

6. Common Law Privileges Available in Court Do Not Shield Witnesses from Complying with Committee Information Demands

Overview

In court proceedings, there are a variety of “testimonial privileges” recognized by our legal system that enable witnesses to refuse to testify on certain subjects or about conversations with particular people. The most common of these is the attorney-client privilege, which protects conversations between lawyer and client as secret, and thus allows people to seek legal advice in confidence. In congressional proceedings, a committee may determine, on a case-by-case basis, whether to accept common law testimonial privileges. It can deny a witness’s request to invoke privilege when the committee concludes it needs the information sought to accomplish its legislative functions.¹ In practice, however, congressional committees have followed the courts’ guidance in assessing the validity of a common law privilege claim.

Examples of common law testimonial privileges include the attorney-client, work-product, and deliberative process privileges. The application of each of these doctrines in congressional hearings is discussed below.

A. The Attorney-Client Privilege and Work-Product Doctrine

1. Defining the Attorney-Client Privilege and the Work-Product Doctrine

As noted above, the attorney-client privilege enables people to seek confidential legal advice by protecting the secrecy of conversations between attorney and client. To prove that the attorney-client privilege should apply, the person claiming the privilege must establish: (1) a communication, (2) made in confidence, (3) to an attorney, (4) by a client, and (5) for the purpose of seeking or obtaining legal advice.² The party asserting attorney-client privilege has the burden of conclusively proving each element,³ and courts strongly disfavor blanket assertions of the privilege⁴ as “unacceptable.”⁵ In addition, the mere fact that an individual communicates with an attorney does not make the communication privileged.⁶

Courts have consistently emphasized that one of the essential elements of the attorney-client privilege is that the attorney

1. Glenn A. Beard, *Congress v. The Attorney-Client Privilege: A ‘Full and Frank’ Discussion*, 35 AM. CRIM. L. REV., 119 (1997); MORTON ROSENBERG, CONG. RESEARCH SERV., 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE, AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995).

2. *See, e.g.*, 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed 1964); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

3. *See, e.g.*, *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450-51 (6th Cir. 1983).

4. *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (“A blanket claim of privilege that does not specify what information is protected will not suffice.”).

5. *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 682 (D.D.C. 1981).

6. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (rejecting applicability of common interest doctrine to communications at a meeting with white house counsel’s office attorneys and private attorneys for the first lady).

be acting as an attorney and that the communication be made to secure legal services. The privilege, therefore, does not apply to legal advice given by an attorney acting outside the scope of his or her role as attorney.⁷ The courts, when determining the underlying purpose of a communication, will take into account the difference between *outside* counsel retained with limited responsibilities to a corporate client and *in-house* counsel who have duties to provide both business and legal advice.⁸ Courts have also invited privilege logs as an acceptable means of establishing a valid claim of privilege, but such logs must be sufficiently detailed and specific in their description to prove each element of the claimed privilege.⁹

The work-product doctrine is a related concept that protects the confidentiality of certain documents created by an attorney as part of his or her representation of a client. The doctrine was recognized by the Supreme Court in 1947,¹⁰ and codified as Rule 26(b)(3) of the Federal Rules of Civil Procedure, and grants limited immunity to an attorney's work product from requests for disclosure. The rule allows for qualified immunity from civil discovery when the materials are: 1) "documents or tangible things," 2) "prepared in anticipation of litigation or trial," and 3) "by or for another party or for that other party's representative." To overcome the privilege, the party seeking the materials must show a substantial need and an inability to obtain the substantial equivalent without undue hardship.

On its face, the definition would not apply to Congress, which is not a court or administrative tribunal, or to a congressional investigative hearing, which does not afford witnesses the same discovery rights afforded during litigation in court. No court has held that the work-product doctrine applies to a legislative hearing, and pertinent federal court rulings support the proposition that it does not apply.¹¹

2. Legal Basis for Denying Attorney-Client and Work-Product Privilege Claims

Other than private persons, entities that often invoke claims of common law privilege include departments and agencies, the White House, and private organizations. However, their assertion of privilege does not necessarily provide a shield from congressional inquiry.

