The Pierced Privilege: Challenges to How Congress Vitiates the Attorney-Client Privilege

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INTRODUCTION

In the summer of 2020, the Supreme Court found itself in uncharted waters. *Trump v. Mazars* was a dispute over a congressional subpoena for President Trump's personal financial records. The Court recognized the case as "the first of its kind to reach this Court."[1] The Court's opinion, delivered by Chief Justice Roberts, chides the legislative and executive branches for failing to work out a compromise. He reminded them that past congresses and presidents had "managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us."[2] Still, however reluctantly, the Supreme Court waded into the choppy waters separating the powers of Articles I and II.

While grappling with the major constitutional concerns such as separation of powers and executive privilege, the Supreme Court's opinion bumped into the largely unrelated issue of the attorney-client privilege. In a short paragraph concluding the opinion's discussion on limitations of congressional investigations, the Court wrote that "recipients [of congressional subpoenas] have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications . . ."[3]

In an opinion full of firsts, this is not the one that has grabbed the most headlines; however, many have been puzzled by the Supreme Court's matter-of-fact decree on the issue. Michael Stern, who served as Senior Counsel to the U.S. House of Representatives, wrote that the Court included the "dicta" for "reasons that escape me" and that "this is assuredly not the case with regard to common law privileges."[4] Andy Wright, a former Associate White House Counsel, wrote that "the Supreme Court's suggestion that there has been a settled understanding that such privileges are binding on Congress ignores stacks of

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1. Trump v. Mazars, 140 S. Ct. 2019, 2031 (2020).

2. *Id.*

3. *Id.* at 2032.

4. Michael Stern, *Mazars and Common Law Privileges Before Congress*, POINT OF ORDER (July 10, 2020), https://www.pointoforder.com/2020/07/10/mazars-and-common-law-privileges-before-congress/ [https://perma.cc/4JSJ-VTS7].

contrary evidence."[5] In fact, experts in congressional investigations have noted that "congressional investigators have long averred that they are not bound by judge-made common law privileges, including the attorney-client privilege and attorney work product doctrine."[6]

As this Note will show, these claims are undoubtedly true: the history of the attorney-client privilege before Congress is far more complicated than the Supreme Court is letting on. It is tempting to stop there and mark the whole thing up as a mistake, but the fact that the Court went out of its way to include this assertion that the attorney-client privilege is a recognized privilege before Congress hints at something more. The decision has brought a long-deferred issue to the fore and, potentially, serves as an invitation to challenge Congress's power to disregard the attorney-client privilege.

This Note accepts that invitation. It proposes new avenues to challenge Congress's power to disregard the attorney-client privilege. Part I outlines Congress's power of inquiry and how it currently interacts with the attorney-client privilege. Part II lays out Congress's arguments to have discretion to disregard the attorney-client privilege. Part III presents two novel arguments asserting that congressional investigations that disregard the attorney-client privilege are unconstitutional: first, that they run afoul of the Fourth Amendment's prohibition against unreasonable searches and seizures, and second, they amount to a deprivation of liberty without due process under the Fifth Amendment.

I. CONGRESSIONAL INVESTIGATIONS

A. "THE GRAND INQUEST OF THE NATION"

In a British parliamentary debate in 1741, William Pitt the Elder decreed that "we are called the Grand Inquest of the Nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, to see that nothing has been done amiss."[7] Not a single member of Parliament disagreed.[8] This sentiment was adopted by the United States Congress, which used the power as early as 1792.[9]

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5. Andy Wright, *Supreme Court's Trump v. Mazars Ruling Gave Attorney-Client Privilege a Boost in Congress*, JUST SECURITY (Aug. 12, 2020), https://www.justsecurity.org/71970/supreme-courts-trump-v-mazars-ruling-gave-attorney-client-privilege-a-boost-in-congress/ [https://perma.cc/PU96-UG5W].

6. Perrin Cooke & Robert Kelner, *The Supreme Court's Mazars Decision Contains a Significant Suggestion That Congress May Be Bound by the Attorney-Client Privilege in Congressional Investigations*, INSIDE POL. L. (July 9, 2020), https://www.insidepoliticallaw.com/2020/07/09/the-supreme-courts-mazars-decision-contains-a-significant-suggestion-that-congress-may-be-bound-by-the-attorney-client-privilege-in-congressional-investigations/ [https://perma.cc/RQH6-FNSD].

7. Harry Evans, *The Senate, Accountability, and Government Control*, THE PARLIAMENTARY STUDIES CENTRE, (2008), https://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/~/link.aspx?_id=17EF4947DD5D4214BC6C1162200D893E&_z=z [https://perma.cc/QZ5A-L2AC].

8. *Id.*

9. James Hamilton, Robert F. Muse & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. LAW REV. 1115, 1118 (2007).

Over the next two centuries, Congress's power of inquiry received conditional support from the Supreme Court. The Court recognized that, while the power of inquiry is not an enumerated power in Article I, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[10] This power, however, is limited to inquiries with a valid legislative purpose.[11] "Legislative purpose" has been broadly construed, and can reach the private affairs of citizens as long as Congress has a legitimate legislative interest in doing so.[12]

Refusing a legitimate congressional inquiry came to have severe consequences. Under its inherent contempt authority, Congress has the power to order the Sergeant at Arms to arrest and jail witnesses until they agree to cooperate with an investigation.[13] This process is unwieldy, as the Supreme Court has limited the extent of the imprisonment to the duration of the congressional legislative session.[14] Further, the witness may challenge his or her imprisonment in court, where Congress must show that it exercised "the least possible power to the end proposed."[15] Due to these limitations, Congress developed and subsequently relied on a statutory enforcement power instead, leading the inherent contempt authority to fall out of use.[16]

The initial iteration of the aforementioned statutory enforcement power was passed in 1857 and provided for the prosecution of noncompliant witnesses for criminal contempt.[17] Under the statute, a committee may report noncompliance to the full House or Senate for a vote, or if Congress is not in session, to the Speaker of the House or President of the Senate for assessment of the issue.[18] If the report survives this scrutiny, the Speaker of the House or President of the Senate relays it to the appropriate United States attorney.[19] The Supreme Court has ruled that the United States attorney has "absolute discretion" to decide whether to prosecute the case,[20] checking Congress's power under this statute considerably, especially when the subpoena involves the Executive Branch, of which the United States attorneys are themselves a part.[21]

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10. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).
11. Watkins v. United States, 354 U.S. 178, 187 (1957).
12. *See id.*
13. *See, e.g.*, Jurney v. MacCracken, 294 U.S. 125 (1935); Marshall v. Gordon, 243 U.S. 521 (1917); Anderson v. Dunn, 19 U.S. 204 (1821).
14. *Anderson*, 19 U.S. at 231.
15. *Id.*
16. Hamilton et. al., *supra* note 9, at 1133.
17. 2 U.S.C. § 194.
18. 2 U.S.C. § 194; *see also* Hamilton et. al., *supra* note 9, at 1134–35.
19. 2 U.S.C. § 194.
20. United States v. Nixon, 418, U.S. 683, 693 (1974).
21. When Congress seeks to find a member of the Executive Branch in criminal contempt under this statute, the decision to enforce that subpoena is made by a fellow member of the Executive Branch, who is more likely to be sympathetic than Congress. *See* James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 153–54

The Senate benefits from an additional statutory enforcement power: 2 U.S.C. § 288(b) and (d). These provisions allow the Senate or an authorized Senate committee or subcommittee to bring a civil action to secure a declaratory judgment that a witness must comply with a subpoena or order.[22] If a court rules in the Senate's favor after they secure a declaratory judgment, the witness could then be held in contempt of court.

