoin AT&T from complying with a House subcommittee's subpoena that

after the Senate Watergate Committee subpoenaed tapes of five conversations between President Nixon and White House Counsel John Dean. Like the Supreme Court in *Nixon*, the circuit court noted that "presidential conversations are 'presumptively privileged.' "[263] This executive privilege applies "with at least equal force" when a subpoena is issued by Congress rather than by a federal court.[264] The Court held that for a congressional committee to obtain evidence protected by executive privilege, "the subpoenaed evidence [must be] demonstrably critical to the responsible fulfillment of the Committee's functions."[265]

The Committee's subpoena did not pass this "demonstrably critical" test. The court explained that there were two possible reasons why the Committee needed the tapes—to expose corruption in the executive branch and to determine whether new legislation was needed. Neither was sufficient to overcome the President's claim of

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sought records related to certain warrantless wiretaps. *AT&T*, 567 F.2d at 122–23. The administration contended that turning over these documents would jeopardize national security. *See id.* The D.C. Circuit observed that were it to decide the case on the merits it would have "to balance the constitutional interests" of the executive and legislative branches. United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976). Because the court thought that it would be difficult to balance these interests, it remanded the case and suggested that the administration and the subcommittee negotiate a settlement. *See id.* at 395.

A year later, the parties were still unable to agree. *See AT&T*, 567 F.2d at 124–25. The court then noted that the case turned on the allocation of foreign-affairs power between the executive branch and Congress and that, on this subject, the Constitution created a "zone of twilight" in which the distribution of power was "uncertain." *Id.* at 128. Rather than navigating through the "zone of twilight," the court declined to rule in favor of either party and instead devised a detailed plan that would help the parties reach agreement and avoid future impasses. *Id.* at 130–33. For criticism of the court's handling of this controversy, see Fein, *supra* note 90, at 840 (characterizing *AT&T* as "wooly and temporizing"). *See also* Howard R. Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking*, 18 MICH. J. INT'L L. 445, 469–70 (1997) (discussing *AT&T*). Part VI of this Article discusses *AT&T* in more detail. *See infra* note 352 and text accompanying notes 343–49 and 364–65.

In *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983), the Justice Department sought a declaratory judgment that the Administrator of the Environmental Protection Agency had "acted lawfully in refusing to release certain documents to a congressional subcommittee." *Id.* at 151. The U.S. District Court for the District of Columbia dismissed the suit as not ripe. *See id.* at 153. The opinion noted that the House had cited the EPA Administrator for contempt. *See id.* at 151. The court declined to rule on the legality of the Administrator's actions because that issue could be resolved if the Administrator would raise it as a defense in a criminal contempt proceeding. *See id.* at 153.

263. *Senate Select Comm.*, 498 F.2d at 730 (quoting Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973)).

264. *Id.* at 731.

265. *Id.*

executive privilege. The power of the Senate Committee to investigate wrongdoing by the Nixon Administration was an insufficient justification because the House Judiciary Committee was conducting an impeachment inquiry at the same time and already had copies of the subpoenaed tapes. The court, therefore, concluded that the Watergate Committee's need for the subpoenaed tapes to investigate President Nixon was "merely cumulative."[266] Moreover, the Committee did not need the tapes to educate itself so that it could recommend legislation:

> There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.[267]

Senate Select Committee's limitation on Congress's subpoena power is dramatic. As we have seen, Congress normally has jurisdiction to subpoena any evidence related to any subject on which it may legislate.[268] When executive privilege is not an issue, Congress can subpoena "merely cumulative"[269] evidence and can use its subpoena power to reconstruct past events—even those involving purely private conduct.[270] Were Nixon's tapes not protected by executive privilege, challenging the Committee's subpoena would have been a " 'fruitless task.' "[271]

What is the explanation for this drastic curtailment of Congress's

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266. *Id.* at 733.

267. *Id.* at 732.

268. *See supra* notes 188–91, 198–208 and accompanying text.

269. *Senate Select Comm.*, 498 F.2d at 733.

270. For example, in *Hutcheson v. United States*, 369 U.S. 599 (1962), the Court held that Congress had the power to subpoena information about a union official's alleged misuse of union funds. *See id.* at 614–22. In dissent, an incredulous Chief Justice Warren declared that "it is incomprehensible to me how it can be urged that Congress needed the details of how petitioner committed this alleged crime in order to pass general legislation about union funds." *Id.* at 636 (Warren, C.J., dissenting).

271. Brand & Connelly, *supra* note 215, at 75 n.28 (quoting Van Alstyne, *supra* note 215, at 478).

subpoena power? Although Congress enjoys broad constitutional authority to investigate, denying the President executive privilege would hamper his ability to perform his constitutional functions. It is a bedrock separation-of-powers principle that one " 'branch [may] not impair another in the performance of its constitutional duties.' "[272] The balance struck by *Senate Select Committee* is an effort to allow both Congress and the executive branch to exercise their constitutional responsibilities.[273]

V. THE SCOPE OF CONGRESS'S POWER TO GRANT IMMUNITY

A. The General Rule

Anderson, *Marshall*, and *Senate Select Committee* teach that although Congress normally maintains broad investigative authority, that authority does not exist in isolation. Instead, it must be curbed to avoid disturbing the separation of powers, either by blending legislative and judicial power or by limiting the executive branch's ability to function. This lesson helps define Congress's power to immunize witnesses.

The Supreme Court has held that because Congress "cannot legislate wisely or effectively in the absence of information respecting conditions which the legislation is intended to affect or change,"[274] it has the power "to obtain what is needed."[275] The power of the House and Senate to issue and enforce subpoenas is unilateral. It is not subject to the bicameralism and presentment requirements that apply to statutes.[276] Congress sometimes needs testimony that it can obtain

272. Clinton v. Jones, 520 U.S. 681, 701 (1997) (quoting Loving v. United States, 517 U.S. 748, 757 (1996)); *accord* Mistretta v. United States, 488 U.S. 361, 383 (1989) (stating that one branch may not interfere with another branch's performance of its duties); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (explaining that although the Constitution does not "contemplate[] a complete division of authority between the three branches," one branch may not prevent another from performing its assigned functions).

273. *Clinton v. Jones* is a recent example of the Court's attempt to balance the competing constitutional interests of two branches. The Court held that although "the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office," the potential burdens on the President "should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton*, 520 U.S. at 705–06, 707.

274. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

275. *Id.*

276. *See* Watkins v. United States, 354 U.S. 178, 201 (1957) (noting that the House or Senate may pass an authorizing resolution empowering a committee to issue subpoenas); United States v. Rumely, 345 U.S. 41, 44–45 (1953) (same); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228–29 (1821) (upholding Congress's inherent contempt power). *See generally supra* notes 188–214, 220–45 and accompanying text (discussing Congress's

only by granting immunity.[277] Thus, Congress's investigative authority must include some unilateral power to compel a witness to testify by granting her immunity.

Although grants of immunity allow Congress to perform its investigative function, they make it nearly impossible for the Justice Department or an independent counsel to prosecute someone who has provided public immunized testimony. In any such prosecution, the Fifth Amendment would prohibit the government from putting on any witness "whose testimony is shaped, directly or indirectly, by compelled testimony regardless of *how or by whom* he was exposed to that compelled testimony."[278] As the cases of Oliver North and John Poindexter illustrate, because it is impossible to isolate potential witnesses from public immunized testimony, this standard is nearly impossible to meet.[279]

Congress's unilateral power to scuttle prosecutions conflicts with fundamental separation-of-powers principles. *Buckley*, *Bowsher*, and *Morrison* enjoin Congress from assigning itself any role in executing the law.[280] *Chadha* complements these cases by forbidding Congress from using a legislative veto to control how the law is executed.[281] When it upends a prosecution, Congress interferes with the ability of the Attorney General or an independent counsel to enforce federal criminal law.

Anderson and *Marshall* show how to reconcile these separation-of-powers principles with Congress's need to obtain immunized testimony. To perform its legislative function, Congress originally relied upon its inherent contempt power.[282] The inherent contempt

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subpoena and inherent contempt power); *supra* notes 158–62 (discussing the bicameralism and presentment requirement).

277. *See* Van Cleve & Tiefer, *supra* note 74, at 49. For example, the Senate Watergate Committee immunized John Dean, *see id.* at 53, who broke open the Watergate scandal by testifying for five days about the Nixon administration's attempt to obstruct the investigation of the Watergate break-in. *See* FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON 363–64 (1994). According to Sam Dash, the Committee's Chief Counsel, Dean would not have testified if he had not been granted immunity, and Nixon might have completed his term of office. *See* van Loben Sels, *supra* note 108, at 2396.

278. United States v. North ("North II"), 920 F.2d 940, 942 (D.C. Cir. 1990) (per curiam).

279. *See* United States v. North ("North I"), 910 F.2d 843, 851 (per curiam), *modified by North II*, 920 F.2d at 942; United States v. Poindexter, 698 F. Supp. 300, 312–13 (D.D.C. 1988), *rev'd on other grounds*, 951 F.2d 369 (D.C. Cir. 1991); *see also supra* notes 91–110 and accompanying text (discussing the cases).

280. *See supra* notes 137–56 and accompanying text.

281. *See supra* notes 157–62, 167–69, 175–76 and accompanying text.

282. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228–29 (1821). Because a criminal

authority is, in part, judicial in nature, and Congress may not ordinarily exercise judicial power.[283] To preserve the separation of powers, *Anderson* and *Marshall* limit Congress to " 'the least possible [inherent contempt] power adequate to the end proposed.' "[284] The same logic should apply to grants of immunity. When Congress frees a witness from prosecution, it plays a part in the execution of criminal law; the Constitution normally forbids Congress from assigning itself any role in the execution of the law. Congress's power to immunize witnesses, therefore, should be limited to "the least possible power adequate to the end proposed."[285]

Senate Select Committee reinforces this reasoning.[286] The President needs some guarantee of confidentiality to perform her constitutional duties.[287] Congressional subpoenas of material protected by executive privilege impede the President's ability to function. Thus, they are constitutional only if "demonstrably critical" to a congressional inquiry. Similarly, congressional grants of immunity impede the Justice Department or an independent counsel from performing its constitutional function.[288] Therefore, as a general rule, Congress should have power to immunize a witness only when doing so is "demonstrably critical" to an investigation. This test, which is a more concise formulation of the *Anderson-Marshall* standard,[289] reconciles Congress's need for immunized testimony with core separation-of-power principles.

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contempt statute now exists, the idea that Congress needs inherent contempt power seems outdated. Nevertheless, the Supreme Court has not cast any doubt on the continued constitutionality of this congressional power. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 821 (1987) (Scalia, J., concurring in the judgment) (recognizing "the narrow principle of necessity underlying *Anderson*—that the Legislative, Executive, and Judicial Branches must each possess those powers necessary to protect the functioning of its own processes, although those implicit powers may take a form that appears to be nonlegislative, nonexecutive, or nonjudicial, respectively"); Groppi v. Leslie, 404 U.S. 495, 496 (1972) (explaining that "[t]he past decisions of this Court . . . leave little question that the Constitution imposes no general barriers to the legislative exercise" of the inherent contempt power).

283. *See supra* notes 220–47 and accompanying text.

284. Marshall v. Gordon, 243 U.S. 521, 541 (1917) (quoting *Anderson*, 19 U.S. (6 Wheat.) at 231) (emphasis omitted).

285. *Anderson*, 19 U.S. (6 Wheat.) at 231.

286. *See supra* notes 262–73.

287. *See* United States v. Nixon, 418 U.S. 683, 705–06 (1974).

288. Here, the *Chadha* analogy is apt—when it grants immunity, Congress "vetoes" a potential prosecution. INS v. Chadha, 462 U.S. 919, 956–59 (1983).

289. If immunizing a witness is not "demonstrably critical" to an investigation, it is also not "the least possible power adequate" to conducting an investigation. *See supra* notes 233, 239 and accompanying text.

B. Two Exceptions

1. Secret Testimony

Like many legal formulae, the "demonstrably critical" test has exceptions. The first involves non-public testimony.

The root cause of the separation-of-powers problems associated with immunity is that convicting someone who has provided public immunized testimony to a congressional committee is nearly impossible.[290] If, however, the witness were to testify in secret, these constitutional problems would vanish and so, too, would the need to apply the "demonstrably critical" test.

