HOUSE RULES: CONGRESS AND THE ATTORNEY-CLIENT PRIVILEGE

DAVID RAPALLO*

ABSTRACT

In 2020, the Supreme Court rendered a landmark decision in Trump v. Mazars *establishing four factors for determining the validity of congressional subpoenas for a sitting president's personal papers. In an unanticipated move, Chief Justice John Roberts added that recipients of congressional subpoenas have "long been understood" to retain not only constitutional privileges, but common law privileges developed by judges, including the attorney-client privilege. This was particularly surprising since Trump was not relying on the attorney-client privilege and the Court had never treated this common law privilege as overriding Congress's Article I power to set its own procedures for conducting investigations.*

This article examines the merits of this claim from three possible sources of authority: separation of powers principles, congressional oversight precedents, and judicial rulings. It concludes that since the attorney-client privilege is rooted in common law, *committees are not required to recognize it, but may do so if they choose. It also finds that although recipients of congressional subpoenas may assert applicable* constitutional *privileges to withhold certain subsets of attorney-client communications, these privileges may be limited. Finally, rather than assuming that the Chief Justice's line was erroneous dictum or a sweeping new pronouncement with no explanation, this article offers an alternative reading that gives him the benefit of the doubt and aligns with current practice: recipients of congressional subpoenas retain their right to assert the privilege in separate proceedings, and complying with compulsory demands from Congress does not constitute a general waiver in other fora.*

---

* Associate Professor of Law and Director of the Federal Legislation Clinic, Georgetown University Law Center. I previously served as Staff Director on the House Committee on Oversight and Reform, which subpoenaed President Trump's accounting firm, Mazars, under then-Chairman Elijah E. Cummings, and conducted several of the investigations described in this article. I thank my colleagues on and around Capitol Hill, including Rep. Jamie Raskin, Phil Barnett, Mort Rosenberg, Lou Fisher, Susanne Grooms, Todd Tatelman, Todd Garvey, Andy Wright, and David Janovsky. I also thank my new colleagues at Georgetown, including Josh Chafetz, Robin West, Deborah Epstein, Sara Colangelo, Tia Johnson, and my terrific research assistants, Oliver Redsten, Alyson Raphael, and Laura Clayton.

TABLE OF CONTENTS

I. CONGRESSIONAL SUBPOENA POWER AND THE COMMON LAW ATTORNEY-CLIENT PRIVILEGE 459
A. *Separation of Powers Principles* 459
B. *Congressional Oversight Precedents* 470
1. *Congressional Precedents on Attorney-Client Privilege* 471
2. *Recent Oversight Committee Case Studies* 476
C. *Judicial Precedents* 482
II. CONGRESSIONAL SUBPOENA POWER AND CONSTITUTIONAL PRIVILEGES 491
A. *Constitutional Privileges for Individuals* 491
B. *Constitutional Privileges for Executive Branch Officials* 500
III. ALTERNATIVE READING OF THE CHIEF JUSTICE'S POSITION IN *MAZARS* 506
CONCLUSION 515

INTRODUCTION

In 2019, three House committees—the Committee on Oversight and Reform, the Permanent Select Committee on Intelligence, and the Committee on Financial Services—issued subpoenas to obtain documents from then-President Donald Trump's bankers and accountants in response to a wide range of troubling allegations.[1] Trump intervened to fight the subpoenas, and the Supreme Court, in its landmark decision, *Trump v. Mazars,* affirmed several core principles: each House of Congress has power under the Constitution to conduct investigations, committees may issue subpoenas to compel the production of documents and testimony, and no individual has an absolute right to defy congressional demands.[2]

However, because the case involved the President, the Court observed that it implicated the separation of powers.[3] The Court set forth a new, non-exhaustive list of four factors for courts to evaluate when reviewing congressional subpoenas for a sitting president's personal papers: (1) whether the legislative purposes warrant involving the President and his papers; (2) whether the subpoena is no broader than reasonably necessary

1. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2027–28 (2020) (including that the President had undisclosed conflicts of interest, violated the Emoluments Clauses, failed to accurately report his finances to the Office of Government Ethics, was compromised by foreign interests, and was receiving illicit funds from Russian oligarchs and others).

2. *Id.* at 2036 ("When Congress seeks information 'needed for intelligent legislative action,' it 'unquestionably' remains 'the duty of *all* citizens to cooperate.'") (citing Watkins v. United States, 354 U.S. 178, 187 (1957)) (emphasis in *Mazars*).

3. *Id.* at 2035.

to support these legislative objectives; (3) whether the evidence offered by Congress establishes that the subpoena furthers a valid legislative purpose; and (4) whether the burdens on the President "cross constitutional lines."[4]

In an unanticipated move, Chief Justice Roberts, writing for the Court, also inserted the following aside regarding testimonial privileges for individuals who receive subpoenas from Congress:

> And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.[5]

This impromptu declaration was doubly surprising because Trump was not relying on the attorney-client privilege and the Supreme Court had never treated common law privileges developed by federal judges as supplanting Congress's explicit authority under Article I of the Constitution to set its own rules to conduct investigations. The Chief Justice drew no distinction between constitutional privileges that Congress *must* recognize and common law privileges that Congress *may* recognize. He did not explain under what authority he believes Congress is required to recognize the common law attorney-client privilege, and he suggested that Congress may be required to recognize other unspecified common law privileges as well.

Part I of this article examines the merits of the claim that Congress is required to recognize the common law attorney-client privilege from three perspectives: separation of powers principles, congressional oversight precedents, and judicial rulings. It concludes that congressional committees are not required to recognize *non-constitutional* common law privileges, but they may do so if they choose. As one of the oldest privileges based in common law, the attorney-client privilege has been developed by courts to serve the widely shared policy goal of promoting trust and confidentiality in attorney-client relationships. But there is no precedent indicating that it has a constitutional basis. While committees respect the policy interests underlying the privilege—and use their discretion routinely to allow assertions of the privilege in their proceedings—they also safeguard their authority to overcome the privilege if necessary to fulfill their many

---

4. *Id.* at 2035–36. The Court remanded, and lower courts applied this new standard. *See, e.g.*, Trump v. Mazars USA, LLP, 39 F.4th 774, 779 (D.C. Cir. 2022) (upholding the Committee's "authority to subpoena certain of President Trump's financial records in furtherance of the Committee's enumerated legislative purposes," but narrowing the subpoena "in a number of respects" in light of the new *Mazars* factors).

5. *Mazars*, 140 S. Ct. at 2032. The Chief Justice followed his sentence with two parallel citations: LOUIS FISHER, CONG. RSCH. SERV., RL31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 16–18 (2003) [hereinafter "2003 CRS REPORT"] for the common law attorney-client assertion, and Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730–731 (D.C. Cir. 1974), for the constitutional executive privilege assertion.

responsibilities under the Constitution. Under Article I, the decision to recognize this common law privilege rests with committees themselves and, absent a committee's consent, federal courts historically have declined to intervene when constitutional privileges are not at stake.

Since Congress must recognize applicable *constitutional* privileges, Part II takes up constitutional privileges that individuals may assert to withhold information that could include a subset of attorney-client communications. For example, a witness may assert the Fifth Amendment right against self-incrimination, or a president may invoke executive privilege over presidential communications. Committees must give due weight to these privileges, and courts evaluate whether these privileges apply. For example, courts examine whether Fifth Amendment claims are properly invoked, and they determine whether government communications are sufficiently linked to presidential decision-making to fall under executive privilege. Courts also consider whether Congress has overcome these constitutional privileges, for example, by granting immunity to witnesses who invoke the Fifth Amendment or making a sufficient showing of need to overcome the presidential communications privilege. However, once courts decide these constitutional questions, their task is complete. Courts generally have avoided deciding whether information sought by Congress would be covered by common law privileges and instead have left those determinations where the Constitution leaves them: with Congress.

Part III takes a closer look at the Chief Justice's position in *Mazars*. If he meant to suggest a broad consensus among Congress and the Judiciary that witnesses may defy congressional subpoenas based on the common law attorney-client privilege, that claim is simply wrong. Congress has taken the opposite position for generations, and the Chief Justice did not cite any judicial precedent to support this interpretation. If he held this inaccurate view, the line should be disregarded as erroneous dictum, and the Court should promptly correct this mistake. Another possibility is that the Chief Justice meant to declare that committees are required—from this point on—to look to federal courts to decide how and when committees must recognize the privilege. However, he provided no explanation of the constitutional authority underpinning this assertion, and there is little evidence that he intended to make such a remarkable pronouncement, unprompted and unbriefed.

Acknowledging the perils of trying to divine the Chief Justice's intent, there is another interpretation of this line that would give him the benefit of the doubt. Instead of assuming he was negligent or imperious, his line could be read as acknowledging that recipients of congressional subpoenas retain the right to assert the privilege *in other venues* not directly related to congressional investigations and that complying with mandatory

congressional demands does not constitute a general waiver in those other proceedings. As discussed in Part III, this interpretation gives meaning to the specific authorities the Chief Justice cited and the particular congressional investigation he referenced in the opinion, it harmonizes current law and practice by squarely addressing the (very real) waiver concerns of practitioners representing clients before Congress, and most importantly, it comports with separation of powers principles, congressional oversight precedents, and judicial rulings.

The resolution of these questions could have significant short- and long-term implications. To legislate effectively, committees examine a wide range of conduct by individuals—including attorneys—who work in corporate and private sector entities in health, finance, defense, and other fields. Congress is also charged with examining the conduct of government officials to expose fraud, waste, and abuse of taxpayer funds, inform the public, and develop legislation governing the activities of federal agencies. Curtailing committees' longstanding practice of examining the conduct of attorneys would significantly impair the ability of those committees to obtain relevant information needed for these constitutional purposes. Forcing committees to relinquish this authority also would shift the balance of power further towards the executive and judicial branches with no constitutional basis.[6]

I. CONGRESSIONAL SUBPOENA POWER AND THE COMMON LAW ATTORNEY-CLIENT PRIVILEGE

Is Congress required to recognize the judicially developed, common law attorney-client privilege? The short answer is "no." Neither separation of powers principles, congressional oversight precedents, nor judicial precedents support the position that Congress must do so. I take these up in that order.

A. Separation of Powers Principles

One of Congress's core powers is the power to investigate.[7] Although not expressly enumerated in the Constitution, Congress has authority to

6. Throughout this article, I include details about congressional investigations that may not have made their way into the academic literature or judicial opinions. My sense, borne of experience, is that few people may be aware of these cases outside the parties directly involved. In addition to contributing to the academic debate on this issue, they may serve as a resource for courts and committees reviewing the precedents of a co-equal branch of government. *See* Steven Ross, *Applicability of the Attorney-Client Privilege Before Congress*, *in* CONGRESSIONAL INVESTIGATIONS: LEGAL ISSUES AND PRACTICAL APPROACHES, 138–39 (1986) (detailing congressional precedents as *lex parliamenti*).

7. *Mazars*, 140 S. Ct. at 2031.

conduct investigations and, as part of that power, to issue subpoenas to compel the production of documents and testimony.[8] This power is extremely broad, and for good reason: it is fundamental to Congress's ability to conduct all of its other constitutional responsibilities.[9] Although it has become shorthand to refer to this power as needing to serve a "valid legislative purpose,"[10] the more precise description, in my view, is that it must serve a valid legislative *branch* purpose.[11] As the Chief Justice affirmed in *Mazars,* it must relate to "a *legitimate task* of the Congress,"[12] which includes more than just passing a bill or an amendment.[13] This power is as extensive as the functions the Constitution assigns to Congress.[14] As a constraining principle, the key question is whether a subpoena exceeds the authority of Congress "under the Constitution."[15] Although this power is not unlimited,[16] it is challenging to identify an investigation that is unrelated to a legitimate function of Congress, as others have noted.[17]

---

8. *Id.* (noting that Congress has power "to secure needed information") (citing McGrain v. Daugherty, 273 U.S. 135, 161 (1927) (involving Senate investigation of Justice Department officials arising out of Teapot Dome scandal)).

9. *Id.* at 2031 (noting that the "'power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function,'" and that "[w]ithout information, Congress would be shooting in the dark, unable to legislate 'wisely or effectively'") (citing *McGrain*, 273 U.S. at 174–75).

10. *Id.* (citing Watkins v. United States, 354 U.S. 178, 187 (1957)) (citing Quinn v. United States, 349 U.S. 155, 161 (1955)).

11. The Constitution grants Congress numerous powers, including to legislate (U.S. CONST. art. I, § 1), impeach (*id.* art. I, § 2, cl. 5; art. I, § 3, cl. 6), raise revenue (*id.* art. I, § 7, cl. 1), tax (*id.* art. I, § 8, cl. 1), establish lower courts (*id.* art. I, § 8, cl. 9), declare war (*id.* art. I, § 8, cl. 11), raise an army (*id.* art. I, § 8, cl. 12), consent to emoluments (*id.* art. I, § 9, cl. 8), establish positions for presidential appointments and advise and consent to presidential nominees (*id.* art. II, § 2, cl. 2), and make laws "necessary and proper" for carrying out all other constitutional powers of government (*id.* art. I, § 8, cl. 18), among others.

12. *Mazars*, 140 S. Ct. at 2031 (citing *Watkins*, 354 U.S. at 187) (emphasis added).

13. *Id.* at 2031 (noting that the power to investigate "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them'") (citing *Watkins*, 354 U.S. at 187).

14. *Id.* at 2031 (noting that "congressional power to obtain information is 'broad' and 'indispensable'") (citing *Watkins,* 354 U.S. at 187); *see also* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("[T]he scope of the power of inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution.").

15. *Id.* at 2029.

16. *Id.* at 2032 (Congress may not issue subpoena for the purpose of "law enforcement") (citing Quinn v. United States, 349 U.S. 155, 161 (1955)); *id.* (Congress "may not use subpoenas to 'try' someone 'before [a] committee for any crime or wrongdoing'" and has no "'general' power to inquire into private affairs and compel disclosures") (citing McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927)). Other cases have explained that subpoenas can be challenged if committees are not properly authorized to conduct investigations, *see, e.g.*, Gojack v. United States, 384 U.S. 702, 705 (1966), or if inquiries are not "pertinent" to the investigations. *See Watkins*, 354 U.S. at 208.

17. *See, e.g.*, James Hamilton, *Overview of the Law Pertaining to Congressional Investigations*, *in* CONGRESSIONAL INVESTIGATIONS: LEGAL ISSUES AND PRACTICAL APPROACHES 15 (1986) (noting that "the doctrine of legislative purpose provides little practical protection"); Michael D. Bopp, Thomas G. Hungar & Chantalle Carles Schropp, *How President Trump's Tangles with Committees Have*

Critical to this analysis, the Constitution also gives "[e]ach House" of Congress independent authority to establish its own rules, including for conducting investigations.[18] Pursuant to this authority, the House adopts rules at the start of every two-year Congress, while the Senate, as a continuous body, retains its rules from one Congress to the next.[19] House and Senate rules have developed key similarities and critical differences over time.[20] By granting each chamber distinct authority to set its own rules, the Founders distinguished this unicameral rulemaking authority from Congress's other powers, including its authority to pass legislation, which carries with it the additional requirements of bicameralism and presentment.[21] The Constitution does not require either the House or Senate, when acting pursuant to its Article I rulemaking authority, to seek or obtain the consent of the other chamber or the President.[22]

A fundamental consequence of the structure of Article I and the separation of powers is that since the attorney-client privilege is based in the common law instead of the Constitution, Congress may determine how it will handle assertions of the privilege. In other words, because the Constitution grants Congress the power to investigate, and since Article I explicitly gives the House and Senate independent authority to set their own rules, a common law privilege may not overcome these constitutional powers. Unless Congress agrees otherwise or a countervailing constitutional interest is identified, the Constitution grants Congress the authority to determine whether, when, and how it will recognize the privilege in its own proceedings. Otherwise, the separation of powers would be upended as

---

Weakened Congress's Investigative Powers, 37 J.L. & POL. 1, 10 (2021) (noting that it is "exceptionally difficult to invalidate a congressional subpoena on the basis that the committee lacked a valid legislative purpose"). For an even broader view, see Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 141 n.117 (2021) ("[E]ven an investigation for a (currently) unconstitutional purpose could be justified as an investigation that might potentially lead to a constitutional amendment, making that (formerly) unconstitutional purpose constitutional.").

18. U.S. CONST., art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings.").

19. The House adopted its most recent version of the rules in 2021. Rules of the House of Representatives, H.R. Doc. No. 116-177, 117th Cong. (2021). The Senate last revised its standing rules on January 24, 2013. Standing Rules of the Senate, S. Doc. No. 113-18, 113th Cong. (2013).

20. For example, the House utilized the filibuster early in its history, but later abandoned the procedure, leaving it to the Senate. *See* GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 37 (2010) (noting that "the fact that filibustering was more common in the U.S. House than the U.S. Senate shatters the notion that obstruction is somehow peculiar to the Senate or essential to its purpose in our constitutional system"); Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 111–19 (2017) (describing evolution of House Rules Committee procedures).

21. U.S. CONST., art. I, § 7, cl. 2.

22. Congress's rulemaking power is similar to other explicit Article I exceptions to bicameralism and presentment, including the House's power to impeach (*id.* art. I, § 2, cl. 5), the Senate's power to try impeachments (*id.* art. I, § 3, cl. 6), and the Senate's powers to approve or disapprove Presidential appointments and to ratify treaties (*id.* art. II, § 2, cl. 2).

federal courts would be able to impose various types of common law privileges onto Congress without a constitutional basis.

In the case of the attorney-client privilege, neither the House nor the Senate has adopted a rule providing witnesses the ability to assert the privilege as a matter of right. Instead, both chambers have adopted rules delegating to their committees' discretion to make rulings on a case-by-case basis.[23] These rules authorize committees to hold hearings and collect testimony and records, including by issuing subpoenas.[24] In addition, both chambers have authorized committees to adopt their own rules,[25] and committees have used this delegated power to establish systems for considering assertions of privileges by witnesses.[26]

Both the House and Senate have rejected amendments to their rules that would have *required* committees to apply the common law attorney-client privilege. For example, the House defeated an amendment to require recognition of the attorney-client privilege in 1857 when it adopted legislation to create a criminal contempt statute that applies to individuals appearing before Congress.[27] During debate on the amendment, Rep. George Dunn of Indiana asked the sponsor of the bill, Rep. James Orr of South Carolina, whether the bill would exempt attorney-client

23. *See, e.g.*, Rules of the House of Representatives, R. X, H.R. Doc. No. 116-177 (establishing committees and jurisdictions); *id.* R. XI, cl. 1(b)(1) (authorizing each committee to conduct "investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X."); Standing Rules of the Senate, R. XXV, S. Doc. No. 113-18 (establishing committees and jurisdictions); *id.* R. XXVI, cl. 1 (authorizing each committee to "may make investigations into any matter within its jurisdiction").

24. Rules of the House of Representatives, R. XI, cl. 2(m)(1), H.R. Doc. No. 116-177 (authorizing committees "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary"); *id.* R. XI, cl. 2(m)(3)(A)(i) (authorizing power to issue subpoenas to be "delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe"); Standing Rules of the Senate, R. XXVI, S. Doc. No. 113-18 (authorizing committees "to hold such hearings, . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony . . . as may be authorized by resolutions of the Senate").

25. Rules of the House of Representatives, R. XI, cl. 2(a)(1), H.R. Doc. No. 116-177 (authorizing each standing committee to adopt written rules governing its procedures); Standing Rules of the Senate, R. XXVI, cl. 2, S. Doc. NO. 113-18 (authorizing each committee to adopt rules governing the procedures of such committee).

26. S. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON HOMELAND SEC. & GOV'TL AFFS., 116TH CONG., RULES OF PROC. R. 9.3 (Comm. Print 2019) (governing the process for ruling on assertions of privilege); H. COMM. ON OVERSIGHT & REFORM, 116TH CONG., RULES OF THE COMM. R. 16 (Comm. Print 2021) (authorizing Chair to rule on assertions of privilege); *id.* at R. 15(i) (setting forth processes for handling privilege assertions).

27. CONG. GLOBE, 34TH CONG., 3d Sess. 432 (1857).

communications.[28] In response, Rep. Orr stated that it would not.[29] A similar amendment was defeated in the Senate.[30]

Since then, Congress has declined repeatedly to change its rules to recognize the privilege when opportunities have squarely presented themselves. For example, the House and Senate rejected amendments in 1954 that would have required the recognition of the attorney-client privilege.[31] This issue arose again when the House voted in 1986 to hold an attorney and his brother in contempt for refusing to answer questions relating to the business dealings of Philippine President Ferdinand Marcos and his wife.[32] A House subcommittee had ruled that the attorney-client privilege was not available as a matter of right before Congress and that it likely would not have applied under common law in any case.[33] Some commentators urged the House to require its committees to recognize the attorney-client privilege,[34] and two House Members introduced a bill to do so,[35] but the bill died within a few months of being referred to subcommittee.[36]

Congress has used its discretion under its Article I rulemaking authority to grant access to other related, but distinct privileges that are not required by the Constitution. For example, the House has adopted a rule that allows witnesses appearing before committees to be accompanied by attorneys

---

28. *Id.* at 431.

29. *Id.*

30. *See* Jonathan P. Rich, Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 154 (1988) (noting that Senate was not intending to subvert common law privileges, but rather meant to reflect its sense that amendments were unnecessary given Senate's own "legislative respect for these privileges").

31. Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 J. MARSHALL L. REV. 309, 316 (1988) (citing S. RULES COMM., 83RD CONG., RULES OF PROC. FOR S. INVESTIGATING COMMS. 27 (Comm. Print 1955) (noting that "committee practice," with some exceptions, has been to observe attorney-client and other common law privileges)).

32. 132 CONG. REC. 3061 (1986).

33. H. COMM. ON FOREIGN AFFS., PROCEEDINGS AGAINST RALPH BERNSTEIN AND JOSEPH BERNSTEIN, H.R. REP. NO. 99-462 (1985), *as reprinted in* 132 CONG. REC. 3028–40 (1986) ("After due consideration, the subcommittee overruled these claims, and, when the witnesses continued their resistance, held the witnesses to be in contempt of Congress, based on the legal advice of the general counsel to the Clerk of the House, and the minority counsel of the House, that the claims were without merit.")

34. *See, e.g.*, James Hamilton, *Can Congress Make Lawyers Talk?*, WASH. POST, Mar. 25, 1986, at A17, https://www.washingtonpost.com/archive/opinions/1986/03/25/can-congress-make-lawyers-talk/8f7ec276-9d5c-41b2-aeb2-b3f9be4f9f55/ [https://perma.cc/WU4B-SR45].

35. The Attorney-Client Privilege Act of 1986, H.R. 4245, 99th Cong. (introduced Feb. 26, 1986).

36. The last action taken on the bill was that it was "Referred to Subcommittee on Criminal Justice" by the House Committee on the Judiciary on April 7, 1986. *See All Actions H.R.4245—99th Congress (1985-1986)*, CONGRESS.GOV, https://www.congress.gov/bill/99th-congress/house-bill/4245/all-actions?r=2& overview=closed&s=4#tabs [https://perma.cc/GWZ5-SD2V] (last visited Sept. 23, 2022).

even though there is no express constitutional requirement to do so.[37] Because the Sixth Amendment right to counsel applies in relation to criminal proceedings,[38] floor debate on this rule made clear that allowing congressional witnesses to be accompanied by counsel was a narrow "privilege" granted by the House.[39] Members explained that because they were adopting this rule to promote public policy goals rather than as a constitutional requirement, they were limiting the privilege as they deemed appropriate.[40] Attorneys who represent congressional witnesses know well that the privilege of accompanying their clients to hearings does not entitle lawyers to present arguments, make motions, question witnesses, or make demands of the committee.[41] These limitations—including not being able to speak at certain congressional proceedings—is a significant difference for attorneys accustomed to practicing in federal courts,[42] but it conforms with longstanding congressional precedent.[43]

Congress has also used its rulemaking authority to adopt other provisions governing the conduct of attorneys who practice before it. Senate

---

37. Rules of the House of Representatives, R. XI, cl. 2(k)(3), H.R. Doc. No. 116-177, 117th Cong. (2021).

38. U.S. CONST. amend. XI.

39. 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES 2275, 2386 (1994) (citing 101 CONG. REC. 3569, 3572, 3582, 3583, 84th Cong. 1st Sess. (1955)) (when Rep. George Meader asked, "Would the absence of counsel where a witness demands the right to have counsel present vitiate the legal status of the inquiry?," Rep. Howard W. Smith responded, "By no means. This is merely a privilege given to him.").

40. *Id.* at 2387 (citing 101 CONG. REC. 3582, 84th Cong. 1st Sess. (1955)) (Rep. Kenneth Keating stated that "[t]here is no specific basis for the right of a witness to be accompanied and advised by his counsel, nor for recognition of the traditional privileges of lawyer and client, doctor and patient, priest and penitent, and the like" and that it is "only a matter of drawing the lines clearly and precisely where *we* wish them to lie") (emphasis added).

41. *Id.* at 2388, § 14.3; *see also id.* at 2389, § 14.5 ("A House committee has discretion to refuse to allow demands of counsel at an investigative hearing and it may reject an attorney's demand that certain evidence be taken in executive session or require the witness personally to raise the issue.").

42. *See also* Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 403 (2016) (noting surprise of those under investigation when they learn that Congress does not provide the same procedures as federal courts for "a whole panoply of fundamental concepts of procedural fairness—right to counsel, regulation of discovery, neutrality of arbiters, safeguarding of confidential information, right of confrontation, common law privileges, rights of privacy").

43. THOMAS JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE 170–71 (1801) ("Counsel are to be heard only on private, not on public, bills and on such points of law only as the House shall direct.") (citation omitted). A typical example occurred at a hearing in 2016, during which an attorney representing Martin Shkreli, a drug company executive accused of bilking customers, sought recognition:

> [Counsel:] Mr. Chairman, may I be recognized for a moment?
>
> Chairman CHAFFETZ: No. No, you are not allowed to. Under the House rules, you have not been sworn in.
>
> [Counsel:] I understand, but he is making—
>
> Chairman CHAFFETZ: You are not recognized. You are not recognized, and you will be seated.

Developments in the Prescription Drug Market: Oversight: Hearing Before the H. Comm. on Oversight & Gov't Reform, 114th Cong. 65 (2016).

committees may eject counsel from their proceedings,[44] and House committees are authorized to remove attorneys and punish them through censure or contempt if warranted.[45] The rules of the Senate's primary investigative body, the Permanent Subcommittee on Investigations, provide that in cases of potential conflicts of interest, witnesses may be represented only by personal counsel and not by counsel from government or corporate entities with which they are affiliated.[46] Similarly, the House has authorized committees to exclude government counsel from depositions of federal employees.[47] The House's primary investigative body, the Committee on Oversight and Reform, has exercised this authority to exclude agency counsel from depositions of federal employees when their presence could intimidate deponents or undermine the veracity of their testimony.[48] Chairs of both parties have deposed a long line of high-level executive branch officials without agency counsel in attendance under this rule.[49]

In addition to safeguarding its own Article I *rulemaking* authority, Congress has exercised its constitutional *lawmaking* power to set, restrict, and in some circumstances, even abolish the common law attorney-client privilege within the proceedings of the judicial and executive branches. There would be a fundamental incongruity, or at least an oddity, if Congress could pass laws establishing how the attorney-client privilege applies to proceedings in the other two branches, but not its own.[50]

---

44. S. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON HOMELAND SEC. & GOV'TL AFFAIRS, 116TH CONG., RULES OF PROC. R. 8 (Comm. Print 2019).

45. Rules of the House of Representatives, R. XI, cl. 2(k)(4), H.R. Doc. No. 116-177, 117th Cong. (2021).

46. S. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON HOMELAND SEC. & GOV'TL AFFAIRS, 116TH CONG., RULES OF PROC. R. 8 (Comm. Print 2019).

47. 167 CONG. REC. H41 (daily ed. Jan. 4, 2021) ("Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights."); *see also* Rules of the House of Representatives, R. X, cl. 4(c)(3), H.R. Doc. No. 116-177 (authorizing Committee to "adopt a rule authorizing and regulating the taking of depositions by a member or counsel of the committee, including pursuant to subpoena"); STAFF OF H. COMM ON OVERSIGHT & REFORM, 116TH CONG., RULES OF THE H. COMM. ON OVERSIGHT & REFORM R. 15 (Comm. Print 2019).

48. STAFF OF H. COMM. ON OVERSIGHT & REFORM, 116TH CONG., REP. ON COMM. DEPOSITIONS IN THE HOUSE OF REPRESENTATIVES: LONGSTANDING REPUBLICAN AND DEMOCRATIC PRACTICE OF EXCLUDING AGENCY COUNSEL 1 (Comm. Print 2019) ("The deposition rule that excludes agency counsel is intended for exactly these types of circumstances—to prevent agency officials who are directly implicated in the abuses we are investigating from trying to prevent their own employees from coming forward to tell the truth to Congress.").

49. *Id.* (citing 141 depositions with personal counsel and without agency counsel conducted by Rep. Dan Burton as Chairman of the House Committee on Government Reform, including White House Chief of Staff Mack McLarty, White House Chief of Staff Erskine Bowles, White House Counsel Bernard Nussbaum, White House Counsel Jack Quinn, Deputy White House Counsel Bruce Lindsey, Deputy White House Counsel Cheryl Mills, Deputy White House Chief of Staff Harold Ickes, Chief of Staff to the Vice President Roy Neel, and Chief of Staff to the First Lady Margaret Williams) (footnote omitted).

50. *See, e.g.*, Millet, *supra* note 31, at 320 ("Nothing in the Constitution compels Congress to respect privileged communications. Indeed, no one would dispute that Congress could adopt legislation

In the judicial context, Congress passed legislation establishing the Federal Rules of Evidence in 1975 to govern common law privileges, but explicitly limited the application of the rules to federal judicial proceedings.[51] The Supreme Court originally proposed that Congress set forth the scope of each common law privilege explicitly in the rules.[52] Instead, Congress chose to allow federal courts to continue using common law principles, essentially deferring to the courts to carry on developing these privileges using their best judgment for use in federal courts.[53] As a result, Rule 501 now provides: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege."[54] However, Congress extended its deference only to proceedings in federal courts and did not authorize the judiciary to decide when or how common law privileges apply in congressional proceedings or in state courts.[55] Some have suggested that since Congress established the Federal Rules of Evidence allowing federal courts to recognize the common law attorney-client privilege, Congress must recognize this privilege in its own proceedings.[56] This argument is undercut by the rules themselves: Rule 101(a) provides that these rules apply only to proceedings in United States courts;[57] and Rule 1101(a) delineates the specific federal judicial fora to which the rules apply.[58]

Like Congress, states also have exercised their independent authority to make their own determinations regarding common law privileges, including the attorney-client privilege. For example, in 2016, the Washington Supreme Court issued a decision finding that the attorney-client privilege does not apply to communications with a company's former employees

---

affecting the role of privileges in judicial proceedings. It follows, then, that Congress is not required to follow these privileges in its own arena.") (footnote omitted).

51. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

52. H. COMM. ON THE JUDICIARY, H.R. REP. NO. 93-650, at 8 (1973) (proposing that Congress set forth "*non-constitutional* privileges which the *federal courts* must recognize") (emphasis added); *see also* S. COMM. ON THE JUDICIARY, S. REP. NO. 93-1277, at 11 (1974).

53. H.R. REP. NO. 93-650, at 8.

54. FED. R. EVID. 501.

55. H.R. REP. NO. 93-650, at 1 (purpose of legislation is to "provide a uniform code of evidence for use *in the Federal courts*") (emphasis added).

56. Bradley J. Bondi, *No Secrets Allowed: Congress's Treatment and Mistreatment of the Attorney-Client Privilege and the Work Product Protection in Congressional Investigations and Contempt Proceeding*, 25 J. L. & POL. 145, 146 (2009) (arguing that because the attorney-client privilege was "codified by Congress" through this legislation, "nothing within Congress's powers should allow it to abrogate this longstanding right").

57. FED. R. EVID. 101 (Scope; Definitions).

58. FED. R. EVID. 1101 (Applicability of Rules, To Courts and Judges) (applying to proceedings before United States district courts, bankruptcy and magistrate judges, courts of appeals, the Court of Federal Claims, and the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands). Although Bondi noted that the Advisory Committee Notes to Rule 501 "unequivocally state that the attorney-client privilege is one of the privileges that federal courts 'must' recognize," those notes do not state that Congress must do so. Bondi, *supra* note 56, at 149 (citation omitted).

even if the communications relate to the individual's employment.[59] Although the state court decided to adopt the U.S. Supreme Court's general approach to the privilege in corporate contexts, it rejected its application to postemployment communications with former employees.[60] The state court acknowledged that federal courts have taken a different position, citing in particular the position of the Fourth Circuit Court of Appeals.[61] But the state court nevertheless decided to make its own determination that expanding the privilege in this way would frustrate "the truthseeking mission of the legal process."[62]

Federal courts have respected state determinations on the scope of the attorney-client privilege. For example, in *Beckler v. Superior Court, Los Angeles County,* the Ninth Circuit upheld a decision by the California Supreme Court that the state's attorney-client privilege did not extend to an attorney subpoenaed by a grand jury for business records in his possession over which his client had attempted to assert a Fifth Amendment claim against self-incrimination.[63] Since this was a proceeding before California state courts, the Ninth Circuit held: "[T]he attorney-client privilege is a matter of state law, for determination by the California courts. It is not a matter of Constitutional law under the Fifth Amendment."[64]

The Supreme Court has recognized the right of states to make their own policy determinations with respect to these non-constitutional privileges. For example, in *Jaffee v. Redmond*, the Court, using authority delegated by Congress under Rule 501 "to define new privileges by interpreting 'common law principles . . . in the light of reason and experience'," recognized a new psychotherapist-patient privilege in federal courts.[65] In informing its determination, the Court looked to the states for guidance on the various ways they had chosen to handle the privilege in their jurisdictions, noting that "the *policy decisions* of the States bear on the question whether federal courts should recognize a new privilege or amend

59. Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1192 (Wash. 2016) (en banc); *see also* Peter R. Jarvis, *Washington Supreme Court Creates Bright-Line Rule*, HOLLAND & KNIGHT ALERT (Oct. 26, 2016) (describing Washington Supreme Court as taking "what is, on a national basis, a minority position") [https://perma.cc/9S3K-2R4F].

60. *Newman*, 381 P.3d at 1192.

61. *Id.* at 1194 (citing *In re* Allen, 106 F.3d 582, 605–06 (4th Cir. 1997) (collecting cases)).

62. *Id.* at 1194 (citing United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986) (citing United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984))).

63. Beckler v. Superior Ct., Los Angeles Cnty., 568 F.2d 661 (9th Cir. 1978).

64. *Id.* at 662 (also noting that the attorney-client privilege under federal rules does not assume "Constitutional dimensions" (citing Fisher v. United States, 425 U.S. 391 (1976)).

65. Jaffee v. Redmond, 518 U.S. 1, 8 (1996) (citing FED. R. EVID. 501). The Court also noted that when Congress enacted Rule 501, it "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Id.* at 9 (citations omitted).

the coverage of an existing privilege."[66] The Court also noted that if the petitioner in this case had brought her case in state court instead of federal court, the state privilege would have applied.[67] Throughout its opinion, the Court made direct comparisons to the attorney-client and other privileges, recognizing "the *common-law* principles underlying the recognition of testimonial privileges."[68] Certainly, if Congress had disagreed with the Court's decision to recognize this new common law privilege, it could have exercised its lawmaking authority once again to amend the Federal Rules of Evidence accordingly.

Congress has also used its legislative power to recognize the independent authority of states to make their own determinations on common law privileges by directing federal courts—through the Federal Rules of Evidence—to apply state privileges in civil diversity cases involving state claims or defenses.[69] Jonathan Rich has suggested that, in requiring federal courts to apply state privileges in diversity suits, Congress must have recognized the attorney-client privilege as a "substantive" right, rather than a procedural one, under the jurisdictional principles of *Erie v. Tompkins,* which established that federal courts sitting in diversity suits generally must apply state substantive law.[70] However, as Glenn Beard has countered, referring to a privilege as substantive in diversity cases does not authorize federal courts to impose their own interpretation of the privilege onto congressional proceedings, particularly when Congress explicitly restricted the application of those rules only to federal courts.[71] This argument also disregards the fact that committees continued to make clear—directly after Congress passed the Federal Rules of Evidence and since—that they retain authority to decide claims of attorney-client privilege in their own proceedings.[72]

---

66. *Id.* at 12–13 (emphasis added) (citations omitted). The Court also noted that while all states have some version of the privilege, there are many differences in how states choose to apply it. For example, some states limit the privilege only to psychiatrists and psychologists, while others extend it to behavioral health professionals and others. *Id.* at 14 n. 13.

67. *Id.* at 15 n. 15.

68. *Id.* at 9–10 (emphasis added) (observing that the psychotherapist-patient privilege, like the spousal and attorney-client privileges, serves broad public policy interests).

69. FED. R. EVID. 501.

70. Rich, *supra* note 30, at 161–66 (referencing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

71. Glenn A. Beard, *Congress v. The Attorney-Client Privilege: "A Full and Frank" Discussion*, 35 AM. CRIM. L. REV. 119, 132 33 (1997) ("Rule 501 expressly applies only to the courts and it is, therefore, difficult to comprehend how its labeling of privileges as 'substantive' gives a federal court authority to restrict Congress's constitutional investigatory and rule-making powers by mandating recognition of the attorney-client privilege.").

72. *See generally Int'l Uranium Cartel: Hearings Before the Subcomm. on Oversight & Investigations of the H. Comm. on Interstate & Foreign Com.*, 95th Cong. (1977) (discussed in Part I.C. below).

Since federal courts defer to states to exercise their own independent judgment on how to handle assertions of the common law attorney-client privilege, they should also defer to Congress as a co-equal branch of government. Different congressional committees certainly may take different approaches, with some choosing to recognize the privilege consistently and others overruling it on a case-by-case basis.[73] However, the fact that some observers might prefer more consistency among committees does not mean the Constitution requires them to do so.[74] The same criticism could be made of states that apply the privilege differently based on their own public policy determinations.[75]

In the executive branch context, Congress has exercised its lawmaking power to define the contours of the attorney-client privilege in federal agencies, while again preserving its own authority to make these determinations for itself. For example, when Congress passed the Freedom of Information Act (FOIA), it included a deliberative process exemption granting agencies authority to withhold internal documents that would not be available to parties in litigation.[76] This exemption has been interpreted to allow agencies to withhold attorney-client information *from the public*.[77] However, Congress also included a provision prohibiting agencies from using this exception to withhold information *from Congress*.[78]

In addition, in 2016, Congress amended the 1978 Inspector General Act to clarify that the original law prevented federal agencies from withholding attorney-client information from their Inspectors General.[79] When Congress first passed the law, it authorized these agency watchdogs to conduct internal audits and investigations to promote the economy, efficiency, and

---

73. *See, e.g.*, AM. COLL. OF TRIAL LAWS., THE ATTORNEY-CLIENT PRIVILEGE IN CONGRESSIONAL INVESTIGATIONS 8 (2010) (noting that allowing committees to decide for themselves whether to recognize the attorney-client privilege on a case-by-case basis results in a lack of consistency).

74. Ross, *supra* note 6, at 136 ("To say that there is a varying degree of acceptance of the privilege before different committees just proves the point that it is a matter of discretion . . . . That some committees have accepted claims of privilege may say something about the specific claims of privilege and may say something about the specific committees, but does not necessarily lead to a specific conclusion as to the overall applicability of the privilege.").

75. *See* Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188, 1192 (Wash. 2016) (en banc); *see also* Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J.L. & PUB. POL'Y, 897, 909–16 (2012) (discussing how the "functional equivalent test," which extends the attorney-client privilege to individuals who are associated with, but not employed by, corporations, "has been adopted and modified in different ways by courts in the Second, Ninth, Tenth, and Eleventh Circuits") (citations omitted).

76. Act of June 5, 1967, Pub. L. No. 90-23, § 552, 81 Stat. 54–55 (codified at 5 U.S.C. § 552(b)(5)).

77. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975).

78. § 552, 81 Stat. at 54–55 (1967) ("This section is not authority to withhold information from Congress.").

79. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101–09 (codified at 5 U.S.C. App. 3).

effectiveness of agency programs.[80] Importantly, Congress explicitly directed agency Inspectors General to report their findings both to agency heads and to Congress,[81] and the law provided Inspectors General with authority to access all information they need to fulfill these responsibilities.[82] In 2016, Congress amended the law to make clear that agencies may not withhold attorney-client or other information from Inspectors General unless Congress enacts a law expressly limiting the right of Inspectors General to access this information.[83] In other words, Congress made clear that executive branch agencies may not assert the attorney-client privilege to withhold information from their Inspectors General.[84] One prominent supporter of this legislation was then-Representative Mark Meadows, who later became President Trump's chief of staff. In a statement on the House floor during debate on this legislation, Meadows explained that he supported this clarification because the Inspector General of the Environmental Protection Agency had been denied access to documents based on what Meadows referred to as "a phony attorney-client privilege claim."[85]

Since the attorney-client privilege is based in common law, either the House or Senate could decide to use its independent Article I rulemaking authority to adopt a uniform rule regarding its applicability. Either the House or Senate could require its committees to recognize the privilege in all cases or in certain limited cases. In fact, neither has opted to do so. Instead, both chambers have continued to delegate this authority to their committees. That is squarely their prerogative under the Constitution.

B. Congressional Oversight Precedents

For generations, congressional committees conducting investigations have distinguished between constitutional privileges they *must* recognize and common law privileges they *may* recognize. Because the attorney-client privilege is based in common law, committees have respected the policy

---

80. *Id.* at § 2(2).

81. *Id.* at § 2(3) (requiring Inspectors General to keep "Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action").

82. *Id.* at § 6(a)(1) (authorizing access to "all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act").

83. Inspector General Empowerment Act of 2016, Pub. L. No. 114-317, § 5, 130 Stat. 1595, 1603–04.

84. *See also* OFF. OF INSPECTOR GEN., DEPT. OF STATE, FREQUENTLY ASKED QUESTIONS 1 (2018) ("The Department does not have an attorney-client or deliberative-process privilege regarding OIG requests for information.").

85. 162 CONG. REC. 9570 (2016) (statement of Rep. Mark Meadows).

interests underlying the privilege even as they have safeguarded their right not to recognize it in certain cases. There is significant historical precedent for this position, which Congress has set forth repeatedly in legislative reports,[86] subpoena instructions and staff reports,[87] committee rules,[88] contempt citations,[89] and legal opinions issued by the Library of Congress[90] and the House Counsel's Office.[91]

1. Congressional Precedents on Attorney-Client Privilege

When examining congressional precedents on the common law attorney-client privilege, it may be helpful to briefly review how committee

---

86. *See, e.g.*, H. PERMANENT SELECT COMM. ON INTEL., REP. ON INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2000, H.R. REP. NO. 106-130, at 36 (1999) (views of Chairman Porter J. Goss) ("Each chamber delegates the authority to rule on objections to the production of documents, such as claims of attorney-client privilege, to its various committees. The rules of judicial procedure are not applicable to congressional inquiries.").

