UIC Law Review

Volume 21 | Issue 2 Article 3

Winter 1988

The Applicability of Evidentiary Privileges for Confidential Communications before Congress, 21 J. Marshall L. Rev. 309 (1988)

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THE APPLICABILITY OF EVIDENTIARY PRIVILEGES FOR CONFIDENTIAL COMMUNICATIONS BEFORE CONGRESS

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From the infamous Army-McCarthy hearings to the recently concluded congressional inquiry into the Iran/Contra affair, the processes of congressional investigating committees frequently command public attention. The televised spectacle of congressional investigations, complete with counsel whispering in witnesses' ears and sparring with the members of Congress and their staff, has become a familiar and often compelling sight, one with the capacity to dominate the national spotlight.

Despite the familiarity of this scenario and the importance of the issues often at stake in these investigations for the participants and the nation at large, relatively little guidance exists concerning the rights and privileges of witnesses before these committees. In particular, the question of the applicability of the familiar evidentiary privileges for confidential communications has never been definitively resolved. Clearly, Congress, like the other branches of the federal government, is bound in its inquiries by constitutional limitations. Thus, a congressional witness retains the right to be free from compulsory self-incrimination.[1] Similarly, the fourth amendment's protections against unreasonable searches and seizures restrict the bounds of congressional action.[2] Due process limits committee queries at least to the extent that they must be authorized by the committee's charter and be relevant to the inquiry.[3] Even the first amendment rights of free speech and association have been held to provide limited protections to witnesses before congressional committees.[4]

Although the constitutional rights and privileges that apply in

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1. Watkins v. United States, 354 U.S. 178 (1957).

2. *Id.*; *see also* McSurely v. McClellan, 521 F.2d 1024 (D.C. Cir. 1975) (holding that the Speech or Debate Clause, art. I, § 6, cl. 1, does not insulate members of Congress or their staffs from liability for unlawful searches and seizures).

3. *Watkins*, 354 U.S. 178.

4. Barenblatt v. United States, 360 U.S. 109 (1959); *Watkins*, 354 U.S. 178.

congressional proceedings may be stated with some certainty, the same cannot be said for other privileges recognized by our legal tradition. Lawyers imbued with the common law's respect for a variety of confidential communications could hardly be faulted for having the intuitive reaction that such communications are sacrosanct, regardless of the forum. It may thus seem surprising that no controlling authority compels this result in the context of congressional investigations. This article examines the manner in which Congress has dealt with privileges for confidential communications in the past and assesses the legal basis for their applicability in the congressional sphere.

I. Confidential Communications: An Overview

In general, certain relationships have been considered important enough to society that communications within those relationships have been protected from compulsory disclosures in litigation. The rationales for these privileges, however, are not tied solely to judicial proceedings. They apply with the same logical force to the legislative arena as the judicial one. On this basis alone, one would expect that the traditional privileges for confidential communications should apply to congressional proceedings. Examination of some of the well-established privileges illustrates this point.

For example, common law courts have traditionally protected communications between attorney and client from compulsory disclosure in judicial proceedings. Originally drawn from an earlier day's code of honor that communications made in confidence should generally be respected, the attorney-client privilege subsequently evolved to its current rationale that negotiating the legal process requires the assistance of learned counsel and that effective representation requires complete disclosure by the client and trust that the communication will be privileged.[5] Clearly, disclosure of communications within the attorney-client relationship would be as equally damaging to those interests if it occured in either a congressional committee proceeding or in a court. Indeed, many of the most visible congressional inquests involve witnesses whose conduct is simultaneously the subject of criminal investigations. The Watergate and Iran/Contra hearings provide recent examples of this type of inquest. As a practical matter, a congressional witness in such a proceeding may be required to put on the same "defense" in a committee room as he may be called upon to present in a courtroom, thus raising the same need for trust and assistance of counsel in congressional investigations as is required in judicial proceedings.

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5. C. McCormick, McCormick on Evidence § 87 (E. Cleary 3d ed. 1984); 8 J. Wigmore, Evidence in Trials at Common Law § 2291 (Rev. ed. 1961).