The legal basis for Congress's right to refuse to recognize assertions of attorney-client privilege comes from its inherent constitutional authority to investigate and the constitutional authority of each chamber to determine the rules of its proceedings.¹² Although the Supreme Court has not definitively ruled on the issue, a number of factors support the

7. "Acting as a lawyer encompasses the whole orbit of legal functions. When he acts as an advisor, the attorney must give *predominantly* legal advice to retain his client's privilege of non-disclosure, not solely, or even largely, business advice." *Zenith Radio Corp. v. Radio Corp. Of America*, 121 F. Supp. 792, 794 (D. Del. 1954) (emphasis added).

8. The courts have recognized that the dual responsibilities of in-house counsel may overlap significantly and the purpose of various communications with others may begin to blur. Thus, courts have closely scrutinized communications to and from in-house counsel and held that they may be sheltered by the attorney-client privilege "only upon a clear showing that [in-house counsel] gave [advice] in a professional legal capacity." In order to ascertain whether an attorney is acting in a legal or business advisory capacity, the courts have held it proper to question either the client or the attorney regarding the general nature of the attorney's services to his client, the scope of his authority as agent, and the substance of matters which the attorney, as agent, is authorized to pass along to third parties. *Colton v. United States*, 306 F.2d 633, 636, 638 (2d Cir. 1962); *United States v. Tellier*, 255 F.2d 441 (2d Cir. 1958); *J.P. Foley & Co., Inc. v. Vanderbilt*, 65 FRD 523, 526-27 (S.D.N.Y. 1974). Indeed, proper invocation of the privilege may be predicated on revealing facts tending to establish the existence of an attorney-client relation. *See, e.g., In re John Doe, Esq.*, 603 F. Supp. 1164, 1167 (E.D.N.Y. 1985) and *In re Arthur Treachers Franchise Litigation*, 92 FRD 429 (E.D. Pa. 1981), cases illustrating how probing the questioning may be to determine whether an attorney was in fact "acting as a lawyer."

9. *Bowne of New York City v. AmBase Corp.*, 150 F.R.D. 465 (S.D.N.Y. 1993). *See also United States v. Construction Products Research*, 73 F.3d 464, 473-74 (2d Cir. 1996) (logs with cursory descriptions of, and comments on, documents "simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation"); *von Bulow v. von Bulow*, 811 F.2d 136, 146-47 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 1891 (1988) (logs which rely on conclusory or *ipse dixit* assertions are normally required to be supported by affidavits from individuals with personal knowledge of the relevant facts); *International Paper Co v. Fibreboard Corp.*, 63 FRD 88, 94 (D. Del. 1974) (Such affidavits must "show sufficient *facts* to bring the identified and described document within the narrow confines of the privilege.") (emphasis in original).

10. *Hickman v. Taylor*, 329 U.S. 495 (1947).

11. *See In re Grand Jury Subpoenas Duces Tecum*, 112 F.3d 910, 924-25 (8th Cir. 1997), *cert. denied sub. nom. Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997) (claims of first lady of work product immunity with respect to notes taken by white house counsel attorneys rejected as inapplicable because the possibility of a congressional investigation did not satisfy the element of anticipation of litigation and trial); *In re Grand Jury Proceeding*, 5 F. Supp. 2d 21, 39 (D.D.C. 1998), *aff'd on other grounds, sub. nom. In re Bruce R. Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied sub. nom. Office of the President v. Office of the Independent Counsel*, 525 U.S. 996 (1998) (dismissing claim of work product immunity of a counsel to the president on the ground that preparation for a possible congressional investigation was not in anticipation of an adversarial proceeding).

12. U.S. Const., Art. I, sec. 5, cl. 2.

conclusion that committees possess the power to compel witness testimony. These indicia include: (1) the Supreme Court's strong recognition of the constitutional underpinnings of the legislative investigatory power to support the critical need for information;¹³ (2) long-standing congressional (and British parliamentary) practice;¹⁴ (3) the rejection by the House and Senate of opportunities to recognize the privilege by adoption of house rules;¹⁵ and (4) applicable appellate court rulings rejecting such claims by executive branch officials subject to grand jury investigations.¹⁶