87. *See, e.g.*, H. COMM. ON FIN. SERV., Subpoena to Timothy J. Sloan, Chief Exec. Officer and President, Wells Fargo & Co. (Aug. 28, 2017), *as reprinted in* STAFF OF H. COMM. ON FIN. SERV., REP. ON DID THE CFPB LET WELLS FARGO "BEAT THE RAP"?: APPENDIX TO SECOND INTERIM MAJORITY STAFF REPORT ON THE WELLS FARGO FRAUDULENT ACCOUNTS SCANDAL, 546 (Comm. Print 2017) ("[T]he Committee does not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative-process privilege, the attorney-client privilege, and attorney work product protections.").

88. *See, e.g.*, RULES OF THE H. COMM. ON SCIENCE, SPACE & TECHNOLOGY, 117TH CONG., R. III(d) ("Claims of common-law privileges made by witnesses in hearings, or by interviewees or deponents in investigations or inquiries, are applicable only at the discretion of the Chair, subject to appeal to the Committee.").

89. *See, e.g.*, H. COMM. ON COM., CONTEMPT OF CONGRESS AGAINST FRANKLIN L. HANEY, H.R. REP. NO. 105-792, at 11 (1998) ("The historic position of the House of Representatives is that committees of Congress are not bound to recognize any non-Constitutional privilege, such as the attorney-client privilege.").

90. *See, e.g.*, Am. L. Div., Libr. of Cong., *Availability of Attorney-Client Privilege Before Congressional Committees*, at 21–22 (1982), *as reprinted in* H. COMM. ON ENERGY & COM., ATTORNEY-CLIENT PRIVILEGE, NO. 98-I, at 23–24 (Comm. Print 1983) ("[T]he suggestion that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules, developed by the judicial branch to govern its proceedings arguably is contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each House of Congress to determine its own rules."); *see also* Am. L. Div., Libr. of Cong., *Ability of a Congressional Comm. to Obtain Documents and Testimony from a Corporation in the Face of an Assertion of the Attorney-Client Privilege and a Claim of Foreign Illegality* (May 24, 1983), *as reprinted in* COMM. ON ENERGY & COM., ATTORNEY-CLIENT PRIVILEGE, NO. 98-I, at 54 (Comm. Print 1983).

91. *See, e.g.*, Off. of the Clerk, H.R., Memorandum Opinion of General Counsel to the Clerk of the House of Representatives on Attorney-Client Privilege (1985), *as reprinted in* 132 CONG. REC. 3019, 3036–38 (daily ed. Feb. 27, 1986) (opinion issued for the House Committee on Foreign Affairs, Subcommittee on Asian and Pacific Affairs, overruling attorney-client privilege assertion in contempt citations of Ralph and Joseph Bernstein when they refused to answer questions about business dealings with Philippine President Ferdinand Marcos and his wife) ("[T]he House has taken a limited view as to the applicability of attorney-client privilege. It has entertained, as a matter of discretion claims to that effect. However, where the House Subcommittee has determined that the legislature need for the information to facilitate the conduct of the public business requires productions such production has been required.").

investigations work. Although there are a number of excellent primers on this topic,[92] one of the most authoritative and comprehensive is the Congressional Oversight Manual issued by Congress's research arm, the Congressional Research Service (CRS).[93]

As CRS explains, a committee typically begins by sending voluntary request letters seeking information in the form of documents or testimony.[94] Although most request letters are honored, in some cases recipients object to the scope or substance of requests and decline to produce some or all of the documents or testimony.[95] The committee may insist on full compliance with its original request, or it could try to negotiate an accommodation, a process that can last for some time as the parties go back and forth on date ranges, search terms, topic areas, or other issues.[96] If a dispute cannot be resolved, the committee could issue a subpoena compelling the witness to produce the documents or testify at a deposition or hearing.[97]

If the witness asserts a privilege to withhold documents or testimony, the committee typically examines whether the privilege derives from the Constitution or common law.[98] As CRS explains, "Whereas committees must recognize and accept properly asserted constitutional privileges during an investigation, it has generally been the congressional view that investigative committees are not bound by court-created common-law privileges."[99] If the witness asserts the common law attorney-client privilege, the committee weighs its investigative need for information against the public policy interests served by the privilege and any possible harm to the witness.[100] Committees consider multiple factors, including the strength of the privilege assertion in light of the pertinency of the information sought, whether the information might be available from other sources, whether the privilege would have been available if it had been

92. The Carl Levin Center for Oversight and Democracy at Wayne State University Law School keeps a list of helpful primers on its website. *Oversight Manuals*, LEVIN CENTER FOR OVERSIGHT AND DEMOCRACY, https://levin-center.org/congressional-lawmakers/congressional-oversight-resources/oversight-manuals/ (last visited Sept. 24, 2022) [https://perma.cc/Z3PW-NTFX].

93. CHRISTOPHER M. DAVIS, TODD GARVEY & BEN WILHEM, CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL (Mar. 31, 2021) [hereinafter "CRS CONGRESSIONAL OVERSIGHT MANUAL"]. This publication is updated regularly with new information on congressional investigations, executive branch activities, and judicial rulings.

94. *Id.* at 45.

95. *Id.* (citing Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 105 (2011) (noting that "Congress routinely obtains massive amounts of information from the executive branch on a daily basis," often through "informal requests from congressional staffers for information from a particular staffer.")).

96. *Id.* at 45–46.

97. *Id.* at 46–48.

98. *Id.* at 61.

99. *Id.* at 61–62.

100. *Id.* at 62.

raised in federal court, and whether witnesses are cooperating with the investigation.[101]

To assist with this assessment, the committee could request that the witness produce a privilege log, which is a list of documents being withheld by the witness, accompanied by basic information about each document, such as the author, recipient, date, and type of document.[102] After reviewing the privilege log, the committee could narrow its request to focus on documents that appear most relevant, or it could negotiate accommodations to allow witnesses to provide information through other means that do not implicate privilege concerns.[103] If the committee suspects assertions of privilege are overbroad or are being abused, it could seek to review a sampling of documents *in camera*.[104] If the witness refuses to comply with the subpoena, the committee could vote to hold the individual in contempt and send the contempt resolution to the full House or Senate for consideration.[105] Once approved, the committee could seek enforcement

101. *Id.* at 63 (citing *Int'l Uranium Cartel: Hearings Before the Subcomm. on Oversight & Investigations of the H. Comm. on Interstate & Foreign Com.*, 95th Cong. 60 (1977) (adding that a "valid claim of attorney-client privilege is likely to receive substantial weight," while "[d]oubt as to the validity of the asserted claim, however, may diminish the force of such a claim").

102. *See, e.g.*, H. COMM ON OVERSIGHT & REFORM, 117TH CONG., RULES OF THE H. COMM. ON OVERSIGHT & REFORM R. 16(c)(2) (Comm. Print 2021) (requiring a privilege log "upon a demand from the Chair" with "(a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipients; (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege asserted").

103. Harold R. Henderson, Vice President & Gen. Couns., Nat'l R.R. Passenger Corp., *Practical Problems of In-House and Retained Counsel in the Investigation Process*, *in* CONGRESSIONAL INVESTIGATIONS: LEGAL ISSUES AND PRACTICAL APPROACHES 186 ("In every instance a mechanism was found which would serve both the Company's interest in protecting certain information or avoiding overburdensome production of a multitude of documents and the investigator's interest in obtaining necessary information.").

104. *See, e.g.*, STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 115TH CONG., REP. ON MISCONDUCT, RETALIATION, AND OBSTRUCTION AT THE TRANSP. SEC. ADMIN. (Comm. Print 2018); *see infra* notes 134–144 and accompanying text. A committee also could take a more aggressive position, calling a deposition or hearing for the purpose of having the witness explain under oath why information is being withheld. *See, e.g.*, H. SELECT COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, DEPOSITION OF JEFFREY CLARK 36 (Nov. 5, 2021) (refusing to answer questions from Rep. Jamie Raskin about Clark's assertion of attorney-client privilege, leading the committee to hold him in contempt).

105. CRS CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 93, at 48–49.

through criminal contempt[106] or civil litigation.[107] Both chambers also have "inherent" contempt authority to try and punish individuals directly, although this remedy has not been used in recent years.[108]

In practice, committees regularly recognize the strong interests served by the attorney-client privilege and use their discretion to routinely accept requests not to produce documents or testimony that would be covered by the privilege in court. Attorneys who represent clients on Capitol Hill readily acknowledge that it is "very, very common" for committees to recognize the privilege.[109] They note that although Congress is not required to do so, it "generally accommodates a witness's legitimate assertions of attorney-client privilege."[110] For example, during the Iran-Contra hearings, Richard Secord, Albert Hakim, and Oliver North were allowed to invoke the privilege with respect to a meeting attended by Secord's attorney, who was acting as counsel for all three.[111]

In light of these congressional precedents, it is difficult to understand the basis for Chief Justice Roberts's statement in *Mazars* that it has "long been understood" that recipients of congressional subpoenas retain the common

---

106. *Id.* at 49–50; *see* 2 U.S.C. §§ 192, 194. The House or Senate may vote to refer an enforcement action to the U.S. Attorney for the District of Columbia, who is required to bring the matter before a grand jury, but for executive branch officials, the U.S. Attorney has followed the direction of the Justice Department not to bring cases against federal employees when the President asserts executive privilege. *See, e.g.*, Letter from Jeffrey A. Rosen, Deputy Att'y Gen., to Nancy Pelosi, House Speaker (July 24, 2019) (declining to prosecute Attorney General William Barr and Commerce Secretary Wilbur Ross in Census citizenship question investigation). With respect to former Trump aides Steve Bannon and Peter Navarro, the Justice Department followed the determination of sitting president Joe Biden, who declined to assert executive privilege over documents or testimony subpoenaed by the January 6 Committee. *See, e.g.*, Letter from Dana A. Remus, Couns. to the President, to David Ferriero, Archivist of the U.S. (Oct. 8, 2021) ("The constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself."). With little explanation, however, the Justice Department declined to prosecute former White House Chief of Staff Mark Meadows and former White House adviser Dan Scavino for refusing to comply with subpoenas from the January 6 Committee, even without an assertion of executive privilege. *See, e.g.*, Alan Feuer & Luke Broadwater, *Navarro Indicted as Justice Dept. Opts Not to Charge Meadows and Scavino*, N.Y. TIMES (June 3, 2022) https://www.nytimes.com/2022/06/03/us/politics/peter-navarro-contempt-jan-6.html [https://perma.cc/X24V-GKR8] (citing Letter from Matthew M. Graves, U.S. Att'y for the Dist. of Colum., to Douglas N. Letter, H. Couns. (June 3, 2022)).

107. CRS CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 93, at 50–52.

108. *Id.* at 52–55 (noting that although neither house has exercised inherent contempt power since the 1930s, Senator Sam Ervin, the Chairman of the Senate Select Committee on Presidential Campaign Activities, "invoked the inherent contempt power several times to encourage compliance with the committee's requests for information during its investigation of the Nixon Administration").

109. *See, e.g.*, John Grabow, Ginsburg, Feldman & Bress, Chartered, *Practical Problems of In-House and Retained Counsel in the Investigation Process*, *in* CONGRESSIONAL INVESTIGATIONS: LEGAL ISSUES AND PRACTICAL APPROACHES 221 (1986).

110. Bopp & Lay, *supra* note 75, at 907 (noting that, since many members of Congress are attorneys, "it is likely that they would take pause before voting to hold in contempt a witness who has a legitimate privilege claim").

111. MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 69 n.32 (2017) (noting that assertions of attorney-client privilege before committees "often have gone unchallenged").

law attorney-client privilege.[112] His assertion is even more perplexing given that his only citation for this claim was to a 2003 report by CRS that does not support his position.[113] That CRS report states that witnesses before Congress "may invoke certain constitutional privileges," such as the Fifth Amendment, but it does not state that Congress must recognize the common law attorney-client privilege.[114] In fact, when another CRS official was asked during a subsequent congressional hearing if the 2003 CRS report supports Chief Justice Roberts's assertion in *Mazars*, the official stated that it did not.[115] Other experts who testified at the hearing agreed.[116]

Indeed, it would have been inaccurate—and surprising—for the Chief Justice to have cited *Congress's own research arm* for the proposition that committees lack authority to make their own determinations on assertions of attorney-client privilege. CRS has issued reports year after year after year highlighting precisely the opposite conclusion: while committees must recognize applicable constitutional privileges, they retain discretion to make their own determinations on common law privileges.[117] These CRS reports,

---

112. *See Millet*, *supra* note 31, at 318 ("Privileges for confidential communications rest on the policy grounds that confidentiality is needed to preserve basic relationships for which society accords a favored status. These policies clearly apply in congressional proceedings. The Constitution gives to Congress the power to determine whether to give effect to those policies."); Beard, *supra* note 71, at 134 ("Simply put, if Congress finds that the public policy driving an investigation outweighs the policy underlying the attorney-client privilege, it should exercise its authority as the ultimate arbiter of public policy to overrule the claim of privilege.").

113. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (citing 2003 CRS REPORT, *supra* note 5, at 16–18).

114. 2003 CRS REPORT, *supra* note 5, at 9.

115. Todd Garvey, Legislative Att'y, Cong. Rsch. Serv., *Civil Enforcement of Congressional Authorities: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong., YOUTUBE (June 8, 2021), https://youtu.be/XDlf4-k2bqs [https://perma.cc/AF4Y-V7WS] ("No, I don't think the report supports that proposition. Congress' position has long been that it is not bound by common law privileges. Instead, Congress has said that it's at the discretion of the committee chair as to whether or not to accept that type of a privilege, and in fact there are multiple House committees who have that specifically in their committee rules. So, I think that line in *Mazars* is an odd one, and it's one that's been subject to a lot of criticism.").

116. When asked if the Chief Justice's dictum squared with her experience, Elise Bean, a former Staff Director and Chief Counsel with the Senate Permanent Subcommittee on Investigations under Chairman Carl Levin, testified: "It does not. For my entire 30 years, my understanding was that the Congress is not bound by common law privileges." Similarly, Thomas G. Hungar, former General Counsel of the House of Representatives and former Deputy Solicitor General at the Department of Justice, testified: "It certainly was always the position of the General Counsel's office at the House, and I'm sure still is, that the House is not obligated to recognize common law privileges." *Civil Enforcement of Congressional Authorities: Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong., YOUTUBE (June 8, 2021), https://youtu.be/XDlf4-k2bqs [https://perma.cc/AF4Y-V7WS].

117. *See, e.g.*, MORTON ROSENBERG, CONG. RSCH. SERV., RL95464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 32 (1995) ("The precedents of the Senate and the House of Representatives, which are founded on Congress' inherent constitutional prerogative to investigate, establish that the acceptance of a claim of attorney-client or work product privilege rests in the sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation."); MORTON ROSENBERG & TODD B.

like the Congressional Oversight Manual, also painstakingly compile numerous examples of committees exercising their own authority to rule on assertions of the attorney-client privilege.

2. Recent Oversight Committee Case Studies

When committees decide to obtain attorney-client information, they do so to serve a wide array of purposes under the Constitution. Informing legislation on a topic being examined is one of the most common goals, but committees also obtain attorney-client information to oversee the expenditure of taxpayer funds, modify how the privilege applies in other branches, and examine executive branch actions that serve improper purposes. Summarized below are examples of all four purposes drawn from my former committee, the House Committee on Oversight and Reform.[118] They are not exhaustive, and they do not represent all of the constitutional purposes for which Congress may seek attorney-client information, but they illustrate how Democratic and Republican chairs alike have been obtaining attorney-client communications for decades to fulfill their constitutional responsibilities.

The first case demonstrates how an investigation helps inform legislation. In 2007, the Committee launched an investigation into one of the most searing incidents of the Iraq War, the brutal killing of four Blackwater USA private security contractors in Fallujah in 2004 after the company failed to provide them with sufficient protective equipment and other critical resources.[119] When Blackwater asserted the attorney-client privilege over several documents, Chairman Henry Waxman sent a letter informing the company that the attorney-client privilege is not a valid basis

---

TATELMAN, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 56 (2007) ("[I]t is the congressional committee alone that determines whether to accept a claim of attorney-client privilege."); BARBARA L. SCHWEMLE, TODD GARVEY, VIVIAN S. CHU & HENRY B. HOGUE, CONG. RSCH. SERV., R40856, THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 32 (2014) ("[A]s with other claims of 'common law' privileges such as the attorney-client privilege . . . congressional practice has been to treat their acceptance as discretionary with the committee of jurisdiction."); TODD GARVEY, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 61, 63 (2017) ("[R]ecognition of non-constitutionally based privileges, such as attorney-client privilege, is a matter of congressional discretion.").

118. The committee's name has changed over time from the Committee on Government Reform to the Committee on Oversight and Government Reform to the Committee on Oversight and Reform.

119. *Iraq Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (2007) (family members testifying); *Blackwater USA: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. (2007) (CEO Erik Prince testifying).

to withhold documents from the Committee.[120] He directed Blackwater to produce documents from the company's privilege log that were relevant to the Committee's ongoing oversight of private security contractors in Iraq, and he made clear that one of the Committee's goals was to inform "potential legislative action to improve oversight and accountability over private military contractors."[121] When Blackwater again refused, the Committee issued a subpoena and threatened to hold Blackwater in contempt.[122] Blackwater ultimately gave the Committee access to the documents, and the Committee issued a report on its investigation.[123] Congress subsequently adopted several legislative reforms setting forth new requirements for private security contractors in areas of combat operations.[124]

The second case involves Congress's efforts to prevent the misuse of taxpayer funds. In the following Congress, the Committee investigated one of the watershed scandals of the financial crisis of 2008: a secret infusion of $20 billion in taxpayer funds for Bank of America's acquisition of the troubled financial services firm Merrill Lynch.[125] Although the Bank's CEO, Ken Lewis, testified that Treasury Secretary Hank Paulson and Federal Reserve Chairman Ben Bernanke pressured the Bank to acquire Merrill Lynch despite its unexpected and growing losses, the Committee obtained evidence that the Bank was threatening to back out of the merger as leverage to obtain federal funds.[126] The Committee's new Chairman, Rep. Edolphus Towns, sought a wide range of attorney-client information to investigate these claims.[127] The Bank's counsel argued that these documents

---

120. Letter from Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform, to Erik Prince, Chairman, Blackwater USA (May 7, 2007) (attorney-client privilege "not a valid basis for withholding information that Congress needs to fulfill its oversight responsibilities").

121. *Id.*

122. H. COMM. ON OVERSIGHT & GOV'T REFORM, Subpoena of Erik Prince (Aug. 3, 2007).

123. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 110TH CONG., REP. ON PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH 16–17 (Comm. Print 2007).

124. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 862, 122 Stat. 3, 254–258.

125. *See, e.g.*, Letter from Edolphus Towns, Chairman, H. Comm. on Oversight & Gov't Reform, & Dennis Kucinich, Chairman, H. Subcomm. on Domestic Pol'y, to Kenneth D. Lewis, Chief Exec. Officer & President, Bank of Am. Corp. (June 3, 2009).

126. *Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?: Hearing Before the H. Comm. on Oversight & Gov't Reform & Subcomm. on Domestic Pol'y*, 111th Cong. 2 (2009) (statement of Chairman Towns) (noting email indicating that Bernanke thought Lewis was using the Merrill losses as a "bargaining chip" to obtain federal funds and concluding: "[T]he Treasury Department had provided $20 billion for a shotgun wedding. But the question may be, who was holding the shotgun?").

127. *See, e.g.*, Letter from Edolphus Towns, Chairman, H. Comm. on Oversight & Gov't Reform, to Kenneth D. Lewis, Chief Exec. Officer & President, Bank of Am. Corp. (Aug. 6, 2009) (seeking records of "legal advice that was provided to you or any Bank of America employee . . . related to

would be covered by the common law attorney-client privilege in court, but he acknowledged that it was up to the Committee to decide in this proceeding.[128] Since one of the company's primary concerns was that producing the documents to the Committee could result in a general waiver of the privilege in other proceedings, the Bank asked the Committee to withdraw its demand.[129] In response, Chairman Towns considered the Bank's request and recognized the interests served by the privilege, but ultimately denied the request, explaining that the documents "go to the heart of the issues most critical to our investigation."[130] The Bank submitted a privilege log, engaged in negotiations, and eventually produced privileged documents and testimony, including notes from attorneys that were used at subsequent hearings to help develop the Committee's findings.[131] The Bank's CEO resigned in 2009,[132] and the company paid back hundreds of millions of dollars to the Treasury.[133]

A third case illustrates how Congress uses its investigative authority to alter the attorney-client privilege itself. From 2015 to 2018, the Committee conducted a bipartisan investigation into serious aviation security

---

disclosure of the financial condition of Merrill Lynch or to the disclosure of any U.S. government financial assistance to Bank of America").

128. Letter from Reginald J. Brown, Russell J. Bruemmer & Laura Moranchek Hussain, Couns. to Bank of America, to Edolphus Towns, Chairman, H. Comm. on Oversight & Gov't Reform (Sept. 9, 2009) (acknowledging "the right of each chamber to make its own independent determination as to whether to recognize the attorney-client privilege").