Similarly, the marital relationship has been one that the common law and later state statutes have given a special status. Initially, husband and wife were disqualified from testifying for or against each other.[6] Legislative action has generally removed this disability and substituted in its place a testimonial privilege, recognizing a societal interest in avoiding the marital discord that would result from compelling spouses to testify against each other.[7] The interests this privilege protects are no less implicated by disclosure in the legislative than judicial forum.

The relationship between doctor and patient has also been afforded a measure of protection in most jurisdictions.[8] Among the justifications cited for this privilege is the need to insure candid communication between physician and patient as a means of assisting the provision of health care.[9] This policy similarly would apply in the legislative and judicial context.

In short, evidentiary privileges for confidential communications generally rest upon policy considerations that transcend the particular forum in which the inquiry is presented. These privileges are based on judgments that simply recognize the harm that is expected to occur to certain relationships from compelled disclosures of communications within those relationships, regardless of the forum.[10] Given that the same policy concerns are presented, the question remains as to whether Congress is required to effectuate those policies. The following section examines Congress' responses to assertions of privileges for confidential communications.

II. Congressional Experience with Confidential Communications

Viewed from the perspective of two hundred years of congressional experience, it is perhaps surprising that relatively few confrontations involving assertions of privileges for confidential communications have occurred. Those that have occurred are not conclusive on the question of the applicability of the privileges to

6. C. McCormick, *supra* note 5, § 78; 8 J. Wigmore, *supra* note 5, §§ 2333-34.
7. C. McCormick, *supra* note 5, § 78; 8 J. Wigmore, *supra* note 5, §§ 2333-34.
8. C. McCormick, *supra* note 5, § 98; 8 J. Wigmore, *supra* note 5, §§ 2380-80a.
9. C. McCormick, *supra* note 5, § 105. The author, however, criticizes this rationale and suggests that the primary motive may be professional jealousy of the medical sector for the privilege traditionally afforded to the legal profession. *See* 8 J. Wigmore, *supra* note 5, § 2380a.
10. Beyond the scope of consideration here are the various governmental privileges collectively known as "executive privilege," such as the deliberative process privilege, and the state secrets privilege. As privileges unique to the executive branch of government, they raise separation of powers concerns that are not involved here. *See* United States v. Nixon, 418 U.S. 683 (1974); Reynolds v. United States, 345 U.S. 1 (1953).

congressional proceedings as a matter of law. At best, they display a practice of avoidance of the issue to the greatest extent possible.

A. *The Woolley Case*

Congressional hearings during Andrew Johnson's impeachment proceedings, investigating a scheme for bribing senators, led to Congress' earliest confrontation over the issue. A House committee investigated allegations that Charles W. Woolley, a lawyer, conspired with others to bribe certain senators. When called as a witness, Mr. Woolley refused to answer questions which, in his view, did not relate to either the bribery scheme or to Johnson's impeachment. When asked whether he had sent certain telegrams to Sheridan Shook, another member of the alleged conspiracy, Mr. Woolley asserted the matter involved a "private and confidential communication, passing between counsel and client. It has reference to business in that relation and nothing else . . . ."[11] Unfortunately for Mr. Woolley, his alleged client Shook denied ever having conducted business with Woolley.[12] The committee then cited Woolley for contempt and introduced a resolution to arrest and hold him in the Capitol until he answered the questions.[13]

The proponents of the resolution focused not on the applicability of the attorney-client privilege to congressional proceedings, but on whether the privilege had been validly asserted. Because Shook denied conducting business with Woolley, over which Woolley claimed the attorney-client privilege, Congressman Bingham argued that the claim of privilege was fraudulent and deserving of a contempt citation.[14] In reply, Congressman Eldridge maintained that this conclusion did not follow, because one could just as easily conclude that Shook may have testified falsely. In the course of his defense of Woolley, Congressman Eldridge delivered a strong plea for the House to respect the traditional privileges for confidential communications:

> I insist this right of confidential communication between the attorney and client is a sacred and well-settled right, and ought not to be violated by this House, any more than by a court of justice. If this be not so I ask you, Mr. Speaker, and I ask this House, what is this committee ruled by? What rights have they not? Can they not ask any question they please? It has been so contended . . . that they are the sole judges of what questions may be asked and what shall be answered.

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11. CONG. GLOBE, 40th Cong., 2d Sess. 2669 (1868).
12. *Id.*
13. The text of the resolution, reciting the testimony of both men and Woolley's claim of attorney-client privilege, is contained in CONG. GLOBE, 40th Cong., 2d Sess., at 2669-70 (1868).
14. *Id.* at 2670.

> Such is not the law. I assert this cannot be so. If it be, then the sacred relations between husband and wife may be investigated before this committee . . . . If this be so the relations and communion between penitent and priest may be pried into and exposed by the "smelling committee," and the sacred office of spiritual advisor is destroyed.[15]

Whatever this argument contained in emotion, it lacked in legal citation. Instead, Congressman Eldridge's argument is nothing more than a recognition of the fact that the policies justifying the privileges apply to any compelled disclosure. None, however, directly disputed Congressman Eldridge's contention that the privilege applied to limit the scope of permissible congressional inquiry. Instead, the only rejoinder was that Woolley simply lied about his relationship with Shook. Whether the House disagreed with Congressman Eldridge or merely with the conclusion that the privilege did not apply is not apparent. What is clear is that the House adopted the resolution and the committee imprisoned Woolley a few days later.[16]

While the issue arose in somewhat unusual circumstances in the *Woolley* case, it demonstrated a pattern that Congress was to repeat. The pattern consisted of not directly asserting that the claimed privilege was inapplicable as a matter of law, but that the claimed privilege had not been properly asserted as to the facts of the case.

B. *The Stewart Case*

The pattern reoccurred during the investigations of the Credit Mobilier affair in 1873.[17] Again the subject was bribery of government officials, this time involving legislation to benefit the Union Pacific Railroad. Again the witness was a lawyer being questioned about the disposition of funds. A House committee questioned attorney Joseph B. Steward about the identities of persons to whom he had given certain funds. Much like Woolley, Stewart stated that the money was not given to any government official and declined to respond further, stating that he would "make no statement to the committee about the business of my clients."[18]

As in the *Woolley* case, proponents of efforts to punish Stewart argued that the question did not implicate the attorney-client privilege because Stewart was not acting in a lawyer's capacity when he delivered the funds to their ultimate destination.[19] One member,

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15. *Id.* at 2674.
16. *Id.* at 2670.
17. Credit Mobilier of America was a company used by officials of the Union Pacific Railroad to transfer profits and government benefits otherwise intended to finance the railroad. II DICTIONARY OF AMERICAN HISTORY 255-56 (1976).
18. CONG. GLOBE, 42d Cong., 3d Sess. 952 (1873).
19. *Id.* at 953-54 (remarks of Congressmen Hoar, Wilson and Poland).

however, went so far as to suggest that privileges do not apply to the government.[20] Stewart was brought to the bar of the House and required to explain his position. He continued his assertion that "all the matters refused by me to be testified about or disclosed had their origin solely and exclusively in the relation of counsel and client . . . ."[21] The House voted to send him to jail for contempt.[22] As with Woolley, the record was too inconclusive to allow a definite statement as to whether the House agreed that the privilege was not properly claimed here or whether it simply did not apply as a matter of law.

Stewart elected to challenge his captivity and brought suit against the Speaker and his jailor, the Sergeant at Arms, alleging assault and false imprisonment.[23] In a brief opinion, the court simply ruled that the House had jurisdiction over Stewart. Finding jurisdiction, the court ruled that execution of the resolution to imprison Stewart was a ministerial act for which neither the Speaker nor the Sergeant at Arms could suffer any liability. The court never directly addressed the question of the applicability of the attorney-client privilege in congressional proceedings. Thus, it is impossible to determine whether the court concluded that the privilege did not apply to congressional proceedings or whether it simply was improperly invoked in this case. The fact that the court's opinion was confined solely to the question of the House's jurisdiction over the party and the subject matter, however, suggests that the question of the validity of the claimed privilege on these facts was, at best, of secondary importance.

C. *The MacCracken Case*

Senate investigations into airmail contracts in 1934 led to the next confrontation involving an assertion of a privilege for confidential communications. Again, the witness was an attorney and the privilege involved was the attorney-client privilege. William MacCracken was subpoenaed to appear before a Senate committee chaired by then Senator Hugo Black and to produce certain

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20. What is the reason for the rule which makes communications between counsel and client confidential? The general rule of public policy; that it would, on the whole, produce more mischief and inconvenience . . . . But that rule of public policy can have no application, it seems to me, when the Government itself comes, in the exercise of the highest public policy, to inquire into corrupt practices by their own officers in regard of the legislation of the Government itself.

