Where Did My Privilege Go? Congress and Its Discretion to Ignore the Attorney-Client Privilege

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INTRODUCTION

“The right to counsel is too important to be passed over for prosecutorial convenience or executive branch whimsy. It has been engrained in American jurisprudence since the 18th century when the Bill of Rights was adopted . . . However, the right to counsel is largely

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ineffective unless the confidential communications made by a client to his or her lawyer are protected by law.”¹ So said Senator Arlen Specter on February 13, 2009, just seven months before Congress chose to ignore the very privilege he lauded. Why then, if the right to counsel is as important as Senator Specter articulated, does Congress maintain that its recognition of the attorney-client privilege is purely discretionary, routinely causing witnesses in congressional investigations to provide its committees with confidential communications between counsel and their clients — all the while knowing that doing so could potentially waive the witnesses’ rights to claim privilege in concurrent or subsequent judicial proceedings?

The most recent example of this derogation of the attorney-client privilege occurred in September 2009 during the uproar over Bank of America’s merger with Merrill Lynch. In response to Bank of America’s rightful claim to withhold privileged documents from the Securities and Exchange Commission, the House Committee on Oversight and Government Reform launched its own investigation into the matter. As part of its inquiry, the committee, through its chairman, Representative Edolphus Towns, directed a letter to the bank requesting documents relating to the merger, including those protected by the attorney-client privilege. In its response, Bank of America conceded that Congress was not required to recognize the attorney-client privilege, but petitioned the committee to do so in its discretion.

Responding for the committee, Chairman Towns flatly stated that his committee would not recognize the bank’s claims of privilege, instead demanding that Bank of America immediately produce the confidential materials and that its employees refrain from asserting the privilege on the bank’s behalf.² The bank consequently surrendered its documents and, in doing so, may have waived the right to claim protection under the attorney-client privilege in future judicial proceedings. Incidentally, when its Board of Directors voted a few weeks later to formally waive the bank’s attorney-client privilege, it may have forestalled a legal battle over the veracity of any claims of privilege Bank of America might have claimed in other venues.³

This article examines the applicability — or lack thereof — of the

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³On October 16, 2009, well after Chairman Town’s letter, Bank of America’s Board of Directors (under severe pressure from the New York State Attorney General, a U.S. district court Judge, and public opinion) voted to waive the attorney-client privilege with regards to certain communications with outside lawyers about the bonus disclosures involving Merrill Lynch executives.
attorney-client privilege to Congress and argues, perhaps contrary to conventional belief, that the privilege is not sub-constitutional, but is instead encompassed in the First Amendment and, therefore, applicable to Congress. Part 1 examines the history and purpose of the privilege; Part 2 provides an overview of Congress’s authority to investigate; Part 3 explains the rationale behind Congress’s position that recognizing the privilege is discretionary; Part 4 elucidates the reasons why providing confidential documents to Congress can destroy privilege claims in subsequent or parallel judicial proceedings; Part 5 discusses the steps witnesses before Congress may take to protect the privilege in concomitant judicial matters; and Part 6 argues that Congress’s claims of discretionary recognition of the privilege may be flawed because the attorney-client privilege is part and parcel of the First Amendment right to free speech and association.

1. History and Purpose of the Attorney-Client Privilege

The attorney-client privilege,\(^4\) which protects legal communications between attorney and client,\(^5\) is the oldest of the legal privileges relating to confidential communications known to common law\(^6\) and can be traced back to the Roman Empire.\(^7\) Its maturation during the reign of Elizabeth I was based upon a contemplation of the “oath and honor of the attorney,” rather than the fear or hesitations of a client to seek counsel.\(^8\) Consequently, the privilege belonged to the attorney and not to the client. In subsequent centuries, however, this view of the privilege altered and the focus shifted to the necessity of providing subjectively for the client’s freedom from apprehension of consulting his attorney,\(^9\) making it client — not attorney — focused.

Through the common law, the privilege developed further still as attorneys and courts advanced a deeper understanding of its importance. As a consequence, the privilege became one of the cornerstones of the modern U.S. adversarial system of justice. Despite this significance, it is important to recognize that the attorney-client privilege is not a

\(^{4}\)The terms “attorney-client privilege” and “the privilege” are used interchangeably throughout the article.

\(^{5}\)John William Gergacz, Attorney-Corporate Client Privilege § 1.04 (3d ed. West 2009).


\(^{7}\)See Gergacz, supra note 5, § 1.04.

\(^{8}\)Radiant Burners, Inc. v. American Gas Ass’n, 320 F.2d 314, 318 (7th Cir. 1963) (citing 8 Wigmore, Evidence § 2290 (McNaughton rev. ed. 1961)).

\(^{9}\)Radiant Burners, 320 F.2d at 318.
statutory right and, arguably, not a constitutional one. Thus, it is only through the common law and the judiciary that this privilege extends to citizens of the United States.

The attorney-client privilege applies to both natural and legally-created persons such as corporations, albeit in slightly different ways. Consequently, the confidential relationship between counsel and client impacts not only legal communications and decisions made by clients, but it also plays a significant role in the business decisions of corporations throughout the United States — if not the world — every day. This is because corporations routinely seek legal advice from attorneys, whether in-house or outside counsel, to ensure that their business decisions stay within the bounds of the law and often do so with the belief that the contents of such communications will remain confidential.

Hence, it is an aphorism that “society is entitled to every man’s evidence.” And while this maxim is significant, privileges such as the attorney-client privilege are designed to protect from disclosure all communications between an attorney and his or her client that concern legal advice — so long as the communications do not further a crime and remain confidential. This is because the general principle of utilizing all means to ascertain the truth is limited when there is a public good from keeping certain information secret; the attorney-client privilege provides just such a public service. Moreover, the privilege “exists to protect not only the giving of professional advice to those who can act on it,” but also the giving of information to the attorney to enable him to provide measured and educated guidance.

Thus, because the attorney-client privilege presumes a confidential relationship between the two parties, a bond of mutual trust should ensue. This bond promotes fair and frank discussions between client and counsel and allows the attorney to be fully informed of all the

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11 Clutchette v. Rushen, 770 F.2d 1469, 1471(9th Cir. 1985), cert. denied, 475 U.S. 1088 (1986).


