Congressional Use of Immunity Grants after Iran-Contra

Ronald F. Wright
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INTRODUCTION

Republicans in Congress once seemed eager to investigate all the dark corners of the Whitewater affair. But after the November 1994 elections, Whitewater hearings began only after months of delay. Once they started, the investigations proceeded slowly and only covered well-worn terrain. What explains this outbreak of caution and deliberation among the new majority party?

Part of the answer lies in the parallel Whitewater investigation of Independent Counsel Kenneth Starr. Starr asked congressional investigators to delay their hearings until he completed his work on the relevant events. Key Republican members of Congress, including Senator Alfonse D'Amato, chair of the Senate Special Committee on Whitewater, and Representative Jim Leach, chair of the House Banking and Financial Services Committee, went along with the request. They told the press that they did not want to interfere with Starr's investigation.

Starr most hoped to avoid a congressional grant of immunity to witnesses. If Congress were to force witnesses to testify by granting them immunity from any prosecution based on that testimony, a later criminal prosecution of the immunized witnesses by Starr's office would be quite difficult. This is particularly true in light of two decisions by the Court of Appeals for the

D.C. Circuit that grew out of the prosecutions of Oliver North and John Poindexter for their conduct in the Iran-Contra affair. Those cases made it more difficult than ever for the government to prove that its prosecution did not rely on a defendant's compelled congressional testimony. These judicial interpretations of the Fifth Amendment's self-incrimination clause and of federal immunity statutes have not only hampered criminal investigations, but have hobbled full democratic debate in the political arena.

The possible damage from congressional immunity grants was not the only reason D'Amato and Leach delayed the White-water hearings. After all, both had promised throughout 1994 that the investigating committees would not grant any witnesses immunity. Yet Starr and his predecessor, Robert Fiske, insisted all along that the hearings would interfere with the criminal investigation, even if Congress granted no immunities at all. Starr and Fiske feared that congressional investigators might contact witnesses before their own investigators could finish collecting evidence. The Whitewater prosecutors worried


5. See generally Andrew Taylor, New Revelations on Whitewater Revive GOP Call for Hearings, 52 CONG. Q. WKLY. Rptr. 585 (1994) (detailing Special Counsel Robert Fiske's appeals to Congress to delay hearings). In March 1994, Senator D'Amato and other Republican members of Congress criticized the Democrats for refusing to vigorously investigate the Whitewater affair. They argued that any potential interference with the special prosecutor could be remedied by avoiding grants of immunity to witnesses and by allowing then-prosecutor Robert Fiske to interview witnesses prior to their appearance before Congress. See Michael Ross, Senate OKs Whitewater Resolution, L.A. TIMES, Mar. 18, 1994, at A17 (reporting Senate compromise on timing of hearings); Whitewater Counsel Urges Hearing Delay, MINNEAPOLIS STAR TRIB., Mar. 10, 1994, at A1 (describing Special Counsel's opposition to hearings); Charles V. Zehren, Fiske to Congress: Put Off Hearings, NEWSDAY, Mar. 8, 1994, at 15 (detailing Fiske's efforts to delay congressional hearings).


Such interviews [congressional interviews of witnesses] could jeopardize our investigation in several respects, including the dangers of Congressional immunity, the premature disclosures of the contents of documents or of witnesses' testimony to other witnesses on the same
that if congressional investigators contacted witnesses and re-
leased any information about their conversations, this would al-
low other witnesses to revise their own testimony in light of the
new information. Such congressional contacts could also affect
the way that the contacted witnesses themselves remembered
the key events.

The prosecutors' request that Congress avoid any contact at
all with potential witnesses — and not just refrain from grant-
ing immunities — demonstrates the breadth of the possible con-
lict between the two parallel investigations. The willingness of
Congress to honor these requests in the Whitewater context is
an extraordinary statement about Congress's view of the rela-
tive importance of criminal and congressional inquiries.

Even accounting for the full range of conflicts between crim-
inal and congressional investigators, relations between the two
groups of investigators do not fully explain the course and tim-
ing of the Whitewater hearings. The law of immunity grants,
and the broader aims of criminal investigators, are only two of
the elements in the political calculus at work here. Democrats
watching these events have pointed out that by delaying a full
congressional investigation several months to accommodate the
Independent Counsel, the Republican committee chairs pushed
their public hearings further into the 1996 presidential cam-
paign season.8 And Republicans outside the banking commit-
tees noted that abbreviated initial hearings on Whitewater did
little to attract popular attention. The Republican leadership
insisted that any Whitewater hearings would have to await ac-
tion on the higher legislative priorities contained in the Contract
with America.

I hope in this Article to sort out how the law of immunity
combines with political forces to shape congressional investiga-
tions of the executive branch that take place at the same time as
criminal investigations. While the Whitewater matter provides
a recent example of this dynamic at work, it is by no means

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at 12 (detailing political considerations involved in the timing and reach of the
Whitewater investigation).
unique. I begin in Part I with a description of the costs that now attach to congressional grants of immunity. In Part II, I suggest steps Congress might take to reduce those costs, but conclude that none of these are likely to succeed.

In Part III, I abandon the idea that Congress can avoid conflicts between parallel prosecutorial and congressional investigations. Recognizing that congressional investigations will sometimes be inconvenient and costly for prosecutors, I propose several ways to help Congress decide more carefully when to go forward despite the risks. I conclude that Congress can take steps to improve procedures for considering possible immunity grants, even though such procedural changes are unlikely to produce consistent and satisfactory deliberation in Congress. Part IV of the Article places Congress's immunity practices in the larger political context of investigations of the executive branch. I lay out some of the inconveniences that congressional investigations might create for prosecutors even if those congressional bodies never grant immunity to witnesses. Then I describe the political circumstances that make these inconveniences valuable to some members of Congress, and give them (at least sometimes) a viable reason to delay or avoid a full investigation.

These questions will remain relevant long after the Whitewater affair fades from memory. Whenever there is reason to suspect wrongdoing by a high-ranking federal official, there is a good chance that both Congress and criminal prosecutors will want to investigate. Because of the consequences of congressional immunity grants, there is also a good chance that the congressional investigation will interfere with the criminal investigation. Recognizing such potential conflicts, criminal prosecutors have time and again requested that Congress postpone or modify its investigation of highly visible incidents.


10. The number of congressional investigations is much higher now than it was earlier in this century. JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 209 (1976).

Whitewater is not unique in the way that congressional investigators have deferred to criminal investigators. From a broader perspective, this tells us something about the relative value in our political culture of congressional hearings and criminal prosecution. The eventual failures of the North and Poindexter prosecutions have forced Congress to choose between holding executive branch officials accountable during congressional hearings or during criminal proceedings. Congress's current reluctance to grant immunity suggests that we will too often choose the latter.

Giving priority to the criminal proceedings reflects our misplaced faith in the power of the criminal law to vindicate all public morality and to stop all wrongdoing. Further, it reinforces cynicism about legislators to say that congressional investigations are only for show, and that good citizens should not be distracted by what happens in that circus atmosphere. Thus, this essay about a narrow investigative technique—grants of immunity—is also a plea to think of congressional hearings as a meaningful forum both for discussing public values and for encouraging lawful and ethical conduct by public officials.

Arlin Adams, Independent Counsel for the HUD scandal, indicated that the two investigations of that matter could run side by side as long as no immunities were given. Congressman Christopher Shays, Inaction by Ethics Committee, Congressional Press Releases, July 29, 1994. Interim U.S. Attorney J. Ramsey Johnson, investigating the House Post Office Scandal, also requested that Congress keep investigative documents secret in order to preserve his investigation. Armed with a letter from Johnson urging that the documents and transcripts be withheld, Democrats charged that Republicans were out to “rev up” the talk shows and score political points, even if it meant “blowing the case.” Eric Pianin, House Votes to Keep Post Office Documents Secret; Democrats Claim Release Would Jeopardize Federal Prosecution; GOP Charges Coverup, WASH. POST, July 23, 1993, at A16.

The same types of requests will surely come from the independent counsels investigating Mike Espy, Henry Cisneros, and Ron Brown should Congress show an interest in conducting its own investigations of their matters. On September 9, 1994, Donald Smaltz was named as independent counsel to investigate whether Agriculture Secretary Mike Espy accepted gifts from companies regulated by his department. Pierre Thomas & Howard Schneider, Los Angeles Attorney Chosen To Head Investigation of Espy, WASH. POST, Sept. 10, 1994, at A3. David Barrett was named on May 24, 1995, as independent counsel to investigate whether HUD Secretary Henry Cisneros broke the law when he lied to the FBI about payments to a former mistress. Michael Hedges, Lawyer Active in GOP to Head Cisneros Probe, WASH. TIMES, May 25, 1995, at A1. The conflict between congressional and prosecutorial investigators can also arise in less visible settings, such as investigations of defense procurement.
I. COUNTING THE COSTS OF IMMUNITY GRANTS

A. THE STATUTE

The Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."\(^{12}\) The government cannot compel a witness in a non-criminal proceeding, such as a civil trial or congressional hearing, to provide evidence that would tend to expose the witness to later criminal charges.\(^{13}\) Therefore, if Congress wants to obtain incriminating testimony from a witness, it must promise that no government agent will use that congressional testimony to further a later criminal prosecution against the witness.\(^{14}\) This promise is known as "immunity."

Between 1892 and 1970, all the federal immunity statutes in active use conferred "transactional immunity" on witnesses.\(^{15}\) The statutes provided that the government would not prosecute a witness for any crimes arising out of any "transaction" de-

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12. U.S. Const. amend. V.
13. Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would support a conviction under a federal criminal statute but likewise embraces those that would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) ("[O]bject was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.").
15. The first federal immunity statute, passed in 1857, conferred "transactional" immunity on witnesses compelled to testify. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155 (1857). An 1862 amendment to the statute provided more limited "simple use" immunity, which prevented the use of testimony, but not prosecution of the witness. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (1862). The Supreme Court overturned one such "simple use" immunity statute in Counselman because the statute allowed "indirect" use of investigative leads from the testimony, such as using the compelled testimony to identify new witnesses or other sources of evidence. 142 U.S. at 586. The Court upheld the use of "transactional" immunity in Brown. 161 U.S. at 610. Nonetheless, the portion of the 1862 statute applying to witnesses appearing before Congress remained unamended (and thus was not used) until 1954, when a revised statute provided "transactional" immunity for witnesses compelled to testify before Congress. Act of Aug. 20, 1954, ch. 769, 68 Stat. 745 (1954) ("[C]ommittee shall [authorize] such witness to be granted immunity ... with respect to the transactions, matters, or things concerning which he is compelled ... to testify.").

scribed in the testimony. For instance, one federal statute prevented criminal prosecution for "any transaction, matter or thing, concerning which [the witness] may testify."\textsuperscript{16}

Even after a grant of transactional immunity, prosecutors could pursue criminal charges in limited circumstances. The government could still prosecute for perjury or false statements any witness who deliberately lied during the immunized testimony or during later testimony.\textsuperscript{17} Moreover, the Fifth Amendment protects only against the use of compelled testimony for criminal sanctions: the government could therefore use the compelled testimony against the witness in later civil or administrative proceedings.\textsuperscript{18} Despite these exceptions, many viewed transactional immunity as overly generous to witnesses because it allowed witnesses to take an "immunity bath" by testifying about as many criminal transactions as possible when called to


\textsuperscript{18} See \textit{Brown v. Walker}, 161 U.S. 591, 598 (1896) ("The extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature."); \textit{see also Ullmann v. United States}, 350 U.S. 422, 430-31 (1956) ("[I]mmunity granted need only remove those sanctions which generated the fear justifying invocation of the privilege."); Daniel E. Feld, Annotation, \textit{Use in Disbarment Proceeding of Testimony Given by Attorney in Criminal Proceeding Under Grant of Immunity}, 62 A.L.R. 3d 1145 (1975) (discussing cases which examine whether an attorney's testimony in a criminal proceeding under a grant of immunity may be subsequently used against the same attorney in a disbarment proceeding).

Immunity would not attach to self-incriminating statements not made in response to a question, nor to crimes not substantially related to the transaction covered during the testimony. Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472, 476-78 (1972); Heike v. United States, 227 U.S. 131, 143-44 (1913); \textit{see Allen B. Moreland, Congressional Investigations and Private Persons}, 40 S. Cal. L. Rev. 189, 253-60 (1967) (discussing investigations involving the Fifth Amendment).

Most states allow non-criminal uses of a witness's compelled testimony. 2 \textit{SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE} § 9.13 (1987). In addition, two federal circuits permit immunized testimony at the sentencing hearing once a witness has been convicted of an offense. United States v. Crisp, 817 F.2d 256, 258-59 (4th Cir. 1987) (immunized testimony at sentencing permitted), \textit{cert. denied}, 484 U.S. 856 (1987); United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986) (same); \textit{contra} United States v. Abanatha, 999 F.2d 1246, 1249 (8th Cir. 1993) (immunized testimony at sentencing prohibited).
testify.\textsuperscript{19} Transactional immunity made compelled witnesses better off than they would have been if they had remained silent.