129. *Id.* at 2–3; *see also* Louise Story, *Congress Presses for Details from Bank of America on Talks*, N.Y. TIMES (Sept. 20, 2009), https://www.nytimes.com/2009/09/21/business/21bank.htm [https://perma.cc/XJ6H-8TZB].

130. Letter from Edolphus Towns, Chairman, H. Comm. on Oversight & Gov't Reform, to Kenneth D. Lewis, Chief Exec. Officer & President, Bank of Am. Corp. (Sept. 18, 2009).

131. *Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout? Part IV: Hearing Before the H. Comm. on Oversight & Gov't Reform & Subcomm. on Domestic Pol'y*, 111th Cong. (2009). *See also* Sue Reisinger, *What Was BofA Lawyer's Advice on Merrill? It Depended on the Audience*, CC CORP. COUNS. (Oct. 26, 2009) (indicating that attorneys were telling the Bank's leadership "one story about how difficult it would be to escape from the merger with Merrill Lynch & Co., Inc., while singing quite a different tune to the federal government," according to "documents released this week from the House Committee on Oversight and Government Reform"); Zach Lowe, *Wachtell Under Fire*, AMLAW DAILY (Oct. 23, 2009, 5:56 PM), https://amlawdaily.typepad.com/amlawdaily/2009/10/wachtell-under-fire.html [https://perma.cc/LS8V-MRGC] (reviewing how "piles and piles of formerly privileged documents related to the Bank of America-Merrill Lynch merger" indicated that "BofA attempted to leverage a threat to break the deal into billions in government bailout aid"); D. Jean Veta & Brian D. Smith, *Congressional Investigations: Bank of America and Recent Developments in Attorney-Client Privilege*, BLOOMBERG L. REPS. 1 (2010), ("The dispute concluded with Bank of America delivering to Congress a substantial quantity of privileged documents and with Bank of America's former general counsel testifying publicly about the legal advice that he and others provided to the company.").

132. Dan Fitzpatrick & Joann S. Lublin, *Bank of America Chief Resigns Under Fire*, WALL ST. J. (Oct. 2, 2009, 12:01 AM), https://www.wsj.com/articles/SB125434715693053835 [https://perma.cc/5ZK3-4ZLB] (including $424 million relating to "financial guarantees against potential losses associated with Merrill Lynch's toxic assets, such as mortgage-backed securities").

133. H. COMM. ON OVERSIGHT & GOV'T REFORM, ACTIVITIES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, H.R. REP. NO. 111-705, at 17–20 (2011).

vulnerabilities and allegations of retaliation by managers against whistleblowers at the Transportation Security Administration (TSA).[134] The Committee issued a subpoena after TSA declined to produce attorney-client information to the Committee and to the Office of Special Counsel (OSC), an independent agency charged with protecting whistleblowers.[135] The new Republican Chairman, Rep. Jason Chaffetz, and the Democratic Ranking Member, Rep. Elijah E. Cummings, sent a joint letter to TSA setting forth Congress's longstanding position on assertions of the common law attorney-client privilege.[136] Again, one of the agency's primary concerns was that producing attorney-client communications would risk a general waiver of the privilege in separate litigation.[137] In its reply, the Committee explained that complying with a mandatory demand from Congress does not constitute a general waiver in other proceedings.[138] Ultimately, TSA provided the Committee with full access to the documents through *in camera* review.[139] After the review was complete, Chairman Chaffetz released findings that TSA's redactions had been inappropriate.[140] Congress subsequently passed legislation amending OSC's authorizing statute to make clear that agencies may not assert any common law privilege, including the attorney-client privilege, to withhold information from OSC.[141] In its own report on the bill, the Senate Homeland Security and Governmental Affairs Committee confirmed that no federal agency may withhold information from OSC on the basis of any common law

134. *See, e.g.*, *Examining Misconduct and Retaliation at TSA: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2018).

135. H. COMM. ON OVERSIGHT & GOV'T REFORM, Subpoena to Acting Adm'r Huban A. Gowadia, Ph.D., Transp. Sec. Admin. (Mar. 17, 2017).

136. Letter from Jason Chaffetz, Chairman, and Elijah E. Cummings, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Huban A. Gowadia, Ph.D., Acting Adm'r, Transp. Sec. Admin., 1 (May 2, 2017).

137. Letter from Joseph B. Maher, Acting Gen. Couns., Dep't of Homeland Sec., to Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, 1 (Mar. 10, 2017).

138. Letter from Jason Chaffetz, *supra* note 136, at 2 ("[I]t is well established that production of materials to Congress is not deemed a disclosure to the public, nor is a compelled production considered a voluntary production for the purpose of waiver.") (citations omitted).

139. Letter from Benjamin L. Cassidy, Assistant Sec'y for Legis. Affs., Dep't of Homeland Sec., to Trey Gowdy, Chairman, H. Comm. on Oversight & Gov't Reform (Feb. 5, 2018).

140. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 115TH CONG., REP. ON MISCONDUCT, RETALIATION, AND OBSTRUCTION AT THE TRANSP. SEC. ADMIN. (Comm. Print 2018).

141. On December 12, 2017, the President signed H.R. 2810, the National Defense Authorization Act (NDAA) for Fiscal Year 2018, Public Law 115–91 (Dec. 12, 2017), which included legislation previously passed by the House and Senate to reauthorize OSC. *See, e.g.*, Office of Special Counsel Reauthorization Act of 2017, S.582, 115th Cong. (as passed by Senate on August 1, 2017); The Thoroughly Investigating Retaliation Against Whistleblowers Act, H.R. 69, 115th Cong. (as passed by House on Jan. 4, 2017). Section 1097(a) of the NDAA amended 5 U.S.C. § 1212(b)(5) to provide that a "claim of common law privilege by an agency, or an officer or employee of an agency, shall not prevent the Special Counsel from obtaining any material" relating to an OSC investigation, review, or inquiry.

privilege.[142] By February of the following year, TSA had reported that it provided OSC unredacted copies of the documents.[143] By May, OSC had obtained settlements with three TSA employees whose cases related to the documents that had been withheld.[144]

The fourth example demonstrates how the Committee helped expose the executive branch's attempt to add a citizenship question to the 2020 Census based on secret, illegitimate purposes. Congress's role in implementing the Census is enshrined in the Constitution,[145] and the House has used its Article I rulemaking authority to grant jurisdiction over the Census to the Committee on Oversight and Reform.[146] When Commerce Secretary Wilbur Ross announced that he was adding a citizenship question to the Census, career experts warned that this sudden change would discourage participation and degrade the quality of the enumeration.[147] Ross testified that he added the citizenship question solely in response to a request from the Justice Department to gather data to help enforce the Voting Rights Act.[148] However, the Committee obtained evidence that this claim was a pretext, that White House and other Administration officials began discussing the citizenship question within days of taking office, and that their actual goals were to exclude immigrants from the count and implement partisan gerrymandering.[149] When then-Chairman Elijah Cummings issued subpoenas to the Departments of Justice and Commerce, they invoked the attorney-client privilege to withhold documents, including several legal

---

142. S. COMM. ON HOMELAND SEC. AND GOV'TL AFFS., OFFICE OF SPECIAL COUNSEL REAUTHORIZATION ACT, S. REP. NO. 115-74, at 7 (2017).

143. Letter from Benjamin L. Cassidy, *supra* note 139.

144. Press Release, Off. of Spec. Couns., OSC Obtains Settlements for TSA Whistleblowers in Three Involuntary Reassignment Cases (May 23, 2018).

145. U.S. CONST., art. I, § 2, cl. 3 (authorizing Congress to carry out the census in "such manner as they shall by law direct").

146. Rules of the House of Representatives, R. X, cl. (1)(n)(8), H.R. Doc. No. 116-177, 117th Cong. (2021).

147. *See, e.g.*, Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Rsch. Methodology, Census Bureau, to Wilbur L. Ross. Jr., Sec'y, Dep't of Com. (Jan. 19, 2018).

148. *FY19 Budget: Dep't of Com.: Hearing Before the Subcomm. on Com., Just., Sci., and Related Agencies of the H. Comm. on Appropriations*, 115th Cong. (2018); *Hearing with Com. Sec'y Ross: Hearing Before the H. Comm. on Ways and Means*, 115th Cong. (2018); *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2018); *FY 2019 Funding Request for the Comm. Dep': Hearing Before the Subcomm. on Com., Just., Sci., and Related Agencies of the S. Comm. on Appropriations*, 115th Cong. (2018).

149. *See* Letter from Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform, to Wilbur L. Ross, Jr., Sec'y, Dep't of Com. (June 3, 2019) (quoting Thomas Hofeller, *The Use of Citizen Voting Age Population in Redistricting* (2015) (contending that counting voting-age citizens, rather than total population, "would be advantageous to Republicans and Non-Hispanic Whites")); *see also* Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html [https://perma.cc/WHN7-7SYX].

memoranda relating to the decision to add the citizenship question.[150] The Committee rejected this assertion on a bipartisan basis, holding Ross and Attorney General William Barr in contempt.[151] At the Attorney General's recommendation, President Trump responded by making a blanket "protective assertion" of executive privilege over all of the documents.[152] After the Committee's contempt vote, the Supreme Court ruled in a separate case brought by the State of New York and others that the Trump Administration's sole reason for adding the citizenship question was "contrived."[153] Within a month of the decision, the full House voted to hold Ross and Barr in contempt,[154] and the D.C. District Court judge hearing the case indicated that he was inclined to uphold the Committee's subpoenas.[155] After additional negotiations, a stay to await an appellate ruling in a separate case, and a change in leadership, the Committee obtained access to the subpoenaed documents, including all those over which the attorney-client privilege had been claimed.[156]

These four relatively recent examples of this longstanding congressional practice—under four different Chairs of both political parties—demonstrate that evaluating the actions of private sector and government attorneys is

---

150. Letter from Stephen E. Boyd. Assistant Att'y Gen., Dep't of Just., to Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform (June 12, 2019); Letter from Charles Kolo Rathburn, Performing the Duties of the Assistant Sec'y for Legis. & Intergovernmental Affs., Dep't of Com., to Elijah E. Cummings, Chairman, H. Comm. on Oversight & Reform (June 6, 2019).

151. H. COMM. ON OVERSIGHT & REFORM, RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, AND WILBUR L. ROSS, JR., SECRETARY OF COMMERCE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON OVERSIGHT & REFORM, H.R. REP. NO. 116-125, 31 (2019) ("[T]he common law privileges cited by the Trump Administration are not valid reasons to withhold documents subject to a valid subpoena from Congress, which derives its investigative authority from the Constitution.").

152. *Id.* at 26–27; Letter from William P. Barr, Att'y Gen., Dep't of Just., to Donald Trump, President of the U.S. 6 (June 11, 2019).

153. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.").

154. H.R. Res. 497, 116th Cong. (July 17, 2019).

155. *See* Spencer S. Hsu, *Judge Says He Will Likely Uphold House Subpoenas in Investigation of Census Citizenship Question*, WASH. POST (Jan. 30, 2020, 7:11 PM) (quoting U.S. District Judge Randolph D. Moss as saying, "I think everyone in this room can see where I'm going"), https://www.washingtonpost.com/local/legal-issues/us-judge-says-he-will-likely-uphold-house-subpoenas-in-investigation-of-census-citizenship-question/2020/01/30/ee688668-4394-11ea-b5fc-eefa848cde99_story.html [https://perma.cc/BMB9-3AHZ].

156. Memorandum from Rep. Carolyn B. Maloney, Chairwoman, to Members of the H. Comm. on Oversight & Reform, Investigation of Census Citizenship Question 3 (July 20, 2022) (noting key legal documents ultimately obtained by the Committee over which the Trump Administration had made "inappropriate and overbroad assertions of attorney-client privilege and deliberative process privilege"). The Committee's civil contempt suit was stayed pending the D.C. Circuit Court's disposition of Comm. on the Judiciary v. McGahn, 968 F.3d 755 (D.C. Cir. 2020). *See* Comm. on Oversight & Reform v. Barr, No. 1:19-cv-03557 (D.D.C. Oct. 6, 2020) (Minute Order). After the Justice Department produced the Census-related documents, the parties jointly dismissed the case. Comm. on Oversight & Reform v. Barr, No. 1:19-cv-3557 (Jan. 7, 2022), Dkt. No. 63–64 (Joint Status Report and Stipulation of Dismissal).

often key to investigations that are critical to informing Congress's legitimate constitutional objectives and serving the nation's interests. Requiring committees to apply the common law attorney-client privilege in all cases would degrade their ability to fulfill their constitutional responsibilities. Not only would it curtail the information Congress is able to obtain, but it would significantly impair Congress's efforts to negotiate accommodations with witnesses—a goal the Supreme Court has repeatedly extolled.[157] Witnesses would have little incentive to negotiate, submit privilege logs, or provide *in camera* viewings as they did in these cases, but instead could simply walk away from the negotiating table and begin litigating every claim of attorney-client privilege, no matter how broad or unfounded.[158]

C. Judicial Precedents

There is no judicial precedent indicating that the attorney-client privilege has a constitutional basis.[159] The attorney-client privilege is not explicitly referenced in the Constitution or the Bill of Rights. In *Mazars,* Chief Justice Roberts referred to it as a common law privilege and cited no judicial rulings requiring committees to recognize it.[160] For attorneys who practice in federal courts, where the privilege is lauded as one of the oldest testimonial privileges under common law, the assertion that Congress is under no legal obligation to recognize the privilege may seem surprising.[161] But as discussed above, there are many significant differences for lawyers representing clients before Congress, including their inability to make statements or motions, present or review evidence, or call or cross-examine witnesses.[162]

---

157. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (citing NLRB v. Noel Canning, 573 U.S. 513, 524–26 (2014)).

158. Ross, *supra* note 6, at 130 ("There have been a number of instances where people have claimed privilege where there was not an establishment of an attorney-client relationship. There have been a number of instances where people have claimed privilege where the public record was replete with evidence of waiver of any privilege that might exist. There are a number of instances where people have claimed privilege where the services performed by the attorney were not the rendering of confidential legal advice, which is a predicate to the assertion of the privilege.").

159. Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th. Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986) (noting that "the attorney-client privilege is merely a rule of evidence" and has not been "held a constitutional right").

160. *Mazars,* 140 S. Ct. at 2032 (citing only 2003 CRS REPORT, *supra* note 5).

161. *See, e.g.*, Beard, *supra* note 71, at 120 ("Most clients, and probably many lawyers, assume that the attorney-client privilege protects their confidential communications against disclosure in any legal proceeding," but "congressional witnesses are not legally entitled to the protection of the attorney-client privilege," and "committees therefore have discretionary authority to respect or overrule such claims as they see fit.").

162. *See infra* Part I.A.

Instead, the consensus has always been that the attorney-client privilege was developed by federal judges based on the common law, as the Supreme Court observed in its seminal case on this issue, *Upjohn Co. v. United States*.[163] In that case, the Court used the authority granted by Congress in Federal Rule of Evidence 501 to expand the application of attorney-client privilege in certain corporate contexts.[164] The Court explained that the purpose of the privilege is to serve a policy goal rather than a constitutional one, which is to encourage full and frank communication between attorneys and their clients to promote broad "public interests" in the administration of justice.[165]

Historically, federal courts have been extremely reticent to impose their own judicially developed procedures onto Congress—except to preserve applicable constitutional protections. In one of the earliest cases on this issue, *United States v. Ballin,* the Supreme Court refused to examine the wisdom of the process established by the House to determine the existence of a quorum.[166] After highlighting each chamber's Article I authority to determine the rules of its proceedings, the Court held that the appropriate role of federal courts is to determine the constitutional validity of the process.[167] The Court noted that the Constitution authorizes both the House and Senate to change their rules in different circumstances, and—except in cases of constitutional limitations—that power is "absolute and beyond the challenge of any other body or tribunal."[168]

The Supreme Court reaffirmed these principles forty years later in *United States v. Smith,* but with a different result. In that case, the Senate had voted in favor of a presidential nominee to the Federal Power Commission and immediately sent the confirmation resolution to the President, but after the President commissioned the nominee to the position,

---

163. Upjohn v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."); *see also* 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. 1961) ("(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection can be waived.").

164. *Upjohn*, 449 U.S. at 389, 392 (expanding the privilege in corporate contexts in light of the "vast and complicated array of regulatory legislation confronting the modern corporation").

165. *Id.*

166. United States v. Ballin, 144 U.S. 1 (1892).

167. *Id.* at 4–5 ("The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration . . . . But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.").

168. *Id.*

the Senate reconsidered the nomination and voted a second time to reject it.[169] As in *Ballin,* the Court cited Congress's constitutional rulemaking authority[170] and explained that the role of federal courts is to examine the constitutional validity of the process.[171] After reviewing the Senate's rule on reconsidering presidential appointments, however, the Court found that the rule envisioned the Senate withholding the notification to the President until the time for motions to reconsider had expired, and when the Senate sent the notification to the President without waiting for reconsideration, it authorized the President to "perfect the appointment."[172]

In some cases, witnesses may seek injunctive relief from federal courts to block compliance with congressional subpoenas without waiting to be held in contempt, and in these cases, Congress has successfully invoked the Speech and Debate Clause to safeguard its authorities and procedures. For example, in *Eastland v. United States Servicemen's Fund,* Chief Justice Warren Burger found that a Senate subcommittee subpoena for bank records furthered a legitimate task of Congress and was properly authorized by the Senate.[173] The Court held that once these constitutional requirements were met, committee members could not be questioned in any other place, including in federal court, and the Speech and Debate Clause provides an "absolute bar" to injunctive relief.[174] The Court refused to look to the motives that prompted the investigation,[175] warning that the wisdom of congressional approach or methodology is "not open to judicial veto."[176] The Court also cautioned against the harm that judicial interference may cause to Congress's constitutional responsibilities.[177]

In the wake of *Eastland,* several district courts refused to interfere with Congress's right to decide claims of attorney-client privilege. In 1977—just two years after Congress enacted the Federal Rules of Evidence—the Subcommittee on Oversight and Investigations of the House Committee on

169. United States v. Smith, 286 U.S. 6, 27–29 (1932).

170. *Id.* at 33.

171. *Id.* at 48 ("The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.").

172. *Id.* at 49; *see also* Vander Jagt v. O'Neill, 699 F.2d 1166, 1173 (D.C. Cir. 1983) ("Because of the position taken in *Ballin*, which apparently was adopted by Justice Brandeis writing for the Supreme Court in *United States v. Smith* . . . we conclude that Art. I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt."); NLRB v. Noel Canning, 573 U.S. 513, 550–51 (2014) (holding that, for purposes of the Recess Appointments Clause, "the Senate is in session when it says it is," provided that it retains the ability to transact business under its own rules).

173. 421 U.S. 491, 505–506 (1975).

174. *Id.* at 503 (quoting Doe v. McMillan, 412 U.S. 306, 314 (1973)).

175. *Id.* at 508 (citing Watkins v. United States, 354 U.S. 178, 200 (1957); Hutcheson v. United States, 369 U.S. 599, 614 (1962)).

176. *Id.* at 509 (citing *Doe*, 412 U.S. at 313).

177. *Id.* at 511 ("A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry.").

Interstate and Foreign Commerce was faced with a claim of attorney-client privilege over documents subpoenaed in an investigation of alleged international uranium price-fixing.[178] In that case, Gulf Oil sought an injunction in D.C. district court to prevent Westinghouse Electric Corp. from producing attorney-client communications.[179] Rep. Henry Waxman, serving as acting chair, cited the witnesses for contempt, referring directly to the holding in *Eastland*.[180]

The district court agreed with Waxman.[181] The court examined the constitutional questions of whether the House had properly authorized the investigation and whether the subpoena was issued for a valid legislative inquiry, finding that both requirements were met.[182] Then, citing *Eastland*, the court declined to examine the question of whether the common law attorney-client privilege applied because it concluded that it was a matter for the committee to decide and not a federal court.[183] After the Subcommittee obtained the documents, Chairman John Moss agreed to hear Gulf's request to recognize the privilege and withhold documents from the public[184] even as Gulf's counsel conceded that the Subcommittee had ultimate discretion to overcome the privilege.[185] After consulting with congressional legal counsel,[186] the Subcommittee adopted a unanimous resolution rejecting Gulf's claim of attorney-client privilege.[187]

In another case, the Senate Permanent Subcommittee on Investigations examined private health insurance companies accused of abusing the Medicare Secondary Payer program, which requires insurance companies

178. *Int'l Uranium Cartel*, *supra* note 72.

179. *Id.* at 46.

180. *Id.* at 38 (citing *Eastland*, 421 U.S. at 491).

181. Gulf Oil Corp. v. Westinghouse Elec. Corp., 434 F. Supp. 773 (D.D.C. 1977).

182. *Id.*

183. *Id.* at 774 (finding that "Gulf claimed attorney-client and other asserted privileges," that "defendant Westinghouse was served with a valid subpoena . . . pursuant to a properly authorized investigation, that the Subcommittee had a valid investigative purpose, [and] that under the case of Eastland v. United States Servicemen's Fund . . . , the Subcommittee action may not be questioned in any other place").

184. Letter from John E. Moss, Chairman, Subcomm. on Oversight & Investigations, Comm. on Interstate and Foreign Com., to Richard T. Colman, Couns. for Gulf Oil (May 23, 1977), *as reprinted in Int'l Uranium Cartel*, *supra* note 72, at 90–91 (noting that "Members of the House of Representatives are in no way constrained to honor the attorney-client and related privileges, or even to entertain their claim").