14 See Gergacz, supra note 5, § 1.06.

15 Elkies, 364 U.S. at 234.

16 Upjohn, 449 U.S. at 390.
facts of the matter for which he or she has been engaged. This, in turn, permits the client to take full advantage of the legal system.\textsuperscript{17} Importantly, once apprised of all of the facts, the lawyer will be in a position to separate the relevant information from the unimportant. This symbiotic relationship, based upon an understood and necessary confidentiality, facilitates the efficient development of legal advice required for the attorney to properly represent the client.\textsuperscript{18}

In order for the legal relationship between attorney and client to function properly, the two must be able to predict with some degree of certainty whether particular discussions will be protected.\textsuperscript{19} Without such guarantees, clients may not be candid. And when a client is not candid, his or her attorney is unable to analyze the case as effectively or make fully informed decisions, which could act to the client’s detriment. Furthermore, any attorney-client relationship based on less than trust must proceed cautiously, as cases will have little or no chance at settling\textsuperscript{20} or, worse still, a criminal defendant may be exposed to additional charges and harsher penalties. Hence, U.S. courts recognize the significant role the privilege contributes to the administration of justice because it promotes full and frank communications between client and attorney.\textsuperscript{21}

The attorney-client privilege does not just serve a client-specific purpose, though. It also provides an important public function. As the Supreme Court stated in \textit{Upjohn Co. v. United States}, “the attorney-client privilege promotes a broader public interest in observing the law and administering justice by encouraging clients to fully engage their counsel.”\textsuperscript{22} Thus, because the vast majority of citizens are aware of the attorney-client privilege and its promise of confidentiality, members of the public are much more likely to discuss their legal concerns with attorneys. This is particularly true in regards to modern corporations, which, unlike most individuals, consistently seek counsel to ensure they are obeying the law.

The attorney-client privilege’s biggest strength — confidentiality — is also the source of its Achilles heel. Due to the fact that it keeps relevant information from the public, which is entitled “to every man’s

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\item\textsuperscript{17} \textit{Upjohn}, 449 U.S. at 391; see also \textit{Trammel v. U.S.}, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186, 5 Fed. R. Evid. Serv. 737 (1980).
\item\textsuperscript{18} \textit{Upjohn}, 449 U.S. at 391.
\item\textsuperscript{19} \textit{Upjohn}, 449 U.S. at 393.
\item\textsuperscript{20} See Gergacz, supra note 5, § 1.08.
\item\textsuperscript{22} \textit{Upjohn}, 449 U.S. at 389.
\end{itemize}
evidence,” privileges such as the attorney-client privilege are not “lightly created and must be strictly construed and apply only where it is necessary to achieve its purpose.” Consequently, a party seeking the protection of the privilege must be extremely careful not to purposefully or inadvertently waive its protections by sharing the confidential information with third parties, even under threat of contempt without, “at minimum, serious resistance” to the production of the contested materials.

Since the attorney-client privilege plays such an important role in our society, it is highly regarded and considered by many to be sacrosanct. It fosters attorney-client relationships, encourages client candor, promotes efficiency in the legal system, and encourages client law-abiding behavior, all of which are important not only in judicial settings, but also in congressional ones.

2. Congress’s Power to Investigate

The power of Congress to conduct investigations is inherent in the legislative process, despite the fact that such power is not expressly provided for in the Constitution or by statute. That power, which is derived from the Constitution’s Necessary and Proper Clause and bolstered by the congressional contempt statutes, is broad.

The Necessary and Proper Clause states: “The Congress shall have 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, or in any department or office thereof.” This clause gives each House of Congress the power to do whatever is customarily required of it, such as holding hearings or conducting investigations, in order to

27 See Gergacz, supra note 5, § 1.08.
29 U. S. Const. art. I, § 8, cl. 18.
31 U. S. Const. art. I, § 8, cl. 18.
engage in its legislative role.\textsuperscript{32} These functions, which are delineated in the Constitution, include passing legislation, overseeing government agencies, investigating regulated activities,\textsuperscript{33} and confirming government appointees, such as ambassadors and Supreme Court Justices.\textsuperscript{34}

This investigative power, while far reaching, is limited to inquiries relating to matters over which Congress has jurisdiction\textsuperscript{35} and “is subject to protections against the invasion of such privileges as those against unreasonable searches and seizures (Fourth Amendment), self-incrimination (Fifth Amendment) and the like.”\textsuperscript{36} Accordingly, Congress and its committees cannot make inquiries into the private affairs of citizens.\textsuperscript{37} Instead it must focus upon matters under its purview, which it has done since the very infancy of the Constitution,\textsuperscript{38} and do so in a manner that does not violate the protections afforded to citizens, both natural and legal, in the Bill of Rights.

Congress, like certain executive agencies, has the power to gain access to the information needed to engage in its legislative functions and is empowered to compel the attendance of witnesses and the production of books and records relating to the subject of its inquiries.\textsuperscript{39} To do so, committees rely upon several legal tools. For instance, all of them can ask for voluntary cooperation from subjects of the investigation and quite often do so through a Chairman’s Letter.\textsuperscript{40} Certain committees, however, such as the Senate Homeland Security and Govern-

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\item[34] The Senate is the only branch of Congress with the authority to conduct confirmation hearings.
\item[36] McGrain, 273 U.S. at 164.
\item[38] The first Congressional investigation/hearing occurred in 1792, when the House of Representatives appointed a select committee to inquire into the St. Clair expedition. That committee was authorized by the House to send for necessary persons, papers, and records. Cf. Mark J. Rozell, Restoring Balance to the Debate Over Executive Privilege: A Response to Berger, 8 Wm. & Mary Bill Rts. J. 541 (2000).
\item[39] Kilbourn, 103 U.S. at 199.
\item[40] A “Chairman’s Letter” is a request from the chair of the congressional committee usually requesting cooperation in the investigation and will often include a request for documents. See Raymond Shepherd III & Don R. Berthiaume, Point of Order: An Insider’s Guide to Congressional Investigations i-17 (Washington Legal Foundation: Contemporary Legal Note Series 56, 2007), available at http://works.bepress.com/don__berthiaume/7.
\end{enumerate}
\end{footnotesize}
ment Affairs Committee and the House Oversight and Government Reform Committee, have the power to issue subpoenas *duces tecum* for documents and subpoenas *ad testificandum* requiring testimony from individuals at depositions or congressional hearings,grant immunity in certain situations, and may hold witnesses in contempt. While granting immunity and issuing subpoenas are important investigatory tools, it is Congress’s contempt power that gives it the force and strength it needs to compel witnesses to comply with its demands to produce documents, including those protected by the attorney-client privilege. If a witness refuses to answer questions or to abide by a congressional subpoena, the committee or subcommittee may attempt to hold the witness in contempt through one of its three contempt powers: (i) the inherent contempt power; (ii) criminal contempt; and (iii) civil contempt, which applies only to the Senate.