As part of the Crime Control Act of 1970, Congress rewrote all federal immunity statutes to provide a narrower form of immunity, known as “use immunity.”\textsuperscript{20} Use immunity makes a less ambitious promise to the witness. It promises only that the government will not use the compelled testimony directly as evidence, and will not use it indirectly as an investigative lead to obtain evidence for a criminal case.\textsuperscript{21} The government can still prosecute an immunized witness for the crime he or she testifies about, so long as the prosecution can prove that it did not make such direct or indirect use of the compelled testimony.\textsuperscript{22}

The power of Congress to compel testimony has always been governed by statutes separate from those dealing with testimony before grand juries, administrative agencies, or trials. The 1862 statute that specifically gave Congress power to grant immunity to witnesses provided only for use immunity.\textsuperscript{23} In 1892, however, the Supreme Court overturned another federal statute that conferred use immunity on witnesses compelled to testify before grand juries, holding that the Fifth Amendment required the more generous transactional immunity as a consti-

\begin{thebibliography}{9}
\bibitem{20} 18 U.S.C. §§ 6001-6005 (1994). The Court in Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964), raised the possibility that a use immunity statute could survive a Fifth Amendment challenge. The Court suggested that a state immunity statute would provide sufficient protection for compelled witnesses if a court-created exclusionary rule prevented use of the testimony or any of its fruits in a subsequent federal prosecution of the witness. \textit{Id.}
\bibitem{21} “\textit{No testimony or other information compelled under the [court] 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 false statement, or otherwise failing to comply with the order.}” 18 U.S.C. § 6002. Some argue that the statute also prevents the prosecution from using the compelled testimony indirectly in any way that could strengthen the government’s case, even if the indirect use does not lead to new evidence. See \textit{infra} notes 59-63 (describing some courts’ per se rule against the prosecution’s use of compelled testimony).
\bibitem{22} See, e.g., United States v. Nyhuis, 8 F.3d 731, 740-42 (11th Cir. 1993) (denying compelled self-incrimination claim when testimony established that evidence was derived from independent sources), \textit{cert. denied}, 115 S. Ct. 56 (1994); United States v. Dynalectric Co., 859 F.2d 1559, 1578-80 (11th Cir. 1988) (“Paxson’s self-serving testimony provided no direct or investigatory leads for which the government did not have a legitimate independent source.”), \textit{cert. denied}, 490 U.S. 1006 (1989).
\bibitem{23} Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (1862) (providing immunity for witnesses testifying before Congress).
\end{thebibliography}
tutional minimum.\textsuperscript{24} Congress did not amend the statute to allow for transactional immunity until 1954 for congressional witnesses. Senator Joseph McCarthy and other members of Congress investigating "un-American activities" hoped to compel the testimony of many witnesses who had invoked the Fifth Amendment, and needed to create a statutory basis for doing so.\textsuperscript{25} Thus, from 1892 until 1954, Congress had no effective power to compel testimony if a witness claimed the self-incrimination privilege.\textsuperscript{26}

The 1954 immunity statute for congressional witnesses did not empower individual members of Congress to obtain a compulsion order. Instead, the request had to come from two-thirds of the members of a full committee,\textsuperscript{27} or from the majority of the members present in either the House or the Senate as a whole.\textsuperscript{28} Congress provided for the two-thirds requirement\textsuperscript{29} because some members were concerned about single-member subcommittees (consisting of individual Senators or Representatives) holding hearings to expose Communists in important American institutions.\textsuperscript{30} Congress as a whole was unwilling to give immunity power to the individual members who were responsible for these abusive proceedings.\textsuperscript{31}

The 1970 version of the congressional immunity statute, 18 U.S.C. § 6005, retains the two-thirds voting requirement of the

\begin{itemize}
\item \textsuperscript{24} Counselman v. Hitchcock, 142 U.S. 547 (1892). See supra note 15 (describing Counselman).
\item \textsuperscript{26} See ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS 336-39 (1928) (reviewing attempts to reenact the statute of 1857); TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 216-21, 296-300 (1955) (examining the 1862 and 1954 immunity statutes).
\item \textsuperscript{27} TAYLOR, supra note 26, at 218. The earliest Congresses were reluctant to give any investigative power at all to full committees. It was not until 1827 in the House, and 1859 in the Senate, that committees had the power to compel testimony at all, putting aside any questions of Fifth Amendment privileges. M. Nelson McGeary, Congressional Investigations: Historical Development, 18 U. CHI. L. REV. 425, 426-27 (1951).
\item \textsuperscript{29} TAYLOR, supra note 26, at 218.
\item \textsuperscript{30} Comment, supra note 28, at 1576-78. For an account of one such single-member subcommittee hearing convened by Senator Eastland, see BARTH, supra note 19, at 83-90.
\item \textsuperscript{31} See Cong. Rec. supra note 25 (discussing Senate debate on the immunity bill); Rufus King, Immunity for Witnesses: An Inventory of Caveats, 40 ABA J. 377-81 (1954) (examining the problems that expanding immunity powers creates).
\end{itemize}
1954 statute. The 1970 statute requires a full committee, or the House or Senate as a whole, to seek an order from a district court judge compelling the testimony of the witness. Before issuing the order, the district court must confirm that an appropriate legislative body authorized the request and that the requesting body has given the Department of Justice at least ten days' notice of the proposed immunity grant. The Attorney General can request an additional twenty days to review the request before the judge may issue the order.

Such an order compels the witness to provide testimony or other information that the witness has previously refused to provide on the basis of the Fifth Amendment privilege. In exchange, the witness receives use immunity: "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."

33. Id.
34. Id.
35. 18 U.S.C. § 6005(b), (c). The legislative history of the 1970 statute does not elaborate on the drafters' reasons for readopting the 1954 authorization procedure. The limited discussion devoted to the immunity statute, part of a much larger crime bill, deals exclusively with the issue of use immunity versus transactional immunity.


36. "The witness may not refuse to comply with the order on the basis of his privilege against self-incrimination." 18 U.S.C. § 6002.
37. Id. The statute, like its predecessors, still allows use of the immunized testimony in prosecutions for perjury or for giving a false statement. Beale & Bryson, supra note 18, § 9.14.


Although the federal system now employs use immunity, several states still provide the more generous transactional immunity to witnesses compelled to testify before a state legislative body. Most state statutes do not mention spe-
In sum, the 1970 statute made two significant changes in immunity practices. The new statute established a uniform procedure for obtaining immunity orders for all compelled testimony in the federal system, replacing the variety of statutes and procedures that applied to congressional, grand jury, administrative, and trial testimony. The statute also attempted to authorize some later prosecutions of immunized witnesses where none had been possible before.

B. Judicial Interpretation of the 1970 Immunity Statute

The Supreme Court considered a challenge to the 1970 federal immunity statute in *Kastigar v. United States.* The Court decided that the use immunity offered under the statute is "coextensive" with the Fifth Amendment privilege against self-incrimination because use immunity leaves the witness in substantially the same position as if he or she had claimed the privilege and remained silent. Transactional immunity, the Court said, offered broader protection than the Fifth Amendment requires.
According to Kastigar, the government can prosecute an immunized witness if prosecutors can satisfy the trial court, during a pre-trial hearing, that the prosecution derived all of its proposed evidence from independent sources. The prosecution has to prove that it made no direct or indirect use of the testimony to make the case against the witness. Direct use means introduction of the compelled testimony into evidence. The bar on indirect (or derivative) use means, at a minimum, that the government may not use the compelled testimony to impeach the witness's testimony or to develop new evidence. The prosecutor bears a "heavy burden" in making this showing.

Federal courts interpreting the immunity statute after Kastigar have found this basic guidance from the Supreme Court insufficient to resolve many of the disputes that have erupted under the statute. For its part, the Court of Appeals for the District of Columbia significantly increased the burdens on prosecutors in its decisions in the Oliver North and John Poindexter Iran-Contra prosecutions. Because the D.C. Circuit is the appeals court most likely to hear challenges to prosecutions in the wake of congressional grants of immunity, these decisions are likely to inform all future congressional immunity grants.

1. Type of Hearing and Standard of Proof

The prosecution, under the immunity statute and the Supreme Court's Kastigar opinion, must prove that it has made no direct or indirect use of immunized testimony. Neither the statute nor Kastigar, however, addresses the type of hearing the

42. Id. at 460.
45. Kurzer, 534 F.2d at 517.
48. See infra notes 78-86 and accompanying text (detailing the D.C. Circuit's opinions in the North and Poindexter cases).
49. The D.C. Circuit is most likely to hear any disputes surrounding congressional grants of immunity because most of the executive branch officials testifying before Congress (at least those witnesses valuable enough to merit immunity) will live and work in Washington. Thus, the federal courts in that district will have venue over most of the subsequent criminal trials that will raise questions about the use of immunized testimony.
court must hold to determine this issue or the exact standard of proof the prosecution must meet.

Federal courts have reached different conclusions about the type of hearing necessary. Some courts, including the D.C. Circuit, have required testimonial presentation of the evidence in an adversarial hearing.\(^{50}\) Other federal courts have allowed the prosecution to demonstrate the independence of its evidence through less formal methods, such as the use of affidavits.\(^{51}\) Even when the court allows less formal methods, the prosecution must do more than submit affidavits or testimony of investigators or prosecutors denying any use of the tainted testimony.\(^{52}\) It must also make an affirmative showing that it derived all the evidence from independent sources.\(^{53}\)

Lower federal courts have also disagreed about the standard of proof the government must meet. The Court in *Kastigar* stated that the prosecution’s burden is “heavy,” but did not specify any of the traditional standards of proof.\(^{54}\) Most lower federal courts (including the D.C. Circuit) have used a preponderance of the evidence standard,\(^{55}\) but a few have required clear and convincing evidence.\(^{56}\) Some federal courts al-

\(^{50}\) United States v. Rivieccio, 919 F.2d 812, 814 (2d Cir. 1990), cert. denied, 501 U.S. 1230 (1991); United States v. Rinaldi, 808 F.2d 1579, 1583-85 (D.C. Cir. 1987); United States v. Zielezinski, 740 F.2d 727, 734 (9th Cir. 1984); United States v. De Diego, 511 F.2d 818, 824 (D.C. Cir. 1975); see United States v. Garrett, 797 F.2d 656, 664 (8th Cir. 1986) (using supervisory power to require district courts to hold evidentiary hearings when the grand jury hearing compelled testimony also indicts the witness).


\(^{52}\) United States v. Turner, 936 F.2d 221, 225 (6th Cir. 1991); United States v. Hampton, 775 F.2d 1479, 1485 (11th Cir. 1985).


\(^{54}\) 406 U.S. 441, 461 (1972).


low prosecutors to demonstrate that any improper use of compelled testimony was harmless error.57

2. "Indirect" Uses by Prosecutors

The federal courts have also reached different conclusions about what constitutes a prohibited "use" of "information directly or indirectly derived" from immunized testimony within the meaning of the statute.58 A few courts have stated that the government can make no use whatsoever of immunized testimony against the witness, whether during the investigation, charging, plea bargaining, or trial of the case.59 These courts emphasize language from the Kastigar opinion suggesting that the statute establishes a "total" or "sweeping" prohibition on "any use" of the compelled testimony "in any respect."60

According to this group of courts, even if the prosecutor's exposure to the compelled testimony does not lead to the introduction of any new evidence, such exposure could motivate the prosecutor to pursue lines of questioning more persistently, or to frame questions or statements more effectively at trial.61 The testimony might also convince a prosecutor to renew efforts to win over a previously identified (but reluctant) prosecution witness.62 These tactical advantages for the prosecution reportedly are functionally equivalent to obtaining new evidence.63

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57. United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989); United States v. Gallo, 859 F.2d 1078, 1083 (2d Cir. 1988); cert. denied, 490 U.S. 1089 (1989).
61. United States v. Pantone, 634 F.2d 716, 721 (3d Cir. 1980) (quoting McDaniel, 482 F.2d at 311, and finding the government successfully showed that it did not use compelled testimony in "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, or otherwise generally planning trial strategy").
63. See Kristine Strachen, Self-Incrimination, Immunity, and Watergate, 56 Tex. L. Rev. 791, 808 (1978) (examining nonevidentiary uses of compelled testimony and endorsing a return to transactional immunity); see also United States v. Dornau, 359 F. Supp. 684, 687 (S.D.N.Y. 1973) (concluding that any prosecutorial exposure to compelled testimony will inevitably lead to tactical advantages, and thus enforcing a per se ban on prosecutorial exposure to immunized testimony), rev'd on other grounds, 491 F.2d 473 (2d Cir.), cert. denied, 419 U.S. 872 (1974); but see Pantone, 634 F.2d at 720 (disallowing "non-eviden-
A larger group of federal courts have prohibited only "evidentiary" uses of the testimony—that is, uses leading to additional evidence admissible in a criminal trial against the witness. These courts allow the prosecution to make "non-evidentiary" uses of the testimony. For instance, a prosecutor might review the immunized testimony to inform a decision about plea bargaining, or to decide where to devote limited investigative resources, or to decide on the order of evidence at trial.

The prosecution can usually demonstrate that it made no evidentiary use of tainted testimony by showing the independent source of each piece of evidence in its case. It can do this most effectively by keeping careful records of the independent source leading to each witness, and to each planned line of questioning on direct and cross-examination. In some circumstances, the prosecution may also be able to "can" the testimony—that is, record the witness's testimony before the defendant receives immunity to testify.

Prosecutors also usually provide a second type of proof. They try to demonstrate that none of the prosecutors, investigators, or others on the prosecutorial team were ever exposed to tainted testimony. This sort of proof is especially helpful in courts that prohibit non-evidentiary uses of testimony, and provides some helpful "insurance" in those courts barring only evidentiary use but upholding conviction after prosecutorial exposure to immunized testimony in between first and second trials of defendant).

64. United States v. Velasco, 953 F.2d 1467, 1474 (7th Cir. 1992); United States v. Rivieccio, 919 F.2d 812, 815 (2d Cir. 1990); United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989); United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); United States v. Crowson, 828 F.2d 1427, 1432 (9th Cir. 1987); United States v. Byrd, 765 F.2d 1524, 1530-31 (11th Cir. 1984); United States v. Bianco, 534 F.2d 501, 508-11 (2d Cir.), cert. denied, 429 U.S. 822 (1976).

65. The D.C. Circuit has not ruled directly on the question of non-evidentiary uses of compelled testimony. Its opinions in the North case, however, suggest that the D.C. Circuit will ultimately join those federal courts completely barring non-evidentiary uses. See United States v. North, 910 F.2d 843, 856-60 (D.C. Cir.) (per curiam), modified, 920 F.2d 940 (D.C. Cir. 1990) (per curiam), cert. denied, 111 S. Ct. 2235 (1991).

66. See Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351, 368 (1987) (arguing that the federal immunity statute and the Fifth Amendment prohibit only evidentiary uses of compelled testimony).


68. 2 Beale & Bryson, supra note 18, § 9.19.
dentary uses. Courts routinely criticize prosecutors who fail to take such precautions when they are available.68

Although it is rare for exposure alone to invalidate an indictment or conviction,69 exposure to immunized testimony does make it more important for the prosecution to document the independent sources for all evidence and trial strategy. Conversely, a showing of no exposure may not be enough, standing alone, to protect an indictment or conviction. The prosecution must still take care to prove the independent source of the evidence, along with the lack of exposure.70

The most important factor about each of these indirect prosecutorial uses of immunized testimony is that the prosecutor retains a great deal of control over the fate of the criminal case. Even if Congress grants immunity over the prosecutor's objection, the prosecutor can—with sufficient planning and expense—insulate the attorneys and investigators from the tainted testimony, and can maintain careful records about the independent sources of evidence. This may be an onerous burden, but prosecutors can nevertheless take steps to meet it.