The recent *McGahn* litigation created another way for Congress to enforce subpoenas and orders. Born out of a serpentine case history, *McGahn* recognized an enforcement power capable of circumventing the procedural limitations of the previous mechanisms. The D.C. Circuit held *en banc* that the House had standing, even without a statute on point, to sue for a declaratory judgment when a witness fails to comply with a subpoena to testify on a legitimate subject of congressional inquiry.[23] This decision allows the Committee, when authorized by a House resolution, to go directly to the courts to enforce subpoenas,[24] thereby circumventing the United States attorneys' (and thus the Executive Branch's) involvement in the prosecution. If the Committee receives a favorable judgment and the witness still refuses, the witness may be found in contempt of court. *McGahn* has introduced a new potential method of enforcement that does not require a statute and avoids the procedure, antiquated practice, and high legal standard of Congress's inherent contempt authority.

B. THE LOOSE THREAD

For the moment, the congressional power of inquiry has developed into a tightwoven fabric of historical precedent, implied constitutional powers, judicial decisions, and statutory provisions.[25] Indeed, with decisions like *McGahn*, that power of inquiry may be stronger than ever before.[26] But that fabric has a loose thread: the attorney-client privilege.

The attorney-client privilege protects communications between attorneys and their clients when the communication was made in confidence for the purposes of obtaining legal advice.[27] Courts have fervently protected legitimate claims of attorney-client privileged communications from discovery.[28]

(1984) (United States Attorney refused to bring House's contempt matter against the Administrator of the EPA before a grand jury); Sunny Kim, *Justice Department won't bring charges against Attorney General William Barr, Commerce Secretary Wilbur Ross after contempt vote*, CNBC (Jul. 25, 2019), https://www.cnbc.com/2019/07/25/doj-wont-bring-charges-against-barr-ross-after-contempt-vote.html [https://perma.cc/HF3V-D8GB].

22. 2 U.S.C. § 288b–d.

23. Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020).

24. *Id.* at 760, 767.

25. *See supra* Section I.A.

26. *Id.*

27. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68.

28. *See generally* Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). However, in a few exceptional circumstances, such as when someone is consulting

However, whether the privilege exists in the context of a congressional investigation remains a controversial topic. While Congress often respects the attorney-client privilege in run-of-the-mill or low stakes proceedings,[29] many committees are quick to disregard the privilege in highly political or pressing matters.[30] A few modern examples will make this abundantly clear.

In 1995, with a Republican-majority Senate, a special committee was established to investigate President Bill Clinton's investments in the Whitewater Development Corporation.[31] President Clinton retained the D.C. law firm Williams & Connolly to represent him in all Whitewater-related matters and met at their office to discuss the issue along with several aides and White House Counsel.[32] The Senate Special Committee issued a subpoena that requested notes taken at the meeting. President Clinton objected, saying that he should not be "the first President in history" to be forced to forfeit his attorney-client privilege.[33] The Committee refused to make any concessions and instead voted to send the issue to the Senate floor to vote on a resolution to bring a civil action against President Clinton to enforce the subpoena under the Senate's civil enforcement statute.[34] The Senate passed the resolution.[35] Out of options, President Clinton turned over the meetings notes that were recorded by White House Counsel, dropping all of his conditions except that the submission was not a legal waiver of his attorney-client privilege.[36] The Committee agreed.[37] This amounts to forfeiting so that you do not have to say you lost. The notes were turned over in their entirety.

In the throes of the Great Recession in 2009, the Chairman of the House Committee on Oversight and Government Reform sent a demand letter to Bank of America's CEO.[38] This letter requested, among other documents, privileged communications including legal advice that related to various facets of Bank of

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their attorney to further a crime or certain disputes between the attorney and client, the privilege has been pierced. Glenn A. Beard, *Congress v. The Attorney-Client Privilege: A Full and Frank Discussion*, 35 AM. CRIM. L. REV. 119, 122 (1997). These circumstances are ancillary to this Note, as when these exceptions are present there is no valid claim to the attorney-client privilege to consider in the first place.

29. *See* Angelle Smith Baugh, Margaret Cassidy & Laura K. Schwalbe, *Attorney-Client Privilege in Government and Congressional Investigations: Key Considerations and Recent Developments*, BUS. L. TODAY, Jan. 2019, at 4.

30. *See infra* text accompanying footnotes 31–52.

31. LOUIS FISHER, CONG. RSCH. SERV., RL31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 16 (2003).

32. *Id.*

33. *Id.* at 16–17.

34. *Id.* at 17.

35. *Id.* at 18.

36. *Id.*

37. *Id.*

38. Brian D. Smith & D. Jean Veta, *Congressional Investigations: Bank of America and Recent Developments in Attorney-Client Privilege*, BLOOMBERG L. REPS., Dec. 6, 2010, congressional-investigations–-bank-of-america-and-recent-developments-in-attorney-client-privile.pdf (cov.com) [https://perma.cc/KWX2-65LS].

America's recent acquisition of Merrill Lynch.[39] Bank of America's counsel asked the Committee to withdraw the request for privileged communications. Bank of America's counsel stated their fears that divulging the information would effectively waive their attorney-client privilege, and that the information could be used against Bank of America in investigations by other organizations such as the Securities and Exchange Commission.[40] The Chairman denied the request, stating that "the materials for which you claim privilege go to the heart of the issues most critical to our investigation."[41] The Chairman released his response publicly, garnering substantial media attention.[42] Bank of America acceded and provided over a thousand documents in the subsequent weeks, including documents by attorneys detailing legal advice.[43] The Committee provided the documents to the press over the course of the next month, and Bank of America's once-privileged legal advice was front and center in press releases.[44]