Recall that under the modern immunity statute, Congress does not grant transactional immunity. Instead, it awards use and derivative-use immunity, which permits "the government to prosecute using evidence from legitimate independent sources."[291] Under this statute, prosecutors have been able to convict defendants who previously had offered immunized testimony to grand juries. One of the reasons for this success is that grand-jury testimony is secret,[292] making it unlikely that trial witnesses will be tainted by immunized testimony as they were in the public hearings at issue in *North* and *Poindexter*.[293] If Congress heard immunized testimony in executive session and took steps to prevent the dissemination of that testimony to the public, the testimony would neither taint trial witnesses nor foil a prosecution.

Secret testimony would eliminate the separation-of-powers problems outlined earlier. Congress would discharge its power to investigate without interfering with the ability of the Attorney General to enforce the law. It would not play a destructive role in the enforcement of criminal law. Then, there would be no need to apply the "demonstrably critical" test, and Congress would be free to immunize whomever it wished.

Although this scenario seems appealing, it raises a number of questions. The first is whether Congress could ensure that potential trial witnesses would not be exposed to immunized testimony. When the Senate Watergate Committee petitioned the district court for orders compelling a number of witnesses to testify under grants of immunity, Special Prosecutor Archibald Cox asked, to no avail, that

290. *See supra* notes 90–110 and accompanying text.
291. Kastigar v. United States, 406 U.S. 441, 461 (1972).
292. *See* FED. R. CRIM. P. 6(e)(2).
293. *See supra* notes 91–99 and accompanying text.

the Committee promise that it would "receive the testimony only in executive session" and not "publicly release the transcript of the testimony or any summary of it" or "make public statements about the witnesses' testimony pending completion of the Committee's investigation."[294] To minimize the possibility that trial witnesses would be tainted, a congressional committee could abide by Cox's suggestions and also promise to place immunized testimony in safes and secure rooms, forbid photocopying, and limit access to a small number of staff.[295] These steps, however, would not be foolproof. Congress often investigates topical and politically sensitive matters, and the temptation to leak information is great.[296] Nevertheless, if Congress were to take these extreme measures, it could greatly reduce the risk that a trial witness would learn enough about immunized testimony to become tainted.[297]

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294. *In re* United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1279 (D.D.C. 1973).

295. *Cf.* Fein, *supra* note 90, at 816 (listing measures Congress could take to minimize the risk that it would disclose classified information).

296. For example, in its investigation of the 1996 federal election campaign, the Senate Governmental Affairs Committee adopted a protocol guaranteeing that all depositions would remain confidential until they were made "part of a Committee hearing or Committee report." U.S. SENATE GOVERNMENTAL AFFAIRS COMM., SECURITY PROCEDURES AND OTHER PROTOCOLS § 5 (1997), *reprinted in* CAMPAIGN-FINANCE REPORT, *supra* note 110, at 8699, 8701. A number of depositions were leaked to the press in violation of this protocol. *See, e.g.*, Asides, *Leak Shocks Democrats*, WALL ST. J., July 11, 1997, at A14 (reporting that portions of a witness's deposition had been faxed to reporters); Guy Gugliotta, *Ickes Denies Arranging 'Hard Money' Campaign Calls*, WASH. POST, Oct. 4, 1997, at A7 (reporting that the *Washington Post* obtained a copy of Harold Ickes's deposition regarding fundraising violations); Peter Knight, *Perspectives on Molten Metal*, WASH. POST, Oct. 31, 1997, at A24 (stating that despite committee counsel's promise that a deposition would be kept confidential, it was leaked to the press); *see also* JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 273–300 (1976) (discussing leaks by the Senate Watergate Committee). The Governmental Affairs Committee, however, did not take the measures suggested in the text. The committee did not prohibit the duplication of deposition transcripts; moreover, the transcripts were stored in unlocked file cabinets accessible by more than 70 majority and minority staff members.

297. During the Iran-Contra hearings, for instance, Congress maintained the confidentiality of Admiral Poindexter's politically sensitive deposition:

> [W]hen the Iran-Contra Committees made arrangements for an early deposition of John Poindexter for investigative reasons, they agreed that the deposition itself would be conducted and attended only by three senior staff attorneys for the Committees, although the immunity orders were communicated to Poindexter with a quorum of Committee members present. All notes of the deposition were placed under seal immediately at its conclusion. Although Poindexter's deposition covered the most sensitive political questions raised during the entire Iran-Contra hearings, since much of his testimony dealt with President Reagan's knowledge of and involvement in various events, there were no leaks of this information prior to Poindexter's public testimony several

A more fundamental question about secret immunized testimony is whether Congress would find it acceptable. Congress's investigative authority includes not only a power to gather facts, but also the power to "publicize corruption, maladministration or inefficiency in the agencies of the Government."[298] Woodrow Wilson described the importance of this congressional power:

> Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. . . .
>
> . . . .
>
> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . [U]nless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.[299]

The Supreme Court has embraced Wilson's characterization of Congress's informing function.[300]

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months later.

Van Cleve & Tiefer, *supra* note 74, at 58–59 (footnotes omitted). For a discussion of the Iran-Contra Committees' efforts to prevent leaks, see Arthur L. Liman, *Hostile Witnesses: When John Poindexter and Oliver North Took the Stand in the Iran-Contra Hearings, They Kept the Lid on a Presidential Scandal Far More Serious Than Today's*, WASH. POST, Aug. 16, 1998, (Magazine) at W16.

298. Watkins v. United States, 354 U.S. 178, 200 n.33 (1957).

299. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 297–303 (1885); *see also* 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

300. *See Watkins*, 354 U.S. at 200 n.33; United States v. Rumely, 345 U.S. 41, 43 (1953); Tenney v. Brandhove, 341 U.S. 367, 377 n.6 (1951). In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court defined the limits of Congress's informing function. *See id.* at 132–33. Senator William Proxmire had distributed a newsletter claiming that a federal grant to behavioral scientist Ronald Hutchinson was wasteful. Hutchinson sued for libel, *see id.* at 118, and Proxmire claimed that the suit was barred by the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, which protects members of Congress from suits for conduct "within the sphere of legitimate legislative activity," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975). The Court held that the Speech or Debate Clause did not protect Senator Proxmire because the informing function refers only to congressional hearings and committee reports and not to the press releases and newsletters of individual legislators. *See Hutchinson*, 443 U.S. at 132–33.

