



THE ATTORNEY-CLIENT PRIVILEGE IN  
CONGRESSIONAL INVESTIGATIONS

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# THE ATTORNEY-CLIENT PRIVILEGE IN CONGRESSIONAL INVESTIGATIONS

## I. Introduction

Lawyers and their clients may take for granted that their confidential communications that meet the standards for attorney-client privilege protection will be steadfastly protected from disclosure. After all, it has long been established that “[t]he rule . . . is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”<sup>1</sup> Moreover, attorneys have imposed upon themselves strict confidentiality as a basic tenet of their professional responsibility to each client.<sup>2</sup> This safety net of confidentiality is designed to assure that the client receives from the lawyer awareness of the client’s legal obligations in particular factual circumstances, and advice that encourages voluntary compliance with the law. Thus, open communication in a confidential relationship is the cornerstone of the attorney-client relationship: if the client is concerned that communications with the lawyer may “return to haunt the client, necessary information will be withheld and legal advice will be predicated on half-truths.”<sup>3</sup> In the courts of the United States, this view of the relationship is almost universally honored as an important and necessary feature of the rule of law, one in which even information that would be useful to the administration of justice in a particular case must be protected from disclosure in service of the greater good.

Perhaps surprisingly to many lawyers and clients, the principal body charged with enacting the rule of law in the United States, the Congress, apparently does not share this view, or at least will not commit to it in a manner upon which the citizens it represents may definitely rely. Throughout the nation’s history, primarily through its House and Senate Committee structure, Congress has developed a practice of demanding documents and testimony from private citizens and business entities in various investigative activities. In these committee proceedings, Congress does not recognize the attorney-client privilege as absolute even when all of its elements are met, and congressional actors have maintained that they may refuse to acknowledge the existence of privilege in any particular circumstance in the interest of expediency or otherwise. However, despite these repeated assertions, neither the House nor the Senate has directly determined by rule or legislation that principles of attorney-client privilege do not apply in their proceedings.

Thus, whether as a matter of reason or raw politics, persons who happen to become caught up in a proceeding before a congressional committee may have their claims of privilege rejected and be forced to provide otherwise protected documents and testimony, or risk standing in contempt of Congress. In weighing these grim options, the target of investigation must in addition consider that compliance with the congressional demand may also cause a waiver of privilege in connection with other proceedings, even those judicial proceedings in which a privilege would have been recognized

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1 *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

2 *E.g.*, with limited exceptions, ABA *Model Rule of Professional Conduct* 1.6 (2007) provides that a lawyer may not disclose “information relating to the representation” (encompassing more than the attorney-client privilege) in the absence of client consent or to “comply with other law or a court order.”

3 Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 4 (5<sup>th</sup> ed. 2007).

in the first instance. Moreover, Congress may actually publicize and affirmatively release the information provided, facilitating its use in collateral litigation, although Congress has recently acted to protect against broad subject matter waiver and collateral use of investigative materials obtained in federal proceedings. Against this backdrop, the courts have recognized and deferred to broad congressional investigative power, but have not directly ruled on the application of attorney-client privilege in congressional proceedings.

This paper will review the current status of the law and practice in congressional investigations, discuss whether the attorney-client privilege should apply given the intersection of the policies that underpin the attorney-client privilege and congressional investigations, and offer best practice suggestions for those attorneys whose clients (or themselves) are the target of congressional subpoenas for information.

## **II. Limited Judicial Review of Congressional Proceedings**

The practice of congressional investigations has its roots in the earliest days of the Republic. In 1792, the House initiated an investigation into a Native American massacre of troops under the command of Major General Arthur St. Clair.<sup>4</sup> Despite arguments based on separation of powers concerns that no investigative power was expressly granted by the Constitution to Congress, the House relied upon the exercise of similar power by the British Parliament and implication of investigative power from the “necessary and proper” clause of Article I, Section 8 of the Constitution.<sup>5</sup> By the twentieth century, major congressional investigations were routine, focused upon social conditions requiring correction or upon the sources and causes of wrongdoing, and on occasion, for partisan advantage or self-aggrandizement. The “Money Trust” investigation in 1912-13 resulted in the passage of antitrust legislation and 1930s investigations into the causes of the Great Depression led to various banking and securities acts.<sup>6</sup> The 1920s “Teapot Dome” and 1980s Iran-Contra investigations exposed governmental wrongdoing, resulting in criminal indictments.<sup>7</sup> Investigations of so-called “Un-American Activities” from the late 1930s through the 1950s brought Senator Joseph McCarthy and eventual President Richard Nixon to prominence.<sup>8</sup> In the twenty-first century, there have been investigations of Enron, WorldCom and the handling of Hurricane Katrina.<sup>9</sup> The recent recession has spurred congressional investigations into failures of the automobile industry and banking system.

To support its investigations, Congress wields contempt power: a power inherent in the legislative function to order its own Sergeant-at-Arms to imprison a witness during the term of Congress for interference with its legislative duties,<sup>10</sup> the power to seek prosecution of witnesses under a criminal statute,<sup>11</sup> and in the case of the Senate the power to seek enforcement by civil action.<sup>12</sup>

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4 Kalah Auchincloss, *Congressional Investigations and the Role of Privilege*, 43 Am. Crim. L. Rev. 165, 167 (2006).

