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The Attorney-Client Privilege Goes to Washington

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David Rapallo, *House Rules: Congress and the Attorney-Client Privilege*, 100 **Wash. U. L. Rev.** 455 (2022).

The 118th Congress has pursued a robust investigatory agenda, probing topics from the origins of COVID-19 to Hunter Biden to "greed in the pharmaceutical industry." Such investigations are hardly new. But the future utility of such investigations may depend on a cryptic aside made by Chief Justice Roberts in the Court's 2020 decision in *Trump v. Mazars*. Roberts stated that recipients of congressional subpoenas "have long been understood to retain common law and constitutional privileges," including the ability to assert the attorney-client privilege. Scholars have spilled significant ink over the significance—if any—of this statement. In *House Rules: Congress and the Attorney-Client Privilege*, David Rapallo examines how to best understand Roberts's statement. In doing so, he delves into an underexamined corner of evidence scholarship: the application of privileges outside of judicial proceedings.

Mazars did not involve an assertion of privilege. Consequently, as Rapallo explains, some scholars dismiss Roberts' statement as "nothing more than erroneous and ill-informed dictum." Others view the statement as affording subpoena recipients absolute protection for attorney-client communications, representing a "sweeping change." It would mean the judiciary—not Congress—decides the evidentiary rules that apply to congressional investigations. While Roberts discussed only the attorney-client privilege, continuing down that road could require Congress to recognize other privileges or evidentiary rules rooted in common law.

Rapallo threads these two extremes by suggesting a third path to understand Roberts' statement: "[r]ecipients of congressional subpoenas who are compelled to produce information to Congress retain their right to assert the attorney-client privilege *in other venues*." For those versed primarily in how privileges work in judicial proceedings, the notion that the attorney-client privilege may not apply to all investigatory proceedings may seem surprising. But Rapallo makes a compelling case from a somewhat surprising starting point: separation of powers.

Rapallo details how Congress—not the judiciary—should decide whether the attorney-client privilege applies to its investigations. Congress is bound to respect privileges grounded in constitutional rights, such as executive privilege. It has the authority, however, to decide to what extent, if any, to adopt common law privileges. Although this power is not unlimited, the Constitution provides Congress the independent authority to establish its own rules necessary to effectuate its granted authority to investigate.

Thus Congress—and Congress alone—has the authority to decide which common law evidentiary rules apply to its investigations. "The Constitution does not require either the House or Senate, when acting pursuant to its Article I rulemaking authority, to seek or obtain the consent of the [judiciary or] the President." For the judiciary to impose a requirement that Congress honor a common law privilege would leave Congress beholden to rules imposed by a separate branch of the government. And, as Rapallo illustrates in recapping practice to date, neither the House nor the Senate has ever required committees to afford privileged attorney-client communications absolute protection. Rather, Congress

has adopted its own posture as to assertions of the privilege, instructing a committee to "weigh [] its investigative need for information against the public policy interest served by the privilege and any possible harm to the witness."

Scholarship urging more limited or tailored application of privileges—including my work on the clergy privilege—often highlights the danger of overly broad applications. Privileges shield otherwise relevant evidence, which can have tremendous evidentiary value and still be excluded from consideration if a privilege is absolute. Rapallo acknowledges these dangers. But rather than delve too deeply into the extrinsic social policies underlying the attorney-client privilege, he builds the remainder of his argument through a methodical discussion of congressional oversight precedents, recent oversight committee case studies, and judicial precedents. These combined sources compellingly show that there is no long-existing understanding that the privilege applies equally to judicial and congressional proceedings.

In staking his claim, Rapallo avoids overclaiming, drawing a line between common law privileges and those grounded in the Constitution. He sidesteps political pitfalls, using examples from across the political spectrum to prove that "Democratic and Republican chairs alike have been obtaining attorney-client communications for decades to fulfill their constitutional responsibilities."

For me, this article executes a few feats. It sheds light on a curious corner of evidence law, where much scholarship focuses on judicial proceedings without much consideration for other contexts. Rapallo's article truly succeeds by decoding the cipher left behind by Roberts in a way that could appease those on different sides of the existing scholarly debate. In the absence of his contribution, Congress and the judiciary would remain on a collision course. Those seeking to hamstring Congress' investigatory powers would route every evidentiary question back to the judiciary, inviting prolonged investigations and diminished access to relevant information.

There is a beauty in weighing in on an existing scholarly debate by saying both sides are a little right and a little wrong—and doing so in such a compelling, thoroughly researched manner. Offering a resolution for a single evidentiary query applicable to a particular segment of congressional work may facially seem inconsequential. But at a time of political gridlock, any road forward is a welcome one.

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