

# No Secrets Allowed: Congress's Treatment and Mistreatment of the Attorney-Client Privilege and the Work-Product Protection in Congressional Investigations and Contempt Proceedings

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## I. INTRODUCTION AND BACKGROUND

The attorney-client privilege is one of the oldest and most sacred privileges recognized by law. In 1577, almost two hundred years before the signing of the Declaration of Independence, the British Chancery Court acknowledged the privilege as a legal right under English common law in *Berd v. Lovelace*.<sup>1</sup> Since the early 1880s, the decisions of American courts have solidified the attorney-client privilege as a substantive right.<sup>2</sup> By contrast, the work-product protection is a relatively recent doctrine developed by the Supreme Court of the United States to shield from discovery documents created by counsel in anticipation of litigation and to provide strict protection to counsel's mental impressions.<sup>3</sup> Congress codified the common law protections for work product in Rule 26(b)(3) of the Federal Rules of Civil Procedure.<sup>4</sup> Together, the attorney-client privilege and work-product protection help to ensure that parties receive adequate representation by counsel and a fair trial by facilitating the free

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<sup>1</sup> *Berd v. Lovelace*, (1577) 21 Eng. Rep. 33 (Ch.).

<sup>2</sup> See *Coastal States Gas Comm. v. Dept. of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (explaining that the attorney-client privilege "is not limited to communications made in the context of litigation, or even a specific dispute"); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555 n.2 (2d Cir. 1967) ("Rules of privilege are not mere 'housekeeping' rules. . . . Such rules 'affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive.'" (quoting *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463, 466 (2d Cir. 1962))); *Flynn v. Church of Scientology Int'l*, 115 F.R.D. 1,3 (D. Mass. 1986) ("[O]ne who consults a lawyer with a view to obtaining professional legal services from him is regarded as a client for purposes of the attorney-client privilege.")

<sup>3</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947). The terms "work-product protection" and "work-product doctrine" are used interchangeably throughout this article.

<sup>4</sup> FED. R. CIV. P. 26(b)(3).

flow of information between lawyer and client and by shielding the lawyer's mental impressions from an adversary, respectively.

While courts have protected vigorously information falling within the attorney-client privilege or work-product protection, some congressional committees have refused to recognize the existence of a privilege or protection during several congressional investigations. Indeed, some members of Congress have gone so far as to argue that neither the attorney-client privilege nor the work-product protection applies to the investigative work of the legislative branch.

This article generally assesses the extent and availability of rights under the attorney-client privilege and work-product doctrine. The article first explores the history and development of those concepts in the courts and before Congress. It next discusses Congress's authority to investigate and compel testimony and the scope of Congress's contempt authority to punish those persons not compliant.

The article also considers whether a basis exists for Congress to treat the two concepts differently. The attorney-client privilege is an established substantive right under common law, codified by Congress as recently as 2008 in the new Rule 502 of the Federal Rules of Evidence; therefore, nothing within Congress's powers should allow it to abrogate this long-standing right. The work-product protection, on the other hand, is primarily a procedural right regarding the permissible scope of discovery during a judicial proceeding. While the interests underpinning the work-product doctrine may not be apparent in a congressional investigation, this article argues that Congress nonetheless should respect the work-product protection in some instances, such as where simultaneous civil and criminal proceedings may be anticipated or ongoing.

To the extent Congress refuses to accept a witness's assertion of the attorney-client privilege or work-product protection during an investigation, this article explores avenues for challenging such an adverse determination and for resisting the disclosure of the confidential information in the face of contempt. The article concludes with a discussion of some practical ways an individual or entity subject to a congressional investigation may limit the extent of any subsequent waiver and minimize the harm caused by the release of the information.

## II. THE ATTORNEY-CLIENT PRIVILEGE

### *A. The Origins of the Attorney-Client Privilege*

The attorney-client privilege is the oldest evidentiary privilege recognized in Anglo-American common law.<sup>5</sup> Some commentators suggest that the notion of an attorney-client privilege has its origins in Roman law, which imposed a duty of loyalty on a lawyer not to serve as a witness in the client's case.<sup>6</sup> In English common law, the concept of an attorney-client privilege stems from the sixteenth century belief in the "oath and honor" of the lawyer.<sup>7</sup> As Professor Wigmore articulated in his treatise, the attorney-client privilege is based on:

consideration for the *oath and honor* of the attorney rather than for the apprehensions of his client. . . . If the "point of honor" was to be recognised at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.<sup>8</sup>

In the earliest reported cases from the 1570s and 1580s, the British Chancery Court acknowledged the existence of a privilege that, when invoked, prevented lawyers from disclosing communications relating to their representation of clients.<sup>9</sup> More than a dozen Chancery Court opinions during that period acknowledged the existence of a privilege; among them is *Berd v. Lovelace*, which recognized in 1577 a lawyer's privilege against the disclosure of "knowledge touching the cause at variance."<sup>10</sup>

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<sup>5</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."); 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton Rev. 1961) (explaining the history of attorney-client privilege).

<sup>6</sup> 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 87 (John W. Strong, ed., 5th ed. West 1999) (explaining that attorney-client privilege may be traced back to Roman law). *See also* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 603 (1980) (citing Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928)); Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 475-87 (1987) (discussing historical development of attorney-client privilege).

<sup>7</sup> J.H. WIGMORE AND J.T. MCNAUGHTON, EVIDENCE IN TRIALS AT COMMONS LAW (Little, Brown & Co., Boston, 1961) § 2290.

<sup>8</sup> *Id.*

<sup>9</sup> *See, e.g.*, JONATHAN AUBURN, LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY 5 n.25 (Hart 2000) (listing Chancery Court decisions recognizing a privilege).

<sup>10</sup> *See, e.g., Berd, supra* note 1; *see generally*, AUBURN, *supra* note 9.

The privilege eventually evolved from a right belonging to the lawyer to a right belonging to the client.<sup>11</sup> Professor Wigmore, in the first edition of his famous treatise on evidence, stated that “[t]he privilege is designed to secure subjective freedom of mind for the client in seeking legal advice.”<sup>12</sup> Early decisions of the Supreme Court of the United States and lower courts recognized the attorney-client privilege as an important right belonging to the client and an “indispensable” part of our justice system.<sup>13</sup> Justice Joseph Story, writing on behalf of the Court in 1826, explained:

The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.<sup>14</sup>

By the middle of the nineteenth century, the privilege was well engrained in the American legal system, and its existence, as a general matter, was beyond dispute.<sup>15</sup> In an 1865 decision, the Supreme Court explained the rationale of the privilege by quoting from a British opinion:

“[I]t is not of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence — in the practice of courts — and in those

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<sup>11</sup> See Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070-80 (1978) (discussing historical development of attorney-client privilege and observing that “the privilege was that of the lawyer (a gentleman does not give away matters confided to him), [but] as the rule developed the privilege became that of the client to have his secrets protected”).

<sup>12</sup> 4 JOHN HENRY WIGMORE, EVIDENCE § 2317 (1st ed., Little, Brown & Co. 1904).

<sup>13</sup> *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826) (“The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.”).

<sup>14</sup> *Id.* at 294.

<sup>15</sup> *Parish v. Gates*, 29 Ala. 254, 259 (1856) (“There, is perhaps, no principle of law which rests on a sounder basis, or which is supported by a more uniform chain of adjudication . . .”).

matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.”<sup>16</sup>

These early American decisions recognized that our judicial system relies on the ability of clients to communicate freely and candidly with their lawyers without fear that their communications will be publicized and used against them. In essence, the *sine qua non* of the attorney-client privilege was throughout history, and is presently, the zealous withholding from an adversary of confidential communications made within the attorney-client relationship.

#### B. *The Modern Attorney-Client Privilege and Its Limitations*

In 1974, Congress enacted Rule 501 of the Federal Rules of Evidence, which provides that privileges of a witness are governed by principles of federal common law in cases involving a federal question and governed by state common law in questions involving a state claim or defense.<sup>17</sup> This dichotomy shows that Congress explicitly recognized that the attorney-client privilege is substantive in nature, requiring significant protection by courts.<sup>18</sup> Indeed, the Advisory Committee Notes to Rule 501 unequivocally state that the attorney-client privilege is one of the privileges that federal courts “must” recognize.<sup>19</sup>

The seminal case defining modern attorney-client privilege is *Upjohn Company v. United States*.<sup>20</sup> In *Upjohn*, the Supreme Court explained that the purpose of the attorney-client privilege is “to encourage full and frank communications between attorneys and their clients.”<sup>21</sup> The Court held that the privilege applies to “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to

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<sup>16</sup> *Blackburn v. Crawford's Lessee*, 70 U.S. (3 Wall.) 175, 192-193 (1865) (quoting *Greenough v. Gaskel*, (1833) 1 My & K 98).

<sup>17</sup> FED. R. EVID. 501.

<sup>18</sup> H. R. REP. NO. 93-650, at 9 (1973) (“The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason.”).

<sup>19</sup> See FED. R. EVID. 501 advisory committee’s notes.

<sup>20</sup> *Upjohn Co.*, *supra* note 5.

<sup>21</sup> *Id.* at 389.

enable him to give sound and informed advice.”<sup>22</sup> The Court espoused the public policy considerations for having a privilege, explaining that “the privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”<sup>23</sup>

The privilege today is one of the most respected rights of a party. Once the attorney-client privilege is established, it is difficult to pierce. As one court explained, “[W]hen the privilege applies, it affords confidential communications between lawyer and client *complete* protection from disclosure.”<sup>24</sup> Nevertheless, because the application of the privilege hinders “the truth-seeking mission of the legal process,”<sup>25</sup> courts narrowly construe the privilege, recognizing it “only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.”<sup>26</sup> Therefore, courts place the burden on the proponent of the attorney-client privilege to demonstrate that each of the elements is met.<sup>27</sup>

Although the privilege is generally deemed absolute once it attaches, courts recognize several important exceptions. Generally, the attorney-client privilege is lost where the communication is disclosed to a third party unless that third party shares a common interest with the client.<sup>28</sup> In addition, the privilege is implicitly waived if a party places the privilege “at issue” by asserting a claim or defense that in fairness requires examination of the protected communications.<sup>29</sup> Finally, while “the

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<sup>22</sup> *Id.* at 390; *see also* *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956).