One of the most recent examples of a clash over the attorney-client privilege is the Senate Permanent Subcommittee on Investigations' inquiry into the role of advertising companies in facilitating criminal sex trafficking.[45] As part of its investigation, the Committee subpoenaed documents from Carl Ferrer, the CEO of the advertising company Backpage.[46] Ferrer divulged some documents but withheld others, claiming attorney-client privilege.[47] The Committee brought a civil action in the D.C. District Court seeking a declaration that he must comply with the subpoena.[48] The District Court ordered Ferrer to comply.[49] Ferrer did, but appealed the case. While the appeal was pending, the Committee finished its investigation and withdrew its interest in enforcing the subpoena, allowing the issue to become moot.[50] Ferrer attempted to keep the case alive, arguing that the Committee destroying the documents presented a still-viable remedy and that the Committee was attempting to evade review by making the case moot.[51] However, the D.C. Circuit could not rid itself of the case fast enough and dismissed it, vacating the district court decision below and thus curtailing any further analysis of the matter.[52]

These examples show a game of chicken, and Congress is never the one swerving. The issue of the attorney-client privilege has come up multiple times yet,

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. Senate Permanent Subcommittee on Investigations v. Ferrer, 856 F.3d 1080, 1083 (D.C. Cir. 2017).
46. *Id.* at 1083–84.
47. *Id.* at 1084.
48. *Id.* at 1084.
49. *Id.* at 1084.
50. *Id.* at 1084–85.
51. *Id.* at 1085.
52. *Id.* at 1089.

much to Congress's benefit, courts have never had to directly rule on the issue, nor do they seem keen on doing so. For many, the negative press of the public dispute, political pressure, litigation costs, uncertainty of success, and the consequences of failure, make resisting Congress simply not worth it.[53] Indeed, most of the advice by leading congressional investigation attorneys on this issue concerns how to best avoid attorney-client communications being subpoenaed in the first place and making sure any divulged privileged documents are not admitted in pending or concurrent litigation.[54] Unlike these strategies, this Note proposes new avenues to challenge Congress's power to disregard the attorney-client privilege head-on, but first, it will survey how Congress protects that power.

II. Congress's Legal Position

Throughout the twentieth century, various arguments were made to support Congress's assertion that it is not bound by the attorney-client privilege,[55] but the modern justifications rest primarily on two principles: (1) that Congress's power of inquiry is necessarily broad and (2) that the principle of separation of powers prohibits the Supreme Court from making Congress beholden to its common law.[56]

Congress's argument to have a robust power of inquiry is summed up well by then-Professor Woodrow Wilson's concern that a lack of such a power would lead to the country remaining "in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct."[57] This sentiment was echoed by the Supreme Court, which held that the power of inquiry was so essential that it was a necessary and implied extension of Congress's constitutional powers.[58] The national and constitutional interests in having an informed Congress have been the driving forces empowering Congress's legal

53. Smith & Veta, *supra* note 38 ("[U]nder the threat of reputational harm, the company agrees to disclosure.").

54. Smith & Veta, *supra* note 38 ("[P]rivate parties have rarely, if ever, succeeded in withholding privileged communications in the face of a determined congressional demand for disclosure. The best strategies, therefore, are those that avoid privilege disputes in the first place."); Baugh, et al., *supra* note 29, at 7–8 (describing strategies to negotiate waiver concerns or strategically waive privilege). *See also* DISTRICT OF COLUMBIA BAR LEGAL ETHICS COMM., OP. NO. 288, COMPLIANCE WITH SUBPOENA FROM CONGRESSIONAL COMMITTEE TO PRODUCE LAWYERS' FILES CONTAINING CLIENT CONFIDENCES OR SECRETS (Feb. 16, 1999) (advising that attorneys make every viable objection to avoid divulging attorney-client privileged communications to a committee, but to ultimately acquiesce if threatened with being held in contempt.).

55. Historical arguments couching Congress's power to disregard attorney-client privilege in the fact that the British Parliament upon which it is based had the power to do so, while once popular, is not the preeminent legal defense for the theory. *See* Beard, *supra* note 28, at 123. *See also* Kilbourn v. Thompson, 103 U.S. 168, 189 (1880) ("[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, nor from the adjudged cases in which the English courts have upheld these practices.").

56. *See infra* text accompanying footnotes 57–62; Baugh, et al., *supra* note 29, at 4.

57. WOODROW WILSON, Congressional Government 193 (1885).

58. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

arguments for a broad power of inquiry,[59] and any serious critique or proposed limitation on the power must grapple with them and present a superseding national and/or constitutional interest.

The principle of separation of powers also animates Congress's legal defense of its power of inquiry.[60] Congress asserts that, as a coequal branch of government, it may not be bound by common law principles (such as the attorney-client privilege) and procedures established by the courts.[61] The argument goes that if Congress's actions could be limited by rules and procedures established by courts, then the courts would be able to exert control over the proceedings of Congress by controlling how it conducts its business. This justification fails, however, if the rule at issue is grounded not just in the common law but in the Constitution itself, which constrains all branches of the government equally.[62]

Defenders of Congress's power of inquiry have also developed reasoned responses to some common challenges to Congress's power to subpoena attorney-client privileged communications. One such challenge is that subpoenaing someone's attorney and compelling them to reveal attorney-client privileged information violates the Fifth Amendment right against self-incrimination.[63] This argument fails on two fronts. First, the Fifth Amendment right against self-incrimination is a personal right and does not extend to anyone else, even an individual's attorney.[64] Second, the right against self-incrimination only protects against testimony, not the contents of voluntarily made documents. So even if the right could be applied, it would fail to protect any attorney-client privileged documents unless the possession of the documents themselves was in some way incriminating.[65]

Another challenge is based upon the Sixth Amendment's right of effective assistance of counsel.[66] While the Sixth Amendment's right of effective assistance of counsel is particular to criminal cases,[67] there are certain circumstances where it could be invoked in a congressional investigation.[68] The client would have to

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59. Baugh, et al., *supra* note 29, at 4.

60. *Id.*

61. *See, e.g.*, S. Rep. No. 105–167, at 586 (1998) ("There is no binding authority that the Senate and its committees are legally required to recognize common-law privileges such as the attorney-client or work-product privilege. As a separate and equal branch of government, Congress is constitutionally authorized to establish its own rules of procedure, so long as they do not contravene the express provisions of the Constitution.").

62. Barenblatt v. United States, 360 U.S. 109, 112 (1959).

63. Beard, *supra* note 28, at 128–29.

64. Couch v. United States, 409 U.S. 322, 328 (1973).

65. United States v. Doe 465 U.S. 605, 610–11 (1984).

66. Bradley J. Bondi, *No Secrets Allowed: Congress's Treatment and Mistreatment of the Attorney-Client Privilege and the Work-Product Protection in Congressional Investigations and Contempt Proceedings*, 25 J. L. & POL. 145, 176 (2009); Beard *supra* note 28, at 129.