Congress’s inherent contempt power is not specifically provided to it by the Constitution, but it has been held by the United States Supreme Court to be necessary to investigate and legislate effectively. The power rests upon the well-settled rule of unexpressed power necessary or proper to the exercise of express powers. Even so, neither the House nor the Senate has used its inherent contempt power in more than 60 years. If Congress chose to use it today, though, the Sergeant-at-Arms would bring the witness before the House or Senate and he or she would be tried by that body. If the witness is held in contempt, he or she may then be imprisoned in the Capitol jail for that congressional session, or until the witness decides to provide testimony to the committee or subcommittee.

The second method of bringing a contempt charge against a witness involves charging him or her with criminal contempt pursuant to the provisions of 2 U.S.C.A. §§ 192 and 194. Section 192 provides that a person who has been summoned to appear before Congress or one of

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41Eastland v. U. S. Servicemen’s Fund, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) (Congressional subpoenas are within the scope of the Speech and Debate clause which provides “an absolute bar to judicial interference” once it is determined that Members are acting within the “legitimate legislative sphere” with such compulsory process.)

42See Shepherd & Berthiaume, supra note 39, at 6.

43See Anderson v. Dunn, 19 U.S. 204, 5 L. Ed. 242, 1821 WL 2177 (1821); McGrain 273 U.S. at 172.

44See Anderson, 6 Wheat. at 233.


46See Rosenberg & Tatelman, supra note 28, at CRS-12.
its committees and willfully fails to deliver documents as ordered or hav- 
ing appeared refuses to answer questions under inquiry is guilty of a 
misdemeanor, punishable by a fine not more than $100,000 or less than 
$100 and imprisonment not less than one month nor more than 12 
months.47

Section 194 provides the procedures Congress must follow in order 
to bring a contempt citation under § 192. It requires that the contempt 
citation first be approved by the subcommittee, then by the full com-
mittee, and finally by the full House or Senate, where the Speaker of 
the House or the President of the Senate certifies the contempt 
charge. Congress then sends the contempt citation to the appropriate 
U.S. Attorney and it is his or her “duty” to bring the matter before the 
grand jury.48

Finally, the Senate has a civil contempt option, which is not available 
to the House of Representatives. Under this option, a federal district 
court must, at the request of the Senate, issue an order to the witness 
compelling him to testify or to produce the requested documents. If 
the witness continues to refuse, the court may, in a summary proceed-
ing, impose sanctions to coerce compliance.49

Without the ability to conduct investigations and bring contempt 
citations against recalcitrant witnesses, Congress would be unable to 
engage in its constitutional duties, such as passing legislation and 
engaging in the oversight of federal agencies. While fulfilling these 
important functions is paramount, congressional inquiries, like execu-
tive branch investigations and prosecutions, place witnesses in peril-
ous positions when they provide testimony or records to committees 
without procedural safeguards or testimonial privileges. At Congress, 
this concern becomes eminently more acute when the witnesses' 
statements or documents — including those protected by the 
attorney-client privilege — may also dictate the decisions of 
prosecutorial agencies or civil litigants considering actions against 
those same witnesses.

3. Why the Attorney-Client Privilege is Not Applicable to 
Congress

Congress has taken a limited view as to the applicability of the 
attorney-client privilege to its proceedings, traditionally entertai

claims of privilege only as a matter of discretion. Typically, the decision to recognize the privilege is based upon the particular circumstances of an investigation and, if it is established that the legislative need for the information outweighs the arguments against production, Congress or its committees will require production of the confidential communications. This discretion is based upon three principles: (i) testimonial privileges have not, historically, applied to legislative activities; (ii) the attorney-client privilege is a judicially-created, sub-constitutional rule not applicable to Congress; and (iii) allowing judicially-created rules to dictate congressional procedures would violate the doctrine of separation of powers.

Historically, the attorney-client privilege is not recognized by legislative bodies.

Congress’s authority to investigate is derived from its inherent power to legislate. This power is akin to the legislative power of the British Parliament, which often conducts inquiries when considering new legislation. Consequently, parliamentary procedures provide some guidance as to how the attorney-client privilege interacts with legislative bodies because the discretion to entertain claims of privilege traces back to that body.

At common law, English courts, like U.S. courts, are bound by the attorney-client privilege; Parliament and Congress, on the other hand, are not. In 1986, during the House’s contempt proceedings against Ralph and Joseph Bernstein, an attorney and real estate agent who both worked for Ferdinand and Imelda Marcos, the House relied upon Parliament’s views of the privilege when analyzing the Bernsteins’ refusals to answer questions put to them on the grounds that doing so would violate their respective attorney-client privileges. In its report, the House cited Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament, which stated that

[a] witness is . . . bound to answer all questions the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that he may thereby subject himself to a civil action, or because he has

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51 See Bernstein Proceedings, supra note 50, at H669.
52 See Bernstein Proceedings, supra note 50, at H669.
53 See Bernstein Proceedings, supra note 50, at 681; see also Kilbourn v. Thompson, 103 U.S. 168, 183, 26 L. Ed. 377, 1880 WL 18803 (1880) (Congress’s power to conduct investigations is based upon the House of Commons power to engage in legislative activities).
54 See Bernstein Proceedings, supra note 50, at H669.
55 See Bernstein Proceedings, supra note 50, at H669.
taken an oath not to disclose the matter about which he is required to
testify, or because the matter was a privileged communication to him, as
where a solicitor is called upon to disclose the secrets of his client.\textsuperscript{56}

History shows that Congress, like Parliament, has traditionally taken
a circumscribed view of the applicability of the privilege in its
proceedings.\textsuperscript{57} For example, in 1874, the House called Joseph B.
Stewart to testify before one of its committees. Stewart refused to
answer the committee’s questions on the grounds that doing so would
require him to violate his client’s attorney-client privilege. As a result,
the committee sought a contempt citation against him through the
House of Representatives. The House then directed the Sergeant-at-
Arms to seize Stewart and return him to Congress to explain his
refusal to answer the committee’s questions. Stewart was subse-
quently brought before the House which, finding that he failed to show
sufficient cause for refusing to answer the committee’s question, held
him in contempt of Congress through its inherent power to do so. In
response, Stewart brought an action in the Supreme Court for the
District of Columbia against the speaker of the House alleging assault
and false imprisonment.\textsuperscript{58}

The court upheld Congress’s contempt power and its authority to
seize Stewart for refusing to answer its committee’s questions. In
reaching this decision, though, the court did not opine on the reason-
ing behind Stewart’s refusal to answer the committee’s questions —
that doing so would violate the attorney-client privilege\textsuperscript{59} — but instead
focused solely on Congress’s inherent contempt power. Consequently,
by upholding that power in the face of a claim of attorney-client
privilege, the court tacitly affirmed the argument that testimonial
protections, such as the attorney-client privilege, are not applicable to
congressional proceedings.