5 *Id.* at 167-68. US Const., Art. I, § 8 provides Congress with the power «to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States.»

6 James Hamilton, Robert F. Muse and Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 Am. Crim. L. Rev. 1115, 1118-19 (2007).

7 *Id.* at 1119-20.

8 *Id.* at 1119.

9 *Id.* at 1121.

10 *See, e.g., Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 219-20 (1821).

11 2 U.S.C. § 192 (2000).

12 2 U.S.C. §§ 288b and 288d; 28 U.S.C. § 1365.



The Supreme Court's early decisions concerning limitation of the investigative power of Congress focused upon the constitutional existence and separation of powers. In *Anderson*, the initial case recognizing the inherent contempt power of Congress, the Supreme Court discussed the possible "tyrannical" abuse of power that could possibly result from its implication of contempt power, but viewed such discretionary power as a necessity in order to enable Congress to perform its functions without disruption or interference.<sup>13</sup> It only qualified the use of this implied power to "the least possible power adequate to the end proposed."<sup>14</sup> This power was limited somewhat on separation of powers grounds in *Kilbourn v. Thompson*, in which the Court held that the House of Representatives had exceeded its authority when it imprisoned a witness for refusing to answer questions about business matters (a real estate pool) in which the United States was a creditor.<sup>15</sup> The Court held that Congress had no right to investigate the private business affairs of individuals not holding government office, a function of the judiciary, which has sole power to resolve the rights and duties of the relevant parties.<sup>16</sup> It rejected the argument that *Anderson* precludes judicial review of a congressional determination of contempt.<sup>17</sup> The *Kilbourn* Court's foray into judicial review was quickly limited in *In re Chapman*, when the Court affirmed a contempt conviction of a stockbroker for refusing to respond to questions in the Senate's investigation of possible trading of sugar stocks by its members, when the matters were "within the range of the constitutional powers of the senate."<sup>18</sup> So long as this was the case, the Senate was not required to specify that the purpose of the investigations was for a non-judicial end, and the Court would not "assume . . . that the action . . . was without a legitimate object."<sup>19</sup> In effect, a legislative purpose, as opposed to a proscribed judicial branch interference, must be presumed. This approach was echoed in cases arising out of the Teapot Dome scandal of the 1920s, when the Court again affirmed the right of Congress to investigate circumstances and compel witnesses to respond in furtherance of "legislative purpose," even when the information sought overlapped and could be used in contemporaneous judicial proceedings.<sup>20</sup>

The McCarthyism of the 1950s brought individual rights into the discussion as a limitation of congressional power.<sup>21</sup> In these cases, the Supreme Court held that the Bill of Rights is applicable to protect individual witnesses in congressional investigations.<sup>22</sup> "Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable searches or seizures. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged."<sup>23</sup> However, in *Eastland v. United States Servicemen's Fund*, the Court held that judicial protection of these rights may only be triggered by a congressional attempt to impose contempt or other criminal sanction for non-compliance; they are not be triggered when the subject of a subpoena seeks to quash or otherwise limit the congressional inquiry in advance, because in that circumstance

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13 *Anderson*, 19 U.S. at 227-232

14 *Id.* at 230-31.

15 103 U.S.168, 192-97 (1880).

16 *Id.* at 196.

17 *Id.* at 198-200.

18 166 U.S. 661, 669-70, 17 S.Ct. 677, 680-81 (1897).

19 *Id.*, 166 U.S. at 670, 17 S.Ct. at 681.

20 *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927).

21 *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 79 S.Ct. 1081 (1959); *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173 (1957).

22 Auchincloss, *supra* n. 4, at 177.

23 *Watkins*, 354 U.S. at 188, 77 S.Ct. at 1179.

the “speech or debate” clause of the Constitution is an absolute bar to judicial interference with congressional action within any “legitimate legislative sphere.”<sup>24</sup>

In this extended history of admittedly cautious review of congressional investigatory power, the courts have never addressed the question of whether witnesses retain a right to rely upon the attorney-client privilege in responding to congressional investigations, or post-*Eastland*, at least to avoid contempt punishment for that reliance. Furthermore, “relatively few confrontations involving assertions of privilege . . . have occurred” and those that have “display a practice of avoidance of the issue to the greatest extent possible.”<sup>25</sup>

### **III. Privilege in Congressional Proceedings: A Record of Cautious Congressional Assertion of Power and an Absence of Judicial Guidance**

#### **A. Congressional Position and Practice**

Although the historical record about the congressional view of privilege is mixed, the current position of Congress appears certain. As described in a Congressional Research Report prepared for members and committees of Congress:

The precedents of the Senate and 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. In practice, committee resolutions of claims of these privileges have involved a pragmatic assessment of the needs of the individual committee to accomplish its legislative mission and the potential burdens and harms that may be imposed on a claimant of the privilege if it is denied.<sup>26</sup>

Accordingly, congressional committees have generally come to examine privilege claims based upon a “weighing [of] the legislative need for disclosure against any possible resulting injury.”<sup>27</sup> Committees weigh various factors including the relative strength of the claim of privilege (whether its assertion is clear or doubtful), the presence or absence of factors suggesting waiver or exception, the availability of information from other sources, and assessment of the cooperation of the witness.<sup>28</sup> Thus, congressional acceptance of privilege in a particular matter reflects a benevolent exercise of what it views as its discretion, most likely to be accepted when the information otherwise protected or the issue at stake is viewed as relatively unimportant or cumulative.

