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Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions

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Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions

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INTRODUCTION

Congressional investigations can derail criminal prosecutions. The most famous example is the failure of the prosecution of Oliver North for his role in the Iran-Contra scandal after he testified at a congressional committee hearing about his conduct. The D.C. Circuit Court of Appeals held that much of the evidence used in the prosecution was tainted by association with North's

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compelled congressional testimony and could not be introduced at trial.[1]

The knowledge that congressional investigations and grants of immunity can create problems for prosecutors has not stopped either the investigations or the immunity grants.[2] In March, 2007, a former Department of Justice official, Monica Goodling, announced that she would take the Fifth Amendment privilege and refuse to testify at a congressional committee hearing about the firing of eight United States Attorneys.[3] Congress granted immunity to Goodling, and she testified about hiring and firing decisions she made that might have been illegal.[4]

This Note argues that immunity grants from congressional committees, and the federal statute that allows committees to make the grants, are unconstitutional under separation of powers doctrine. The privilege against self-incrimination[5] requires the government to make a decision: it can either prosecute someone on criminal charges and allow him to remain silent, or it can grant immunity, compel him to testify, and give up the prosecution. In some circumstances, compelled testimony is a good choice—it can lead to the conviction of a "bigger fish" or allow Congress to gather information that will lead to beneficial legislation or better government oversight. In other cases, the compelled testimony would bring disappointing results and a criminal would nonetheless go free.

The essential separation of powers question is whether Congress has the constitutional authority to make the choice between these competing goals, or whether that choice is reserved for the prosecutorial discretion of the executive branch. A federal statute, 18 U.S.C. § 6005, allows a single house or committee of Congress to vote to grant a congressional witness immunity from prosecution,[6] thereby requiring the witness to give full and complete testimony at the

1. *See generally* United States v. North, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (setting high requirements for the prosecution to prove that evidence introduced in a criminal trial was not impermissibly derived from compelled testimony after an immunity grant).

2. *But see* Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 429–35 (1995) (detailing evidence that Congress was more reluctant to grant immunity in the years after the Iran-Contra hearings because of heightened awareness that compelled testimony can inhibit prosecution).

3. *See* Letter from John M. Dowd & Jeffrey M. King, counsel for Monica M. Goodling, to Hon. Patrick J. Leahy, Chairman, Committee on the Judiciary, United States Senate, Re: Senate Judiciary Committee Hearings on the Firings of United States Attorneys (March 26, 2007), *available at* http://www.talkingpointsmemo.com/docs/goodling-5th/ (last visited April 22, 2007); *see also* Alan Cooperman, *Bush Loyalist Rose Quickly at Justice*, WASH. POST, Mar. 30, 2007, at A15 (identifying Goodling as "the most prominent federal official to invoke the Fifth Amendment to avoid testifying before Congress since Lt. Col. Oliver L. North").

4. *See* Dan Eggen & Paul Kane, *Goodling Says She "Crossed the Line"*, WASH. POST, May 24, 2007, at A1 ("Goodling's testimony about hiring practices amounts to a dramatic public admission that she and other Justice aides routinely used potentially illegal criteria in deciding whom to hire . . . .").

5. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

6. *See* 18 U.S.C. § 6005 (2000).

hearing.[7]

I argue in this Note that the congressional immunity statute is unconstitutional because it violates separation of powers doctrine. The statute unconstitutionally allows a committee of Congress to dictate prosecutorial decisions to the executive branch and to make changes to legal rights and duties without using the legislative process laid out in the Constitution. The procedure directly violates the Supreme Court's holdings in the landmark separation of powers cases *INS v. Chadha*[8] and *Bowsher v. Synar*.[9] Whether the power to grant immunity is characterized as executive or legislative, it may not be exercised by a congressional committee. The decisions whether or not to prosecute and which evidence should be used in pursuing a conviction are matters within executive branch control. Congress can make binding decisions in these areas only by statute.

In Part II of this Note, I describe the current congressional immunity statute and the types of immunity that have been used over the years. In Part III, I explain the separation of powers problems caused by allowing a committee of Congress to grant immunity to a witness at a hearing. In Part IV, I examine the history of congressional investigations and the recognized limits on Congress's power to investigate. I argue that the separation of powers concerns described in this Note mark another limit on Congress's investigative power—a committee may not grant most types of immunity to witnesses, though it may compel testimony without an explicit immunity grant. When testimony is compelled without immunity, the courts must determine how to protect the privilege against self-incrimination in any later prosecution.

I. THE CONGRESSIONAL IMMUNITY STATUTE

The congressional immunity statute, 18 U.S.C. § 6005, allows a single house or committee of Congress to grant immunity to a witness who testifies at a congressional hearing.[10] The immunity grant forbids a prosecutor from using the hearing testimony as evidence at a criminal trial against that witness, and also forbids the prosecutor from using the testimony in any other way, such as gathering leads or influencing witnesses.[11]

7. *See id.* § 6002 ("[T]he witness may not refuse to comply with the [congressional] order on the basis of his privilege against self-incrimination.").

8. 462 U.S. 919 (1983).

9. 478 U.S. 714 (1986).

10. *See* § 6005.

11. *See* § 6002. *See also* Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that § 6002 protects the privilege against self-incrimination because "[i]t prohibits the prosecutorial authorities from using the compelled testimony in any respect"); United States v. North, 920 F.2d 940, 942 (D.C. Cir. 1990) (per curiam) (holding that *Kastigar* and § 6002 are violated "whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony").

A. STATUTORY IMMUNITY PROCEDURE

When a witness called to testify at a congressional hearing indicates that he will exercise his Fifth Amendment privilege against self-incrimination and refuse to testify, the procedure in 18 U.S.C. § 6005 allows the house or committee of Congress holding the hearing to grant the witness immunity from prosecution.[12] For a hearing before a full house of Congress, a majority vote of the members present triggers a grant of immunity.[13] For a hearing before a committee or subcommittee of Congress, which is much more common than a full house hearing,[14] the statute requires a two-thirds vote of the full committee membership to grant immunity.[15]

The immunity order does not issue directly from Congress or a committee, but instead from a United States district court judge.[16] However, the judge has no discretion to deny the immunity grant. The statute requires that the judge "shall issue" an immunity order as long as the procedural requirements are met,[17] and the courts have always treated this as a ministerial task.[18] For

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12. The full text of 18 U.S.C. § 6005 is as follows:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—
(1) in the case of a proceeding before or ancillary to either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;
(2) in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and
(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

13. *See* § 6005(b)(1).

14. *See* Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2461 (2002) ("[C]ongressional committees routinely call hearings and subpoena witnesses as a means of obtaining information."). Congress's first real investigation was performed by a select committee of the House of Representatives appointed for that purpose. *See id.* at 2458–59.

15. *See* § 6005(b)(2).

16. *See* § 6005(a).