In 1935, the Supreme Court of the United States, in the matter of
\textit{Jurney v. MacCracken}, had the opportunity to analyze the same issue
faced by the \textit{Stewart} court. In \textit{Jurney}, the Senate subpoenaed William
MacCracken, an attorney, to testify before it regarding the destruction
and removal of documents, files and memoranda relating to air mail

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\item[\textsuperscript{56}] See Bernstein Proceedings, supra note 50, at H669 (citing Sir Thomas Erskine
\textit{May}, \textit{Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parlia-
ment} 746–47 (Sir Charles Gordon ed., 20th ed. 1983)).
\item[\textsuperscript{57}] See \textit{Stewart v. Blaine}, 8 D.C. 453, 1 MacArth. 453, 1874 WL 17266 (D.C.
\item[\textsuperscript{58}] Stewart, 1874 WL at *1.
\item[\textsuperscript{59}] Stewart, 1874 WL at *4.
\end{itemize}
\end{footnotesize}
and ocean mail contracts. He appeared as requested, but refused to turn over documents in his possession that consisted of communications between himself and his corporate and individual clients on the grounds that such exchanges were protected by the attorney-client privilege. The committee, after hearing MacCracken’s reasoning for withholding the materials, determined that none of the documents could be withheld under such a claim and held him in contempt through its inherent contempt power. Shortly thereafter, MacCracken secured permission from his clients to release the privileged materials to the committee and did so.

Like the Stewart case, the Supreme Court did not opine on the validity of MacCracken’s privilege claims and focused only on Congress’s authority to hold witnesses in contempt. It held that Congress did indeed have the power to punish witnesses for contempt and, by doing so, indirectly affirmed that withholding documents or testimony from Congress on the basis of the attorney-client privilege was unjustifiable and punishable.

While no court has ever specifically ruled on whether the attorney-client privilege is applicable at Congress, these two decisions, coupled with the historical right of legislatures to access information necessary to fulfill legislative duties, indicate that Congress can punish those who refuse to provide testimony or documents under a claim of privilege and force the production of confidential materials if it deems it necessary to do so.

The attorney-client privilege is a sub-constitutional, judicially-created rule.

As discussed in Part 2, supra, the attorney-client privilege is a judicially-created rule that developed through the common law. It has never been a statutorily granted right and Congress has rejected opportunities to enact legislation that would have made the privilege applicable to it. For instance, in February 1986, in the wake of the Bernstein Proceedings, Congressman Mervyn Malcolm Dymally introduced H.R. 4245, also known as the Attorney-Client Privilege Act of 1986. The purpose of this bill was to “confirm that the attorney-client and other privileges are available to persons testifying before

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60 Jurney, 294 U.S. at 144.
61 Jurney, 294 U.S. at 145.
62 Jurney, 294 U.S. at 146.
63 Jurney, 294 U.S. at 146.
64 Jurney, 294 U.S. at 150–52.

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This bill, which would have unquestionably brought the testimonial rights of witnesses to Congress, was soundly rejected and never became law.66 While Congress may not want to statutorily protect the privilege, it must, like all branches of government, honor those rights specifically granted to citizens in the Constitution; such as the Fourth Amendment right against illegal searches and seizures and the Fifth Amendment right against self-incrimination67 and, under certain circumstances, those granted by statute. It is not bound to honor those privileges that are sub-constitutional and the product of the common law.68 Since the Constitution does not specifically provide for testimonial privileges and the Supreme Court has never identified a "constitutionally protected attorney-client privilege,"69 it is arguable that the attorney-client privilege is sub-constitutional and inapplicable to the either the House of Representatives or the Senate.

As a consequence, Congress maintains that because the privilege is neither constitutionally nor statutorily granted, it is not bound by its tenets and has the discretion to respect or reject the privilege as it sees fit. There is an argument, however, that suggests that the attorney-client privilege is part and parcel to the First Amendment right to speech and association and may be applicable to Congress. This theory is discussed in Part 6, infra.

Judicially-created rules cannot dictate congressional procedure. The Constitution provides that each House of Congress may "determine the rules of its proceedings."70 And, apart from those specific privileges created by the Constitution through the Bill of Rights, "the privileges applicable to judicial and legislative proceedings arise

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67 See Bernstein Proceedings, supra note 50, at H679.
68 Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). See Beckler v. Superior Court, Los Angeles County, 568 F.2d 661 (9th Cir. 1978) ("[T]he attorney-client privilege is a matter of state law, for determination by the California courts. It is not a matter of Constitutional law under the Fifth Amendment.").
70 U.S. Const. art. I, § 5, cl. 2.
from policy determinations by the lawmakers empowered to make those policy decisions.\textsuperscript{71} For legislative proceedings, which include congressional hearings and investigations, Congress makes those edicts through its statutes, rules of the House and Senate, and committee rules. In judicial proceedings, the policy determinations are developed by the judiciary through the common law, and the courts define the boundaries of attorney-client privilege as they see fit.\textsuperscript{72}

From a policy perspective, witnesses in legislative settings are, arguably, not placed in positions where their property rights or personal freedoms are put in jeopardy,\textsuperscript{73} as Congress has no power to impose judgment upon them. Conversely, those rights and freedoms are at the very core of legal actions argued before the judiciary. It follows then that the attorney-client privilege is more suited for use in the judiciary and the adversary process and not the legislative process of Congress\textsuperscript{74} because freedoms and liberties are at risk in one, but not the other.