67. U.S. CONST. amend. VI.

68. If an attorney is subpoenaed to testify or divulge privileged information that concerns an upcoming or ongoing criminal case, the client in that case could claim that this would violate his or her Sixth Amendment right to effective assistance of counsel by vitiating the privacy of the attorney-client consultation and thus

be implicated in an upcoming or ongoing criminal case and a committee would have to subpoena their attorney to speak directly on that case for this constitutional argument to have merit. Even in those circumstances, it does not stop Congress from inquiring into the privileged information. Rather, the potential constitutional dilemma could be resolved by Congress granting congressional immunity for any divulged privileged information or any evidence arising from that divulged information.[69] Since this argument could only be made in a very limited set of circumstances and Congress has a simple remedy for it, it cannot reliably protect attorney-client communications from disclosure.

A challenge made famous by the prominent lawyer Alan Dershowitz is that compelling an attorney to divulge privileged information forces the attorney to choose between violating his or her mandated ethical duty of confidentiality and being held in contempt.[70] This "between a rock and a hard place" argument fails for a simple reason. The *ABA Model Rules of Professional Conduct*, the *District of Columbia Rules of Professional Conduct*, and the rules of professional conduct in almost every other jurisdiction have an exception to the duty of confidentiality for when disclosure is required by law or a court order.[71] Thus, when withholding privileged information puts an attorney at risk of being held in contempt of either Congress or a court, that attorney is released from their duty of confidentiality.[72] This resolves any potential conflicts between the ethics rules and congressional subpoenas that request attorney-client privileged documents.

These examples show that, thus far, challenges to Congress's power to disregard the attorney-client privilege have been unsuccessful or ineffective, leaving Congress with the ability to vitiate the attorney-client privilege at will. However, this is not because there are no legitimate constitutional challenges. Rather, it is because the constitutional provisions that offer the most protection from this encroachment have been ignored or have been construed so narrowly as to have been effectively rendered null. The next section of this Note will examine how the Fourth Amendment and the Fifth Amendment Due Process Clause have been underapplied to congressional investigations and the increased protections the amendments should offer to those who have their attorney-client privileged communications subpoenaed by Congress.

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affecting his or her ability to receive a fair trial. Coplon v. United States, 191 F.2d 749, 757–59 (D.C. Cir. 1951) (holding that denying a criminal defendant a private consultation with their attorney violates the Sixth Amendment). *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the defendant's ability to receive a fair trial is fundamental to the Sixth Amendment).

69. Bondi, *supra* note 66, at 177.

70. Beard, *supra* note 28, at 131.

71. *E.g.*, MODEL RULES OF PROF'L. CONDUCT R. 1.6(6) (2016) [hereinafter MODEL RULES]; DISTRICT OF COLUMBIA RULES OF PRO. CONDUCT R. 1.6(e)(2)(A) (2007).

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

III. THE CASE FOR PRIVILEGE

The Supreme Court has stated that "Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action. . . ."[73] This section will examine two such constitutional limitations on Congress's ability to disregard the attorney-client privilege: the Fourth Amendment and the Fifth Amendment Due Process Clause.

A. THE FOURTH AMENDMENT AND THE *KATZ* TEST

The Fourth Amendment states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[74] Historically, the Fourth Amendment's sole protection for the targets of congressional subpoenas has been a prohibition on egregiously overbroad or burdensome subpoenas, a standard that the courts have applied with substantial deference to Congress.[75] This limited application of the Fourth Amendment drastically underrepresents its true scope as defined by the Supreme Court.[76]

The Supreme Court's modern approach to the Fourth Amendment was established in *Katz v. United States*. *Katz* held that the "Fourth Amendment protects people, not places."[77] The opinion stressed that while what a "person knowingly exposes to the public" is not protected, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[78] Justice Harlan's concurrence in *Katz* established a two-prong test in accordance with these principles, which later was adopted by the Court as the primary framework for analyzing whether a government action is a Fourth Amendment search that requires a warrant.[79] This test poses two questions: (1) has the person exhibited an actual, subjective expectation of privacy and (2) is that expectation one that society is prepared to recognize as reasonable?[80] If both of these questions are answered in the affirmative, then the government action is a search that requires a warrant from a neutral and detached judge, not just a subpoena from a congressional committee or its chairman, as has been Congress's practice.[81]

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73. Barenblatt v. United States, 360 U.S. 109, 112 (1959).

74. U.S. CONST. amend. IV.

75. *See* McPhaul v. United States, 364 U.S. 372, 382 (1960). *See also* CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 58 (2021).

76. *See infra* Section III.A.1–3.

77. Katz v. United States, 389 U.S. 347, 351 (1967).

78. *Id.*

79. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979).

80. *Id.*

81. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326–27 (1979) (holding that a valid search warrant requires a "neutral and detached judicial officer" to approve it.) A congressional committee subpoena fails this standard on two fronts. First, members of Congress are not judicial officers. Second, members of Congress that are a part of a congressional investigation are clearly not "neutral and detached" in regard to that investigation, and therefore could not sign their own warrants. For these reasons, a congressional subpoena does not function as a warrant, and requires judicial approval.

1. SUBJECTIVE EXPECTATION OF PRIVACY

In regard to the first prong, clients have an actual, subjective expectation of privacy when consulting with their attorneys about attorney-client privileged information. When determining whether someone has exhibited an actual expectation of privacy in a communication, the Supreme Court looks to whether a person has taken steps to "preserve [it] as private."[82] Attorney-client privileged communications fit neatly into this framework. For a communication to qualify for the attorney-client privilege in the first place, deliberate steps for privacy must be taken.[83] The communication must be made with a reasonable belief that no one besides a privileged person will learn the contents of the communication (which is known as being made "in confidence").[84] Since any legitimate claim of attorney-client privilege involves a person taking the deliberate steps of seeking out and communicating in confidence with privileged individuals about legal matters, attorney-client privileged communications are made with an actual expectation of privacy.

A useful analogy may be found in the seminal case on the issue: *Katz*. In *Katz*, a man entered a one-person glass-walled phone booth, closed the door, paid the toll to place a call, and had a phone conversation that, unbeknownst to him, was being wiretapped.[85] Justice Harlan's aforementioned milestone concurrence noted that an individual who has taken such actions to ensure privacy "is surely entitled to assume that his conversation is not being intercepted" and thus has a subjective expectation of privacy.[86] Compare this to the actions that are necessary to ensure attorney-client privilege in a communication. To qualify for the attorney-client privilege, the communication must be made in confidence, between privileged persons, and concern legal advice.[87] If someone is "surely entitled to assume" that going to a phone booth for a conversation is private, then the assumption that attorney-client privileged communication is private is likewise, if not more, reasonable.

2. OBJECTIVE EXPECTATION OF PRIVACY

In most cases, the second prong of the *Katz* test garners the most attention,[88] and the circumstances of congressional inquiries are no exception. The second prong has come to be known as the "objective" test and concerns whether society

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82. *Katz*, 389 U.S. at 351. *See also Smith*, 442 U.S. at 739–40; Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

83. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (Am. L. Inst. 2000) ("[T]he attorney-client privilege may be invoked. . . with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.").

84. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71.

85. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

86. *Id.*

87. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68.

88. *See* Orin S. Kerr., *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 113 (2015).

has recognized an expectation of privacy as reasonable and justified.[89] In determining this, the Supreme Court has considered a slew of factors, but in the context of communications, the Court's jurisprudence has one through-line: assumption of risk.[90] The rationale is that the reasonableness of someone's expectation of privacy is reduced in communications voluntarily divulged to another, including necessary third parties to the communication (e.g., telephone companies), since that person is assuming the risk that those third parties may relay it to the government.[91] This theory has been used to justify warrantless recordings of private conversations by government informants,[92] installing a pen registry to track what phone numbers someone dials,[93] and subpoenaing personal bank records maintained by a bank.[94]

Attorney-client privileged communications do not fit into this doctrine of assumed risk.[95] Society has recognized a justified expectation of privacy in privileged communications with attorneys over and above the expectations present in other types of communications.[96] The Supreme Court has recognized the attorney-client privilege as "one of the oldest recognized privileges for confidential communication" and that it is "intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"[97] In accordance with this history and policy, the attorney-client privilege has been regularly protected by the courts.[98] Moreover, even Congress itself has recognized the significance of the attorney-client privilege, making it the only enumerated privilege in the Federal Rules of Evidence in 2008 and leaving the application of the privilege up to the common law.[99] Further, every jurisdiction has promulgated ethical rules that impose a duty on attorneys to keep all of their communications with their clients confidential, going above and beyond just protecting the attorney-client privilege.[100] These recognitions and protections of the privilege by our highest

89. *Id.* at 113–14.

90. *See* United States v. Miller, 425 U.S. 435, 443 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."); Hoffa v. United States, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person whom he voluntarily confides his wrongdoing will not reveal it."); United States v. White, 401 U.S. 745, 752 (1971) ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police.").

91. *See supra* footnote 90.

92. *White*, 401 U.S. at 746–52.

93. Smith v. Maryland, 442 U.S. 735, 737–45 (1979).

94. *Miller*, 425 U.S. at 436–43.

95. See *infra* text accompanying footnotes 96–100.

96. *See infra* text accompanying footnotes 97–100.

97. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

98. *See generally Swidler*, 524 U.S. at 403; *Upjohn*, 449 U.S. at 389.

99. FED. R. EVID. 501, 502.

100. *E.g.,* MODEL RULES R. 1.6 (2020).

institutions demonstrate a societal recognition of a heightened expectation of privacy in attorney-client privileged communications, and make it unlike general disclosures in regular conversations and to third parties. This distinction makes the assumption of risk rationale inapplicable.

Even if it is assumed that a person's expectation of privacy in attorney-client privileged communication is reduced when it occurs in the context of a congressional investigation, the Fourth Amendment may still protect the communication. The Court has held that "diminished privacy interests do[] not mean that the Fourth Amendment falls out of the picture entirely"[101] and that when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy. . . ."[102] The privacy concerns related to the attorney-client privilege are weighty enough for it to surmount any diminished expectation of privacy that could reasonably be identified. Revealing attorney-client privileged information may not only affect current or future litigation, but can also harm the public opinion of the person and reveal otherwise confidential information that the person would not have communicated but for their reasonable expectation that it would remain private.[103] The privacy interests in this sensitive information are significant enough to warrant protection even if it is assumed that a situation arises where the expectation of privacy is reduced.

3. THE SPECIAL NEEDS SEARCH EXCEPTION

Critics of this challenge would be quick to point out the special circumstances of a congressional investigation. Indeed, the *Katz* test has been applied more leniently when a search is primarily aimed at a compelling government interest outside of law enforcement.[104] These searches are known as "special needs searches."[105] To be considered a "special needs search" the government interest must be a "real, current, and vital problem" that the government could not adequately address if regular Fourth Amendment protections were to apply.[106] Undoubtedly, many congressional investigations deal with pressing national issues; however, recognizing a special need is not a get out of jail free card for government officials to conduct boundless searches. Rather, when a special need

101. Florida v. Riley, 573 U.S. 373, 392 (2014).

102. Maryland v. King, 569 U.S. 435, 463 (2013).

103. *See supra* text accompanying notes 31–52; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. a.

104. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (holding that urinalysis drug tests of high school students in extracurricular activities do not violate the Fourth Amendment, citing the state's interest in combating child drug use, the lessened reasonableness of an expectation of privacy by school children, and the minimal intrusiveness of the search); *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that sobriety checkpoints do not violate the Fourth Amendment, citing the state's interest in road safety and the minimal privacy intrusion).

105. *Warrantless Searches and Seizures*, 35 GEO. L.J. REV. CRIM. PROC. 37, 121 (2006).

106. *Id.* at 119–21.

is present, the Supreme Court has "balance[d] the individual's privacy expectations against the government's interests. . . ."[107]

This balancing test has resulted in the special needs exception primarily considering three factors: (1) whether the individual has a reduced expectation of privacy,[108] (2) whether the search is reasonably related to the government interest,[109] and (3) the public policy concerns of allowing or disallowing the search.[110]

The first factor has been relied on in situations where a person's reasonable expectation of privacy is reduced.[111] For example, students who are in the custody of a school and people who drive on public roads are thought to have given up some of their legitimate expectations of privacy. In contrast, people reasonably expect their attorney-client privileged communications to be private,[112] and could not reasonably expect if, when, and to what extent a congressional committee may decide to intrude on that privacy.

The second factor has been given great weight, being used to invalidate even school searches when they overreach the related government interest.[113] In *Safford Unified School Dist. No. 1 v. Redding*, the Supreme Court found that stripping a middle school student down to her underwear to search her for contraband ibuprofen was outside the "reasonable scope" of the government interest in keeping schools drug-free since there was no evidence that students hid over-the-counter drugs in their underwear, ibuprofen is not a very dangerous drug, and the search was exceedingly intrusive.[114] This analytical framework demands that a search that is a significant intrusion into privacy be specifically proven to be justified to not be considered an overreach. The modern examples in this Note reveal broad, sweeping subpoenas issued by congressional committees for attorney-client privileged communications that fail to meet this standard.[115] Congressional

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107. Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989) ("[W]here a Fourth Amendment intrusion serves special government needs. . . it is necessary to balance the individual's privacy expectations against the government's interests. . ."). *See also Vernonia*, 515 U.S. at 652–53 ("[W]hether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

108. *Vernonia*, 515 U.S. at 657 (justifying the warrantless urinalysis of student-athletes in part by asserting that "school athletes have a reduced expectation of privacy."); *Sitz*, 496 U.S. at 451 (justifying the warrantless stop of drivers at sobriety checkpoints in part by asserting that "the measure of the intrusion on motorists stopped briefly at sobriety checkpoints — is slight.").