3. “Indirect” Uses by Prosecution Witnesses: The North and Poindexter Decisions

In addition to such indirect uses of immunized testimony by prosecutors, a few courts have considered whether exposure of other witnesses to the immunized testimony of a defendant can taint the testimony of those other witnesses. Until recently, courts reviewing this alleged indirect “use” of testimony have left the prosecutor with some ability to protect his or her case

68. See United States v. Harris, 973 F.2d 333, 337-38 (4th Cir. 1992) (finding the prosecution failed to prove it did not use defendant's immunized testimony in obtaining evidence because immunized statements were not insulated from the prosecution and incriminating documents were not sealed); United States v. Schwimmer, 882 F.2d 22, 26 (2d Cir. 1989), cert. denied, 493 U.S. 1071 (1990) (recommending the government take precautions such as a “China Wall” to ensure subsequent proceedings would not be tainted by compelled testimony); United States v. Serrano, 870 F.2d 1, 18 n.18 (1st Cir. 1989) (finding no direct or indirect evidentiary use of the testimony notwithstanding the prosecution's access to televised versions of immunized testimony because the prosecution succeeded in showing an independent source for evidence); United States v. Byrd, 765 F.2d 1524, 1532 n.11 (11th Cir. 1985) (stating the government need only show by a preponderance of the evidence that everything used at trial was derived from a legitimate source).


from any tainted witnesses.\textsuperscript{71} Recent decisions, however, have reduced the prosecutor's control over the taint of immunized testimony.

Where other witnesses have been exposed to immunized testimony, some courts have required the prosecution to show that the witness would have chosen to testify at trial, even without the exposure to immunized testimony.\textsuperscript{72} In other words, these courts inquire into the motives of the witness in choosing to testify. They have usually not scrutinized the content of witness testimony for signs of taint from the defendant's immunized testimony.

For instance, in \textit{United States v. Brimberry}, the defendant gave immunized grand jury testimony implicating two fellow employees in a tax fraud.\textsuperscript{73} The two co-workers then pleaded guilty and offered evidence in turn against Brimberry.\textsuperscript{74} Brimberry claimed that the prosecution made an indirect "use" of his testimony by using it to induce the co-workers to testify against him.\textsuperscript{75} The prosecution demonstrated, however, that its case against the co-workers, even without Brimberry's evidence, was very strong and gave the co-workers enough incentive to plead guilty and cooperate with the government.\textsuperscript{76} Hence, the prosecution could avoid the taint of immunized testimony by ensuring that it gives all its witnesses adequate incentive to testify voluntarily.\textsuperscript{77}

Two recent decisions of the D.C. Circuit, however, have reduced the prosecutor's ability to control the tainting of prosecution witnesses by focusing on the content of a witness's testimony, rather than his or her motives in testifying. In

\textsuperscript{71} See G. Robert Blakey, \textit{Immunity Can Work If Used with Care}, \textit{L.A. Times}, Dec. 28, 1986, at 5 (asserting that use immunity can be used to determine the truth in a congressional investigation without jeopardizing subsequent criminal prosecutions).

\textsuperscript{72} \textit{United States v. Brimberry}, 803 F.2d 908, 915-17 (7th Cir. 1986), cert. denied, 481 U.S. 1039 (1987); \textit{United States v. Hampton}, 775 F.2d 1479, 1489 (11th Cir. 1985); \textit{United States v. Kurzer}, 534 F.2d 511, 517-18 (2d Cir. 1976). The defendant in \textit{Brimberry} had testified before a grand jury, and before representatives of the Securities Exchange Commission. \textit{Brimberry}, 803 F.2d at 910; \textit{see also} \textit{United States v. Cavalier} 17 F.3d 90, 94 (5th Cir. 1994) (allowing testimony from a witness who was motivated to testify after hearing about the defendant's compelled testimony implicating him in a separate crime).

\textsuperscript{73} 803 F.2d at 910-11; \textit{but cf. Hampton}, 775 F.2d at 1489 (requiring inquiry into witness's motive to testify \textit{and} content of witness testimony).

\textsuperscript{74} \textit{Brimberry}, 803 F.2d at 910.

\textsuperscript{75} \textit{Id.} at 911.

\textsuperscript{76} \textit{Id.} at 916-17.

\textsuperscript{77} \textit{See} \textit{United States v. Kurzer}, 534 F.2d 511, 517-18 (2d Cir. 1976).
United States v. North and United States v. Poindexter, the court overturned the convictions of Iran-Contra figures Oliver North and John Poindexter because prosecution witnesses' exposure to North's and Poindexter's immunized testimony before Congress constituted improper "use."

The Independent Counsel, Lawrence Walsh, had taken extensive precautions to prevent any prosecutorial exposure to the immunized testimony. The prosecutors canceled newspaper subscriptions and stopped watching broadcast news. Prosecutors also filed with the court "canned" versions of witness interviews completed before the congressional testimony, and memoranda describing the prosecution's investigation and strategy up to that point. Grand jury proceedings were already underway when both Poindexter and North testified. The Independent Counsel presented no immunized testimony to the grand jury, and repeatedly cautioned the grand jurors not to listen to media accounts of the congressional testimony.

The difficulty in the case came not in the exposure of prosecutors to immunized testimony, but in the exposure of the prosecution's grand jury and trial witnesses. Many of the witnesses closely followed the testimony of Oliver North and John Poindexter during televised congressional hearings. While some of those witnesses had given interviews to the FBI or had testified to the grand jury before the congressional testimony took place, others had not yet recorded their testimony in any format. The Independent Counsel asked some witnesses not to expose themselves to the compelled testimony, but most refused. The Independent Counsel also requested that grand jury and trial witnesses answer questions based only on their own recollection, and not based on any facts they may have learned from hearing North or Poindexter testify. The trial court gave the same instruction to trial witnesses.

81. Id. at 309.
83. North, 910 F.2d at 916-17. The district court found that the exposure of witnesses to immunized testimony occurred "in the natural course of events," and was not the product of prosecutorial efforts to refresh the recollection of the witnesses. Poindexter, 698 F. Supp. at 313.
The defendants claimed that this witness exposure to the immunized testimony influenced the content of the witnesses' testimony to the grand jury and at trial. The trial judges in both cases made factual findings that the witnesses all testified truthfully, and based on their own knowledge only. The trial judges also reviewed grand jury testimony and FBI interview notes for trial witnesses before they testified. However, the judges did not review witnesses’ trial testimony line-by-line after the trial to determine whether any witnesses changed testimony as a result of hearing immunized testimony.

The D.C. Circuit held, in both cases, that the trial judges had not taken adequate steps to determine whether exposure to the defendants’ immunized testimony had changed the content of later witness testimony. The trial court in such a circumstance must review the proffered testimony of a witness, line-by-line, to make the determination. The prosecutor may show that there was no impermissible use by demonstrating (1) that the witness was not exposed to compelled testimony, or (2) that the witness was exposed, but conformed his or her testimony to prior recorded testimony. These decisions suggest that prosecutors will need to record or “can” the testimony of their prospective witnesses before any congressional testimony takes place; it is difficult to imagine any other method of showing that a witness’s exposure to compelled testimony did not change the testimony the witness would have given.

Prosecutors will have an extremely difficult time going forward with criminal cases under this standard. Very often, they will be unable to “can” the testimony of key witnesses because witnesses will either not agree to interviews or will invoke their own Fifth Amendment privileges. Prosecutors may also have difficulty predicting, early in an investigation, the identity of witnesses they will need later in the investigation or at trial. It is also likely that prosecutors will not be fully aware of particular issues or facts at the time of canned interviews, and so will simply lack information needed to conduct canned interviews that sufficiently protect against taint.

85. North, 910 F.2d at 872-73.
86. Poindexter, 951 F.2d at 376-77.
Moreover, prosecutors cannot control the exposure of witnesses to the immunized testimony of a defendant. The Iran-Contra prosecutors themselves knew about and tolerated the taint in North's and Poindexter's cases, but they did not initiate or encourage the exposure. The North and Poindexter opinions do not limit themselves to witness exposure that the prosecution initiates. The taint occurs regardless of how the witness learns about the immunized testimony, even if the prosecutor never learns of the exposure. Prosecutors might show the testimony to the witness, or some third party intent upon sabotaging the prosecution might do so. Indeed, a hostile witness might intentionally expose himself or herself to the immunized testimony, hoping to make later testimony useless to the prosecution.\(^8\)

Obstruction-of-justice statutes are no cure for the conduct of potential witnesses. Prosecutors might file criminal obstruction charges against a witness who deliberately attempts to make his or her own testimony worthless by exposure to the defendant's immunized testimony.\(^8\) 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.\(^9\)

Prosecutors have even less chance of controlling the exposure of witnesses when the defendant gives immunized testimony before Congress (rather than, say, a grand jury or an administrative agency).\(^9\) Grand jury testimony — the most common form of compelled testimony — remains secret,\(^9\) and the prosecutor can be careful to assign different attorneys to the later criminal case against a defendant who testifies with immu-

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89. See 18 U.S.C. § 1503 (1994) (calling for punishment of whomever "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice").
9. Prosecutors would also have great difficulty proving any false statements case against a congressional witness, since Congress is not a "department" or "agency" within the meaning of the false statements statute, 18 U.S.C. § 1001. Hubbard v. United States, 115 S. Ct. 1754, 1765 (1995).
91. Department of Justice statistics indicate that in Fiscal Year 1992, Congress sought immunity for one witness, administrative agencies sought immunity for 198 witnesses, and Department attorneys sought immunity for 3931 witnesses. Report from the Department of Justice Witness Immunity Unit (June 7, 1994) (on file with the Minnesota Law Review).
Potential witnesses have no realistic way of exposing themselves to the compelled testimony. Even testimony compelled at trial will, as a practical matter, be difficult for many prospective witnesses to review. The proceedings will not typically be broadcast, and access to the transcript may be limited by the expense and effort necessary to obtain copies of such material.

Testimony before Congress, however, is likely to be very widely reported and available. Indeed, when congressional hearings receive the press coverage we have come to expect on matters such as Iran-Contra or Whitewater, it is difficult for any interested person to avoid exposure. Thus, the problem for prosecutors is most pronounced in cases where Congress — a body beyond their control — both obtains the immunized testimony and controls public access to the testimony.

In sum, the D.C. Circuit has made congressional grants of immunity more costly than immunity grants in other proceedings, and more costly than they have been at any time since the passage of the 1970 statute. The court's emphasis on the content of the witness's testimony severely limits the prosecutor's ability to control damage from the immunized testimony. Prior to North and Poindexter, a prosecutor could successfully craft questions for direct or cross-examination of a witness who has been exposed to the defendant's testimony, provided he or she took care to base each of the questions on independent evidence. So long as the investigators and attorneys do not pursue questions based on the defendant's compelled testimony, courts have not usually inquired whether the witness's answer to the untainted question relies in some way on the defendant's testimony.

By shifting scrutiny from the witness's motives to the content of a witness's testimony, the Iran-Contra opinions have created a huge body of potential taint for prosecutors to disprove. Prosecutors have only a limited ability to anticipate everything that every witness will say, and cannot document in advance the independent source for every likely comment. The sheer mass of material makes it unlikely for a prosecutor to succeed. Indeed, the Independent Counsel did not even attempt to make the required showing on remand in the North and Poindexter cases.

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Other circuit courts may decide not to follow *North* and *Poindexter*. No other court, however, has considered these opinions in the context of a congressional grant of immunity. Indeed, the decisions of other circuits will not often prove helpful for congressional investigations. As in the Iran-Contra prosecutions, orders compelling a witness to testify before Congress will most commonly issue from a federal court in the District of Columbia, and subsequent criminal prosecutions of the executive branch officials who testified before Congress will most frequently take place in the District of Columbia.

C. CONGRESSIONAL PRACTICES BEFORE AND AFTER *NORTH* AND *POINDEXTER*

The *North* and *Poindexter* opinions make it more difficult for prosecutors to obtain convictions against defendants after Congress compels testimony from them. It does not necessarily follow, however, that these decisions have changed congressional practices in granting immunity to witnesses. In this section of the Article, I attempt to determine whether Congress has indeed changed its practices.

Congress has been stingy with grants of immunity over the last twenty-five years. Since Congress passed the statute in

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95. The Second Circuit distinguished the *North* decision in a case involving a defendant who was immunized during testimony before a state grand jury and was later prosecuted in federal court for tax violations. The court, however, approved of the outcome in *North* on the facts of that case. United States v. Helmsley, 941 F.2d 7, 82 (2d Cir. 1991), cert. denied, 112 S. Ct. 1162 (1992) (stating the prosecutor’s burden is met if the substance of the exposed testimony relies on a legitimate source outside of the immunized testimony); see also United States v. Koon, 34 F.3d 1416, 1432 (9th Cir. 1995); Wiley v. Doory, 14 F.3d 993, 998 n.11 (4th Cir. 1994) (entitling prosecutor to qualified immunity for compelling police officers to take a polygraph test when the officers were never charged).

The D.C. Circuit recently ruled in favor of the government in a case involving immunized grand jury testimony. In *Kilroy*, the prosecution’s primary source of evidence initiated a private audit in Washington after the defendant testified with immunity in Las Vegas about unrelated charges. 27 F.3d at 688. The audit uncovered evidence of the defendant’s embezzlement. The government was not able to determine whether a newspaper account of the Las Vegas proceedings influenced the Washington auditor to begin an embezzlement investigation. Nonetheless, the court sustained the conviction because the defendant could produce no evidence showing anything more than a temporal link between the Las Vegas story and the Washington audit. *Id.* The *Kilroy* case may signal a retreat from the most extreme implications of the *North* opinion, at least for grand jury immunities.

96. Apparently, immunity grants under the 1954 statute were also relatively rare. Congress made no use of the statute at all during its first few years.
1970, it has requested about 300 court orders compelling the testimony of witnesses. Congress obtained most of those grants of immunity in clusters, in connection with a few major investigations. For instance, congressional investigations into Watergate, the Iran-Contra Affair, and the assassinations of President Kennedy and Martin Luther King, Jr. account for roughly three quarters of Congress's immunity requests.