Thus, because Congress has used immunized witnesses to inform the public about critical issues, it may be reluctant to limit its informing function by hearing immunized testimony in executive session. The nation, for example, first discovered the depth of President Nixon's misconduct in Watergate from John Dean's public immunized testimony.[301] Likewise, the citizenry learned much about Iran-Contra from the public immunized testimony of Oliver North and John Poindexter.[302] Members of Congress also may have less pure motives for wanting to hear an immunized witness in public session. A televised hearing can give a congressman valuable publicity[303] and can be used to secure partisan advantage. Thus, although Congress would be free to immunize whomever it wanted if it were to keep immunized testimony secret, legislators will often insist on public testimony.

2. Permission from the Attorney General or an Independent Counsel

Another situation in which the "demonstrably critical" test should not apply would be when the Attorney General or an independent counsel endorses a congressional grant of immunity.

Since *The Laura* and *Brown v. Walker*, it has been clear that a

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Hutchinson does not cast any doubt on Congress's power to conduct public hearings. The Court cited approvingly *Doe v. McMillan*, 412 U.S. 306 (1973). *See Hutchinson*, 443 U.S. at 133. *McMillan* held that "authorizing an investigation pursuant to which [materials] were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report" were legislative acts protected by the Speech or Debate Clause. *McMillan*, 412 U.S. at 313. The case also drew a distinction that supports Congress's power to conduct public hearings—distributing a committee report to members of Congress is part of Congress's informing function, but disseminating that report directly to the public is not. *See id.* at 316–17. The Court explained that the public can be informed by an internally circulated committee report because the report, "unless sheltered by specific congressional order, [is] available for inspection by the press and by the public." *Id.* at 317. Such a report is analogous to a public congressional hearing. The public can "inspect" a hearing by attending it or watching it on C-SPAN, and it may avail itself of media coverage of the hearing. Distributing a committee report directly to the public would be analogous to mailing out videotapes of a hearing.

301. *See supra* note 277. James Hamilton, Assistant Chief Counsel to the Senate Watergate Committee, wrote that, "[i]t was Senator Ervin's view that informing the nation immediately of the full parameters of the Watergate affair was the country's most pressing need." HAMILTON, *supra* note 297, at 20.

302. Representative Lee Hamilton, Chairman of the House Iran-Contra Committee, stated that congressional hearings " 'were more important than the trial .... It has always been my view that policy questions exceeded in importance the question of individual criminal liability, and I do not think that Congress made a mistake in granting that immunity.' " Haynes Johnson & Tracy Thompson, *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1 (quoting Rep. Hamilton).

303. *See* Ghio, *supra* note 53, at 233–34.

federal prosecutor's grant of immunity does not pose any separation-of-powers problem.[304] If a unilateral decision by the Attorney General or an independent counsel to grant immunity would not raise any constitutional questions, then a joint immunity decision by a congressional committee *and* the Attorney General or an independent counsel would be constitutionally trouble free as well.[305]

The problem is that Congress would not want to give federal prosecutors veto power over immunity decisions. Under the modern immunity statute, the Attorney General or an independent counsel has thirty days to review a congressional immunity request[306] and to " 'lobby for a change of mind' on the part of [a] congressional committee."[307] But, for good reason, the statute leaves the decision in Congress's hands. The statute's legislative history refers to the Teapot Dome scandal in which Attorney General Harry Daugherty was accused of corruption. It declares that " 'it would be virtually unthinkable to give the Attorney General the additional power of disapproval of conferment of immunity, because in a Teapot Dome-type congressional investigation the Attorney General himself would be the focus of the inquiry.' "[308] Even in investigations of other executive branch officials, Congress would not want to be dependent on the Attorney General's approval.

Aside from the concerns that would arise in investigations of the executive branch, Congress would want a unilateral power to immunize because its priorities often differ from those of prosecutors. The congressional committees that investigated Watergate and Iran-Contra immunized key witnesses over the objections of Archibald

304. *See supra* notes 120–25 and accompanying text.

305. Also, an endorsement of a congressional decision to immunize a witness by the Justice Department or the Office of Independent Counsel would demonstrate that prosecutors do not intend to pursue that witness or, for some other reason, feel that granting immunity would not interfere with their work. Without this interference, granting immunity would not raise any separation-of-powers problem. Thus, there would be no need to apply the "demonstrably critical" test.

306. *See* 18 U.S.C.A. § 6005(b)(3), (c) (West 1985 & Supp. 1999); 28 U.S.C.A. § 594(a)(7) (West 1993 & Supp. 1999) (expired June 30, 1999).

307. *In re* Application of United States Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1236 (D.C. Cir. 1981) (quoting 2 NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 59, at 1406).

308. *In re* United States Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1277 (D.D.C. 1973) (quoting 2 NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 59, at 1440). The court gave great weight to the Working Papers of the National Commission on the Reform of Federal Criminal Laws because Congress "relied heavily on the testimony of Commission members and adopted the Commission's recommendations concerning immunity without significant modification." *Id.* at 1275.

Cox and Lawrence Walsh. The committees felt that uncovering the truth was more important than prosecuting wrongdoers.[309] Cox and Walsh, whom no one has ever accused of being overly friendly to the Nixon and Reagan Administrations, had a different perspective. Their job was to prosecute, and they naturally opposed measures that would prevent them from accomplishing that task.[310]

Sometimes, however, the Justice Department does not object to congressional immunity requests.[311] On these occasions, the "demonstrably critical" test would not apply. But often, Congress and the Attorney General would not agree, and the test would limit Congress's power to confer immunity.

VI. THE APPLICATION OF THE "DEMONSTRABLY CRITICAL" TEST

A. A Court's Task

Having determined that Congress should be able to hear public immunized testimony over the objection of the Attorney General only if that testimony is "demonstrably critical" to an investigation, we must consider how a court would apply this legal standard. Specifically, when would a court have the opportunity to decide whether immunized testimony would be "demonstrably critical"? What factors would guide its analysis?

The immunity statute provides an easy answer to the first of these questions. Recall that Congress itself does not grant immunity. Rather, after a congressional committee has notified the Attorney General of its desire to hear immunized testimony, the committee submits an application to a federal district court.[312] When Congress wrote the immunity statute, it envisioned that district courts would conduct " 'a sort of declaratory judgment proceeding *not* on the wisdom of conferring immunity,' " but on the legality of doing so.[313] Thus, as Chief Judge Sirica explained when he granted the immunity

309. *See supra* notes 73–74 and accompanying text.