3. The Rationale for Congressional Discretionary Authority to Deny Attorney-Client Claims

The attorney-client privilege is not a constitutionally based privilege. Rather, it is a judge-made exception to the general evidentiary principle of full disclosure in the context of court proceedings.¹⁷ The historic congressional discretionary practice is reflective of the widely divergent nature of the judicial and legislative forums. The attorney-client privilege is the product of a judicially developed public policy designed to foster an effective and fair adversary system. Courts view the privilege as a means to foster client confidence and encourage full disclosure to an attorney. Free communication, the argument goes, facilitates justice by promoting proper case preparation.¹⁸ Full factual disclosure can also help an attorney more accurately assess the strength of a client's case, and discourage frivolous litigation when the case is weak.¹⁹

It is critically important to remember that the attorney-client privilege is designed for, and properly confined to, the adversary process: the adjudicatory resolution of conflicting claims of individual obligations in a civil or criminal proceeding. The need to protect individual interests is less compelling in an investigatory setting where a legislative committee is not empowered to adjudicate a witness's liberty or property. Indeed, several courts have recognized that "only infrequently have witnesses...[in congressional hearings] been afforded rights normally associated with an adjudicative proceeding."²⁰

The suggestion that the legislature's investigatory authority is subject to non-constitutional, common law rules developed by the judicial branch to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures, which is difficult to reconcile with the constitutional

13. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959).

14. As with the legislature's inherent authority to investigate, the discretion to entertain claims of privilege traces back to the model of the English Parliament. See ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, 746-47 (20th edition 1983) which has been relied as an authoritative guide by the Supreme Court. See *McGrain v. Daugherty*, 273 U.S. at 161. Nineteenth century congressional rejections of attorney-client privilege claims are recounted in Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 JOHN MARSHALL L. REV. 309, 312-14 (1988).

15. In 1857 the House rejected an amendment to adopt recognition of claims of attorney-client privilege before committees during consideration of legislation to establish a criminal contempt process, which is recounted in Todd Garvey, *The Webster and Ingersoll Investigations*, at Part II *infra*. In 1954 the Senate rejected a similar proposal in S. REP. NO. 84-2 (1955).

16. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub. nom.* Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (claims of first lady of attorney-client and work-product privilege with respect to notes taken by white house counsel office attorneys rejected); In re Lindsey (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied* 525 U.S. 996 (1998) (White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (deliberative process privilege is a common law agency privilege which is easily overcome by showing of need by an investigating body); In re A Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002) (attorney-client privilege not applicable to communications between state government counsel and state office holder). *But see* In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005) (upholding a claim of attorney-client privilege with respect to communications between a former chief legal counsel to the governor of Connecticut who was under grand jury investigation. It is worth noting that the Second Circuit recognized its apparent conflict with the afore-cited cases, and that the ruling is arguably distinguishable on its facts. See Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75 (2006).

17. *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991) ("Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly."); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (Sixth Amendment not a source for attorney-client privilege); *Fisher v. United States*, 425 U.S. 391, 396-97 (1976) (compelling an attorney to disclose client communications does not violate the client's Fifth Amendment privilege against self-incrimination); *Hannah v. Larche*, 363 U.S. 420, 445 (1960) ("[O]nly infrequently have witnesses [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding."); *United States v. Fort*, 443 F.2d 670 (1970) (rejecting contention that the constitutional right to cross-examine witnesses applied to congressional investigations). With respect to court treatment of other common law privileges, *see, e.g.*, In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (The deliberative process privilege is a common law privilege which, when claimed by executive officials, is easily overcome, and "disappears" altogether upon the reasonable belief by an investigating body that government misconduct has occurred.).

18. *See, e.g.*, *Upjohn v. United States*, 449 U.S. 382, 389 (1981).

19. *Id.*

20. *Hannah*, 363 U.S. at 425; *see also Fort*, 443 F.2d at 670.

authority granted to each house of Congress to determine its own rules. This was dramatically underlined in *NLRB v. Noel Canning*,²¹ where the Supreme Court rejected the president's attempt to determine unilaterally when the Senate was in recess. The Court held that "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."

Moreover, importing the judiciary's privileges and procedures is likely to have a paralyzing effect on the investigatory process. Indeed, it already has; the district court's ruling in the Fast and Furious litigation that agencies can validly invoke the common law deliberative process privilege in challenges to committee civil enforcement proceedings has significantly delayed committees access to information.²² Such judicialization is also antithetical to the consensus, interest-oriented goal of policy development in the legislative process.