17. *See id.*

convenience, I will refer to the immunity grant as issuing from Congress or from a congressional committee, though it technically issues from a district court judge.[19]

The executive branch has no veto power over Congress's decision to grant immunity. The statute requires that the Attorney General be notified of the request for an immunity order[20] and allows him to defer the order for up to twenty days, but does not allow him to prohibit the grant entirely.[21] Under this statutory scheme, a congressional investigating committee has complete and unfettered discretion to grant immunity to any witness who invokes the privilege against self-incrimination.

B. SCOPE OF IMMUNITY

Three major types of immunity grants have been used in criminal trials and congressional investigations over the years—transactional immunity, use immunity, and derivative use immunity. To illustrate the differences, imagine that a witness testifies under compulsion and makes the following statement: "After the murder, I hid the gun under a tree in the park." Under the different types of immunity grants, the prosecutor has different limitations in a later criminal trial of the witness.

1. Transactional Immunity

The broadest type of immunity is *transactional immunity*. Under this type of grant, the witness may not be prosecuted for any crime arising out of any transaction he discusses in his testimony.[22] In the hidden gun example, the compelled statement would prevent prosecution of the witness for the murder itself, aiding and abetting, or any other crime related to the incident about which he testified.

The original congressional immunity statute, enacted in 1857, granted transactional immunity.[23] But these grants led to an unfortunate result: "immunity baths," in which a criminal would convince a friendly member of Congress to

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18. *See* Application of U.S. Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1270, 1272, 1278 (D.D.C. 1973) (holding, after extensive analysis, that the district court's task in certifying an order of immunity granted by a congressional committee is purely ministerial and that the court has no discretion to deny the order when the committee properly followed the statutory procedure); *see also In re* Kilgo, 484 F.2d 1215, 1219 (4th Cir. 1973).

19. This is consistent with the common practice of talking about immunity in the criminal trial context as being granted by prosecutors, even though those immunity orders also issue from judges. *See* 18 U.S.C. § 6003. Immunity for testimony given at an agency proceeding is granted directly by the agency. *See id.* § 6004.

20. *See* § 6005(b)(3).

21. *See* § 6005(c).

22. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 57 (1997).

23. *See* Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155, 156 ("[N]o person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice . . . for any . . . act touching which he shall be required to testify. . . ."); O'Neill, *supra* note 14, at 2503–10 (discussing the enactment of the 1857 immunity statute).

call him as a hearing witness and then, with heavy heart, confess all his sins and escape all possible prosecution.[24] In addition to the practical problems, transactional immunity grants from Congress also pose serious separation of powers problems.[25]

2. Use Immunity

In an attempt to avoid the "immunity bath" problem, Congress experimented with a plain *use immunity* statute.[26] Under a grant of use immunity, the actual testimony given by the witness cannot be introduced as evidence against him, but evidence derived from that testimony can be.[27] The witness can still be convicted for the crimes mentioned in the testimony on the basis of other evidence.

Continuing with the hidden gun example: Under a use immunity grant, the prosecutor is forbidden from entering into evidence the fact that the witness confessed to the crime during his compelled testimony.[28] A transcript of that testimony is inadmissible in evidence.[29] However, the prosecutor is free to hear or read the testimony himself while investigating the case. After learning about the location of the gun from the compelled testimony, the prosecutor could have police retrieve the gun and submit it as evidence at the witness's trial.

In a strongly worded opinion in *Counselman v. Hitchcock*,[30] the Supreme Court held that use immunity is not sufficient to guarantee the freedom from compelled self-incrimination guaranteed by the Fifth Amendment.[31] Because of this holding, use immunity is not commonly granted by prosecutors or congressional investigating committees. However, it is the only type of immunity grant from Congress that would entirely avoid separation of powers problems.[32]

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24. *See* O'Neill, *supra* note 14, at 2508; Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress's Power to Immunize Witnesses*, 78 N.C. L. REV. 153, 158–59, 162 (1999); Wright, *supra* note 2, at 414–15.

25. *See infra* Part III.

26. *See* O'Neill, *supra* note 14, at 2510–13 (discussing the Amendment to the 1862 Act). Some commentators refer to this type of immunity as "testimonial immunity." *See* AMAR, *supra* note 22, at 47 (explaining that under a "testimonial immunity" rule, "the compelled words will never be introduced over the defendant's objection in a criminal trial . . . but the fruits of these compelled pretrial words will generally be admissible").

27. *See* Counselman v. Hitchcock, 142 U.S. 547, 564 (1892) (describing a use immunity grant as not preventing the prosecutor from obtaining witnesses and evidence on the basis of the compelled testimony); AMAR, *supra* note 22, at 70.

28. See AMAR, *supra* note 22, at 70.

29. *See id.* at 70–71.

30. 142 U.S. 547 (1892).

31. *See id.* at 585 ("[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States."). *Counselman* was understood to require transactional immunity until the Supreme Court limited the holding in *Kastigar v. United States*, 406 U.S. 441 (1972). *See infra* note 35 and accompanying text.

32. *See infra* Part III.C.

3. Derivative Use Immunity

The middle ground, frequently employed by prosecutors today,[33] is *use plus derivative use immunity*, also called simply *derivative use immunity*.[34] Under this type of immunity grant, the prosecutor cannot introduce the compelled testimony into evidence, nor can he derivatively use the compelled testimony to find other evidence. However, if he finds the same evidence through independent channels, he can introduce the testimony. The Supreme Court has held that derivative use immunity satisfies the requirements of the Self-Incrimination Clause.[35] Congressional immunity grants under § 6005 are grants of this type.[36]

The prosecutor's actions in the hidden gun example under the use immunity grant—learning of the gun from the testimony and then searching for it—are forbidden under derivative use immunity. Following leads based on information obtained from compelled testimony is a derivative use of the testimony. But if the prosecutor found the gun in an unrelated way—for instance, while walking his dog in the park—without having heard the compelled testimony, the evidence would be admissible in the witness's trial. Congress's practice of issuing derivative use immunity grants raises serious separation of powers problems.[37] My analysis throughout this Note centers on derivative use immunity grants, since that is the standard currently in use.

In theory, a sufficiently careful prosecutor can successfully prosecute a witness who received derivative use immunity for congressional testimony.[38] The prosecutor could avoid watching or reading about the testimony, going about his investigation as if the hearing had never happened. If the prosecutor gathered enough evidence on his own to convict the witness, the conviction

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33. *See* AMAR, *supra* note 22, at 58 (describing derivative use immunity as "the standard still in operation today").

34. Some courts and commentators refer to this type of immunity as "use immunity" or "use plus use-fruits immunity" and to the less stringent form of immunity as "testimonial immunity." *See, e.g.*, *id.* at 72 (distinguishing between "testimonial immunity" and "use plus use-fruits immunity"); George W. Van Cleve & Charles 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, 44 n.1 (1990) (equating the terms "testimonial immunity," "use immunity," and "use and derivative use immunity"). In this Note, I use the term "use immunity" to refer to an immunity grant which forbids only the actual compelled testimony from being introduced as evidence in a later criminal trial. I use the term "derivative use immunity" to refer to an immunity grant which forbids the compelled testimony plus any evidence derived from it from being introduced in a criminal trial.