310. *See* Wright, *supra* note 42, at 437.

311. *See, e.g.*, *Senate Permanent Subcomm. on Investigations*, 655 F.2d at 1234 (noting that the Justice Department did not object to a Senate subcommittee's decision to immunize a witness in a probe of organized crime); Edward Walsh, *Tamraz Defends Political Donations; Access to Top Officials Was 'Only Reason,' Pipeline Promoter Testifies*, WASH. POST, Sept. 19, 1997, at A1 (reporting that the Justice Department acquiesced in the decision of the House Government Reform and Oversight Committee to immunize three witnesses in the Committee's investigation of the 1996 election campaign).

312. *See supra* notes 58–71 and accompanying text.

313. *United States Senate Select Comm.*, 361 F. Supp. at 1278 (quoting 2 NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 59, at 1441).

requests of the Senate Watergate Committee, a court will order a congressional witness to testify under a grant of immunity only if the immunity statute's procedural requirements are satisfied,[314] the sought testimony is relevant to an investigation that has been authorized by the House or Senate[315] and that "falls within the total constitutional scope of the congressional investigatory power,"[316] and the testimony is not protected by the First Amendment.[317] Judge Sirica also added an important catchall—a court will deny an immunity application if "it believes that the statute compelling testimony may be unconstitutional as applied."[318]

In this "sort of declaratory judgment proceeding," the district court should apply the "demonstrably critical" test set forth in *Senate Select Committee*. A grant of immunity that does not meet the "demonstrably critical" standard would fit into Judge Sirica's catchall—it would be an unconstitutional application of the immunity statute.

The question of how a court should decide whether testimony would be "demonstrably critical" to an investigation is more complicated. A court would begin by determining what Congress is investigating. As Part III discussed, Congress may empower its committees to inquire into almost any subject.[319] Before a committee may conduct an investigation, the House or Senate must pass an authorizing resolution that defines the committee's jurisdiction. For example, the Senate authorized the Watergate Committee to investigate "illegal, improper, or unethical activities" in connection with the 1972 presidential election campaign and "to determine ... the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen."[320] When a court is confronted with a challenge to a committee's jurisdiction, it examines the text of the authorizing resolution.[321] If the resolution is ambiguous, it consults the resolution's legislative history.[322] Similarly, a court applying the "demonstrably critical" test should use the authorizing resolution and

314. *See id.* at 1275–76.
315. *See id.* at 1279.
316. *Id.* at 1278–79.
317. *See id.* at 1279; *see also supra* note 68 (discussing the First Amendment's limits on the power to investigate).
318. *United States Senate Select Comm.*, 361 F. Supp. at 1279.
319. *See supra* notes 195–214 and accompanying text.
320. S. Res. 60, 93d Cong., § 1(a) (1973) (Sup. Docs. No. Y1.4/2:93-60).
321. *See supra* notes 209–14 and accompanying text.
322. *See id.*

its legislative history to define the subject of a congressional investigation.

Once a court determines what a committee is investigating, it would then focus on whether subpoenaed material is "demonstrably critical" to the committee's investigation. Although *Senate Select Committee* does not explain in much detail what "demonstrably critical" means, its choice of words is telling. "Demonstrably critical" is a tough-sounding phrase, and that toughness is appropriate. Immunizing a witness short-circuits the executive branch's power to prosecute. Congress should have to show that it has no choice, that it simply cannot conduct an investigation without granting immunity.

The D.C. Circuit's decision in *Espy*[323] shows how demanding the "demonstrably critical" test should be. *Espy* held that for a grand jury or trial court to subpoena material protected by executive privilege, two things must be true: "first, ... each discrete group of the subpoenaed materials [must] likely contain[ ] important evidence; and second, ... this evidence must not [be] available with due diligence elsewhere."[324] Although *Espy* involved an attempt by a grand jury, rather than a congressional committee, to interfere with the executive branch's ability to perform its constitutional duties, courts should use these same two criteria to determine whether immunized testimony is "demonstrably critical" to a congressional investigation. For one thing, both *Espy* and *Senate Select Committee* involve attempts by investigative bodies—a grand jury in one case and a Senate committee in the other—to subpoena material protected by executive privilege. The same legal standard should govern both types of subpoenas. More importantly, the *Espy* criteria are sensible: if either criterion is not met, Congress can do without the evidence or can obtain it by issuing a subpoena that does not interfere with the executive's constitutional authority.

To see how a court should apply the *Espy* factors, let us return to *Senate Select Committee.* In that case, the court evaluated whether the Nixon tapes were "demonstrably critical" to an investigation of the two subjects mentioned in the Committee's authorizing resolution—recommending legislation and uncovering wrongdoing by President Nixon.[325] Although the court's reasoning is cursory and a bit disorganized, its mode of analysis is similar to that called for in

323. *In re* Sealed Case ("Espy"), 121 F.3d 729 (D.C. Cir. 1997).

324. *Id.* at 754.

325. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

Espy.

Senate Select Committee essentially relied on the first *Espy* factor to reject the Committee's argument that it was entitled to the Nixon tapes to conduct an investigation into the need for new legislation. The court explained that unlike a grand jury, Congress does not need a "precise reconstruction of past events" to pass legislation.[326] In fact, it often legislates "on the basis of conflicting information."[327] The Committee did not need to know exactly what happened in the Watergate break-in and cover-up to evaluate the need for legislation.[328]

The court's analysis is sensible and points to a general rule that should apply when considering whether subpoenaed testimony would likely contain important relevant evidence. When Congress is investigating the need for future legislation, rather than inquiring into executive branch misconduct, the *Espy* relevance standard probably will not be met. On the other hand, when Congress is investigating executive branch misconduct, it does need a precise reconstruction of past events, and immunized testimony may be required.[329]

Senate Select Committee relied on something akin to the second *Espy* criterion to reject the Committee's argument that it needed the tapes to investigate the Nixon administration's misdeeds. The court noted that the House Judiciary Committee, which was then conducting an impeachment inquiry, already had copies of the subpoenaed tapes. Thus, the Senate Committee's need for the tapes was "merely cumulative."[330] The court's analysis is, for the most part, consistent with the second *Espy* factor: if Congress already possesses highly relevant information, why would enforcing a redundant subpoena be "demonstrably critical" to an investigation?