Finally, concerns that denying the privilege in the congressional setting would undermine it elsewhere appear over-exaggerated. Parliament's rule has not impaired the practice of law in England, nor has its limited use here inflicted any apparent damage on the practice of the profession. Congressional investigations in the face of claims of executive privilege or the revelation of trade secrets have not diminished the general utility of these privileges nor undermined the reasons they continue to be recognized by the courts. Moreover, the assertion implies that current law is an impregnable barrier to the disclosure of confidential communications when, in fact, the privilege is riddled with qualifications and exceptions, and has been subject as well to the significant current development of the waiver doctrine. Thus, there can be no absolute certainty that communications with an attorney will not be revealed.

There are still unyielding private sector opponents of discretionary committee exercises of refusals to accept claims of attorney-client privilege.²³ But most recent critical commentary has focused on how to live with the reality of the assumed congressional authority, utilizing the understanding that committees need information sooner rather than later and that criminal and civil enforcement processes take too much time. Negotiating tactics are the theme of such articles.²⁴ Committees still retain significant leverage. There has been no definitive court ruling on the issue because no objector as yet has been willing to be the subject of a criminal prosecution as a matter of principle.

4. How Congress Has Traditionally Weighed the Attorney-Client Privilege

In practice, all committees that have denied claims of privilege have considered numerous factors before doing so. In favor of disclosure, committees consider (1) legislative need, (2) public policy, and (3) the ever-present statutory duty to oversee the application, administration, and execution of all laws within Congress' jurisdiction. They balance these considerations against any possible injury to the witness. Committees also consider whether a court would have recognized the claim in the judicial forum,²⁵ and invite the submission of privilege logs to support the validity and weight of the claims.

21. 134 S. Ct. 2550 (2014).

22. See Chris Armstrong, *A Costly Victory for Congress: Executive Privilege After Committee on Government Oversight and Reform*, 17 THE FEDERALIST SOCIETY REVIEW 28, 32 (2016) ("In recent months [as a result of the *Lynch* ruling] there appear to have been a marked increase in DPP claims across agencies and to a wide range of committees conducting active investigations."). See also HOUSE COMMS. ON ENERGY AND COMMERCE AND WAYS AND MEANS, JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM, 95-109, 114th Cong. 2d Sess. (2016) (detailing refusals by the Departments of Treasury, Health and Human Services, and the Office of Management and Budget to comply with requests and subpoenas for testimony and documents relevant to ACA cost sharing funding based on assertions of the common law deliberative process privilege).

23. See, e.g., Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILLANOVA L. REV. 469, 474-98 (2003).

24. See, e.g., 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 Proceedings*, 25 J. L. & POL. 145 (2009); James Hamilton, Robert F. Muse and Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AMER. CRIM. L. REV. 1115 (2007); Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J. L. PUB. POL'Y 897 (2012).

25. See, e.g., H. COMM. ON COMMERCE, CONTEMPT OF CONGRESS AGAINST FRANKLIN L. HANEY, H.R. DOC. NO. 105-792, at 11-16 (1998); H. COMM. ON GOV'T REFORM, PROCEEDINGS AGAINST JOHN. M. QUINN, DAVID WATKINS, AND MATTHEW MOORE, H.R. REP. NO. 104-598, at 50-54 (1996); REFUSAL OF WILLIAM H. KENNEDY, III TO PRODUCE NOTES SUBPOENAED BY THE SPECIAL COMM. TO INVESTIGATE WHITEWATER DEV. CORP. AND RELATED MATTERS, S. REP. NO. 104-191, at 9-19 (1995); H. COMM. ON FOREIGN AFF., PROCEEDINGS AGAINST RALPH BERNSTEIN AND JOSEPH BERNSTEIN, H.R. REP. NO. 99-462, at 13-14 (1986); *International Uranium Control: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 60, 123 (1977). See also H. COMM. ON ENERGY AND COMMERCE, 98TH CONG., ATTORNEY-CLIENT PRIVILEGE (Comm. Print 98-1, 1983) (dealing with two separate instances of rejections of privilege claims by the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, one invoked by the general counsel of the Securities and Exchange Commission, the other by a corporation).