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

36. *See* 18 U.S.C. § 6002 (2000) ("[N]o testimony or other information compelled under the order [of immunity granted at a congressional request under § 6005] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .").

37. *See infra* Part II.

38. *See Kastigar*, 406 U.S. at 453 ("The privilege [against self-incrimination] has never been construed to mean that one who invokes it cannot subsequently be prosecuted."); United States v. North, 920 F.2d 940, 943 (D.C. Cir. 1990) (per curiam) ("[T]he prosecutor has to *prove* that witnesses who testified against the defendant did not draw upon the immunized testimony to use it against the defendant. . . .").

would be valid. In practice, however, even the most diligent prosecutor cannot meet the conditions courts now require for independent, "untainted" evidence.[39]

Keeping prosecutors and witnesses free from taint is especially difficult when immunized testimony is given in a highly publicized forum like a congressional hearing.[40] Even if prosecutors can sometimes keep witnesses from hearing compelled testimony at criminal trials, the publicity surrounding a high-profile congressional investigation is almost impossible to avoid. The most famous example of this inability to convict someone who has obtained derivative use immunity from a congressional committee is the prosecution of Oliver North and John Poindexter for their roles in the Iran-Contra affair. Independent Counsel Lawrence Walsh and his staff documented and sealed all the evidence they had gathered before Congress's immunity order became effective.[41] They then sequestered themselves from all information about the hearing by avoiding newspapers, televisions, and political conversations for months while they continued to follow leads and gather what they hoped would be "untainted" evidence.[42] But ultimately, the D.C. Circuit held that the prosecutors were required to prove that not only they themselves, but also the witnesses that testified against the defendant, were not influenced by the compelled testimony.[43] Because witnesses who testified against North at his criminal trial had seen North's compelled congressional testimony, their later testimony against him was irrevocably tainted.[44] Since a prosecutor has no authority to control the actions of witnesses before trial and cannot require potential witnesses to avoid exposure to the compelled testimony, successfully prosecuting someone who

39. *See North*, 920 F.2d at 951 (Wald, C.J., dissenting) (describing the new requirements for avoiding taint imposed by the majority as "practically unattainable"). The requirements are strictest in the D.C. Circuit, and other circuits have imposed requirements that are easier to meet. *See, e.g.*, U.S. v. Pantone, 634 F.2d 716, 719 (3d Cir. 1980) (holding that derivative use immunity should not be an "insurmountable barrier" to prosecution). However, such prosecutions are still difficult. Additionally, many cases involving congressional hearings would arise within the jurisdiction of the D.C. Circuit, including criminal prosecutions for refusing to answer questions at a hearing. *Cf.* 2 U.S.C. § 192 (2000) (making it a misdemeanor to refuse to testify or produce papers at a congressional hearing).

40. *See* Wright, *supra* note 2, at 427–28 (explaining that preventing witness exposure to compelled testimony is most difficult when the testimony is given in a congressional hearing rather than a criminal trial, because "[t]estimony before Congress . . . is likely to be very widely reported and available").

41. *See* United States v. Poindexter, 698 F. Supp. 300, 313 (D.D.C. 1988); *see also* JEFFREY TOOBIN, OPENING ARGUMENTS 55–59 (1991) (describing the Independent Counsel's process of "canning" leads and evidence before compelled testimony was given to the congressional hearing in the Iran-Contra investigation).

42. *See Poindexter*, 698 F. Supp. at 312–13 (describing efforts by prosecutors in the Independent Counsel's office to avoid exposure to North's compelled testimony); *see also* TOOBIN, *supra* note 41, at 60–62 (describing the decision by the Independent Counsel that he and his staff should avoid exposure to any publicly available information about the Iran-Contra hearings).

43. *See North*, 920 F.2d at 943 (per curiam) ("[T]he prosecutor has to *prove* that witnesses who testified against the defendant did not draw upon the immunized testimony to use it against the defendant. . . .").

44. *See id*. at 942 ("[The Fifth Amendment] is . . . 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.").

has received a grant of derivative use immunity is next to impossible.[45]

II. SEPARATION OF POWERS LIMITATIONS ON CONGRESSIONAL IMMUNITY GRANTS

The current immunity statute violates separation of powers doctrine because it lets a single house or committee of Congress interfere with the executive branch's prosecutorial decisions. The problem is not that immunity is granted to the witness; a prosecutor could make the choice to grant immunity at any time. Instead, the problem arises because Congress, without conforming to the Constitution's prescribed legislative process, makes a decision that alters rights and duties outside of Congress and that interferes with an executive branch function.

A. IMMUNITY GRANTS AS LEGISLATIVE ACTION

Congress has the power to legislate.[46] The legislative power is exercised through bicameralism and presentment to the President,[47] a "finely wrought and exhaustively considered[] procedure" created by the Framers of the Constitution as the *only* way to create federal laws.[48] Congressional immunity grants are not passed through this exclusive procedure. Instead, they are similar to a one-house veto, a mechanism the Supreme Court has held unconstitutional.

In *INS v. Chadha*,[49] the Supreme Court invalidated the one-house veto because the procedure violates the Constitution's requirements for making laws.[50] Under one-house veto statutes, a single house of Congress was empowered to overturn a decision of an executive officer, such as the Attorney General, by majority vote. No concurrence by the other house of Congress or the President was required. The Court held that, unless a power is explicitly given to a single house of Congress by the Constitution, legislative action may be taken only through the process laid out in Article I, § 7 of the Constitution.[51]

Like the one-house veto, the congressional immunity statute purports to empower a single house, or even a committee, of Congress to take legislative action outside the bicameralism and presentment requirements of the Constitu-

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45. *See, e.g.*, *id.* at 943 (acknowledging that unless the a prosecutor can obtain and seal a witness's testimony before an immunity grant is given, "it may well be extremely difficult for the prosecutor to sustain its burden of proof that a witness exposed to immunized testimony has not shaped his or her testimony in light of the exposure"); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991). Some commentators have made the argument that derivative use immunity is the functional equivalent of transactional immunity. *See, e.g.*, R.S. Ghio, Note, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 230 (1992) ("'[U]se and derivative use' immunity is a legal fiction. When ethically applied, § 6002 leads to precisely the same result as did the 'transactional' immunity statutes it replaced."); *see also* AMAR, *supra* note 22, at 60 ("The D.C. Circuit's superstrict approach leaves little difference between use plus use-fruits and transactional immunity.").

46. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

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

48. INS v. Chadha, 462 U.S. 919, 951 (1983).

49. 462 U.S. 919 (1983).

50. *See id.* at 959.