The following table, drawn primarily from the final reports of congressional committee investigations,\textsuperscript{97} lists many of the congressional grants of immunity under the 1970 statute:

\begin{quote}


\end{quote}
Table. Topic of Investigation and Number of Immunities Requested

<table>
<thead>
<tr>
<th>Topic</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Watergate (1974)</td>
<td>28</td>
</tr>
<tr>
<td>Koreagate (1977)</td>
<td>11</td>
</tr>
<tr>
<td>Assassinations of President Kennedy and Martin Luther King, Jr. (1978)</td>
<td>165</td>
</tr>
<tr>
<td>Government contracting fraud (1978)</td>
<td>1</td>
</tr>
<tr>
<td>Ethics investigation of Senator Herman Talmadge (1980)</td>
<td>1</td>
</tr>
<tr>
<td>ABSCAM undercover operation (1982)</td>
<td>2</td>
</tr>
<tr>
<td>Organized crime in hotel and restaurant industries (1983)</td>
<td>3</td>
</tr>
<tr>
<td>Iran-Contra Affair (1987)</td>
<td>26</td>
</tr>
<tr>
<td>Narcotics traffic in Central America (1988)</td>
<td>1</td>
</tr>
<tr>
<td>Fraud in Indian programs (1989)</td>
<td>26</td>
</tr>
<tr>
<td>Impeachment of Judge Alcee Hastings (1989)</td>
<td>1</td>
</tr>
<tr>
<td>HUD influence-peddling (1990)</td>
<td>1</td>
</tr>
<tr>
<td>Ethics investigation of Senator Alfonse D'Amato (1991)</td>
<td>7</td>
</tr>
<tr>
<td>Ethics investigation of senators in Charles Keating/savings and loan affair (1991)</td>
<td>1</td>
</tr>
<tr>
<td>Confirmation of Director of Central Intelligence Agency (1991)</td>
<td>1</td>
</tr>
<tr>
<td>Ethics investigation of Senator Robert Packwood (1995)</td>
<td>1</td>
</tr>
</tbody>
</table>

Records from the Department of Justice confirm that this list covers most of Congress's formal immunity requests since 1987. Between March 1987 and the present, Senate investigators requested forty-five immunity orders and House investigators requested seventeen.

Anecdotal evidence suggests that the North and Poindexter decisions have discouraged congressional committees from using immunities in particular cases:

1) The House Energy and Commerce Committee decided, several days after the issuance of the North opinion in 1990, not to grant immunity.
to Michael Milken during an investigation of junk bonds dealing, at least until after his criminal sentencing.\textsuperscript{99}

2) The Senate Ethics Committee, during its investigation of several senators implicated in the Charles Keating affair, declined in 1991 to request an immunity order for Keating because of the importance of a later criminal prosecution.\textsuperscript{100}

3) Senator John Kerry established a policy of making no grants of immunity during the inquiry by the POW/MIA Committee into whether American servicemen were knowingly left in Vietnam.\textsuperscript{101}

4) The Committee on House Administration, during its 1992 investigation of the House Post Office, voted not to request immunity orders for three key witnesses because of a possible conflict with an ongoing crim-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Date of Request & Number of Witnesses \\
\hline
3/12/87 & 3 \\
3/13/87 & 1 \\
5/28/87 & 3 \\
6/05/87 & 2 \\
7/08/87 & 1 \\
3/23/88 & 1 \\
3/30/88 & 2 \\
10/25/88 & 7 \\
12/07/88 & 9 \\
1/05/89 & 2 \\
5/23/89 & 1 \\
7/31/89 & 1 \\
12/06/90 & 1 \\
3/14/91 & 7 \\
5/29/91 & 2 \\
7/30/91 & 1 \\
2/03/95 & 1 \\
\hline
\end{tabular}
\caption{SENATE REQUESTS}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Date of Request & Number of Witnesses \\
\hline
8/11/87 & 6 \\
5/25/88 & 7 \\
10/11/88 & 1 \\
8/08/90 & 2 \\
6/18/92 & 1 \\
\hline
\end{tabular}
\caption{HOUSE REQUESTS}
\end{table}

Report from the Department of Justice Witness Immunity Unit (Sept. 15, 1995) (on file with the \textit{Minnesota Law Review}). The Department does not maintain records on the number of immunity orders Congress actually obtains from the court, or the number of congressional witnesses who actually testify under a grant of immunity.


More recently, the House decided to postpone further an Ethics Committee investigation into the Post Office, again citing concern about interference with criminal investigations.\textsuperscript{103} 5) The Senate Permanent Subcommittee on Investigations decided against using immunities during its 1993 investigation of the misuse of student grants from the Department of Education.\textsuperscript{104} 6) Senator Arlen Specter, chair of a subcommittee of the Senate Judiciary Committee, declared before hearings on the shooting incident between FBI agents and Randy Weaver at Ruby Ridge, Idaho, that the subcommittee would seek no grants of immunity.\textsuperscript{105} 

The strongest signals yet about Congress's new reluctance to use immunities have come out of the Whitewater investigation. Early in 1994, when Democrats controlled the Banking Committee in both the Senate and the House, they declared that the committees would not grant any immunities and would delay hearings whenever necessary to avoid inconveniencing Special Prosecutor Robert Fiske. Republican members agreed that the committees should grant no immunities, and concluded on that basis that no harm could come to the investigation if Congress immediately went forward with hearings.\textsuperscript{106} Early in 1995, after Republicans took control of the committees, Republican committee leaders reaffirmed the decision not to grant any immunities.\textsuperscript{107} Throughout this, members of Congress from both parties explicitly invoked the Oliver North and John Poindexter cases to explain their opposition to immunity grants.\textsuperscript{108}

\textsuperscript{103} Phil Kuntz, Rostenkowski Probe Postponed, 52 Cong. Q. Weekly Rpt., 2436, 2436 (1994).
\textsuperscript{105} Jon Sawyer, Weaver Makes Case to Senators He Calls for Justice in Ruby Ridge Killings, St. Louis Post-Dispatch, Sept. 7, 1995, at A1.
\textsuperscript{107} Labaton, supra note 3 and accompanying text (discussing Republican controlled hearings investigating the Whitewater affair and activities at the Branch Davidian compound). See also 141 Cong. Rec. S6771 (daily ed. May 17, 1995) (Whitewater resolution).
\textsuperscript{108} Andrew Taylor, Senate Panel Plans Broad Probe Of Whitewater This Summer, 1995 Cong. Q. 1390.
Despite this strong and recurring rhetoric about discontinuing the use of immunities, Congress has not abandoned the practice altogether. It has requested several immunity orders since the 1987 Iran-Contra hearings, including a few immunity requests after the publication of the first North decision in July 1990. Senator Specter also declared his willingness, just as the Ruby Ridge hearings began, to consider immunities for some witnesses.

Periods of up to nine years have elapsed between major grants of immunities (ten or more witnesses) in the past. It is thus too early to conclude that Congress has permanently changed its ways because of the Iran-Contra experience. It would be consistent with past patterns if Congress, in the near future, were to take up another high-priority investigation and grant a large number of immunities. Congress's current reluctance to compel testimony may continue in the long run to result in fewer grants of immunity. It may take years, however, to determine whether this current lull is different from other slow periods in the cyclical grants of immunity.

Several institutional factors suggest that Congress will not completely abstain from immunity orders for very long. For one thing, the decision to seek an immunity order is decentralized; any committee from either house of Congress can obtain an order. Neither the Senate nor the House require any leadership group or other centralized group of senators or House members to evaluate the need for an immunity.

The only centralization in the current process occurs once an appropriate body has voted to request a court order. House committees submit requests for immunity orders to the District Court through the Office of the General Counsel for the House of Representatives; Senate committees employ the Office of Senate Legal Counsel. Yet even this degree of centralization has little effect on the choices that the members make. Members do not


111. 18 U.S.C. § 6005.
always consult legal staff about their decisions, but simply direct staff to obtain an order already voted upon.\textsuperscript{112}

Another factor suggests that any apparent changes in the use of immunity orders will not last. Historically, the investigating committees most likely to issue a large number of immunities are not standing committees. Rather, they are committees formed specifically to investigate one event or series of events: Watergate, Iran-Contra, assassinations, and so forth.\textsuperscript{113} They assemble their staffs ad hoc, often drawing them from private law practice. After the investigation concludes, the staffers return to private practice. Hence, it is difficult for the most important users of immunity grants to develop and maintain long term expertise or institutional memory on the use of immunity.\textsuperscript{114}

Of course, staffers and members of Congress do not necessarily need a rich institutional memory to realize that immunity orders can be costly. But it is one thing to understand that an immunity order places any later criminal case in peril; it is another to be able to assess the relative need to take such a risk in different subject areas and at different times. Tunnel vision on the part of members and staffers investigating a particular issue or event is a genuine danger. An investigator of financial institutions may come to believe, for example, that the public must learn as quickly as possible about financial fraud. Others, with exposure to a broader range of investigations over time, may conclude that immunities in this area should not have a very high priority.

D. THE HIDDEN COSTS OF CURRENT PRACTICES

By increasing the chances that some wrongdoers will avoid criminal prosecution, the D.C. Circuit's Iran-Contra decisions increased the costs to the public when Congress relies on an im-

\textsuperscript{112} This decentralized process for deciding to seek immunity reinforces the individualistic nature of congressional investigations. Individual members of Congress pursue investigations for a number of reasons, many of them related to their prospects for re-election, and are not much constrained in this choice by party loyalties or the leadership structure of their house. DAVID R. MAYHEW, \textit{Divided We Govern: Party Control, Lawmaking and Investigations, 1946-1990}, at 110-12 (1991) [hereinafter \textit{Divided We Govern}].

\textsuperscript{113} See McGarey, supra note 27, at 431-32 (describing congressional preference for select committees).

\textsuperscript{114} Consultations do occur between the special committees and the centralized staff who know the most about past grants of immunity (for instance, the staff of the Office of Senate Legal Counsel). The consultations, however, are neither required nor routine.
munity order to obtain testimony. How should Congress respond to this turn of events? If we count only the most obvious costs of immunity grants, the clear solution is for Congress to restrain itself and grant fewer immunities. Fewer immunity grants are not, however, necessarily better because many of the important but hidden costs of immunity grants will only worsen if Congress continues to grant fewer immunities.

A few costs of stringent immunity rules are obvious and spectacular, such as the loss of criminal convictions when Congress immunizes the defendant. These would include convictions overturned on appeal (such as the convictions of Oliver North and John Poindexter), and charges dismissed at the trial court (such as charges against Watergate figure Gorden Strachen).115

Other costs are less visible, such as the criminal charges never brought because of the prosecution’s belief that it would lose at a Kastigar hearing. It is impossible to say which immunized witnesses over the years might have been prosecuted if not for a congressional grant of immunity. Given the relatively small number of immunity grants conferred, however, the absolute number of unfiled criminal cases cannot be large, surely less than 300 over a period of twenty-five years. Moreover, the number of prosecutions attempted, even before the Iran-Contra cases, was not large to begin with.116 Thus, the effect of North and Poindexter in terms of the additional cases that were never filed would have to be small.117

These costs of immunity grants, however, do not tell half the story. Most of the costs of the new rules governing the use of congressional immunity occur when Congress decides not to compel testimony. A greater reluctance to use compulsion orders will mean less-than-complete congressional investigations. This, in turn, will postpone and ultimately deaden public debate about government accountability because the public will not have timely facts for making judgments.

115. See Strachen, supra note 63, at 816 (describing criminal proceedings against author’s spouse, Gordon Strachen).


117. Nonetheless, suspected official corruption, usually the basis for congressional testimony, could lead to extraordinarily visible criminal cases. When prosecutors decline to bring charges in these cases, the harm is disproportionate to the small number of cases. Unfiled cases of this type can contribute to the cynical view that the powerful can always escape criminal accountability.
I argued earlier that the decentralized process for seeking immunity grants would make it unlikely that Congress will abstain completely from granting immunities in the long run. On the other hand, when Congress investigates a matter under active criminal investigation, it will grant immunities only rarely. Indeed, Congress likely will sacrifice its own investigations in favor of criminal prosecutions far too often. The ordinary patterns of interaction between Congress and criminal investigators will give members of Congress a distorted view of the relative importance of congressional and criminal investigations.

First, many congressional investigations have partisan implications, such as the Whitewater investigation, the inquiry into the management of the House Post Office, and the ethics investigations of members of Congress. In such circumstances, one or another group of committee members will have a strong incentive to curtail a public inquiry. The fears of criminal investigators about possible interference from Congress (newly-enhanced by the Iran-Contra decisions) may provide a convenient excuse for congressional committees not to aggressively pursue investigations. Surely this dynamic explains the willingness of Democrats during 1994 to limit and delay any hearings about the Whitewater affair.

Prosecutors also have every incentive to identify too broad a group of witnesses as potential defendants. They cannot know, early in an investigation, who will ultimately become criminal defendants. Prosecutors may have strong suspicions that certain witnesses will not face charges in the end, but they have no reason to “release” these potential defendants for a congressional investigation. Prosecutors do not directly benefit from Congress’s investigations, and early guesses about the most likely defendants might prove inaccurate. They have every reason to keep the pool of potential targets as large as possible. As a result, prosecutors will, more often than not, ask Congress to forego the testimony of witnesses who will never be charged with a crime.

118. See supra notes 111-114 and accompanying text (describing the current decentralized process for obtaining immunity grants).
120. Cf. 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN-CONTRA MATTERS xxiii-xxv, 555-59 (1993) (describing fourteen prosecutions, and suggesting that Congress avoid immunity grants to any witness who would ordinarily be a “logical subject for prosecutive consideration”).
Finally, it may be more politically costly for a member of Congress to undermine a criminal case than it is to investigate too timidly. If a grant of immunity results in dismissal of criminal charges months or years after the investigation, political opponents could in hindsight charge the member with "interference." Opponents might question the member's commitment to punishing corruption, or to fighting crime. In contrast, a member is less likely to receive criticism about the failure of an investigation to inform the public adequately. Even if the question arises, the member can simply explain that he or she wanted to avoid interfering with an ongoing criminal investigation. Just as drug safety regulators tend to fear the one highly visible accidental death from a quickly-approved drug, rather than the many deaths occurring because drugs appear on the market too slowly, members of Congress will too often avoid immunity grants because their evils are more obvious.

II. REDUCING THE COSTS OF IMMUNITY GRANTS

Is it possible for Congress to have it both ways? Congress might search for ways to preserve more potential criminal cases against witnesses, even after congressional investigators have granted those witnesses immunity to testify. There are several plausible strategies for doing so. Unfortunately, none of the available strategies is likely to succeed in cutting the costs of immunity grants in the ordinary case. These strategies might save some criminal prosecutions, but probably only a few.