The court, however, overlooked the fact that the House and Senate are distinct, co-equal bodies. Although a House and Senate committee conducting parallel investigations may choose to cooperate with each other, they are not obligated to do so. One House of Congress has no more authority to compel the other to cooperate in an investigation than it has to compel the other to cooperate in passing a law.[331] Indeed, when different parties control

326. *Id.* at 732.

327. *Id.*

328. *See supra* note 267 and accompanying text (quoting the Court's language).

329. This general rule is, of course, not absolute; it is conceivable that, for a particular bill, Congress may need to reconstruct the past.

330. *Senate Select Comm.*, 498 F.2d at 732.

331. *Cf.* U.S. CONST. art. 1, § 7, cl. 2 ("Every Bill which shall have passed the House of

the House and Senate,[332] cooperation is unlikely. Thus, in applying the second *Espy* criterion, a court should examine only whether the particular congressional committee seeking to immunize a witness can obtain the evidence it seeks from another source. Whether another House of Congress or another congressional committee already has the evidence is immaterial.[333]

Holding Congress to the "demonstrably critical" standard would have two primary implications. First, as mentioned above, a committee generally will not be able to immunize witnesses when it is investigating the need for future legislation, rather than misconduct by the executive branch. Second, a committee may have to delay an immunity application until it has obtained enough information to predict what an immunized witness would say and to show that this prospective testimony satisfies *Espy*'s relevance and availability requirements.[334] But when Congress can show that it truly needs immunized testimony, *Senate Select Committee* would not stand in the way.

B. The Political-Question Doctrine

Some might object to my proposal by arguing that if courts were to apply the *Senate Select Committee's* "demonstrably critical" test, they would become embroiled in politically contentious congressional investigations. I will now consider two possible objections to this judicial role.

The first possible objection involves the political-question doctrine. Although the doctrine can be traced back to *Marbury v.*

Representatives and the Senate, shall, before it become[s] a Law, be presented to the President . . . ."); INS v. Chadha, 462 U.S. 919, 948–51 (1983) (discussing the importance of the Constitution's bicameralism requirement).

332. Between 1981 and 1987, for instance, the Republicans controlled the Senate, and the Democrats controlled the House. *See* 41 CONG. Q. ALMANAC 3–5 (1986); 39 CONG. Q. ALMANAC 3–5 (1984); 37 CONG. Q. ALMANAC 3–5 (1982).

333. A congressional committee conceivably could have the authority to compel another committee in the same House of Congress to share information. Committees obtain their authority from authorizing resolutions passed by the full House or Senate. *See, e.g.*, United States v. Rumely, 345 U.S. 41, 44–45 (1953). The House or Senate could include a clause in an authorizing resolution that would require a committee to share information with another committee. In such a case, the committee with access to this information should not have the power to compel duplicative immunized testimony.

334. *See In re* Sealed Case ("Espy"), 121 F.3d 729, 756–57 (D.C. Cir. 1997) ("The primary effect of this standard will be to require a grand jury to delay subpoenaing evidence covered by presidential privilege until it has assured itself that the evidence sought from the President or his advisers is both important to its investigation and practically unavailable elsewhere.").

Madison,[335] the leading case in this area is *Baker v. Carr*.[336] In *Baker*, the Supreme Court surveyed its past decisions and found that the political-question doctrine had "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness."[337] The *Baker* Court stressed that simply because a case involves a political controversy does not mean that the political-question doctrine applies.[338] The Court concluded:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from mutifarious pronouncements by various departments on one question.[339]

These six factors are vague and not particularly useful in determining what constitutes a political question.[340] Since *Baker*, the Court has encountered the political-question doctrine a number of times and has held in all but two cases that the doctrine did not apply.[341] Even after these decisions, many of which addressed the

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335. 5 U.S. (1 Cranch) 137, 166 (1803) (explaining that "in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable").

336. 369 U.S. 186 (1962).

337. *Id.* at 210.

338. *See id.* at 217.

339. *Id.*

340. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.6, at 144–45 (2d ed. 1994). Professor Chemerinsky explains:

> For example, there is no place in the Constitution where the text states that the legislature or executive should decide whether a particular action constitutes a constitutional violation. The Constitution does not mention judicial review, much less limit it by creating "textually demonstrable commitments" to other branches of government. Similarly, most important constitutional provisions are written in broad, open-textured language and certainly do not include "judicially discoverable and manageable standards." The Court also speaks of determinations of a kind "clearly for a nonjudicial determination," but that hardly is a criterion that can be used to separate political questions from justiciable cases.

Id. at 145.

341. The Court refused to apply the political-question doctrine in *United States*

political-question issue in a conclusory fashion, the precise scope of the doctrine remains unclear.[342]

The existing case law, however, suggests that the political-question doctrine does not apply to congressional immunity requests. For example, *United States v. AT&T*[343] addressed the doctrine, and its consideration of the first *Baker v. Carr* criterion is particularly

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Department of Commerce v. Montana, 503 U.S. 442, 459 (1992) (reapportionment); *United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990) (constitutional requirement that all revenue measures originate in the House of Representatives); *Quinn v. Millsap*, 491 U.S. 95, 102 (1989) (state constitutional provision requiring that members of a county board had to be property owners); *Japan Whaling Ass'n v. American Cetecean Society*, 478 U.S. 221, 229–30 (1986) (Foreign Commerce Clause challenge to a tax measure); *Davis v. Bandemer*, 478 U.S. 109, 122–23 (1986) (gerrymandering); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 250 (1985) (Indian affairs); *Uhler v. AFL-CIO*, 468 U.S. 1310, 1312 (1984) (opinion in chambers) (procedures used to ratify a constitutional amendment); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254 n.25 (1984) (congressional action regarding the Warsaw Convention); *INS v. Chadha*, 462 U.S. 919, 941–43 (1983) (legislative veto); *Elrod v. Burns*, 427 U.S. 347, 352 (1976) (termination of public employees because of their political affiliations); *United States v. Nixon*, 418 U.S. 683, 697 (1974) (intra-branch dispute regarding executive privilege); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (decision by House to exclude a member); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (reapportionment).