51. *See id.* at 952–57.

tion.[52] A congressional immunity grant matches the several indications of legislative action described by the Court in *Chadha*:

> Examination of the action taken here by one House pursuant to [the legislative veto provision of the statute] reveals that it was essentially legislative in purpose and effect. . . . [T]he House took action that 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. . . . The one-House veto operated in this case to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status.[53]

The legislative character of a committee's immunity grant is easiest to see when it is a grant of transactional immunity. If the committee conducting the hearing votes to grant the witness transactional immunity, the committee is forbidding any later prosecution of the witness for any matter he testifies about. This violates separation of powers under the *Chadha* framework: the committee takes an action—voting to grant immunity—that alters legal rights and duties without going through bicameralism and presentment. The witness can no longer be a potential criminal defendant. And the Attorney General's duty to help the President "take Care that the Laws be faithfully executed"[54] is constrained.

A congressional committee's grant of derivative use immunity is legislative in just the same way. Instead of operating directly to change the status of the witness, it works as a rule of evidence.[55] The committee decrees, through its immunity grant, that any evidence derived from the hearing testimony is inadmissible in court during a prosecution of the witness. Congress can create a

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52. The apparent conflict between § 6005 and the Supreme Court's separation of powers decisions was analyzed by another commentator several years ago. *See* Sklamberg, *supra* note 24, at 173–81. Sklamberg concludes that despite the apparent separation of powers violation, § 6005 is constitutional because it is based on Congress's inherent power to investigate. *See id.* at 181. I argue instead that Congress's investigative power does not allow it to violate other constitutional limitations. *See infra* Part III.A.

53. *Chadha*, 462 U.S. at 952 (emphasis in original).

54. U.S. CONST. art. II, § 3. The Constitution puts this duty directly on the President, but the Attorney General inherits the duty as the agent of the President primarily responsible for prosecution of federal crimes. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and the United States Attorneys . . . are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'").

55. Because the rules for admissibility of evidence after a grant of derivative use immunity are so strict, *see supra* Part I.B.3, a derivative use immunity grant may lead functionally to the same result as a transactional immunity grant. The extent of interference with the prosecution may thus be the same in the two cases, though the form is different.

rule of evidence by statute. But under *Chadha*, it cannot delegate power to a single house or committee of Congress to create a binding law. A congressional grant of derivative use immunity does just that—it purports to be a binding rule of evidence, but is promulgated by a committee alone instead of the full Congress with the assent of (or over the veto of) the President.

The *Chadha* analysis is triggered when a congressional committee takes *any action* that alters the legal rights, duties, and relations of persons outside the legislative branch.[56] The interference does not arise simply because the committee *votes* to grant immunity. Consider a hypothetical statute that automatically gives immunity—either transactional or derivative use—to *all* witnesses who testify at congressional hearings, without giving the investigating committee any opportunity to vote on whether immunity will be granted to particular witnesses.[57] The committee still has complete discretion over which witnesses to call, and therefore over which people will benefit from immunity.[58] When a committee chooses to call one witness instead of another under this statutory scheme, it simultaneously decides to grant immunity to that person instead of the other. The *Chadha* analysis remains unchanged because the committee still takes an action—calling a witness—that alters legal rights and duties.

Congress could grant immunity to individuals without violating separation of powers if it did so by passing a targeted immunity statute for a particular witness. Article I, § 7 of the Constitution creates the process by which Congress can make laws and thereby change legal rights and duties. The Supreme Court has held that if Congress could accomplish an action through legislation, this fact is evidence that the action is legislative in character.[59]

Congress passes private bills for the benefit of particular individuals on a

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56. *See Chadha*, 462 U.S. at 952.

57. The original congressional immunity statute provided exactly this. *See* Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155, 156 ("[N]o person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice . . . for any . . . act touching which he shall be required to testify. . . .").

58. Calling a witness to a congressional hearing takes much less cooperation than the two-thirds majority that is statutorily required to grant immunity. In most congressional committees, the minority party on the committee is allowed to call witnesses of its own. If immunity were granted automatically to witnesses, this practice would allow an immunity grant to issue based on the wishes of less than half of the committee members. *See* SENATE RULE XXVI(4)(d), *available at* http://rules.senate.gov/senaterules/rule26.php ("Whenever any hearing is conducted by a committee (except the Committee on Appropriations) upon any measure or matter, the minority on the committee shall be entitled, upon request made by a majority of the minority members to the chairman before the completion of such hearing, to call witnesses selected by the minority to testify with respect to the measure or matter during at least one day of hearing thereon."); HOUSE OF REPRESENTATIVES RULE XI(2)(2)(j)(1), *available at* http://www.rules.house.gov/ruleprec/RXI.htm ("Whenever a hearing is conducted by a committee on a measure or matter, the minority members of the committee shall be entitled, upon request to the chairman by a majority of them before the completion of the hearing, to call witnesses selected by the minority to testify with respect to that measure or matter during at least one day of hearing thereon.").

59. *See Chadha*, 462 U.S. at 952–54 ("The legislative character of the one-House veto in this case is confirmed by the character of the Congressional action it supplants. . . . Without the challenged provision . . . [the action] could have been achieved, if at all, only by legislation . . . .").

regular basis, though these are mostly regarding immigration.[60] Similar private bills could be written and passed to grant derivative use immunity to particular individuals who testify at congressional hearings. This would, of course, be an onerous process, requiring a majority of both houses of Congress and the signature of the President, or a two-thirds majority of Congress for a veto override.[61]

Congress could also grant transactional immunity by private bill if it wanted to provide even more protection than derivative use immunity. A statute can make prosecution of an individual impossible.[62] Congress always has the option to repeal or amend the law the witness may have violated.[63]

If a grant of immunity given by Congress is a legislative action, it can only be accomplished through the Article I, § 7 legislative process. Any grant of immunity would have to be introduced as a bill, pass both the Senate and House of Representatives, and either be signed by the President or passed by a supermajority vote of Congress over a presidential veto. The process in § 6005, enabling an immunity grant by majority vote of a single house of Congress or by two-thirds vote of a single committee, is unconstitutional under *Chadha*.

B. IMMUNITY GRANTS AS EXECUTIVE ACTION

Immunity grants can also be seen as executive action. They are most commonly used to compel witness testimony in criminal trials, not congressional hearings. A prosecutor grants immunity to a person who may have been involved in a crime, then compels that person to testify against the defendant whom he believes is more culpable. The decision is a tradeoff: the prosecutor could attempt to prosecute both people, but without enough outside evidence to convict both, it is often better to convict one at the price of letting the other go free.[64]

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60. *See generally* Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966) (examining the practice of private legislation in Congress).

61. *See* U.S. CONST. art. I, § 7.

62. Congress could certainly avoid the prosecution of an individual by amending the criminal law to make that person's actions legal. It is less clear whether Congress could by statute exempt an individual from prosecution without making the person's actions non-criminal. Such a statute might create a conflict with the President's obligation to faithfully execute the laws, *see* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . ."), or be a usurpation of the President's pardon power, *see* U.S. CONST. art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States . . . .").

63. *See* Brown v. Walker, 161 U.S. 591, 601 (1896) ("Although the constitution vests in the president 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' this power has never been held to take from congress the power to pass acts of general amnesty . . . ."). Congress would have to expressly forbid punishment of past offenders when repealing the law. *See* 1 U.S.C. § 109 (2000) ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide . . . .").