This distinction between Congress and the Judiciary is derived from the doctrine of separation of powers, which is defined as being “the division of governmental authority into three branches of government — legislative, executive, and judicial — each with specified duties on which neither of the other branches can encroach.”\textsuperscript{75} While \textit{Marbury v. Madison}\textsuperscript{76} established the doctrine of judicial review, which provides the Judiciary with the authority to review congressional actions and decide the constitutionality of Congress’s deeds or decisions, the Constitution does not obligate Congress to recognize or follow the testimonial privileges witnesses enjoy in judicial settings. Contemporaneously, the Constitution specifically grants Congress the power to determine its own rules.\textsuperscript{77} Accordingly, binding Congress to judicially-created rules would violate the separation of powers doctrine and, by extension, the Constitution.

4. Providing Privileged Materials to Congress Waives the Attorney-Client Privilege

The attorney-client privilege, like all privileges, must be strictly construed and applied only where it is necessary to achieve its

\textsuperscript{71}See Bernstein Proceedings, supra note 50, at H670.
\textsuperscript{72}See Bernstein Proceedings, supra note 50, at H670.
\textsuperscript{73}See Bernstein Proceedings, supra note 50, at H670.
\textsuperscript{74}See Bernstein Proceedings, supra note 50, at H682.
\textsuperscript{75}Black’s Law Dictionary, 1396 (8th ed. 2009).
\textsuperscript{76}Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).
\textsuperscript{77}U.S. Const. art. 1, § 5, cl. 2.
purposes. As a consequence, attorneys and clients cannot pick and choose with whom to waive or enforce the privilege. They must either choose to keep the communication confidential or, if they wish to share the information with an unrelated third-party, such as an executive agency or Congress, risk waiving the right to claim the privilege as to all other opponents. While one circuit has accepted the doctrine of selective waiver, the vast majority of circuits have held that this waiver principal applies even if that third-party agrees through a non-disclosure agreement or similar instrument not to disclose the privileged information to others.

Congress relies upon subpoenas to compel witnesses to appear before it and to produce books and records. While some may argue that responding to a duly issued subpoena is involuntary, the simple fact is that it is not, as production in response to a subpoena is “not normally viewed as a compulsory disclosure.” In order to preserve the privilege, the subpoenaed witness must take all steps reasonably

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78 Nixon, 418 U.S. at 710.
70 Permian 665 F.2d at 1427.
81 See Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); Don R. Berthiaume, Changes to Federal Rules of Evidence May have a Negative Impact on Corporate America, SEC & White Collar Defense-Client Alert, (Venable LLP, Sept. 2006) (The selective waiver doctrine allows corporations seeking to cooperate with a government investigation to disclose to the government, pursuant to a confidentiality agreement, information that is otherwise protected by the attorney-client privilege, but continue to maintain those protections against others. Presently, the selective waiver doctrine has been rejected by almost every single federal circuit.), available at http://www.venable.com/files/Publication/52f60a39-361c-4aeb-ba65-7411e7ae7690/Presentation/PublicationAttachment/5d023852-6bb5-4512-a39c-fecab64abd69/1559.pdf (last visited Feb. 18, 2010).
82 Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977). This risk of global privilege waiver, or “subject-matter waiver,” is ameliorated by recent revisions to Federal Rule of Evidence 502(a). Intended to encourage the disclosure of information to federal investigators, the rule codifies the concept of selective waiver in certain circumstances, providing, “that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver . . . is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.” Fed. R. Evid. 502, advisory committee notes, revised Nov. 28, 2007.
available to contest that subpoena, and only if those steps are unsuccessful will testimony or document production in compliance with the subpoena be treated as compulsory. It follows then that compliance with a subpoena without first exhausting the available avenues to challenge it is deemed a waiver of any privileges that might otherwise apply.\textsuperscript{84} Thus, where witnesses have not met their burden of proving that their prior disclosure of documents was involuntary, that disclosure must be viewed as a waiver of whatever privileges may have applied to the documents in question.\textsuperscript{88}

The impact of this waiver principle as it relates to Congress’s discretion to ignore the privilege came to a head in the tobacco litigation cases of the late 1990’s and early 2000’s.\textsuperscript{86} These civil suits, which were filed across the nation by numerous states and insurance carriers against the major tobacco manufacturers,\textsuperscript{87} sought the recovery of Medicaid and other health care expenses, which related to smoking related illnesses, from the defendants.\textsuperscript{88} Due to the extraordinarily large amount of damages sought by the plaintiffs, Congress was considering legislation that would create certain limitations on the manufacturers’ liabilities through a national settlement.\textsuperscript{89} During the legislative process, the Commerce Committee through its chairman, Rep. Thomas Bliley of Virginia, subpoenaed documents and materials from the tobacco producers,\textsuperscript{90} some of which the manufacturers claimed were protected from disclosure by the attorney-client privilege.\textsuperscript{91}

\textsuperscript{85}Philip Morris, 1998 WL 1248003, at *12.
\textsuperscript{86}There were 26 separate lawsuits filed against the Tobacco Manufacturers. For purposes of this article we are not including a list of each of the cases.
\textsuperscript{87}For purposes of this section of the article we are referring to the tobacco manufacturers as “manufacturers” and “defendants.”
\textsuperscript{89}Philip Morris, 1998 WL 1248003, at *1.
\textsuperscript{90}Philip Morris, 1998 WL 1248003, at *1.
\textsuperscript{91}The documents in question consisted of approximately 39,000 pages and were placed at issue in the State of Minnesota’s third-party cost recovery suit. A special master assigned to the case determined that the documents, despite the defendants’ claims, were not protected by the attorney-client privilege. The defendants then appealed that decision through the Minnesota appellate courts and U.S. Supreme Court, but the appeals were unavailing. The defendants then turned the documents over to the Minnesota Attorney General, which were then publicly released. The plaintiffs
In seeking the documents, Rep. Bliley sent a letter to the tobacco manufacturers’ attorneys in which he stated:

[T]he claim of privilege for the documents requested in the subpoenas will not be recognized. Further, unless the documents in question are produced immediately, I intend to proceed with a contempt resolution for enforcement of the subpoenas by the House of Representatives... I urge your clients to remedy their current non-compliance by immediately producing the subpoenaed documents.92

In addition to informing the manufacturers of his intent to seek contempt proceedings, Rep. Bliley also declared that his committee would review the materials confidentially and then determine whether to publicly release them.93

The manufacturers produced the requested documents to the committee the same day they received Rep. Bliley’s letter. In cover letters attached to the privileged materials, they each claimed, in similar fashion, that they were compelled to produce the materials because of the committee’s threatened contempt citations and that by producing the documents they were not waiving their attorney-client privilege rights.94 In doing so, the manufacturers attempted to sustain the privilege in the concurrent judicial proceedings despite producing the confidential materials to Congress.