In the absence of a definitive court ruling,²⁶ the Legal Ethics Committee of the District of Columbia Bar issued an advisory opinion in February 1999.²⁷ It directly addressed the limits of an attorney's ethical duty of confidentiality to a client when the attorney is faced with a congressional subpoena for documents that would reveal client confidences.²⁸ The opinion urges attorneys to press every appropriate objection to the subpoena until no further avenues of appeal are available, and even suggests that clients might be advised to retain other counsel to file a separate lawsuit to prevent compliance with the subpoena.²⁹ But it does allow the attorney to relent and comply with the subpoena at the earliest point when he or she is in danger of being held in criminal contempt of Congress.

According to the D.C. Bar's ethics committee, an attorney acting under the D.C. Code of Professional Conduct³⁰ facing a congressional subpoena that would reveal client confidences or secrets must "seek to quash or limit the subpoena on all available legitimate grounds to protect confidential documents and client secrets."

If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. 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).

The opinion represents the first and thus far the only bar in the nation to directly and definitively address this question. Its publication aroused a good deal of debate.³¹ However, there is no evidence that congressional committees have been more aggressive in attempting to overrule privilege claims since the issuance of the opinion. Rather, Congress has been sparing in its attempts to challenge claims of attorney-client privilege.³² Interestingly, none of the writings in opposition to committee exercise of the discretionary authority reference or discuss the D.C. Bar opinion.

26. The Supreme Court has recognized that "only infrequently have witnesses ... [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding." *Hannab*, 363 U.S. at 445; *See also Fort*, 443 F.2d at 670, In the Matter of Provident Life and Accident Co., E.D. Tenn., S.D., CIV-1-90-219 (June 13, 1990) (per Edgar, J.) (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States").

27. DISTRICT OF COLUMBIA BAR LEGAL ETHICS COMM., OP. NO. 288, COMPLIANCE WITH SUBPOENA FROM CONGRESSIONAL COMMITTEE TO PRODUCE LAWYERS' FILES CONTAINING CLIENT CONFIDENCES OR SECRETS (Feb. 16, 1999).

28. The occasion for the ruling arose because of an investigation of a subcommittee of the House Commerce Committee into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex. *See* H.R. REP. NO. 105-792, at 1-8, 15-16. During the course of the inquiry, the subcommittee sought certain documents from the Portals' developer, Mr. Franklin L. Haney. Mr. Haney's refusal to comply resulted in subpoenas for those documents to him and the law firm representing him during the relocation efforts. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. The law firm sought an opinion from the D.C. Bar's Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation, but the Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the committee. *See* H. COMM. ON COMMERCE, 105TH CONG., MEETING ON PORTALS INVESTIGATION: AUTHORIZATION OF SUBPOENAS; RECEIPT OF SUBPOENAED DOCUMENTS AND CONSIDERATION OF OBJECTIONS; and CONTEMPT OF CONGRESS PROCEEDINGS AGAINST FRANKLIN L. HANEY 48-50 (1998). The firm continued its refusal to comply until the subcommittee cited it for contempt, at which time the firm proposed to turn over the documents if the contempt citation was withdrawn. The subcommittee agreed to the proposal. *Id.* at 101-05.

29. A direct suit to block a committee from enforcing a subpoena was foreclosed by the Supreme Court's decision in *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975), but that ruling does not appear to foreclose an action against a "third party," such as the client's attorney, to test the validity of the subpoena or the power of a committee to refuse to recognize the privilege. *See, e.g., United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters).

30. Under D.C. Rule of Professional Conduct 1.6(e)(2)(A), a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. rules or when "required by law or court order."

31. *See, e.g.,* W. John Moore, *First Save All The Lawyers*, NATIONAL LAW JOURNAL, July 24, 1999 at 2170.

32. In the past, assertions of attorney-client and other common law privileges before committees often have gone unchallenged. One example occurred during the Iran-Contra hearings. Richard Secord, Albert Hakim, and Oliver North invoked the privilege as to a meeting with Secord's attorney, attended by all three, on the ground that he was acting as attorney for all at the time. In the same hearing, the committees recognized a rare assertion of the marital privilege by North on behalf of his wife who refused on that basis to testify about various funds created for the benefit of North's family from the proceeds of the Iranian arms sales. *See* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, REP. NO. 216, H. R. REP. NO. 433, 100TH CONG., 1ST SESS. at 345 (1987). Privilege claims are also commonly negotiated prior to public hearings.