64. The witness who is granted immunity may "go free" because she is granted transactional immunity and cannot be prosecuted at all, or because she is granted derivative use immunity and the prosecutor knows the evidentiary burdens are so high that any prosecution probably could not succeed.

The decision to prosecute or not, and decisions about how to conduct an ongoing prosecution, are core executive functions.[65] All sorts of factors weigh into these decisions, including how best to use limited prosecutorial resources, the chances of success, a sense of justice and appropriateness, and the possibility of having one potential defendant testify against another in exchange for immunity or reduced charges. Because it is tied up with these quintessential executive decisions of whether to prosecute and what evidence to introduce at trial, a grant of immunity is, normally, a fundamentally executive act within the prosecutor's discretion.[66] This context may be enough to consider an immunity grant an executive action even when it is performed by Congress.

But characterizing the action as executive does not solve the separation of powers problems raised by congressional immunity grants. The Supreme Court has consistently held that Congress may not play any role in the execution of a law. In *Bowsher v. Synar*,[67] the Court noted that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[68] The Court held that the Comptroller General, an officer removable by Congress and thus subject to congressional control, could not execute a law.[69] To allow him to do so would aggrandize the legislative branch at the expense of the executive, a situation the Framers of the Constitution worked to avoid.[70]

Congress may delegate to one of its committees functions that further its legislative proceedings. But it may not delegate executive functions to a congressional committee. In *Buckley v. Valeo*,[71] the Court distinguished between legislative and executive functions that Congress had delegated to the same committee.[72] Investigative authority, the Court reasoned, falls within Congress's own power, and therefore Congress may delegate this power to a committee or agent.[73] Enforcement power, however, is executive in nature and not within Congress's

65. *See* Morrison v. Olson, 497 U.S. 654, 691 (majority opinion) (1988) (characterizing prosecution functions as executive in nature); *id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion."). The Court in *Morrison* held that prosecutorial discretion need not ultimately be controlled by the President, *see Morrison*, 497 U.S. at 691–92, but distinguished the case from one where Congress might try to retain impermissible, ongoing control or supervision of executive branch functions. *See id.* at 694.

66. *See Bordenkircher*, 434 U.S. at 364; *Prosecutorial Discretion*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 203–05 (2006) (citing a long list of cases holding that prosecutorial functions are entirely within the executive branch's discretion).

67. 478 U.S. 714 (1986).

68. *Id.* at 722.

69. *See id.* at 726.

70. *See id.* at 727; THE FEDERALIST NO. 48 (James Madison).

71. 424 U.S. 1 (1976) (per curiam).

72. *See id.* at 137–40.

73. *See id.* at 137 ("Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which

authority.[74] Since Congress does not possess enforcement power itself, it cannot delegate that power to a committee or agent.[75]

The executive power at issue in *Buckley* was the authority to bring civil litigation to enforce election laws.[76] A grant of transactional immunity, which is a decision not to prosecute an individual for a crime at all, can be seen as an equally executive function. The decision of which evidence will be used in a criminal trial—the core of a grant of derivative use immunity—is also a choice within the executive's prosecutorial discretion. An immunity grant from a congressional committee operates, in at least some instances, to overrule the Attorney General or other executive branch officials, who may already be in the process of investigating an individual for prosecution when Congress chooses to call that person as a witness.[77] This executive power cannot be delegated to congressional agents.

The delegation problem is the same whether the delegated powers are exercised by members of Congress or by agents who are not themselves Congresspersons. Congress cannot delegate executive power to a subgroup of Congress, regardless of whether the appointed persons are said to act in their official capacity or their individual capacity.[78] This requirement comports with the constitutional requirement that no member of Congress may simultaneously hold office in the executive branch.[79]

If Congress is dissatisfied with the way the executive branch is executing statutes, it has only one binding mechanism for change—passing new legislation to repeal or amend the provisions with which it is unhappy.[80] This leads to the same ultimate conclusion as the *Chadha* analysis. Congress could pass a

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Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.").

74. *See id.* at 138 ("The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. 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.'").

75. *See id.* at 138–40.

76. *See id.* at 140.

77. This was the case in the Oliver North prosecution. *See* TOOBIN, *supra* note 41, at 51–59 (describing the efforts of the independent counsel's office to secure its ongoing prosecution before North was granted immunity).

78. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 267 (1991) ("That the members of Congress who serve on the Board nominally serve 'in their individual capacities, as representatives of users' of the airports . . . does not prevent this group of officials from qualifying as a congressional agent exercising federal authority for separation-of-powers purposes.").

79. U.S. CONST., art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

80. *See* Bowsher v. Synar, 478 U.S. 714, 733–74 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment indirectly—by passing new legislation."). Congress may also seek to persuade the President to interpret or enforce the statute differently through informal negotiations and political pressure, but these tactics are of course not binding in law.

law, through the bicameralism and presentment procedure created by Article I, § 7 of the Constitution, to remove the possibility of prosecuting an individual. But Congress cannot allow a congressional committee to make that decision alone.

III. RECONCILING POWERS AND PRIVILEGES

Congress's power to conduct investigations and compel testimony has been recognized since the founding era. The power is broad, encompassing any investigation in furtherance of its legislative power or other enumerated powers, but not unlimited. The separation of powers problems described above place another important limit on Congress's investigative power—a committee may not grant transactional or derivative use immunity to a witness even if doing so would further its investigative goals. However, because Congress has inherent investigative power, the investigating committee may compel the testimony without a grant of immunity. The protective consequences of the Self-Incrimination Clause can be left in the hands of the executive and judicial branches to determine and implement. A committee may also grant use immunity for the testimony itself, since this type of grant does not interfere with prosecution or change any rights and duties outside the legislative branch.

A. CONGRESS'S INVESTIGATIVE POWER AND ITS LIMITS

Congress has an inherent power to conduct investigations in pursuit of its enumerated powers. This power has been used since very early in American constitutional history[81] and has its roots even earlier in colonial and British parliamentary practice.[82] The investigative power is a necessary incident to Congress's legislative power, and also plays a role in oversight of the executive branch, which is crucial to the constitutional system of checks and balances. However, the power to investigate is not absolute and cannot negate the separation of powers problems caused by congressional immunity grants. Courts have recognized important limitations on Congress's investigative power, which protect individual rights and the prerogatives of the executive branch against encroachment by the legislature. Separation of powers marks another necessary limitation on the investigative power, one the Supreme Court has not yet taken up.

The Constitution does not explicitly grant power to conduct investigations to any branch of government. Congress draws support for its investigative power not from the text of the Constitution, but from a long history of legislative investigations and from the necessity of gathering information in order to

81. *See* O'Neill, *supra* note 14, at 2458–59 (describing "the first noteworthy congressional investigation" in 1792).