A. SUBSTANTIVE AMENDMENTS TO THE IMMUNITY STATUTE

Perhaps the most direct way to reduce the impact of the North and Poindexter opinions would be to overrule them by statute. Such legislation might attempt to return immunity law to its condition before Iran-Contra. An amendment to the federal immunity statute could accomplish this either by (1) changing the statute's definition of prohibited "uses" of compelled testimony, or (2) changing the methods the government may use to prove that no prohibited use took place.

Either type of amendment could make it possible once again to pursue criminal prosecutions against witnesses Congress has compelled to testify. Both are based on credible readings of the Supreme Court's current Fifth Amendment jurisprudence. However, for reasons described below, either of these amendments would face a serious constitutional challenge.

1. Amend the Definition of Prohibited "Uses"

Several statutory changes could make it possible once again for a prosecutor to win a criminal case against a previously-immunized witness. An amendment could clarify that the statute prohibits only those uses of immunized testimony that lead to new evidence. If the prosecutor is exposed to the immunized testimony, but can still show that each piece of evidence came from an independent source, the conviction could stand.

An amendment might also specify that use of immunized testimony by a party other than a prosecutor (or the agent of a prosecutor) would not constitute a prohibited use. For instance, if a witness learns about immunized testimony of a defendant from sources other than the prosecutor, no prohibited "indirect" use of the testimony has occurred. Senators Lieberman and Rudman offered one such bill in 1991, although it never became law.

122. Thus, the amended statute would repudiate those cases holding that any prosecutorial exposure to the immunized testimony is a per se violation of the statute. See United States v. Dornau, 359 F. Supp. 684, 687 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir. 1974), cert. denied, 419 U.S. 872 (1974) (holding that when a prosecutor read a defendant's testimony transcript that contained immunized testimony, the possibility of that testimony's use necessitates case dismissal).

123. S. 2074, 102d Cong., 1st Sess., 137 Cong. Rec. S18385 (1991) follows:

SECTION. 1. IMMUNIZED TESTIMONY.

(a) AMENDMENT OF TITLE 18, UNITED STATES CODE.—Section 6002 of title 18, United States Code, is amended . . . by adding at the end the following new subsection:

(b)(1) Testimony of a witness that is based on the witness's personal knowledge, irrespective of whether the witness has been exposed to testimony compelled under subsection (a), shall not be considered to be directly or indirectly derived from or to constitute a use of such compelled testimony if—

(A) the prosecution has made no use of the immunized testimony; and

(B) the witness was not exposed to the immunized testimony by the prosecution or by a third party acting, directly or indirectly, at the direction of the prosecution.
Apart from this one initiative, Congress has not shown much interest in revising the immunity statute in the five years since North. And even if Congress were to choose this route in the near future, a direct statutory repudiation of North would probably not survive a constitutional challenge.

Even though the North court interpreted a statute, it simultaneously interpreted the self-incrimination clause of the Fifth Amendment. Since Kastigar, courts interpreting the immunity statute have assumed that Congress meant for the statute to provide protection "co-extensive" with the Fifth Amendment, and there is some indication to that effect in the legislative history of the statute.

The D.C. Circuit in its North opinions clearly stated that the Constitution, and not just the immunity statute, requires a strong version of use immunity: "the immunity statute is constitutional only because it is co-extensive with the Fifth Amendment." The D.C. Circuit, if it follows the holding and the strong dicta of North, would surely overturn the amended statute on constitutional grounds. The Fifth Amendment, the court would say, requires a reversal of any conviction in which a witness uses compelled testimony to change his or her testimony (assuming that the change is not harmless error), even if the

(2) This subsection does not affect the prosecution's affirmative duty to prove that the evidence it proposes to use is otherwise derived from legitimate sources wholly independent of the compelled testimony.

(3) This subsection shall be applied so as fully to protect a witness's privilege against self-incrimination in all respects. If, in the particular circumstances of any case, any provision of this subsection cannot be applied in a manner that is fully consistent with a witness's privilege against self-incrimination, the provision shall be applied only to the extent that it is fully consistent with the witness's privilege against self-incrimination, and the remainder of this subsection shall be fully applicable.

124. Kastigar v. United States, 406 U.S. 441, 462 (1972); see In re Doyle, 839 F.2d 865, 867 (1st Cir. 1988) ("The immunity granted appellant is coextensive with his fifth amendment protection."). This language might be construed to mean that Congress intended to provide in the statute at least as much protection as required by the Fifth Amendment, and possibly more. But neither the legislative history nor any cases construing the statute have suggested that a statute meant to be "co-extensive" with the Fifth Amendment actually provided more protection than was constitutionally necessary.


prosecutor is not responsible for that witness's exposure to the immunized testimony.

But the future of an amended immunity statute is by no means certain. Other circuits have not had many opportunities to approve or disapprove of the specific elements of a Kastigar hearing that the D.C. Circuit now requires, although the few federal courts discussing North thus far have mentioned it with approval.\textsuperscript{127} An amended immunity statute could provoke a rethinking of the question in the federal courts. A revision to the statute might make the issue more visible and increase the chances that the Supreme Court would address again the types of uses for compelled testimony the Constitution allows. The considered views of a coordinate branch on the debatable meaning of a constitutional provision might carry some weight with the Justices.

a. \textit{The Attenuation Doctrine}

There are at least two possible lines of argument to support an amended statute that defines a prohibited "derivative use" to include only prosecutorial uses and to exclude uses by private parties, such as witnesses. The first line of argument, which the dissent in the second \textit{North} opinion mentions briefly,\textsuperscript{128} is the doctrine of "attenuation."

Although a Fifth Amendment violation will taint any evidence obtained as a result of the violation (as "fruit of the poisonous tree"),\textsuperscript{129} events occurring after the constitutional violation may be more important in explaining how the government obtained the evidence.\textsuperscript{130} The later events thus over-


\textsuperscript{130} See Adams v. Aiken, 965 F.2d 1306, 1316 (4th Cir. 1992) (concluding that initial admissions illegally obtained from defendant did not taint defend-
shadow the constitutional violation; to use torts concepts, the later events constitute a superseding cause of the prosecution's acquisition of the evidence.

For instance, a coerced confession may lead police to arrest a second suspect. If the police release the second suspect, but he later returns to the police of his own volition to confess and provide evidence against the first suspect, a court may conclude that the effect of the original coerced confession was too attenuated to require exclusion of the new evidence. Similarly, the taint of compelled testimony may become overly attenuated if enough events occur between the time of the immunity order and the subsequent use of the testimony. Congress in 1970 may have intended to invoke this limitation on the definition of evidence derived “indirectly” from a constitutional violation: a committee report cited to a Supreme Court decision on just this subject.

One problem with the attenuation argument in the immunity context is that it appears to require the passage of time and events after the constitutional violation occurs. When the prosecution obtains evidence as a result of a coerced confession or an improper search and subsequently introduces that evidence at trial, events might combine with time to diminish the significance of the original constitutional violation. On the other hand, when the government compels a witness to testify, that person only becomes a “witness against himself” when the government attempts to use the testimony or the fruit of the testimony at the witness's later criminal trial. Unlike the coerced confession or improper search, the constitutional violation here takes place during the trial itself. Thus, it is difficult to argue

ant's subsequent, lawfully obtained, written confession), cert. denied sub nom., Adams v. Evatt, 113 S. Ct. 2966 (1993), and judgment on reh'g vacated, 114 S. Ct. 1365 (1994); Brown v. Illinois, 422 U.S. 590, 604-05 (1975) (prohibiting evidentiary use of defendant's statements made less than two hours after his illegal arrest because the court found “no intervening event of significance”).

131. Wong Sun, 371 U.S. at 475-77, 491-92 (finding the evidence admissible in a case involving substantially similar facts).


133. See, e.g., Brown, 422 U.S. at 604-05 (“no intervening event of significance”).

that violations of the immunity statute become attenuated after passage of time and events. 135

Nevertheless, perhaps the passage of time does not matter as much as government coercion. When the government compels testimony, it clearly is using its coercive power against the witness. But is that coercion any greater when the government later initiates a criminal case and relies on witnesses who, unbeknownst to prosecutors, have familiarized themselves with the compelled testimony? The individual choices of the witnesses themselves, even though they precede the moment of the constitutional violation at trial, still seem to supersede the government's initial choice to compel the testimony and its later decision to prosecute based on independent evidence.

The attenuation doctrine, when properly analogized to the common law doctrine of superseding causes, deserves closer attention than it received in North. But even in this form, attenuation offers limited help to the government. If federal courts were to adopt this doctrine, they would require the government to show that the use of compelled testimony by prosecution witnesses was unforeseeable, a traditional prerequisite to showing that some superseding cause relieves a tort defendant of responsibility for her earlier actions. It would be an unusual case where the prosecution could show that the witness's exposure to the compelled testimony was unforeseeable, especially when the compelled testimony takes place in a public hearing before Congress. 136

b. Private Action

The second line of argument supporting an amended statute might draw an analogy to the law of private searches. 137 The Fourth Amendment prohibits unreasonable searches or seizures by government agents, but it does not stop the government from using as evidence the information that a private party obtains

135. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44 (5th ed. 1984) for an overview of theories of intervening cause in tort, and § 52 for a discussion of apportionment of responsibility in cases involving multiple tortfeasors.

136. The Wong Sun Court did not inquire if the actions of the witness who later confessed were foreseeable. See Wong Sun v. United States, 371 U.S. 471 (1963).

137. This line of argument was not addressed in the North opinions. North, 910 F.2d at 889; North 920 F.2d at 956-57; see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1 at 117-119 (2d ed. 1992 & Supp. 1995) (providing an overview of the exclusionary rule and private party searches).
during an unreasonable search. Of course, if the government induces a private party to carry out the search, the search is no longer "private." But if the search or seizure takes place at the initiative of a party truly independent of government control, then there can be no unconstitutional search or seizure.

Similarly, in the context of immunized testimony, one might conclude that the government is not responsible for a private-party witness who relies on compelled testimony to shape testimony or to refresh recollection. So long as the prosecution discourages witnesses from using immunized testimony, insists that witnesses rely upon their own memory during testimony, and asks specific questions based on independent sources, the private party—not the prosecution—is responsible for any "use" of compelled testimony. Any incidental benefit to the government's prosecution would be tolerable here, just as in the private search context.

A defendant might point out at this juncture that compelled testimony is unlike a private search because government action (the compulsion order) makes possible the later private use of information. But the same could be said of some private searches. Government might make the conditions possible for a private search—for instance, it may pass and enforce laws allowing landlords reasonable access to tenants' apartments. Even though governmental power might enable a private party to search, the courts will still place responsibility for the search with the private party rather than the government.

In the end, such arguments may fail to convince the D.C. Circuit to overrule its current expansive definition of prohibited "uses" of testimony. The North opinions are peppered with absolute language about the use of compelled testimony: "The polit-

138. Burdeau v. McDowell, 256 U.S. 465, 474 (1921); see also Colorado v. Connelly, 479 U.S. 157, 166 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against the defendant does not make that evidence inadmissible under the Due Process clause.").
139. United States v. Feffer, 831 F.2d 734, 737 (7th Cir. 1987); United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981).
140. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8 at 175 (2d ed. 1987).
141. Id. § 1.8 at 175, 177.
143. Compare LAFAVE supra note 140, § 1.8(b) (discussing evidentiary effects of specific government instigation of private search) with id. § 1.8(c) (discussing evidentiary effects of "other pre-search encouragement" by government).
ical needs of the majority, or Congress, or the President never, never, never, should trump an individual’s explicit constitutional protection.”\(^\text{144}\) Unless the court takes a different and more accommodating view of immunity grants, it is not likely to view the actions of government witnesses as “private” action.

If all the federal courts follow the route mapped out by the D.C. Circuit, it might take a Supreme Court opinion redefining the contours of the Fifth Amendment before Congress could successfully amend the statute. Such an opinion could, consistent with the history of the Fifth Amendment, conclude that the Fifth Amendment allows prosecutors to use all the evidentiary fruit of compelled testimony, but not the testimony itself.\(^\text{145}\) Barring such a profound reshaping of the self-incrimination privilege, however, Congress would be safer to choose some more oblique strategies and not confront the North requirements directly.

2. Amend the Method for Proving Lack of Taint

An amendment to the immunity statute would stand a better chance of survival under current law if it were geared to the procedure or the allocation of the burden of proof, rather than the definition of “use.” On these procedural questions, the Fifth Amendment text is silent.\(^\text{146}\)

Chief Judge Wald’s dissents in both of the North opinions distinguished between prosecutorial exposure to immunized testimony and witness exposure to the testimony.\(^\text{147}\) Chief Judge Wald proposed a special allocation of the burden of proof when a defendant only alleges that witnesses have used immunized testimony.\(^\text{148}\)

In such cases, a prosecutor would need to establish a prima facie case of no taint by showing (1) an independent source for the identity of each witness, (2) an independent source for all

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144. United States v. North, 920 F.2d 940, 945-46 (D.C. Cir. 1990) (per curiam), modifying 910 F.2d 843 (D.C. Cir.) (per curiam), cert. denied, 500 U.S. 941 (1991); see also North, 910 F.2d at 869 (“If the government chooses [to compel and immunize testimony], then . . . it is taking a great chance that the witness cannot constitutionally be prosecuted.”).


146. See U.S. Const. amend. V, cl. 3.

147. North, 920 F.2d at 954 (Wald, C.J., dissenting); North, 910 F.2d at 914 (Wald, C.J., dissenting).

questions asked of the witnesses, (3) warnings to all witnesses to base their testimony only upon personal knowledge, and (4) delivery to defense counsel of all recorded statements of witnesses. Once the prosecution has shown such a prima facie case, the defendant would have to produce some specific evidence (but not conclusive evidence) that the testimony was in fact tainted. If the defendant could not produce such evidence, the trial court would not need to hold a hearing on the question.\textsuperscript{149} Congress might amend the immunity statute to endorse just this sort of allocation of the burden of proof in cases where the prosecutors themselves have avoided exposure to the compelled testimony.