<sup>23</sup> *Upjohn Co.*, *supra* note 5, at 389.

<sup>24</sup> *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir.1998) (emphasis added).

<sup>25</sup> *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir.1986).

<sup>26</sup> *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation marks omitted).

<sup>27</sup> *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). In *Jones*, the Fourth Circuit articulated the classic test to determine whether the attorney-client privilege applies to certain communications or documents. That court explained that the privilege applies only if “(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” *See id.*

<sup>28</sup> *Cavallaro v. United States*, 284 F.3d 236, 246-47 (1st Cir. 2002); *see also* *Schwimmer*, *supra* note 22, at 243 (2d Cir. 1989).

<sup>29</sup> *See* *Clark v. United States*, 289 U.S. 1, 15 (1933) (“The privilege takes flight if the relation is abused.”); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (“[T]he attorney-client privilege cannot at once be used as a shield and a sword.”); *United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981) (claim of good faith reliance on governmental representations waived attorney-

attorney-client privilege must necessarily protect the confidences of wrongdoers,” it “ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.”<sup>30</sup> The purpose of this so-called “crime-fraud exception” is to ensure that the secrecy between lawyer and client does not extend to communications “made for the purpose of getting advice for the commission of a fraud or crime.”<sup>31</sup>

### III. THE WORK-PRODUCT PROTECTION

#### A. *The Origin of the Work-Product Protection*

Unlike the attorney-client privilege, the work-product doctrine is a relatively recent concept. The doctrine first was endorsed by the Supreme Court in the 1947 decision *Hickman v. Taylor*, where the Court affirmed the Third Circuit’s decision to shield from discovery statements made by witnesses to defense counsel during the course of an investigation.<sup>32</sup> The Supreme Court held that information prepared by counsel in anticipation of litigation — coined “work product of the lawyer” by the Third Circuit — was not discoverable unless the moving party established a compelling need for that information.<sup>33</sup> The Court reasoned that an attorney must be afforded a degree of privacy in his or her preparation for litigation, which includes the ability to create memoranda, correspondence, and other intangible items and to be secure in his or her mental impressions.<sup>34</sup> The Court explained that to allow discovery into these areas would “contraven[e] the public policy underlying the orderly prosecution and defense of legal claims.”<sup>35</sup>

Acting on the recommendation of the Advisory Committee of the Judicial Conference, the Supreme Court in 1970 formally codified the work-product doctrine in Rule 26(b)(3) of the Federal Rules of Civil Procedure.<sup>36</sup> Rule 26(b)(3) allows discovery of tangible work product only

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client privilege); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (assertion of qualified immunity defense waived attorney-client privilege).

<sup>30</sup> *United States v. Zolin*, 491 U.S. 554, 562-563 (1989) (citations omitted) (internal quotation marks omitted).

<sup>31</sup> *Id.* at 563 (citations omitted) (internal quotation marks omitted).

<sup>32</sup> *Hickman*, *supra* note 3, at 497.

<sup>33</sup> *Id.* at 510.

<sup>34</sup> *Id.* at 510-11.

<sup>35</sup> *Id.* at 510.

<sup>36</sup> Certain of the Amendments of Federal Rules of Civil Procedure Adopted by the Supreme Court of the United States on March 30, 1970, Effective July 1, 1970, With Advisory Committee's Notes

upon a showing by the party seeking discovery that it is unable to obtain the substantial equivalent without undue hardship.<sup>37</sup> Courts protect mental impressions, opinions, conclusions, and legal theories by counsel even more vigorously than mere tangible work product, and several courts have ruled that this intangible work product is entirely shielded from discovery, except in rare cases of crime, fraud, or bad faith.<sup>38</sup>

*B. The Modern Work-Product Protection and Its Limitations*

Since *Hickman v. Taylor* and the codification of the work-product doctrine in Rule 26(b)(3), the work-product doctrine has expanded to be broader in many respects than the attorney-client privilege. The work-product protection now protects materials that are not even seen or reviewed by the client.<sup>39</sup> And while materials must be prepared “in anticipation of litigation,”<sup>40</sup> litigation need only be contemplated, not necessarily imminent, at the time the work is performed for the doctrine to apply.<sup>41</sup> Moreover, courts have construed broadly the term “litigation” as used in Rule 26(b)(3) to include administrative and federal investigations.<sup>42</sup>

As with the attorney-client privilege, the work-product protection can be waived in certain instances. The protection is lost if a party voluntarily

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Thereon, as reprinted in KEVIN M. CLERMONT, FEDERAL RULES OF CIVIL PROCEDURE, AND SELECTED OTHER PROCEDURAL PROVISIONS 287-346 (Foundation Press ed., 2006).

<sup>37</sup> FED. R. CIV. P. 26(b)(3).

<sup>38</sup> See, e.g., *Duplan Corp. v. Moulinae et Retorderie de Chavanoz*, 509 F.2d 730, 734-35 (4th Cir. 1974); see also *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973); Deborah F. Buckman, Annotation, *Crime-Fraud Exception to Work Product Privilege in Federal Courts*, 178 A.L.R. FED. 87 (“[T]he privilege generally accorded to consultations for litigation is subject to what is known as the crime-fraud exception. The purpose of the exception is to ensure that the otherwise protected secrecy of attorney-client discussions does not extend to communications which are made for the purpose of continuing or contemplating criminal or fraudulent activity. The term ‘crime-fraud’ is a bit of a misnomer, as several courts have recognized situations involving wrongdoing which was not specifically criminal or fraudulent in which the exception might also apply. For example, some courts have applied the exception to a lawyer’s unprofessional behavior. Such criminal, fraudulent, or otherwise improper misconduct, obviously, would be fundamentally inconsistent with the basic premises of the adversary system.”).

<sup>39</sup> *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979) (explaining that the work-product protection is “broader than the attorney-client privilege; it protects materials prepared by the attorney, whether or not disclosed to the client, and it protects material prepared by agents for the attorney.”).

<sup>40</sup> FED. R. CIV. P. 26(b)(3).

<sup>41</sup> *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 7 (D.D.C. 1995).

<sup>42</sup> See *In re Grand Jury Proceedings*, 867 F.2d 539 (9th Cir. 1989) (applying doctrine in context of grand jury investigation); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (applying doctrine in the context of SEC and IRS investigations).



discloses work product to an adversary.<sup>43</sup> However, “[b]ecause the work product doctrine aims to not only preserve confidentiality, but also to protect the integrity of the adversary system, the privilege is not automatically waived by any disclosures to a third party. Instead, the work-product protection is waived only if such disclosure substantially increases the opportunity for potential adversaries to obtain the information.”<sup>44</sup>

Several key distinctions exist between the work-product protection and the attorney-client privilege. First, the work-product protection is not a privilege; it can be overcome in some instances by a showing of undue hardship.<sup>45</sup> Second, unlike the attorney-client privilege, which is rooted in public policy concerns of protecting *the client* in seeking legal advice, the work-product protection is designed primarily to protect *the attorney* in his or her advocacy role.<sup>46</sup> Indeed, an inquiry under the work-product doctrine focuses not on the communications from the client, but rather on the actions of the attorney. Third, the work-product protection is a judicial protection that is procedural in nature. It applies to the discovery in litigation into the mental impressions of counsel and tangible materials

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<sup>43</sup> *In re Steinhardt Partners*, 9 F.3d 230, 235 (2d Cir.1993) (“[V]oluntary disclosure of work product to an adversary waives the privilege as to other parties.” (citing *United States v. Nobles*, 422 U.S. 225, 239 (1975))).

<sup>44</sup> *Constr. Indus. Serv. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 49 (E.D.N.Y. 2001) (quoting *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 641) (E.D.N.Y. 1997). *See also* *Sec. Exch. Comm’n v. Beacon Hill Asset Mgmt. LLC*, 231 F.R.D. 134 (S.D.N.Y. 2004) (holding that disclosures by hedge fund manager to hedge fund and fund through which manager conducted the trading of the hedge fund and to other “feeder” funds were not sufficient to destroy the work-product protection, because interests of the funds were aligned with and not adverse to those of manager which was the target of enforcement action by the Securities and Exchange Commission (SEC), and disclosures did not make it more likely the documents would be disclosed to a party of adverse interest).

<sup>45</sup> FED. R. CIV. P. 26(b)(3)(A)(ii) (“...the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means”); *Hickman*, *supra* note 3, at 509 (“We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner’s case or cause him any hardship or injustice.”); *id.* at 511 (“Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.”).

<sup>46</sup> *Hickman*, *supra* note 3, at 510-511; *see also* *Allen v. Chicago Transit Auth.*, 198 F.R.D. 495, 500 (N.D.Ill.2001) (“Th[e] intent [of the work product doctrine] is to protect the adversarial process by providing an environment of privacy in which a litigator may creatively develop strategies, legal theories, and mental impressions outside the ordinary liberal realm of federal discovery provisions, thereby insuring that the litigator’s opponent is unable to ride on the litigator’s wits.”).

created in anticipation of litigation, while the attorney-client privilege is a substantive right that is not confined to the context of litigation.<sup>47</sup>

#### IV. CONGRESS'S ABILITY TO INVESTIGATE AND COMPEL TESTIMONY AND TO SANCTION NONCOMPLIANCE

##### A. *The Implied Contempt Authority of Congress*

Congress has an implied, yet well-established, right to investigate and compel testimony. The so-called implied or inherent authority is “coercive” in nature; a witness may be confined until he or she cooperates. Once the witness complies with the request, he or she may be released from detention.<sup>48</sup> In the early years of the Republic, Congress relied upon British parliamentary practice to hold a contumacious witness in contempt by issuing a warrant for his or her arrest, trying the witness before the committee where the witness refused to testify, and then punishing the witness by jailing him or her on the premises of Capitol Hill.<sup>49</sup>

Although it consistently has upheld Congress's implied contempt authority, the Supreme Court has not been consistent on the grounds for that implied authority. In 1821, the Supreme Court first recognized Congress's implied contempt authority in *Anderson v. Dunn*, although the Court rejected the argument that this implied authority was rooted in British parliamentary practice.<sup>50</sup> Instead, the Court held that Congress's power to punish a witness for interfering with the legislative process was derived from the concept of self-preservation, that is, an inherent power to

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<sup>47</sup> See cases cited *supra* note 2; see also James Hamilton, *Memorandum Regarding the Applicability of the Attorney-Client Privilege Before Congressional Committees*, 99th Cong. 2d Sess., 132 Cong. Rec. H693, 694 (daily ed. Feb. 27, 1986) (arguing that the recognition of the attorney-client privilege in grand jury proceedings supports its availability in congressional investigations).