82. *See id.* at 2451–57.

legislate and perform its other functions.[83]

In *McGrain v. Dougherty*,[84] the Supreme Court recognized Congress's long-standing use of its investigative power to gather information for evaluating potential legislation.[85] The Court based its holding on the fact that Congress must gather information in order to legislate properly: "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it."[86] Congress's power "[t]o make all Laws which shall be necessary and proper"[87] thus carries with it an implied power to conduct investigations to determine which laws are necessary and proper.[88]

Congress's power to impeach officials also requires investigations. The House of Representatives would likely need to gather information any time it is contemplating using its "sole Power of Impeachment."[89] And the Senate necessarily needs to obtain evidence and question witnesses when exercising its "sole Power to try all Impeachments."[90] Similarly, investigations may be necessary for "[e]ach House [to] be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."[91] The Supreme Court has recognized the propriety of congressional investigations in pursuance of all of these enumerated powers.[92]

The investigative power also includes the power to compel witnesses to appear and to issue subpoenas for documents.[93] The *McGrain* Court recognized that the power to investigate would be toothless without the ability to require witnesses to testify.[94] Congress can require witnesses to present information that

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83. Michael O'Neill has documented the history of congressional investigations in detail. *See generally id.* at 2451–60 (describing the historical practice of legislative investigations in Britain's Parliament, the American colonies, and the early years of the United States Congress); *see also* McGrain v. Daugherty, 273 U.S. 135, 161–74 (1926) (examining the historical practice of legislative investigations in the early Congress and the state legislatures); Sklamberg, *supra* note 24, at 181–82 (noting the practice of legislative investigations in Britain's Parliament and the early Congress).

84. 273 U.S. 135 (1926).

85. *See id.* at 174 ("We are of [the] opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

86. *Id.* at 175. *See also* United States v. Rumely, 345 U.S. 41, 46 (1953) (noting that Congress's "power to inform itself . . . underlies its policy-making function").

87. U.S. CONST. art. I, § 8, cl. 18.

88. *See* O'Neill, *supra* note 14, at 2460 (explaining that the Necessary and Proper Clause implies investigative power, as do the powers to advise and consent, impeach and convict, ratify treaties, and other enumerated powers of Congress).

89. U.S. CONST. art. I, § 2, cl. 5.

90. U.S. CONST. art. I, § 3, cl. 6.

91. U.S. CONST. art. I, § 5, cl. 1.

92. *See* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

93. *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1926).

94. *See id.* at 175 ("Experience has taught that mere requests for . . . information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."). Similarly, the Court in *Kilbourn* included compulsion of testimony in Congress's investigative power. *See Kilbourn*, 103 U.S. at 190.

is necessary to its legislative functions.

The Supreme Court has never explicitly ruled on whether Congress has a power to grant immunity to witnesses at congressional hearings.[95] Some commentators argue that the power to grant immunity is included in Congress's recognized power to investigate and compel testimony.[96] In particular, Howard Sklamberg argues that Congress's inherent power to investigate means that congressional immunity grants are constitutional despite the separation of powers concerns raised by *Chadha* and other cases.[97]

Congress's investigative power, however, is not absolute. The Supreme Court has recognized a number of limitations on Congress's power to conduct investigations.[98] Many of these limitations come into play when an exercise of the investigative power would interfere with constitutional limitations placed explicitly on Congress or powers granted to another branch.[99] The executive branch has also noted that Congress's power of inquiry is limited by the constitutional separation of powers.[100] These precedents strongly suggest that the investigative power does not allow Congress to grant any type of immunity that oversteps its legislative powers or interferes with executive branch prerogatives.

Because the investigative power of Congress is an incident of its enumerated powers, every congressional investigation must be justified with a purpose that furthers an enumerated power. Except in special circumstances like impeachment, congressional investigations are performed under Congress's legislative power. The investigation must therefore have a legislative purpose. The Supreme Court has recognized the necessity of a legislative purpose to make a congressional investigation valid.[101] But in the modern era, this limitation is a

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95. *See* Sklamberg, *supra* note 24, at 164; *see also* Watkins v. United States, 354 U.S. 178, 195–96 (1957) (noting that the government had never challenged congressional witnesses' claims of Fifth Amendment protection in court).

96. *See* Sklamberg, *supra* note 24, at 186–87 (arguing that Congress's investigative power may provide a constitutional basis for a congressional power to immunize witnesses); Van Cleve & Tiefer, *supra* note 34, at 49 ("Although the immunity power is exercised on the basis of statute, it is likely that the Supreme Court would hold that it involves an inherent power of Congress necessary to the exercise of its legislative function."); *see also* Ghio, *supra* note 45, at 236 ("Although the courts have not seriously challenged the authority for congressional grants of immunity, it is, at this point, probably beyond review.").

97. *See* Sklamberg, *supra* note 24, at 180–81 (arguing that the investigative power authorizes Congress to take actions outside the legislative branch without meeting the bicameralism and presentment requirements).

98. *See, e.g.*, Quinn v. United States, 349 U.S. 155, 161 (1955) (noting limitations on Congress's power to investigate).

99. *See id.* at 161 ("[T]he power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.").

100. *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124 (1996), *reprinted as* Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 63 L. & CONTEMP. PROBS. 514, 528–29, 529 n.44 (1996) (noting that though Congress may compel testimony through subpoenas, its power to conduct investigations is subject to the anti-aggrandizement principle and other separation of powers limitations).

101. *See* Watkins v. United States, 354 U.S. 178, 187 (1957) ("No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely

flimsy one. Congress has the power to regulate almost every area of life.[102] It would be a rare hearing subject that could not be supported by some plausible legislative purpose. This limitation may mean little more than that Congress has "no general authority to expose the private affairs of individuals without justification."[103]

Individual rights protected in the Bill of Rights are generally retained by witnesses when they testify in a congressional hearing. Congress must conduct its investigation within the limits imposed by these rights. The Supreme Court held in *Watkins v. United States*,[104] for instance, that a congressional committee must respect the First Amendment speech and associational rights of witnesses.[105]

Congress's power to conduct investigations is also limited by the doctrine of executive privilege.[106] Courts are often reluctant to tread into separation of powers disputes, so claims of executive privilege are frequently avoided through a finding of lack of standing or other devices.[107] Assertions of executive privilege have nonetheless been highly effective in limiting the reach of congressional investigations. As a district court noted recently, "no court has ever before granted . . . an order that the President (or Vice President) must produce information to Congress (or the Comptroller General)."[108] Executive privilege has thus traditionally acted as a separation of powers limitation on Congress's inherent power to investigate.

In the areas described above, other rights and powers have been considered by the courts as valid reasons to limit Congress's investigative powers. The inherent power to investigate does not allow Congress to disregard individual rights or the executive's prerogative to keep internal documents confidential. In fact, the reverse is true. Those rights and prerogatives demarcate the limits of the investigative power. Sklamberg's argument that Congress's investigative power allows committees to grant immunity in violation of the *Chadha* and

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for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.").

102. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); Wickard v. Filburn, 317 U.S. 111 (1942) (expanding the reach of the Commerce Clause to intrastate noncommercial activity); Gonzales v. Raich, 545 U.S. 1 (2005) (reaffirming *Wickard*). *But see* United States v. Morrison, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as not affecting interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as not affecting interstate commerce).