B. Claims of Deliberative Process Privilege and Presidential Communications Privilege

1. Definition and Purpose of the Deliberative Process Privilege

The deliberative process privilege permits government agencies to withhold documents and testimony relating to policy formulation from the courts. The privilege was designed to enable executive branch officials to seek a full and frank discussion of policy options with staff without risk of being held to account for rejected proposals.

Executive branch officials often argue that congressional demands for information regarding an agency's policy development process would unduly interfere with, and perhaps "chill," the frank and open internal communications necessary for policymaking. In addition, they may also argue that the privilege protects against premature disclosure of proposed policies before the agency fully considers or adopts them. Agencies may further argue that the privilege prevents the public from confusing matters merely considered or discussed during the deliberative process with those that constitute the grounds for a policy decision. These arguments, however, do not necessarily pertain to Congress in its oversight and legislative roles.

2. Application of the Deliberative Process Privilege to Congressional Investigations

Congress's oversight process would be severely undermined were the courts or Congress to uniformly accept every agency assertion of the deliberative process privilege to block disclosure of internal deliberations. Such a broad application of the privilege would encourage agencies to disclose only materials that support their positions and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence and would become a "show and tell" performance.

Broad application of the deliberative process privilege to congressional investigations would also induce executive branch officials, including attorneys, to claim that oversight would dissuade them from giving frank opinions, or discourage others from seeking such advice. The Supreme Court dismissed that argument in *NLRB v. Sears, Roebuck & Co.*³³ It said:

The probability that the agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].³⁴

Agencies often claim the privilege to forestall inquiries while they develop substantive rules. However, an agency's rulemaking process is the prime object of legislative scrutiny; agencies may engage in substantive rulemaking only with an express grant of legislative authority. Moreover, Congress has enacted legislation determining the procedures each agency must follow³⁵ and retains ultimate control over each agency's rulemaking process.³⁶

33. 421 U.S. 132 (1975).

34. *Id.* at 161 (emphasis added). See also *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 101–02 (D.D. C. 2008) (rejecting the executive's argument that enforcing a congressional subpoena to a close adviser of the president would "chill" the candor necessary for frank and free advice to the chief executive).

35. See 5 U.S.C. § 553 (2000).

36. Congress may intervene in an agency rulemaking proceeding at any point. It is not limited to withdrawing an agency's authority or negating a particular rule by law after the fact. Where agency rulemaking is akin to the legislative process, the courts have held that "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall." *Sierra Club v. Costle*, 657 F.2d 298, 400–401 (D.C. Cir. 1981). It is, therefore, "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking . . . [A]dministrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources." *Id.* at 409–10. See also *Assoc. of National Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). For a full discussion of the legal propriety of committee interventions into agency rulemaking proceedings and other agency decision-making processes, see Chapter 12 *infra*.

Finally, the integrity, even the legitimacy, of an agency's rulemaking would be damaged more by efforts to avoid oversight inquiries than it would be by the agency officials' public embarrassment over disclosure of positions taken during the policy development process. The legitimacy and acceptability of the administrative process depends on the public's perception that the legislature has some sort of ultimate control over the agencies.

3. Congress Treats Deliberative Process Privilege Claims as Discretionary

As with claims of attorney-client privilege and work-product immunity, congressional practice has been to allow committees discretion over acceptance of deliberative process claims. Moreover, a 1997 appellate court decision, discussed below, shows that the deliberative process privilege is easily overcome by an investigatory body's showing of need for the information. Other court rulings and congressional practices have recognized the overriding necessity of an effective legislative oversight process.

4. The Deliberative Process Privilege is More Easily Overcome by Congress Than the Presidential Communications Privilege

As discussed in detail in Chapter 5, the presidential communications privilege is a constitutionally based doctrine that protects communications between the president and his or her immediate advisers in the Office of the President from disclosure.³⁷ It also extends to communications made by presidential advisers in the course of preparing advice for the president.³⁸ This doctrine does not cover the entire executive branch, but it applies more directly to relations between the president and his or her closest White House aides.