<sup>48</sup> *Watkins v. United States*, 354 U.S. 178, 206 (1957).

<sup>49</sup> See, e.g., *Jurney v. MacCracken*, 294 U.S. 125 (1935); *McGrain v. Dougherty*, 273 U.S. 135 (1927); *Marshall v. Gordon*, 243 U.S. 521 (1917); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); see also MORTON ROSENBERG & TODD B. TATELMAN, CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 12 (Cong. Research Serv., CRS Report for Congress Order Code RL 34097, July 24, 2007), at 12 (“Under the inherent contempt power the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail.”), <http://www.scotusblog.com/movabletype/archives/crs.contempt.report.pdf>; Adam Cohen, *Congress Has a Way of Making Witnesses Speak: Its Own Jail*, N.Y. TIMES, Dec. 4, 2007, at A34.

<sup>50</sup> *Anderson*, *supra* note 49, at 225-31. The *Anderson* case involved the arrest, trial, and conviction of John Anderson by the House under its implied authority. Anderson had attempted to bribe a representative to gain support for pending legislation. Anderson sued the House for false imprisonment and bribery, contending that Congress lacked the power to punish a private citizen. In *Anderson*, the Supreme Court rejected Anderson's arguments and held that Congress has an implied right to punish persons who interfere with the legislative function.

ensure order within the chambers.<sup>51</sup> The Court again rejected any connection to British parliamentary practice decades later in 1880 in *Kilbourn v. Thompson*.<sup>52</sup> In the early twentieth century, however, the Supreme Court made a *volte-face* in *Jurney v. MacCracken* when it accepted the notion that the British Parliamentary practice of punishing contempt was incorporated into Congress's power through the Constitution.<sup>53</sup> In *Jurney*, a short opinion authored in 1935 by Justice Louis Brandeis, the Court cited *Anderson* as precedent for the implied contempt authority yet did not acknowledge any disagreement over the origin of the power.<sup>54</sup>

Eventually, the practice of using implied contempt authority fell out of use by Congress in large part because of the passage of a specific contempt statute in 1857, discussed below, which provides Congress with the ability to seek a punitive criminal sanction against a contumacious witness.<sup>55</sup> Congressional reliance on the implied contempt authority as a basis for holding a witness in contempt of a congressional investigation thus fell out of favor. The *Jurney* case in 1935 marked the last instance in which Congress utilized its implied contempt authority as grounds for a contempt action.<sup>56</sup> In 1957, the Supreme Court in *Watkins v. United States* acknowledged that Congress had abandoned its use.<sup>57</sup>

Although members of Congress have alluded to an implied contempt authority since the *Watkins* decision,<sup>58</sup> Congress has never explicitly relied on that authority in a contempt proceeding. Congress's reluctance to use the implied authority could be due to a number of reasons. Congress likely would need to demonstrate a compelling reason for resorting to its implied contempt authority, especially in light of its apparent abandonment for the past 50 years in favor of its statutory contempt authority.<sup>59</sup> Moreover, as a

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<sup>51</sup> *Id.*

<sup>52</sup> *Kilbourn*, *supra* note 49, at 189 (“[T]he right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament.”).

<sup>53</sup> *Jurney*, *supra* note 49, at 130-31.

<sup>54</sup> *Id.* at 148-49 & n.6.

<sup>55</sup> 2 U.S.C. § 192 (2008). *See infra* note 65.

<sup>56</sup> Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 148 (Jan. 1988) (citing *Jurney*, 294 U.S. at 151).

<sup>57</sup> *Watkins*, *supra* note 48, at 206.

<sup>58</sup> Statement by Chairman Porter Goss, H.R. Rep. No. 106-130, 106<sup>th</sup> Cong., 1st Sess. (1999) (“At common law, for instance, English courts were bound by an assertion of attorney-client privilege; Parliament was not.”).

<sup>59</sup> In addition to the accepted maxim that Congress's contempt power is limited to “the least possible power adequate to the end proposed,” *Anderson*, *supra* note 49, at 231, there is the due process concern of fair notice that could be triggered by resurrecting the implied authority. *See United States v. Williams*, 128 S.Ct. 1830, 1845 (2008) (“A conviction fails to comport with due process if the statute

practical matter, the implied contempt authority is narrow in scope. The implied contempt authority has been limited by the courts to “the least possible power adequate to the end proposed,”<sup>60</sup> which means that Congress may not detain a witness beyond the current session.<sup>61</sup> Finally, the implied authority also is limited to acts that specifically obstruct the legislative duties of Congress.<sup>62</sup> As a result of these restraints, Congress likely will not attempt to revive the doctrine of implied contempt authority in the future.<sup>63</sup>

*B. The Statutory Contempt Authority of Congress*

Congress has a sharper arrow in its quiver than implied authority to sanction noncompliance. In response to the limitations of the implied authority, Congress passed the congressional contempt statute in 1857 to give Congress the ability to seek a criminal punitive sanction.<sup>64</sup> The contempt statute currently states:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee . . . of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common

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under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”).

<sup>60</sup> *Anderson*, *supra* note 49, at 231.

<sup>61</sup> *Id.* The House, unlike the Senate, is not a continuing body. The ability to detain a witness ceases at the end of the session.

<sup>62</sup> *Marshall v. Gordon*, 243 U.S. 521 (1917).

<sup>63</sup> See MORTON ROSENBERG & TODD B. TATELMAN, CONGRESS’S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 12 (Cong. Research Serv., CRS Report for Congress Order Code RL 34097, July 24, 2007), at 15 (“[I]nherent contempt has been described as ‘unseemly,’ cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar. Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.” (citations omitted)).

<sup>64</sup> The impetus for the congressional contempt statute was the refusal of J.W. Simonton, a newspaper reporter for *The New York Times*, to testify about a news story, alleging that members of the House had solicited bribes for votes on pending bills, on the grounds that the information was confidential. See CONG. GLOBE, 34th Cong., 3d Sess. 403-13 (1857). Under the implied contempt authority, Congress only could detain him until the end of the session. *Id.* at 405.

jail for not less than one month nor more than twelve months.<sup>65</sup>

If a person fails to comply with a subpoena to testify or to produce documents, the committee issuing the subpoena can initiate contempt proceedings by submitting a statement of facts to the House or Senate.<sup>66</sup> The House or Senate (or, in some cases, the Speaker of the House or the President of the Senate)<sup>67</sup> then will decide whether to certify the facts to the U.S. Attorney General to determine whether to bring the matter before a federal grand jury.<sup>68</sup>

Following an indictment by a grand jury, a person accused of contempt is tried in federal district court.<sup>69</sup> As with any criminal prosecution, the government has the burden of proof to establish that the defendant's conduct falls within the terms of the statute.<sup>70</sup> A prosecution for contempt of Congress, however, is unique in that the government also must establish that Congress had the authority to investigate the underlying matter and that the authorizing resolution covers the disputed inquiry upon which contempt is charged.<sup>71</sup>

An important question is whether a contempt proceeding under the contempt statute can be based on a witness's refusal to answer a question or produce a document on grounds of the attorney-client privilege or work-product protection. The legislative debate concerning the contempt statute illustrates the differences in opinion concerning the availability of testimonial privileges. Although the House committee that introduced the contempt legislation had recognized previously the availability of the attorney-client privilege,<sup>72</sup> several members of that same committee

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<sup>65</sup> 2 U.S.C. § 192 (2008).

<sup>66</sup> 2 U.S.C. § 194 (2008).

<sup>67</sup> When Congress is in session, the entire chamber must vote to certify the facts to the United States Attorney. *See Wilson v. United States*, 369 F.2d 198, 201-03 (1966). If Congress is not in session, the Speaker of the House or the President of the Senate may certify the facts. *See id.* at 203-05.

<sup>68</sup> 2 U.S.C. § 194. (2008). An interesting issue, beyond the scope of this article, is whether a United States Attorney may exercise prosecutorial discretion and not institute a criminal contempt proceeding.

<sup>69</sup> *See, e.g., Watkins*, *supra* note 48.

<sup>70</sup> *Id.* at 208.

<sup>71</sup> *See, e.g., id.* at 187 (“The power of Congress to conduct investigations . . . must be related to, and in furtherance of, a legitimate task of the Congress.”); *Kilbourn*, *supra* note 49, at 190 (explaining that Congress does not possess “the general power of making inquiry into the private affairs of the citizen.”).