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24 421 U.S. 491, 95 S.Ct. 1813 (1975).

25 Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 John Marshall L. Rev. 309, 311-12 (1988).

26 Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, CRS Rep. No. 95-464, at 32 (1995)(hereinafter “CRS Report”). See also Morton Rosenberg, *When Congress Comes Calling, A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry* 39-41 (The Constitution Project 2009).

27 Hearings, “International Uranium Cartel,” Subcom. On Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., Vol. 1, 123 (1977).

28 CRS Report, *supra* n. 26, at 32.

Historically, Congress has demonstrated a bit more uncertainty on the matter, and has avoided the question in many instances.<sup>29</sup> For example, during 1868 hearings related to the impeachment of President Andrew Johnson, a House committee investigated possible bribery of Senators by lawyer Charles Woolley. Woolley refused to answer certain questions, asserting that the answers concerned “private and confidential communication... between counsel and client.”<sup>30</sup> But, the alleged client testified that he had not conducted any business with Woolley.<sup>31</sup> A resolution to convict him of contempt was then introduced and argued, in which a passionate argument was advanced to the effect that the right of “confidential communication between the attorney and client is a sacred and well-settled right, and ought not to be violated by this House, any more than by a court of justice.”<sup>32</sup> Although Woolley was convicted of contempt, no argument was advanced in the proceedings in opposition to the view that privilege applied to limit the scope of congressional inquiry, only an argument that the claim of privilege was fraudulent based upon the purported client’s denial of a relationship.<sup>33</sup> In two other congressional investigations of alleged government corruption in which issues of attorney-client privilege issues arose, the *Stewart* and *McCracken* matters, similar questions about the applicability of the privilege in contempt proceedings were resolved without any clearly articulated statement about the applicability of privilege.<sup>34</sup> In 1986, a congressional committee recommended that Ralph and Joseph Bernstein be held in contempt for refusing to provide allegedly privileged information in the investigation of Ferdinand and Imelda Marcos, but the committee based that recommendation primarily on the ground that the asserted “claim of privilege would not have been upheld even in a court.”<sup>35</sup>

It is noteworthy that neither the Senate nor the House has adopted a rule or resolution purporting to determine or provide a framework for decision concerning the applicability of attorney-client privilege in its investigations. In 1857, an amendment to proposed legislation on contempt power that would have formalized protection of privilege in congressional proceedings was defeated, but the resulting statute did not address the issue.<sup>36</sup> In 1954, in reaction to McCarthy era questioning, the Senate Committee on Rules and Administration proposed an amendment to Senate Rules to explicitly recognize the attorney-client privilege (and other common law privileges). The provision was not adopted, with a report “reasoning that ‘[w]hile the policy behind the protection of confidential communication may be applicable to legislative investigations as well as to court proceedings, no rule appears to be necessary at this time.’”<sup>37</sup> Finally, despite the antithetical position asserted by various congressional actors over the years, many congressional committees have recognized privilege in highly significant proceedings.<sup>38</sup>

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29 See, e.g., Christopher F. Cort and Gregory J. Spak, *The Congressional Subpoena: Power, Limitations and Witness Protection*, 6 *BYU J. Pub. L.* 37, 58-59 (1992)(hereinafter, “Cort and Spak”)(“From its earliest cases, Congress avoided taking any definitive position as to whether the privilege limits its investigative powers”); Millet, *supra* n. 25, at 313 (congressional pattern of “not directly asserting that the privilege was inapplicable as a matter of law, but that ...[it] had not been properly asserted”).

30 CONG. GLOBE, 40<sup>th</sup> Cong., 2d Sess. 2669 (1868).

31 *Id.*

32 *Id.* at 2674.

33 Millet, *supra* n. 25, at 312-13.

34 *Id.* at 313-16.

35 CRS Report, *supra* n. 26, at 34 (citing Proceedings Against Ralph Bernstein and Joseph Bernstein, H.Rept. No. 99-462, 99<sup>th</sup> Cong., 2d Sess. 13, 14-15 (1986)).

36 See Auchincloss, *supra* n. 4, at 181.

37 James Cole, Kate Seikaly and P.J. Meitl, *Exploring Every Avenue: The Dilemma Posed By Attorney-Client Privilege Assertions in Congress*, 8 *Appalachian J.L.* 157, 165-66 (2009)(quoting Sen. Rpt. 84-2, at 28 (1954)).

38 See James Hamilton, *Attorney-Client Privilege in Congress*, 12 *LITIGATION* 3, 4 (1986)(noting that the Senate Watergate Committee recognized the general applicability of the privilege).