As a consequence of this disclosure, the various plaintiffs all sought the discovery of these privileged communications. One argument they relied upon was that the defendants waived their attorney-client privileges when they produced the confidential communications to the House Commerce Committee.95 In response, the tobacco manufacturers argued that they did not waive their privileges because they were compelled under threat of contempt to produce the materials to Rep. Bliley and his committee.96

The vast majority of the courts ruled in favor of the plaintiffs on the grounds that the tobacco manufacturers did not take all of the necessary steps to safeguard the privileged communications and failed to exhaust all administrative remedies before providing the materials to the Commerce Committee. In short, the courts found that the manufacturers had to do more than simply state in a letter that they were providing the documents only under Congress’s threat of

argued that this release of documents constituted a waiver as well; this issue, however, is not discussed in this article.

93See Reilly, supra note 88.
contempt and were not waiving their privileges. They needed to do more.

As a consequence, it is appropriate to conclude that those who produce privileged communications to Congress in response to chairmen's letters or subpoenas waive their rights to withhold those documents from others in concomitant judicial proceedings if they fail to take steps to avoid producing the privileged communications. Thus, individuals and corporations that find themselves embroiled in congressional inquiries face a serious dilemma: how do they comply with congressional subpoenas without risking a contempt citation while at the same time protecting the privilege rights and protections they are afforded in judicial proceedings?

5. Protecting the Privilege in Parallel and Subsequent Judicial Proceedings

Neither the House nor the Senate rules provide procedures for challenging a subpoena issued by one of their committees and a person seeking to challenge a congressional subpoena does not have any ability to obtain a court order quashing or modifying that subpoena, as the Constitution's Speech or Debate Clause prevents such judicial interference with legislative activities. Consequently, a court review of a congressional subpoena can only occur as part of a contempt proceeding. However, there are certain steps — that are far short of being held in contempt — which witnesses in congressional investigations and hearings can take to sustain their privilege rights in concurrent or subsequent judicial proceedings. The tobacco litigation cases, in addition to firmly establishing the rule that producing privileged documents to Congress waives the producers' rights to claim privilege as to other third-parties after a disclosure has been made, also identified steps that such individuals could take to sustain their privilege in civil or criminal actions.

It is important to recognize that congressional subpoenas, in and of themselves, do not create a legal requirement for the disclosure of confidential information or privileged communications. Accordingly, "part[ies] must do more than merely object to Congress's ruling,"

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97 See Reilly, supra note 88 (for a list of the courts that ruled in favor of privilege waiver).
98 U.S. Const. art. 1, § 6, cl. 1.
101 D.C. Bar Ethics Formal Op. 288, Compliance with Subpoena from Congressional Subcommittee to Produce Lawyer's Files Containing Client Confidences or
instead, they must risk standing in contempt of Congress\textsuperscript{102} if they want to maintain the attorney-client privilege in Congress and not produce the documents in question. At the same time, however, they should not have to risk contempt to protect the privilege in parallel or subsequent judicial proceedings.

While parties may not have to risk a congressional contempt citation, they do face a high burden to sustain their rights in judicial proceedings. Parties seeking to maintain the attorney-client privilege must establish for the court what steps they took to challenge Congress’s subpoena, that they made “all appropriate objections,”\textsuperscript{103} and that the steps they did take represented the fullest extent of the options available.\textsuperscript{104} As candid attorney-client communications are “worthy of maximum legal protection,” courts expect attorneys and their clients to “zealously” protect documents believed, in good faith, to be within the scope of the privilege.\textsuperscript{105}

The options available to those seeking to protect the privilege in congressional proceedings include: (i) negotiating with committee staff regarding its anticipated treatment of privileged materials; (ii) meeting or attempting to meet with the committee chair or other committee members to sustain the privilege; (iii) lodging objections to the full committee; (iv) seeking a ruling from the full committee regarding the privileged materials; and (v) requesting a formal hearing in front of the committee.\textsuperscript{106} While this may seem like a “lot of hoops to jump through,” those appearing before congressional committees must make every effort short of holding themselves in contempt in order to secure their privilege rights in judicial proceedings. Witnesses, targets or subjects of congressional investigations must also be sure to document the efforts they have undertaken to sustain the confidentiality of their privileged communications, as failing to do so may lead to the waiver of the attorney-client privilege in concomitant judicial proceedings.

Witnesses that are subpoenaed to appear before Congress or


\textsuperscript{103}See D.C. Bar Ethics Formal OP. 288, supra note 100.


\textsuperscript{105}Haines v. Liggett Group Inc., 975 F.2d 81, 90, 36 Fed. R. Evid. Serv. 782 (3d Cir. 1992).

produce documents do, in fact, have some means to oppose Congress’s demands for the production of materials protected by the attorney-client privilege. While the efforts undertaken by such parties may ultimately end in failure at the congressional level, these same efforts will most likely permit courts to find in favor of the privilege in simultaneous or succeeding judicial actions. Consequently, witnesses placed in these types of predicaments must consider all of the options available to them before throwing in the towel and conceding Congress’s power to reject or honor the attorney-client privilege as it sees fit.

6. The Attorney-Client Privilege is Engrafted Into the First Amendment

There is one additional argument that individuals or corporations subpoenaed to appear before or produce books and records to Congress must consider prior to disclosing confidential communications. One can argue that the attorney-client privilege is not sub-constitutional, but is instead constitutional because it is embodied within the First Amendment right to free speech and association. Therefore, like the Fifth Amendment, Congress should honor the privilege and cannot, except under very limited circumstances, require witnesses to produce privileged documents.

The downside, of course, is that the only way for such an argument to be tested is for a witness in a congressional hearing to withhold testimony or documents based upon a claim of attorney-client privilege and then have Congress file a contempt citation against him, her, or it; thereby causing the case to go before the Judiciary. Under these circumstances, the witness could contend that the right to hire and consult an attorney is protected by the First Amendment’s guarantee of freedom of speech and association because it prohibits the government from interfering with a citizen’s right to seek legal advice or retain counsel.