Such a procedural approach to amending the statute would stand a better chance of survival in a constitutional challenge than a statute attempting to overturn the \textit{North} court's broad definition of derivative use. Lower federal courts have developed the contours of use immunity by studying nuances of the 1972 \textit{Kastigar} opinion, rather than the text, history or structure of the Fifth Amendment itself. And \textit{Kastigar} itself specifies only that the government retain an "affirmative" and "heavy" burden.\textsuperscript{150}

In some other contexts, courts have assigned to defendants some burden of producing evidence even when the ultimate burden of proof remains with the government. For instance, a defendant claiming the defense of entrapment must show that the government induced him to commit the crime. Only after the defendant comes forward with evidence of entrapment does the government have to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime.\textsuperscript{151}

\textsuperscript{149} Id. The D.C. Circuit in a recent case apparently placed the burden of production on a defendant to show that a key government witness relied on earlier immunized testimony by the defendant in deciding to audit the defendant. The audit provided key evidence in the criminal case. See Kilroy v. United States, 27 F.3d 679, 687-88 (D.C. Cir. 1994).


\textsuperscript{151} See Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992) (reversing, on grounds of entrapment, defendant's conviction for receiving child pornography through the mails); United States v. Gifford, 17 F.3d 462, 467 (1st Cir. 1994) (noting that prosecution need answer entrapment defense only after defendant has met burden of production sufficient to raise that defense); United States v. Holmes, 13 F.3d 1217, 1221 (8th Cir. 1994) (same); United States v. Budd, 23 F.3d 442, 445 (D.C. Cir. 1994) (same), \textit{cert. denied}, 115 S. Ct. 910 (1995); United States v. Wright, 921 F.2d 42, 44 (3d Cir. 1990) (stating that
The various burdens of proof for exclusionary rule hearings also support shifting a burden of production to the defense in some Kastigar hearings. In a hearing to establish the voluntariness of a confession, the prosecution carries both the burden of persuasion and the burden of production. The prosecution also carries the burden when attempting to introduce evidence seized during a warrantless search. However, the defendant carries the burden of proof when attempting to exclude evidence obtained during a warranted search, because a warrant makes a search presumptively reasonable.

When the prosecution has effectively insulated itself from the compelled testimony of a defendant, is the best analogy the involuntary confession cases (where the prosecution has the burden) or the warranted search cases (where the defendant has the burden)? Certainly a Kastigar hearing, like a voluntariness hearing for a confession, involves the admission of evidence potentially derived from an involuntary statement of the defendant. But the primary concern with a coerced confession taken in a police station is its reliability. If prosecution witnesses base their story in part on what they hear during the defendant's compelled testimony before a congressional committee, there is no particular reason to question the accuracy of the evidence. The defendant had every reason to tell the truth during the compelled testimony; if anything, a witness's exposure to the compelled testimony will sharpen her memory of events involving the defendant.

The leading concern with witness exposure to compelled testimony is not the reliability of the evidence, but the propriety of the government's behavior in obtaining the evidence, whatever its reliability. When the prosecutors have avoided any exposure

defendant bears burden of production on both inducement and "non-predisposition" to commit the crime), cert. denied, 501 U.S. 1207 (1991).

152. Colorado v. Connelly, 479 U.S. 157, 168 (1986); Lego v. Twomey, 404 U.S. 477, 489 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.").

153. LAFAVE & ISRAEL, supra note 137, § 10.3(b). The decision in United States v. Leon, 468 U.S. 897 (1984), makes this shift in the burden of proof less important, because for many warranted searches there is now a "good faith exception" to the exclusionary rule, and the defendant will have no opportunity to carry a burden of proof at a suppression hearing. Leon does not apply, however, to all warranted searches in the federal courts, and does not apply at all in some state courts. Thus, there are still some suppression hearings where the defendant will carry the burden of proof.

154. See, LAFAVE & ISRAEL, supra note 137, § 6.2(a) & n.3 (noting traditional judicial concern that such confessions are untrustworthy).

to immunized testimony, and have taken steps to ensure that witnesses will not rely on such testimony, perhaps the government deserves a presumption that prosecutors acted properly, just as courts presume that warranted searches are reasonable.

This line of argument might prove too much, for it suggests that the defendant should carry both the burden of production and the burden of persuasion once the prosecutor has shown no exposure to immunized testimony and adequate efforts to prevent witness use of the testimony. *Kastigar*, however, says that the “burden” remains with the prosecutor. A shift in the burden of production, therefore, is the most that a federal court can require of a defendant and remain consistent with *Kastigar*. This position is a compromise that carves out an area where the court can presume that the prosecution behaved appropriately.

Even if procedural amendments to the statute have the best chance of surviving constitutional challenge, such a solution would probably give a smaller benefit to prosecutors than a statute that redefines prohibited derivative uses. Although the defendant might sometimes fail to carry a burden of production, the burden will shift back to the prosecution in many cases. Because it is sufficient to prove that any material witness changed his or her testimony because of exposure to the defendant’s compelled testimony, it will not be difficult for defendants to meet their burden by producing some evidence on the issue.

3. All Immunities or Only Congressional Immunities?

If Congress decides to amend the statute in either of the ways discussed above, it must decide on the scope of the changes. Should the revisions apply to all the federal immunity statutes, or only to immunity orders that Congress requests?

There is surely a virtue in uniformity, providing the same immunity for all compelled testimony, regardless of the forum. The uniform approach avoids any suggestion that Congress imposes on executive branch immunities (that is, compelled testimony before a grand jury, a trial court, or an administrative tribunal) a heavier burden than it imposes on the immunities granted during its own investigations. It affirms that Congress can live with the same rules it imposes on other investigators.

Nevertheless, while the need for uniformity is legitimate, there are special concerns involved with congressional testimony. For instance, the news media disseminates congressional testimony much more broadly than testimony before a grand jury, thus increasing the risk of exposure and taint. Congres-
sional testimony also has unique value. It goes to questions of self-government, to questions of national priorities. If Congress fails to get critical testimony during its hearings, it might draft statutes poorly, or it might fail to hold executive officials politically accountable for serious misconduct.

Loss of crucial information in a criminal case could undermine a conviction for one person, and foreclose one set of potential punishments for that person. But loss of crucial information during congressional hearings may have effects reaching far beyond a single case, however important that case may be. The special difficulties arising from congressional immunities, together with the unique value of congressional testimony, might justify special immunity rules for Congress.

B. RELIANCE ON EXECUTIVE SESSIONS

Congress might also attempt to reduce immunity costs by changing the investigative techniques it uses after an immunity grant. If Congress could investigate in a way that reduces the amount of public exposure to compelled testimony, more criminal cases could survive. It would not be necessary to amend the statute to change the legal consequences of exposing prosecutors or their witnesses to immunized testimony.

For example, one of the chief difficulties in the criminal case against Oliver North was a factor arguably within Congress's control: the easy access of potential prosecution witnesses to North's immunized testimony before Congress. The testimony was broadcast so widely that it would have been difficult to avoid seeing or hearing it. Most of the prospective witnesses had no particular incentive to avoid North's testimony, and every reason to study it carefully.

Prosecutors would applaud if Congress, after it grants immunity, takes steps to make the testimony less widely available. For instance, congressional investigators could take testimony more often in executive session, closed to the public.156 Congressional investigations could also rely on depositions before the members of Congress begin their questioning. Limiting the publicity surrounding compelled testimony could make it easier for prosecutors to avoid exposing themselves to the taint, and could reduce the number of witnesses exposed.

Greater use of executive sessions, however, will limit the impact of a congressional immunity grant only in exceptional cases. In most cases, Congress will insist on a public forum for the testimony. There are many reasons this will occur. Members of Congress may be convinced that the public deserves to hear about a topic important enough to justify hearings and a request for a compulsion order.\textsuperscript{157} They may also want the opportunity to appear in the media in a publicized investigation—surely one of the motives of congressional investigators in the Whitewater affair.\textsuperscript{158} The members might also want to avoid charges from the press, and perhaps from the public, that executive sessions are merely a cover for incompetent, insincere, or corrupt investigations.

Even if Congress uses executive sessions to limit the publicity of compelled testimony, the most interested parties (the potential witnesses in a later criminal trial) are still likely to learn about the content of the testimony.\textsuperscript{159} Interested parties will review carefully any report or other work product of the committee, which often will be based on the compelled testimony. Third parties could also learn of the substance of the testimony through leaks to the press.

Although executive sessions do not promise a comprehensive solution to the problems of immunity grants, their selective use could limit the negative effects of some immunities on later criminal cases. Committees might use executive sessions to identify particular subjects to focus upon in the later public testimony of the witness. Just as important, the committee staff might identify, during interviews preceding a public hearing, certain areas of inquiry that are collateral to Congress's investigative purposes, but that might interfere in a later prosecution. Questioners at the later public testimony could be careful to avoid questions on the most damaging and unproductive subjects. Even though the executive session testimony does qualify as compelled testimony, Congress can at least use the executive


\textsuperscript{159} Tiefer, supra note 156, at 162.
session to screen from wide public exposure some of the possible subjects of testimony.\textsuperscript{160}

C. More Effective Investigations

Congress also inflates the costs of immunity when it impedes a criminal prosecution with an immunity grant, yet fails to get much valuable information in return. Some members of Congress and their staff feel that this was part of the problem in Oliver North's case.\textsuperscript{161} North was able to testify on highly favorable terms, and his questioners were unable to insisting on a complete and accurate accounting from him.

For instance, North and his attorney objected to testifying during a closed session with congressional staffers. North argued that Congress could only compel testimony before a committee or subcommittee or the body as a whole: it could not compel deposition testimony to staff.\textsuperscript{162} Although Iran-Contra committee members were convinced that the statute did empower them to compel such testimony, the prospect of a dilatory court challenge from North was enough to convince the committee not to press the issue. The lack of any pre-hearing interrogation of North made it difficult to select areas of interest to highlight, and areas of ambiguity or obfuscation to pursue more aggressively at the hearing.\textsuperscript{163}

\textsuperscript{160} This approach depends on the good faith of members and their staff. A member intent on undermining a criminal prosecution could still do so despite the efforts of the committee to limit immunity damage during executive sessions. Political reprisals against such a member would be the most readily available response.

\textsuperscript{161} \textit{Walsh}, supra note 120, at 426.

\textsuperscript{162} \textit{See Congressional Oversight Manual} 33-34 (3d ed. 1995) (providing a description of staff depositions) [hereinafter \textit{Oversight Manual}]. North's attorney argued that the statute did not extend to depositions conducted by House or Senate staff because 18 U.S.C. § 6005 only speaks of immunity for testimony in "proceedings before" a congressional committee or either House. The legislative history, along with the language of the accompanying § 6002 of the statute, make it clear that the order could be used to compel deposition testimony. 18 U.S.C. § 6002 (providing immunity for testimony "in a proceeding before or ancillary to . . . either House of Congress, . . . or a committee or subcommittee of either house"); \textit{Measures Relating to Organized Crime: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,} 91st Cong., 1st Sess. 409 (1969). \textit{But see} United States v. Brennan, 214 F.2d 268 (D.C. Cir. 1954) (rejecting defendant's argument that the 1952 version of the immunity statute immunized voluntary statements made to committee staff), \textit{cert. denied}, 348 U.S. 830 (1954).

Congress can avoid some problems of this sort by amending the immunity statute to explicitly authorize compelled testimony during staff depositions as well as during the hearings themselves. Congress considered, but did not pass, legislation to this effect after the Iran-Contra hearings ended.\textsuperscript{164} Such an amendment, however, would not prevent all future instances of ineffective investigation. Investigations can break down for any number of reasons. Perhaps the best way for Congress to get full value for any immunities it grants is to hire experienced staff members to direct aggressive and uncompromising investigations.

D. DELAYED INVESTIGATIONS

Once it becomes apparent that Congress will grant immunity to a witness, prosecutors investigating the case can ask for as much time as possible before the testimony takes place. During the interim, the prosecutors can contact as many prospective witnesses as possible, record sources of evidence currently known, and otherwise prepare for any eventual Kastigar hearing.\textsuperscript{165}

Congress has been willing in the past to cooperate with such requests. During the Iran-Contra investigation, the committee agreed to delay questioning North, Poindexter and others to give the Independent Counsel more time to pursue the criminal investigation. More recently, congressional investigators of the FBI shooting incident at Ruby Ridge, Idaho, negotiated with the Department of Justice to give criminal investigators more time to work before the hearings reached the most sensitive topics.

Given the urgent and usually politicized nature of congressional hearings, Congress may not consistently grant prosecutors adequate time to prepare for the impending testimony. North and Poindexter only increase the likelihood of this because they virtually force prosecutors to conduct exhaustive canned interviews of all potential witnesses. More criminal cases might remain viable if prosecutors could point to a statutory provision giving them a fixed amount of time for further investigation, rather than leaving the amount of delay to negotiations in individual cases. The current immunity statute allows the Attorney

\textsuperscript{164} See H.R. Rep. No. 1040, 100th Cong., 2d Sess. 3-4 (1988) (to accompany S. 2350, 100th Cong., 2d Sess. (1988)) (indicating intent to remove ambiguity in statute); see also 1 Walsh, supra note 120, at 426.

\textsuperscript{165} John Grabow, Congressional Investigations: Law and Practice § 3.6(b) (1988).
General to delay the issuance of the compulsion order by twenty
days;\textsuperscript{166} perhaps an increase to ninety days would give the pros-
secutor a more realistic period to prepare the complicated crim-
inal cases that usually are involved in congressional hearings.

Giving the prosecutor unilateral power to delay an immu-
nity grant for as long as ninety days may, however, prove too
politically costly. The timing of congressional investigations is
critical. To delay congressional hearings on an issue currently
receiving public attention can change the atmosphere of the in-
quiry dramatically; delay can even mean that Congress will drop
the subject entirely. Congress is unlikely to cede this question of
timing to prosecutors. Given that Congress is a representative
body with the responsibility to consider the relative importance
of many possible agenda items, it is better suited than a crim-
inal investigator (who has only one priority to consider) to decide
timing issues.

III. DELIBERATING THE COSTS OF IMMUNITY GRANTS

Even after Congress exhausts all of its potential methods
for reducing the costs of immunity, some conflicts between con-
gressional and prosecutorial investigators will remain. Unless
Congress is to stop hearing testimony on volatile public issues, it
will usually not be able to avoid the hard choice between immu-
nity during congressional hearings and a viable criminal
prosecution.