185. *Int'l Uranium Cartel*, *supra* note 72, at 49 (statement of Richard T. Colman, Counsel for Gulf Oil) ("[W]e recognize the position of the chairman and the committee that we are not entitled as a matter of right to privilege.").

186. *Id.* at 62.

187. *Id.* at 123–28 ("[T]he power of the Congress to inquire is sufficiently broad to encompass the entirety of the body of law, either the statutory law, the constitutional law, or the common law under which we act. It is my firm conviction that the commonwealth precedents, customs of both the Commons and the House, fully sustain rejecting a claim of attorney-client privilege if it impedes in any manner whatsoever the necessary inquiries of the Congress in determining whether a law of the United States may have been violated or whether that law accords sufficient protection to the American people.").

to be the primary payer for people over sixty-five who are still employed and have insurance through their employers.[188] The Subcommittee's chairman, Senator Sam Nunn, sought information from an employee of Provident Life and Accident Insurance Company who had written a memo indicating that Provident knew its failure to process claims as the primary payer was illegal.[189] The company sought a preliminary injunction in federal court based on the attorney-client privilege to prevent the employee from producing records or testifying before the Subcommittee.[190] The company filed its motion in the United States District Court for the Eastern District of Tennessee because that court had ruled *in separate litigation* that the memo was covered by the privilege in that litigation.[191] The district court rejected Provident's motion, finding that it was premature since the Subcommittee itself had not yet ruled on the privilege claim.[192] The court also noted that even if the case had been properly brought, the court would not have granted the motion because federal courts should not make determinations on evidentiary privileges that are not derived from the Constitution.[193] With respect to its previous ruling on the attorney-client privilege claim in the separate litigation, the court stated: "That ruling, which is not of constitutional dimensions, is certainly not binding on the Congress of the United States."[194]

After the court issued its opinion, Chairman Nunn allowed Provident to make its case in executive session about why the document should be withheld,[195] but he ultimately ruled that the attorney-client privilege did not apply.[196] The Subcommittee obtained the withheld document, deposed the

188. *Healthcare Fraud/Medicare Secondary Payer Program: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Gov'tl Affs.*, 101st Cong. 2 (1990).

189. *Id.* at 235, Exhibit P, Memorandum from Marilyn Shelley to Dana Reynolds (Mar. 5, 1985) (concluding that it was a "violation of federal law when we pay as a secondary carrier").

190. *In re* Provident Life & Accident Ins. Co., No. CIV-1-90-219, 1990 U.S. Dist. LEXIS 21067 (E.D. Tenn. June 13, 1990).

191. *Id.* at *6.

192. *Id.*

193. *Id.* ("Congress, as represented in this case by the Senate Subcommittee, stands as a separate and co-equal branch of government which is capable of making its own determinations regarding privileges asserted by witnesses before it. This Court's ruling that a portion of the March 5, 1985 Shelley memorandum is subject to the attorney-client privilege was an evidentiary ruling applying only in the case before this Court in which it was made.").

194. *Id.* at *6–7.

195. *Healthcare Fraud/Medicare Secondary Payer Program*, *supra* note 188, at 4, Exhibit JJ, Attorney-Client Privilege Exhibit ("The attorney-client privilege is a common law rule of evidence which protects certain confidential communications between a client and a lawyer from compelled disclosure. Congress has in the past often been willing to recognize valid assertions of the privilege this Subcommittee also . . . . The burden is then, as I see it, on you as the party claiming the privilege to demonstrate that the privilege exists and to tell us why. I will hear from you about whatever you would like to tell us concerning why this is privileged and then I will make a determination on that question.").

196. *Id.* (explaining that Provident waived privilege through separate production to Justice Department).

Provident employee, and held a hearing with the company's CEO, during which he was asked repeatedly about the document.[197] The Subcommittee included in its official hearing record an "Attorney-Client Privilege Exhibit" which cited the district court's observation that non-constitutional privilege determinations by federal courts are not binding on Congress.[198] Chairman Nunn succinctly explained his authority to rule on behalf of the Subcommittee: "The *court* has made a ruling governing *its* proceedings and, as the Chairman of the Subcommittee, *I* will make a ruling governing *these* proceedings."[199]

Although federal courts historically have declined to interfere with Congress's constitutional authority to make its own determinations on claims of attorney-client privilege, courts have decided *subsequent* cases brought by third parties to examine whether witnesses may have waived the privilege by producing records or testimony to Congress voluntarily. Many of these waiver cases arose in the 1990s when the House Commerce Committee under Chairman Thomas Bliley subpoenaed and obtained attorney-client records from tobacco companies, after which various plaintiffs in separate litigation sought discovery of the documents.[200] These waiver cases generally found that to preserve the privilege in subsequent litigation, parties must demonstrate that their compliance with congressional subpoenas was not voluntary, and they must go beyond merely noting their concerns in a letter.[201] Instead, they must demonstrate that they took all appropriate steps to contest the subpoena, raise objections, and negotiate with the committee to avoid the production.[202]

---

197. *Id.* at 41–45.

198. *Id.* at 3–4.

199. *Id.* at 4 (emphasis added).

200. *See* Don. R. Berthiaume & Jeffrey J. Ansley, *Where Did My Privilege Go? Congress and Its Discretion to Ignore the Attorney-Client Privilege*, 47 CRIM. L. BULL. 210 (2011) (describing House Commerce Committee investigation and subsequent litigation on waiver issue).

201. *See, e.g.*, Int'l Union of Operating Eng'rs, Local No. 132, Health & Welfare Fund v. Philip Morris, Inc., No. CIV.A 3:97-0708, 1999 WL 33659387 (S.D. W. Va., June 28, 1999) (alteration in original) (compelled production of privileged documents does not waive privilege when witness "objects and take[s] reasonable steps to protect its claims of privilege and protection"); Iron Workers Local No. 17 Ins. Fund v. Philip Morris, Inc., 35 F. Supp. 2d 582, 595 (N.D. Ohio, 1999) (company waived attorney-client privilege when it produced subpoenaed documents with "no real effort by defendants to challenge the order," "no effort by the tobacco defendants to meet with Chairman Bliley or other members of the Committee," no "legal memorandum setting forth the bases for the privilege with the committee or statement to the committee of the factual bases for the privileges," and "no submission of a privilege log"); United States v. Philip Morris Inc., 212 F.R.D. 421, 425 (D.D.C. 2002) ("Although there is no checklist of procedural steps that automatically guarantees preservation of the privilege, in this instance Defendants' limited efforts to preserve the privilege prior to production were clearly insufficient.").

202. *See, e.g.*, Commonwealth v. Philip Morris Inc., No. 957378J, 1998 WL 1248003, at *6 (Mass. July 30, 1998) ("In order to preserve any privilege, the subpoenaed witness must take all steps reasonably available to contest that subpoena, and only if those steps are unsuccessful will testimony or document production in compliance with the subpoena be treated as a compulsory disclosure.").

Dovetailing with this approach, the D.C. Bar issued an opinion in 1999 making clear that although attorneys have a responsibility to safeguard client confidences,[203] they do not violate ethics rules by producing privileged documents once a committee has issued a subpoena, which carries the force of law similar to a court order, and has threatened contempt.[204] A brief summary of the investigation that led to this ethics opinion helps illustrate the point. In 1998, a subcommittee of the House Commerce Committee was examining allegations of illegal influence in the construction of a $400 million building for the Federal Communications Commission.[205] As part of that investigation, Chairman Bliley issued four subpoenas to the developer, Franklin L. Haney, and three companies under his control.[206] When Haney asserted the attorney-client privilege, the subcommittee held him in contempt.[207] The full Committee then held its own meeting, confirmed the subcommittee's action, and also voted to hold Haney in contempt.[208] After that vote, Haney's attorneys asked whether the Committee would rescind the contempt finding if the documents were produced, and the Committee confirmed that it would.[209] The Committee took the rescission vote, and Haney's attorneys produced the documents.[210]

The following year, the D.C. Bar's Ethics Committee issued its opinion advising that while attorneys must protect attorney-client information, they may produce it to Congress after raising all available, legitimate objections and engaging in negotiations to modify or withdraw the subpoena.[211] The opinion recognized that these negotiations may bear no fruit and that a

---

203. *See, e.g.*, D.C. BAR, RULES OF PRO. CONDUCT, R. 1.6(a)(1) (prohibiting a lawyer from knowingly revealing a client's confidence or secret); *id.* R. 1.6(e)(2)(A) (allowing disclosure when required by law or court order).

204. D.C. Bar, Legal Ethics Comm., Opinion No. 288, *Compliance with Subpoena from Congressional Committee to Produce Lawyers' Files Containing Client Confidences or Secrets* (Feb. 16, 1999) ("A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of 'required by law' as that phrase is used in D.C. Rule of Professional Conduct 1.6(d)(2)(A).").

205. H. COMM. ON COM., CONTEMPT OF CONGRESS AGAINST FRANKLIN L. HANEY, H.R. REP. NO. 105-792, at 1 (1998).

206. *Id.* at 1, 7 (including Tower Associates II, Inc., the Franklin L. Haney Company, and Building Finance Company of Tennessee).

207. *Id.* at 2.

208. *Id.* at III.

209. *H. Comm. on Com., Meeting on Portals Investigation (Authorization of Subpoenas; Receipt of Subpoenaed Docs. and Consideration of Objections; and Contempt of Congress Proceedings Against Franklin L. Haney)*, 105th Cong. 101–05 (Comm. Print. 1998); see also ROSENBERG, *supra* note 111, at 69 n.28; ROSENBERG & TATELMAN, *supra* note 117, at 55–56.

210. H.R. REP. NO. 105-792, at III.

211. D.C. Bar, *supra* note 204. Haney had sought the opinion before producing the privileged documents, but the ethics committee informed him it would not be able to provide advice until after it considered the matter further. *Meeting on Portals Investigation*, *supra* note 209, at 48–50. *See also* ROSENBERG, *supra* note 111, at 69 n.28; ROSENBERG & TATELMAN, *supra* note 117, at 55.

committee might demand production "under pain of contempt."[212] According to the opinion, when a committee threatens to use its contempt power, that is the point at which the lawyer becomes required by law to disclose client confidences, and a lawyer need not risk criminal prosecution.[213] The Commerce Committee's actions in successfully obtaining attorney-client information in this case, and the subsequent ethics opinion approving of the attorneys' compliance, dispel any notion that attorneys violate ethics rules when they comply with congressional subpoenas backed by the threat of contempt.[214]

Some have argued that if federal courts begin allowing Congress to overcome the attorney-client privilege, a potentially abusive committee chair could start obtaining the internal communications of lawyers and their clients at will.[215] This assertion is inaccurate and misplaced for several reasons. As a preliminary matter, the fact that Congress has been exercising its discretion over common law privileges is not a new or sudden development—it is the status quo. Committees have been making their own determinations on non-constitutional privileges for many years, and courts have respected their authority to do so.[216]

This argument also fails to recognize that both witnesses and committees have significant incentives to accommodate each other's interests.[217] There is no question that the prospect of being held in contempt for refusing to comply with a congressional subpoena can be strong motivation for witnesses to accommodate congressional demands.[218] In addition, publicly traded companies may be required to report to shareholders, lenders, auditors, or others when they become the subject of investigations, receive subpoenas, are held in contempt, or face litigation, providing an additional

212. D.C. Bar, *supra* note 204.

213. *Id.* (referencing Off. of the Clerk, H.R., Memorandum Opinion of General Counsel to the Clerk of the House of Representatives on Attorney-Client Privilege (1985), *as reprinted in* 132 Cong. Rec. 3019, 3036, 3038 (daily ed. Feb. 27, 1986) ("In the Congressional context, the ruling by the Subcommittee chair that the privilege will not be accepted is the legal and functional equivalent [of] a legal requirement or a court order. Failure to answer at that point constitutes a criminal violation. Disclosure at that stage does not violate the Canons of Ethics nor the Bar Code of any jurisdiction.")).

214. *Id.*

215. *See, e.g.*, James Hamilton, *Attorney-Client Privilege in Congress*, 12 LITIG. MAG. 3 (1985) (warning that "Members of Congress have diverse agendas and constituencies and leaving such decisions to their discretion risks serious abuse").

216. *See also* Ross, *supra* note 6, at 125 (noting that Hamilton "happens to disagree with the position that the House has taken historically").

217. Michael Davidson, Legal Couns. to the U.S. Senate, *Senate's Civil Remedy to Compel Testimony and Document Production*, *in* CONGRESSIONAL INVESTIGATIONS: LEGAL ISSUES AND PRACTICAL APPROACHES 55 (1986) ("In fact, subpoena enforcement proceedings are rare because the Congress seldom needs to compel testimony.").

218. Harold Damelin & Jennifer Peru Gary, *Understanding and Defending Against a Congressional Investigation* 2, BLANK ROME, LLP (Fall 2007) ("In reality, a contempt proceeding can be more damaging than complying with the subpoena.").

incentive to resolve disputes expeditiously.[219] On the other hand, because Congress operates in two-year legislative sessions, the possibility of lengthy litigation strongly argues in favor of committees resolving disputes quickly to obtain information in a timely way.[220]

This argument also discounts the burdensome and time-consuming nature of the procedural and political hurdles involved with holding a witness in contempt and adopting a contempt resolution that is referred to court. Congress has reserved this power for a relatively small number of cases that it concludes are most weighty. According to data from CRS and other sources, the full House or Senate has voted to approve contempt resolutions for any reason (not just for withholding attorney-client communications) for fewer than two dozen individuals since 1980.[221]

The fact that there have been so few historical contempt cases may offer little comfort to those concerned that an increasingly extremist climate in Washington could lead to future misdeeds, particularly in light of recent events.[222] The answer to such an abuse, however, is not to compound it with another. The judicial precedents detailed above demonstrate that federal courts have reviewed congressional actions for violations of *constitutional* protections, but have refrained from imposing *common law* privileges onto congressional committees. Instead of obliterating the distinction between common law and constitutional privileges, the check on potential

---

219. *See, e.g.*, Deborah S. Birnbach, *Do You Have to Disclose a Government Investigation?*, (HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 9, 2016), https://corpgov.law.harvard.edu/2016/04/09/do-you-have-to-disclose-a-government-investigation/ [https://perma.cc/68QS-BPD3] (reviewing disclosure requirements in securities laws).

220. In *Mazars*, for example, Trump filed two suits to block the three committees' subpoenas in 2019, yet the Oversight Committee's case was not settled until September 2022 and the other case remains ongoing as of this writing more than three years later. Order Granting Motion for Voluntary Dismissal, Trump v. Committee on Oversight & Reform, No. 1:19-cv-01136-AP (D.D.C. September 11, 2022); Joint Status Report, Trump v. Deutsche Bank AG, No. 1:19-cv-03826-ER (S.D.N.Y. September 27, 2022); *see also Article One: Strengthening Congressional Oversight Capacity: Hearing Before the H. Select Comm. on the Modernization of Cong.*, 117th Cong. 7 (2021) (testimony of Josh Chafetz) (citing other examples of lengthy litigation and noting that "judicial pacing and other judicial choices served to slow oversight of the Trump Administration across the board to such an extent as to render it largely impotent").

221. GARVEY, *supra* note 117, at 74–76, 82–84 (describing House floor votes relating to ten individuals and Senate floor votes relating to six individuals from 1980 through 2014). In addition, since 2014, there have been House floor votes relating to seven more individuals: Attorney General William P. Barr and former White House Counsel Donald F. McGahn, II, H.R. Res. 430, 116th Cong. (2019) (relating to House Judiciary Committee investigation of Russian interference in 2016 election); Attorney General William P. Barr (again) and Commerce Secretary Wilbur L. Ross, Jr., H.R. Res. 497, 116th Cong. (2019) (relating to House Oversight and Reform Committee investigation of addition of citizenship question to 2020 Census); and former Trump officials Stephen K. Bannon, H.R. Res. 730, 117th Cong. (2021), Mark Meadows, H.R. Res. 851, 117th Cong. (2021), and Peter K. Navarro and Daniel Scavino, Jr., H.R. Res. 1037, 117th Cong. (2022) (relating to January 6 Committee investigation).

222. *See, e.g.*, Li Zhou, *147 Republican Lawmakers Still Objected to the Election Results After the Capitol Attack*, VOX (Jan. 7, 2021, 3:28 PM), https://www.vox.com/2021/1/6/22218058/republicans-objections-election-results [https://perma.cc/KTW4-V67M].

congressional abuses must derive from the Constitution itself, and Part II discusses some of the constitutional protections that recipients of congressional subpoenas may raise, and that courts may decide.

II. CONGRESSIONAL SUBPOENA POWER AND CONSTITUTIONAL PRIVILEGES

If Congress exercises its discretion to overcome assertions of attorney-client privilege, recipients of congressional subpoenas could pursue at least two potential constitutional avenues: they could claim a separate constitutional basis to withhold certain information that may include some attorney-client communications; or they could try to make the unprecedented argument that the attorney-client privilege has constitutional underpinnings despite the fact that it has always been considered a common law privilege. I take up these points below by examining constitutional privileges available to all individuals and to executive branch officials in particular.

A. Constitutional Privileges for Individuals

Recipients of congressional subpoenas may invoke applicable privileges that are based in the Constitution, and if these privileges are properly asserted, congressional committees are bound to honor them.[223]

For example, in *Quinn v. United States,* a witness invoked his Fifth Amendment right against self-incrimination and other privileges to refuse to answer questions from a subcommittee of the House Committee on Un-American Activities about his alleged membership in the Communist Party.[224] Both the witness and the government agreed that the witness could invoke the Fifth Amendment, and the principal issue before the Court was whether or not he had done so properly.[225] The Court held that both committees and courts must respect an assertion of the Fifth Amendment if the language used is reasonably understood as an effort to invoke the privilege.[226] Recipients of congressional subpoenas have availed themselves

223. *See* Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("Congress . . . must exercise its powers subject to the limitations placed by the Constitution on government action.").

224. 349 U.S. 155 (1955).

225. *Id.* at 162.

226. *Id.* at 162–63 (invocation of Fifth Amendment right against self-incrimination "does not require any special combination of words"). However, the Supreme Court has rejected an argument for a "constitutionally protected" attorney-client privilege in the context of an attorney advising a client about invoking the Fifth Amendment in a civil proceeding. Maness v. Meyers, 419 U.S. 449, 466 n.15 (1975) (rejecting a concurring opinion by Justice Stewart, asserting: "We are not aware that the Court has ever identified a 'constitutionally protected attorney-client' privilege of the scope postulated by MR. JUSTICE STEWART.").

of this Fifth Amendment protection to withhold testimony or documents that may include attorney-client communications.[227] Congress has passed legislation creating a statutory procedure to overcome Fifth Amendment assertions through a vote by a majority of the House or Senate or two-thirds of the members of a committee to apply for a court order granting "use" immunity to compel the witness to testify, but the decision to grant immunity carries significant risk since it could scuttle criminal convictions.[228]

Separately, a witness might try to argue that a committee's decision not to recognize the attorney-client privilege in a congressional proceeding implicates the Sixth Amendment's right to effective assistance of counsel. However, the Sixth Amendment applies only to criminal prosecutions.[229] Although the Supreme Court has repeatedly highlighted the importance of the Sixth Amendment right to counsel in criminal proceedings, it has never held that its protections apply to witnesses appearing before Congress.[230]

---

227. For example, former Justice Department official Jeffrey Clark asserted the attorney-client and other privileges in response to a subpoena from the January 6 Committee seeking information about his efforts to use the Justice Department to press Georgia and other states to call special legislative sessions to appoint new electors. Letter from Harry W. MacDougald, Couns. for Jeffrey Bossert Clark, to Bennie G. Thompson, Chairman, H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, 2 (Nov. 5, 2021). In response, the Committee held Clark in contempt, noting that "under longstanding congressional precedent, recognition of common law privileges such as the attorney-client privilege is at the discretion of congressional committees." H. COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, RES. RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND JEFFREY BOSSERT CLARK IN CONTEMPT OF CONG. FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE SELECT COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, H.R. REP. NO. 117-200, at 2, 18 (2021) (citing CRS CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 93 at 61–64). Clark then invoked his Fifth Amendment right against self-incrimination. *See* H. Rules Comm., *Meeting on H. Res. _ (H. Rept. 117-200); H.R. 6119*, YOUTUBE (Dec. 2, 2021), https://www.youtube.com/watch?v=jvZ2kmeFuDI [https://perma.cc/KXN3-QF49] (testimony of Rep. Liz Cheney, Vice Chair, H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol) (noting that Clark "believes testimony about his interactions with President Trump would tend to incriminate him and thus may subject him to criminal prosecution"); *see also* Press Release, H. Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, Thompson & Cheney Testimony at Rules Committee Meeting (Dec. 2, 2021), https://january6th.house.gov/news/press-releases/thompson-cheney-opening-statements-rules-committee-meeting-0 [https://perma.cc/MP92-BQHW]; H. COMM. TO INVESTIGATE THE JAN. 6TH ATTACK ON THE U.S. CAPITOL, MEETING BEFORE THE H. COMM. ON RULES, H.R. REP. NO. 117-200 (2021).

228. 18 U.S.C. §§ 6002, 6005. *See also* ROSENBERG, *supra* note 117, at 7–10 (describing court decisions reversing the convictions of Iran-Contra figures Lieutenant Colonel Oliver North and Rear Admiral John Poindexter after Congress granted them immunity); *id.* at 10 (citing Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. L. REV. 1, 9 (1988)) ("The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.").

229. U.S. CONST., amend. VI; *see also* Strickland v. Washington, 466 U.S. 668, 684 (1984) ("[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").

230. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 430 (1986) (noting that "the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment

The Supreme Court has entertained objections to congressional subpoenas on First Amendment grounds,[231] but courts have not held that witnesses may invoke the First Amendment to withhold information from Congress based on the attorney-client privilege.[232] Some commentators have argued that courts should recognize a First Amendment right to speak with counsel that is "interwoven" with the right to effective assistance of counsel.[233] However, no court has done so, and these commentators apparently concede that this theory would be especially challenging in light of the Supreme Court's 1935 opinion in *Jurney v. MacCracken*.[234] In that case, the Court held that Congress could use its inherent contempt authority to arrest and try an attorney who, after invoking the attorney-client privilege to withhold information in response to a Senate committee subpoena, allowed some papers to be removed and destroyed.[235] The committee overruled the privilege, and the attorney eventually produced records to which he still had access.[236] As a result, the Court did not have to decide the attorney-client privilege question, but the Court nevertheless held that the Senate could still try him for having obstructed its work.[237] Proponents of the First Amendment attorney-client privilege theory acknowledge that the Court "indirectly affirmed that withholding documents or testimony from Congress on the basis of the attorney-client privilege was unjustifiable and punishable."[238]

With respect to the Due Process Clause of the Fifth Amendment, the Supreme Court has never held that it requires Congress to recognize the attorney-client privilege, but the Court has held that witnesses may challenge the "pertinency" of congressional inquiries under the federal

---

misconceives the underlying purposes of the right to counsel" and that the "Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake").

231. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959) (upholding criminal contempt conviction against witness asserting First Amendment defense before a subcommittee of the House Committee on Un-American Activities) ("[T]he protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.").

232. *See* Wright, *supra* note 42, at 437–38 (reviewing First Amendment challenges to congressional investigations, most of which have "roundly failed").

233. Berthiaume & Ansley, *supra* note 200, at 229 (arguing that attorney-client privilege is "embodied within First Amendment right to free speech and association").

234. 294 U.S. 125 (1935).

235. *Id.* at 152.

236. *Id.* at 145–46.

237. *Id.* at 144, 148 (noting that privilege claim was "no longer an issue" because attorney complied with subpoena, but that Congress may punish past actions that "obstruct the legislative process").

238. Berthiaume & Ansley, *supra* note 200, at 221.

statute governing criminal contempt.[239] When Congress passed this statute, it provided criminal penalties for witnesses who refuse to answer questions that are "pertinent to the inquiry" of a committee operating under the authority of the House or Senate.[240] Based on this requirement, the Supreme Court held in *Watkins v. United States* that a conviction under the statute was invalid when the House Un-American Activities Committee, which purportedly was investigating Communist infiltration of labor groups, failed to adequately explain the pertinency of its questions, including why it was asking about individuals "completely unconnected with organized labor."[241] Although future witnesses could seek to challenge a committee's demands for attorney-client communications on this basis, the operative question is not whether the communications fall under the common law privilege, but rather whether the committee provides adequate justification to meet the requirement of pertinency.[242]

James Hamilton, a former congressional investigator and outspoken opponent of committee authority in this area, has made a different due process argument, asserting that since Congress used its Article I authority to adopt internal rules granting witnesses a limited privilege to be accompanied by attorneys during certain congressional proceedings—and since "many" committees regularly use their discretion to recognize the attorney-client privilege—Congress must have "implicitly" granted witnesses a due process right to withhold attorney-client communications from Congress.[243] This argument faces significant challenges. Most

239. *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957); Deutch v. United States, 367 U.S. 456, 467–68 (1961) (explaining that witnesses must be informed of committee rulings on privileges in order to meet the requirements of due process and intent under the contempt statute); Barenblatt v. United States, 360 U.S. 109, 123 (1959) ("Undeniably, a conviction for contempt under 2 U.S.C. § 192 cannot stand unless the questions asked are pertinent to the subject matter of the investigation.").

240. 2 U.S.C. § 192.

241. *Watkins*, 354 U.S. at 213.

242. The Court in *Watkins* also pointed to several other limitations on committee activities and authorities. For example, committees are "restricted to the missions delegated to them" by the House or Senate, and "[n]o witness can be compelled to make disclosures on matters outside that area." *Id.* at 206. In addition, several years after *Watkins*, the Court held that a witness may challenge a conviction under the criminal contempt statute if a committee's investigation was not properly authorized under its own rules. Gojack v. United States, 384 U.S. 702, 705 (1966) ("The subject of the inquiry was never specified or authorized by the Committee, as required by its own rules, nor was there a lawful delegation of authority to the Subcommittee to conduct the investigation."). Witnesses may seek to use these and other arguments to withhold information from Congress that includes attorney-client communications, but as with the pertinency requirement, the determination is not whether the materials fall under the common law privilege.

243. Hamilton, *Attorney-Client Privilege*, *supra* note 215, at 64 ("Rules allowing counsel—and implicitly the right to communicate with counsel with no concern that confidences must be disgorged—thus appear to have constitutional underpinnings. An argument can even be made—given the practice of virtually all congressional committees to permit counsel and the policy of many to respect the privilege—that the Due Process Clause of the Fifth Amendment requires that the privilege be recognized.").

importantly, it disregards the fact that both the House and Senate repeatedly voted *against* requiring their committees to recognize the attorney-client privilege, directly undermining the premise that Congress implied such a privilege.[244] It also discounts the fact that while many committees indeed recognize the privilege, they also zealously safeguard their right to overcome it when necessary to serve their legislative goals.[245] Although Hamilton argues that the attorney-client privilege should extend "at least" to communications between attorneys advising their clients during congressional proceedings covered by House or Senate rules, this argument is less persuasive for attorney-client communications relating to past matters under investigation by a committee.[246] In any case, Hamilton acknowledges that efforts to use due process arguments to require Congress to provide other protections available in federal courts have been unsuccessful.[247]

For example, in *United States v. Fort,* the D.C. Circuit held that congressional investigations are "outside the guarantees of the due process clause of the Fifth Amendment and the confrontation right guaranteed in criminal proceedings by the Sixth Amendment."[248] In that case, the court upheld a criminal contempt conviction for a witness who refused to comply with a congressional subpoena based on a claim that Congress violated his rights to call his own witnesses and cross-examine others.[249] The decision highlighted that the Constitution does not require Congress to recognize non-constitutional privileges, but that each chamber has used its own discretion to do so in discrete cases.[250] The court noted several instances in

---

244. *See infra* Part I.A. *See also* Beard, *supra* note 71, at 133 (noting that the "legislative history and constitutional law clearly weigh in favor of congressional discretion when balanced against the unconvincing legal arguments advanced by supporters of the privilege as a right").

245. *See infra* Part I.B. *See also* United States v. Ballin, 144 U.S. 1, 5 (1892) ("It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted.").

246. Hamilton, *Attorney-Client Privilege*, *supra* note 215, at 4, 64 (acknowledging that House and Senate rules are limited to allowing witnesses to be represented by attorneys in certain circumstances, but arguing that the attorney-client privilege should be honored "at least in this context").

247. *Id.* at 64 (referring to Hannah v. Larche, 363 U.S. 420, 442 (1960); United States v. Fort, 443 F.2d 670, 678–81 (1970), *cert. denied*, 403 U.S. 932 (1971); *see infra* notes 248–254 and accompanying text).

248. *Fort*, 443 F.2d at 678–79 ("The right to present evidence in one's own behalf and to confront and cross examine one's accusers are rights designed to protect the individual's interests when the Government seeks to impose criminal sanctions upon him. But the plain fact is that the congressional investigation with which we are here concerned is an investigative proceeding and not a criminal proceeding, and in such proceeding Congress is not empowered to adjudicate criminal sanctions on the witness.").

249. *Id.*

250. *Id.* at 680 (citing special rules for the Senate Committee on Government Operations' Army-McCarthy hearings of 1954, which provided a limited right of cross-examination, but noting that the Committee made clear that "these procedural rules are not in any way to establish a precedent" (quoting S. REP. NO. 2507, at 2–3 (1954)).

which committees have allowed cross-examination of witnesses in certain special proceedings, while not in others.[251] The court held that Congress's adoption of different procedures for different proceedings did not result in an abdication to the judiciary of its authority to establish rules for its own proceedings.

The court in *Fort* relied on the Supreme Court's decision in *Hannah v. Larche*, which upheld investigative procedures established by Congress for the Commission on Civil Rights, which was created as part of the Civil Rights Act of 1957 to investigate voter suppression.[252] The Court found that the Due Process Clause did not require the Commission to provide witnesses with information about the charges being investigated, the identity of the complainants, or the right to cross-examine complainants or other witnesses.[253] The Court supported its position by drawing comparisons to congressional investigations which, similarly, do not recognize privileges that apply in adjudicative proceedings.[254]

Some, including Hamilton, have argued that allowing committees to overcome the attorney-client privilege "flies in the face of the basic policy underlying the attorney-client privilege."[255] This complaint raises a policy issue rather than a legal one, and it gives no weight whatsoever to Congress's countervailing constitutional interests. When a committee rejects an assertion of the attorney-client privilege, that determination may go against the policy goals of the common law privilege, but it reflects Congress's conclusion that more pressing constitutional objectives must be served.

On the other hand, a committee may determine that exercising its discretion to recognize the attorney-client privilege may serve broader interests. The Senate Watergate Committee is sometimes held up as an example of a congressional investigation that recognized the attorney-client

---

251. *Id.* at 680–81 ("These include impeachment trials, investigations looking toward impeachment, proceedings involving the privileges of a member and when a committee is directed to determine whether there have been violations of the election laws. Such variances in committee procedures from the procedures followed here are based on substantial differences in the nature of the investigations, are permissible under the power of a committee to adopt rules of procedure it considers to be appropriate for the examination of witnesses in a given investigation and do not help appellant.") (footnotes omitted).

252. 363 U.S. 420 (1960).

253. *Id.* at 441.

254. *Id.* at 444–45 ("A frequently used type of investigative agency is the legislative committee. The investigative function of such committees is as old as the Republic . . . . The procedures adopted by legislative investigating committees have varied over the course of years. Yet, the history of these committees clearly demonstrates that only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding. In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses.") (citations omitted).

255. Hamilton, *Attorney-Client Privilege*, *supra* note 215, at 64 (citing Upjohn v. United States, 449 U.S. 383, 389 (1981)).

privilege for certain witnesses.[256] Sam Dash, the Chief Counsel of the Committee, explained that Chairman Sam Ervin gave witnesses various procedural privileges that the Constitution did not require him to provide, such as allowing counsel to make objections, argue legal points, and suggest questions to other witnesses.[257] Dash's point was not that these protections were mandated by the Constitution or Senate rules, but that they helped the Committee garner public trust, communicate its findings, and fulfill its objectives more effectively.[258] These are valid policy considerations that committees may evaluate as they determine their approaches to future investigations and fulfill their constitutional responsibilities.[259]

Finally, a committee may choose not to object to a federal court ruling on a witness' claim of attorney-client privilege in certain limited circumstances that serve broader policy goals. Congress's investigation into the attack on the Capitol on January 6, 2021 illustrates this point.[260] The select committee established by the House, known as the January 6 Committee, issued a subpoena for documents and testimony from John Eastman, one of Trump's outside attorneys who became infamous for authoring the "blueprint for a coup."[261] Like other Trump attorneys implicated in the plot, Eastman refused to comply by invoking the Fifth

---

256. *See, e.g.*, *id.* at 4; Hamilton, *Can Congress Make Lawyers Talk?*, *supra* note 34. *But see* Joseph E. diGenova, *No Attorney-Client Privilege for Clinton*, WALL ST. J., Dec. 20, 1995 ("Ervin refused to recognize the privilege for any government lawyer in the performance of official duties. He declined, for example, to permit Justice Department official Robert Mardian to invoke it. Claims of privilege were likewise rejected for G. Gordon Liddy, Bebe Rebozo and Herbert Kalmbach, President Nixon's personal attorney.").

257. Samuel Dash, Former Chief Couns., S. Watergate Comm., *in* CONGRESSIONAL INVESTIGATIONS: LEGAL ISSUES AND PRACTICAL APPROACHES (1986) 101–102 ("[W]e allowed challenges to evidence. We allowed presentation of questions to witnesses and also legal arguments."); *see also id.* at 101 (describing how committee chose not to call witnesses at public hearings to invoke their Fifth Amendment rights).

258. *Id.* at 98 ("First, and most compelling, [is] the requirement of fairness, for, without it, congressional investigations will not have the public's confidence. They won't have credibility and, therefore, they will fail in their constitutional function of public information because that information won't be communicated. It will be taken by the pubic as merely a political manifestation or an effort to expose unfairly and, therefore, the message won't get across.").

259. *See* Wright, *supra* note 42, at 405–06, 460 (acknowledging that "legislative self-regulation, rather than constitutional law, is the primary mechanism for the establishment of congressional due process," and urging Congress to use its discretionary rulemaking authority to adopt a policy that presumes the validity of the attorney-client and other privileges, but also provides a uniform standard for overcoming these privileges when Congress chooses).

260. H.R. Res. 503 § 1, 117th Cong. (2021) (establishing H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol) (the "January 6 Committee").

261. Letter from Rep. Bennie G. Thompson, Chair, H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, to John Eastman (Nov. 8, 2021) (transmitting subpoena for documents and deposition). *See also* Luke Broadwater, *Trump Lawyer Blamed Pence for Violence as Rioters Stormed Capitol*, N.Y. TIMES (Oct. 30, 2021) (https://www.nytimes.com/2021/10/30/us/politics/eastman-pence-capitol-riot.html [https://perma.cc/7SB8-XVYD] (citing members of both parties describing Eastman's memos).

Amendment.[262] The Committee then issued a separate subpoena to compel his employer, Chapman University, to produce his emails to the Committee.[263] Eastman responded by filing suit in federal court seeking injunctive relief to block Chapman from complying.[264] He asserted a host of privileges, including under the First Amendment and Fourth Amendment, as well as under the common law attorney-client privilege.[265] He did not assert a constitutional basis for the attorney-client privilege.

At that point, the Committee could have argued that the court should rule only on the constitutional claims and, based on the Speech and Debate Clause, defer to the Committee's determination not to recognize the common law attorney-client privilege.[266] But the Committee informed the court that it was not making that argument, instead acceding to the court ruling on both the constitutional and attorney-client privilege claims.[267] The Committee made clear in its brief, however, that it reserved the right to assert this argument in other proceedings.[268] Ultimately, the court ruled in favor of the Committee on both the constitutional and attorney-client privileges[269] and ordered Chapman to produce the majority of Eastman's emails from the time period between January 4 and 7, 2021.[270]

---

262. Letter from Charles Burnham, Couns. to John Eastman, to Rep. Bennie G. Thompson, Chair, H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol (Dec. 1, 2021) (asserting Fifth Amendment in response to subpoena for documents and testimony).

263. Complaint for Declaratory and Injunctive Relief at 3, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 WL1407965 (C.D. Cal. Jan. 20, 2022).

264. *Id.*

265. *Id.* at 3, 14–17.

266. This would have been consistent with the approach discussed in Section I.C, *infra*, describing how Senate and House committees have successfully invoked the Speech and Debate Clause to block suits for injunctive relief, including in Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975); Gulf Oil Corp. v. Westinghouse Elec. Corp., 434 F. Supp. 773 (D.D.C. 1977); and *In re* Provident Life & Accident Ins. Co., No. CIV-1-90-219, 1990 U.S. Dist. LEXIS 21067 (E.D. Tenn. June 13, 1990).

267. Congressional Defendants' Brief in Opposition to Plaintiff's Privilege Assertions at 37 n.73, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 8, 2022).

268. *Id.* ("Congress has consistently taken the view that its investigative committees are not bound by judicial common law privileges such as the attorney-client privilege or the work product doctrine. *See generally* [CRS CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 93, at] 61–62. This aspect of Congress's investigative authority is rooted in the separation of powers inherent in the Constitution's structure. *Id.* Congress and its committees make decisions regarding such common law privileges by balancing the important institutional, constitutional, and individual interests at stake on a case-by-case basis. Here, Congressional Defendants have determined, consistent with their prerogatives, not to submit an argument on this point. This is not, however, intended to indicate, in any way, that Congress or its investigative committees will decline to assert this institutional authority in other proceedings.").

269. Order Denying Plaintiff's Motion for Preliminary Injunction, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 WL 1407965 (C.D. Cal. Jan. 25, 2022) (regarding constitutional claims); Order re Privilege of Documents Dated January 4-7, 2021, Eastman v, Thompson, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 28, 2022) (regarding attorney-client claims).

270. Order re Privilege of Documents Dated January 4-7, 2021 at 43, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 WL 1407965 (C.D. Cal. Jan. 25, 2022) (holding that Chapman must produce 101 emails from the January 4–7 period, but could withhold ten that were not "pivotal" to the investigation).

There are several reasons the Committee may have chosen not to raise its available objection and instead allow the court to rule on the merits of the attorney-client privilege claim. Time is always a key consideration for congressional investigations. In the Eastman case, the Committee clearly viewed his claim as exceptionally weak, successfully arguing that even the common law attorney-client privilege applicable in federal courts does not extend to communications in furtherance of a crime.[271] Allowing the court to dispose of Eastman's attorney-client privilege claim using the familiar and well-recognized crime-fraud exception may have avoided a more protracted appeal on the complicated merits of Congress's Article I authority.[272] The flip-side of submitting to the court's jurisdiction—other than the risk of losing the case—was that the Committee then had to comply with the court's procedures for *in camera* review of additional records from other time periods, a process that continued until the eve of the Committee's public hearings in June 2022.[273]

Another reason the January 6 Committee may have allowed the court to rule on Eastman's claim of attorney-client privilege is to enhance public trust in, and support for, the investigation itself. Just as Chairman Nunn gave Watergate witnesses certain protections he was not required to provide, Chairman Bennie Thompson, Vice Chair Liz Cheney, and other members of the January 6 Committee agreed to allow a federal court to rule on Eastman's attorney-client privilege claim when they were not required to do so. In return, they obtained a significant benefit—nationwide recognition that a federal court agreed with them about the potentially criminal nature of Trump's and Eastman's actions,[274] accompanied by a forceful judicial declaration that the "illegality of the plan was obvious."[275] As one

271. Congressional Defendants' Brief in Opposition to Plaintiff's Privilege Assertions at 37, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 8, 2022) (No. 8:22-cv-00099) (*citing In re* Grand Jury Investigation, 810 F.3d 1110, 1113 (9th Cir. 2016)).

272. Chapman produced an additional 933 documents after Eastman withdrew his privilege claims regarding those documents. Notice at 1–2, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. May 6, 2022).

273. *Id.* at 2–3 (requesting that the court review additional documents *in camera* for production to the Committee as it "prepares to present the conclusions of its investigation to the public through hearings"); Order re Privilege of 599 Documents Dated November 3, 2020 - January 20, 2021, Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. June 7, 2022) (directing Eastman to disclose additional documents two days before the January 6 Committee began its series of hearings on June 9, 2022).

274. *See, e.g.*, Farnoush Amiri, *Judge: Trump Likely Committed Crimes Related to Election*, ASSOCIATED PRESS (Mar. 28, 2022), https://apnews.com/article/capitol-siege-elections-crime-donald-trump-presidential-elections-7b25a5f116f56f73d60b6cb298386bb9 [https://perma.cc/8UJ7-Z4VH]; Luke Broadwater, Alan Feuer & Maggie Haberman, *Federal Judge Finds Trump Most Likely Committed Crimes Over 2020 Election*, N.Y. TIMES (July 12, 2022), https://www.nytimes.com/2022/03/28/us/politics/trump-election-crimes.html [https://perma.cc/8DDB-HDN4].

275. Order re Privilege of Documents Dated January 4-7, *supra* note 270, at 36; *see also id.* at 44 ("Dr. Eastman and President Trump launched a campaign to overturn a democratic election, an action

commentator observed of the court's opinion, "the history of the United States has never seen an account of a president's conduct quite so devastating."[276]

B. Constitutional Privileges for Executive Branch Officials

In addition to recognizing constitutional protections available to all witnesses appearing before Congress, the Supreme Court has held that presidents have a constitutional basis to assert executive privilege over presidential communications. Using this authority, a president could seek to assert executive privilege to withhold a subset of communications that otherwise might have fallen under the common law attorney-client privilege, but these communications must relate directly to presidential decision-making, and the privilege may be overcome with a requisite showing from Congress.

In *United States v. Nixon,* the Supreme Court held that President Nixon had a constitutional basis to assert executive privilege over audio tapes of his Oval Office conversations regarding Watergate, but that the privilege is limited and may be overcome with a demonstrated, specific need.[277] Applying this standard, the Court directed Nixon to produce the tapes for use in a criminal trial.[278] In a previous case involving the Senate's effort to obtain the Nixon tapes, *Senate Select Committee v. Nixon,* the D.C. Circuit denied enforcement of a congressional subpoena, holding that the Senate committee had not demonstrated that the tapes were "demonstrably critical" to its functions.[279] In particular, since the House Judiciary Committee had begun impeachment proceedings and already had copies of the subpoenaed tapes,[280] the court found that the Senate committee's oversight need was "merely cumulative."[281] Notwithstanding the different results, both cases

---

unprecedented in American history. Their campaign was not confined to the ivory tower—it was a coup in search of a legal theory. The plan spurred violent attacks on the seat of our nation's government, led to the deaths of several law enforcement officers, and deepened public distrust in our political process.").