At first blush, one may say that seeking or retaining counsel is not the same as a constitutionally protected attorney-client privilege. However, a key component of seeking legal advice and retaining counsel is the power of attorneys and clients to sustain the confidentiality of their communications. Thus, the client’s interest in speaking freely with his or her counsel is interwoven with his or her

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107 DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult an attorney . . . implicates not only the Sixth Amendment, but also clearly established First Amendment rights of association and free speech.").

108 DeLoach, 922 F.2d at 620.

109 DeLoach, 922 F.2d at 954.
right to effective assistance of counsel. 110 And, “because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel [his or her] client, interference with this confidentiality impedes the client’s First Amendment right to obtain legal advice.” 111

It is important to appreciate that the First Amendment is implicated any time the government compels individuals to speak. 112 As previously discussed, one method the government relies upon to compel witnesses to do so is through the issuance of subpoenas. These legal documents, by their very nature, obligate witnesses to “speak” through testimony or by the production of books and records; unless, of course, a testimonial privilege or constitutional right obviates the need for the citizen to comply. Most individuals, in response to such demands, choose to engage counsel or, in certain situations, have already engaged counsel to provide them with legal guidance relating to either responding to the subpoena or the underlying cause of the subpoena’s issuance. Thus, the need for confidential communications between counsel and client are necessary in order to avoid any potential liabilities.

Moreover, “[t]he Constitution is . . . applicable to any governmental action, including the action of congressional subcommittees. But which constitutional rights are applicable depends on the nature and consequences of the governmental action. Thus, certain protections of the Constitution may rightfully be claimed by a witness called to testify before a congressional subcommittee, such as the right not to incriminate himself, the right to be free of unreasonable searches and seizures and the right not to have his First Amendment freedoms abridged.” 113 It follows then that absent appropriate justification, Congress cannot compel the revelation of privileged attorney-client communications because a citizen’s interest in keeping legal conversations private is an aspect of freedom of speech; thus, causing the

111 Martin, 686 F.2d at 32.
privileged communication’s disclosure is violative of the First Amendment.\textsuperscript{114}

For example, in the matter of Denius v. Dunlap, the defendant, an administrator of a federally-funded educational program, required teachers employed by the school to consent to background checks and to sign waivers that caused them to forswear their attorney-client privileges. Denius, one of the program’s teachers agreed to the background check, but refused to sign the waiver. In response, Dunlap refused to renew Denius’s teaching contract and would not allow him to return to teach his classes.\textsuperscript{115}

Denius filed suit under 42 U.S.C.A. § 1983 against Dunlap alleging that Dunlap violated his civil rights. He sought injunctive, declaratory, and monetary relief on the premise that the defendant’s requirement that he waive his attorney-client privilege to retain his federally funded job violated his First, Sixth, and Fourteenth Amendment rights to counsel.\textsuperscript{116} Dunlap contended that the case should be dismissed on sovereign immunity grounds.\textsuperscript{117} In relying on this defense, he failed to provide the court with any evidence that his needs for the privileged communications outweighed Denius’s right to confidential legal communications under the First Amendment.\textsuperscript{118}

In reaching its decision, the court found that Denius did indeed have a First Amendment right to consult with an attorney and that encompassed within this right to consultation was the attorney-client privilege. It held further that absent appropriate justification, the government, in this particular case Dunlap, could not compel Denius to reveal his confidential attorney-client communications.\textsuperscript{119} Thus, by failing to provide the court with any reasonable explanation for requiring the relinquishment of privileged materials, the court ruled that the government violated Denius’s right to consult with his attorney in an unfettered manner.\textsuperscript{120}

Congress, as a branch of the U.S. government, must observe the

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\item \textsuperscript{114}Denius, 209 F.3d at 954; McIntyre, 514 U.S. at 341–42; National Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 462–63, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).
\item \textsuperscript{115}Denius, 209 F.3d at 948–49.
\item \textsuperscript{116}Denius, 209 F.3d at 949.
\item \textsuperscript{117}Denius, 209 F.3d at 949.
\item \textsuperscript{118}Denius, 209 F.3d at 955.
\item \textsuperscript{119}Denius, 209 F.3d at 955.
\item \textsuperscript{120}Despite this finding, Dunlap was immune from suit for damages under Section 1983 because the First Amendment right to privileged communications was not clearly established prior to the court’s decision.
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rights of U.S. citizens provided to them in the Constitution. Thus, when Congress compels witnesses to reveal confidential communications, it is infringing upon those parties’ First Amendment rights to obtain legal advice. That is, unless Congress can show sufficient justification for the disclosure because, absent appropriate rationalization, it cannot compel the revelation of privileged attorney-client communications.

Interestingly, the standard Congress uses to determine if it will honor the attorney-client privilege, which it laid out in the Bernstein Proceedings, is very similar to the test courts would use to determine if an executive agency or other governmental body was violating the First Amendment. That is, does the legislative need for the privileged information outweigh the arguments against its production?

To begin such an analysis, one must start with the premise that facts, in and of themselves, are never privileged. Instead, what is protected from disclosure are the communications between client and counsel regarding those facts. These communications could, under certain circumstances, include admissions of guilt or liability, advice regarding the ramifications of legal decisions, or similar information. The details of events that occurred or actions in which a witness engaged, however, are not privileged and would be discoverable by Congress, unless, in the case of individuals, the witness refused to testify by invoking the Fifth Amendment. Consequently, there are few circumstances in which privileged communications between

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121 See Bernstein Proceedings, supra note 50, at H679.
122 See generally Citizens United v. Federal Election Com’n, 130 S. Ct. 876, 187 L.R.R.M. (BNA) 2961, 159 Lab. Cas. (CCH) P 10166 (2010) (finding that corporations cannot be denied the First Amendment right to donate to political campaigns and have the same rights as natural citizens).
123 Denius, 209 F.3d at 954.
124 See Bernstein Proceedings, supra note 50, at H669; Denius, 209 F.3d at 955.
126 See City of Philadelphia, Pa. v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831, 5 Fed. R. Serv. 2d 546 (E.D. Pa. 1962) (“[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney.’
127 Corporations do not possess a Fifth Amendment right and witnesses representing the corporation might have to admit to wrongdoing by the corporation. They could,
counsel and client would be necessary for Congress to possess in order for it to engage in its legislative functions; that is, overseeing government agencies and regulated activities and enacting legislation.