## **B. No Meaningful Judicial Review of the Issue**

No higher court has addressed whether and to what extent the attorney-client privilege must or should be available in congressional proceedings. Moreover, no meaningful guidance appears in those cases that have touched upon the issue. In *Stewart v. Blaine*, Stewart was held in contempt of Congress for refusing to respond to questions concerning the Credit Mobilier scandal based upon an assertion of privilege.<sup>39</sup> The record before Congress is unclear concerning whether the contempt citation was based upon a rejection of privilege or a rejection that it was properly claimed,<sup>40</sup> and the resulting judicial opinion challenging Stewart's imprisonment addresses only whether the House had jurisdiction over Stewart.<sup>41</sup>

In *United States v. Keeney*, the court appears to assume that common law privileges are applicable to congressional proceedings, but not in a manner that can be said to be the holding of the case.<sup>42</sup> In the unpublished decision of *In re Provident Life & Accident Co.*, a district court refused to enjoin the appearance of a witness before a congressional committee on the subject of testimony the court had found to be privileged in its own related proceedings, noting that its determination was not binding on Congress; but based its ruling on alternate grounds, including the absence of case or controversy, ripeness and the failure to meet injunction standards.<sup>43</sup> Ultimately, the committee chair in question heard testimony on the matter and avoided the issue of recognition of privilege entirely by determining that the privilege had been waived because the information at issue had been provided to the Department of Justice.<sup>44</sup> In light of the *Eastland* holding that even constitutional rights may not be protected by judicial proceedings to interfere in advance with congressional proceedings, the *Provident* result (whatever its weight) is unremarkable.

Accordingly, the courts have not faced, and Congress has largely side-stepped, a direct assault on the applicability of attorney-client privilege in congressional investigations. *Eastland's* apparent teaching that no challenge to current congressional practice would be ripe in the absence of the target person or entity putting themselves at the point of punishment means that the current state of affairs is likely to continue.

## **C. Should Congress Recognize the Attorney-Client Privilege?**

Advocates of the current expediency-based discretionary approach used by congressional committees to selectively accept or reject claims of privilege rely upon three primary arguments: a separation of powers assertion that because Congress' power to investigate is derived (implied) from the Constitution, it should not be subject to the attorney-client privilege which is a judicial doctrine that does not and should not apply to Congress; a contention that the policies underlying the privilege apply to the adversary context, not the legislative context of congressional investigations;

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39 8 D.C. (1 MacArth.) 453 (1874).

40 Millet, *supra* n. 25, at 314.

41 8 D.C. at 455.

42 111 F. Supp. 233, 234-35 (D.D.C. 1953).

43 CRS Report, *supra* n. 26 at 35 (*discussing In re Provident Life & Acc. Co.*, E.D. Tenn., S.D., Civ-1-90-219 (June 13, 1990)).

44 *Id.*

and the precedent that the British parliament retains the discretionary power to entertain claims of privilege.<sup>45</sup> Each of these arguments is flawed.

Although congressional investigatory power is derived from the Constitution, that is not necessarily dispositive of whether it should recognize attorney-client privilege in its proceedings. Grand jury investigations also have their roots in the Constitution, yet common law privileges apply in that context.<sup>46</sup> Moreover, in at least certain circumstances, the separation of powers argument actually militates against the current approach. For example, when Congress investigates matters that involve contemporaneous judicial proceedings, Congressional compulsion of privileged information in a manner inconsistent with judicial determination of the same issues could effectively override or obviate the exercise of judicial power.<sup>47</sup> This concern is particularly acute if disclosure of information to congressional committees waives privilege in judicial proceedings – it permits Congress to trump the judicial resolution of privilege issues by killing the privilege for judicial proceedings in those matters that only it chooses.<sup>48</sup> In that circumstance, the litigants or accused in judicial proceedings would receive their determinations of right concerning privilege from the legislative branch.

The contextual argument, *i.e.*, that the attorney-client privilege is a value of the judicial system of litigation, not necessarily a valuable policy in the context of legislative investigation, similarly suffers from a myopic point of view. With increasing regularity, matters of investigation by congressional committees are also matters of litigation. The value of a consistently applied privilege lies in its predictability – if clients become concerned that there is a circumstance in which the privilege does not apply (congressional investigations) and that may destroy the privilege for other purposes, then faith in the privilege overall will be undermined and clients will be less likely to consult with counsel to understand and comply with the law. Whether a confidential conversation with counsel seeking or receiving legal advice is revealed to the world in a legislative or a judicial proceeding makes no difference to the person who sought advice. Indeed, the importance and value of counsel has long been recognized by Congress itself. The various committees of both the House and Senate are themselves served by counsel, and the rules of each recognize the right to counsel in their proceedings.<sup>49</sup> It is difficult to conceive of an effective right to counsel without the correlative right to attorney-client privilege – without the privilege, a witness appearing before a congressional committee might as well have an open dialogue with counsel before the committee. There is no meaningful distinction in congressional proceedings that suggests that devaluation of the systemic value of counsel is necessary.