<sup>72</sup> CONG. GLOBE, 34th Cong., 3d Sess. 410 (1857) (statement by Rep. Warner) (“[A]ll confessions and other matters not confided to legal counsel[] must be disclosed when required for the purposes of justice.”).

seemed to express their belief that the proposed contempt statute conferred authority to Congress to overrule common-law privileges.<sup>73</sup> The United States Representative who introduced the legislation explained, however, that the legislation did not expand Congress's authority and that it was designed merely to substitute a judicial proceeding for punishment at the bar of Congress.<sup>74</sup>

The legislative debate in the Senate illustrates a clearer belief that the contempt statute does not grant Congress the ability to overrule the attorney-client privilege.<sup>75</sup> Senator Robert Toombs, the primary sponsor of the contempt legislation in the Senate, stated:

The bill puts witnesses before a committee of Congress, precisely on the same terms, and leaves them with the same exemptions, that they have at common law, except in two respects . . . . The bill takes away [the privileges against self-incrimination and infamy] . . . . The bill leaves every other exemption where it was before – that resulting from the relation of husband and wife, and *counsel and client*.<sup>76</sup>

Senator Bayard echoed the House sponsor's belief that the bill does not confer any additional powers on Congress but that it merely transfers authority to punish a contemptuous witness to the judiciary.<sup>77</sup> Senator Isaac Toucey went even further, arguing that members of Congress had a duty "to interpose the objection, and stop the witness" if the witness were to testify to attorney-client privileged information.<sup>78</sup>

Although the original legislative debate concerning the contempt statute is murky, the legislative history concerning subsequent amendments to the contempt statute suggests that Congress intended to uphold the availability of the attorney-client privilege. For example, in 1862, five years after the

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<sup>73</sup> *Id.* 427-28 (statement by Rep. Davis) ("[T]he rule of parliamentary law in England is, that every witness called before the lower House, is not exempted from answering any question. . . . [W]e only desire to reenact the common law of the Parliament of England."); *id.* at 31 (statement by Rep. Orr) ("[T]he common law of England does not exempt a witness from testifying upon any such ground.")

<sup>74</sup> CONG. GLOBE, 34th Con., 3d Sess. 427 (1857).

<sup>75</sup> *Id.* at 440-43.

<sup>76</sup> *Id.* at 440 (emphasis added). The privilege against infamy and the privilege against disgrace were explicitly abolished in congressional proceedings. 2 U.S.C. § 193 (2008).

<sup>77</sup> CONG. GLOBE, 34<sup>th</sup> Cong., 3d Sess. 445-45 (1857) (statement by Sen. Bayard) ("There is no attempt to abandon any of those guards which the great principles of the common law throw around individual liberty as against legislative or executive oppression.")

<sup>78</sup> *Id.* at 438-39 (statement by Sen. Toucey).

original debate, a subsequent debate over an amendment to the contempt statute evidences respect for the attorney-client privilege.<sup>79</sup> Similarly, in 1954, both the House and the Senate rejected an amendment to recognize the attorney-client privilege, seemingly based on the belief that the privilege already was respected.<sup>80</sup> Although there was little debate concerning the amendment, the report of the Senate Committee on Rules and Administration suggests that the 1954 proposed amendment was viewed as unnecessary:

With a few exceptions, it has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergymen and parishioner, doctor and patient, *lawyer and client* . . . . Controversy does not appear to have arisen in this connection.<sup>81</sup>

From the time of the adoption of the contempt statute until the 1980s,<sup>82</sup> Congress generally exhibited respect for common-law privileges, and rarely, if ever, challenged an assertion. Indeed, to date, Congress never has instituted a criminal contempt proceeding based upon a refusal to recognize a valid assertion of the attorney-client privilege, although members of Congress have threatened implicitly to do so.<sup>83</sup>

### *C. An Analysis of the Power of Congress To Override Testimonial Privileges*

Proponents of the view that Congress can reject an otherwise valid claim of the attorney-client privilege generally offer three justifications.<sup>84</sup>

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<sup>79</sup> CONG. GLOBE, 37th Cong., 2d Sess. 429-30 (1862).

<sup>80</sup> The Senate decided not to act on the amendment. See S. REP. NO. 84-2, at 27-28 (1954) (“While the policy behind the protection of confidential communication may be applicable to legislative investigations as well as to court proceedings, no rule appear [sic] to be necessary at this time.”). Similar legislation in the House of Representatives was never taken to a vote. See STAFF OF H. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, 98D CONG., ATTORNEY-CLIENT PRIVILEGE 25 (Comm. Print 1983).

<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> See discussion *infra* Part V.A.

<sup>83</sup> See discussion *infra* Part V.A.

<sup>84</sup> See Jonathan Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 151 (1988) (citing H. R. REP. NO. 462, (1985), reprinted in 132 CONG. REC. H666-97 (daily ed. Feb. 27, 1986); OFFICE OF THE CLERK OF THE HOUSE OF REPRESENTATIVES, MEMORANDUM OPINION OF GENERAL COUNSEL TO THE CLERK OF THE HOUSE OF REPRESENTATIVES ON ATTORNEY-CLIENT PRIVILEGES, reprinted in 132 CONG. REC. H674-75 (daily ed. Feb. 27, 1986); CONGRESSIONAL RESEARCH SERVICE MEMORANDUM, reprinted in 132 CONG. REC. H681-85 (daily ed. Feb. 27, 1986)).

First, proponents argue that because the attorney-client privilege was derived from English common law, it follows that the treatment of the attorney-client privilege in Congress also should be derived from English Parliament.<sup>85</sup> While English courts were bound by a valid assertion of the attorney-client privilege, Parliament was free to reject the privilege.<sup>86</sup> Some nineteenth century American commentators espoused the notion that the English Parliament's view toward the privilege should apply to Congress.<sup>87</sup>

This first argument, however, fails to consider Congress's apparent respect for the attorney-client privilege during the debate over the contempt statute, as discussed above. To the extent that the early Congress had the view that it could override a privilege like the English Parliament, Congress's view appeared to change over time, as exhibited in the legislative history of subsequent amendments to the contempt statute.<sup>88</sup>

A second argument in favor of Congress's ability to reject an otherwise valid claim of privilege is rooted in the broad authority granted to Congress by the Constitution. Proponents of this view argue that Congress's broad investigative powers are accompanied by specific constitutional authority to rule on claims of the attorney-client privilege and work-product doctrine. For support, they cite the language of Article I of the Constitution stating that "[e]ach House may determine the Rules of its Proceedings."<sup>89</sup> Courts have construed that clause to mean that the rules of judicial procedure are not applicable to congressional inquiries.<sup>90</sup> The argument follows that, because courts cannot impose such procedural rules on Congress, no laws prevent a congressional committee from rejecting a claim of attorney-client privilege or attorney work product.<sup>91</sup>

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<sup>85</sup> See, e.g., Office of the Clerk of the House of Representatives, Memorandum Opinion of General Counsel to the Clerk of the House of Representatives on Attorney-Client Privileges, *reprinted in* 132 Cong. Rec. H666-01 (daily ed. Feb. 27, 1986).

<sup>86</sup> See, e.g., H.R. Rep. No. 106-130 (1999) (Statement by Chairman Porter Goss) ("At common law, for instance, English courts were bound by an assertion of attorney-client privilege; Parliament was not."); *Proceedings Against Ralph Bernstein and Joseph Bernstein*, H.R. Rep. No. 99-462, at 12, 13 (1986), *reprinted in* 132 Cong. Rec. H666-01 (contempt proceedings against lawyers to Ferdinand Marcos for refusing to disclose to House subcommittee the communications they had with their client).

<sup>87</sup> See Luther Stearns Cushing, *Elements of the Law and Practice of the United States of America* 390 (1856 ed., *reprinted in* 1971) ("A witness cannot excuse himself from answering . . . because the matter was a privileged communication to him, as where an attorney is called upon to disclose the secrets of his client . . .").

<sup>88</sup> See discussion *supra* Part IV.B.

<sup>89</sup> U.S. CONST., art. I, § 5, cl.2.

<sup>90</sup> *United States v. Fort*, 443 F.2d 670, 679- 680 (D.C. Cir. 1970).

<sup>91</sup> Congressional Research Service, Comments on Dershowitz Memorandum (1986), *reprinted in* 132 Cong. Rec. H666-01 (daily ed. Feb. 27, 1986).



While this argument might have merit when Congress exercises its inherent power to punish a contemptuous witness, the argument lacks merit under the contempt statute because *courts*, not Congress, are responsible for determining the rights of a witness in the contempt proceeding.<sup>92</sup> However, this argument does raise an interesting question under the doctrine of separation of powers. It remains an open question whether Congress could declare at the start of a legislative session that it will not recognize the attorney-client privilege or work-product protection and then enforce that decision in a contempt proceeding in federal court.<sup>93</sup>

Third, proponents of broad congressional authority to overrule privilege argue that judicial decisions support the notion that Congress has discretion to reject any common-law privilege.<sup>94</sup> However, no court has ruled on Congress's ability under the contempt statute to override a claim of attorney-client privilege or work-product protection.<sup>95</sup> Decisions that recognize Congress's authority to accept or reject a claim of confidentiality concern Congress's implied power of contempt.<sup>96</sup> Courts have yet to decide whether Congress has the authority in a proceeding brought under the contempt statute.

#### V. ATTEMPTS BY CONGRESS TO OVERRIDE COMMON-LAW PRIVILEGES AND PROTECTIONS ASSERTED DURING A CONGRESSIONAL INVESTIGATION

##### *A. Congressional Override of the Attorney-Client Privilege*

Throughout its history, Congress generally has avoided confronting the difficult issue of whether the attorney-client privilege applies to matters before Congress. One of the most famous instances of Congress's side-stepping the issue occurred during the impeachment proceedings of Andrew Johnson in 1868. During the impeachment trial, a committee in the House of Representatives investigated the activities of Charles W. Woolley, a lawyer accused of bribing Senators.<sup>97</sup> The House Committee cited Woolley with contempt after he refused to answer questions

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<sup>92</sup> See discussion *supra* Part IV.B.

<sup>93</sup> These questions, although fascinating, are beyond the scope of this article.

<sup>94</sup> See Rich, *The Attorney-Client Privilege in Congressional Investigations*, *supra* note 84, at 151 (citing H.R. REP. NO. 462, *supra* note 84, at H669-70; CONGRESSIONAL RESEARCH SERVICE MEMORANDUM, *supra* note 84, at H681).

<sup>95</sup> See Rich, *The Attorney-Client Privilege in Congressional Investigations*, *supra* note 84, at 151.