Congress might, therefore, consider methods to promote
better deliberation about its need for witness immunity before it
makes the request for a court order. Those methods include (1)
the adoption of substantive criteria for determining which wit-
tnesses deserve immunity despite the high price, and (2) the
adoption of new procedural mechanisms for weighing such costs.

A. SUBSTANTIVE CRITERIA

It is impossible to say what criteria various committees use
when they determine that a particular witness should receive

\textsuperscript{166} 18 U.S.C. § 6005(c). The Attorney General apparently does not often
invoke the current 20-day period. The prosecutor can routinely negotiate a pe-
riod longer than 20 days. Congress sometimes will give informal notice to pros-
secutors before it makes the formal request for authorization. The extra notice
time allows the prosecution to begin checking for possible grounds for objec-
tions. The independent counsel has the same power as the Attorney General to
delay the grant of a court order compelling a congressional witness to testify.
immunity for testimony. On occasion, a member of Congress might articulate some basis for making a particular immunity grant, but more frequently the decision goes unexplained except in the most general terms. Because of the importance of such decisions, Congress as a whole may wish to delineate the criteria that committees should consider as they decide immunity questions. Congress could embody such criteria in a statute, but a less formal vehicle such as internal rules might accomplish the task just as well.

Consistent and effective substantive criteria, however, will prove elusive. It is virtually impossible to extrapolate from recent congressional investigations general principles that describe where immunity was either clearly appropriate or inappropriate. For instance, after reflection upon the Iran-Contra proceedings, Congress might decide that it will be more inclined to grant immunity for cases of alleged high-level misconduct in the executive branch. Such incidents seem to call for immediate public attention and debate.  

Incidents other than Iran-Contra show, however, that high-level misconduct would be too general a prerequisite for immunity. Although Samuel Pierce, Secretary of the Department of Housing and Urban Development during the Bush administration, was charged with official misconduct, Congress was unanimous in opposing any grant of immunity to him. Members of Congress considered the potential criminal cases against Pierce and other officials at HUD far too important to jeopardize. The same appears to be true for high-ranking Clinton administration figures charged with wrongdoing, such as Ron Brown, Henry Cisneros, and Mike Espy. There is no sentiment in Congress for using immunities to investigate their activities.

What makes the Pierce case a time to refrain from immunities, while the North case remains (for some, at any rate) a time when the cost of immunity was well worth paying? Both cases involved government officials with mixed motives — both Pierce and North believed that the public good required some departure from literal legal requirements, but both also profited personally from their wrongdoing. Both cases involved deep-seated management problems that Congress could have addressed.

167. See Zeev Segal, The Power to Probe into Matters of Vital Public Importance, 58 Tul. L. Rev. 941, 943 (1984) (arguing that it is essential in all cases to bring official misconduct to the public's attention).

through legislation or the budget process. Both cases received media coverage, although one received considerably more.\textsuperscript{169} Both involved a small group of potential witnesses. The difference between the Pierce and North cases is not readily apparent.\textsuperscript{170}

Instead of looking to the prominence of the alleged wrongdoers under investigation, Congress might look to the seriousness of the alleged conduct as a source of criteria for granting immunities. One might argue that Congress could decide to conduct hearings and grant any necessary immunities whenever the Justice Department requests appointment of an independent counsel; such an appointment perhaps serves as a rough proxy for the most serious allegations of official misconduct because the independent counsel statute applies to the highest level executive officials. Yet this approach would surely be over-inclusive, for independent counsels (or more recently, special prosecutors) are appointed to investigate a wide range of official misconduct.\textsuperscript{171} Further, the appointment of an independent counsel may argue for just the opposite result: It could be an indication that criminal charges are especially important, and should remain unpolticized to the extent possible.

It may be easier to identify criteria for cases when the cost of an immunity will be especially low. For instance, there may be times when Congress might offer immunity to a witness who has already been convicted.\textsuperscript{172} Although such an immunity may impede a later criminal prosecution (say, under state law), Congress may decide that there is little relative value in additional criminal sanctions.

\textsuperscript{169} \textsc{Mayhew}, supra note 112, at 25 (listing both Iran-Contra and HUD investigations as "major" investigations, HUD receiving 23 days of front-page newspaper coverage and Iran-Contra receiving 95).

\textsuperscript{170} \textsc{Biskupic}, supra note 99, at 2668, 2671-72; \textsc{Arthur L. Liman \& Mark A. Belnick}, Congress Had to Immunize North, \textsc{Wash. Post}, July 29, 1990, at C7. Perhaps the major difference between the two cases was the possible involvement of the President in one of the incidents. To the extent that President Reagan was suspected of official wrongdoing while in office, his ability to govern was called into question. The prospect of such paralysis made a delay, while waiting for criminal investigators to complete their work, out of the question. Note the contrast to the Whitewater affair, where the central allegations involve associates of President Clinton, or about his own conduct many years before he took national office.

\textsuperscript{171} \textsc{See Katy J. Harriger}, \textsc{Independent Justice: The Federal Special Prosecutor in American Politics} 74-85 (1992) (discussing the variety of contexts in which special prosecutors are employed).

\textsuperscript{172} \textsc{See Biskupic, supra note 99, at 2668, 2670 (indicating the possibility of immunity being granted after conviction).
Similarly, lower-cost immunities may also be possible in situations where civil sanctions will overshadow the criminal sanctions available against a potential congressional witness. When the civil sanctions include debarment from contract work with the government (say, for a defense contractor),\(^{173}\) or major sanctions from regulatory agencies (perhaps for a licensed commodities broker),\(^{174}\) or a false claims action to recover government funds,\(^{175}\) a possible criminal conviction may just duplicate already significant sanctions. In such a circumstance, Congress might decide that the loss of a criminal conviction is not a very high price to pay if immunized testimony can contribute to an important investigation.

Congress might also decide to grant immunities more freely to federal officers who could later face a realistic possibility of impeachment. If Congress were to give new life to this near-moribund check on executive and judicial power,\(^{176}\) investigators might reason that an impeachment and conviction would be the most fitting punishment for malfeasance in office, and could justify the possible loss of a criminal conviction.

A survey of past immunity recipients does not, in the end, yield a ready set of criteria for Congress to apply in choosing whether the need for effective congressional investigation outweighs the possible loss of criminal prosecution. The fundamental problem is that there are few cases where the value of testimony is high for congressional investigators but low for criminal investigators. Generally speaking, those persons with the information that most needs public airing are also the most attractive criminal defendants. Specific substantive criteria may help choose whether to grant immunity in a few easy cases; yet most choices about congressional immunity will remain close questions, and Congress will remain both unwilling and unable to resolve these questions satisfactorily by drafting such guidelines.

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176. For a thoughtful proposal to make impeachment of judges easier to accomplish, see generally Maria Simon, Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges, 94 COLUM. L. REV. 1617 (1994).
B. Request Mechanisms

Instead of substantive criteria for immunity requests, Congress might create procedural devices to promote deliberation in its use of immunity. The current statute requires the judge ruling upon the request to determine that a majority of the members present in one house, or two-thirds of a committee, voted to request the immunity order. The judge must also give ten days notice to the Attorney General, and must delay the issuance of the order an additional twenty days if the Attorney General asks for more time. These statutory voting requirements and the brief waiting period may not sufficiently focus the attention of Congress on the need for immunity in a particular case, or the costs of an immunity grant. Congress could supplement the statutory requirements with internal rules designed to prevent hasty consideration, or requests by a small group of members who do not reflect the views of the body as a whole.

Two features of the current system make hasty or unrepresentative requests more likely. As discussed earlier, the current system is highly decentralized: any full committee can vote to grant an immunity. Further, institutional memory or expertise among staff members is not widely dispersed, and can go unnoticed or unheeded by the members of Congress and committee staffs who make the decisions about immunity.

Either house of Congress might address these problems by passing internal rules designed to centralize consideration of immunity questions in the hands of a few members; this might allow those members to develop consistency and expertise. New rules might require any committee wishing to obtain an order compelling a witness to testify to win the approval of a designated clearinghouse for immunity questions. Perhaps the proper body would be an existing committee, such as the Senate Judiciary Committee or the House Government Operations

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177. 18 U.S.C. § 6005(c). See supra notes 23-35 and accompanying text (discussing the historical development of the immunity statute).

178. The full committee voting requirement originated with the 1954 version of the congressional immunity statute. Pub. L. No. 600, ch. 769, 68 Stat. 748 (1954); 99 Cong. Rec. 8646-63 (1953). In 1953, there were 15 standing committees in the Senate, and 19 in the House; in the 104th Congress there are 17 in the Senate and 19 in the House. There were 11 joint committees in 1953, there are 4 today. 1 Cong. Index, 104th Cong. (CCH), 12051-63 (1995); 2 id. at 26151-721 (1995); 1 Garrison Nelson & Clark H. Bensen, Committees in the U.S. Congress 1947-1992, Committee Jurisdictions and Member Rosters 867-999 (1993).
Committee. The Senate's Permanent Subcommittee on Investigations could also be a candidate.

Rather than giving approval power to an existing committee, the rules may require instead the approval of leadership groups in the House or the Senate, such as the leadership groups now consulted on intelligence issues. As with intelligence questions, the leadership group that would approve all immunity requests would have to be discreet. Immunity requests are often made under seal, to prevent premature disclosure of a committee's investigative strategy.

Another centralizing option would be to amend the immunity statute to require a majority vote by the full Senate or House (or both) before any grant of immunity. While this would assure that any request for immunity accurately reflects the political judgment of the body as a whole, it does not allow much expertise on immunity requests to develop. Indeed, it may reduce the quality and amount of deliberation involved because a large group will probably devote less time and attention to the question than a smaller group with a more focused interest in the investigation.

Given the power of the committee structure, it seems reasonable to predict that the power to request immunities will remain with the various committees themselves. Even so, if the rules required that all committees consult with some centralized support staff before granting immunity, they would achieve some but not all of the benefits of centralization. The staff could certainly develop an expertise and experience regarding investi-


181. Apparently the 1857 immunity statute did not require a vote from the full House or Senate: "[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, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify." Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156 (1857); see also Cong. Globe, 34th Cong., 3d Sess. 427 (1857) (discussing the history of the immunity statute). The same was true of the 1862 version of the statute. Act of Jan. 24, 1862, ch. 11, 12 Stat. 393 (1862).

182. See generally Steven S. Smith & Christopher J. Deering, Committees in Congress (2d ed. 1990) (analyzing the congressional committee process).
gative needs, the impact of immunities on criminal enforcement, and the history of immunity grants. Repositories of such expertise already exist (although committees have no obligation to utilize them before they vote) in the Office of Senate Legal Counsel and in the Office of General Counsel for the House of Representatives. 183

A staff support group would be less able than a centralized group of Senators or House members to create adequate deliberation on the immunity question. Given the political exigencies of many congressional investigations, the requesting committee may have little incentive to consult the centralized staff in anything more than a pro forma fashion. Moreover, when the immunity question requires a legislative judgment about the relative political importance of different instances of wrongdoing, the committee cannot and should not defer entirely to staff members. 184

IV. THE POLITICAL CONTEXT OF CONGRESSIONAL IMMUNITY GRANTS

Very few strategies for dealing with the costs of immunity grants have caught the attention of Congress, and none have borne fruit. 185 It is hard to blame Congress for its failure to take

183. See supra notes 111-114 and accompanying text (discussing the role of the House and Senate legal counsel offices in making decisions regarding grants of immunity).

184. If Congress does not choose to require consultation with centralized staff, it still may wish to empower some support office to provide periodic education about the effects of immunity to committees often engaged in investigations with criminal ramifications. See Oversight Manual, supra note 162, at 34-35 (stating that recent court decisions "appear to make the prosecutorial burden substantially more difficult, if not insurmountable" and advising as follows: "[A] committee might wish to consider, on the one hand, its need for [a witness's] testimony in order to perform its legislative, oversight, and informing functions, and on the other, the possibility that the witness's immunized congressional testimony could jeopardize a successful criminal prosecution"). Given the breadth of federal criminal provisions, this would include virtually every committee on Capitol Hill. See John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It, 101 Yale L.J. 1875, 1878-82 (1992) (discussing the ever-widening definition of criminal conduct); see generally Lawrence G. Baxter, Judicial Responses to the Recent Enforcement Activities of the Federal Banking Regulators, 59 Fordham L. Rev. S193 (1991) (examining the increasingly expanding definition of criminal conduct in the context of bank regulation).

185. See, e.g., S. 2074, 102d Cong., 1st Sess., 137 Cong. Rec. S18385 (1991) (describing an attempt to amend the immunity statute in such a way as to legislatively overrule the North decision).
any action in the five years since the *North* decision,¹⁸⁶ because political considerations often make pointless any changes in immunity laws and practices. Immunities are surely more costly than they need to be, but members of Congress have powerful political reasons to keep them that way.¹⁸⁷ The Whitewater investigations offer the most recent and vivid examples.

Representative Henry Gonzalez, a Democrat, chaired the House Banking, Finance and Urban Affairs Committee when allegations about President Clinton's investment in the Whitewater development first surfaced. Gonzalez resisted the calls of Republican committee members to hold hearings on the matter because he considered the Whitewater matter to be a "premeditated Republican plan to do in the President."¹⁸⁸ He asked Whitewater Special Prosecutor Robert Fiske to appear before his committee to explain "the scope and findings" of the first phase of Fiske's investigation.¹⁸⁹ Gonzalez hoped that this testimony would reveal "how much of the Whitewater furor is simply partisan hysteria."¹⁹⁰ Fiske refused to testify before the committee because it would "compromise" his effectiveness as a special prosecutor.¹⁹¹ Fiske also asked the committee not to call as witnesses several key figures in the incidents he was investigating. Fiske's reason, again, was a concern that congressional testimony by these witnesses would compromise the investigation.¹⁹²

¹⁸⁶. United States v. North, 920 F.2d 940 (D.C. Cir. 1990)(per curiam), modifying 910 F.2d 843, 851-52 (D.C. Cir.) (per curiam), cert. denied, 111 S. Ct. 2235 (1991); see supra notes 50-55 and accompanying text (discussing the *North* holding regarding the improper use of immunized testimony).