The 1997 D.C. Circuit's unanimous ruling in *In re Sealed Case (Espy)*³⁹ distinguishes between the "presidential communications privilege" and the "deliberative process privilege" and describes the severe limits of the latter as a shield against congressional investigative demands. The court of appeals held in *Espy* that the deliberative process privilege is a common law privilege that Congress can more easily overcome than the constitutionally rooted presidential communications privilege. Moreover, in congressional investigations, the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred."⁴⁰ The court's understanding thus severely limits the extent to which agencies can rely upon the deliberative process privilege to resist congressional investigative demands. A congressional committee merely needs to show that it has jurisdiction and authority, and that the information sought is necessary to its investigation to overcome this privilege. A plausible showing of fraud, waste, abuse, or maladministration would conclusively overcome an assertion of privilege.

On the other hand, the deliberative process privilege covers a broader array of information. Whereas the presidential communications privilege covers only communications between the president and high-ranking White House advisers, the deliberative process privilege applies to executive branch officials generally. But the deliberative process privilege only protects executive branch officials' communications that are "pre-decisional" and a "direct part of the deliberative process."

5. Congress Has Greater Ability to Obtain Deliberative Information Than Citizens Have Under FOIA

Even before *Espy*, courts and committees consistently countered agency attempts to establish a privilege that thwarted congressional oversight efforts. Agencies often claimed that internal communications must be "frank" and "open," and that communications are a part of a "deliberative process." This is the standard under the Freedom of Information Act (FOIA), which allows an agency to withhold documents from a citizen requester.⁴¹ It does not apply to Congress.

37. *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

38. *Espy*, 121 F.3d. at 729.

39. *Id.* Among other things, the case involved White House claims of executive and deliberative process privileges for documents subpoenaed by an independent counsel.

40. *Id.* at 745-746 ("[W]hen there is reason to believe the documents sought may shed light on government misconduct, 'the [deliberative process] privilege is routinely denied' on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'"); *id.* at 737-38.

41. 5 U.S.C. § 552 (b)(5)(2010).

Congress has vastly greater powers of investigation than those of citizen FOIA requesters. Moreover, Congress carefully provided that the FOIA exemption section “is not authority to withhold information from Congress.”⁴² The D.C. Circuit in *Murphy v. Department of the Army*⁴³ explained that FOIA exemptions were no basis for withholding from Congress because “Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively.”⁴⁴

6. The Anomalous Ruling in *COGR v. Lynch*

The disquieting ruling in the Fast and Furious litigation and its immediate and long-range disruptive consequences for effective investigate oversight demands closer, albeit somewhat repetitive, examination.

The binding law with respect to executive privilege in the D.C. Circuit was established by the court’s rulings in *Espy* (1997) and *Judicial Watch* (2004). Those decisions made an unequivocal distinction between the constitutionally-based presidential communications privilege and the common law deliberative process privilege, which the presiding judge in *COGR v. Lynch* ignored. While both have common general goals—to protect in some degree sensitive internal executive deliberations—and both are qualified privileges, the resemblance for purposes of legal significance and impact ends there. The *Espy* court’s unanimous opinion emphasized the severe limits that the deliberative process privilege, as a common law privilege, would have as a shield against congressional demands since it would be more easily overcome by a showing of need. The court twice remarked that if there is a plausible showing that government misconduct may have occurred, the privilege “disappears.” At one point it stated: “[W]hen there is reason to believe the documents sought may shed light on government misconduct, ‘the [deliberative process] privilege is routinely denied’ on the grounds that shielding internal government deliberations in this context does not serve ‘the public interest in honest, effective government.’”⁴⁵ There is no hint of any constitutional concern that would allow an agency to invoke the deliberative process privilege in such circumstances.

And yet, the *Lynch* court determined that there “is an important constitutional dimension to the deliberative process aspect of the executive privilege.” This finding has serious constitutional and practical consequences for effective investigative oversight.⁴⁶

Historically, Congress has been recognized as the *initial determiner* of its own institutional rights and prerogatives, particularly for matters directly or indirectly related to oversight. Since the 1870s—with the express acquiescence of the Justice Department—all subpoena demands by the Justice Department to members or component entities must first be processed and reviewed by House and Senate leadership and counsel. In 2006, the Justice Department decided to circumvent this initial review process by means of a search warrant executed at a member’s office. FBI agents barred the House general counsel and the member’s private counsel from overseeing the search. The D.C. Circuit Court of Appeals declared the search a violation of the Constitution’s Speech or Debate Clause. The court emphasized that a critical purpose of the clause is to prevent intrusions into the legislative process. The executive’s search procedures did just that by “den[ying] the Congressman any opportunity to identify or assert the privilege with respect to legislative materials *before* their compelled disclosure to executive agents.”⁴⁷

Previously, in the same vein, the court ruled that courts may not block a congressional subpoena, holding that the Speech

42. 5 U.S.C. § 552 (d).