<sup>96</sup> See, e.g., *Stewart v. Blaine*, 8 D.C. 453 (D.C. 1874).

<sup>97</sup> See Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 J. MARSHALL L. REV. 309, 312 (1988).

regarding his business dealings.<sup>98</sup> The House Committee then introduced a resolution to arrest and to detain Woolley in the Capitol until he answered the questions. During the floor debate on the resolution, various views were espoused concerning the applicability of the attorney-client privilege.<sup>99</sup> Rather than resolve the difficult question of whether the attorney-client privilege was available before Congress, the House decided as a threshold matter that Woolley had not met the burden of establishing that the communications were privileged.<sup>100</sup>

In only a few instances has Congress directly confronted the issue of whether the attorney-client privilege applies in a congressional investigation. During the 1980s, a period when Congress took an exceedingly hostile view toward claims of privilege, Congress (in particular, the House Committee on Energy and Commerce and the Subcommittee on Oversight and Investigations) launched a series of aggressive investigations into business activities. As a result, the attorney-client privilege and work-product doctrine replaced the executive privilege and deliberative process as the grounds cited by witnesses for objecting to the disclosure of information. Congressman John Dingell of Michigan, the long-time chairman of that committee, emerged as an aggressive proponent of Congress's authority to disregard a claim of privilege. In 1983, Congressman Dingell (D-MI) argued in a committee document:

[T]he position of the Subcommittee has consistently been that the availability of the attorney-client privilege to witnesses before it is a matter subject to the discretion of the Chair . . . . [A]lthough there are no judicial precedents directly on point, there is ample support for the view that the availability of the attorney-client privilege is a matter of discretion with the Subcommittee based on analogous judicial authority, coupled with the full investigative prerogatives of Congressional committees acting within their jurisdiction and for a valid legislative purpose, the custom, practice and precedent of both Houses of Congress and the British Parliament and the consistent

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 312-313.

<sup>100</sup> *Id.* at 313.

practice of the Subcommittee on Oversight and Investigations.<sup>101</sup>

In 1986, a subcommittee in the U.S. House of Representatives took an extraordinary step by citing a lawyer for contempt — the first time in over a century<sup>102</sup> — after rejecting his claim that his communications were shielded by the attorney-client privilege.<sup>103</sup> Although members debated whether Congress had the discretion to refuse to recognize the attorney-client privilege, the House ultimately sustained the contempt citation on the ground that the attorney had failed to establish the requisite elements of the privilege — an outcome that dodged the difficult issue of whether Congress could override an otherwise valid privilege.<sup>104</sup> Three years later, in 1989, a Senate committee took a similarly hostile position against the attorney-client privilege. In an opinion denying the attorney-client privilege to a witness, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works wrote:

[W]e start with the jurisdictional proposition that this Subcommittee possesses the authority to determine the validity of any attorney-client privilege that is asserted . . . . A committee's or subcommittee's authority to receive or compel testimony derives from the constitutional authority of Congress to conduct investigation and take testimony as necessary to carry out its legislative powers. As an independent branch of government with such constitutional authority, the Congress must necessarily have the independent authority to determine the validity of

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<sup>101</sup> See James Hamilton, *Attorney-Client Privilege in Congress*, Vol. 12, No. 2, 12 LITIGATION MAGAZINE 3 (Winter 1986).

<sup>102</sup> See *Stewart v. Blaine*, 8 D.C. 453 (D.C. 1874).

<sup>103</sup> 132 Cong. Rec. H666-01 (daily ed. Feb. 27, 1986) (The lawyer had represented Philippine President Ferdinand Marcos and his wife in business dealings. The House Subcommittee on Asian and Pacific Affairs relied on an opinion by the General Counsel to the Clerk of the House, which stated that congressional committees could disregard a witness's assertions of the attorney-client privilege). See James Hamilton, *supra* note 101.

<sup>104</sup> *Proceedings Against Ralph Bernstein and Joseph Bernstein*, 132 Cong. Rec. H666-01 (daily ed. Feb. 27, 1986). See also 132 Cong. Rec. H666-01 (daily ed. Feb. 27, 1986) (statement by Rep. Leach) (explaining that the matter was not a "test case on the applicability of the attorney-client privilege before Congress").

non-constitutional evidentiary privileges that are asserted before the Congress.<sup>105</sup>

*B. Congressional Override of the Work-Product Protection*

Although the work-product doctrine rarely arises during a congressional investigation, congressional committees generally have viewed the work-product doctrine as a procedural, rather than substantive, defense to discovery that Congress could override.<sup>106</sup> As with the attorney-client privilege, the work-product doctrine came under assault as Congress undertook aggressive examinations during the 1980s. In 1985, the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations rejected an Amtrak employee's assertion that a document that detailed an investigation she had conducted at the direction of in-house counsel was protected under the work-product doctrine.<sup>107</sup> The subcommittee stated:

When a claim of privilege that is not of constitutional origins is asserted before a congressional investigating committee, it is within the discretion of the committee whether to uphold the claim. In exercising that discretion, the committee must weigh Congress' constitutional right to compel the disclosure of information needed for legislative and oversight purposes against the purpose served by the privilege.<sup>108</sup>

It is not surprising that the subcommittee believed that it could override a witness's assertion of the work-product protection. By its expressed terms, the work-product protection in Rule 26(b)(3) involves a balancing between an opposing party's need for the information and the desire to protect the attorney in his or her preparation.<sup>109</sup> Because the work-product doctrine is procedural in nature, rather than a substantive right of a party,<sup>110</sup>

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<sup>105</sup> Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, CRS Rep. No. 95-464, at 46-47 (1995) (quoting Subcommittee on Nuclear Regulations of the Senate Committee on Environment and Public Works, Ruling on Claims of Attorney-Client Privilege to Ms. Billie P. Garde from Chairman Breaux and Senator Alan K. Simpson, July 19, 1989, at 12-13).

<sup>106</sup> Hamilton, *Attorney-Client Privilege in Congress*, *supra* note 101.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> FED. R. CIV. P. 26(b)(3); *Hickman*, *supra* note 3, at 510-511.

<sup>110</sup> *Hickman*, *supra* note 3, at 510-511.

Congress has greater power to abrogate the work-product protection than it does the attorney-client privilege.

*C. Recent Congressional Views on the Attorney-Client Privilege and Work-Product Protection*

Actions in recent years by Congress seem to signify a growing respect for the attorney-client privilege and work-product protection. In 2008, Congress passed a law to clarify the circumstances that constitute the waiver of the attorney-client privilege and work-product doctrine. In introducing the bill to the House, Representative Sheila Jackson-Lee (D-TX) said:

The attorney-client privilege and work product protection are crucial to our legal system. They encourage businesses and individuals to obtain legal counsel when appropriate by protecting the confidentiality of communications between clients and their attorneys, and documents prepared by attorneys to assist their clients in litigation. In fact, this is the backbone, the infrastructure of civil and criminal litigation.<sup>111</sup>

On September 8, 2008, Congress passed S. 2450, which added Rule 502 to the Federal Rules of Evidence. Rule 502 sets forth the elements of intentional waiver of the attorney-client privilege and work-product protection.<sup>112</sup> The rule protects against the inadvertent waiver of the

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<sup>111</sup> 154 CONG. REC. H7818 (2008). In the last few years, the protection of the attorney-client privilege and work-product doctrine has been a bipartisan issue. *See, e.g.*, Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).

<sup>112</sup> FED. R. EVID. 502(a). An intentional waiver of the attorney-client privilege occurs when the party holding the privilege knowingly discloses the privileged information. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also* 1 MCCORMICK ON EVID. § 93 (6th ed. 2006):

Since as we have seen, it is the client who is the holder of the privilege, the power to waive it is his, and he alone, or his attorney or agent acting with his authority, or his representative, may exercise this power. In the case of the corporation, the power to claim or waive the privilege generally rests with corporate management, i.e., ultimately with the board of directors.

Waiver may be found, as Wigmore points out, not merely from words or conduct expressing an intention to relinquish a known right, but also from conduct such as partial disclosure which would make it unfair for the client to invoke the privilege thereafter. Finding waiver in situations in which forfeiture of the privilege was not subjectively intended by the holder is consistent with the view, expressed by some cases and authorities, that the essential function of the

attorney-client privilege and work-product protection.<sup>113</sup> Although the effect of the new rule on congressional investigations appears to be minimal, the passage of the new rule exhibits Congress's desire to preserve these principles and to minimize instances of waiver.<sup>115</sup>

Another bill designed to protect the attorney-client privilege was introduced in the Senate in 2007, although it was not considered by the full Senate. Senator Arlen Specter (R-PA)<sup>116</sup> introduced S. 186 to prohibit prosecutors and government attorneys from demanding the waiver of the attorney-client privilege and work-product protection.<sup>117</sup> Although there was no reference to Congress specifically, the bill by its terms would have applied to any "agent or attorney of the United States," presumably encompassing counsel to congressional committees.<sup>118</sup> While it is always capricious to draw lessons from legislation that is not enacted, the recent focus on the protection of the attorney-client privilege and work-product protection by some members of Congress suggests a growing respect for these important concepts.

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privilege is to protect a confidence that, once revealed by any means, leaves the privilege with no legitimate function to perform. Logic notwithstanding, it would appear poor policy to allow the privilege to be overthrown by theft or fraud, and in fact most authority requires that to effect a waiver a disclosure must at least be voluntary.

<sup>113</sup> FED. R. EVID. 502(b); see also A. Benjamin Spencer, *Congress Passes New Federal Evidence Rule 502: September 8, 2008*, FED. CIV. PRAC. BULL., Sept. 11, 2008, <http://federalcivilpracticebulletin.blogspot.com/2008/09/congress-passes-new-evidence-rule-502.html>.

<sup>115</sup> 154 CONG. REC. 7817-20 (2008).

<sup>116</sup> Senator Specter subsequently switched political parties and became a Democrat in 2009. See Kent Hoover, *Sen. Arlen Specter Switches to Democratic Party*, WASH. BUS. J., Apr. 28, 2009, <http://washington.bizjournals.com/washington/stories/2009/04/27/daily32.html>.