276. Benjamin Wittes, *Donald Trump, John Eastman and the Silence of the Justice Department,* LAWFARE (Mar. 29, 2022, 3:28 PM), https://www.lawfareblog.com/donald-trump-john-eastman-and-silence-justice-department [https://perma.cc/8KGQ-EB2P]; *see also* Michael Barbaro, The Daily, *"The Illegality of the Plan Was Obvious,"* N.Y. TIMES, at 22:13 (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/podcasts/the-daily/trump-jan-6-eastman.html [https://perma.cc/NZM7-LRZN] (noting "the irony of the fact that if John Eastman had just complied with the January 6 committee's subpoenas, this would never have happened," and that "based on this ruling, he may have actually just strengthened their hand").

277. 418 U.S. 683, 713 (1974).

278. *Id.*

279. 498 F.2d 725, 731 (D.C. Cir. 1974).

280. *Id.* at 732.

281. *Id.*

highlighted that a presidential claim of executive privilege is based on the Constitution rather than common law.[282]

Two Circuit Courts have applied a common law analysis to reject executive branch assertions of the attorney-client privilege in the context of criminal proceedings, finding that the privilege is unavailable to government employees. In the first case, Independent Counsel Kenneth Starr sought through a grand jury subpoena to obtain documents created during meetings attended by attorneys representing the White House Counsel's Office and Hillary Clinton relating to the Whitewater investigation.[283] The White House did not invoke executive privilege, but instead relied solely on the common law attorney-client privilege and the work product doctrine.[284] In *In re Grand Jury Subpoena Duces Tecum,* the Eighth Circuit Court of Appeals found no basis for the executive branch to invoke the common law attorney-client privilege.[285] Applying *Upjohn* and Federal Rule of Evidence 501, the court identified no cases applying a governmental attorney-client privilege in the context of a grand jury investigation.[286] As a result, the court held that the White House could not use the attorney-client privilege to refuse to comply with the subpoena.[287]

The following year, the D.C. Circuit Court of Appeals issued a similar ruling in *In re Lindsey*, which involved Starr's investigation of the Monica Lewinski matter.[288] Noting that Congress authorized courts to recognize common law attorney-client privilege claims through Rule 501,[289] the court found no basis for Deputy White House Counsel Bruce Lindsey to assert a government attorney-client privilege to withhold information from the federal grand jury.[290] Notably, Brett Kavanaugh, who was serving on Starr's

---

282. *Nixon*, 418 U.S. at 708, 711 (noting that executive privilege is "inextricably rooted in the separation of powers under the Constitution").

283. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 913 (8th Cir. 1997).

284. *Id.* at 914; *see also id.* at 919 (noting that, in *Nixon,* the Supreme Court "recognized that the need for confidential presidential communication 'can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties'" (quoting *Nixon*, 418 U.S. at 705)).

285. *Id.* at 921 (finding that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets").

286. *Id.* at 917.

287. *Id.* at 924; *see also* Arthur B. Culvahouse, Jr., *Has Attorney-Client Privilege Departed the White House?*, 63 NYU ANN. SURV. AM. L. 139, 147 (2007) ("The Supreme Court allowed the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum* to stand. That decision's broad holding—that there is no attorney-client privilege protecting White House Counsels' advice to the President—must be viewed as the law of the land when such evidence is sought by a federal grand jury or in any related criminal proceeding.").

288. 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).

289. *Id.* at 1268.

290. *Id.* at 1266 (finding that, "[i]n the context of federal criminal investigations and trials, there is no basis for treating legal advice differently from any other advice the Office of the President receives in performing its constitutional functions"). *Cf. In re* Special Grand Jury No. 81-1, 676 F.2d 1005, 1007 (4th Cir. 1982) (finding that an assertion of personal, non-governmental attorney-client privilege before

team at the time, joined the brief for the case, which drew a stark contrast between the constitutional and common law privileges.[291]

After the Nixon cases were decided, the executive branch began taking the position that executive privilege includes the common law attorney-client privilege, but it cited no judicial precedent for such an expansive approach. Opinions issued by the Department of Justice's Office of Legal Counsel (OLC) acknowledge the distinction between common law privileges and the constitutional basis for the presidential communications privilege, but they give little significance to their distinct origins. For example, a 1982 OLC opinion on the confidentiality of the Attorney General's communications recognizes that the attorney-client privilege is a common law evidentiary privilege in federal courts.[292] Conceding that the Federal Rules of Evidence do not apply to Congress, the OLC opinion nevertheless argues that claims of attorney-client privilege are "subsumed" under claims of executive privilege when disputes arise between the executive and legislative branches.[293] An OLC opinion four years later also argues that the attorney-client privilege is not generally considered to be "distinct" from the executive privilege in disputes between the two branches.[294] Similarly, when President Trump asserted executive privilege in 2019 during the congressional investigation of the addition of a citizenship question to the Census, OLC's opinion invoked *Nixon's* standard for executive privilege,[295] acknowledged the common law roots of the attorney-client privilege by citing *Upjohn*,[296] and then attempted to fuse

---

a grand jury may be overcome if the United States Attorney makes "a preliminary showing of relevance and need").

291. Brief of Appellee United States at 4–8, *In re Sealed Case*, Nos. 98-3060, 98-3062, 98-3072, 1998 WL 35240369 (D.C. Cir. Jan. 26, 1998) (asserting that "[c]*ommon-law* governmental attorney-client and work product privileges are neither as important nor as historically rooted as the presidential communications privilege" and that "no case, no statute, no rule, no agency opinion—*ever* has concluded that a department or agency of the United States (or any state or local governmental entity) can maintain common-law attorney-client and work product privileges in federal grand jury or criminal trial proceedings") (emphasis in original). Of course, the views of now-Supreme Court Justice Kavanaugh may be different than when he was an advocate.

292. Confidentiality of the Att'y Gen.'s Commc'ns in Counseling the President, 6 Op. O.L.C. 481, 494 n. 24 (1982).

293. *Id.*

294. Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 78 (1986) (footnote omitted).

295. Assertion of Exec. Privilege Over Deliberative Materials Regarding Inclusion of Citizenship Question on 2020 Census Questionnaire, 43 Op. O.L.C. 1, 5 (2019) (slip opinion) ("The Supreme Court has recognized 'the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties,' concluding that 'the importance of this confidentiality is too plain to require further discussion.'" (quoting United States v. Nixon, 418 U.S. 683, 705 (1974))).

296. *Id.* at 6 ("In the common law, the attorney-client privilege 'is the oldest of the privileges for confidential communications.'" (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981))).

them together.[297] Instead of citing any judicial precedent, OLC referred to one of its own previous opinions.[298]

The scope of executive privilege over presidential communications is narrow, however, and communications must relate directly to presidential decision-making, according to *In re Sealed Case (Espy)*.[299] This unanimous decision issued by the D.C. Circuit Court in 1997 involved a grand jury subpoena for documents underlying a report compiled by the White House Counsel's office regarding allegations that Agriculture Secretary Mike Espy had accepted gifts in violation of federal law.[300] Since the president asserted executive privilege, the court applied *Nixon,* explaining that communications must be made by presidential advisers who prepare advice for the president relating to a "quintessential and non-delegable Presidential power."[301] The *Espy* decision distinguished the presidential communications privilege based in the Constitution from another common law privilege—the deliberative process privilege.[302] The court described the low standard for overcoming the common law deliberative process privilege in judicial proceedings, noting that it "disappears altogether" when government misconduct is alleged.[303] The court did not have to rule on the deliberative process privilege claim, however, because it found that all of the documents withheld by the White House were subject to the constitutionally based presidential communications privilege.[304]

---

297. *Id.* (asserting that executive privilege "also protects attorney-client communications and attorney work product").

298. *Id.* (citing Assertion of Exec. Privilege Regarding White House Couns.'s Off. Documents, 20 Op. O.L.C. 2, 3 (1996)).

299. 121 F.3d 729 (D.C. Cir. 1997).

300. *Id.*

301. *Id.* at 745, 752–53, 757 (adding that the privilege applies to "communications which these advisers solicited and received from others as well as those they authored themselves," as well as those "authored or received in response to a solicitation by members of a presidential adviser's staff"); *see id.* at 752 ("Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.").

302. *Id.* at 745 ("The presidential privilege is rooted in constitutional separation of powers principles and the president's unique constitutional role; the deliberative process privilege is primarily a common law privilege.").

303. *Id.* at 746. The court emphasized that the privilege is routinely denied on the grounds that shielding government deliberations in this context does not serve the public interest in honest, effective government. *Id.* at 738 (quoting Texaco Puerto Rico, Inc. v. Dep't of Consumer Affs., 60 F.3d 867, 855 (1st Cir. 1995)); *In re* Subpoena Served Upon Comptroller of Currency, & Sec'y of Bd. of Governors of Fed. Rsrv. Sys., 967 F.2d 630, 634 (D.C. Cir. 1992) ("the privilege may be overridden where necessary . . . to 'shed light on alleged government malfeasance'") (quoting *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 582 (E.D.N.Y 1979)).

304. *In re Sealed Case*, 121 F.3d at 758.

One curious district court case has held that, although the deliberative process privilege originated in common law, it implicates constitutional separation of powers issues when asserted by the executive branch before Congress. In *Committee on Oversight and Government Reform v. Holder*, the Committee subpoenaed Justice Department documents relating to Operation Fast and Furious, in which federal agents allowed straw purchasers to transfer firearms into Mexico to track drug cartel leaders.[305] The court held that the Department had a constitutional basis to assert the deliberative process privilege before the Committee, but that it carries a lower threshold than the presidential communications privilege.[306] The court ultimately found that the privilege had to yield and ordered the Justice Department to produce many of the documents.[307] Although both parties disagreed with parts of the decision, they settled the case before any appellate ruling was issued.[308]

The legal basis for the ruling in *Holder* is questionable as it appears to misread *Espy* and omits a key case cited by the D.C. Circuit Court.[309] As a result, serious concerns have been raised about the decision.[310] Some have suggested that the *Holder* opinion offers a cautionary tale for future committees that act in ways that appear irresponsible, thereby increasing the risk that a court may strain to counter potentially abusive conduct.[311]

---

305. 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

306. Order Denying Summary Judgment at 3, Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. Aug. 20, 2014) (No. 1:12-cv-01332).

307. Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 106 (D.D.C. 2016) (No. 1:12-cv-01332).

308. Motion for Voluntary Dismissal with Prejudice, Comm. on Oversight & Gov't Reform v. Barr, No. 16-5078 (D.D.C. May 8, 2019); Order Granting Motion for Voluntary Dismissal, Comm. on Oversight & Gov't Reform v. Barr, No. 16-5078 (D.D.C. June 5, 2022).

309. The *Holder* opinion began by citing *In re Sealed Case,* which noted that the deliberative process privilege originated as a common law privilege that agencies frequently invoke in litigation under FOIA, which grants the executive branch an exemption to withhold certain deliberative materials from the public, but not from Congress. Order Denying Summary Judgment, *supra* note 306, at 1–2 (citing *In re Sealed Case*, 121 F.2d at 736–37). But the *Holder* court went on to hold that the privilege could be asserted before Congress, citing a footnote in *Espy* suggesting that asserting the deliberative process privilege could raise "constitutional separation of powers." *Id.* (citing *In re Sealed Case*, 121 F.2d at 737 n.4). However, the case cited in *In re Sealed Case*'s footnote—a case omitted in the *Holder* opinion—held that courts lack authority to second-guess adjudicative proceedings that Congress authorizes federal agencies to conduct. *Id.* (omitting citation to United States v. Morgan, 313 U.S. 409, 421–22 (1941)). The separation of powers concern in that case was that the judiciary may not intervene in determinations assigned by the legislature to the executive—not that the executive branch has a constitutional basis to withhold deliberative material from Congress. *Morgan*, 313 U.S. at 413, 422 (holding that "it was not the function *of the court* to probe the mental processes *of the Secretary*") (emphasis added) (internal citations omitted). The *Holder* court also seemed to disregard *In re Sealed Case's* warning that its opinion "should not be read as in any way affecting the scope of the privilege in the congressional-executive context." *In re Sealed Case,* 121 F.2d at 753.

310. *See, e.g.*, Bopp et al., *supra* note 17, at 20 (referring to court's "strained reading of Espy"); ROSENBERG, *supra* note 111, at 72–73.

311. At the time of the decision, there was widespread criticism of the Committee for not calling available witnesses to testify, including the Director of the Bureau of Alcohol, Tobacco, and Firearms,

To briefly recap these precedents, no court to date has indicated that the attorney-client privilege is anything but a common law privilege. Under Congress's Article I rulemaking authority and its inherent investigative power, committees have exercised discretion for many years to make their own determinations about whether to recognize the attorney-client privilege in their own proceedings. This is similar to the independent authority of states to determine the scope of the attorney-client and other non-constitutional privileges in their jurisdictions. For these reasons, federal courts historically have declined to interfere with the decisions of Congress or the states on these matters, and the Supreme Court has expressed great concern with courts reviewing congressional actions for anything other than constitutional deficiencies.

This is why Chief Justice Roberts's apparent suggestion in *Mazars*—that Congress must now recognize the common law attorney-client privilege developed by federal courts—raises such difficult questions. He did not identify a constitutional basis for applying the privilege to Congress, but referred to it as a common law privilege.[312] Under this theory, would the federal judiciary also have the ability to dictate to Congress "the full panoply" of other protections available in federal courts,[313] such as the right to call and cross-examine witnesses or object to hearsay,[314] regardless of whether there is a constitutional basis to extend them to Congress? Would states also be subject to the determinations of federal judges on non-constitutional privileges? And would federal agencies now be able to wall off the actions of *any* government attorney offering *any* legal advice as long

---

or adequately considering accommodations offered by the Department before going to court. *See, e.g.*, Editorial, *A Pointless Partisan Fight*, N.Y. TIMES (June 20, 2012), https://www.nytimes.com/2012/06/21/opinion/a-pointless-partisan-fight.html [https://perma.cc/KAS8-P5PY]; Juan Williams, *Darrell Issa's Fast and Furious Campaign Against Team Obama*, FOX NEWS (May 7, 2015, 12:04 AM), https://www.foxnews.com/opinion/2012/05/15/darrell-issa-fast-and-furious-campaign-against-team-obama/ [https://perma.cc/Y965-237S]; Ned Resnikoff, *Michael Steele on Issa's Contempt Vote for Holder: 'The Optics Are Not Good for the GOP,'* MSNBC (June 20, 2012, 12:58 PM), https://www.nbcnews.com/news/world/michael-steele-issas-contempt-vote-holder-optics-are-not-good-flna838126 [https://perma.cc/9R8T-M2LV]. Several minority ranking members, while expressing strong support for the Committee's authority to obtain information necessary to its legislative functions, nevertheless warned that the Committee was risking damage to its ability to conduct effective oversight by rushing to court. Memorandum Amici Curiae of Representatives Elijah E. Cummings, John Conyers, Jr., Henry A. Waxman, Edolphus Towns, & Louise M. Slaughter in Support of Dismissal at 1, 2, 8; Committee on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013).

312. *See, e.g.*, Trump v. Mazars, 140 S. Ct. 2019, 2032 (2020) (referring to attorney-client privilege as common law privilege).

313. Bopp et al., *supra* note 17, at 48.

314. *See, e.g.*, James Steiner-Dillon, *Why Hearsay Isn't a Problem for Congress in Impeachment Hearings*, CONVERSATION (Nov. 20, 2019, 1:51 PM), https://theconversation.com/why-hearsay-isnt-a-problem-for-congress-in-impeachment-hearings-127164 [https://perma.cc/GZ7L-UMXG]; FED. R. EVID. 802 (Rule Against Hearsay) (applying only to federal courts); *see also* Wright, *supra* note 42, at 461 (noting that hearsay is admissible in congressional hearings, but urging Congress to use its discretionary rulemaking power to provide "rebuttal or confrontation rights").

as it meets the common law standard, thereby shifting the balance of power even further towards the executive branch?[315]

Part III examines whether there may be another interpretation of the Chief Justice's sentence that comports with existing precedents without upsetting the constitutional balance of power.

III. ALTERNATIVE READING OF THE CHIEF JUSTICE'S POSITION IN *MAZARS*

Since the *Mazars* decision was issued, there have been various interpretations of Chief Justice Roberts's position on attorney-client privilege, including two from opposite ends of the spectrum: one argues that his sentence was nothing more than erroneous and ill-informed dictum, while the other argues that he intended to announce a sweeping change to the way Congress and courts historically have handled the attorney-client privilege. Adopting either of these theories could suggest a lack of respect by the Supreme Court for Congress as a co-equal branch of government—through inattention or intention. Either the Court failed to exercise due diligence in understanding how Congress works, or it intended to override decades of congressional precedent without explanation and impose its own judicially developed common law rules on the legislative branch.[316] After assessing these interpretations below, I offer evidence for an additional, more charitable reading that is consistent with separation of powers principles, congressional precedents, and judicial rulings.

Under the first interpretation, there is a strong argument that the Chief Justice's line in *Mazars* is simply irrelevant, inaccurate, and non-binding

---

315. Indeed, in the lead-up to the *Mazars* decision, Trump had already refused to recognize the legitimacy of any congressional requests he opposed, declaring on the White House lawn: "We're fighting all the subpoenas." Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html [https://perma.cc/Y236-3298]. He and his aides blocked the production of documents not only from his accounting firm, but from multiple agencies and the White House. *See, e.g.*, Elijah Cummings, Opinion, *The White House Hasn't Turned Over a Single Piece of Paper to My Committee*, WASH. POST (Mar. 19, 2019, 5:24 PM), https://www.washingtonpost.com/opinions/elijah-cummings-presidential-harassment-more-like-unprecedented-obstruction/2019/03/19/8382d0fc-4a6a-11e9-b79a-961983b7e0cd story.html [https://perma.cc/RFK3-G936]. Trump's actions intensified through the first impeachment inquiry, directing all federal agencies and employees to withhold all documents and testimony even as Congress's authority to compel information was at its zenith, leading the House to pass a second article of impeachment for Obstruction of Congress. Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019); H. PERMANENT SELECT COMM. INTELL., THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REP., H.R. REP. NO. 116-335, at 216 (2019) (prepared in consultation with the House Committee on Oversight & Reform and the House Committee on Foreign Affairs).

316. Josh Chafetz's analysis of *Mazars* makes a similar criticism about the Court's decision on the merits, asserting that it is continuing a trend begun with the Nixon cases of "aggrandizing judicial institutions at the expense of Congress" and selling "an exalted view of judicial process, coupled with a degraded view of congressional process"). Chafetz, *supra* note 17, at 128, 139, 144.

dictum.[317] Trump was not relying on the attorney-client privilege before the Court, so it was not at issue or addressed by the parties, and there are "grave doubts" about whether the Constitution requires congressional committees to recognize common law privileges.[318] Under this theory, it is possible that the Chief Justice was unfamiliar with the historical congressional precedents discussed above, so he carelessly combined the common law and constitutional privileges together. Admittedly, the idea of committees ruling on assertions of attorney-client privilege may be a foreign concept for attorneys and judges who worked in the executive branch and now practice primarily before, and within, the judicial branch.[319] As some have argued, the fact that seven Justices previously held high-level positions in the executive branch may have predisposed them to make assumptions about congressional practice that are incorrect.[320] In any case, erroneous dicta has "staying power" and should be corrected, as the author of the 2003 CRS report cited by the Chief Justice has warned.[321]

A second possibility is that Chief Justice Roberts meant to assert that courts should impose their own determinations regarding claims of common law attorney-client privilege onto congressional committees. As some commentators have noted, subpoena recipients are more likely to litigate attorney-client privilege assertions in court "now that the highest court in the land has endorsed the applicability of common law privileges as defenses to congressional subpoenas."[322] Prior to the *Mazars* decision, practitioners routinely advised their clients that it was up to committees—not federal judges—to decide whether to recognize the attorney-client

317. *See, e.g.*, Michael Stern, *Mazars and Common Law Privileges Before Congress*, POINT OF ORDER (July 10, 2020), https://www.pointoforder.com/2020/07/10/mazars-and-common-law-privileges-before-congress/ [https://perma.cc/JB69-6QBU] ("Congress has long asserted that it is not obligated to respect common law privileges such as the attorney-client privilege," and "the Supreme Court's poorly researched dicta on this point should not be given any weight.").

318. THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.4.3 (noting that it is "debatable how much weight should be attached" to the Chief Justice's statement since "it is technically dictum," and adding that "[i]f the Congress possesses the greater power to completely preclude judicial recognition of privileges, it would seem to follow that it may also assert the lesser power to disregard such privileges in its own investigations").

319. *See, e.g.*, Hamilton, *supra* note 17, at 3 ("Many lawyers, good and bad, are mystified as to how a congressional investigation works. They don't know what powers Congress has; they don't know what the limitations are on those powers.").

320. David Janovsky & Sarah Turberville, *Congress Needs to Reclaim Its Time from the Courts*, PROJECT ON GOVERNMENT OVERSIGHT (Nov. 18, 2020), https://www.pogo.org/analysis/2020/11/congress-needs-to-reclaim-its-time-from-the-courts [https://perma.cc/YMB2-J5D4] (noting that of these seven Justices, six held positions in the White House or at the Justice Department).

321. Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 149 (2016) (asserting that the "responsible step for the Supreme Court is to revisit the mistake and correct it").