For example, how could knowledge of a discussion between the chief executive officer of a corporation and his attorney regarding the acquisition of a competitor impact the legislative decisions of Congress? Congress knows that the corporation acquired its rival and it can analyze the communications between the two parties prior to the acquisition because such communications are not privileged, and draw the inferences it needs to enact legislation or engage in its oversight function. Reviewing the advice the corporation received regarding the acquisition adds nothing to the equation; unless, of course, Congress is simply looking for a “smoking gun” to embarrass the corporate executives or similar witnesses who would appear before it. Such a motive, however, flies in the face of Congress’s constitutional role.

Furthermore, courts and juries in this country pass judgments on individuals and corporations that negatively impact property rights and personal freedoms. Congress, however, is not similarly situated. As it pointed out in the Bernstein Proceedings, Congress does not pass judgment or make legally binding decisions on individuals or corporations. In the Proceedings, Congress expressed that its recognition of the attorney-client privilege was unnecessary because witnesses were not in danger of losing freedoms or property if the parties’ privileged communications were revealed during its hearings or investigations.

However, this reasoning is illogical and backwards. If courts and juries can make life-altering determinations without access to privileged information, why does Congress require the production of confidential materials to make non life altering or legally binding reports? Surely, when a person or corporation commits a crime or tort, the communications between client and counsel regarding such occurrences would be relevant to any corresponding judicial proceedings. However, because of all the policy reasons for the privilege’s existence, discussed in Part 2, supra, courts do not allow such evidence to come to light. It follows then that Congress, like the judiciary, should not be permitted to ignore a First Amendment right to privileged legal communications because its needs for such communications are, arguably, less than the needs of the judiciary. That is, of course, unless Congress can establish that its needs for the

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128 See Bernstein Proceedings, supra note 50, at H670.
privileged information outweigh the producer’s rights to keep such information secret, which, in many respects would mirror the circumstances under which the judiciary would require the production of similar materials.

There are circumstances where such needs may exist. For example, if Congress were inquiring into an industry where allegations arose regarding the veracity of the legal advice received by the targets of its investigation, then Congress’s legislative need might outweigh the witness’s right to confidentiality of legal communications. The Bank of America case, referenced in the opening paragraphs of this article, is an excellent example of just this type of scenario.

After the Securities and Exchange Commission ("SEC") sued Bank of America for failing to disclose bonuses it paid to Merrill Lynch executives, the bank and the SEC reached a settlement agreement whereby the bank agreed to pay a $33 million fine. Unfortunately for the parties involved, the judge in that case refused to accept the settlement when it became uncertain if the perpetrators of the alleged fraud would be charged either criminally or civilly with any wrongdoing. To alleviate the judge’s concerns, the SEC informed the court that Bank of America relied upon the “advice of counsel,” when it engaged in its questionable actions.129

Under these circumstances, Congress’s need for such information would outweigh Bank of America’s right to privileged communications under the First Amendment because the legal communications were at the center of Congress’s inquiry — that is, the advice attorneys provided to the bank regarding SEC disclosures prior to issuing the bonuses. However, an analysis under the First Amendment would be unnecessary, as Congress would be entitled to access the privileged information for other reasons. In particular, the crime-fraud exception130 to the attorney-client privilege would negate the bank’s ability to shield its legal communications from disclosure in a judicial setting, and the same standard would apply at Congress. Thus, communications between counsel and client concerning an intended or ongoing fraud would be well within Congress’s right — and any courts’ for that matter — to review. This exception was, at least questionably, implicated with Bank of America’s disclosure regarding the Merrill Lynch bonuses.

What is more, Bank of America’s invocation of the advice of counsel


130 Communications between an attorney and a client concerning an intended or continuing crime or fraud are not protected by the attorney-client privilege.
defense put its legal communications squarely at issue; thus making any claims of privilege untenable. Under these circumstances, Congress — and courts in judicial settings — would need to analyze the legal communications in order to engage in its functions. Thus, while it is only in the very rare situation where Congress’s needs for privileged attorney-client communications would ever outweigh a citizen’s right to keep such communications private, there are circumstances where analyzing privileged communications is absolutely necessary.

Some may argue that requiring Congress to engage in procedures to analyze First Amendment claims would protract or forestall its ability to fulfill its constitutional objectives. However, this argument does not hold water. Congress already engages in some semblance of an analysis prior to requiring witnesses to produce privileged materials. Its standard, as discussed in the Bernstein Proceedings, is whether the legislative need for the privileged information outweighs the arguments against its production. In most instances, Congress, in its discretion, determines that its needs do not outweigh the witnesses’ arguments against production and will not cause the disclosure of privileged communications. However, if it finds its needs do outweigh the witnesses’ case in opposition to disclosure, committees will often not disclose their reasons for such a finding and the people often making such determinations are committee staff-members and not the committees’ chairpersons. More transparency is necessary.

Congress, in light of the fact that the First Amendment is applicable to its proceedings, must institute some procedural safeguards that would ensure its committees do not violate this important constitutional protection, or if it is going to do so, it must do so in a more transparent manner. One such safeguard could include requiring a ruling from the committees’ chairpersons expressing the reasons why the legislative need for privileged materials outweighs the witnesses’ First Amendment rights to confidential legal communications prior to compelling production. Such rulings would have the same authority as court orders and would allow the witnesses’ to then take steps to sustain the confidentiality of their documents in concomitant judicial proceedings.\footnote{It might also provide a court with relevant background information as it considers whether the attorney-client privilege is being appropriately applied to the litigants’ legal communications.} One thing has become clear: unless witnesses appearing before Congress are provided with procedural safeguards, such individuals will consistently be faced with a Hobson’s choice of choosing between citation for contempt of Congress or the full disclosure of potentially litigation-changing documents and materials.

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to adverse third-parties — neither of which is a palatable conclusion to an already stress inducing situation.

CONCLUSION

The attorney-client privilege is, as Senator Specter said, “too important to be passed over for prosecutorial convenience.” Moreover, it is too significant to be ignored by congressional branch “whimsy,” as it serves an important function in every scenario where a citizen, either natural or corporate, is placed in danger of having his, her, or its constitutional rights threatened, regardless of whether such threats develop in a courtroom or in the halls of Congress. Consequently, Congress must take steps to provide procedural safeguards for those required to appear before it and submit, at its discretion, privileged materials. In currently failing to do so, Congress may be violating the very instrument it has sworn to uphold, the Constitution. In the meantime, those placed in such perilous situations must make every effort to sustain their attorney-client privilege rights in Congress, as simply submitting to Congress’s will may lead to the waiver of such protections in future or parallel judicial proceedings.