<sup>117</sup> Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007). A broad coalition of groups, including the American Civil Liberties Union, Association of Corporate Counsel, Business Roundtable, Financial Services Roundtable, National Association of Criminal Defense Lawyers, National Association of Manufacturers and the U.S. Chamber of Commerce, voiced support for this legislation. See Statement of the Coalition to Preserve the Attorney Client Privilege (Sept. 18, 2007), [http://nam.org/~media/Files/s\\_nam/docs/239300/239292.pdf.ashx](http://nam.org/~media/Files/s_nam/docs/239300/239292.pdf.ashx); see also *New Support for Attorney-Client Privilege Legislation*, FED. EVIDENCE REV. (June 24, 2008), <http://federalevidence.com/node/95>. Although the bill never was voted out of the committee, it appears to have influenced the revision of the so-called McNulty Memorandum. See Letter from Mark Filip, Deputy Attorney General, to Senators Patrick Leahy and Arlen Specter (July 9, 2008), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/leahy\\_specter\\_principles\\_letter\\_0.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/leahy_specter_principles_letter_0.pdf); see also *DOJ Reevaluating McNulty Attorney-Client Privilege Memo*, FED. EVIDENCE REV. (July 13, 2008), <http://federalevidence.com/node/109>.

<sup>118</sup> Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3014(b) (2007) ("In any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not . . .").

VI. PRACTICAL WAYS TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE  
AND WORK-PRODUCT PROTECTION

As a practical matter, the availability of the attorney-client privilege and work-product protection need not depend on the ultimate question of whether Congress has the authority to override them. Neither the witness nor the congressional committee wants to press a privilege dispute to a court determination. A witness generally desires to avoid the public stigma associated with fighting to shield information from Congress and, thus, from the American public. On the other hand, the congressional committee often needs to obtain the information in a prompt fashion necessary for its investigation, so it must avoid a time-consuming legal battle that effectively could cause the information to be moot for the current congressional investigation.<sup>119</sup> More importantly, losing a legal battle has potentially devastating implications for a congressional committee, particularly if a court rules that the committee lacks the authority to override a privilege or protection.

Given these considerations, a witness and congressional staff generally can resolve privilege disputes in an amicable fashion without resorting to contempt proceedings.<sup>120</sup> The most common method to shield privileged information is for a witness's counsel to negotiate with the committee counsel to narrow the scope of the subpoena.<sup>121</sup> Congressional committees usually need subpoenaed records delivered within a short time period, so narrowing the scope of the subpoena is often possible.<sup>122</sup>

A congressional committee may insist on obtaining specific information that the witness asserts is privileged, so an agreement to narrow the subpoena may not be possible. In such instance, other avenues allow a

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<sup>119</sup> For an excellent example of counsel utilizing a committee's deadline to his advantage, see James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1160 (2007) ("Also highly effective was Brendan Sullivan of Williams & Connolly who served as counsel for Marine Lieutenant Colonel Oliver North before the Iran-Contra Committee. Sullivan knew that the Committees desperately needed North's testimony to complete their hearings, but had set a deadline for ending the hearings and thus did not have time to pursue contempt proceedings if North refused to testify. By threatening that North would not appear, Sullivan was able to negotiate the terms of his testimony.").

<sup>120</sup> Indeed, as discussed above, only a few disputes have ever resulted in litigation, and the specific issue of whether Congress has the discretion to disregard the attorney-client privilege or work-product protection has never been decided in federal court. See discussion *supra* Part V.

<sup>121</sup> Hamilton, et al., *supra* note 119, at 1159 ("Subpoenaed entities, however, are not powerless. Often, for example, the scope of a subpoena can be narrowed, especially when it calls for privileged materials (despite the claims by some that an attorney-client privilege has no applicability in a congressional investigation).").

<sup>122</sup> *Id.* ("The reason is that congressional committees often want the subpoenaed records delivered within a very short time frame and do not want a time-consuming fight.").

witness to shield the privileged information while at the same time meeting the demands of a congressional committee during an investigation. Some of the possible avenues are discussed briefly below.<sup>123</sup>

#### A. Agreements with Congressional Staff

##### 1. Independent Review by a Special Master

A witness's assertion of the attorney-client privilege or work-product protection concerning documents (as opposed to testimony)<sup>124</sup> is often handled by committee counsel in one of three ways or in a hybrid of the three: 1) acceptance by the committee counsel of the witness's assertion of the privilege or protection; 2) requiring the witness's counsel to submit a privilege log; or 3) conducting a preliminary review by committee counsel to determine whether a valid assertion exists under the attorney-client privilege or work-product doctrine.<sup>125</sup> Under the first approach, the matter is resolved, and the confidentiality of the information is upheld. Under the second and third approaches, however, counsel for the witness is often left negotiating in good faith with the committee counsel, using whatever leverage the witness may possess.<sup>126</sup>

A difficulty with the third approach – review by committee counsel – is that the determination is left solely to the discretion of the committee counsel, who may be swayed in his or her determination after realizing the importance of a particular document during the preliminary review. In other words, the more important a document appears to the committee counsel during the preliminary review, the more inclined committee

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<sup>123</sup> This article does not set forth all the possible avenues that may be taken. Instead, it merely highlights some of the possible avenues to consider.

<sup>124</sup> Both the attorney-client privilege and the work-product protection can extend to both tangible and intangible information. See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (describing the elements of the attorney-client privilege); 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2290 (McNaughton Rev. 1961); 1 CHARLES TILFORD MCCORMICK, *MCCORMICK ON EVIDENCE* § 87 (John W. Strong, ed., 5th ed. West 1999); Jeffrey F. Ghent, *Development, Since Hickman v Taylor, of Attorney's "Work Product" Doctrine*, Annotation, 35 A.L.R.3d 412 (“[A] lawyer’s ‘work product’ consists of the information he has assembled, his mental impressions, and the legal theories and strategies that he has pursued or adopted after retainer, in preparation for litigation, as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, personal beliefs, and other tangible or intangible means, where relevant to the possible issues.”).

<sup>125</sup> See Stephen R. Ross & Raphael A. Prober, *Attorney-Client Privilege in Congressional Investigations*, 6 BUS. CRIMES BULL. (Jan. 2009), <http://www.akingump.com/files/Publication/10b2fc7d-2507-4377-a44f-789f3ce0c11a/Presentation/PublicationAttachment/3e25a224-0e74-44ca-9cc7-80b2abb88366/055081010911Akin.pdf>.

<sup>126</sup> *Id.*; see also Hamilton et al., *supra* note 119, at 1160-61 (discussing counsel’s role in a congressional investigation).



counsel may be to challenge an assertion of attorney-client privilege or work-product protection.<sup>127</sup>

Agreeing to allow a special master to review the withheld documents may provide a better alternative to a preliminary review by committee counsel.<sup>128</sup> A special master, who is often a retired judge, could conduct the equivalent of an *in camera* review to determine the applicability of privileges and protections.<sup>129</sup> Under the arrangement, counsel for the witness and committee counsel would agree on the person to serve as the special master. The special master's determinations concerning the validity of the assertions of attorney-client privilege or work-product protection would be binding.

From the witness's point of view, a review by a special master provides several important benefits. First and foremost, resorting to a special master to determine claims of privilege or work product presupposes that Congress recognizes the attorney-client privilege and work-product protection, at least for that particular witness in that particular investigation.<sup>130</sup> The congressional committee would be hard pressed to argue later in the same investigation that it may disregard, at its discretion, a claim of attorney-client privilege or work-product protection. Second, using a special master to conduct a privilege review serves as a fair and impartial way to balance the interests of Congress in obtaining the information and the witness's claims of privilege.<sup>131</sup> Third, a review by a special master keeps a witness from having to defend against a costly and uncertain contempt proceeding.

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<sup>127</sup> This is not to suggest that committee counsel will act improperly. Rather, committee counsel undoubtedly will closely scrutinize a privilege assertion for a document that is obviously important to an investigation.

<sup>128</sup> See, e.g., *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 397 (2004) (referring to the district court's suggestion that the court could appoint the equivalent of a special master to review the documents withheld on privilege grounds); *In re Teleglobe Communications Corp.*, 493 F.3d 345, 356-57 (3d Cir. 2007) (discussing the privilege review by a special master); *In re Grand Jury Subpoenas*, 454 F.3d 511, 524 (6th Cir. 2006) (utilizing a special master to review documents before providing to a grand jury); *Schwimmer*, *supra* note 22 (8th Cir. 1956) (authorizing special master to make privilege determinations in grand jury context so long as counsel had a right of review); *United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995) (appointing a special master to review law firm documents seized by the government).

<sup>129</sup> *Cheney*, *supra* note 128, at 397.

<sup>130</sup> Nevertheless, the resort to a review by a special master by one congressional committee clearly would not bind another committee.

<sup>131</sup> Cf. *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 405 (1976) (“[A]n *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of ... privilege and plaintiffs' asserted need for the documents is correctly struck.”).

A review by a special master is not without costs. First, the fees for the special master's review likely would be borne by the witness, which may be expensive depending on the particular special master chosen and the time necessary to review the documents. Second, due to time constraints, committee counsel likely would insist that the special master's review be limited to only a small universe of documents. If a witness withholds a large number of documents on grounds of a privilege or protection, then review by a special master may not be feasible.<sup>132</sup> Third, a special master may be used only for reviewing documents. A special master is generally ill-suited to review claims of attorney-client privilege or work-product protection concerning proposed testimony.

The review by a special master may provide a meaningful compromise to avoid an impasse over the withholding of certain documents. Because each congressional investigation is unique, counsel for a witness in an investigation should consider the nature of the investigation and the personalities of committee staff members when weighing the costs and benefits of the use of a special master.