43. 613 F.2d 1151 (D.C. Cir. 1979).

44. *Id.* at 1158.

45. *Espy*, 121 F.3d at 745-46; *id.* at 737-38.

46. One could argue that the ruling is the equivalent of holding that denying a witness the right to cross-examine other witnesses or to call witnesses on his or her behalf at a congressional hearing violates the Sixth Amendment—an argument which the Supreme Court rejected in *Moran v. Burbine*, 475 U.S. 412, 430 (1986)—or violates due process rights, which the Supreme Court and lower courts have also rejected. See *Hannah v. Larche*, 365 U.S. 420 (1960) and *United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971). The ruling is further discussed in Chapter 3 *supra* section 4.b.ii.

47. *United States v. Rayburn House Office Bldg.*, 497 F.2d 654, 661-62 (D.C. Cir. 2008), cert. denied 552 U.S. 1295 (2008)(emphasis supplied).

or Debate Clause provides “an absolute bar to judicial interference with such compulsory process.”⁴⁸ As a consequence, a government witness’ sole remedy, until recently, was to refuse to comply, risk being cited for contempt, and then raise privilege claims as a defense in a contempt prosecution.

Most recently the Supreme Court deferred to the exercise of the Senate’s internal rulemaking authority to define when it is in session for recess appointments purposes, thereby nullifying a presidential attempt to unilaterally make that determination.⁴⁹ And, finally, there has been judicial approval and general recognition of each chamber’s absolute control over the initiation and conduct of investigations and hearings.⁵⁰

The *Lynch* court’s departure from both prior law and practice recognizing the legislature’s primacy in establishing first responses to intrusions on its core institutional prerogatives threatens to undermine one of Congress’s primary functions in our scheme of separated powers. The district court’s ruling has been appealed to the D.C. Circuit Court of Appeals. Under the appeals courts’ argument schedule no resolution can be expected until well into 2017.⁵¹

C. Release of Attorney-Client, Work-Product, or Deliberative Process Material to Congress Does Not Waive Applicable Privileges in Other Forums

Private parties and agencies often assert that yielding to committee demands for material arguably covered by the attorney-client, work-product, or deliberative process privileges will waive those privileges in other forums. Applicable case law, however, is to the contrary. When a congressional committee compels the production of a privileged communication through a properly issued subpoena, it does not prevent the assertion of the privilege elsewhere,⁵² as long as it is shown that the compulsion was in fact resisted.⁵³

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in Part II:

Todd Garvey: *The Webster and Ingersoll Investigations*

48. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503-07 (1975).

49. *NLRB v. Noel Canning*, 573 U.S. ___ (2014).

50. See *Hanna*, 365 U.S. 420 and *Fort*, 443 F.2d at 670.

51. Committee on Government and Oversight Reform of the United States House of Representatives v. Lynch, Case No. 16-5078, (D.C. Circuit, appeal filed 10/6/2016). As a result of the change in presidential administration, the *Lynch* (now *Sessions*) appeal has been put on indefinite hold.

52. See, e.g., *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) (release of information to a congressional committee is not deemed to be disclosure to the general public); *Exxon Corp. v. FTC*, 589 F.2d 582 (D.C. Cir. 1978); *Rockwell International Corp. v. U.S. Department of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (compliance with a statutory obligation to provide Congress with information did not waive its FOIA exemption protection); *Murphy v. Department of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979); *Florida House of Representatives v. Department of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff’d in part, vacated in part*, 491 U.S. 554 (1989) (“When disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts ‘reasonably designed’ to protect and preserve the privilege.”).

53. See *Iron Workers Union Local No. 17 Insurance Fund v. Phillip Morris, Inc.*, 35 F. Supp. 2d 582 (N.D. Ohio, 1999) and *Commonwealth of Massachusetts v. Phillip Morris, et al.*, 1998 Lexis 438 (Mass. Super. Ct. July 30, 1998) (holding that the companies had failed to sufficiently resist the committee’s subpoenas).