103. *Watkins*, 354 U.S. at 187.

104. 354 U.S. 178 (1957).

105. *See id.* at 197 ("[A]n investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly.").

106. Executive privilege is the claim that communications between a President and his advisors should remain confidential and are not discoverable by a court or congressional hearing. *See* United States v. Nixon, 418 U.S. 683, 703 (1974).

107. *See, e.g.*, Walker v. Cheney, 230 F. Supp. 2d 51, 74–75 (D.D.C. 2002) (dismissing for lack of standing a suit by the Comptroller General to compel documents from the Vice President).

108. *Id.* at 53.

Bowsher principles therefore runs contrary to existing investigative powers doctrine.[109] Instead, Congress's power to conduct investigations is limited by the separation of powers problems inherent in congressional grants of immunity.

B. COMPELLING TESTIMONY AND GRANTING IMMUNITY

The history and doctrine recounted above shows that Congress has an inherent power to compel testimony in furtherance of its legislative and other powers. A distinction must be drawn, however, between compelling testimony and granting immunity. While compelling testimony on pain of contempt is directly related to the operation of the legislative functions, granting immunity is not. Instead, the immunity grant deals with the expected consequences of compelling the testimony. These consequences fall within the scope of the executive and judicial branches, not Congress.

Testimony—even potentially incriminating testimony—can be compelled without an accompanying grant of immunity. Congress has used its power to compel testimony since at least 1792,[110] but did not enact the first immunity statute until 1857.[111]

There is an important difference between the propriety of compelling testimony in the first instance and the propriety of introducing the evidence into trial later. Akhil Amar has pointed out that testimony may properly be compelled in a variety of settings[112] and that the question of whether the compelled testimony may be introduced into a criminal trial is conceptually separate.[113]

Amar argues that the questions of exclusion of evidence and the scope of immunity are identical.[114] He is correct only to the extent that an immunity grant is kept at its constitutional minimum. A prosecutor might choose to give a witness more immunity than absolutely required, in order to convince the witness to cooperate more fully or ensure that the witness is completely honest in his testimony.[115] A prosecutor can grant more immunity than is constitutionally necessary because his prosecutorial discretion allows him to make tradeoffs, including the choice not to prosecute someone at all.[116]

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109. *See* Sklamberg, *supra* note 24, at 180–81, 198 (arguing that Congress may grant derivative use immunity when doing so is "'demonstrably critical' to an investigation," despite the separation of powers problems with such a grant). Sklamberg is correct that Congress has some authority in specific circumstances to alter rights and duties outside the legislative branch without bicameralism and presentment, but these are limited to areas in which the Constitution grants explicit authority to a single house of Congress, such as the power of impeachment held by the House of Representatives and conviction held by the Senate, which he mentions. *See id.* at 181 n.178.

110. *See* O'Neill, *supra* note 14, at 2458–59.

111. *See id.* at 2503.

112. *See* AMAR, *supra* note 22, at 70 (arguing that the government should be able to compel testimony in many non-court situations).

113. *See id.* at 77.

114. See *id.*

115. *See id.* at 71 (arguing that reliability of witness testimony is the key purpose for understanding the meaning of the Self-Incrimination Clause).

116. *See supra* note 66 and accompanying text.

If a witness is not specifically granted immunity, but is nonetheless compelled to testify on pain of contempt, the privilege against self-incrimination does not cease to exist. Instead, the judge at the later criminal trial should interpret the Self-Incrimination Clause to prevent the introduction of the compelled testimony and any other evidence that is forbidden under the Constitution.[117] Since the judge is applying the Constitution alone, not an immunity statute or an immunity agreement between the prosecutor and the defendant, the judge only has the power to grant the minimum amount of protection constitutionally required. In this situation, the questions of immunity and excludable evidence are in fact identical.

The situation of a congressional committee compelling testimony is closer to that of the judge than the prosecutor. Because of the limits on committee action recognized in *Chadha*, a committee cannot take any action altering the rights and duties of individuals. The committee therefore cannot grant any more immunity than absolutely required by the Constitution—that is, the amount of protection the witness would have even without a specific "grant." Offering any extra immunity would alter the rights of the witness and the duties of the Attorney General,[118] and would also impermissibly interfere with the executive branch's prosecutorial discretion.[119]

If the congressional committee chooses not to actively grant immunity at all, the witness will continue to be protected by the Self-Incrimination Clause at a later trial. The judge in that trial will be obligated to exclude any evidence that violates the witness's privilege against self-incrimination. A perfectly constitutional route for an investigating committee wishing to gather necessary information without intruding on the power of the executive branch is to simply compel the testimony and let the prosecutor (in his exercise of discretion) and the judge (in his application of the Constitution) decide whether a prosecution against the congressional witness can proceed.[120]

The judge's interpretation of the constitutional requirements of the Self-Incrimination Clause, coming last in time, will usually prevail. By contrast, the congressional investigating committee comes first in time. A congressional immunity grant might be seen as an interpretation of the constitutional limits on the use of compelled testimony. But even if the committee believes that a certain level of immunity is required by the Constitution and flows naturally

117. *See* AMAR, *supra* note 22, at 79 n.221 (explaining that Self-Incrimination Clause can be self-executing but that judges have been reluctant to read it in that way). The Self-Incrimination Clause already operates as self-executing to a certain extent, since the remedy for compelling testimony without granting enough immunity is either a reversal of the conviction or exclusion of the evidence at trial. *See* Counselman v. Hitchcock, 142 U.S. 547, 586 (1892) (ordering the appellant to be released from custody); United States v. North, 920 F.2d 940, 946–49 (D.C. Cir. 1990) (per curiam) (reversing the conviction and requiring that testimony be excluded from any later criminal trial unless the prosecution met a high burden of proving the evidence was not tainted).

118. *See supra* Part II.A.

119. *See supra* Part II.B.

120. *See* O'Neill, *supra* note 14, at 2546–47, 2549–50.

from the compulsion of testimony, the committee may not dictate its interpretation of the requirements of the Self-Incrimination Clause to the executive and judicial branches.[121] If Congress's compulsion of a witness's testimony has consequences for the witness's prosecutability, the executive branch must make that determination when deciding whether to prosecute.[122] If the prosecutor does decide to bring charges against the witness, the judge in the case will make the ultimate decision about the extent of the privilege against self-incrimination as applied to the witness and his situation.[123]

In a sense, a congressional grant of immunity is not a "grant" at all. To the extent that the congressional immunity grant exceeds the constitutional minimum, it is ineffective because it is not within Congress's power to give. Suppose Congress granted a witness transactional immunity, which is more than the minimum protection required by the Self-Incrimination Clause.[124] A prosecutor wishing to bring charges against the witness, supported by evidence derived entirely from independent sources, could argue that since Congress's immunity grant was invalid, the case against the congressional witness should be allowed to proceed. But if Congress's grant of immunity is only at the constitutional minimum level,[125] the grant operates no differently than flatly compelling the testimony without any explicit guarantee of non-use. Congress's practice of granting immunity, therefore, is either unconstitutional or superfluous, depending on the extent of the immunity offered.