The two cases holding that there was a political question are *Nixon v. United States*, 506 U.S. 224, 226–238 (1993) (procedures used in the Senate trial of an impeached federal judge), and *Gilligan v. Morgan*, 413 U.S. 1, 5–12 (1973) (adequacy of the training of a state's national guard). In *Goldwater v. Carter*, 444 U.S. 996 (1979), although a majority of the Court concluded that a challenge to the President's power to terminate a treaty unilaterally was not justiciable, only four Justices relied on the political-question doctrine. *See id.* at 1002–06 (Rehnquist, J., concurring in the judgment) ("I am of the view that the basic question presented ... is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations ...."). Chief Justice Burger, Justice Stewart, and Justice Stevens joined Justice Rehnquist's concurrence. *See id.* at 1002.; *see also id.* at 997–1001 (Powell, J., concurring in the judgment) (concluding, instead, that the issue was not ripe for judicial review); *id.* at 1006–07 (Brennan, J., dissenting) (arguing that the case was not a nonjusticiable political question to the extent that "it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments").

342. *See* CHEMERINSKY, *supra* note 340, at 142 (stating that "[i]n many ways, the political-question doctrine is the most confusing of the justiciability doctrines"); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 144 (2d ed. 1996) ("That there is a 'political question' doctrine is not disputed, but there is little agreement as to anything else about it—its constitutional basis and scope; whether abstention is required or optional; how the courts decide whether a question is 'political', and which questions are."); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1985) (noting that the political-question doctrine "has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity ... but they have also differed significantly over the doctrine's scope and rationale"). Professors Henkin and Redish have argued forcefully that the political-question doctrine should be abandoned. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622–25 (1976); Redish, *supra, passim.*

343. 567 F.2d 121, 126 (D.C. Cir. 1977).

relevant in determining whether congressional grants of immunity are political questions. In *AT&T*, the Justice Department sought to enjoin AT&T from complying with a subpoena issued by a House Subcommittee in an investigation of warrantless national-security wiretaps.[344] The Department claimed that the documents sought contained sensitive national-security information.[345] The court held that the political-question doctrine did not prevent judicial resolution of the conflict between the Justice Department and the House Subcommittee.[346] The court recognized that there was "a clash of authority between two branches"[347]—the executive branch's authority to protect national-security secrets and Congress's authority to investigate. Thus, in *Baker* terms, there was no "textually demonstrable constitutional commitment" to any one branch of government.[348] The same reasoning applies to a congressional immunity application. The "demonstrably critical" test is an attempt to balance two constitutional interests—the executive branch's in enforcing the law and Congress's in conducting an investigation. Neither Congress nor the executive has, to quote *AT&T*, "a clear and unequivocal constitutional title" in a dispute over immunizing a witness.[349]

United States v. Nixon is a useful benchmark for addressing other *Baker* criteria. In *Nixon*, the Court curtly rejected the application of the political-question doctrine.[350] Instead, it proceeded to balance the executive's need to preserve the confidentiality of presidential communications with the judiciary's need for subpoenaed testimony.[351] As we have seen, that balancing test, which the D.C. Circuit recently employed in *Espy*, is the same test a court would apply when evaluating a congressional immunity application. In both instances, the court's role is modest. The court simply evaluates the relevance of evidence contained in subpoenaed material and whether that evidence is available elsewhere. This task is certainly judicially "manageable"[352] and does not require a "policy determination of a

344. *Id.* at 122.
345. *See id.* at 122–23.
346. *See id.* at 127.
347. *Id.* at 126.
348. Baker v. Carr, 369 U.S. 186, 217 (1962).
349. *AT&T*, 567 F.2d at 127.
350. *See* United States v Nixon, 418 U.S. 683, 696–97 (1974). For a discussion of *Nixon*, see *supra* notes 251–57 and accompanying text.
351. *See Nixon*, 418 U.S. at 705–14.
352. *Baker*, 369 U.S. at 217. In *AT&T*, the court held that " 'judicially discoverable and manageable standards' " existed for resolving the dispute between the House

kind clearly for nonjudicial discretion."[353] It is the type of inquiry that courts routinely perform.[354] Indeed, the *Senate Select Committee* and *Nixon-Espy* tests are far more manageable and far less policy-oriented than, say, defining what the term "liberty" means in the Fifth and Fourteenth Amendments.[355]

The similarity between the Court's role in *Nixon* and the role a court would play in evaluating an immunity application shows that the remaining three *Baker v. Carr* criteria are inapplicable. Rejecting an immunity request is no more disrespectful of Congress than rejecting an assertion of executive privilege is disrespectful of the President.[356] There is no greater need to adhere to Congress's "political decision" to grant immunity than there is to adhere to the

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Subcommittee and the Justice Department. *AT&T*, 567 F.2d at 126 (quoting *Baker*, 369 U.S. at 217). That holding, however, should be taken with a grain of salt. In *AT&T*, the court previously had refused to decide whether the Subcommittee's subpoena was enforceable and remanded the case to request that the parties negotiate a compromise. *Id.* at 123. The court's justification for its sheepishness was that it would have been difficult to "to balance the constitutional interests" of the executive and legislative branches. United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976). The balance depended on the Constitution's distribution of foreign-affairs power. The problem, as the court saw it, was that in foreign-affairs matters, the Constitution created a " 'zone of twilight' " in which the distribution of power was "uncertain." *AT&T*, 567 F.2d at 128 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). The court avoided stepping into this murky area by devising a plan that it hoped would avoid an impasse. *AT&T*'s citation to an "uncertain" " 'zone of twilight' " and its refusal to reach the merits resemble a holding that there were no " 'judicially discoverable and manageable standards' " and that the dispute, therefore, was a nonjusticiable political question. *Id.* at 126 (quoting *Baker*, 369 U.S. at 217).

353. *Baker*, 369 U.S. at 217.

354. *See, e.g.*, FED. R. EVID. 401–15 (defining "relevancy and its limits" in federal trials); *Nixon*, 418 U.S. at 699–700 (holding that FED. R. CRIM. P. 17(c), which governs subpoenas duces tecum, requires that for a subpoena to be enforced, subpoenaed material must be relevant, admissible, and specific).

355. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 65–80, 97–117 (1991) (discussing a number of approaches that the Court and individual Justices have taken in determining which rights are protected by the Fifth and Fourteenth Amendment's Due Process Clauses). For two quite different methods of defining "liberty," see *Washington v. Glucksberg*, 521 U.S. 702, 753–74 (1997) (Souter, J., concurring in the judgment), *Michael H. v. Gerald D.*, 491 U.S. 110, 120–30 (1991) (plurality opinion) (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J.), and *id.* at 127–28 n. 6 (Scalia, J., joined by Rehnquist, C.J.).