109. *E.g.*, New Jersey v. T.L.O, 469 U.S. 325, 342 (1985) ("special needs school searches "will be permissible. . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive. . ."); *Sitz*, 496 U.S. at 452 ("brief stops [are] necessary to the effectuation of these two types of checkpoints. . .").

110. *E.g.*, *Vernonia*, 515 U.S. at 660–61; *Sitz*, 496 U.S. at 451.

111. *See, e.g.*, *T.L.O.*, 469 U.S. at 337–41; *Sitz*, 496 U.S. at 451–53; Skinner v. Railway Labor Execs.' Ass'n., 489 U.S. 602, 625–26 (1989).

112. *See supra* Section III.A.1–2.

113. Safford Unified Sch. Dist. No. 1 v. Redding, 577 U.S. 364 (2009).

114. *Id.* at 375–77.

115. *See supra* Section I.B.

committees have pursued attorney-client privileged communications without having to show that the legal communications are specifically necessary to the legislative purposes of their investigations, despite the significant intrusion into privacy that vitiating the privilege causes.[116]

Lastly, the public policy concerns of warrantless searches and seizures of attorney-client privileged documents by congressional committees outweigh the benefits. Congress staying abreast of the nation's affairs is important;[117] however, the Supreme Court has laid out the severe consequences that accompany disregarding the attorney-client privilege. The Court has explained that the privilege is necessary to ensure "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[118] The Court reasoned that individuals must trust that their communications with their attorneys are private or they will not divulge all of the information necessary for their attorney to knowledgeably advise them about the legality of their conduct or to protect them from legal action.[119] This issue is exacerbated, rather than mitigated, by congressional committees' irregular recognition of the privilege. With no discernible standard for when the privilege will be respected, individuals who are or who may become the subject of a congressional subpoena cannot foresee when they will benefit from the privilege, eviscerating the policy goal of ensuring confidence to encourage open communication and informed representation. As Chief Justice Rehnquist wrote for the majority in *UpJohn Co. v. United States*: "An uncertain privilege . . . is little better than no privilege at all."[120]

Further, Congress exempting attorney-client privileged documents would by no means ruin its committee investigations. In *Upjohn*, the Court explained that a robust attorney-client privilege would not put severe burdens on discovery or create a "zone of silence" since the underlying facts would still be discoverable and could be revealed by any documents, testimony, or communication that is not attorney-client privileged.[121] The same reasoning is applicable to congressional subpoenas. The attorney-client privilege only protects the legal advice itself, and Congress could often reach the same underlying facts without destroying a privilege that is instrumental to our legal system and to the privacy of the American people.

Due to these factors, congressional investigations that vitiate the attorney-client privilege fail the balancing test necessary to apply the special needs exception. Congressional committees may be granted leeway in their investigations, but that leeway has limits. As Judge Mackinnon once put it: "an unreasonable

116. *Id.*
117. *See supra* Section II.
118. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
119. *Id.*
120. *Id.* at 393.
121. *Id.* at 395–96.

search and seizure is no less illegal if conducted pursuant to a subpoena of a congressional subcommittee than if conducted by a law enforcement official."[122]

B. FIFTH AMENDMENT DUE PROCESS CLAUSE

1. SUBSTANTIVE DUE PROCESS

The Due Process Clause of the Fifth Amendment provides that no person be "deprived of life, liberty, or property without due process of law."[123] Due process issues in congressional investigations have mostly been constrained to protecting witnesses from irrelevant questions by requiring congressional committees "upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."[124] Any further due process protections have been curtailed in congressional investigations under the theory that the "process" that is "due" in a congressional investigation is far less than that due in an adjudicative proceeding, since someone's liberty is not directly implicated in the outcome.[125] One defending Congress's power may point to a Supreme Court decision from 1960 stating that "when a general factfinding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used,"[126] or a D.C. Circuit decision from 1970 asserting that the distinguishing procedures of congressional investigations make them fall "outside the guarantees of the due process clause of the Fifth Amendment."[127] These opinions restrict Due Process Clause protections to the procedures of the courtroom,[128] and do not account for the doctrine of modern substantive due process that has expanded the clause's scope and protections since these opinions were drafted.[129]

Modern substantive due process doctrine is aimed at protecting the fundamental rights, "or liberties," of individuals.[130] "Liberty" is not limited to freedom from physical restraint, rather, it "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective."[131] Defining the liberties one is free to pursue and when those must yield to proper government objectives is a primary goal of constitutional

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122. United States v. Fort, 443 F.2d 670, 678 (D.C. Cir. 1970).

123. U.S. CONST. amend. V.

124. Watkins v. United States, 354 U.S. 178, 214–15 (1957).

125. CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 61 (2021); Hannah v. Larche, 363 U.S. 420, 441–42 (1960).

126. *Hannah*, 363 U.S. at 442.

127. United States v. Fort, 443 F.2d 670, 679 (D.C. Cir. 1970).

128. *Hannah*, 363 U.S. at 442 ("it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings"); *Fort*, 443 F.2d at 679–81.

129. *See infra* text accompanying notes 130–39.

130. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 427 (2010).

131. Bolling v. Sharpe, 347, U.S. 497, 499–500 (1954).

law, and how the Court has analyzed the issue has evolved over the nation's history.[132]

2. THE *GLUCKSBERG* TEST

Various doctrines exist to define liberties and their limitations, but currently the most prominent is the *Glucksberg* test.[133] While the *Glucksberg* test was originally developed to find rights in a Fourteenth Amendment substantive due process analysis, the Fifth Amendment due process clause contains the exact same language, and receives the same fundamental rights analysis, making the *Glucksberg* test a useful and applicable framework.[134] As Justice Frankfurter wrote: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."[135]

The *Glucksberg* test requires (1) that the right at issue be carefully and narrowly described.[136] Once the right is identified, the Court looks to see if (2) the right is "deeply rooted in our nation's history and tradition" and "implicit in the concept of ordered liberty."[137] If it is, then the right is considered fundamental, and the government cannot infringe upon it unless (3) the infringement is "narrowly tailored to serve a compelling state interest."[138] The attorney-client privilege meets the parameters of the *Glucksberg* test, and therefore congressional subpoenas that seek attorney-client privileged communications should be subject to the highest level of scrutiny.[139]

a. Narrowly and Carefully Describe the Right

The first step of the *Glucksberg* test is to narrowly and carefully define the right at issue. This step is imperative to a good faith use of the *Glucksberg* test, since the broader the right is defined, the more likely it is to be found to be "deeply rooted in the nation's history and tradition" and "implicit in the concept of

132. Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1481–95.

133. The Supreme Court has utilized the *Glucksberg* test's analysis in many of its recent cases involving fundamental rights. *See* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019); McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). *See also* Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 411 (2006) ("My survey of 102 cases applying *Glucksberg* since the day the Supreme Court decided *Lawrence* indicates that the *Glucksberg* Doctrine has not only survived *Lawrence*, but has flourished.").