C. USE IMMUNITY AND SEPARATION OF POWERS

The separation of powers problems caused by congressional immunity grants only arise when the grant is of transactional or derivative use immunity. A congressional committee could grant plain use immunity without violating the

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121. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) ("The power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers.").

122. *See generally* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990) (discussing the long history and validity of executive branch interpretation of the Constitution); *see id.* at 927 (noting that the executive branch must interpret the requirements of the Constitution when deciding whether to prosecute).

123. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recognizing the authority for judicial review of legislative and executive action).

124. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) ("Transactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege."); United States v. Poindexter, 951 F.2d 369, 373 (D.C. Cir. 1991) ("The scope of immunity provided by § 6002 is coextensive with the scope of the Fifth Amendment privilege against self-incrimination.").

125. The minimum level is currently recognized to be derivative use immunity. *See generally Kastigar*, 406 U.S. 441 (1972). However, some scholars have argued that plain use immunity is sufficient to protect the constitutional privilege against self-incrimination. *See, e.g.*, AMAR, *supra* note 22, at 70. If plain use is the constitutional minimum and congressional committees could grant that level of protection, the separation of powers problems with congressional immunity grants would disappear. *See infra* Part III.C.

Chadha or *Bowsher* doctrines.[126] However, the Supreme Court has held that use immunity is not sufficient to protect the privilege against self-incrimination.[127] Some scholars have argued that the Court's self-incrimination precedents are erroneous and should be changed to permit plain use immunity.[128] The wisdom of such a change in doctrine is beyond the scope of this Note, but in this section I explain why plain use immunity avoids the separation of powers problems inherent in other types of congressional immunity grants.

Congressional action is only forbidden under *Chadha* and *Bowsher* if it alters rights, duties, or relationships outside the executive branch.[129] Unlike transactional or derivative use immunity, a grant of use immunity does not alter rights and duties. This is true either under a statutory scheme that allows a committee to vote to grant use immunity or under a blanket statute that forbids the use of any congressional hearing testimony as evidence in a witness's trial.

The witness's rights and duties outside Congress are largely the same before and after a use immunity grant. True, the witness may have a duty to testify at the congressional hearing that was previously blocked by the assertion of the privilege against self-incrimination.[130] But the duty to testify only applies within the legislative branch, and so does not require legislation to impose.[131] Outside the legislative branch, the witness's status as potential criminal defendant has not changed, nor have any rights been granted or taken away.

Neither does a congressional grant of use immunity interfere with the prosecutor's rights and duties. A grant of use immunity to a congressional witness certainly makes the prosecutor no worse off than he was prior to the grant. He can continue to investigate and make prosecutorial decisions exactly the way he would if Congress were not involved at all. He need not worry about impermis-

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126. Michael Stokes Paulsen noted this point in a brief comment, without elaboration, in a book review several years ago:

> 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. These difficulties do not disappear, but they are reduced substantially, if the privilege operates to exclude only the immunized testimony itself, not derivative evidentiary facts.

Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1480 (1997). Paulsen's observation is actually slightly inaccurate—use immunity without derivative use immunity eliminates the separation of powers problems with congressional immunity grants entirely.

127. *See* Counselman v. Hitchcock, 142 U.S. 547, 564–65 (1892) (holding a use immunity statute unconstitutional because it "is not co-extensive with the constitutional provision" against compelled self-incrimination).

128. *See, e.g.*, AMAR, *supra* note 22, at 70.

129. *See* INS v. Chadha, 462 U.S. 919, 952 (1983).

130. If the Self-Incrimination Clause is self-executing as described in Part III.B, even this duty has not changed, since the witness is subject to compulsory process regardless of his assertion of the privilege.

131. *See Chadha*, 462 U.S. at 952 (noting that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Art. I" and that only exercises of legislative power require the Article I, § 7 process). If imposing a duty to testify required legislation, every congressional committee subpoena would require a statute.

sible exposure of himself, his staff, or witnesses ruining the case against the potential defendant. There would be no rush to gather and "can" evidence before the compelled testimony is given to Congress. He could even examine the testimony to gather new leads that he did not have before the hearing.

The only thing off-limits to the prosecutor after a use immunity grant from Congress is introduction of the compelled testimony into evidence in a criminal trial against the witness. But without the immunity grant and compelled testimony, the transcript would not be in existence at all. The action of the congressional committee to grant use immunity (or to call a witness to testify, in the case of a blanket use immunity statute) does not interfere with any executive branch duties or prerogatives.

Use immunity grants from congressional committees are thus permissible under existing separation of powers doctrine, even though more extensive immunity grants are forbidden. A use immunity grant could also work in conjunction with the self-executing privilege against self-incrimination described in Part III.B. Since use immunity is insufficient to protect the privilege against self-incrimination in current doctrine, the judge in any later criminal trial could impose additional requirements.

CONCLUSION

Investigations can help Congress explore and write effective legislation, provide oversight of the executive branch, and educate the public. To perform these functions, investigating committees sometimes must compel testimony, even over a witness's claim of the constitutional privilege against self-incrimination. This situation leads to a number of separation of powers problems. The fundamental difficulty is that Congress, in the exercise of its legislative powers, makes decisions in an area that is normally within executive branch control. When operating on such sensitive ground, Congress should take care both to stay within the formal limits of its powers and to be attentive to later difficulties it may create for prosecution.

When Congress decides to compel potentially incriminating testimony, it should stay within its constitutional powers. In addition to respecting the formal limits on its powers, Congress should whenever possible respect the goals and intentions of the executive branch. Congress should be mindful that compelling testimony, even without a grant of immunity, could hinder later criminal prosecutions through executive and judicial interpretations of the Self-Incrimination Clause. More often than not, the investigating committee and the prosecutor will be able to reach an agreement about the most effective way to accomplish both branches' goals.[132] Congressional testimony may be postponed until a criminal investigation is complete. Or Congress and the executive might

132. For example, the independent counsel and congressional investigating committee in the Iran-Contra investigations agreed that certain key witnesses should receive immunity. *See* TOOBIN, *supra* note 41, at 47–48, 52.

agree that the prosecutor should grant immunity to some people, thus freeing them to give congressional testimony, while preserving others for potential prosecution. Any number of compromises could be worked out between the branches.[133] Only in exceptional cases will a congressional investigating committee need to act in contravention of the executive branch. By working together with the executive branch and remaining within the limits of its own power, Congress can avoid creating separation of powers disputes whenever possible.

133. These sorts of compromises between the branches likely are easier to accomplish than a congressional grant of transactional or derivative use immunity by statute, as discussed *supra* notes 60–61 and accompanying text. Without the cooperation of the President signing the immunity bill into law, Congress would require a two-thirds majority of both houses to grant immunity over a presidential veto.