Nor does reference to practice of British Parliament serve as a justification for uncertain expediency-based recognition of privilege. The American system of tri-partite government is

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45 See, e.g., CRS Report, *supra* n. 26, at 33-36.

46 See Hamilton, Muse and Amer, *supra* n. 6, at 1149.

47 As discussed *infra*, in *Sinclair*, the Court held that congressional power to investigate is not limited by the existence of separate judicial proceedings on the same subject. 279 U.S. at 293, 49 S.Ct. at 271. However, the Court did not address legislative branch determination of matters at issue in judicial proceedings.

48 Advancing the separation of powers argument, the CRS Report asserts that subjecting the legislative branch to common law privileges created by the judicial branch would “permit the judiciary to determine congressional procedures.” CRS Report, *supra* n. 26, at 36. But, permitting Congress to destroy the privilege (by disclosure or waiver) for judicial proceedings creates just the same separation of powers issue.

49 See Hamilton, Muse and Amer, *supra* n. 6, at 1149, n.196 (arguing that attorney-client privilege is inherent to the right to counsel established by House and Senate rules that may be sufficiently well established as to be protected under the Due Process Clause of the Fifth Amendment).

structurally different from the English model. Under the British model, Parliament holds both legislative and judicial power;<sup>50</sup> thus, it can appropriately determine matters of privilege in a consistent manner. In contrast, the current congressional discretionary model is inconsistent and unpredictable; it can be interpreted in different ways by different congressional committees or even differently according to the political forces surrounding the subject at issue. Again, lack of consistency in application of the privilege undermines its purposes: the bare knowledge that congressional committees may compel the revelation of attorney-client privileged material can only result in clients who fear to divulge relevant facts to their attorneys, harming not only the judicial system but also the congressional investigations themselves. Although forcing the revelation of attorney-client confidences may yield useful information in the course of a legislative investigation, just as it might within a judicial proceeding, the damage done to the purposes of the privilege exceeds any such temporary benefit.

Finally, this issue is really a two part problem. There is the issue of whether attorney-client privilege is a value that should be consistently recognized (as suggested by the congressional action on Rule 502).<sup>51</sup> There is also the issue of who determines whether particular claims of privilege are legitimate. Congress could minimize or avoid systemic friction around separation of powers issues, and parallel proceeding inconsistencies, through predictable recognition of privilege, even if it were to retain the right to determine the legitimacy of individual claims of privilege in particular cases free from judicial review.

#### **IV. If Attorney-Client Privilege is Not Recognized in Congressional Proceedings, Should Compliance with Congressional Directive Constitute a Waiver of Privilege in Other Proceedings?**

##### **A. What Conduct Gives Rise to Waiver of Privilege in Other Contexts?**

While there are many nuances of what constitutes waiver of attorney-client privilege in various jurisdictions, the touchstone requirements for waiver are disclosure of the information to third parties, accompanied by conduct of the privilege holder that is inconsistent with maintaining the information in confidence. When the privilege holder purposefully or voluntarily discloses the information, privilege is almost always waived.<sup>52</sup> It is also relatively clear that, absent an agreement, rule or statute to the contrary, partial disclosure of privileged material on a particular subject matter generally waives privilege as to other information on the same subject.<sup>53</sup> Affirmative reliance on privileged information as proof or for a defense, e.g., advice of counsel, also generally waives privilege.<sup>54</sup> The privilege holder may also lose protection by other, less purposeful, but still fault-based conduct, such as a failure to make an adequate or timely objection to discovery requests or subpoenas,<sup>55</sup> or a failure

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50 See, e.g., Ronald J. Krotoszynski, Jr., *The Perils and Promise of Comparative Constitutional Law: The New Globalism and the Role of the United States in Shaping Human Rights*, 61 Ark. L. Rev. 603, 618 (2009) (“The separation of powers is another structural innovation of the United States that has proven quite popular. The British model of legislative, executive and judicial power all being vested in a single body (like the Parliament) no longer seems a successful way to run a railroad.”).

51 In 2008, Congress endorsed the inherent systemic value of the attorney-client privilege in all “federal proceedings” and “state proceedings” when it approved by legislation amendments to Federal Rule of Evidence 502. Pub. L. 110-322, §1(a), 122 Stat. 3537 (Sept. 19, 2008). These amendments protect disclosures of privileged information from waiver even when disclosures have been made in “proceedings” extending beyond those that are purely judicial – arguably even to congressional investigations as “federal proceedings.”

52 See Epstein, *supra* n.3, at 398-407.

53 *Id.* at 407-10.

54 *Id.* at 507-525.

