

House Rules: Congress and the Attorney-Client Privilege

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

Dave Rapallo
Associate Professor
Director, Federal Legislation Clinic
Georgetown University Law Center

Levin Center for
Oversight and Democracy
Wayne State University Law School
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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.”

Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020).

Citations

1. Common Law (Attorney-Client Privilege):

Louis Fisher, Congressional Research Service,
*Congressional Investigations: Subpoenas and
Contempt Power* 16–18 (2003).

2. Constitutional (Executive Privilege):

*Senate Select Comm. on Pres. Campaign Activities v.
Nixon*, 498 F.2d 725, 730–731 (D.C. Cir. 1974).

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

CRS Reports—Congress’s Research Arm

2017: “[R]ecognition 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

Gulf Oil Corp. v. Westinghouse Elec. Corp. (D.D.C. 1977)

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."

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Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020).

Alternative Interpretation of Line in *Mazars*

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.

Weather

Today: Partly sunny, windy, cold, burries. High 40. Low 28. Wind northwest 15-30 mph.
Saturday: Partly sunny, chilly. High 44. Low 28. Wind 12-25 mph.
Yesterday: Temp. range: 23-36. Wind chill: 5. Details on Page B2.

The Washington Post

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FRIDAY, DECEMBER 22, 1995

Price
Metro

Whitewater Notes Being Surrendered

White House Ends Standoff With Hill

By Susan Schmidt
Washington Post Staff Writer

The Clinton White House agreed last night to drop its defiance of a congressional subpoena and turn over disputed Whitewater notes, defusing a politically charged constitutional standoff that had been headed for the courts.

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.



Chances Dim for End of S As House Republicans Sta

By John F. Harris and Stephen Barr
Washington Post Staff Writers

President Clinton is set to meet with his congressional foes at the White House this morning on the budget impasse. But prospects for ending the partial government shutdown before Christmas were imperiled by the continued opposition of House Republicans to any deal that does not include a long-term plan to balance the budget.

The human effect of the shutdown, setting a new record as it stretched into its seventh day, is about to rise considerably. The 500,000 federal employees at work in agencies without funding will likely receive only a half-month's pay unless an interim spending measure is approved today, budget officials said. Checks to some 13 million welfare recipients could also be delayed unless there is action today.

After the blowup of the budget talks Wednesday, a delicate, mostly behind-the-scenes effort was underway yesterday to start anew. White House Chief of Staff Leon E. Panetta spent much of the day meeting with GOP leaders on Capitol Hill in talks that both sides last night termed "constructive."

While the negotiators skirted such key issues as Medicare revisions and a tax cut Republicans want, they reached tentative agreement to cut an estimated \$30 billion to \$35 billion from banking, energy, transportation and veterans programs and civil service benefits, sources close to the negotiations said.

Following a new proposal yesterday from a bipartisan group in the Senate, there are now at least four different balanced budget proposals on the table. But most of the

Internal P Limit Ma

By
Washing

A liberal Democrat talks to blow up, insisting Clinton had little to compromise with the Republicans. He stood up to the Republicans, his public approval time he

NEWS ANALYSIS
publican within h

very identity as a Democrat.

For their part, Clinton has little reason for their ground with Clinton. "the hook?" one conservative said. "We campaigned on a platform and won the Congress. We compromise on that. We lose."

While the Clinton White House congressional leaders

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!