House Rules: Congress and the Attorney-Client Privilege

100 Wash. U.L. Rev. 455 (2022)

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May 16, 2023
North Star: Familiarize academics, courts, and others with the principle that Congress makes its own decisions on common law privileges.

Topline Points:

1. Congress is not required to recognize the common law attorney-client privilege, but it may do so if it chooses.

2. There is no support for this position in separation of powers principles, congressional precedent, or case law.

3. Alternative reading—witnesses don’t waive common law privileges in other fora when they comply with 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.”

Citations


2. Constitutional (Executive Privilege):

Is Congress required to recognize the common law attorney-client privilege?

1. Separation of Powers Principles
2. Congressional Oversight Precedents
3. Judicial Rulings
Is Congress required to recognize the common law attorney-client privilege?

Committees are not required to recognize common law privileges, but they may do so if they choose.

The attorney-client privilege is one of the oldest in common law, but there is no precedent indicating it has a constitutional basis.

Committees respect the policy interests underlying the privilege and routinely use their discretion to recognize it.

Committees safeguard their authority to overcome the privilege if necessary to fulfill their responsibilities under the Constitution.
Separation of Powers Principles

The Constitution gives Congress the power to investigate.

The Constitution gives the House and Senate power to set their own rules (art. I, § 5, cl. 2).

Through their rules, both the House and Senate have delegated investigative powers to their committees.

Both Houses have rejected proposals to require committees to recognize common law privileges—instead allowing chairs to continue ruling on those assertions.
Congressional Oversight Precedents
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Hearing Records
Demand Letters to Witnesses
Staff Reports
Committee Reports
Committee Rules
Instructions to Subpoena Recipients
Contempt Citations and Reports
Congressional Legal Office Opinions
Floor Speeches by Members
2017: “Recognitions of non-constitutionally based privileges, such as attorney-client privilege, is a matter of congressional discretion.”

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.”

2007: “[I]t is the congressional committee alone that determines whether to accept a claim of attorney-client privilege.”

1995: “[T]he 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.”
Four Examples—House Oversight Committee

• 2007—Wartime Contractors in Iraq
  (Chairman Waxman—Blackwater USA)

• 2008 Financial Crisis—Use of $20 Billion in Taxpayer Funds
  (Chairman Towns—Bank of America)

• 2015-2018—Protection of Federal Whistleblowers
  (Chairman Chaffetz—TSA)

• 2019-2022—False Rationale for Census Citizenship Question
  (Chairman Cummings—DOJ and Commerce)
Judicial Precedents

There’s no judicial precedent indicating the attorney-client privilege has a constitutional basis or that Congress is required to recognize it.

The attorney-client privilege has always been a privilege developed by judges based on the common law.

Federal courts have been extremely reticent to impose their own judicially developed procedures onto Congress—except to preserve constitutional protections.

Federal courts have respected Congress’ constitutional authority to obtain attorney-client information—and have used the Speech or Debate Clause to dismiss suits challenging Congress’s authority.
Courts Refuse to Rule on A/C Privilege in Congress

O&I Subcommittee, House Interstate and Foreign Commerce Committee, sought attorney-client information from Westinghouse in investigation of international uranium price fixing. Gulf Oil sought injunction. D.C. District Court refused, citing Speech or Debate Clause.

In re Provident Life & Accident Ins. Co. (E.D. Tenn. 1990)
Senate PSI sought attorney-client information from employee of Provident regarding abuses in Medicare Secondary Payer Program. Provident sought injunction. Court refused, citing Speech or Debate Clause, and distinguished previous ruling that didn’t involve Congress: “That ruling, which is not of constitutional dimensions, is certainly not binding on the Congress of the United States.”
“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.”

Witnesses retain common law and constitutional privileges in other fora and don’t waive these privileges by complying with Congress’ subpoenas.

- The *Mazars* opinion cited pp. 16-18 of the 2003 CRS Report, which described the Senate Whitewater Investigation, the waiver issue, and the President’s concern about “other investigative bodies.”
- The *Mazars* opinion separately discussed how the Senate in fact obtained the attorney-client information after the President was assured that “he had not waived any privileges.”
- The Senate contempt report also highlighted that the main obstacle to resolving the attorney-client impasse was the waiver issue.
Privilege Issue Was Front-Page News
Why Highlight the Whitewater Investigation?

• Congress overruled the assertion of attorney-client privilege by a sitting President.

• Congress did so by asserting its own power under the Constitution to conduct investigations and establish its own rules.

• Congress actually obtained the attorney-client information after clarifying that witnesses don’t waive the privilege in other fora when they comply with mandatory subpoenas from Congress.
Thank you!