55 *Id.* at 417-22.

to exercise adequate care to protect the privilege.<sup>56</sup> There are many decisions concerning inadvertent or accidental disclosure in discovery proceedings and otherwise. While there are differing approaches to this topic, in general, whether waiver is found to have occurred depends upon the care that has been exercised by the holder of the information, *i.e.*, a simple mistake in the absence of carelessness typically does not give rise to waiver.<sup>57</sup>

In contrast, when a party has attempted to protect the privileged information, but through no fault of its own has been compelled to produce it upon an erroneous view that privilege does not apply, generally waiver does not occur.<sup>58</sup> Similarly, when the privilege holder has no opportunity to protect its privilege, as when for example its documents are taken by theft, typically courts do not enforce a waiver, at least when the holder acts promptly to recover or protect the information.<sup>59</sup>

## **B. Application of Waiver Principles in Congressional Inquiries**

In 1997, Congressman Thomas Bliley, Chairman of the House Committee on Commerce, began proceedings related to a national settlement of tobacco lawsuits and claims.<sup>60</sup> He requested and eventually subpoenaed on behalf of the Committee about 40,000 documents from several tobacco companies, concerning which a Special Master in Minnesota had recently overruled claims of privilege, primarily by reason of the “crime-fraud exception” to privilege.<sup>61</sup> In correspondence with Chairman Bliley, the tobacco companies continued to argue that the documents were privileged, a claim that he refused to recognize in return correspondence.<sup>62</sup> The tobacco companies then produced almost all of the documents at issue to Chairman Bliley, asserting that they were doing so only by compulsion, under threat of contempt of Congress for non-compliance with the subpoenas in question.<sup>63</sup> The Committee promptly made the documents public and posted them on the internet.<sup>64</sup>

In a series of subsequent cases, many courts held that the production of these documents to Congress by the tobacco companies was voluntary, and although pursuant to congressional subpoena, had not been sufficiently “compelled” so as to preclude the application of waiver

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56 See, e.g., *State v. Vennard*, 270 A.2d 837,849 (Conn. 1970), *cert denied*, 400 U.S. 1011 (1971) (waiver occurred when lawyer and accused client permitted police officer to overhear conversation at police station); *In re Victor*, 422 F.Supp. 475 (S.D.N.Y. 1976) (papers left in public hallway).

57 See Epstein, *supra* n.3, at 433-66. Fed. R. Civ. P. 26(b)(5)(B) now provides protection for materials inadvertently produced, at least until presentation of the matter to the court.

58 *Id.* at 411 (“The modern view...is that evidence of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or if the holder had no opportunity to assert the privilege”)(citing J. Weinstein & M. Berger, Evidence ¶ 512[01]). See also, e.g., *American Nat’l Bank & Trust Co. v. Equitable Life Assur. Soc’y of the United States*, 406 F.3d 867, 877 n.5 (7<sup>th</sup> Cir. 2005) (disclosure compelled by order of magistrate did not give rise to waiver).

59 See, e.g., *Dyer v. William S. Bergman & Assocs.*, 657 A.2d 1132 (D.C. 1995) (employee theft of privileged documents upon termination did not waive privilege, documents ordered returned).

60 *Commonwealth v. Phillip Morris Inc.*, No. 957378J, 1998 WL 1248003, \*1 (Mass. Super. July 30, 1998).

61 *Id.* at \*1-3.

62 *Id.*

63 *Id.* at 2-4. At that time, having exhausted appeals in the Minnesota court system, the tobacco companies also produced the documents to opposing counsel in the Minnesota case. *Id.* at \*5. The case was subsequently settled with a consent judgment that permitted plaintiffs to seek court approval for public release of the documents. *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F.Supp. 2d 70, 76 (N.D.N.Y. 2000).

64 *Commonwealth v. Phillip Morris, Inc.*, 1998 WL 1248003, at \*5.

principles.<sup>65</sup> These cases found that the attempt to convince Chairman Bliley by correspondence that the documents were privileged was not enough, that the tobacco companies should have pressed the issue further.<sup>66</sup> The cases do not specify or delineate how far the tobacco companies must have pressed the issue in order to preserve the privilege claim: additional efforts to convince Chairman Bliley and committee members, hearing and a ruling by the full committee, an order from the House as a whole, standing in contempt of Congress, or resisting prosecution on a contempt charge.

In 2007, the United States District Court for the District of New Mexico considered whether, by providing certain documents to Congress, the University of California and an entity associated with the Los Alamos facility had waived claims of privilege.<sup>67</sup> Noting a split in the sparse cases that have addressed the question concerning the effect of production of documents to Congress, the court determined the better rule adopted by those courts that have considered the matter in depth requires a party seeking to preserve privilege to “take all reasonable efforts to do so.”<sup>68</sup> Expressly not determining whether a party would have to actually stand in contempt of Congress in order to preserve a claim of privilege, the court found that waiver had occurred in the case before it based upon an absence of evidence that the parties had even objected to the request.<sup>69</sup> Thus, the extent to which a party must resist a congressional subpoena in order to avoid privilege waiver remains undefined.