## 2. *Express Recognition of a Common Interest*

A judicially recognized exception to the waiver of the attorney-client privilege and work-product protection, known as the common-interest rule or common-interest privilege, may provide in some narrow instances an avenue to preserve the attorney-client privilege or work-product protection even when the information is disclosed voluntarily to a congressional committee.<sup>133</sup> The common-interest rule has been described as "an extension of the attorney[-]client privilege,"<sup>134</sup> but it also applies in the context of the work-product doctrine.<sup>135</sup> The rule protects the confidentiality of communications passing from one party to the attorney of another party when the parties share a common interest in a legal

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<sup>132</sup> The parties may be able to agree to a random sampling review combined with a review of the privilege log. See, e.g., *In re* U.S. Dept. of Def., 848 F.2d 232, 234 (D.C. Cir. 1988) (approving the use of a special master to review random samples of withheld documents).

<sup>133</sup> Of course, it is unlikely a court in unrelated litigation would find a waiver of the attorney-client privilege or work-product protection if the witness had been forced by Congress to disclose the information. See FED. R. EVID. 502.

<sup>134</sup> *Schwimmer*, *supra* note 22, at 243 (2d Cir. 1989) (quoting *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n. 7 (9th Cir.1987)).

<sup>135</sup> See, e.g., *Brill v. Walt Disney Pictures and Television*, No. 00-55592, 2000 WL 1770657, at \*1 (9th Cir. 2000) (explaining that "the common interest privilege simply expands application of the attorney-client privilege or the work-product doctrine to circumstances in which it otherwise might not apply." (citations and internal quotations omitted)); see *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994); *United States v. AT&T*, 642 F.2d 1285, 1300-01 (D.C. Cir. 1980) (describing the scope of the common-interest rule).

matter.<sup>136</sup> Only those communications made during the course of an ongoing common enterprise and intended to further the enterprise are protected.<sup>137</sup> The presence of actual litigation is not required for the common-interest rule to apply.<sup>138</sup> As the name implies, the essential requirement of the common-interest rule is the presence of a common interest between the parties sharing the information; if the parties are adverse on the matter at issue, then the common-interest rule would not apply.<sup>139</sup> Furthermore, as with all claims of the attorney-client privilege or work-product protection, the common-interest rule presumably requires a showing that the communication was made in confidence and that the recipient reasonably understood it to be so given.<sup>140</sup>

No case law exists construing the common-interest rule in the context of information voluntarily disclosed to Congress. Nevertheless, a reasonable basis may exist to argue that the case law should be extended to the congressional setting.<sup>141</sup> In a congressional investigation, counsel for a

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<sup>136</sup> *Schwimmer*, 892 F.2d at 243. The common-interest rule originally was designed to permit counsel for clients having a common-interest in the matter “to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege.” *Haines v. Liggett Group Inc.*, 975 F.2d 81, 94 (3d Cir. 1992); *see also* P.J. *ex rel. Jensen v. Utah*, 247 F.R.D. 664, 675 (D. Utah 2007) (holding that former attorney did not waive the work-product protection by providing subsequent attorney with representation file); *Waller*, *supra* note 134, at 583 n.7 (“[C]ommunications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for purposes of a common defense”); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 389 (S.D.N.Y. 1975) (“[T]he attorney-client privilege covers communications to a prospective or actual co-defendant’s attorney when those communications are engendered solely in the interests of a joint defense effort.”). In other decisions, however, the common-interest rule was applied to sharing of any information, even outside of the defense context, where there was a common interest in the subject. *See, e.g., AT&T*, *supra* note 135, at 1300-01 (broadly applying the common-interest rule).

<sup>137</sup> *Schwimmer*, 892 F.2d at 243 (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985)).

<sup>138</sup> *Id.* (citing *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir.1987), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir.1988) (*en banc*), *aff’d in part and vacated in part on other grounds*, 491 U.S. 554, (1989)).

<sup>139</sup> *United States v. Bergonzi*, 216 F.R.D. 487, 495-498 (N.D. Cal. 2003) (holding that the common interest exception to the waiver of work-product protection did not apply to company’s disclosure to the government of documents created by law firm in course of internal investigation, notwithstanding that company and government entered into confidentiality agreements regarding the documents, as the company and government did not have the requisite common interest).

<sup>140</sup> *See generally*, *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-816 (7th Cir. 2007) (setting forth the elements of the common-interest rule); *cf.* 1 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 1.21, 1-54 (2d ed. 1993) (“Where the same attorney represents two or more clients having a common interest, confidential communications made by those clients to the common lawyer will be protected from disclosure to third parties.”).

<sup>141</sup> *Cf. AT&T*, *supra* note 135, at 1300 (finding that because “MCI shares common interests with the United States,” MCI did not waive the work product privilege by sharing documents with the government); *Enron Corp. v. Borget*, No. 88 CIV. 2828 (DNE), 1990 WL 144879, at \*2 (S.D.N.Y.

witness may be able to lay the foundation for a later assertion of the common-interest rule for privileged information voluntarily shared with Congress. To establish the common-interest privilege, counsel must ensure that the information provided — whether it be in the form of documents, an interview, or testimony — is maintained in confidence by the congressional committee and its staff and not shared with a third party. This task is particularly challenging because the nature of most congressional investigations is to provide information to the public.<sup>142</sup> Information conveyed to Congress in the presence of a third party — as the case would be in a public hearing — clearly would not fall within the common-interest rule.

Obtaining a blanket assurance from a congressional committee that all information would be maintained in confidence is unrealistic. Any request for information to be treated confidentially would be viewed with skepticism by inquisitive congressional staff. Moreover, obtaining an agreement from a requisite majority of the members of the committee (or all the members, as the situation may require) to maintain the confidentiality may be very difficult. Members of Congress may view a request for confidentiality as offensive to their obligations to constituents.<sup>143</sup>

Therefore, counsel for a witness should limit any requests for confidentiality to a small amount of information that it wishes to exclude from the public forum. Congressional counsel undoubtedly would require a sufficient description of the information before considering whether to provide any assurance that the confidentiality would be maintained. Under case law pertaining to privilege logs, private counsel is permitted to provide a limited amount of detail sufficient to describe the protected communication without constituting waiver.<sup>144</sup>

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Sept. 22, 1990) (“the public policy concern of encouraging cooperation with law enforcement militates in favor of a no waiver [of the privilege as to other parties] finding.”).

<sup>142</sup> See Hamilton et al., *Congressional Investigations: Politics and Process*, supra note 119, at 1158 (“[C]ommittees generally have broad authority to release what they want to disclose. While some committees and staff are sensitive to business concerns, counsel must be explicit in notifying staff that serious economic harm may result if corporate documents are publicly disclosed.”).

<sup>143</sup> See *id.* at 1158-59 (“Relationships with staff are crucial in reaching agreements of this sort. But be wary of the effect of any such agreement. Except for matters of national security, members, as a practical matter, have considerable latitude in releasing information despite rulings from the committee chair. Equally problematic is the ever present threat of a surreptitious leak to the media.”).

<sup>144</sup> Rule 45(d)(2) provides:

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

Establishing that the witness and Congress truly have a “common interest” in the legal matter presents another challenge. The common-interest privilege is destroyed when an adversarial relationship develops over any material issue.<sup>145</sup> Accordingly, the common-interest privilege is not available where a person is under investigation by Congress or a government agency.<sup>146</sup> On the other hand, if the witness was a proponent of the investigation — by, for example, exposing the wrongdoing and cooperating with law enforcement — then that witness and Congress may have a common interest in the matter.<sup>147</sup>

While a written acknowledgement by the parties of these elements is not essential to establishing the common-interest rule, it would be helpful to obtain some written assurance from the committee counsel before any privileged information is transmitted. Such an assurance, however, must represent the position of the entire congressional committee, which may be nearly impossible to obtain in the political environment of Capitol Hill. Only witnesses who are viewed by both political parties in the same light can ever hope to obtain any such assurance.

Given the legal and practical hurdles, counsel for a witness should not draw much comfort from assertions of the common-interest privilege in a congressional investigation.

### *3. Agreement to Maintain Confidentiality: Work Product*

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- (i) expressly make the claim; and
  - (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

FED. R. CIV. P. 45(d)(2); *see also In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir.1992) (finding privilege log to satisfy burden where it identified attorney and client involved; nature of document withheld; all persons or entities shown on or intended to be or known to have been shown the document or informed of its substance; date document was generated, prepared, or dated; and information on subject matter of each document); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 662 (D.Colo.2000) (finding assertion of privilege inadequate where party asserting privilege failed to provide “description of the nature of the communication sufficient to enable [opposing party] to assess the applicability of the claimed privilege.”).

<sup>145</sup> *See, e.g., In re Initial Public Offering Sec. Litig.*, 2008 WL 400933 (S.D.N.Y. Feb. 14, 2008).

<sup>146</sup> Courts do not distinguish between different agencies in government. Instead, courts generally treat the government as a single party for purposes of determining the existence of a common interest. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 308 (6th Cir. 2002) (“All of the other circuit decisions that the court cites either concern whether disclosures to one federal government agency waive privilege as to another federal government agency.”); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (holding that disclosure to Department of Defense audit committee without a confidentiality agreement waived privilege in IRS investigation).

<sup>147</sup> *See cases cited supra* note 136.

The work-product doctrine may permit the sharing of information with a congressional committee without constituting a waiver. As with the attorney-client privilege, the work-product protection is lost if a party voluntarily discloses work product to an adversary.<sup>148</sup> However, a party may disclose work product to any non-adversary, even without a common interest,<sup>149</sup> so long as the disclosure does not substantially increase the opportunity for a potential adversary to obtain the information.<sup>150</sup> In other words, while the common-interest privilege requires a finding of a “common interest” in a legal matter, no such finding is required for maintaining the work-product protection when work product is shared with Congress.<sup>151</sup> The law is evolving in this area, and there can be no assurance that the information shared would not find its way into the hands of an adversary. Accordingly, counsel for a witness should be aware of the possibility that a court may subsequently rule that the work-product protection was waived by the disclosure to Congress.