356. Courts would show no more disrespect in holding that a congressional grant of immunity is unconstitutional than if they struck down a statute that Congress had passed. This level of "disrespect" is not enough to create a political question. *See* United States v. Munoz-Flores, 495 U.S. 385, 390 (1990) ("[A] judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a 'lack of respect' for Congress's judgment. But disrespect, in [this sense], cannot be sufficient to create a political question.").

President's "political decision" that executive privilege applies.[357] Finally, a disagreement between the judiciary and another branch of government over immunity is no more embarrassing than is a disagreement over executive privilege.

In addition to the inapplicability of *Baker v. Carr*'s six factors, the Court's long history of defining the scope of Congress's investigative power demonstrates that evaluating an immunity application would not be a political question. Although the Supreme Court has never discussed the relationship between congressional investigations and the political-question doctrine, as Part III shows, since the 1880 case of *Kilbourn v. Thompson*, the Supreme Court has ruled on a number of challenges to Congress's exercise of investigative power.[358] This long history belies the assertion that the judiciary is incapable of resolving disputes relating to Congress's investigative power.

C. *The Speech or Debate Clause*

Judicial scrutiny of congressional immunity applications not only is consistent with the political-question doctrine, but also would not offend the Speech or Debate Clause, which provides that representatives and senators "shall not be questioned in any other Place" for "any Speech or Debate in either House."[359]

In *Eastland v. United States Servicemen's Fund*,[360] the Supreme Court held that, in some contexts, the Speech or Debate Clause limits the judiciary's power to intervene in congressional investigations.[361] Senator Eastland's Subcommittee on Internal Security had subpoenaed bank records of the United States Servicemen's Fund (USSF), which the Subcommittee suspected of subversive activities. The USSF claimed that the subpoena violated its First Amendment rights. It sued the members of the Subcommittee and sought an injunction forbidding the enforcement of the subpoena. The Court pointed out that the Speech or Debate Clause protects members of Congress from being sued over actions that fall within the "sphere of legitimate legislative activity."[362] Because the Subcommittee's investigation was a "legitimate legislative activity," its members could

357. *Cf. Baker*, 369 U.S. at 217 (noting that the political-question doctrine does not apply simply because a case is politically controversial).

358. *See supra* notes 195–214 and accompanying text.

359. U.S. CONST. art. I, § 6, cl. 1.

360. 421 U.S. 491 (1975).

361. *See id.* at 501–11.

362. *Id.* at 503.

not be named as defendants in a suit.[363]

As the D.C. Circuit explained in *AT&T*, however, the holding in *Eastland* is quite narrow. In holding that the Justice Department's suit was not barred by the Speech or Debate Clause, the *AT&T* court cited a number of cases, including *Senate Select Committee*, as evidence that courts have ruled on the validity of exercises of Congress's investigative power.[364] The court distinguished *Eastland* from these cases on the ground that individual senators had been named as defendants in *Eastland*. That distinction, the court stated, "should not be dismissed as merely procedural, since it sheds light on the nature and purpose of the protection afforded by the Speech or Debate Clause. The Clause was intended to protect legislators from executive and judicial harassment" and " 'from the burden of defending themselves.' "[365]

AT&T is consistent with the Court's reasoning in *Eastland*. Although the Eastland's Subcommittee's status as defendants made the USSF's First Amendment claim nonjusticiable, the *Eastland* Court recognized that, in a number of cases, it had ruled on First Amendment challenges to the actions of congressional committees. Those cases arose from statutory contempt trials in which "defendants sought to justify their refusals to answer congressional inquiries by asserting their First Amendment rights."[366] The *Eastland* Court explained that when Congress initiates a statutory contempt proceeding, it makes " 'the federal judiciary the affirmative agency for enforcing [its power].' "[367] When a congressional committee opts to enlist the judiciary, it is not entitled to the protections of the Speech or Debate Clause.

Eastland and *AT&T* show that the Speech or Debate Clause would not prevent a court from applying the "demonstrably critical" test. Under the modern immunity statute, a congressional committee submits an application for an immunity order to the judiciary. Unlike in *Eastland*, the committee is not the defendant in a lawsuit. Rather, it seeks "the aid of the Judiciary to enforce its will."[368] Because Congress makes a court "the affirmative agency for enforcing"[369] a

363. *Id.*
364. *See* United States v. AT&T, 567 F.2d 122, 128–29 (D.C. Cir. 1977).
365. *Id.* at 129 (quoting *Eastland*, 421 U.S. at 503).
366. *Eastland*, 421 U.S. at 509 n.16.
367. *Id.* at 510 n.16 (quoting Watkins v. United States, 354 U.S. 178, 216 (1957) (Frankfurter, J., concurring)).
368. *Id.* at 509 n.16.
369. *Id.*

committee's power to immunize, the court is free to examine the constitutionality of an immunity application.[370]

Thus, neither the political-question doctrine nor the Speech and Debate Clause precludes the judiciary from enforcing the "demonstrably critical" test. This test calls upon courts to perform the familiar and manageable task of judging the constitutionality of an assertion of Congress's power to investigate.

CONCLUSION

For more than a century, Congress has exercised an unchecked power to grant immunity to whomever it wants, at any time, for any reason. This unlimited authority allows Congress to prevent the executive branch from enforcing our nation's criminal law. Such authority not only allows the guilty to escape justice, but it conflicts with basic separation-of-powers principles.

The modern immunity statute gives the judiciary the means to end this conflict by confining Congress's immunity power to its proper, constitutional scope. If a court were to reject an immunity application, Congress would surely protest. Congress would claim that the court was inserting itself into politics. It would protest that the court was not showing respect for Congress's power to investigate. But the court would be doing no such thing. It would be doing what courts are supposed to do—enforcing our Constitution.

370. If Congress were to rewrite the immunity statute so that a committee could issue an immunity order without applying to a district court, the Speech or Debate Clause still would not prevent a court from examining the committee's order. If the Attorney General thought that a unilateral immunity order failed the *Senate Select Committee* test, she could do what the Justice Department did in *AT&T* and seek to enjoin the witness from complying with the committee's order. As in *AT&T*, the committee would not be the defendant in such a suit, and the suit would be justiciable.