134. The only difference between the Fifth Amendment due process clause and the Fourteenth Amendment due process clause is that the former applies to the federal government and the latter applies to the states. Beyond whom it applies to, the wording, and the construction of the clauses is the same. U.S. CONST. amend. V, XIV.

135. Malinski v. New York, 324 U.S. 401, 415 (1945), (Frankfurter, J., concurring).

136. *Glucksberg*, 521 U.S. at 721.

137. *Id*. at 720–721.

138. *Id*. at 721.

139. *See infra* Section III.B.2.a–b.

ordered liberty."[140] For example, take the right to buy and drink orange juice. The broadest definition of that right might be defined as "the right to lawfully contract to acquire and consume liquids with essential nutrients," and the narrowest may be "the right to buy and drink squeezed oranges." Both are accurate, but the former sounds far more fundamental than the latter. With this in mind, the reason the Court requires narrowly and carefully defining the right is forthcoming: broadly defining the rights would result in the due process clauses protecting an innumerable expanse of rights, placing that conduct "outside the arena of public debate and legislative action" and into the hands of judges.[141]

The Court has never clearly laid out how to go about narrowly and carefully defining a right. Indeed, some scholars argue that this discretion means "a court may rule however it wishes simply by choosing how to describe the right."[142] Nevertheless, the Court in *Glucksberg* gave a rule and a policy rationale for that rule, and jurists and scholars alike must strive to use it.

Thus, the right at issue in this Note cannot be defined as simply "the right to privacy" or the "right to privacy in your intimate conversations," nor should it even be defined as "the right to the attorney-client privilege." A narrow and careful description of the right at issue is "the right to the attorney-client privilege against warrantless searches by Congress."

b. Fundamentality of the Right

With the right carefully and narrowly defined, the *Glucksberg* test turns to whether the right is fundamental. The fundamentality of the right is determined by analyzing whether the right is "deeply rooted in the nation's history and traditions" and "implicit in the concept of ordered liberty."[143] The analysis relies on "crucial guideposts" such as "our nation's history, legal traditions, and practices. . .."[144] All three of these guideposts point to the fundamentality of protecting attorney-client privileged communications from warrantless searches by Congress.

This analysis begins by explaining what historical tradition will *not* be relied on: that of British parliamentary investigations. The tradition and practices of British parliamentary investigations may be helpful insofar as they contextualize the United States Congress's practices; however, the Supreme Court has stated that "the 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. . ."[145] This

140. Barnett, *supra* note 132, at 1489–91.
141. *Glucksberg*, 521 U.S. at 720.
142. Barnett, *supra* note 132, at 1490.
143. *Glucksberg*, 521 U.S. at 720–21.
144. *Id.* at 721.
145. Kilbourn v. Thompson, 103 U.S. 168, 189 (1880).

is inherently cogent and is applicable here. British parliamentary investigations did not recognize the attorney-client privilege;[146] however, the British parliamentary system differed greatly from the American congressional system during the American Founding Era.[147] British Parliament was, at the time the Constitution was ratified and long after, endowed with judicial power by the Crown to try a broad array of cases involving private rights, a power not granted to the United States Congress.[148] The Constitution that followed the American Revolution was not a wholesale adoption of the British form of government of which the American people had just rid themselves. In fact, not only did the Constitution not adopt the British parliamentary model, it also added provisions such as the Third, Fourth, and Fifth Amendments that were specifically designed to combat the evils of the British government system at the time.[149] Thus, this analysis will focus on the history and tradition of how the United States Congress has conducted its investigations and the related case law.

This Note began with the Supreme Court's assertion that "recipients [of congressional subpoenas] have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications . . ."[150] As this Note has shown, this is not the case in modern history.[151] However, a deeper dive into the nation's past reveals that Congress's disregard for the privilege is a modern trend, not a historical constant.

The attorney-client privilege is the "oldest privilege for confidential communications known to the common law."[152] The privilege was originally developed by the British Chancery Court in the 1570s as a right of the attorney, but early American jurisprudence adapted the privilege into a right of the client.[153] Justice Story wrote on behalf of the Supreme Court in 1826 that the privilege "is indispensable for the purposes of private justice."[154] The Supreme Court would reiterate the necessity of the attorney-client privilege for the administration of justice in a long line of cases.[155] However, it was not just the courts that recognized the sanctity of the privilege.

One of the earliest records of Congress discussing the attorney-client privilege is the debate on the congressional criminal contempt statute in 1857. While the debate in the House of Representatives included conflicting statements on the

146. *See* Beard, *supra* note 28, at 123.

147. *See* text accompanying footnotes 149–50.

148. *Kilbourn*, 103 U.S. at 183–84.

149. *See*, *e.g.*, United States v. Galpin, 720 F.3d 436, 445 (2d Cir. 2013); Englblom v. Carey, 677 F.2d 957, 966–67 (2d Cir. 1982) (Kaufman, J. concurring).

150. Trump v. Mazars, 140 S. Ct. 2019, 2032 (2020).

151. *See supra* Sections I–II.

152. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

153. Bondi, *supra* note 66, at 147–48.

154. Chirac v. Reinicker, 24 U.S. 280, 294 (1826).

155. *See generally* Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); *Upjohn*, 449 U.S. at 389; Trammel v. United States, 445 U.S. 40, 51 (1980); Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

issue and did not touch on Congress's historical practices in the area,[156] the Senate debate revealed substantial deference to the privilege.[157] In response to concerns that the bill could lead to violating privileges, the bill's sponsor in the Senate, Senator Toombs, stated:

> The idea that it will happen results from a forced and wrong construction of this bill. 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 [self-incrimination and infamy privileges] . . . The bill leaves every other exemption where it was before - that resulting from the relation of husband and wife, and counsel and client.[158]

This sentiment was reiterated by Senator Bayard, who stated that "[t]here 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. . ."[159] Senator Toucey asserted not only that the privilege should continue to be protected, but that it also should "be the duty of the House or committee to interpose the objection and stop" a counsel from testifying "against the client."[160]

This legislative history evidences the deeply rooted tradition of honoring the privilege. The very suggestion that the statute could be construed as even interacting with the privilege was forcefully rejected by the sponsor as a "forced and wrong construction" and prompted assurances from multiple senators that the privilege would be protected.[161] At the very least, this reveals that any suggestion that the statute would undermine the attorney-client privilege would have been unpopular at the time, and further reveals a presumption of protecting the privilege. Moreover, the statements by Senators Toombs (*"leaves* every other exemption where it was *before*. . .") and Bayard ("no attempt to *abandon* any of those guards. . .") imply that the protection had always been recognized by Congress.[162]

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156. Even those who spoke out against the idea of recognizing the privilege could not point to any examples supporting their assertion in American law or Congress's history. Instead, they relied on English parliamentary practice, which, as has been discussed previously, is ancillary to determining if the right at issue is "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty." The House member who most adamantly supported adopting the British model, Congressman Davis, was something of a radical, who also argued during the debate that the right against self-incrimination should not apply against Congress either. Cong. Globe, 34th Cong., 3d Sess. 403–32 (1857).