### C. Congressional Enactment of Federal Rule of Evidence 502

In 2008, both the Senate and House passed an amendment to the Federal Rules of Evidence, adopting new Rule 502.<sup>70</sup> The amendment was recommended by the Judicial Conference of the United States to “resolve . . . longstanding disputes in the courts about the effect of certain disclosures” on privilege and to “respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure . . . will operate as a subject matter waiver of all protected

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65 *Id.* at \*12 (motion to “de-privilege” documents granted); *United States v. Phillip Morris, Inc.*, 212 F.R.D. 421, 424-26 (D.D.C. 2002) (defendants limited efforts to preserve privilege insufficient, privilege waived); *Neri v. R.J. Reynolds Tobacco Co.*, No. 98-CV-371, 2000 WL 33911224, \*3 (N.D.N.Y. Sept. 28, 2000)(privilege waived as to document in Bliley production); *Tompkins*, 92 F.Supp. 2d at 77-78 (production of the documents to Congress was voluntary and waived privilege); *Falise v. American Tobacco Co.*, 193 F.R.D. 73, 74-75 (Magistrate’s order requiring production of documents affirmed); *Little v. Brown & Williamson Tobacco Corp.*, Nos. CA 2:98-1879-23, CA 2:98-3235-2, 2000 WL 33957167 \*3 (D.S.C. Feb. 23, 2000) (magistrate’s order overruling claims of privilege affirmed); *Iron Workers Local Union No. 17 Insurance Fund v. Phillip Morris, Inc.*, 35 F.Supp.2d 582, 594-96 (N.D. Ohio 1999) (disclosure to Chairman Bliley was voluntary and waived privilege). *See also* Robert F. McDermott, Jr, *The Assault on the Attorney-Client Privilege and Work Product Doctrine in the Tobacco Wars: A Dispatch from the Eastern Front*, 3 Sedona Conf. J. 133, 137-38 (2002); John P. Reilly, *Privilege Claims for the “Bliley” Documents: Mixed Rulings Imperil Basic Principles*, 69 Def. Couns. J. 50 (2002). *But see In re Tobacco Cases*, No. JCCP 4042, 1999 WL 33722342, \*1 (Ca. Super. Ct. San Diego Cty. Sept. 16, 1999) (production was not voluntary because of threat of contempt, motion to compel production denied).

66 *E.g.*, *United States v. Phillip Morris, Inc.*, 212 F.R.D. at 426 (no evidence that tobacco companies sought hearing or meeting with Chairman Bliley or the committee to argue the privilege, or a ruling from the full committee); *Iron Workers*, 35 F.Supp. 2d at 595 (generally, a party seeking to preserve a claimed privilege must stand in contempt of Congress and be the subject of prosecution; certainly a party must do more than merely object); *Commonwealth v. Phillip Morris, Inc.*, 1998 WL 1248003, at \*9-11 & nn.12 (although a witness is not required to be in contempt to avoid waiver, must do more than token objection; no evidence here of use of “every reasonable effort” to convince full committee of validity of privilege claim).

67 *Anaya v. CBS Broadcasting, Inc.*, No. CIV 06-476 JB KBM, 2007 WL 2219394 (D.N.M. Apr. 30, 2007).

68 *Id.* at \*9.

69 *Id.* at \*12. The court summarily rejected the argument that the parties could not practicably object given their status as government contractors. *Id.*

70 122 Stat. 3537.



communications or information.”<sup>71</sup> Rule 502 (a) provides that disclosure of a communication or information “in a federal proceeding or to a federal office or agency” that waives attorney-client privilege or work product protection does not extend the waiver to other undisclosed communications or information on the same subject matter, in any federal or state proceeding, unless the waiver is intentional and the disclosed and undisclosed information “ought in fairness to be considered together.”<sup>72</sup> The “ought in fairness” standard was drawn from Rule 106 concerning the use of selective portions of documents, “[t]hus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner.”<sup>73</sup> Rule 502(f) clarifies that the rule applies to state proceedings (even if state law provides the rule of decision) and to certain federal court-annexed and arbitration proceedings.

Is a disclosure made in response to a congressional subpoena a “disclosure made in a Federal proceeding or to a federal office or agency?” The term “federal proceeding” is not defined in the rule, but does not appear to exclude a congressional investigation or other committee “proceeding” instituted by a congressional committee as a component of the “Federal” government. Therefore, it appears that Rule 502 operates to limit the subject matter waiver effect of disclosures in congressional proceedings in collateral litigation or other proceedings, *e.g.*, executive branch investigations, grand jury investigations, state agency investigations or other criminal investigation.

Moreover, aside from the express effect on subject matter waivers, Rule 502 is also noteworthy as a modern congressional endorsement of the concepts of attorney-client privilege and work product protection as worthy subjects of preservation (except to prevent selective, misleading and unfair disclosures) in all federal and state proceedings. This buttresses the notion that Congress should consistently recognize privilege in its own proceedings, if for no other reason, to avoid interference with judicial and executive branch proceedings caused by waiver of legitimately-claimed privilege concerning information required to be produced in congressional proceedings.

## **V. Best Practices: Dealing With Privilege in Congressional Investigations**

### **A. Best Practices for Counsel to Preserve Privilege in Congressional Proceedings**

There is no one template for dealing with the dilemma posed by the conflict between the congressional power to investigate and the central importance of the attorney-client privilege. The approach of different congressional committees, their chairpersons, their members and their staff, differ markedly. Given the risk of waiver of the privilege by disclosure, and the potential for collateral injury to the client, there are several points a lawyer should bear in mind when dealing with these issues.<sup>74</sup>

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71 Fed. R. Ev. 502, Explanatory Note.