Id. (remarks of Congressman Potter).

21. *Id.* at 982.

22. *Id.* at 988.

23. Stewart v. Blaine, 8 D.C. (1 MacArth.) 453 (1874).

records.[24] Rather than produce the records when initially called before the committee, MacCracken asserted that they fell within the attorney-client privilege.[25] He agreed, however, to ask his clients for authorization to produce the records to the committee.[26] While most of the clients assented to disclosure, two persons responded by reviewing MacCracken's files and removing documents that were later destroyed.[27] Not surprisingly, this result did not please the committee and the Senate cited MacCracken and his two clients to show cause why they should not be held in contempt for those actions.[28]

The contempt proceedings thus turned primarily upon the destruction of documents, not upon MacCracken's assertion of the attorney-client privilege. The question of the applicability of the privilege in the first instance, however, did not escape consideration in the affair. Senator King expressed the clear view that the privilege was inapplicable in the legislative arena stating: "The question of privilege does not extend to confidential communications between an attorney and his clients in a legislative investigation, and it would be for the committee, after examining the records, to determine whether they are pertinent or material."[29]

Other members took a different approach. Senator MacCarren expressed the view that MacCracken was not acting in the capacity of counsel in the events subject to the committee's inquiries and that the privilege did not apply.[30] Senator Black agreed, and also suggested that MacCracken was acting in furtherance of an illegal conspiracy, which negated the validity of a privilege claim.[31] Ultimately, the Senate determined to confine MacCracken in the Capitol.[32]

MacCracken then brought suit against the Sergeant at Arms of the Senate seeking release. Because he was not held in contempt for refusing to produce allegedly privileged documents, but rather for aiding in their destruction after the issuance of a subpoena, the question of privilege was not involved. Indeed, by the time MacCracken's challenge reached the Supreme Court, Justice Brandeis was able to state that "[t]he claim of privilege . . . is no longer an

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24. 78 CONG. REC. 1852 (1934).
25. *Id.* at 2402.
26. *Id.*
27. *Id.* at 2402-03.
28. S. Res. 172, 73d Cong., 2d Sess. (1934).
29. 78 CONG. REC. 2403.
30. *Id.* For example, one of the events critical to the committee's inquest was a meeting between representatives of different airlines and the Postmaster General. *Id.* at 2405-06.
31. *Id.* at 2404.
32. The proceedings leading to the order to confine MacCracken were closed. *Id.* at 2461.

issue."[33]

D. *A McCarthy Era Postscript*

The excesses of the McCarthy era caused a reexamination of the procedures for congressional committees. Considered at that time, among a host of other proposals, was a suggestion to incorporate into the Senate rules an explicit recognition of the confidential status of communications traditionally protected in judicial proceedings.[34] The proposal prompted some favorable comment, based on the fact that the same policy concerns justifying the privileges in the first instance apply equally in both the legislative and judicial arenas:

> [S]ection 3(d) of Senate Resolution 256 establishes as privileged all communications between clergymen and parishioner, doctor and patient, lawyer and client, and husband and wife. There is no justification for permitting easy invasion by congressional investigators of the privileges against testifying that are scrupulously observed in our criminal courts, and, that in every case have been predicated upon precepts fundamental to our Anglo-American law. These privileges have not been frivolously evolved: they are not impediments to the trial of issues. On the contrary, in each instance they embody a basic concept whose maintenance has been found crucial to the determination of just conclusions.[35]

Ultimately, however, the Senate decided not to enact such a rule. The rationale for this decision, as expressed by the Senate committee report, aptly summarizes the history of congressional treatment of privileges and the uncertain legal status of the privileges before Congress, an uncertainty that remains today:

> With few exceptions, it has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, lawyer and client, and husband and wife. Controversy does not appear to have arisen in this connection. 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.[36]

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33. Jurney v. MacCracken, 294 U.S. 125, 144 (1935). Instead, MacCracken chiefly argued that the Senate lacked the power to punish a contempt for the sake of punishment alone and unrelated to an effort to compel compliance with the underlying legislative demand. The Supreme Court ultimately upheld the Senate's exercise of the contempt power in such circumstances.