157. Cong. Globe, 34th Cong., 3d Sess. at 434–45. *See also* Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 153–55 (1988) (the subsequent and more comprehensive debate in the Senate reveals a clear intent to preserve most existing common-law privileges, particularly that protecting attorney-client communications."); Bondi, *supra* note 66, at 158 ("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.").

158. Cong. Globe, 34th Cong., 3d Sess. at 440.

159. *Id*. at 445.

160. *Id*. at 441.

161. *See supra* text accompanying footnotes 158–60.

162. Cong. Globe, 34th Cong., 3d Sess. at 440, 445 (1857) (emphasis added).

For over a century afterward, it was standard procedure for Congress to respect the attorney-client privilege.[163] This was summed up by the Senate Committee on Rules and Administration, which stated that an amendment to the criminal contempt statute to expressly recognize common-law privileges was unnecessary, since: "With 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."[164]

Evidence points to the attorney-client privilege even being understood as protected in the highly contentious congressional investigation following the Watergate Scandal.[165] The Watergate Committee's Chief Counsel submitted a memorandum to the Committee that made no mention of being able to disregard the privilege.[166] Rather, it detailed how to recognize a legitimate claim of attorney-client privilege, and the legal and policy rationales legitimizing the privilege.[167]

The shift toward absolute congressional discretion in recognizing the attorney-client privilege occurred in only the last forty-five years.[168] Perhaps unsurprisingly, it occurred soon after the highly publicized congressional investigation of the Watergate Scandal. The first noted instance of the assertion was during the investigation of a uranium trafficking cartel in 1977.[169] Explaining the Committee's justification for rejecting a claim of attorney-client privilege, Chairman Moss stated that a committee could choose to override the privilege if it impedes a necessary inquiry of Congress.[170] This approach quickly gained traction, with multiple highly publicized investigations disregarding the attorney-client privilege throughout the late twentieth-century.[171] However, even after this shift, Congress has not uniformly rejected the privilege. Some committees have respected the privilege even in highly public congressional investigations such as that of the Iran-Contra Affair.[172]

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163. The few Congressional investigations in this time period that did not honor attorney-client privilege did so because the assertions of privilege were improper (communications did not involve legal advice), not because Congress did not recognize the privilege when used legitimately. *See* Thomas Millet, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 J. MARSHALL L. REV. 309, 312–15 (1988).

164. S. Rep. No. 2, 84th Cong., 1st Sess. 27–28 (1955).

165. *See* Beard, *supra* note 28, at 127.

166. PRESIDENTIAL CAMPAIGN ACTIVITIES OF 1972, APPENDIX TO THE HEARINGS OF THE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES OF THE U.S. SENATE, 93d Cong., 1st and 2d Sess. Part I, 119–29 (1974).

167. *Id.*

168. *See* Beard, *supra* note 28, at 126.

169. *Id.*

170. *Id.*

171. *Id.* at 126–27 (*e.g.*, Subcommittee on Asian and Pacific Affairs's investigation of the Philippine President's real estate holdings in the U.S., Whitewater Controversy).

172. *See* Beard, *supra* note 28, at 127.

Congress respected valid claims of attorney-client privilege up through the mid-twentieth century. Congress's modern approach of disregarding the attorney-client privilege may obfuscate the analysis, but it does not change that history. The decisions of the Supreme Court, statements of Members of Congress, and the historical practice of respecting the privilege establishes that the privilege is "deeply rooted in the nation's history and tradition" and "implicit in the concept of ordered liberty." Thus, the right to the attorney-client privilege against warrantless searches by Congress is fundamental.

c. Strict Scrutiny

Having established that the right at issue is fundamental, the *Glucksberg* test next analyzes whether Congress's infringement on that right is "narrowly tailored to serve a compelling state interest."[173] This phrase is a signal for an analysis known as "strict scrutiny."[174] Strict scrutiny requires that (1) the government has a substantial societal interest at stake, and (2) that to achieve that societal interest, the government uses means that are the least restrictive on the rights of the people.[175]

This Note has recognized that Congress often has compelling government interests in its investigations;[176] however, warrantless subpoenas of privileged information are not the least restrictive means Congress could employ to achieve those ends. Currently, congressional committees have no recognizable standard for when they will and will not subpoena attorney-client privileged documents, nor must they show that the attorney-client privileged documents are specifically necessary for their investigation.[177] Congress's lack of transparency and consistency makes its treatment of the attorney-client privilege arbitrary and unpredictable, causing subjects of congressional subpoenas to lack the confidence in their attorney-client communications that is necessary for full and frank disclosures. Rather than being narrowly tailored, Congress's current ability to subpoena attorney-client privileged communications is broad: applying anytime a committee wishes as long as there is a legitimate legislative purpose to the investigation. Various other types of government searches and seizures require the government to make a showing of specific cause or need that must meet a defined standard.[178] Such systems present an alternative means for Congress to conduct its investigations that is less restrictive on the rights of the people. Since Congress's ability to

173. *Supra* Section III.B.2.

174. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts* 59 VAND. L. REV. 793, 810 (2006).

175. *Id*. at 800–801.

176. *See supra* Section II.

177. *See* Smith & Veta, *supra* note 38 ("Because of the absence of a clear legal rule, the privilege issue is typically left to the discretion of the relevant congressional committee or subcommittee, which, as a practical matter, often means the discretion of the chairman."). *See also supra* Section I.B.

178. Geo. L.J. Rev. Crim. Proc., *supra* note 105, at 37–39.

disregard the attorney-client privilege has no standard and does not require a showing of necessity for the privileged information, it fails strict scrutiny and is therefore unconstitutional.

CONCLUSION

Justice Harlan wrote of Congress's investigative power that "[b]road as it is, the power is not, however, without limitations."[179] The Fourth and Fifth Amendments are two such limitations. Congress's current discretionary approach to the attorney-client privilege vitiates a valuable and long-respected right of the American people without needing a warrant or any other kind of approval. These constitutional provisions hold Congress to a higher, stricter standard to regulate and legitimize congressional subpoenas for attorney-client privileged communications. Without such a standard, one thing remains certain: Congress's treatment of the attorney-client privilege is illegitimate, and if that infamous line from *Trump v. Mazars* is any indication, the Supreme Court may be starting to think the same.[180]

179. Barenblatt v. United States, 360 U.S. 109, 111 (1959).

180. Trump v. Mazars, 140 S. Ct. 2019, 2032 (2020) ("recipients [of congressional subpoenas] have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications . . .").