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George Van Cleve
Charles Tiefer

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NAVIGATING THE SHOALS OF "USE" IMMUNITY AND SECRET INTERNATIONAL ENTERPRISES IN MAJOR CONGRESSIONAL INVESTIGATIONS: LESSONS OF THE IRAN-CONTRA AFFAIR

George W. Van Cleve[*]
Charles Tiefer[**]

In its Iran-Contra investigation, Congress faced legal challenges which evolved logically from the two-century long history of Congressional investigations, and yet at the same time were unmatched in their significance. One challenge concerned "use" immunity, and its employment when high advisers to the President faced parallel Congressional and criminal proceedings. A second concerned the investigation of a secret international "Enterprise," which, like similar enterprises, was established overseas to carry on international operations without public accountability, and was protected by multiple layers of secrecy sanctioned by law. This article addresses how history brought Congress to those challenges, and how Congress met them, because they are the two major legal obstacles to contemporary Congressional investigations.

Part One begins with a discussion of factors influencing the timing of congressional investigations and the conflict between such investigations and parallel or subsequent criminal investigations and prosecutions. It then analyzes key developments in the law of immunity since Watergate. Next, this part reviews the employment of use immunity in

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* Mr. Van Cleve is Deputy Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice. He was formerly Chief Minority Counsel, U.S. House of Representatives Select Committee to Investigate Covert Arms Transactions with Iran. B.A., University of Chicago, 1973; J.D., Harvard Law School, 1977.

** Mr. Tiefer is Deputy General Counsel to the Clerk of the U.S. House of Representatives. He was formerly Special Deputy Chief Counsel, U.S. House of Representatives Select Committee to Investigate Covert Arms Transactions with Iran. B.A., Columbia College, 1974; J.D., Harvard Law School, 1977. The views expressed here are solely those of the authors.

the Watergate and Iran-Contra congressional investigations. After a general treatment of the employment of use immunity in those investigations, the article considers two types of problems with the use of the federal immunity statute: first, significant interpretive problems under the statute and second, problems in enforcing immunity orders.

Part Two begins with a survey of the expanding use of international enterprises whose operations are deliberately concealed from United States executive and congressional authorities by a web of foreign secrecy laws. As an example of such concealment, it then describes the legal artifices used to create and hide the North-Secord Enterprise and the operation of that Enterprise in the Iran-Contra Affair. Next, Part Two considers the strengths and weaknesses of the three basic legal tools available to the United States in investigating such enterprises: treaties, compelled confidentiality waivers, and compelled or negotiated transfer of information through immunization or other means. It analyzes the use of these tools in the Iran-Contra investigation. Part Two then considers the overseas reach of United States process for individual and corporate evidence, the barriers created by bank secrecy laws, and techniques of international investigation.

PART ONE

I. THE EMPLOYMENT OF "USE" IMMUNITY IN PARALLEL CONGRESSIONAL AND CRIMINAL PROCEEDINGS

A. Introduction

The history of the Watergate and Iran-Contra investigations by Congress shows that grants of testimonial or "use" immunity[1] are very often indispensable tools of major congressional investigations. Yet, such grants of immunity intensify the conflict between key purposes of Congressional investigations and those of the criminal justice system by

1. Under federal law, testimonial or "use" immunity (technically referred to as "use and derivative use immunity") is granted by an immunity order which compels testimony over a claim of fifth amendment privilege. The law provides that neither the testimony so compelled, nor any evidence derived therefrom, may be used in any subsequent prosecution against the witness except for perjury, giving a false statement, or otherwise failing to comply with the order. 18 U.S.C. § 6002 (1985). Because the immunity from prosecution conferred by the statute is coextensive with the scope of the fifth amendment privilege, immunized testimony can constitutionally be compelled over a claim of privilege. Kastigar v. United States, 406 U.S. 441 (1972). "Use or derivative use" immunity is distinguishable from transactional immunity, an immunity from prosecution for offenses related to the compelled testimony. *Id.* at 453.

erecting a potentially formidable barrier to subsequent criminal prosecutions.[2] If they are not properly timed or employed once made, grants of testimonial immunity may block otherwise successful criminal prosecutions by making it difficult or impossible for prosecutors to meet their "heavy burden" of demonstrating that their cases are not tainted by the immunized testimony given before the Congress.[3]

Improperly made grants of immunity may also result in failed congressional investigations. If an immunity is granted prematurely, a thorough investigation may not be able to be conducted. Immunity also may be granted improvidently, by giving it to a witness who should not be immunized, thus assisting an individual who should be prosecuted to escape prosecution.[4] Finally, even when an immunity is granted, it may not be able to be enforced so that an investigation cannot proceed.

Given this tension between the need for congressional investigations to employ use immunity and the possibility that using it may defeat the ends of the criminal justice system, one of the first orders of business for a major congressional investigation which precedes or parallels related criminal investigations or prosecutions will be to navigate the shoals of use immunity. The first part of this article discusses the task of such navigation, with particular emphasis on how this challenge was met in the Iran-Contra investigation.

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2. *See, e.g.*, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-11.212 (1977) (gives a prosecutor's view of the difficulties of prosecution after a grant of immunity).

3. *Kastigar*, 406 U.S. at 461. The Watergate Special Prosecution Force described the problems posed by the investigation conducted by the Senate Select Committee on Presidential Campaign Activities [hereinafter Senate Watergate Committee] in the following manner: "The danger existed that legislative hearings might frustrate the criminal proceedings. For example . . . the Committee planned to immunize [several important witnesses], thus barring any prosecution which could be shown to be based on any direct or indirect use of their Senate testimony." UNITED STATES WATERGATE SPECIAL PROSECUTION FORCE, UNITED STATES DEPARTMENT OF JUSTICE, REPORT 6 (1975) [hereinafter WATERGATE SPECIAL PROSECUTION FORCE].

4. It is essentially for this reason that, as James Hamilton said, "A Congressional committee normally grants immunity to a witness only when convinced that his testimony will produce new and vital facts previously undisclosed by the investigation." J. HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 18 (1976) [hereinafter THE POWER TO PROBE].

1. The Timing of Congressional Investigations

It would be desirable if conflicts between congressional investigations and criminal prosecutions could be avoided. This could be done either by allowing prosecutions to precede investigations, or by deciding in advance in particular cases that, in view of the necessity for legislative factfinding, there would not be any criminal prosecutions.

In the case of a major congressional investigation, however, there may well be both considerations of general policy and more immediate, sometimes partisan, political reasons which lead Congress to be unwilling to wait for the conclusion of criminal prosecutions before beginning an investigation. In the case of the Iran-Contra affair, for example, there was a widespread public feeling that the country needed to determine whether the events under investigation called for systematic reform of the national security decision-making process, a question which could not easily be deferred for two or three years pending the outcome of criminal investigations and prosecutions.[5] This public sentiment was reflected in the prompt appointment of the President's Special Review Board (Tower Board) with a very short reporting deadline and the virtual unanimity of both Houses of Congress in promptly authorizing massive investigations, despite their foreign policy sensitivity, also with relatively short deadlines.[6] Of course, there was

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5. PRESIDENT'S SPECIAL REVIEW BOARD, REPORT, at I-1 (Feb. 26, 1987). Similarly, James Hamilton, Assistant Chief Counsel to the Senate Watergate Committee, reported that during the Watergate investigation the Senate Watergate Committee unanimously rejected Special Prosecutor Cox's request that the Committee delay hearings during his investigation. According to Hamilton: "It was Senator Ervin's view that informing the nation immediately of the full parameters of the Watergate affair was the country's most pressing need." THE POWER TO PROBE, *supra* note 4, at 20. Cox then unsuccessfully argued in court that the Committee's ability to obtain immunity orders for certain witnesses should be made conditional on court-imposed limits on the broadcasting of their testimony. *Id.*

6. The President's Special Review Board was established by Executive Order No. 12,575, 51 Fed. Reg. 43,718 (1986). The Executive Order gave the Board sixty days to report. *Id.* The Senate Select Committee on Military Assistance to Iran and the Nicaraguan Opposition (hereinafter Senate Select Committee) was established by S. Res. 23, 100th Cong., 1st Sess. (1987), which passed by a vote of 88-4 on January 6, 1987. The resolution gave the Senate Select Committee an August 1, 1987 reporting deadline. *Id.* § 9. The House Select Committee to Investigate Covert Arms Transactions with Iran (hereinafter House Select Committee) was established by H.R. Res. 12, 100th Cong., 1st Sess. (1987), which passed the House by a vote of 416-2 on January 7, 1987. The resolution gave the House Select Committee an October 30, 1987 reporting deadline. *Id.* § 12. The House and Senate Select Committees are hereinafter

a feeling in some quarters that a promptly begun, extensive Congressional investigation that continued for some time would maximize the critical political scrutiny received by the Administration for the affair itself.

The Iran-Contra affair also points out the common difficulty in deciding at the outset of, or during, an investigation that no criminal prosecutions should be brought. Congress generally strives to avoid a decision on such a point which can be second-guessed effectively later.

In the early stages of the Iran-Contra investigation, no one in Congress was entirely sure what had happened. There was a possibility that there had been any number of events of which Congress was unaware. Congress initially had access to only a small part of the available relevant documents.[7] It was apparent from the beginning that certain major witnesses were likely to exercise their fifth amendment right against self-incrimination in response to any significant questions. Also, there was early and persistent disagreement within the Congressional committees about whether certain conduct which had allegedly occurred violated any law, let alone about whether the conduct was criminal. For these reasons, the Committees decided to act in a manner that would hold open the possibility of subsequent criminal prosecutions as they proceeded with their investigation and hearings.[8]

No limits are imposed on Congress' decisions about the timing of investigations other than those established by public opinion and court decisions on prejudicial publicity, the latter of which generally impose relatively minor limits.[9] The absence of such limits, increased use of the Independent Counsel statute, and commonly found circumstances counseling prompt congressional investigations, make it reasonable to

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referred to collectively as the "Iran-Contra Committees" or "the Committees."

7. The first public disclosures, in early November 1986, occurred subsequent to the adjournment of Congress on October 18 of that year. The Intelligence Committees of both Houses, and certain other committees of jurisdiction, quickly began investigations, but time permitted them to gather only a small portion of the relevant evidence before Congress decided in early December to establish special investigating committees.

8. The Committees' reservation was best exemplified by the early decisions to delay the North and Poindexter immunities against the wishes of some members. Felton, *Senate Report Lays Out Details of Iran, Contra Arms Dealings*, 45 CONG. Q. 182, 184-185 (1987); Felton, *Select Panels Combine Activities, Set Immunity*, 45 CONG. Q. 509-10 (1987); Felton & Pressman, *Hill Panels, Special Counsel Wrestle with Immunity Issues*, 45 CONG. Q. 464 (1987). Incidentally, the decisions played a principal role in transforming the investigation from one conducted behind closed doors by national security and foreign policy experts to one conducted in front of the cameras by criminal lawyers.

9. Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

expect that there often will be major parallel criminal and congressional investigations.

2. The Effect on Immunity Decisions of the Conflict Between Congressional Investigations and Criminal Justice

Congressional investigations of government action have an important informing function in which public scrutiny, criticism, and, possibly, legislative action may create political accountability for actions under review.[10] Congressional investigations also may expose conduct which the executive branch then decides to treat as criminal.[11]

No matter how harsh the political judgment ultimately made by the congressional majority in power about the conduct investigated might be, however, Congress is constitutionally prohibited, by article I of the Constitution, from acting to punish individuals for the conduct under investigation.[12] As the Supreme Court has said, Congress is not "a law enforcement or trial agency."[13] An outgrowth of the prohibition against Congressional sanctions has been the recent custom that Congress generally will not accuse specific individuals of having committed specific crimes, except when this forms part of "judicial" actions envisioned for Congress by the Constitution, such as the impeachment process.[14] Congress increasingly is confining itself voluntarily to making judgments about the political legitimacy of conduct, not its criminality.

The rationale for these constitutional restrictions is not hard to find. Congressional investigations tend, by their nature as very substantial grants of power with fluid boundaries, to collapse the distinction between the political legitimacy of conduct and its criminality if there is advantage to be gained from collapsing this distinction.

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10. THE POWER TO PROBE, *supra* note 4, at 127-29.

11. *See Silverthorne*, 400 F.2d at 633-34; *Delaney*, 199 F.2d at 109-10.

12. Article I provides that "[n]o Bill of Attainder . . . shall be passed." U.S. CONST. art. I, § 9, cl. 3. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867). Congress may enact laws of general application which may also apply to persons under investigation as long as they do not run afoul of the *ex post facto* clause. Article I provides that "[n]o . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

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

14. THE POWER TO PROBE, *supra* note 4, at 281 (Senate Watergate Committee report intentionally did not allege specific criminal acts by individuals); REPORT OF THE CONGRESSIONAL COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, 100th Cong., 1st Sess. 27 (1987) [hereinafter IRAN-CONTRA REPORT].

Because Congress cannot impose criminal sanctions on the specific individuals it investigates, congressional investigations may be conducted, without raising constitutional questions, under procedures which do not provide criminal defendants with many of the procedural protections available to them in a court of law.[15] Since such investigations have no, or very few, procedural rules to prevent directly, or indirectly, the collapse of the distinction between unpopular and criminal conduct, the courts have tended to be skeptical of imposing unwarranted criminal sanctions on witnesses.[16]

Yet, congressional powers whose use may conflict with the purposes of criminal justice sometimes are indispensable to Congress' execution of its constitutional responsibilities. One such example is the power to grant testimonial immunity. The Supreme Court has observed that many congressional investigations are of offenses which could not be examined effectively without such power.[17] Although the immunity power is exercised on the basis of statute, it is likely that the Supreme Court would hold that it involves an inherent power of Congress necessary to the exercise of its legislative function.[18]

By sharply expanding Congress' ability to investigate, however, the necessary exercise of the immunity power heightens the conflict which sometimes occurs between congressional efforts to expose and control politically imprudent conduct and the purpose of the criminal justice system to apportion criminal guilt. In recognition of this potential conflict, the courts have hedged the exercise of the powers to grant immunity and to conduct investigations by insisting that their use not limit the constitutional rights of potential criminal defendants to a fair

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15. *See* United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (upheld the constitutionality of denying the right of cross-examination). As further examples of this, note that examination of congressional committee rules shows that the committees do not normally observe formal rules of evidence, or allow cross-examination of witnesses, and arguably are not required to observe traditional privileges against testimony such as the attorney-client privilege, though they often do the latter. *See, e.g.*, HOUSE COMM. ON RULES, RULES ADOPTED BY THE HOUSE OF REPRESENTATIVES, 100th Cong., 1st Sess. 115-28 (1987) (Rules of the Committee on Foreign Affairs).

16. THE POWER TO PROBE, *supra* note 4, at 235. "[T]he tendency of courts in contempt situations where liberty is at stake is to restrict the powers of Congress . . . ." *Id.*; *see also id.* at 208-45 (discusses the fact that on many occasions courts in contempt situations have required very strict compliance with the minimal procedural rules that apply in congressional proceedings).

17. Kastigar v. United States, 406 U.S. 441, 446-47 nn.14-15 (1972).

18. This is strongly suggested by the reasoning of Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), the landmark decision which held that Congress possessed an inherent contempt power on this basis.

trial.[19] Therefore, when Congress exercises these powers, it needs to do so with a recognition that the courts will require that Congress exercise the powers prudently if it wishes to maintain the possibility of subsequent criminal prosecutions. This will entail a measured effort by Congress to compare the needs of the particular congressional investigation with the rights of any potential criminal defendants that are implicated by that investigation.[20] And this, in turn, will require a grasp of the law governing immunity grants.

II. DEVELOPMENTS IN THE LAW OF IMMUNITY SINCE WATERGATE

Shortly before the Watergate investigation began, the Supreme Court upheld the constitutionality of the federal "use or derivative use" immunity statute in *Kastigar v. United States*.[21] The principal issue in the case law since *Kastigar* has been what prosecutors will have to do precisely to meet the "heavy burden" of showing that their prosecutions are not tainted by immunized testimony. The Supreme Court described this burden as including an "affirmative duty to prove that the evidence [the prosecution] proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[22]

The most difficult questions encountered in interpreting the requirements of *Kastigar* have had to do with the non-evidentiary use of immunized testimony by prosecutors.[23] In the typical case, a defendant seeks to have an indictment dismissed on the ground that prosecutors or grand juries had access to immunized testimony and may in some manner have relied on it to make decisions connected with the proposed prosecution. The courts appear to have split in their interpretation of the *Kastigar* requirements.

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19. *Kastigar*, 406 U.S. at 461-62; Silverthorne v. United States, 400 F.2d 627, 633-34 (9th Cir. 1968) (prejudicial publicity); Delaney v. United States, 199 F.2d 107, 113-14 (1st Cir. 1952) (prejudicial publicity).

20. *Delaney*, 199 F.2d at 114.

21. 406 U.S. 441 (1972).

22. *Id.* at 460-61.

23. Non-evidentiary uses of testimony are its uses for purposes other than presentation as evidence. For example, testimony might be used for developing trial and negotiation strategy or developing cross-examination. For largely, if not completely, opposing views of the validity of the non-evidentiary use of immunized testimony under *Kastigar* and the fifth amendment, see Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX L. REV. 351 (1987); Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978).

One distinct view is that the prosecution must be able to prove not only that its proposed evidence at trial was obtained independently of the immunized testimony or its fruits, but also that none of the prosecution's decisions concerning trial strategy or tactics were tainted by such information.[24] Both the Third Circuit, in *United States v. Semkiw,*[25] and the Eighth Circuit, in *United States v. McDaniel,*[26] have adopted as a standard that the government must show that "defendant and prosecution remained in substantially the same position as if the defendant had not testified," and that this includes the effects of immunity testimony on matters such as plea bargaining strategy, evidence interpretation, planning cross-examination, and general trial strategy.[27]

In *United States v. Byrd,*[28] the Eleventh Circuit took a contrary position. There, the court held that under *Kastigar* it would not "inquire into a prosecutor's motives in seeking indictment" when one of the prosecutors who had access to immunized testimony participated in the indictment decision.[29] It held that the Third and Eighth Circuit holdings in *United States v. Semkiw*[30] and *United States v. McDaniel,*[31] respectively, would effectively convert use immunity into transactional immunity.[32] With respect to trial, the *Byrd* court further held that the *Kastigar* requirements could be met either by a showing that the trial prosecutors had not had access to the immunized testimony *or* by showing by a preponderance of the evidence that the evidence to be adduced at trial was derived from independent sources.[33] This, too, differed from the position taken in *McDaniel* and *Semkiw* which would not have allowed the latter showing when prosecutors had such access.[34]

In addition, courts appear to disagree on the standard of proof required to make the necessary *Kastigar* showing. Some courts, such as the Eleventh Circuit in *Byrd,* hold that a "preponderance of evidence"

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24. *See* United States v. Semkiw, 712 F.2d 891 (3d Cir. 1983); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

25. 712 F.2d 891 (3d Cir. 1983).

26. 482 F.2d 305 (8th Cir. 1973).

27. *Semkiw,* 712 F.2d at 893-94; *McDaniel,* 482 F.2d at 311.

28. 765 F.2d 1524 (11th Cir. 1985).

29. *Id.* at 1530.

30. 712 F.2d 891 (3d Cir. 1983).

31. 482 F.2d 305 (8th Cir. 1973).

32. *Byrd,* 765 F.2d at 1531.

33. *Id.*

34. *Semkiw,* 712 F.2d at 895; *McDaniel,* 482 F.2d at 311.

standard is sufficient,[35] while other courts appear to require "clear and convincing" evidence that there is no taint of the government's evidence or trial work.[36]

Under the most stringent reading of the *Kastigar* requirements, the government would be required to prove by clear and convincing evidence that both its evidence and all of its litigation decisions were based on evidence obtained independently of the immunized testimony, including any leads which might have been obtained from persons who had heard the immunized testimony. This burden often has proven to be a difficult one for prosecutors to carry in situations in which immunized testimony has been presented, even in secret to a grand jury prior to trial. Recognizing this problem, even the *Byrd* court, which proposed a relatively lenient standard of proof, stated that it would "be unwise to permit an attorney familiar with the immunized testimony to participate in the trial or preparation of the case."[37]

As a practical matter, in a situation in which the immunized testimony will be presented on nationwide television and radio broadcasts, as in a major congressional hearing, to successfully protect itself against taint claims, the prosecution will quite likely need to seal the evidence composing its case before the public testimony begins.[38] If this is not done, the prosecution will have difficulty proving that any evidence it collects after the beginning of the testimony was not collected either by investigators who had been exposed to the testimony or from individuals who had themselves been exposed to the testimony.[39] In addition, the prosecution may need to take clear and strict

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35. *See, e.g.*, United States v. Hampton, 775 F.2d 1479, 1485 (11th Cir. 1985); United States v. Contreras, 755 F.2d 733, 735 (9th Cir.), *cert. denied*, 474 U.S. 832 (1985).

36. United States v. Smith, 580 F. Supp. 1418, 1422 (D. N.J. 1984) (cites other cases requiring clear and convincing evidence).

37. *Byrd*, 765 F.2d at 1532.

38. For a discussion of this procedure, see Strachan, *supra* note 23, at 812 n.97, 814-15 n.107; WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 3, at 6.

39. This latter possibility has been a major focus of the attack by the Iran-Contra defendants on the procedures used by Independent Counsel to avoid taint. In the Oliver North trial, the defendant asserted that the testimony of various grand jury witnesses was tainted because they had heard immunized testimony of one or more of the Iran-contra defendants. Defendant argued that Independent Counsel should be required to prove that the testimony of these witnesses was not altered by the tainted information. Judge Gesell rejected this argument. United States v. Poindexter, 698 F. Supp. 300 (D.D.C.) (order denying motions to dismiss on taint grounds), *appeal denied, petition for mandamus denied, appeal dismissed*, 859 F.2d 216 (D.C. Cir. 1988). However, Judge Gesell required that the grand jurors in the North trial remain free of

affirmative steps to shield its prosecutors from exposure to the immunized testimony, which may include a ban on listening to radio and television news broadcasts. If these steps are taken, they may be sufficient to shield a prosecution against taint claims.[40]

To make these steps by a prosecution effective, however, a congressional committee may need to be willing to alter the timing of its activities to suit the needs of a prosecution, since by acting prematurely the committee may preclude an effective defense by the prosecution against taint claims. As will be seen below, there have been assertions that such coordination would be legally impermissible.

III. THE EMPLOYMENT OF USE IMMUNITY IN THE WATERGATE AND IRAN-CONTRA INVESTIGATIONS

A. General

Both the Senate Watergate Committee and the Iran-Contra Committees depended heavily on the use of immunity grants to build their investigations. According to Hamilton, "[t]o get to the bottom (or the top) of many crimes, it is necessary to secure the testimony of one of the wrongdoers . . . . Historically [to circumvent the privilege against self-incrimination] the immunity mechanism has been widely used—the Ervin Committee, for example, conferred immunity on twenty-seven witnesses."[41] Nor were the witnesses granted immunity by the Ervin Committee minor witnesses in the Watergate Affair. They included: John W. Dean III, Jeb Stuart Magruder, G. Gordon Liddy, Gordon Strachan, and Donald Segretti, among others.[42] According to another

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knowledge of North's immunized testimony. *Id.* at 309.

40. The Iran-Contra prosecutions may provide a good case to test whether the *Kastigar* requirements can be met in a prosecution following a major congressional investigation which relies heavily on immunized testimony. So far as can be determined from court papers, Judge Walsh has taken most, if not all, of the precautions which could reasonably have been taken to protect against taint. *See infra* note 47 for discussion of these precautions. If Judge Walsh's actions do not meet the *Kastigar* requirements, Congress should probably conclude that its grants of immunity in major investigations will likely preclude subsequent prosecution of immunized individuals. This result would force Congress to become more discriminating in granting immunity, and to confront the question whether it is worth pursuing an investigation if the price is the loss of criminal sanctions against the individuals investigated.

41. THE POWER TO PROBE, *supra* note 4, at 78.

42. SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, LEGAL APPENDIX, S. REP. NO. 93-981, 93rd Cong., 2d Sess. 2154-55 (1974). All but one of the witnesses who received immunity and were indicted later pled guilty to one or more offenses. Strachan, *supra* note 23, at 814.

observer, "[t]he United States Senate and the Watergate Special Prosecution Forces (WSPF) employed use and derivative use immunity as a principle investigatory tool."[43]

B. Iran-Contra Committees

1. Committee Action

The Iran-Contra Committees also granted immunity to substantial numbers of very significant witnesses. The Committees granted immunity to twenty-six witnesses.[44] Most immunity grants were made by unanimous votes of the Committees, and even with respect to the non-unanimous votes there was limited dissent.[45] Included among the witnesses granted immunity were the individuals who generally were regarded as principal figures in both the congressional and the criminal investigations: Albert Hakim, Oliver North, and John Poindexter. The Committees also immunized a number of other figures significant in both investigations.[46]

Judge Walsh, the Iran-Contra Independent Counsel, recognized from the beginning that he would need to take extraordinary steps to protect his criminal investigation against taint by the congressional investigation, and acted accordingly.[47] Judge Walsh wisely made clear

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However, the prosecution against the immunized witness who refused to plead was later dismissed with prejudice by the Watergate Special Prosecution Force partially because of the "significant possibility" that the defendant would prevail on taint claims after giving public immunized congressional testimony. *Id.* at 819 n.126. Another Watergate indictment was also dismissed with prejudice on motion of the Special Prosecutor, apparently for similar reasons. Memorandum of the Independent Counsel Concerning Use Immunity, at 7 (Jan. 13, 1987) (submitted to the congressional Iran-Contra Committees).

43. Strachan, *supra* note 23, at 814.

44. IRAN-CONTRA REPORT, *supra* note 14, at 686.

45. W. Cohen & G. Mitchell, Men of Zeal: A Candid Inside Story of the Iran-Contra Hearings 39-41 (1988).

46. *E.g.*, Fawn Hall, Robert C. Dutton.

47. According to Judge Gesell, Independent Counsel took numerous steps to avoid exposure to immunized testimony:

> [S]teps . . . were taken by Independent Counsel from an early date to prevent exposure of himself and his associate counsel to any immunized testimony. Prosecuting personnel were sealed off from exposure to the immunized testimony itself and publicity concerning it. Daily newspaper clippings and transcripts of testimony before the Select [Iran-Contra] Committees were redacted by non-prosecuting "tainted" personnel to avoid direct and explicit references to immunized testimony. Prosecutors, and those immediately associated with them,

to the Committees at an early point that he held the view that the Committees' decisions about their investigation would take primacy over his work and that he would not seek to interfere with those decisions.

In addition, Judge Walsh and his staff took steps to make certain the Committees were aware of his views on various immunity issues within the limits imposed by grand jury secrecy rules, and to accommodate the decisions of the Committees on immunity issues.[48]

From the beginning of their work, the Committees were acutely aware of the potential for conflict between the investigation and possible prosecutions by the Independent Counsel.[49] On January 13, 1987, only a few days after the Committees formally were established, Judge Walsh sent to the Committees a legal memorandum opposing grants of immunity for any persons under investigation by the Independent Counsel before completion of that investigation, principally on grounds of the formidable difficulties such immunity grants would pose for subsequent prosecutions. On that date, Judge Walsh also sent to the Committees a memorandum describing legal issues posed by the relationship between the Committees and the Independent Counsel,

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were confined to reading these redacted materials. In addition, they were instructed to shut off television or radio broadcasts that even approached discussion of the immunized testimony. A conscientious effort to comply with these instructions was made and they were apparently quite successful. In order to monitor the matter, all inadvertent exposures were to be reported for review of their possible significance by an attorney, Douglass, who played no other role in the prosecution after the immunized testimony started. The court has reviewed *in camera* a file maintained by Douglass which consists of his miscellaneous papers recording, often in cryptic terms, incidents where Mr. Walsh, an Associate Independent Counsel, paralegal or a senior staff member inadvertently were exposed . . . . In a very few situations the employee was detailed to wholly unrelated work [because of exposure] at the employee's own suggestion or by Douglass.

United States v. Poindexter, 698 F. Supp. 300, 312-13 (D.D.C. 1988). Judge Gesell also discussed extensively the precautions taken by Independent Counsel to shield grand jurors from immunized testimony. *Id.* at 317-27.

48. As contemplated by the immunity statute itself, Judge Walsh and his prosecutorial staff met periodically with the senior staff of the Iran-Contra Committees to discuss various matters related to the Committees' immunity actions. *See* 18 U.S.C. § 6005(b)(3), (c) (1985); *see infra* note 70 for discussion of this matter. In addition, Judge Walsh appeared before the Committees to present the views of Independent Counsel on significant immunity matters. W. COHEN & G. MITCHELL, *supra* note 45, at 39-42.

49. Judge Walsh was appointed on December 19, 1986 by the special three-judge panel with jurisdiction under the independent counsel statute. *See* 28 U.S.C. § 49, 591-599 (1988).

particularly the issues raised by the transfer of information from the Independent Counsel to the Committees and *vice versa*.[50]

The principal action taken by the Committees in response to these concerns, which were expressed by members of the Committees and their staffs as well, was to delay the grants of immunity to certain key witnesses to give Judge Walsh time to build his cases independently of the Committees' investigation of those witnesses.[51] Where the demands of the investigation and hearing process required the Committees to grant immunities earlier than Judge Walsh would have preferred, extraordinary and generally successful precautions were taken by the Committees to insure against disclosure of information obtained by compelling testimony in executive session.[52]

Within the Committees, the principal difference of opinion between members on immunity matters concerned the timing of the immunity grants, with some members favoring early grants of immunity to major witnesses, while a substantial majority of the Committees favored deferral of the issue in deference to the concerns of the Independent Counsel.

The Committees Report Appendix defends the grant of immunity to Albert Hakim principally on the grounds that he controlled access to Swiss bank records of various transactions which the Committees otherwise could not obtain. The Committees obtained these records by virtue of the immunity grant long before these records were obtained by the Independent Counsel through a different method,[53] and there is no

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50. *See* Memorandum of the Independent Counsel Concerning Use Immunity, *supra* note 42; Memorandum of the Independent Counsel Concerning the Relationship Between the House and Senate Select Comms. and the Independent Counsel (Jan. 13, 1987).

51. This was exemplified by the Committees' early decisions to defer the question of immunity for North and Poindexter against the wishes of certain members after Judge Walsh appeared before the Committees to oppose these immunities. See *supra* note 8 for discussion of these delays.

52. Generally speaking, an executive session of a committee is one which only committee members, its designated staff, and witnesses, if any, are permitted to attend. Its proceedings may not be publicly discussed. C. TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 160-61 (1989). For example, security precautions were taken with respect to the May 2, 1987 executive session deposition of John M. Poindexter. *See infra* text accompanying note 61 for description of these precautions.

53. The Committees obtained the records in April, 1987 by compelling their production by Albert Hakim at a deposition in Paris, France. The Independent Counsel obtained them about four months later through Swiss court process against Swiss banks pursuant to an application filed under a United States-Switzerland treaty. Pressman, *Walsh Wins Rounds on Records, Role*, 45 CONG. Q. 1944 (1987).

assurance that even after the Independent Counsel had obtained them he would or could have provided them to the Committees or that the Committees could have obtained them through the method used by the Independent Counsel.[54] The Committees Report Appendix characterizes the evidence obtained from bank records and Hakim's compelled testimony as "indispensable . . . in tracing the flow of money in the Iran-Contra affair."[55]

The Committees' decision to grant immunity to Oliver North, a "principal target of the criminal investigation," is characterized in the Committees' Report as "not an easy one" and defended on the grounds that "the Committees' failure to obtain North's testimony would leave the record incomplete."[56] The Committees Report Appendix notes that the Committees agreed to defer North's testimony until the latter stages of the Committees' investigation, to strike a balance between the needs of the Independent Counsel and those of the Committees.[57]

Thus, both the Senate Watergate Committee and the Iran-Contra Committees found that they could not investigate properly the events they had been charged to investigate without employing grants of immunity to substantial figures in the investigation. The need for the use of immunity grants was particularly acute in the Iran-Contra investigation because of the difficulties posed by the foreign secrecy laws which were in effect in a number of the jurisdictions in which individuals under investigation had operated businesses or conducted transactions. This problem, one of substantial proportion, is the second major obstacle to the conduct of successful contemporary Congressional investigations, and is discussed in Part Two of this article.

2. Problems in Enforcing Grants of Immunity

Once Congress decides to make a grant of immunity, problems in the use of the immunity order are of two types: problems in the interpretation of the immunity authority, and problems in enforcing a grant of immunity in the case of recalcitrant witnesses.

a. Key Problems in the Interpretation of the Immunity Authority

After the Iran-Contra Committees had obtained an immunity order to compel the testimony of Oliver North, North objected to the Commit-

54. IRAN-CONTRA REPORT, *supra* note 14, at 686-87.
55. *Id.* at 687.
56. *Id.*
57. *Id.*

tees' proposed procedures for the implementation of the immunity order. North objected to two aspects of the Committees' proposed procedures which are relevant here: the proposal that he be deposed initially by Committee staff only, and the proposal that after any such executive session proceeding, whether attended by members or staff or both, he would then be required to testify again in public.[58]

The Committees had proposed an investigative deposition conducted and attended only by staff principally for investigative purposes and partially as a means of protecting against leaks of North's testimony prior to his public testimony. As James Hamilton noted in his discussion of the Senate Watergate Committee, the work of that Committee was attended by many leaks, and there was reason to believe that a number of those leaks came from members of the Committee.[59] In fact, Hamilton noted that one of the most sensitive documents ever prepared by the Committee staff was not leaked, apparently because it was never distributed to members of the Committee.[60]

For this reason, when the Iran-Contra Committees made arrangements for an early deposition of John Poindexter for investigative reasons, they agreed that the deposition itself would be conducted and attended only by three senior staff attorneys for the Committees, although the immunity orders were communicated to Poindexter with a quorum of Committee members present.[61] All notes of the deposition were placed under seal immediately at its conclusion. Although Poindexter's deposition covered the most sensitive political questions raised during the entire Iran-Contra hearings, since much of his testimony dealt with President Reagan's knowledge of and involvement

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58. Letter from Brendan V. Sullivan, Jr. to Reps. Hamilton, Fascell & Cheney, at 3-4 (June 17, 1987) (on file with the Missouri Law Review and the House Select Committee files in National Archives) [hereinafter Sullivan Letter].

59. In the case of the Senate Watergate Committee, efforts to shield testimony from disclosure often failed. THE POWER TO PROBE, *supra* note 4, at 273-300; Strachan, *supra* note 23, at 814 n.107. As Hamilton says:

> [N]ever, it is safe to say, has Congress experienced such a frenetic outpouring of supposedly confidential information .... The leaks were the major stain on the Committee's performance. They severely jeopardized its credibility and the integrity of its proceedings .... [T]he leaks were illegal ... and arguably some of them had criminal implications .... [I]t can be said with assurance that senators and staff were the funnels for much of the confidential information that mysteriously appeared in the public domain during the committee's probes.

THE POWER TO PROBE, *supra* note 4, at 274-75.

60. THE POWER TO PROBE, *supra* note 4, at 281 (alleged involvement of former President Nixon in Watergate coverup).

61. Poindexter's attorneys did not object to this deposition arrangement.

in various events, there were no leaks of this information prior to Poindexter's public testimony several months later.

North objected to the staff deposition proposed in his case on the ground that a deposition is not a proceeding before a house of Congress or one of its committees or subcommittees. If this position was correct, North reasoned, then, testimony given at such a deposition would not be testimony covered by the immunity statute or the immunity order issued pursuant to that statute. Therefore, the testimony could not be compelled, and would not be protected by the immunity order if given.[62]

Even if North's position were correct,[63] this defect in the proposed procedures could easily have been cured by arranging for the attendance at the deposition of three of the twenty-six members of the Iran-Contra Committees (one Senator and two House members). Of course, curing the problem in this manner would have created an increased risk of public disclosure. Nevertheless, unless the immunity statute is interpreted to cover depositions conducted without the presence of members, this is a risk that would have had to have been taken.

North further objected to conducting a secret deposition to avoid leaks. North contended that no valid legislative purpose would be served by such a deposition, and, therefore, it could not be authorized by either House.[64] He contended further that House rules did not permit a secret deposition to avoid leaks,[65] and he objected on due process grounds to the fact that he would not be given copies of his

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62. *See generally* Sullivan Letter, *supra* note 58.

63. The Congressional Research Service provided the House Iran-Contra Committee with a legal opinion taking the position that the better view was that staff depositions were within the purview of the immunity statute. *See* Memorandum from Jay R. Shampansky of the Congressional Research Service, Library of Congress, American Law Division, to House Select Comm. to Investigate Covert Arms Transactions with Iran, "Applicability of Immunity Order to Witness, Congressional Deposition Testimony" (June 22, 1987) (available in the House Select Committee files in the National Archives). Apparently, the legal question was considered significant enough that the Senate subsequently passed a bill, S. 2350, 100th Cong., lst Sess. (1987), designed in part to alter the immunity statute to make this explicit. In its report on the bill, the House Judiciary Committee expressed the view that existing law already provided that staff depositions were covered by the immunity statute. H.R. REP. NO. 100-1040, 100th Cong., 2nd Sess. 3-4 (1988). The bill, which also contained a mildly controversial amendment to the Senate's civil contempt powers, failed of passage in the House on the suspension calendar, which requires a two-thirds vote for passage, in the final days of the 100th Congress. We thank Jay Shampansky of the Congressional Research Service for bringing this bill to our attention.

64. Sullivan Letter, *supra* note 56, at 15-17.

65. *Id.* at 15.

documents or contemporaneous transcripts or recordings of his testimony at such a deposition.[66]

These arguments of North had little merit. The contention that witnesses before Congress have a constitutional right to appear in public—that no valid legislative purpose is served by an executive session proceeding—flies in the face of the fact that Congress has a right to determine the truth in support of its legislative, as well as its informing functions.[67] The longstanding use of secret grand jury proceedings as a powerful tool of investigation should put to rest any notion that the truthfinding process cannot be served properly by secrecy.[68] Therefore, Congress has a right to hold executive session proceedings in support of its investigations.

North's argument that congressional executive session proceedings may not incidentally assist, or be intended to assist, a prosecution by minimizing the possibility of leaks and, thus, of taint is also mistaken for several reasons.[69] First, since Congress constitutionally can grant

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66. *Id.* at 17-22.

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

68. The Senate Watergate Committee appears commonly to have held executive session proceedings with witnesses prior to their public testimony. *See, e.g.*, THE POWER TO PROBE, *supra* note 4, at 275-82. The House Judiciary Committee held months of executive session hearings before beginning public proceedings in the Nixon impeachment matter. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93rd Cong., 2d Sess. 9 (1974).

69. The principal cases cited by North, Watkins v. United States, 354 U.S. 178 (1957), and United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956), are clearly factually distinguishable from the circumstances of the Committees' proposed investigation of North. *Watkins* was a contempt proceeding against a congressional witness for refusing to answer questions about previous Communist Party membership by various individuals. The Supreme Court held that in order to protect the constitutional rights of congressional witnesses it would require a clear showing of the pertinency of the questions for which Congress sought an answer to a legitimate legislative purpose, and also that a potential witness was informed, or could be charged with knowledge, of such pertinency, before upholding a contempt citation against a witness. *Watkins*, 354 U.S. at 208-09. *Watkins* expressly excluded congressional investigations into, and publicity related to, "corruption, maladministration, or inefficiency in agencies of the Government" from the scope of its holding. *Id.* at 200 n.33. The Committees' inquiry into North's conduct was therefore outside the scope of *Watkins*. In addition, *Watkins* dealt with the substance of the inquiries propounded to the witness, not with the procedures used to obtain the information. *See id.* at 215. The Committees had no plans to inquire into North's past or present political associations except as they were directly relevant to events involving the use of governmental power and authority which were plainly quite properly under investigation by the Committees. As Judge

immunity limited to use and derivative use, rather than transactional immunity, it seems to follow that Congress can act, then, in a manner calculated to limit the effect of the immunity to its intended scope by preserving the possibility of untainted prosecution.[70] Second, courts have made it clear that criminal prosecutors, whether they are independent counsels or in the executive branch, will pay the price if Congress decides not to stay its proceedings when there are criminal proceedings pending.[71] It follows from this and basic separation of powers principles, which counsel that the branches generally should not function in a vacuum,[72] that Congress may consider whether it wishes to force this result or not. Third, courts clearly have recognized that Congress' investigations actually may provide, and may be intended at least partially to provide, information on which prosecutors may later decide to act.[73] Therefore, it seems legitimate for Congress to decide whether it wishes to provide such information. These latter points are the clear implications of *Delaney v. United States*[74] and *Silverthorne v. United States*,[75] which together stand for the proposition that Congress may choose its timing for investigations without legal restraint, conducting hearings before or after criminal indictments issue, but that the courts will protect defendants against incursions into their

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Gesell noted, none of the Iran-Contra defendants now argues in court that the congressional investigation represented "exposure for the sake of exposure." United States v. Poindexter, 698 F. Supp. 300, 307 (D.D.C.), *appeal denied, petition for mandamus denied, appeal dismissed*, 859 F.2d 216 (D.C. Cir. 1988).

Icardi involved a situation where a congressional committee undertook an investigation which had no other purpose except to attempt to fix criminal responsibility for an isolated crime which had occurred at a military installation some years previously. *Icardi*, 140 F. Supp. at 384. Again, no such argument can plausibly be made about the Iran-Contra investigation.

70. The immunity statute itself contemplates discussions between prosecutors and Congress concerning the advisability and timing of any proposed grants of immunity, and is also specifically designed to allow prosecutors time to take steps to avoid taint which might occur as a result of such a grant. *See* 18 U.S.C. § 6005 (b)(3), (c) (1985); *In re* United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973).

71. Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

72. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

73. Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

74. 199 F.2d 107 (1st Cir. 1952).

75. 400 F.2d 627 (9th Cir. 1968).

rights if Congress has decided to act without regard to the effect on pending prosecutions.[76]

In short, the operative principles seem to be the following. Congress may not try criminal cases itself solely for the purpose of trying such cases;[77] and Congress could not agree with a prosecutor to conduct an investigation solely for the purpose of providing evidence of criminal conduct for a prosecutor.[78] Congress certainly can act, however, in a manner that is intended to minimize Congress' interference with possible prosecutions and can provide assistance to such prosecutions as an incident of its legislative investigations by providing information it uncovers.

North's assertion that failure to provide documents in advance, or contemporaneous transcripts or recordings, with respect to such an executive session deposition violates due process is equally flawed. Congress generally has broad power to structure its investigative process in a manner designed to meet its legislative needs.[79] There does not appear to be any statutory or constitutional right of discovery available to witnesses in front of Congressional committees. After all, they cannot face any substantive penalties imposed by Congress as a result of their testimony, except for failure to provide testimony or failure to tell the truth when doing so. A method of investigation designed to elicit truthful testimony from persons who may not be inclined to be truthful, for example, through denial of discovery by refusing to provide documents or transcripts, can be defended readily as within that authority.

North also complained that other witnesses, who did not assert their fifth amendment privilege, were allowed to review their Committee documents, while he was not. North's contention that denying documents only to persons who have asserted their fifth amendment privilege is constitutionally deficient, because it impermissibly burdens the exercise of that constitutional right, is also mistaken. By drawing such a distinction, Congress is not imposing a penalty, or denying a right, in a constitutionally protected context. A congressional committee may act on its conclusion that persons who have pled the fifth amendment and then been compelled to testify are less likely to be willing to cooperate with the truthfinding process than persons who have not. This is so because the fifth amendment right against self-incrimination directly protects only against sanctions in the criminal process, and its exercise is further protected against burden by loss of limited rights in

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76. *Silverthorne*, 400 F.2d at 634; *Delaney*, 199 F.2d at 114-15.

77. *Cf.* Watkins v. United States, 354 U.S. 187 (1957); United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956).

78. Sinclair v. United States, 279 U.S. 263 (1929).

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

quasi-public property, not with respect to every conceivable civil disability or distinction.[80]

Finally, North's argument that a witness cannot be made to testify twice under compulsion, once in executive session and once in public, lacks any serious force once it is clear that Congress can conduct investigations in executive session. The usual point of an executive session is to allow exploratory questioning, to seek leads, and so on. The fact that after a committee has had a chance to sift the executive session testimony, to compare it to the testimony of others, to examine relevant documents, and to develop its approach to questioning the witness, the witness would then be required to testify in public does not in any way distinguish a congressional investigation's truthfinding process from that of either the civil or criminal litigation process. Witnesses routinely are questioned in depositions before civil trial, and in grand jury before criminal trial. To suggest, as North did, that it is somehow "unfair" or "punitive" to require repetitive testimony because a witness may be indicted, or may have been indicted, whether for perjury or any other offense, is effectively to complain that the witness was not given transactional immunity rather than use immunity. The Supreme Court has made it clear that transactional immunity is not constitutionally required, and that witnesses given use immunity must tell the truth.[81] Indeed it would be remarkable to think that the truthseeking process available to the Congress should be less powerful than that available to ordinary litigants.

Considering that North's contentions on these points were without substantial merit, the question remains why the Committees partially acceded to some of North's proposals about the conditions under which he would appear.[82] This decision by the Committees has been criticized,[83] but can be defended readily. The Committees were informed that North would have been advised by counsel to refuse to answer despite their immunity order, and to obtain North's compliance with the order, the Committees would have had to hold North in contempt.

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80. Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (loss of political office); Lefkowitz v. Turley, 414 U.S. 70 (1973) (loss of government contracts); Spevack v. Klein, 385 U.S. 511 (1967) (revocation of lawyer's license); Brown v. Walker, 161 U.S. 591 (1896); Flint v. Mullen, 499 F.2d 100 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).

81. *See Watkins*, 354 U.S. at 215.

82. We emphasize that the Committees did not make a legally binding agreement with North on these matters, and specifically informed North that they were unwilling to enter into any binding agreement. W. COHEN & G. MITCHELL, *supra* note 45, at 149.

83. *Id.* at 149-51.

It was the judgment of a large majority of the Committees that it was more important to obtain North's testimony, with some possible sacrifice in terms of the thoroughness of the Committees' preparation and examination,[84] than it was to impose a lengthy delay on the Committee proceedings to try the legal issues raised by North in a contempt proceeding. To understand the basis for this judgment, it is necessary to consider the problems of enforcing a congressional contempt citation.

b. Problems in the Use of the Contempt Power

There are presently three types of contempt power available to the Congress: nonstatutory or inherent contempt power; statutory criminal contempt power; and statutory civil contempt power (available only to the Senate).[85] The effort to use any of these forms of contempt power would have delayed the testimony of Oliver North for a minimum of six weeks, and possibly for as long as six months. In addition, there were uncertainties about whether Congress actually would have been able to use any of the forms of contempt authority against North. Finally, even if North had been successfully cited for contempt, he could have refused to testify and gone to jail.

Congress has not used its nonstatutory, or inherent, contempt power since 1935.[86] Its use has been criticized,[87] though it has its defenders and its constitutionality cannot be doubted.[88] To the authors' knowledge no one seriously suggested it should have been used against North, although, in retrospect, considering the alternatives available it might well have been the most attractive choice. If, however, the House or Senate had held the required contempt trial, and

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84. *Id.* at 148-49 (noting the assertion by Chief Counsel to the Senate Iran-Contra Committee Arthur Liman to that Committee that North could be effectively questioned under proposed constraints; this view was not universally held).

85. Congressional Research Service, Library of Congress, American Law Division (Jay R. Shampansky), "Congress' Contempt Power," at 2 (Feb. 28, 1986). [hereinafter "Congress' Contempt Power"].

86. *Id.* at 11 (citations omitted).

87. *See* S. REP. NO. 170, 95th Cong., lst Sess. 97 (1977); Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 254-55 n.71.

88. Groppi v. Leslie, 404 U.S. 496 (1972) (although it involved a state legislature, by implication upholds the inherent contempt power of Congress); Jurney v. MacCracken, 294 U.S. 125 (1935) (upheld the use of the inherent contempt power of the Senate to punish an individual for obstruction of a Senate inquiry even after the obstruction has ceased or its removal has become impossible).

ordered North imprisoned, North's attorneys undoubtedly would have sought a writ of habeas corpus to determine whether North was imprisoned properly, and the resulting constitutional litigation probably would have continued until the full Supreme Court was asked to hear the case. Of course, even if North ultimately had been held in contempt, he could have chosen jail over testimony.

Congress' criminal contempt power established by statute is not designed to elicit testimony, but to punish.[89] In addition, there is a critical uncertainty under the existing statute about whether the United States Attorney will always pursue a contempt prosecution that is referred to him by a house of Congress.[90] If it had sought a criminal contempt prosecution against North, Congress would have had to risk being put in a position in which it could not force testimony at all, either because the Department of Justice would not prosecute the contempt or because North might successfully have defended against the contempt,[91] or have been pardoned if convicted.

Finally, the Senate's civil contempt power may not have applied to North, a former executive branch officer, since the Senate's statutory power does not apply to executive branch officials in certain circumstances.[92] This was a significant enough legal issue that a suit brought under this statute possibly would have been a lengthy detour.

Ironically, then, the Committees found themselves in a position in which, despite the strength of their legal position, their ability to enforce their immunity order was limited unless they were willing to endure a lengthy delay while litigation to enforce the order was pursued to the Supreme Court. Of course, even if the Supreme Court upheld any contempt citation against North, North still had available the ultimate defense against testimony: he could refuse to testify and go to jail instead, as did G. Gordon Liddy during the Watergate-related hearings.

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89. "Congress' Contempt Power," *supra* note 85, at vi.

90. *Id.*

91. This latter outcome seems unlikely if the issues were confined to those raised in North's brief against the Committee investigative and hearing procedures, for the reasons previously given.

92. Existing law limits the Senate's civil contempt power by providing that it does not apply to executive branch officials when they are "acting within [their] official capacity." 28 U.S.C. § 1365(a) (1988); *see also* HOUSE COMM. ON THE JUDICIARY, CLARIFYING THE INVESTIGATIVE POWERS OF THE UNITED STATES CONGRESS, H.R. REP. NO. 1040, 100th Cong., 2d Sess. 2 (1988). North asserted that he would be covered by this proviso, and there appeared to be a possibility that this was so. The Senate therefore adopted legislation, S. 2350, 100th Cong., 1st Sess. (1987), to revise this exception to the scope of the civil contempt power so that it clearly would not have applied to persons situated similarly to North. *Id.* at 2-4. However, the bill failed to pass the House.

For these reasons, the Committees decided to strike a balance between the benefits for the Congress in vindicating its undoubted right to obtain North's testimony under its proposed procedures (or to have him punished for failing to give it) and the needs of the Iran-Contra investigation. As explained above, the Committees decided to forego the marginal benefits which could have been gained from forcing the Committees' proposed deposition procedure on North in return for the expedition gained by his agreement to testify fully. This is certainly a defensible choice. Having said that, however, it would be a gross mistake for future potential witnesses before the Congress to conclude that Congress has in any realistic sense conceded any of the legal issues that North raised, or that a future Congressional committee would be likely to reach the same balance of competing considerations reached in North's case by the Iran-Contra Committees. Nevertheless, the Congress should carefully review its contempt procedures to provide additional needed authority to Committees faced with this problem in the future.

PART TWO

I. CONGRESSIONAL INVESTIGATION OF HIDDEN "ENTERPRISES"

The congressional Iran-Contra investigation faced a major challenge in probing "the Enterprise," the name given to the operations established by Major General Richard V. Secord which provided outside support for the activities of North.[93] This aspect of the investigation required dealing with a maze of complex legal problems concerning the investigation of secret international enterprises. By starting historically with the rise of the nether world of such enterprises, and then a description of the North-Secord Enterprise itself, the importance of the legal protections for these entities, which amount to general barriers to the investigations of Congress specifically and the authority of the United States generally, becomes clear.

A. International Role of Hidden "Enterprises"

In recent decades, international financial "enterprises" have flourished on a large scale, using overseas distance and foreign secrecy laws to hide transactions and activities from United States scrutiny.

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93. "One of the main objectives of the Committees was to penetrate this secrecy—to find out where the money came from, and where it went; and thus, to learn about the operations and organization of the enterprise." IRAN-CONTRA REPORT, *supra* note 14, at 331.

Such enterprises range from runaway private activities supporting governmental activities, such as the North-Secord "Enterprise," to the international financial infrastructure for corporate payments, organized crime, narcotics trafficking, and tax and securities fraud. The Supreme Court described the problem in 1974 in an opinion upholding new statutory reporting requirements for banks and foreign financial transactions.[94] As the Court explained,

> following extensive hearings concerning the unavailability of foreign and domestic bank records . . . Congress was concerned about a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments.[95]

The authors emphasize that, despite their disparate motives and means, secret international enterprises have in common the systematic effort to structure operations to avoid their detection and control by United States authorities. To achieve this end, they must generally rely on certain specific legal protections afforded to them by foreign secrecy laws and United States legal principles. This article will discuss below the means that the government can use to overcome these barriers to detection and control.

Multinational enterprises with a taste for concealed quasi-official activity are hardly new. From the international oil cartel organized by Standard Oil to the World War II work by international chemical and electronics firms on behalf of both the Axis and the Allies, private enterprise long has sought, by operating internationally, to circumvent or override the law or policy of any one country.[96]

Even by historical standards, a special era of international "enterprises" began in the twentieth century, with the pioneering work probably being organized crime's efforts to shield itself from local law enforcement. A number of factors, including the highly publicized congressional investigations by the Kefauver Crime Committee and the McClellan Labor Racketeering Committee in the 1950s, along with law enforcement efforts, drove organized crime to seek international

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94. California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

95. *Id.* at 27.

96. *See generally* A. SAMPSON, THE SEVEN SISTERS: THE GREAT OIL COMPANIES AND THE WORLD THEY SHAPED 72-73 (1975); *see also* A. SAMPSON, THE SOVEREIGN STATE OF ITT 33-43 (1973).

refuge.[97] In particular, Meyer Lansky, an unfortunately brilliant innovator, developed the techniques of overseas operations and money laundering to new heights. Lansky pioneered the use of bank secrecy havens such as Switzerland, and the worth of investment in receptive Third World countries, notably Cuba.[98]

As late as the 1960s, United States law enforcement authorities apparently paid little attention to the matter of hidden international "enterprises." In that decade, Congressional investigations began the exposure and analysis of the problem.[99] Over the following two decades, a host of congressional investigations and hearings studied the problems of international "enterprises" shielding narcotics trafficking, organized crime, and tax evasion.[100] The Supreme Court gave great

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97. An historical account is provided by an investigative reporter in H. MESSICK, LANSKY (1971). During the post-Prohibition era, as organized crime moved more heavily into gambling, it invested in a number of "wide-open" localities. The Kefauver Committee investigation impaired this effort.

> Prior to the 1951 [Kefauver] hearings, Saratoga closed down again. Similar action was taken in other corrupt cities ranging from Miami Beach to Newport, Kentucky. . . . [T]he experience left [Lansky] more convinced than ever that a sustained gambling operation should have legal status or else be conducted offshore in the Caribbean. What's more, some international banking resources would be helpful.

Id. at 164.

98. In 1951, "Lansky opened his first numbered bank account in Switzerland . . . . The bankers pointed out that not even Hitler had been able to break down the traditional wall of secrecy with which their financial transactions were protected from prying eyes." *Id.* at 170. In 1952, Fulgencio Batista took over Cuba by coup, and the following year, Lansky led extensive organized crime investment in gambling casinos for Cuba. *Id.* at 194-98. Along with funds being laundered through a Miami bank, "[c]ash was also carried by courier to the International Credit Bank of Switzerland. Once safely deposited in numbered accounts there, it could be invested in the stock market or returned in the form of loans to individuals and corporations controlled by the National Crime Syndicate." *Id.* at 99.

99. The Senate's Permanent Subcommittee on Investigations started by revealing the strong ties between the American and Sicilian Mafias, and continued by uncovering the network of international traffic in stolen and counterfeit financial instruments. House Committees received testimony from Robert M. Morgenthau, United States Attorney for the Southern District of New York, who had traced money laundering by organized crime. *Foreign Bank Secrecy and Bank Records: Hearings Before the House Committee on Banking and Currency*, 91st Cong., 1st & 2d Sess. 18, 90 (1969-70).

100. For lists of the hearings, see Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025, 1029-30, 1029 n.13 (1986). Mr. Weiland had been chief counsel of the Senate Permanent Subcommittee on Investigations.

weight to the findings of the congressional investigations when upholding laws aimed at supervising foreign currency transactions. The Court quoted a House Report to provide a classic description of the range of activities occurring through these enterprises:

> Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges . . . and have served as the cleansing agent for 'hot' or illegally obtained monies.[101]

Justice Rehnquist commented, wryly, that previous generations might not have adopted intrusive bank legislation only because they "did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy."[102] Of particular interest, in view of the "Enterprise's" role in the alleged diversion of the proceeds of the sale of arms to Iran, the Supreme Court quoted the House Report regarding two particular uses of such foreign bank accounts: that they "have served as essential ingredients in frauds including schemes to defraud the United States [and] have covered conspiracies to steal from the U.S. defense and foreign aid funds."[103]

Congressional investigations in the 1970s moved beyond the purely private aspects of the matter. The Senate Watergate Committee had uncovered what proved to be the tip of the iceberg of international financial maneuvers by intelligence agencies and corporations, notably by Senator Howard Baker's path-breaking inquiries into the role of the Central Intelligence Agency (CIA). Thereafter, Senator Frank Church chaired a follow-up series of investigations of multinational companies and intelligence activities. His hearings and reports publicized the maneuverings of International Telephone and Telegraph in Chile and elsewhere, improper corporate payments overseas by arms manufacturers and other companies, and intelligence operations operated on questionable authority throughout the postwar era. Together with the investigations of purely criminal enterprises, these later investigations of intelligence and corporate activities highlighted both the importance, and the difficulty, of scrutinizing hidden international enterprises.

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101. California Bankers Ass'n v. Shultz, 416 U.S. 21, 28 (1974) (quoting H.R. REP. No. 975, 91st Cong., 2d Sess. 12-13 (1970)).

102. *Id.* at 30 (Rehnquist, J., dissenting).

103. *Id.*

A brief concrete description of such enterprises by type, with examples, will aid the discussion of the legal issues that follows. The particular subject of the Iran-Contra investigation can be called loosely a private enterprise supporting government objectives, being staffed by former government officials and being in the grey area of having an agenda of privately supported and conducted covert action along with purportedly legal activity. Such enterprises are characterized by an unclear but definite degree of cooperation with government agencies, private motivations mixing patriotism and profit, and an absence of accountability. The Iran-Contra enterprise, of course, had its unique aspects, but it may not have been the only activity of that type. The Castle Bank of the Bahamas in the 1960s and early 1970s, and the Nugan Hand bank in Australia in the late 1970s, were both connected with a number of American former high-level military and intelligence officials. Both allegedly mixed the kind of unaccountable intelligence cooperation and personal profit that characterized the enterprise of Richard Secord, and both ended in scandals that only partially resolved the mysteries hidden behind the international financial veil.[104]

Another type of activity with its start in the legal world but its continuation in an international financial nether world consists of the structures used by major corporations for making overseas payments to foreign officials and middlemen. Both the Church Committee and the Senate Watergate Committee contributed to an understanding of these activities. A series of prosecutions, both before and after enactment of the Foreign Corrupt Practices Act, contributed to a contemporaneous understanding of these structures.[105]

Another great, but hidden, tributary to the international financial river consists of flight capital, often with political overtones. One author has noted that "flight capital from the rest of Latin America is generally acknowledged as the source of most of the $35 billion deposited in Panamanian banks."[106] Congress faced the challenge of

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104. For descriptions, see J. KWITNY, THE CRIMES OF PATRIOTS (1987). The Castle Bank became the subject of an IRS inquiry that led to House hearings and a Supreme Court case. *See* United States v. Payner, 447 U.S. 727 (1980); *Oversight Hearings into the Operations of the IRS (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program): Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st Sess. (1975).

105. For descriptions of corporate payments through international finance channels, see PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 12 (1984) [hereinafter PRESIDENT'S COMMISSION ON ORGANIZED CRIME].

106. Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 INTER-AM. L. REV. 33, 63 (1986).

investigating an enterprise akin to flight capital in the 1985-86 investigation of Ferdinand Marcos' real estate holdings in the United States.[107]

Finally, as noted above, organized crime, narcotics, tax, and securities fraud make their own major contributions to the world of hidden international enterprises. By sheer volume, narcotics traffickers create the greatest demand in international money laundering.[108]

B. The North-Secord "Enterprise"

The "Enterprise" of the Iran-Contra affair grew out of the expertise of individuals with experience in the world of hidden enterprises, who then took on projects publicly unsurpassed in impact. During the Vietnam War, Major General Richard V. Secord had been involved in special operations with the CIA in Laos. In 1975-78, he headed the United States Air Force mission to Iran, where he met Albert Hakim, an Iranian businessman selling systems to the Iranian Air Force. When Secord retired in 1983, he went into business with Hakim.[109] Thus, both Secord and Hakim knew intimately the world of international intelligence and corporate operations.

Starting in 1971, Hakim obtained banking-type services from Willard I. Zucker, a U.S. citizen and former Internal Revenue Service lawyer residing in Switzerland. Zucker ran Compagnie de Services Fiduciaries (CSF), a Swiss fiduciary company, which accepts and invests clients' funds, keeps their books, and establishes tax haven offshore companies. Zucker himself had done legal work for Bernard Cornfeld, whose massive securities operation, Investor Overseas Services, had been run as an overseas enterprise systematically avoiding the jurisdiction of the Securities and Exchange Commission. As the Iran-Contra Report observed, "[t]he client employing a Swiss fiduciary such as CSF—which uses Panamanian or Liberian companies, Swiss bank

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107. For discussions of the Marcos matter, see 133 CONG. REC. H698 (daily ed. Feb. 27, 1986); *Investigation of Philippine Investments in the United States: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 99th Cong., 1st & 2d Sess. (1985-86).

108. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *supra* note 103, at 7.

109. IRAN-CONTRA REPORT, *supra* note 14, at 40; *Testimony of Richard V. Secord: Joint Hearings Before the House Select Comm. to Investigate Covert Arms Transactions with Iran and the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong., 1st Sess. 46-47 (1987) [hereinafter *Testimony of Secord*].

accounts, and offshore trust accounts—buys a triple layer of secrecy, a formidable barrier against identification of the location of money."[110]

By North's account, in 1984, as the Boland Amendments cut off CIA funding for the Contras, CIA Director Casey "suggested General Secord to [North] as a person who had a background in covert operations" who could set up private entities for providing aid to the Contras.[111] Thus, the Enterprise served as a means for North to tap into the expertise and connections developed by past intelligence activities.[112] For a financial infrastructure, Secord turned to Hakim, and they started by use of a limited number of companies and bank accounts set up in secrecy havens. As a key example, in 1985, Lake Resources, Inc. was incorporated in Panama with three Swiss citizens associated with CSF as its initial officers and with a bank account at Credit Suisse in Geneva. CSF had bank accounts in Switzerland, the United States, Bermuda, Paris, and Brussels. When funds had to be transferred, the Enterprise made wire transfers from banks in secrecy havens.[113]

Once established, the Enterprise put its infrastructure and funds to a dizzying set of purposes. In what was by no means the most convoluted of laundering operations, the Enterprise provided a Contra leader, Calero, with funds and Calero in 1985 provided over $90,000 in travelers checks to North for hostage ransom operations. When North needed an operational and financial infrastructure for an arms sale to Iran in November 1985, he turned again to Secord, who used the Lake Resources account at Credit Suisse, which became the model for subsequent arms sales to Iran.[114]

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110. IRAN-CONTRA REPORT, *supra* note 14, at 332. "Zucker, who had a license to practice law in the United States, all the powers of a Swiss fiduciary, an inside knowledge of the IRS, and experience in meeting the needs of clients such as Hakim—was a covert operator's model banker, accountant, lawyer, and money manager." *Id.*

111. *Testimony of Oliver L. North: Joint Hearings Before the House Select Comm. to Investigate Covert Arms Transactions with Iran and the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong., 1st Sess., pt. 1-3, at 119 (1987) [hereinafter *Testimony of North*].

112. For operations, namely arms purchases and delivery, Secord turned to business associates, notably Thomas Clines, whom he knew "from CIA days." *Testimony of Secord, supra* note 107, at 50.

113. IRAN-CONTRA REPORT, *supra* note 14, at 354. The Enterprise could make payments either directly with such wire transfers, by wiring funds to CSF accounts which issued checks, or even by giving checks to associates of Hakim or Zucker who would deposit them and provide cash. *Id.*

114. IRAN-CONTRA REPORT, *supra* note 14, at 179. The Lake Resources account became famous when the Sultan of Brunei attempted to deposit ten million dollars in it for the Contras. Those funds went astray because North or his secretary had inverted two digits in providing the account number, and

This deployment of the Enterprise realized what some have claimed was an entire philosophy sanctioning the exercise of private power for governmental purposes without accountability or oversight by public institutions. By North's account, for which there is no written confirmation, CIA Director Casey sought for North to set up "stand-alone, offshore commercial ventures," which would be "self-financing, independent of appropriated monies," and "capable of conducting operations or activities of assistance to U.S. foreign policy goals."[115] A blueprint by Hakim of the Enterprise (or at least what Hakim tried to do in conducting the Enterprise) reflected the breadth of the Enterprise's concept of its operations.[116] The blueprint listed the various secrecy haven companies in the Enterprise, classifying them as collecting, treasury, and operating companies. In the concept, collecting companies received funds for a time, and then, when they became visible, were cast aside to preserve secrecy. They sent their funds to the treasury companies, each of which was responsible for funds for operations in a distinct region of the world: South America, the Middle East, and Africa. As the Iran-Contra Report noted, "The treasury companies show the global scope of the plan."[117]

Treasury companies would pass funds to operating companies each of which performed specific operations, so that the exposure of any single company would not bring down the entire network. Thus, when Costa Rica denounced the airstrip built from Enterprise funds, it exposed Udall Resources, Inc., the operating company for an airstrip constructed for the Contra resupply operation. North wrote to Poindexter about Udall: "Damage assessment: Udall Resources, Inc. SA, is a proprietary of Project Democracy [North's phrase for the Enterprise]. It will cease to exist by noon today. There are no USG fingerprints on any of the operations."[118] By likening Udall to a "proprietary," North again invoked the traditional concepts of intelligence enterprises, in which private companies serve as CIA proprietaries, thereby providing services with a degree of disintermediation, secrecy, and deniability.

The Enterprise took in nearly $48 million, spending almost $35.8 million on a wide array of covert operations. The air resupply operation supported the conduct of a small war, including acquisition of an air force, building an air strip in Central America, purchase of arms on the

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landed in the account of a Swiss shipping magnate who redeposited them in an account of his own. *Id.* at 352-53.

115. *Testimony of North*, *supra* note 109, pt. 1, at 3; *Id.* pt. 3, at 317.

116. North asked Secord to prepare the chart; Secord got the chart from Hakim, who had it drawn on a computer with the assistance of NSF. *Id.*; IRAN-CONTRA REPORT, *supra* note 14, at 333-34.

117. IRAN-CONTRA REPORT, *supra* note 14, at 333.

118. *Id.* at 335 (quoting PROF message).

global market from sources such as Eastern Europe, payments for flight support services and for the salaries of crews, and hiring of an expert mercenary, David Walker.[119] Also from that $35.8 million, the Enterprise spent $15.2 million on arms sales to Iran, serving as the middleman in an incredible series of secret international arrangements between sworn adversaries, generating as a byproduct the famous alleged "diversion."[120] It should be noted that these other participants had their own "enterprises" for providing secrecy. For example, Adnan Khashoggi ran commercial activities in the United States, whose assets often were shielded by as many as four layers of corporate shells, and whose loan transactions with certain important Canadians were conducted through offshore entities.[121]

Another $3.1 million went for such diverse activities as the purchase of a Danish ship, the *Erria*, for covert operations; a project with Drug Enforcement Agency agents for ransoming hostages; and the supplying of radios to a political party of a foreign nation.[122] Besides conducting these operations, the Enterprise gave millions of dollars of profits for its participants.[123]

C. Procedure Used to Investigate the North-Secord "Enterprise"

As the foregoing description shows, the Enterprise had buried itself deep in layers of secrecy haven protections. The Congressional investigation had three basic alternative routes for penetrating those layers: obtaining records through treaty-defined government channels from the banks involved; obtaining confidentiality waivers by the participants and then using these to obtain records from the banks; or some degree of compelled or negotiated surrender of records by

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119. *Id.* at 338.

120. The Congressional committees estimated that the Iran arms sales generated a $16.1 million surplus for the enterprise, of which a part, $3.8 million, was spent for the Contras before operations stopped; this was the alleged "diversion." *Id.* at 343.

121. IRAN-CONTRA REPORT, *supra* note 14, at 485 (deposition of Emanuel A. Floor, app. B, vol. 10).

122. IRAN-CONTRA REPORT, *supra* note 14, at 341 (brief description of financing); 337 (table of sums); 361-66 (DEA ransom operation); 357 (radios); 367-69 (*Erria*).

123. Approximately $4.4 million dollars was paid in commissions on arms sales to Secord, Hakim and Clines, and $2.1 million was disbursed as profit distributions either for personal purposes or into business enterprises such as submachine gun manufacturing and production of a laser night-vision sight for military use. *Id.* at 347, 349-50.

participants. Each of these routes had its particular perils. Apart from obtaining the central bank records of the Enterprise, the Congressional committees also had the challenge of fleshing out the transactions and activities to the extent possible from overseas, as well as domestic witnesses.

1. Swiss Treaty

The most important bank records were from Swiss banks. Swiss law provides a set of criminal, civil, and contractual liabilities for revealing information about bank clients; specifically, secrecy violations by bankers are made criminal by Article 47 of the Swiss Banking Law.[124] As a general matter, only domestic Swiss government authorities, not foreign governments, can pierce this confidentiality.[125] Efforts to overcome this barrier by treaty culminated in negotiations between the United States and Switzerland begun in 1973, in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money.[126] After four years, in 1977 a Mutual Legal Assistance Treaty (MLAT) went into effect.[127]

The treaty has resolved some of the problems posed for American authorities by Swiss banking secrecy, as did further elaborations in Swiss law and by a Memorandum of Understanding aimed at securities fraud.[128] That treaty did provide a means for American law enforcement authorities, and specifically the Independent Counsel, to obtain the Enterprise's Swiss bank records. The Independent Counsel could show his investigation of specific criminal charges against North, Secord, and others, such as defrauding the United States. Ultimately, the Independent Counsel did obtain the Swiss bank records he needed through that treaty process. As the Iran-Contra Report explains, "The Committees initially hoped to overcome this obstacle [of Swiss bank

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124. Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C.J. INT'L L. & COM. REG. 1, 4 (1983).

125. *Id.* at 5.

126. Nadelmann, *supra* note 102, at 46 (footnote omitted).

127. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 (effective Jan. 23, 1977). For a section-by-section analysis of the treaty, see *Treaty With the Swiss Confederation on Mutual Assistance in Criminal Matters*, S. DOC. NO. F, 94th Cong., 2d Sess. (1976).

128. For a description of the 1981 Swiss law codifying and expanding the treaty's provisions, see Nadelmann, *supra* note 102, at 47, 47 n.32. For a discussion of the 1982 Memorandum of Understanding, see Honegger, *supra* note 124, at 21-29.

secrecy law] by application to the Swiss authorities pursuant to [the] treaty between the United States and Switzerland."[129]

The Swiss treaty process, however, poses serious problems for the efforts of a congressional investigation. First, it takes time. Affected individuals can take appeals from decisions of Swiss authorities to comply with American requests, leading to substantial delays.[130] In this case, Hakim and others did take such appeals, leading to very substantial delays.

Second, the Congressional investigation faced the likelihood of considerable resistance. As the report notes, "[a]fter discussions with the Department of State and research by the staff, however, the Committees concluded that the Swiss would take the position that the Committees were not criminal investigative authorities and were therefore not covered by the Treaty."[131] As a general matter, the Justice Department, which passes on treaty requests to Switzerland, could be expected on institutional grounds to take a narrow view of Congressional rights to evidence when their assertion might jeopardize its relationship with Swiss authorities. In the Iran-Contra matter, where certain actions by officials of the Justice Department itself were under investigation, it would have been surprising if the Justice Department had manifested any special eagerness to take a broad view of Congressional rights. Thus, the Committees faced the likelihood of having both the Swiss and the Justice Department against them—both astride the channel to the documents.

In a variation on the treaty process, as the report notes, "[t]he Committees next endeavored to reach an agreement whereby the Independent Counsel would make copies of the bank records available to the Committees once he obtained them pursuant to the Treaty;" however, "[t]he Independent Counsel, because he believed that any such agreement would prejudice his own chances of obtaining the records, declined."[132] This proved particularly ironic in the end, because the Iran-Contra Committees made extensive use of the Swiss bank records once they obtained them, for analyzing and documenting the wide-ranging activities of the Enterprise. In contrast, although the Indepen-

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129. IRAN-CONTRA REPORT, *supra* note 14, at 686.

130. Nadelmann, *supra* note 104, at 47. The delays necessitated enactment of two criminal law provisions in 1984, excluding delays to obtain foreign evidence from the running of the Speedy Trial Act and suspending the statute of limitations for such delays. *See* 18 U.S.C. §§ 3161(h), 3292 (1975). Nationals or residents of the United States who file formal oppositions in foreign courts to official United States requests for evidence must serve a copy of that pleading on the United States. 18 U.S.C. § 3506 (1982).

131. IRAN-CONTRA REPORT, *supra* note 14, at 686.

132. *Id.* at 686-87.

dent Counsel initially included counts in the indictment of North based on the alleged diversion of funds, ultimately he had to drop those counts to avoid unrelated problems connected to the potential disclosure of classified information. Hence, the Independent Counsel never made major in-court use in North's trial of the Swiss bank records. The Swiss Treaty gave him greater rights, for lesser needs, a problem that may recur in parallel Congressional and criminal investigations of international enterprises.

The worst of all worlds would have been for the Congressional Committees to demand Swiss evidence through the treaty process, and have the Independent Counsel join the Justice Department and the Swiss Government in opposing such a demand, collectively complaining that the demand jeopardized the criminal investigation of the matter. Such a confrontation would have put the Committees in the position of being obstructionists, without any guarantee of success to justify such a position. Accordingly, the Committees made no request to obtain Swiss bank records through the treaty process.

2. Secord Waiver

A second possible route to the documents was to compel Secord to consent to their production. As a partner in the Enterprise, Secord arguably had control over the Enterprise's funds. With his consent, the banks with Enterprise accounts presumably[133] would agree to provide copies of the account records. While Secord would not voluntarily give consent, he could be compelled to sign a consent form or waiver of secrecy.

Accordingly, the Senate Iran Committee, through a subpoena to Secord, demanded that he sign such a form. He refused, contending that requiring him to sign a waiver form amounted to compelling him to incriminate himself, and, thus, violated his fifth amendment rights. The Senate Committee countered with the view of some courts of appeals, which have held that a compelled consent waiver did not amount to a testimonial communication.[134]

When Secord still refused to provide a consent form, the Senate adopted a resolution, invoking the civil enforcement statute for Senate subpoenas. Pursuant to this statute, the Senate can authorize a

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133. This point was never resolved as a factual matter. Secord claimed he had depended on Hakim to set up and manage the accounts, and it was possible that Secord could not obtain the records over resistance by Hakim. "When Secord subsequently agreed voluntarily to provide evidence to the Committees, he claimed that he had no relevant Swiss bank records and that all such records were under the control of Hakim." IRAN-CONTRA REPORT, *supra* note 14, at 687.

134. *See, e.g.*, United States v. Ghidoni, 732 F.2d 814 (11th Cir. 1984).

committee to bring a civil action "to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or order issued by the committee to any natural person to secure the production of documents or other materials of any kind."[135] The statute explicitly excludes suits against executive officials, but for private individuals such as Secord it furnishes an alternative to criminal prosecution for contempt of Congress when one is needed for testing good faith legal defenses.

The Senate Committee filed suit in district court, only to suffer a serious defeat. Although it recognized that several courts of appeals had upheld the consent form procedure, the district court refused to follow them.[136] The district court understood well the necessity for the form, noting that Secord's protests against disclosure of the bank records "would be of no avail if the Committee had subpoenaed a bank in the United States. "The laws of countries such as Switzerland, however, require a bank to obtain the consent of its customers before releasing their records."[137] Nevertheless, it refused to require a consent form, since it considered that "[b]y signing the directive, Secord would be testifying just as clearly as if he were forced to verbally assert his consent."[138]

From this decision the Senate Committee appealed. Ultimately, the appeal was dismissed as moot on the Senate Committee's motion, once the records were obtained through the other method discussed below. Ironically, the following year, the Supreme Court upheld the consent waiver procedure, vindicating (too late) the Senate Committee's position. In *Doe v. United States*,[139] a grand jury sought a court order that a target of its fraud investigation (named throughout as "John Doe") "sign 12 forms consenting to disclosure of any bank records respectively relating to 12 foreign bank accounts [in the Cayman Islands and

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135. 28 U.S.C. § 1364 (1982). This statute applies only to Senate proceedings. Congress enacted it as part of the Ethics in Government Act of 1978, following a recommendation from the Senate Watergate Committee to create such a mechanism for resolving disputes with witnesses. The conference report on the bill explained that the statute did not include the House because the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H.R. REP. NO. 1756, 95th Cong., 2d Sess. 80 (1978). The particular resolution for this suit was S. Res. 170, 100th Cong., 1st Sess., 133 CONG. REC. 53,562 (daily ed. Mar. 19, 1987). For a description of the Senate civil enforcement procedure, see J. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE § 3.4[c] (1988).

136. Senate Select Comm. v. Secord, 664 F. Supp. 562 (D.D.C. 1987).

137. *Id.* at 565.

138. *Id.*

139. 487 U.S. 201 (1988).

Bermuda] over which the Government knew or suspected that Doe had control."

Doe asserted his fifth amendment rights, but the Supreme Court concluded that the compelled consent form was not testimonial in nature. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself."[140] Since the compelled consent procedure did not require that Doe "acknowledge that an account in a foreign financial institution . . . [was] in existence or that it . . . [was] controlled by [him]," and "[did] not point the Government toward hidden accounts or otherwise provide information that . . . [would] assist the prosecution in uncovering evidence," the Court viewed compelling a signature to such a form as no more a violation of the fifth amendment than "be[ing] forced to surrender a key to a strong box containing incriminating documents."[141]

The *Doe* decision opened up a vital tool for investigation in the future. It came too late, however, to assist the Iran-Contra investigation, which was forced to use a different route.

3. Hakim Immunization

A remaining option for the Committees was to obtain the records from Hakim. This was a particularly sensitive and difficult decision. Hakim was telling the Committees, through his counsel, that he was not in the United States, and that he would not come to the United States, at least at that moment, to provide evidence. Thus, he could not be personally served with process, and if an arrangement was made, the evidence would have to be obtained from him overseas. Moreover, Hakim himself, as a private businessman who had profited personally from a series of uncertain arms sales, was not an attractive person to immunize.

The decision to obtain the records through immunizing Hakim involved members and counsel for the Committees personally going to Paris to conduct a session in which Hakim was immunized. He, then, turned over the Enterprise records. That session ranks as one of the boldest actions of the investigation, and one which, in retrospect, proved the soundest. As the report described the decision:

> The Committees decided that, to obtain the critical financial records, they would have to obtain an order of use immunity for Hakim. After the order was obtained, Hakim produced his records, and equally

140. *Id.* at 9 (footnote omitted).

141. *Id.* at 9 n.9, 14.

> important, assisted in interpreting them through his compelled testimony. The evidence thus obtained was indispensable to the Committees in tracing the flow of money in the Iran-Contra Affair.[142]

Even as a negotiated arrangement with immunity, obtaining the records from Hakim posed some sensitive issues. Hakim insisted that the records would only be produced at a session in Paris. Both to establish the Committee's own investigative process, and to satisfy Hakim about the authoritativeness of his immunization, the Committees desired to cloak the Chief Counsel with the maximum Congressional authority.

Hence, the House Committee employed a familiar device—the "commission" procedure—in obtaining information overseas for civil litigation. As described in Federal Rule of Civil Procedure 28(b), this procedure consists of an order (the "commission") from a domestic court empowering an individual (the "commissioner") to obtain evidence in another country and to bring it back. It contrasts both with letters rogatory, for which process goes to a foreign court, and with domestic deposition practice, which occurs on notice without process going to or from any court.[143] As part of the routine nature of commissions, State Department regulations make consular officials available as commissioners.[144] In this instance, the House Committee issued a commission, much like a subpoena in format, to further document the Chief Counsel's authority to obtain the evidence from Hakim.

D. Specific Issues

1. Overseas Reach of United States Process for Corporate and Bank Records

Several major issues arise in Congressional investigations of international "enterprises:" jurisdiction over records that are out of the country; foreign secrecy laws; and availability of tools such as commissions and letters rogatory. At the outset, a key factor is the broad view

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142. IRAN-CONTRA REPORT, *supra* note 14, at 687.

143. Rule 28(b) provides in pertinent part:

> In a foreign country, depositions may be taken . . . before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testi-mony . . . . A commission . . . shall be issued on application and notice and on terms that are just and appropriate.

FED. R. CIV. P. 28(b).

144. *See* 22 C.F.R. § 92.55 (1989).

taken by the federal courts of the reach of United States jurisdiction and law. To the immense irritation of other countries, United States courts refuse to confine themselves to United States territory either in exercising jurisdiction or even in the overruling of foreign secrecy laws. In one of the leading cases, a grand jury seeking drug-related evidence subpoenaed the Bank of Nova Scotia for records in its branches in the Bahamas and Cayman Islands. The Bank has branches in the United States. When the bank failed to produce records in timely fashion,[145] a district court held it in civil contempt and assessed a fine of $1,825,000. The governments of the United Kingdom, Canada, and the Cayman Islands appeared as *amici curiae* in support of the bank, and "[t]he Government of Canada vigorously asserted that the situs of the records is of utmost significance and that, absent extraordinary circumstances, the law of the jurisdiction [i.e., the Cayman secrecy law] must prevail."[146]

In 1984, the Court of Appeals rejected that position, declaring:

> The foreign origin of the subpoenaed documents should not be a decisive factor. The nationality of the Bank is Canadian, but its presence is pervasive in the United States. The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations.[147]

With the territorial barrier down at least for some exercises of American jurisdiction and law, the question becomes how far the courts will push their reach, and how far the Congress can do so either in investigations or in legislation. As to jurisdiction, the Iran-Contra matter itself brought a sharp reminder that the courts still set limits. The Independent Counsel flexed his subpoena power to serve a

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145. *In re* Grand Jury Proceedings Bank of Nova Scotia, 740 F.2d 817, 819-20 (11th Cir. 1984). The records requests for Cayman and Bahamian records followed different paths. In the Cayman Islands, in May 1983, and again in November 1983, the Grand Court issued orders (on the bank's petition) not to produce the documents. Finally, the Governor of the Islands authorized the disclosure of the subpoenaed documents pursuant to a provision in the secrecy law allowing him to do so. In the Bahamas, the Attorney General of the Bahamas issued an order allowing the bank to produce the requested documents. The contempt fine issued thereafter came largely because production was still tardy, with undisclosed withholding that was only corrected later upon outside inspection, even with these permissions, but part of the fine did come from pre-permission refusals to produce documents. *Id.* at 821-23.

146. *Id.* at 828 n.17.

147. *Id.* at 828 (footnote omitted).

subpoena duces tecum on Albert Hakim, as custodian, for records of eight companies allegedly under his control. Hakim refused to produce the records, asserting, among other grounds, that the court lacked jurisdiction over the companies. A district court rejected the argument and held him in civil contempt.

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the district court and ruled for Hakim. It noted that "the District Court unquestionably had personal jurisdiction over [Hakim] since he is a United States citizen."[148] The court held, however, that to obtain corporate records, the Independent Counsel had to obtain personal jurisdiction, not over Hakim as the corporations' representative, but over the corporations themselves.[149] The court of appeals tested such personal jurisdiction by the traditional due process standard of *International Shoe Co. v. Washington*,[150] namely, whether the foreign corporations themselves had "minimum contacts" with the United States; alternatively, "[i]n the case of foreign companies that do not regularly do business here, jurisdiction may be founded on conduct abroad that causes injury within the United States."[151]

It left to the Independent Counsel the task of making such a showing, allowing him to meet a "lower hurdle" to "establish jurisdiction for purposes of enforcing a grand jury subpoena" than would be needed "for purposes of trial."[152] The Court of Appeals distinguished the *Bank of Nova Scotia* case on the straightforward ground that the Bank of Nova Scotia itself "did considerable business in the United States [and] therefore plainly had the 'minimum contacts' with this country to establish jurisdiction" while there had been no showing of "business [done] in the United States on behalf of [Hakim's] companies."[153]

The decision on Hakim's corporations points to the two different bases for personal jurisdiction over foreign corporations. First, the corporations may have regular contacts with the United States sufficient to establish their "minimum contacts" for due process purposes. The Supreme Court described this basis in the 1983 case, *Helicopteros*

148. *In re* Sealed Case, 832 F.2d 1268, 1272 (D.C. Cir. 1987). The decision does not name the litigant, but the litigant who is the subject of this decision is in circumstances which appear to be Hakim's. We are accordingly referring to Hakim as that litigant for purposes of analysis.

149. *Id.* at 1272-73.

150. 326 U.S. 310, 316 (1945). For recent cases discussing this test, see Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

151. *Sealed Case*, 832 F.2d at 1274.

152. *Id.* at 1274.

153. *Id.* at 1273 n.3.

Nacionales de Colombia, S. A. v. Hall,[154] as that of "general jurisdiction," such as when a foreign corporation carries on "continuous and systematic" activity in the United States. Alternatively, as the Hakim decision explained "[i]n the case of foreign companies that do not regularly do business here, jurisdiction may be founded on conduct abroad that causes injury within the United States."[155] *Helicopteros Nacionales* described this as the "specific jurisdiction" basis, applicable "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum."[156]

The Hakim decision marks out the ultimate limits of United States jurisdiction for corporate evidence: either "minimum contacts" on a regular basis, or effects on the United States from particular conduct. Presumably a Congressional subpoena, like a grand jury subpoena, would be held to reach to the full constitutional limit of such jurisdiction. Congressional subpoenas, like grand jury subpoenas, have the force of the federal government behind them and are restrained only by the due process clause of the fifth amendment. While due process limitations apply to all subpoenas, due process may impose different limitations in different contexts. The personal jurisdiction limits discussed most often by the Supreme Court concern private tort suits and the reach of state long-arm statutes. Enforcement of federal subpoenas, though, lacks the restraint required in state-court private tort cases that the Supreme Court noted in 1982: "that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States."[157] In the case of federal subpoenas, the reach is as far as the constitutional power of the federal government, unrestrained by the federalist concessions made by the individual states.[158]

As to congressional subpoenas, from the very first Supreme Court decision on congressional process, *Anderson v. Dunn*[159] in 1821, the Supreme Court has treated the reach of such process as the same as "the limits of the legislating powers of that body [i.e., Congress]," giving potentially contemptuous witnesses only the consolation that "[i]f the

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154. 466 U.S. 408, 414-15 (1984) (quotations omitted).

155. *Sealed Case*, 832 F.2d at 1274.

156. *Helicopteros*, 466 U.S. at 414 (quotations omitted). This was a test which the District of Columbia Circuit intended the district court to apply on remand.

157. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03, 703 n.10 (1982).

158. For a discussion of the potent reach of federal grand jury subpoenas aimed at overseas documents, see *In re* Marc Rich & Co., 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).

159. 19 U.S. (6 Wheat.) 204 (1821).

inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical."[160] The Court has consistently maintained on other questions the equivalence of the reach of Congress's investigative and legislative powers, and could be expected to continue to do so in this context.[161]

With respect to foreign bank accounts, these limits on United States jurisdiction produce a strange line. Subpoenas, including congressional subpoenas, can obtain records from those foreign banks with the requisite minimum contacts in the United States. Foreign banks that absolutely lack contacts in the United States, however, would argue that they should escape subpoenas for records of transactions not clearly involving conduct that causes injury within the United States.

It may be that through negotiation of bilateral treaties and similar approaches, the United States judicial and legislative systems can obtain the evidence they need despite this limitation. In the Iran-Contra matter itself, the Independent Counsel did obtain the records it needed through the Swiss treaty process; it just took a long time. On the other hand, if international "enterprise" develops in a way that hides more and more behind banks without direct, demonstrable United States contacts, Congress might have to respond with more aggressive steps. Most simply, but most roughly, Congress could legislate sanctions against countries that serve as havens for the most egregious enterprises, such as Caribbean bank secrecy havens with large flows of narcotics proceeds, and that refuse to enter into Mutual Assistance Legal Treaties or similar treaties allowing investigative access.

A more legally complex approach would have Congress seek, either as part of a specific Congressional investigation, or through enactment of a statute making legislative findings and establishing procedures for investigations generally, to secure jurisdiction over foreign banks involved in the stream of transactions that reach the United States. This would follow the "stream of commerce" reasoning used to support

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160. *Id.* at 234-35. In that nineteenth century era, it was a bold step for the Court to hold that congressional process could go beyond state boundaries and reach anywhere in the country. Although the Court indicated that congressional investigative power could cross state boundaries, the era was one of general territorial limits on legislative and investigative powers. *See id.* at 234 ("We know no bounds that can be prescribed to its range but those of the United States."). The same concept of full reach would, under today's long-arm concepts, mean the application of "minimum contacts" and "domestic impact" tests.

161. "[T]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) (quoting Barenblatt v. United States, 360 U.S. 109, 111 (1959)).

Congressional statutes invoking the interstate nature of commerce as a basis for federal law. Congress has both the authority and the information to judge the benefits for foreign banks in participating in that stream, and the burdens for them in responding to United States subpoenas. If Congress used that authority and information generally to seek jurisdiction over foreign banks involved in that stream, it could expect a generous, although arguably not absolute, measure of judicial deference on whether it was meeting the constitutional limits involved in due process.[162]

Congress's conclusions about how the world financial system functions, and that system's high significance of indirect access to the United States market, even for banks which stay offshore, should receive deference from the courts. As previously noted, in the 1974 case upholding a series of burdensome requirements on banks involving, among other matters, reporting of foreign transactions, the Supreme Court gave great weight to the findings and procedures established by Congress following hearings on illegal international enterprise.[163]

2. Overseas Reach of United States Process for Individual Evidence

Interesting questions of a different nature arose when the Iran-Contra committees pursued elusive individual witnesses. One question is very basic: whether a United States citizen who is served in another country must obey the summons. Hakim fled overseas. Another important figure in the matter was the attorney Willard Zucker, an American citizen settled in Switzerland. The Supreme Court has settled the constitutionality of the general statute for summoning citizens back to testify in criminal cases, with one prominent use of the statute ironically being none other than an effort in the 1960s to bring back to the United States Meyer Lansky.[164]

No case has applied that general statute to Congressional hearings, and some well-known individuals have left the country to avoid being served with a subpoena to testify, such as Bebe Rebozo, President Nixon's friend, who went on a long cruise during the Watergate investigation.[165] In 1964, however, Congress amended the statute

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162. For a recent discussion of the interaction of Congress and the courts in the similar context of fourth amendment limitations on investigative means, see Fisher, *Congress and the Fourth Amendment*, 21 GA. L. REV. 107 (1986).

163. Ass'n v. Shultz, 416 U.S. 21, 27-28 (1974).

164. Blackmer v. United States, 284 U.S. 421 (1932), upheld the statute. United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974), described Lansky's case.

165. S. DASH, CHIEF COUNSEL: INSIDE THE ERVIN COMMITTEE—THE UNTOLD STORY OF WATERGATE 245 (1976).

specifically to broaden its use beyond criminal cases.[166] Congress generally uses the same procedural tools—writs, immunity orders, subpoenas, contempt—that courts do to obtain witnesses.

Witnesses may go beyond merely leaving, or staying away, all in the open, by resorting to hiding, thus, aggressively evading testifying. During the initial months of the Iran-Contra matter, Hakim kept his whereabouts secret, communicating only through counsel. This was one of his trump cards in negotiating the arrangements for his coming forward and providing evidence under immunity. Traditionally, like criminal and civil subpoenas of the courts, Congressional subpoenas have been served in hand, without the kinds of substituted or other service (such as leaving process at the last known residence) used for service of complaints in civil cases, particularly "long-arm" service of out-of-state defendants.[167] Accordingly, over the years, many witnesses have simply hidden from Congressional investigations. One example was the historic disappearance of William Rockefeller, who, despite being the retired head of possibly the most powerful company in the world and one of the world's wealthiest individuals, aggressively hid from the Senate's Pujo Committee (the "Money Trust" investigation) in 1912-13: "For seven months the elusive businessman could not be found at any of his several places of residence."[168] Regarding Hakim, the Iran-Contra Committees, like many Congressional investigations, had too great a need to move expeditiously to outwait a patient witness determined to stonewall.

At present, committees generally deal with evasive witnesses by dogged pursuit and strategy. If Congress faces some flagrant cases of evasion by witnesses who have solid roots—businesses, homes, families—it might ultimately choose to employ something like substituted service of civil complaints. For example, pursuant to Federal Rule of Civil Procedure 4(d)(1), a civil complaint can be served either by

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166. *See* 28 U.S.C. § 1783 (1982). As amended, the statute could be used "in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner." *Id.* The statute was amended by Pub. L. No. 88-619, § 10(a), 78 Stat. 997 (1964). A congressional committee might have a choice between using its own subpoena, applying pursuant to 28 U.S.C. § 1783 (1982) for a judicial subpoena, or it might use both. Such options are not unusual. A recalcitrant Senate witness may, in the end, be in contempt either of a Senate subpoena or a court order pursuant to the Senate civil enforcement statute.

167. *Compare* FED. R. CIV. P. 45 (in-hand service of civil subpoenas) *and* FED. R. CRIM. P. 17 (in-hand service of criminal subpoenas) *with* FED. R. CIV. P. 4 (substituted service of civil process).

168. R. N. SHELDON, *The Pujo Committee, 1912*, in 3 CONGRESS INVESTIGATES: 1792-1972, at 2267 (A. Schlesinger & R. Bruns. ed. 1975).

delivering the complaint to the defendant personally, "or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."[169] Similar service of a Congressional subpoena would presumably be upheld against due process challenges, so long as the prosecution of a contempt or obstruction of Congress charge proved (by direct or circumstantial evidence) that the witness had actual notice of the subpoena and a meaningful opportunity to be heard on it.

3. Bank Secrecy Laws

Quite apart from these issues regarding obtaining jurisdiction over witnesses, once they do obtain jurisdiction, the courts and Congress face separate issues concerning the application of foreign secrecy laws. The issue received its most extensive consideration from the Supreme Court in 1957 in *Societe International Pour Participations Industrielles v. Rogers.*[170] In *Rogers,* the United States during World War II had seized I.G. Farben's American interests, and a Swiss holding company had sued for the return of those interests. In that suit, document discovery on behalf of the United States government was resisted by a Swiss banking firm allegedly tied to I.G. Farben and the Swiss holding company. The dispute reached the point that the Swiss Federal Attorney confiscated the bank's documents to prevent their disclosure in violation of Swiss law.[171]

The Supreme Court refused to accept the claim that Swiss secrecy law excused refusal to produce the records. It emphasized the intent of "the Congress when it broadened the Trading with the Enemy Act in 1941, . . . to reach enemy interests which masqueraded under those innocent fronts."[172] It "would undermine congressional policies . . . and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records" if "fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had 'control' over them."[173] Since then the same logic has encouraged lower courts to effectuate Congressional policies in the tax, drug, and securities fraud laws by refusing to accept claims of foreign secrecy laws.

Societe Internationale, together with the previously discussed *Bank of Nova Scotia* case in the court of appeals, show that American courts

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169. FED. R. CIV. P. (4)(d)(1).

170. 357 U.S. 197 (1958).

171. *Id.* at 199-200.

172. *Id.* at 205 (quoting Clark v. Vebersee Finanz-Korp., 332 U.S. 480, 485 (1947)).

173. *Id.*

do not always honor such laws, but that is a far cry from regarding such laws as nullities in every instance. For example, in the 1988 decision in *United States v. Rubin*,[174] the Eighth Circuit upheld a Cayman Islands bank manager's refusal to give evidence in a major stock fraud case. Pursuant to waivers of the Cayman secrecy law by the court-appointed receiver for a defunct Cayman company, the manager testified as a key witness for the prosecution regarding specific empty company accounts misrepresented by the defendants as containing $8 million. The defense sought records and testimony from the bank manager regarding other accounts for which there were no waivers. In light of the applicability of the Cayman bank secrecy law, the district court issued an order, upheld by the court of appeals, precluding questioning the bank manager of those other accounts.[175]

In upholding the claim of bank secrecy, the Eighth Circuit distinguished *Bank of Nova Scotia* because in that case "the government was seeking the bank records of United States citizens who . . . [were] the target of a United States criminal proceeding . . . to determine if a United States citizen . . . [had] violated laws of the United States."[176] "By contrast, here [defendant] Rubin is attempting to obtain the records of Cayman Island residents who are neither the target of a United States criminal proceeding nor subject to the laws of the United States."[177] The Eighth Circuit applied the same multi-factor test of other courts, and because it sustained the shield of the Cayman secrecy law, it made the operation of that test more visible.[178]

The test is a balancing test derived from section 40 of the Restatement (Second) of the Foreign Relations Laws of the United States, which provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
> (a) vital national interests of each of the states,
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

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174. 836 F.2d 1096 (8th Cir. 1987).

175. *Id.* at 1098-100.

176. *Id.* at 1102.

177. *Id.* A number of other factors went into the Eighth Circuit decision, including lack of materiality of the other accounts, since almost no money had been shifted into them from accounts regarding which the defendant had made the fraudulent representations. *Id.*

178. *Id.* at 1101.

> (c) the extent to which the required conduct is to take place in the territory of the other states
> (d) the nationality of the person, and
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[179]

For a foreign bank secrecy provision, courts typically look quite hard at factor (b), the hardship to the bank if it violates its country's secrecy law.[180] The Supreme Court in *Societe Internationale* described "fear of criminal prosecution" as "a weighty excuse for non-production," while still saying that the record-holder was in the "most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans that will at the least achieve a significant measure of compliance with the production order," and that what the courts should do "depends upon the circumstances of a given case."[181]

Some courts have respected foreign bank secrecy laws on this ground; others have not. In *Rubin,* the Eighth Circuit had been "persuaded that if [the bank manager] were required to testify absent account waivers, the hardship to him would be great. He would be subject to criminal penalties which include a fine and incarceration."[182] This was a major factor in not enforcing the defendant's subpoena. On the other hand, *Bank of Nova Scotia* ordered disclosure despite the threat of prosecution of the bank for violation of the Cayman secrecy law:

> As the Second Circuit noted years ago, "If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom."[183]

The Court pointedly drew on both executive and congressional concerns in this regard: "Congress, as well as the Executive Branch, has long been 'concerned about [the] serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of

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179. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

180. United States v. Rubin, 836 F.2d 1096, 1102 (8th Cir. 1987).

181. Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197, 205-06, 211 (1958).

182. *Rubin,* 836 F.2d at 1102.

183. *In re* Grand Jury Proceedings Bank of Nova Scotia, 740 F.2d 817, 828 (11th Cir. 1984) (quoting First Nat'l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960)).

secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax and regulatory enactments.'"[184]

These cases show why Congressional investigations should, and hopefully will, be able to pierce these barriers. Even for non-criminal matters, congressional authorities (and agencies, such as the SEC) have "vital national interests" in conducting investigations.[185] Such areas as corporate payments and private quasi-governmental operations, even were they completely non-criminal, have profound implications for United States policy; therefore, investigations of these are vital for the conduct of government.

4. Techniques of International Investigation

A question of particular interest in congressional investigations concerns what tools are available to investigate overseas matters. Congress has some standard—and some not so standard—methods for obtaining evidence itself. Of course, it can hold hearings domestically in which foreigners testify. Once they have been validly served, non-citizens have the same obligations as citizens. One court held, in sustaining a contempt conviction for a witness who refused to take the oath at a Congressional hearing: "Although he is an alien, appellant stood before the Committee in much the same position as does any citizen of the United States."[186] For example, Adolfo Calero, the Contra leader who had worked with North, proved to be a key witness both in the Iran-Contra Committee hearings and in the prosecution of North.

Congressional committees also, on occasion, may hold hearings overseas. The Iran-Contra Committees, like most congressional investigations, chose not to use that option, instead bringing its overseas evidence back to the United States for hearings. One example of a committee that chose to hold overseas hearings was a House subcommittee inspecting the construction of a network of United States bases in Western Europe that had been experiencing supply problems. Like most congressional overseas trips, it received information primarily by visits, briefings, and conferences, but it supplemented these with

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184. *Id.* at 827 (quoting California Bankers Ass'n v. Shultz, 416 U.S. 21, 27 (1974)). Similarly, the Second Circuit called on the "strong national interest in safeguarding the integrity of its criminal process" and 1984 congressional legislation to sustain demands for Cayman records in United States v. Davis, 767 F.2d 1025, 1037 (2d Cir. 1985).

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

186. Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir.), *cert. granted*, 335 U.S. 857 (1948), *cert. dismissed*, 338 U.S. 883 (1949).

hearings designed to dig into the types of construction problems which could best be analyzed by a more formal hearing process.[187]

To obtain testimony overseas, a committee may authorize its staff to conduct depositions. The writer of a recent treatise explained the deposition's use:

> The deposition procedure may be used for varied reasons when it is expedient to obtain testimony without a member present—for example, to fill in the details of a complex investigation, to question witnesses outside of Washington while avoiding the inconvenience of conducting a field hearing, or to provide background information for use in later questioning of witnesses at a hearing. Depositions may be used by a committee in place of closed hearings, with a large number of members and staff present, to minimize leaking of witness' testimony in advance of public hearings.[188]

The writer pointed out the importance of the technique in international investigations: "An intensive investigation like that of the Iran-Contra affair often will make ample use of this technique, having its staff take hundreds of depositions throughout the world."[189] As described above regarding the Hakim deposition, on occasion, the taking of overseas depositions may be bolstered by providing an official authorization, or "commission," to the deposition-taker. Another potential procedure is the videotaped deposition, now routinely used in civil litigation.

Another question has been the potential for use of letters rogatory by Congressional investigations. Rule 28(b) of the Federal Rules of Civil Procedure explains: "A letter rogatory may be addressed 'To the Appropriate Authority in [here name the country].'"[190] In contrast to a deposition notice or commission, which directs Congressional staff or agents to question witnesses, a letter rogatory asks a foreign court or

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187. SUBCOMM. ON MILITARY OPERATIONS OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, REPORT OF AN INSPECTION TRIP TO CERTAIN SELECTED MILITARY INSTALLATIONS IN EUROPE, SEPTEMBER 1954, 83d Cong., 2d Sess. (1955). The subcommittee's report includes its schedule of briefings, conferences, and hearings. The Subcommittee explained that "[a] transcript was taken of each briefing and hearing during the course of this trip. For the most part these transcripts are classified and thus unavailable to the public." *Id.*

188. J. Grabow, *supra* note 133, § 3.3. For descriptions of the deposition procedure and sample documents, see *Appendix to the Inquiry Into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 1741-70 (1980).

189. J. Grabow, *supra* note 133, § 3.3.

190. FED. R. CIV. P. 28(b).

similar authority to do the questioning.[191] This procedure facilitates use of that country's own compulsory means for obtaining evidence, such as a foreign court which, upon receiving through channels a letter rogatory, issues its own subpoena to a witness, when United States process would be either dubious or completely useless. The Iran-Contra committees had authority to apply for letters rogatory,[192] but in light of the pace of the investigation, did not do so. Previous investigations, notably the House Select Committee on Assassinations, however, had used the procedure as it methodically ran down overseas leads.[193]

CONCLUSION

Congress's effort to investigate the Iran-Contra matter forced it to confront two of the most daunting legal obstacles to investigations today: the problems of "use" immunity where the key witnesses for a Congressional investigation also are likely targets of criminal charges, and the problems of international "enterprises" with finances cloaked in foreign secrecy barriers. Only by complex and subtle timing of "use" immunity, and extensive negotiation with the possessors of "enterprise" information, did the Congressional investigation surmount these obstacles. Future investigations will profit from a study of these efforts of the Iran-Contra investigation. Moreover, Congress should review its contempt, immunity, and international investigative authorities to determine whether they allow it to shape the laws so the United States has power to detect and overcome global stratagems for evading legal or political accountability.

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191. *Id.* (letter rogatory addressed to "appropriate authority" in foreign country).

192. The Senate Committee's charter, S. Res. 23, authorized it in section 5(d)(5) "to make application for issuance of letters rogatory." S. RES. 23, 100th Cong., 1st Sess. (1987).

193. *In re* Application of United States House of Representatives Select Committee on Assassinations, Misc. No. 78-0120 (D.D.C. April 19, 1978) (used to inquire into James Earl Ray's activities in Portugal in May, 1968), *reprinted in Legislative and Administrative Reform: Appendix to Hearings Before the House Select Comm. on Assassinations*, 95th Cong., 2d Sess. 134 (1978).