72 *Id.*

73 *Id.*

74 Advisory Opinion 288 of the Legal Ethics Committee of the District of Columbia Bar (1999) addresses the lawyer’s ethical duty of confidentiality in this context, providing that the lawyer should press every appropriate objection to a congressional subpoena until there is no remaining avenue of appeal, but that he lawyer may (but is not required to) comply with the subpoena when in danger of being held in criminal contempt of Congress. Opinion 288 (1999).

First, the lawyer should explore the approach, attitude and prior practice of the relevant committee or subcommittee in dealing with attorney-client and work product issues. The degree to which members and staff insist on disclosure and possible waiver varies widely, and will also be affected by the perception of the conduct in question and the political pressures on those seeking the information, as well as those providing it. The persons seeking the information should be educated (or reminded) about the importance of the privilege, its deep roots in the common law, and the potential damage that could be caused by a deemed waiver through production. It is worth noting that while there is a perception that privilege does not apply in congressional proceedings, that issue has never been determined by the Supreme Court, and in practice many congressional committees have routinely accepted privilege. The lawyer should relate the harm that may occur in collateral proceedings and the interference that congressional production may cause in judicial (or grand jury or other investigative proceedings). Many members of Congress greatly respect the privilege and are sympathetic to its assertion in the right cases.

Second, when producing documents or giving testimony, the lawyer should clearly assert the privilege at the first opportunity, but should also build trust with the staff by being clear about the scope of the claim. The approach being taken should be discussed with the staff, including how that approach specifically translates into which materials are being produced and which are being withheld. Related to that, the lawyer should avoid blindsiding the staff by raising privilege issues for the first time in the heat of an actual hearing. In addition, the lawyer should not make excessively broad claims of privilege that may unnecessarily provoke confrontation with a committee and its staff.

Third, the lawyer should be willing to negotiate the objections that are made. There is often a willingness on the part of the investigators to try to obtain the information in question from non-privileged sources. The lawyer should suggest and encourage this approach as an alternative to a struggle over privileged material. And if that is not possible, then the lawyer should be forthcoming about the facts which support the claim of privilege, by producing a privilege log that demonstrates the factual support underlying the claim of privilege.

Fourth, the lawyer should not voluntarily produce privileged information on the theory that Congress may force the issue through contempt powers if it chooses to do so, because that will only compound the waiver problem. Keep in mind that while the threat to seek contempt may be made by one person, it cannot be carried out except through the vote of the full committee in question and then a vote of the entire body. There may be great reluctance in the House or Senate as a whole to compel the production of privileged information, despite a perception that each body has the power to do so. Any decision to yield to the demand prior to the last act to enforce it will only increase the chance that a waiver is found.

Finally, if you do reach the point where the information is produced, do it the right way. Negotiate the narrowest production possible, and seek agreements limiting the use of the information supplied. Consider invoking Rule 502 of the Federal Rules of Evidence, and make a

“disclosure” of information which carries with it the narrowest range of information which might be deemed to be waived by operation of Rule 502.<sup>75</sup>

## **B. Recommended Guidelines for Congressional Committees**

Congressional committees and their staff have a legitimate and important job to do, one that encompasses fact-finding and investigative proceedings in support of legislative functions. The use of subpoena power to obtain documents and information furthers this task. Just as there is no one-size-fits-all approach to these proceedings for the responding lawyer, there should also be a flexible approach by Committees and staff.

First, Committees and staff should not assert as a blanket matter that there is no privilege applicable in congressional proceedings. As previously discussed, this question simply has not been determined in an authoritative and final manner, either by the Supreme Court or (to the extent it views the question as uniquely within its purview) by Congress itself. Indeed, the oft-stated rationale for this position, that to recognize a judicially-created concept of privilege would burden separation of powers between the judicial and congressional branches, can be turned back on itself. Congressional investigative action that causes waiver of privilege in contemporaneous judicial proceedings can be characterized as congressional interference with judicial power. Moreover, the principles of privilege (to encourage consultation with counsel and compliance with law) are just as applicable. Rule 502 is a modern congressional endorsement of the concepts of attorney-client privilege and work product protection.

Second, whatever their conceptual view of privilege applicability, Committees and staff should first work to obtain the factual information they require through non-privileged means. Centuries of judicial experience suggest that only in rare cases does the assertion of privilege actually preclude access to the essential facts necessary to make appropriate findings of fact. Staff should work with counsel for subpoena targets to identify and exhaust non-privileged sources, and thereby eliminate issues concerning privileged documents.

Finally, Committees and staff can and should appropriately limit the assertion of privilege to documents and information that are actually privileged, requiring those asserting privilege to support the assertion with privilege logs or other information. The burden to prove the application of privilege should remain on the person asserting it.

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<sup>75</sup> As noted in text accompanying notes 10-12, *supra*, Congress may choose to enforce its subpoena power by invoking its inherent contempt power or by resorting to the Courts to compel enforcement. If a federal court is issuing the order enforcing the subpoena, counsel for the respondent should attempt to secure the anti-waiver protections of Rule 502(d) as part of the order. It may also be possible to negotiate with staff the inclusion of similar protective language in a congressional order.

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