322. Bopp et al., *supra* note 17, at 48.

privilege.[323] Since the *Mazars* decision was issued, practitioners have been looking forward to taking advantage of the Chief Justice's sentence to benefit their clients.[324] Attorneys now cite the line in *Mazars* to try to withhold attorney-client information from committees, and committees continue to insist that it is within their prerogative to determine whether to accept assertions of non-constitutional privileges.[325] Although there is little evidence that the Chief Justice meant to announce such a sweeping change with so little fanfare, even parties who would benefit from this interpretation acknowledge that the line is not binding on lower courts.[326]

As an aside, it is also possible that the Chief Justice meant to do nothing more than reflect that witnesses may *assert* the attorney-client privilege, while leaving unsaid the distinction that *committees* are normally the final arbiters for common law privileges and *courts* have the final say for constitutional privileges. This appears to be how CRS interprets the Chief Justice's sentence in its most recent Congressional Oversight Manual.[327]

---

323. *See, e.g.*, Damelin & Gary, *supra* note 218 ("In light of the strong constitutional underpinnings of Congress's investigatory power, a congressional committee's recognition of the common law attorney-client privilege, which has no constitutional foundation, likely will rest within the sound discretion of the respective committee.").

324. Robert Kelner & Perrin Cooke, *The Supreme Court's Mazars Decision Contains a Significant Suggestion That Congress May Be Bound by the Attorney-Client Privilege in Congressional Investigations*, INSIDE POL. L. (July 9, 2020), https://www.insidepoliticallaw.com/2020/07/09/the-supreme-courts-mazars-decision-contains-a-significant-suggestion-that-congress-may-be-bound-by-the-attorney-client-privilege-in-congressional-investigations/ [https://perma.cc/3PLU-UWQK] ("[T]he Court's approving recognition of the view that the privilege does apply to Congress will surely prove helpful to parties fighting efforts by congressional investigators to compel disclosure of privileged material."); Andrew Wright, *Supreme Court's Trump v. Mazars Ruling Gave Attorney-Client Privilege a Boost in Congress*, JUST SEC. (Aug. 12, 2020), https://www.justsecurity.org/71970/supreme-courts-trump-v-mazars-ruling-gave-attorney-client-privilege-a-boost-in-congress/ [https://perma.cc/24GJ-5427] ("[T]hose of us in private practice that assist parties in investigations will make great use of that language whenever privilege issues arise.").

325. For example, during a recent investigation by the House Committee on Oversight and Reform into allegations from dozens of Washington Commanders employees regarding toxic workplace conditions, an attorney for one deponent asserted that the "recent Supreme Court precedent from Mazars . . . clearly established this through dicta that there is recognized attorney-client privileges within congressional investigations." HOUSE COMM. ON OVERSIGHT & REFORM, Deposition of Brian Lafemina (Mar. 30, 2022), at 203. The Committee's position remained unchanged, noting that the House of Representatives and the Committee "do not recognize any common-law nondisclosure privileges, including . . . attorney-client privilege." *Id.* at 9; *see also id.* at 206–09. After suspending the deposition to allow the deponent to consult further with the Commanders, the witness withdrew the attorney-client privilege assertion and answered the Committee's questions. HOUSE COMM. ON OVERSIGHT & REFORM, Supplemental Deposition of Brian Lafemina (Apr. 8, 2022), at 6–24.

326. Kelner & Cooke, *supra* note 324 ("Of course, the question of the applicability of the attorney-client privilege to congressional investigations was not squarely before the Court in *Mazars*, and the Court's brief aside on this subject may be easily cast as dicta."); Wright, *supra* note 324 (acknowledging that the line is "classic dicta").

327. CRS CONGRESSIONAL OVERSIGHT MANUAL, *supra* note 93, at 62–63 (noting that while the Chief Justice's line is unclear, he "did not go so far as to state that common-law privileges can be used to shield information from Congress," and the line "only suggests that witnesses have been 'understood' to 'retain' certain common-law privileges," which may be a reference to the fact that "committees at times choose to recognize and accept common-law privileges, especially the attorney-client privilege").

Another interpretation which, to my knowledge, has not been explored, is that recipients of congressional subpoenas who are compelled to produce information to Congress retain their right to assert the attorney-client privilege *in other venues*. In other words, complying with mandatory demands from Congress does not constitute a general waiver of the privilege in separate judicial proceedings that may involve the same parties or underlying facts, but are distinct from a committee's investigation. To be clear, this interpretation refers to involuntary disclosures compelled by Congress. Practitioners warn their clients not to voluntarily produce privileged documents on the theory that a committee later may compel them because this will "compound the waiver problem."[328] Practitioners also warn clients that voluntary disclosures may give rise to inconsistent resolutions under the selective waiver doctrine.[329] Under this alternative interpretation, whether the privilege ultimately applies in separate proceedings is not guaranteed, but is decided by courts based on various factual and legal determinations.[330]

There is compelling evidence for this alternative reading. Consider the sole source for the Chief Justice's assertion: the 2003 CRS report.[331] In the section of that report cited by the Chief Justice, CRS describes a famous investigation conducted by the Senate Whitewater Committee in 1995 that focused on a key concern expressed by the White House, which was that complying with the Committee's subpoena could risk a general waiver of the privilege in other proceedings.[332] The CRS report describes notes taken by Associate White House Counsel William Kennedy during a meeting with

---

328. AM. COLL. OF TRIAL LAWS., *supra* note 73, at 12 (2010).

329. *See, e.g.*, Bopp & Lay, *supra* note 75, at 924–25 (noting split among circuits). In addition, Congress passed legislation in 2008 to adopt Federal Rule of Evidence 502, which provides that a disclosure to a federal office or agency that waives the attorney-client privilege does not extend to undisclosed information on the same subject unless the waiver was intentional and both the disclosed and undisclosed information "ought in fairness to be considered together." Pub. L. No. 110–322 § 1(a), 122 Stat. 3537 (Sept. 19, 2008).

330. These may include whether witnesses properly preserved the privilege before Congress by taking sufficient steps to resist subpoenas, whether the privilege is available in different civil and criminal contexts, or whether the conduct of attorneys falls under the crime-fraud or other exceptions. For information that is made public by government agencies or Congress, courts apply evidentiary rules to determine its admissibility in separate proceedings. *See, e.g.*, FED. R. EVID. 803(8) (public records exception to hearsay rule); Ponce v. Constr. Laborers Pension Tr. for S. Cal., 774 F.2d 1401, 1403 (9th Cir. 1985) (Senate report admissible to corroborate evidence for expert testimony), *cert. denied*, 479 U.S. 890 (1986); Bright v. Firestone Tire & Rubber Co., 756 F.2d 19, 22–23 (6th Cir. 1984) (House report not admissible for subjective conclusions rather than factual findings); Barry v. Trs. of Int'l Ass'n Full-Time Salaried Officers & Emps. of Outside Loc. Unions & Dist. Couns.'s (Iron Workers) Pension Plan, 467 F. Supp. 2d 91, 97, 101 (2006) (D.D.C. 2006) (Senate report admissible, but House report inadmissible, based on four non-exhaustive factors for public records exception to hearsay rule) (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 n.11 (1988)).

331. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (citing 2003 CRS REPORT, *supra* note 5, at 16–18)

332. 2003 CRS REPORT, *supra* note 5, at 16–18.

the President's private attorneys over which the President invoked the attorney-client privilege.[333] The White House sent a letter to the Committee stating: "all we need is an assurance that *other investigative bodies* will not use this as an excuse to deny the President the right to lawyer confidentiality that all Americans enjoy."[334] According to the CRS report, this was consistent with the Committee's view, which Chairman Alfonse D'Amato was willing to put in writing.[335] Similarly, the Chairman of the House Banking Committee, Rep. Jim Leach, announced that the House would not try to assert that the President's compliance with this mandatory congressional demand would constitute a general waiver in other proceedings.[336]

In a separate part of the *Mazars* opinion, Chief Justice Roberts provided his own summary of this dispute, and he highlighted how the Senate Whitewater Committee in fact *obtained* the attorney-client information after resolving the White House's waiver concern.[337] The White House would have had little incentive to negotiate this resolution if it could have claimed that the attorney-client privilege applies before Congress as a matter of right.

This alternative interpretation is even more convincing in light of the contempt report adopted by the Senate Whitewater Committee, which also makes clear that the principal concern was whether the White House would waive the privilege *in other proceedings* if it complied with the Committee's subpoena.[338] The contempt report notes that the White House offered to produce the notes if the Committee agreed to several conditions,

---

333. *Id.*

334. *Id.* at 18 (citing 141 CONG. REC. 37730 (1995)) (emphasis added).

335. *Id.* at 17 (agreeing to "send a letter saying we do not feel that there would be any waiver of any privilege, that the administration's turning over the notes would not be deemed a waiver in our eyes").

336. *Id.* at 18 (citing Susan Schmidt, *Whitewater Notes Being Surrendered*, WASH. POST, Dec. 22, 1995, at A1; Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. ROUNDTABLE at 189–93). A year after Louis Fisher authored the 2003 CRS report, he published a book providing even more information, including an additional quote from Chairman Leach stating: "It is well-established by congressional precedent and practice that acceptance of a claim of attorney-client privilege rests in the sole and sound discretion of Congress, and cannot be asserted as a matter of right." LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 106 (2004).

337. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2030–31 (2020) ("Eventually the parties reached an agreement, whereby President Clinton avoided the threatened suit, agreed to turn over the notes, and obtained the Senate's concession that he had not waived any privileges.") (citing S. REP. NO. 104-204, at 16–17 (1996); 2003 CRS REPORT, *supra* note 5, at 16–18).

338. COMM. ON BANKING, HOUSING, AND URBAN AFFS., REP. ON REFUSAL OF WILLIAM H. KENNEDY, III, TO PRODUCE NOTES SUBPOENAED BY THE SPEC. COMM. TO INVESTIGATE WHITEWATER DEVELOPMENT CORP. AND RELATED MATTERS, S. REP. NO. 104-191 (1995). The minority members of the Committee agreed, writing that the "White House letter made clear that its principal concern remained the waiver issue" and that "the principal issue remaining is the risk that producing the Kennedy notes to the Special Committee might be construed as a general waiver of the attorney-client privilege." *Id.* at 24, 27.

including acknowledging that the meeting was privileged and that no privileges had been waived.[339] The Committee refused to recognize the meeting as privileged, but agreed that producing the notes would not constitute a waiver in other proceedings.[340] The contempt report observes that a congressional subpoena, like a court order, is compulsory and that compelled disclosures do not result in waivers.[341] Highlighting Congress's discretionary power to recognize claims of attorney-client privilege,[342] the report concludes that failing to honor Congress's authority in this regard effectively would have blocked it from receiving the information and shut down negotiations before they started.[343]

On December 20, 1995, the full Senate voted to confirm the Committee's decision to reject the assertion of attorney-client privilege in this case.[344] During debate on the Senate floor, Senator Orrin Hatch, then the Chair of the Judiciary Committee, explained his support for the resolution and gave a thorough recitation of Congress's constitutional authority to rule on assertions of attorney-client privilege. Since Chief Justice Roberts pointed to this specific investigation as support for his sentence in *Mazars,* Chairman Hatch's statement is worth quoting in detail:

> As chairman of the Judiciary Committee, I see it as my duty to defend the prerogatives of the executive branch and the separation of powers. Indeed, I recognize that the executive branch has a right to confidential communications regarding its core functions. After giving this issue careful thought and consideration, however, I have decided that enforcing the subpoena is the proper course of action to take. This issue transcends claims of partisanship and goes to the very

339. *Id.* at 8. This report also noted that "Counsel for the President and Mrs. Clinton and the White House have expressed the concern that disclosure of the Kennedy notes would result in a broad waiver of the attorney-client privilege." *Id.* at 9.

340. *Id.*

341. *Id.* at 9–10 (noting that "an order from a congressional committee is no less compulsory than an order from a court," and "courts have recognized that disclosure of documents in response to a court order is compelled, not voluntary, and, therefore, that such disclosure does not function as a waiver against future assertions of privilege") (citing Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1427 n.14 (3d. Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214, 1221–22 (D.C. Cir. 1981); MODEL CODE OF PRO. RESP. DR 4-101(C)(2) (AM. BAR ASS'N 1980) ("A lawyer may reveal: . . . [c]onfidences of secrets when . . . required by law or court order.")).

342. *Id.* at 11 (citations omitted) ("It is within the sound discretion of Congress to decide whether to accept a claim of attorney-client privilege. . . . Unlike some other testimonial privileges, such as the privilege against compulsory self-incrimination, . . . the attorney-client privilege itself is not rooted in the Constitution. . . . Rather, the attorney-client privilege is a product of the common law and is observed in federal courts by virtue of the Federal Rules of Evidence . . . . ") (citations omitted).

343. *Id.* at 14 (noting that requiring the common law privilege to apply before Congress "would give the Executive Branch the power substantially to impair the Congress's ability to perform its constitutional responsibility to "probe[] into departments of the Federal Government to expose corruption, inefficiency or waste" (citing Watkins v. United States, 354 U.S. 178, 184 (1957)).

344. Record Vote 610, S. Res. 199, 104th Cong. (1995).

> constitutional authority of Congress to investigate wrongdoing at the highest levels of Government.
>
> The Senate has a constitutional obligation to conduct oversight hearings. It is a duty we must not surrender. . . .
>
> [T]he President not only claims that the November 5 Whitewater meeting is cloaked in attorney-client privilege, but that the privilege applies against Congress. No Congress in history, however, has recognized the existence of a common-law privilege that trumps the constitutionally authorized investigatory powers of Congress. While Congress has chosen, as a matter of discretion, to permit clear, legitimate claims of privilege, it has never allowed its constitutional authority to investigate wrongdoing in the executive branch to be undermined by universal recognition of the attorney-client privilege. As Senator Sarbanes has noted, we have chosen, in our discretion, to recognize the privilege with respect to some of the witnesses who have testified before the Committee.
>
> The attorney-client privilege exists as only a narrow exception to broad rules of disclosure. And the privilege exists only as a statutory creation, or by operation of State common law. No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules. As the Clerk of the House stated in a memorandum opinion in 1985: "attorney-client privilege cannot be claimed as a matter of right before a congressional committee." The attorney-client privilege is a rule of evidence that generally applies only in court; it does not apply to Congress which, under article I, section 5 of the Constitution, has the sole authority to "determine the Rules of its Proceedings."[345]

Two days later, the White House turned over the attorney-client documents, and front-page news accounts noted how the waiver issue had been successfully resolved.[346] According to a report issued by the Senate Whitewater Committee the following month—which is also cited by the

345. 141 CONG. REC. S18961-62 (daily ed. Dec. 20, 1995) (citations omitted).

346. *See, e.g.*, Susan Schmidt, *Whitewater Notes Being Surrendered*, WASH. POST, Dec. 22, 1995, at A1 ("After a dramatic Senate vote Wednesday to enforce a subpoena for the notes, White House lawyers agreed to terms set by House Banking and Financial Services Committee Chairman Jim Leach (R-Iowa) stating that the House would not try to assert later that the president had waived his attorney-client privilege. A White House spokesman said the material would be released today to the Senate Whitewater committee and the media.").

Chief Justice in *Mazars*—the notes turned out to be highly relevant and identified "numerous investigative avenues for the Committee."[347]

To take a step back, the specific investigation highlighted by the Chief Justice to support his assertion in *Mazars* is one in which Congress: (1) overruled an assertion of attorney-client privilege by a sitting president over documents prepared by his chief attorneys; (2) asserted its own power under the Constitution to successfully obtain the privileged information under threat of contempt; and (3) confirmed its view that the President's compliance with its mandatory subpoena, after raising all available objections, did not waive the privilege in separate proceedings.

Why would the Chief Justice hold up this particular investigation? If he meant to suggest a broad consensus that courts could overrule committee determinations, there is no such consensus, as the Whitewater investigation and many others clearly demonstrate. If he intended to cite Congress's own research arm in support of that consensus, that claim also would have been inaccurate since CRS has issued numerous reports, including its Congressional Oversight Manual and many others, reflecting the opposite position. And if he was suggesting that this has been the longstanding position of the federal judiciary, he did not cite a single court ruling to support that interpretation. In contrast, this alternative interpretation—that recipients of congressional subpoenas retain the right to assert common law privileges in other fora—directly aligns with the specific congressional investigation the Chief Justice highlighted (the Senate Whitewater investigation), is consistent with the only source he cited (the 2003 CRS report), and comports with separation of powers principles, congressional oversight precedents, and judicial rulings.

Interestingly, when the D.C. Circuit Court rejected Trump's claim of executive privilege before the January 6 Committee, it included in its opinion a recounting of the Chief Justice's discussion in *Mazars* on the general scope of Congress's investigative power.[348] The opinion also repeated the Chief Justice's line regarding privileges, but it inserted new text in brackets, stating that recipients of congressional subpoenas "have long been understood [by the courts] to retain common law and constitutional privileges."[349] Some might see this as an attempt to retroactively distinguish the large body of congressional precedent that appears to contradict the line in *Mazars*, but the D.C. Circuit Court still

347. SPEC. COMM. TO INVESTIGATE WHITEWATER DEV. CORP. AND RELATED MATTERS, PROGRESS OF THE INVESTIGATION INTO WHITEWATER DEV. CORP. AND RELATED MATTERS AND RECOMMENDATION FOR FUTURE FUNDING, S. REP. NO. 104-204, 17 (1996) (cited in Trump v. Mazars, 140 S. Ct. 2019, 2030–31 (2020) (noting that President Clinton "had not waived any privileges")).

348. Trump v. Thompson, 20 F.4th 10, 24–25 (D.C. Cir. 2021) (citing *Mazars*, 140 S. Ct. at 2031–36).

349. *Id.* at 25.

included no judicial precedents to support its position. Instead, this additional bracketed text also could be read as consistent with the alternative interpretation, clarifying that courts continue to entertain assertions of attorney-client privilege in separate litigation as they defer to congressional committees to make their own determinations.

Admittedly, this alternative reading requires a bit of parsing. The sentence by Chief Justice Roberts includes two parallel citations—one for common law privileges including the attorney-client privilege and one for constitutional privileges—without distinguishing that committees make final decisions over the first and courts make final decisions over the second. Yet, the sentence does recognize the distinct derivations of the two types of privileges, and it explicitly acknowledges that the attorney-client privilege is based in common law. In any case, the Court clearly does not impute constitutional origins to a formerly common law privilege in the *Mazars* case.[350]

If federal courts were charged with reexamining all committee decisions relating to attorney-client privilege claims, they would be bound to examine only whether the common law elements of the privilege were met, without considering Congress's broader legislative objectives. Courts might be inclined to develop a balancing test to weigh the interests served by the attorney-client privilege against Congress's legislative purposes, but they would not be balancing two competing *constitutional* powers, as they did with Congress's investigative power and the presidential communications privilege in *Senate Select Committee v. Nixon* and *Trump v. Thompson*. Instead, courts would be weighing Congress's constitutional investigative power against the non-constitutional, common law attorney-client privilege.

I recognize the possibility that a court in the future could break new ground and find that the attorney-client privilege, despite historically being recognized as a common law privilege, implicates constitutional interests in certain narrow circumstances. In such a case, it then would be incumbent on a court to employ the type of balancing test described above for competing *constitutional* powers. After determining that the privilege applies by assessing its common law elements, the court would be obliged to weigh the interests served by the privilege against Congress's constitutional need for the information. This balancing approach would mirror the approach used for executive privilege, which is referenced in the

350. This distinction is further supported by the sentence immediately preceding the Chief Justice's line, which states that recipients of congressional subpoenas "retain their constitutional rights throughout the course of an investigation." *Mazars*, 140 S. Ct. at 2032 (citing Watkins v. United States, 354 U.S. 178, 188, 198 (1957)). This sentence includes no reference to witnesses retaining their common law privileges throughout the course of congressional investigations.

other half of the Chief Justice's sentence in *Mazars*.[351] Moreover, if a court determines in a particular case that Congress has made a sufficient showing to overcome the constitutionally based executive privilege, that showing also should be sufficient to overcome the attorney-client privilege in the same or a related case.

CONCLUSION

Congress is charged with investigating private sector activities and government operations to inform its responsibilities under the Constitution. In limited circumstances, Congress has determined that fulfilling these core duties requires an examination of communications between attorneys and their clients. Because the attorney-client privilege is not based in the Constitution, it is up to Congress to determine for itself whether it will be recognized in committee proceedings. The judicial branch historically has examined whether congressional subpoenas meet constitutional requirements, but courts have refrained from imposing their own common law procedures onto Congress when constitutional protections are not implicated.

This is not a novel argument being put forth in the wake of the assault on the nation's democratic institutions by Donald Trump and his attorneys. It has been the longstanding position of committee chairs of both political parties. In addition to being asserted by Democratic investigative stalwarts, such as John Dingell, Henry Waxman, Elijah Cummings, and Sam Nunn, this position has been championed by Republicans in the House, including Reps. Porter Goss, Jeb Henserling, Jim Leach, Thomas Bliley, and Jason Chaffetz, and in the Senate, including Senator D'Amato, the Chair of the Senate Whitewater Committee, and Senator Hatch, the Chair of the Senate Judiciary Committee, in the specific investigation highlighted by Chief Justice Roberts in *Mazars*.

The Supreme Court has correctly identified grave concerns with federal courts going down the road of attempting to evaluate the wisdom of congressional procedures rather their constitutional validity. Separation of powers principles militate against such judicial interference, particularly since Article I includes an explicit grant of rulemaking authority to Congress. Absent the consent of Congress, the imposition of the judicial branch's attorney-client privilege onto the legislative branch would directly contravene this admonition and impermissibly replace the judgments of congressional committees with those of federal judges with no constitutional predicate.

---

351. *Mazars*, 140 S. Ct. at 2032.