*B. Aligning the Assertion of Attorney-Client Privilege or Work Product with a Constitutional Right*

Although much debate exists over whether Congress can overrule a valid assertion of a privilege or protection, it is undisputed that Congress must respect a constitutional right such as the Fifth Amendment right against self-incrimination or the Sixth Amendment right to counsel. In *Watkins v. United States*, the Supreme Court decided the issue of whether Congress could overrule a witness’s assertion of his Fifth Amendment right against self-incrimination.<sup>152</sup> The Fifth Amendment to the Constitution provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>153</sup> In overturning *Watkins*’s conviction, the Court held that the Bill of Rights applies to Congress in the

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<sup>148</sup> *In re Steinhardt Partners*, 9 F.3d 230, 235 (2d Cir. 1993) (“[V]oluntary disclosure of work product to an adversary waives the privilege as to other parties.”).

<sup>149</sup> *Constr. Indus. Servs. Corp.*, *supra* note 44.

<sup>150</sup> *Id.*; see also *United States v. Textron Inc.*, 553 F.3d 87, 102-03 (1st Cir. 2009) (holding that taxpayer did not waive its work-product protection by showing its tax accrual work-papers to its independent auditor) *vacated en banc*, *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009); *Beacon Hill Asset Mgmt.*, *supra* note 44, at 146-47 (S.D.N.Y. 2004) (holding that disclosures by hedge fund manager to hedge fund and fund through which manager conducted the trading of the hedge fund and to other “feeder” funds were not sufficient to destroy the work-product protection, because interests of the funds were aligned with and not adverse to those of manager which was target of enforcement action by the SEC, and disclosures did not make it more likely the documents would be disclosed to a party of adverse interest).

<sup>151</sup> See *Beacon Hill Asset Mgmt.*, *supra* note 44, at 146-47.

<sup>152</sup> *Watkins v. United States*, 354 U.S. 178, 187-88 (1957).

<sup>153</sup> U.S. CONST. amend. V.

same fashion as it does to courts and other forms of government.<sup>154</sup> The Court wrote:

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of government action. Witnesses cannot be compelled to give evidence against themselves.<sup>155</sup>

In other words, in Congress, as in the courts, the Fifth Amendment right is a fundamental right that cannot be abridged.<sup>156</sup>

The Fifth Amendment provides that a witness has a constitutional right to refuse to answer any question that may result in an answer that might incriminate the witness.<sup>157</sup> A witness may refuse to answer a question if:

there is reasonable apprehension on the part of the witness that his answers would furnish some evidence upon which he could be convicted of a criminal offense against the United States, or which would lead to a prosecution of him for such offense, or which would reveal sources from which evidence could be obtained that would lead to such conviction, or to prosecution therefor.<sup>158</sup>

In other words, in order to qualify for protection under the Fifth Amendment, the answer to a question need not incriminate the witness so

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<sup>154</sup> *Watkins*, *supra* note 152, at 188.

<sup>155</sup> *Id.* at 187-88.

<sup>156</sup> *See Couch v. United States*, 409 U.S. 322, 327 (1973) (explaining that the Fifth Amendment “respects a private inner sanctum of individual feeling and thought”); *Hoffman v. United States*, 341 U.S. 479, 485-86 (1951) (explaining that the guarantee against testimonial compulsion must be liberally construed).

<sup>157</sup> *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

<sup>158</sup> *United States v. Jaffe*, 98 F.Supp. 191, 193 (D.D.C. 1951); *See also Hoffman*, *supra* note 156, at 486-87.

long as it provides information that could lead to other evidence that could incriminate the witness.<sup>159</sup>

Communication that is covered by the attorney-client privilege also may be covered by the Fifth Amendment if there is an indication that a witness may incriminate himself or herself. Unlike in trials, however, where a criminal defendant cannot be compelled to take the stand, Congress can force a witness to assert his or her Fifth Amendment right in public before a national audience.<sup>160</sup> In addition, Congress can grant immunity to a witness from prosecution in a subsequent criminal trial, thus effectively forcing the witness to testify before Congress.<sup>161</sup>

A related concept is the Sixth Amendment right to counsel. The Sixth Amendment provides that a criminal defendant “shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic].”<sup>162</sup> Forced disclosure of an attorney-client privileged communication may infringe upon the witness’s Sixth Amendment right to the assistance of counsel if the disclosure affects the witness’s ability to a fair trial as a criminal defendant.<sup>163</sup> In order for the Sixth Amendment to be implicated in a congressional investigation, there generally must be a pending or threatened criminal proceeding and the disclosure of the information to the congressional committee must interfere with the ability of the disclosing party to have a fair trial. In practice, the existence or threat of a criminal proceeding would trigger an assertion of the Fifth Amendment right against self-incrimination, making it less challenging for a party to justify the withholding of information under the Fifth Amendment than the Sixth Amendment right to a fair trial.

With these concepts in mind, counsel for a witness before Congress should evaluate fully whether any information provided to Congress may

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<sup>159</sup> *Id.*

<sup>160</sup> See *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948) (holding that Congress may compel a witness to appear and provide testimony). Of course, counsel must consider the embarrassment to a witness by being forced to assert his or her Fifth Amendment rights and the subsequent stigma that accompanies such public assertion. See also Hamilton et al., *Congressional Investigations: Politics and Process*, *supra* note 119, at 1160 (“In 1987, Edward Bennett Williams represented Michael Milken in a hearing on the activities of Drexel Burnham Lambert before Chairman John Dingell’s Energy and Commerce Subcommittee on Oversight and Investigations. To prevent the media spectacle of Milken taking the Fifth Amendment before television cameras, Williams invoked a little-known, and now repealed, House rule that allowed a subpoenaed witness to turn off the television cameras.”).

<sup>161</sup> 18 U.S.C. §§ 6002, 6005 (2008) (empowering Congress to grant immunity to a witness); see also *United States v. Poindexter*, 698 F. Supp. 300, 304 (1988) (“[C]ongressional power of inquiry is very broad. Congress may compel witnesses to testify over their assertion of Fifth Amendment rights . . . by granting some form of immunity.”).

<sup>162</sup> U.S. CONST. amend VI.

<sup>163</sup> See *Tierney v. United States*, 409 U.S. 1232, 1233 (1972).



trigger concerns with the witness's Fifth and Sixth Amendment rights.<sup>164</sup> If it appears that one of these constitutional rights may be infringed, counsel for a witness should negotiate with committee counsel to modify any requests for testimony or documents. If a witness has a reasonable basis for asserting a constitutional right, then a congressional committee may be inclined instead to accept an assertion of the attorney-client privilege or work-product protection for the information. As discussed above, in many cases the same information can be conveyed to the congressional committee in a manner without invading the attorney-client privilege or work-product protection and without infringing upon a constitutional right.<sup>165</sup> Only in rare instances would Congress push for the disclosure of a specific conversation or document that is squarely covered by a privilege or protection.<sup>166</sup>

If counsel to a witness is unsuccessful in modifying the request or subpoena, counsel may wish to assert applicable constitutional rights. Raising these constitutional claims comes at the cost of potential embarrassment to the client, who may be forced by the committee to assert his or her rights before a television audience.<sup>167</sup> In addition, to the extent the witness was not the target of a criminal inquiry prior to asserting these constitutional rights, the witness undoubtedly will become a target after the criminal authorities learn of the assertions. Congress also may opt to grant immunity, thereby forcing the witness to testify.

## VII. CONCLUSION

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<sup>164</sup> The defense bar has expressed concern over the forced waiver of the attorney-client privilege, particularly when it implicates Fifth Amendment rights. In testimony before the United States Sentencing Commission, Kent Wicker, representing the National Association of Criminal Defense Lawyers, testified:

This compelled waiver of the attorney-client privilege forced my client to give up the protection at the heart of our criminal justice system: The privilege under the Fifth Amendment against self-incrimination. It is not enough to say he could have just given up his job and retained his Fifth Amendment rights. This is a real person, with a real family to support.

Testimony, United States Sentencing Commission, Kent Wicker, National Association of Criminal Defense Lawyers (Mar. 15, 2006).

<sup>165</sup> See discussion *supra* Part VI.

<sup>166</sup> *Id.*

<sup>167</sup> JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 28-29 (1988) (quoting *The New York Times*' scrutiny of Secretary of the Interior Albert Fall when he asserted his Fifth Amendment right against self-incrimination in response to questions by Congress: "what a grave national humiliation it is and was to see a former Senator of the United States . . . clinging to the shield grasped desperately so often by gunmen and other base criminals.").

The attorney-client privilege and the work-product protection are sacred pillars of our legal system. Together, they promote the sharing of information between a client and his or her lawyer necessary for adequate legal representation and compliance with the law, and they help to ensure a fair and unbiased trial, as guaranteed by the Constitution.

While the attorney-client privilege and work-product protection are well established in judicial proceedings, they rest on less established grounds in Congress. Some congressional committees have refused to recognize the existence of a privilege or protection during congressional investigations in the past. Indeed, several members of Congress have gone so far as to argue that neither the attorney-client privilege nor the work-product protection applies to the investigative work of the legislative branch.

The attorney-client privilege is an established substantive right under common law and was codified by Congress as recently as 2008 in the new Rule 502 of the Federal Rules of Evidence; therefore, nothing within Congress's powers should allow it to abrogate this long-standing right. The work-product protection, on the other hand, is primarily a procedural right regarding the permissible scope of discovery during a judicial proceeding. While the interests underpinning the work-product doctrine may not be apparent in a congressional investigation, Congress nonetheless should respect the work-product protection under certain situations.

The outlook of the attorney-client privilege and work-product protection in Congress is uncertain. In the future, Congress may decide to take an aggressive posture toward the attorney-client privilege and work-product protection as it took during the 1980s. On the other hand, Congress may decide to respect the privilege and protection by upholding valid assertions during congressional investigations. Regardless of the path Congress ultimately takes, counsel for a witness should not overlook practical ways to avoid or minimize the abrogation of the attorney-client privilege and work-product protection.