¹⁹¹. Susan Schmidt, *Fiske Refocuses Whitewater Probe on Justice Dept. and S&L Case; Special Counsel Says 2 Clinton Appointees Are 'Potentially Involved'*., WASH. POST, July 9, 1994, at A3. Fiske did, however, offer to meet privately with Gonzalez and the ranking Republican on the committee, Jim Leach, to coordinate efforts between the two investigations. Gonzalez refused the offer. *Id.*

Gonzalez was more than willing to grant Fiske’s request, perhaps because it gave him a non-partisan reason to squelch charges against the President — charges that Gonzalez believed to be both unfounded and politically motivated. If key witnesses were off limits to the congressional investigators, Congress would have to postpone its efforts. In the meantime, the public’s interest in the whole affair might fade away. And it might prove difficult to ignite that interest again several months or years later after the events had grown stale.193

But delay can serve more than one purpose. While Gonzalez hoped that delay would move the whole Whitewater question off the political agenda permanently, Republicans after the November 1994 elections hoped that delay would shift Whitewater off the crowded fall agenda of the new Congress, and into the thick of the 1996 Presidential election campaign. Thus, Senator D’Amato, who had pressed for immediate hearings in 1994, was more willing in 1995 to defer to the request for more time from Fiske’s replacement, Kenneth Starr.194

What is true for Whitewater holds true for any other congressional investigation of high-level executive wrongdoing. Some members of Congress will hope to push ahead with hearings and the attendant political struggles. Several factors will inspire them, not the least of which is the personal publicity hearings on a timely subject can create. Concerns about costly immunities will not create much hesitation.195 Others in Congress will want to delay the political struggle until a more advantageous moment — the “delay-to-win-later” camp. The delay might move an investigation closer to a campaign season, or to a time when the public seems more interested in the issue.196

193. Katy Harriger argues that the appointment of a special prosecutor or independent counsel also serves the purpose of postponing or squelching media and public interest in executive branch behavior. Harriger, supra note 171, at 68-98.

194. Kosova, supra note 8, at 12; Labaton, supra note 3, at A8 (reporting that Sen. D’Amato denied political motivation for timing of hearings and planned for the hearings to extend into the political season of 1996).

195. See Divided We Govern, supra note 112, at 6-33, 110-12, 138-39, 141-42, 173-75 (discussing the political motivations for public hearings); see generally John W. Kingdon, Congressmen’s Voting Decisions (2d ed. 1981) (giving a theoretical overview of the legislative process linking all legislative choices to re-election prospects).

196. For discussions of how the Watergate and Iran-Contra affairs initially did not inspire much public interest (and therefore not much congressional interest), see Gladys Engel Lang & Kurt Lang, The Battle for Public Opinion: President, the Press, and the Polls During Watergate 44-61(1983) (detailing the rise in public interest in Watergate); Scott Armstrong, Iran-Con-
Still others will want to delay the struggle in hopes that it will not reappear later — the “delay-to-forget” camp.

The delay-to-forget camp will have the strongest reasons to keep immunities very costly, as they have been since the North and Poindexter decisions. If a congressional decision to immunize a witness makes a criminal prosecution virtually impossible, then any congressional use of immunities must wait until the prosecutor's investigation and all the criminal proceedings have ended. In the Iran-Contra affair, for instance, if Congress had decided to avoid any risk of interference with the criminal proceedings, it might have delayed any immunity grants until August 1993 — seven years after the events in question took place.197

The delay-to-win-later camp would rather have immunities more readily available and less costly. When the time does finally arrive for the hearings and the political strife, they will want access to as much testimony as possible. Hence, these members of Congress will look for reasons to delay the start of an investigation, but will ultimately need to think carefully about granting immunities and to reduce immunity costs as much as possible.

Prosecutorial investigators have provided this group with enough reason to delay their hearings for the time being, even when Congress has no plans to obtain any immunity orders for witnesses. Prosecutors virtually always would prefer that congressional investigators stay far removed from the case, whether or not Congress grants immunities in the short run. Under the right political conditions, these broader requests from prosecutors for Congress to delay its investigations will find favor.198

197. 1 WALSH, supra note 120, at 51-53 (providing a concise chronology of key events in the Iran-Contra affair, most of which occurred after 1986).

198. In the Whitewater investigations, Independent Counsel Starr's requests for more time have given Representative Leach and Senator D'Amato reason to conduct hearings that slowly address one phase of the matter at a time, only moving to a new topic after Starr has completed his work on that group of witnesses and documents. The initial Whitewater hearings in the Senate, before the August recess, covered the suicide of Vince Foster and the White House handling of executive documents in his possession after the suicide. Other aspects of Whitewater became the topic of Senate hearings after Labor Day, 1995. Holly Idelson, Nussbaum Defends Actions After Foster's Death, 53 CONG. Q. Wkly. Rpr. 2419, 2419 (1995). Initial hearings in the House Banking and Financial Services Committee focused on the testimony of an investigator for the Resolution Trust Corporation claiming that Clinton administration offi-
There are several forms of short-term problems that a congressional investigation might pose for a parallel criminal investigation, all unrelated to grants of immunity. If witnesses talk first to congressional staff members and give their testimony in congressional hearings, they will be less likely to give criminal prosecutors the exact testimony they might hope to hear. Different sets of investigators will interview and examine witnesses with different priorities and abilities, so some may pursue a line of questions more thoroughly than others.\textsuperscript{199} Questioners also may have different facts at their disposal, facts that are necessary to jog the memory of the witness, or to prevent the witness from subtly shading testimony in a particular direction.\textsuperscript{200}

Unfortunately for criminal investigators who do not arrive on the scene first, a witness who has already recounted events to earlier congressional investigators will tend to "lock in" to the earlier version of the story. This takes place in part for psychological reasons: the original retelling of the events becomes just as real as the events themselves.\textsuperscript{201} It also takes place for legal reasons: in extreme cases, a witness who gives inconsistent statements might face charges of perjury.\textsuperscript{202} To the extent that witnesses do elaborate on their earlier statements, they are...
more susceptible to cross-examination later for inconsistent statements.

Criminal investigators face additional obstacles if witnesses testify publicly at a congressional hearing. The public airing of the testimony, through the media and through published reports at the close of congressional investigations, enables other witnesses to listen to that testimony and to shift their own account of the events in light of what they hear.\(^2\) It also creates opportunities for witnesses to tamper with documents and other physical evidence.

Thus, whenever a congressional investigation coincides with a criminal investigation, the prosecutor will have a variety of concerns, and a receptive congressional audience for each of them. The delay-to-forget camp will be especially willing to avoid any use of immunities, while the delay-to-win-later camp will listen carefully to any requests from the prosecutor to have the first access to witnesses.

Of course, the political costs of public hearings are not limited to one party. Most members of Congress, at one time or another, will find themselves in the delay-to-forget camp and will be grateful for the high costs of witness immunities. In this complex political landscape, Congress's willingness to amend statutes or its internal rules to reduce the cost of immunities, or to deliberate more carefully about immunities, is in real doubt.

CONCLUSION: A NOTE ON THE VALUE OF CONGRESSIONAL HEARINGS

The *North* and *Poindexter* cases have highlighted for Congress and the public the impact on criminal investigations when Congress grants use immunity to a witness to compel testimony. At this point, Congress appears more willing to choose criminal prosecution than to pursue its own inquiries vigorously. Yet it is too early to tell, even five years after the Iran-Contra cases, whether Congress has abandoned the use of immunity grants over the long run.

There are a few changes to the federal immunity statute, internal rules of the Senate and House, and investigative practices that might make immunities less costly. None of these changes, however, are likely to make a prosecutor's work much easier if Congress decides to grant immunity to a potential de-

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fendant. The changes either would run into conflict with current Fifth Amendment jurisprudence, or they would lessen the burden on the prosecution in too few cases.

This leaves Congress, for the foreseeable future, with a choice between full-blown and timely congressional hearings, or criminal charges. That Congress has chosen criminal charges so consistently over full congressional inquiry in recent years is both revealing and troubling. This trend reveals just how heavily our society depends on the criminal law, both to express disapproval and to change behavior. There are plenty of other indicators of our heavy reliance on the criminal law. But a congressional preference to preserve possible criminal charges down the road, instead of pursuing immediate public hearings, is one strong signal from the highest reaches of government about the centrality of criminal law.

Preserving criminal prosecution may be the foremost concern in some incidents of alleged wrongdoing. But when full and immediate congressional investigation of matters of public import, such as Whitewater or the FBI's conduct at Ruby Ridge, are delayed or diminished out of deference to criminal investigation, then one must ask whether the public has been best served. The choice of the criminal forum over the legislative forum in such cases is troubling because of the cynicism about Congress that the choice displays. It suggests that little worthwhile can come of a congressional hearing, and that any prospect of a criminal conviction should be enough reason to forego the pointless spectacle of hearings. Whether or not this is a sound judgment, it corrodes public faith to hear members of Congress themselves declare this judgment.

Further, it is certainly worth asking whether a criminal prosecution provides the appropriate sort of accountability for misconduct in public office. If congressional hearings, rather than a criminal proceeding, were to become the main event for public scrutiny of a political figure, then political crimes would

204. See R.S. Ghio, The Iran-Contra Prosecutions and the Failure of Use Immunity, 45 Stan. L. Rev. 229, 247-51 (1992) (arguing that congressional immunity grants make later prosecutions virtually impossible and concluding that Congress should not immunize witnesses who are likely to face criminal prosecution).

receive political punishments. And the decisionmakers — both the members of Congress and the interested public — would be better equipped to decide the issues than the often ill-informed jurors who must decide criminal cases under current juror selection rules.206

It is now unfashionable to praise congressional hearings.207 Yet there is a long history in this country of defending the virtues of congressional investigations as a genuine forum for public debate.208 As defenders have pointed out over the years,


207. This public perception about congressional hearings may have crystallized in recent years during the Clarence Thomas/Anita Hill hearings, which placed Senate investigators in a very unflattering light.

208. Attitudes towards congressional investigations have shifted throughout this century. Up until the 1950s, liberal and progressive figures tended to support broad investigative powers for Congress. See Woodrow Wilson, Congressional Government: A Study In American Politics 303 (1885) (stating congressional inquiry is necessary to fulfill the informing function of Congress); Felix Frankfurter, Hands Off the Investigations, The New Republic, May 21, 1924, at 329-31 (urging Congress's broad investigative powers be left untrammeled); James M. Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 194-210 (1926) (arguing the investigative activities of Congress are necessary to carry-out the legislative function and should not be limited). Investigations in the 1920s worked to hold executive branch officials accountable (Teapot Dome, for instance) during a period of growing delegation of authority. See Eberling, supra note 26, at 280-81 (1928) (describing congressional inquiry into executive performance as "very successful and most invaluable"). Investigations in the 1930s were designed to further executive branch efforts to pass new legislation. M. Nelson McGeary, The Developments of Congressional Investigative Power 39-43 (1940) (recognizing the reinforcing role of investigations during the New Deal efforts to pass legislation); Marshall Smelser, The Problem in Historical Perspective: The Grand Inquest of the Nation, 1792-1948, 29 Notre Dame L. Rev. 163, 179-80 (1954) (stating investigations in the 1930s aided the Roosevelt administration). McCarthy-era abuses of congressional investigations provoked an outpouring of new scholarship on the subject, much of it critical of Congress and distraught over the lack of effective judicial supervision of congressional investigations. See generally, Bar, supra note 19, at 197-200 (criticizing the judicial branch for being "slow in imposing any check upon the congressional investigating power"); Robert K. Carr, The House Committee on Un-American Activities 406-48 (1952) (examining the judiciary's reluctance to review and limit congressional investigations); Taylor, supra note 26, at 240-62 (encouraging the development of judicial review to limit investigations); Martha M. Driver, Constitutional Limitations on the Power of Congress to Punish Contempts of Its Investigating Committees, 38 Va. L. Rev. 887, 888-911 (1952) (reviewing the First, Fourth and Fifth Amendment analysis of issues raised by investigations);
congressional hearings can achieve a wider range of objectives than a judgment and sentence in a criminal case. Hearings will sometimes result in genuine punishment for wrongdoers who have not, strictly speaking, violated a criminal law.\textsuperscript{209} Hearings can inform Congress about the need for new legislation.\textsuperscript{210} They can also lead to public scrutiny of poor governance, and quicker and more certain accountability of government officials—accountability in a broader sense than the criminal law can achieve.\textsuperscript{211}

The costs of slow and incomplete congressional investigations are diffuse, but they have serious consequences for the health of the republic. Obstacles to the use of immunity grants do not, standing alone, cause ineffective congressional hearings. But when Congress inquires into governmental conduct with possible criminal ramifications, immunities are the central


\textsuperscript{209} Segal, \textit{supra} note 167, at 952-54 (explaining that congressional investigations may extend beyond inquiry into legally recognized crimes). Punishment of witnesses, however, cannot be the only purpose of a hearing.

\textsuperscript{210} MARSHALL EDWARD Dimock, \textit{Congressional Investigating Committees} 72-84 (1929) (examining several cases in which Congress initiated fact-finding investigations to perform its law-making function); George W. Van Cleve & Charles Tiefer, \textit{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, 92 (1990) (urging Congress to review the problems encountered during the Iran-Contra hearings and amend "the laws so the United States has power to detect and overcome" similar cases).

\textsuperscript{211} \textit{See} McGEARY, \textit{supra} note 208, at 23-49 (comparing congressional investigations to a board of directors in that it holds officials accountable for performance of their duties); HAMILTON, \textit{supra} note 10, at 121-207 (analyzing the informative and investigatory functions of congressional inquiries); Harriger, \textit{supra} note 171, at 206-07 (discussing the drawbacks of an overly legalistic approach which focuses on narrow criminal prosecutions rather than investigating gray areas of "unethical but not criminal behavior"); TAYLOR, \textit{supra} note 26, at 58-70 (describing congressional investigations to expose economic and political abuses); George B. Galloway, \textit{The Investigative Function of Congress}, 21 AM. Pol. Sci. REV. 47, 48-49, 55 (1927) (exposing the wide range of governmental activities subjected to investigation by Congress). All of this would be even more emphatically true if impeachment were to become a realistic possibility. \textit{See} Michael J. Gerhardt, \textit{The Constitutional Limits to Impeachment and its Alternatives}, 68 TEx. L. REv. 1, 10-46 (1989) (tracing the problems associated with current approaches to impeachment).
source of conflict between congressional and criminal investigations. If Congress can improve its practices with immunities, it will do more than improve its inner workings. It will reaffirm its own legitimacy as a place for meaningful debate and accountability. It could foster, in a small way, the conditions for democratic debate and self-governance.