34. S. Res. 256, 83d Cong., 2d Sess. (1954).

35. *Rules of Procedure for Senate Investigating Committees, Hearings Before the Senate Subcommittee on Rules of the Committee on Rules and Administration*, 83d Cong., 2d Sess. 139 (1954) (testimony of Will Maslow, General Counsel, American Jewish Congress).

36. RULES OF PROCEDURE FOR SENATE INVESTIGATING COMMITTEES, 83d Cong., 2d Sess. 27 (Comm. Print 1955). The only "exception" to Congressional respect for privi-

This statement is significant for two reasons. First, it highlights the congressional practice of seeking to avoid confrontation over privilege claims, as discussed above. Second, it indicates some uncertainty over the applicability of the privileges in congressional proceedings as a matter of law. The decision not to adopt the proposal, according to the Report, is based on practical considerations of a history of accommodation even though the Report frankly acknowledges that the policy concerns justifying privileges are equally applicable when the privilege is claimed in a legislative context.[37]

III. Experience in Other Forums

As shown above, congressional experience with evidentiary privileges for confidential communications is hardly extensive or especially definitive. Experience in other jurisdictions and legislatures sheds little light and is, unfortunately, equally unsatisfactory in determining the scope of congressional power.

For example, the West Virginia Supreme Court has suggested, without deciding, that the attorney-client privilege could validly limit an inquiry by a state legislative body investigating alleged bribery.[38] On the other hand, in reviewing the limits of a similar legislative investigation of a bribery scheme, the Wisconsin Supreme Court indicated, without deciding, that "[i]t could be very unwise to confine the legislature in its investigations to the same strict rules of evidence which prevail in courts of law."[39]

English practice has been less ambiguous. As early as 1856, one writer was able to state without equivocation that when called before Parliament, "[A] witness cannot excuse himself from answering on the ground that . . . [the] matter was a privileged communication to him, as where an attorney is called upon to disclose the secrets of his clients . . . ."[40] Moreover, English courts have elected to let Parliament define the issue of what can be punished as a con-

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leged communications referred to in the Report was the MacCracken affair discussed above.

37. Just two years earlier, however, the court in United States v. Keeney, 111 F. Supp. 233, 234-35 (D.D.C. 1953), in reviewing a claim of privilege by an employee of the United Nations based on United Nations' regulations, seemed to accept without question the proposition that evidentiary privileges apply in congressional proceedings. The issue was not material to a decision in the case, however, and, in any event, was later reversed on procedural grounds. Keeney v. United States, 218 F.2d 843 (D.C. Cir. 1954).

38. Sullivan v. Hill, 79 S.E. 670, 672 (W. Va. 1913).

39. *In Re* Falvey, 7 Wis. 630, 642 (1858).

40. Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America § 983, § 1001 (1856). Cushing states that this result is based, at least in part, on the distinction between a house of Parliament acting in its capacity as a court and as a legislature, with rules of evidence applying in the former but not the latter. *Id.* § 985.

tempt of the legislature.[41] As discussed in the following section, however, the English experience, although part of the common law tradition, does not control the outcome here. Rather, the answer lies in the Constitution.

IV. Privileges and Congress—A Proposed Analysis

As the foregoing discussion demonstrates, neither historical practice nor legal precedent supplies a ready answer to the basic question of whether traditional privileges for confidential communications limit congressional inquiries. Both Congress and the privileges have managed to coexist peacefully for the greater part for over two hundred years, with the few exceptions noted above. That result could just as easily follow from a binding principle that the privileges apply in the legislative context, a result at odds with the English rule noted above, as tacit acquiescence in the privileges.[42] Moreover, while the result may appear to be the same, the question is not without significance. A result that denies the applicability of the privilege as a matter of law can directly affect efforts to claim a privilege. As a practical matter, a clear difference exists between the ability to claim an established privilege that is binding on Congress and the need to persuade a committee to respect a privilege recognized as binding on the courts alone but which the committee, as a matter of law, is free to ignore.

Privileges for confidential communications rest on the policy grounds that confidentiality is needed to preserve basic relationships for which society accords a favored status. These policies clearly apply in congressional proceedings. The Constitution gives to Congress the power to determine whether to give effect to those policies.

The Constitution gives to each house of Congress the authority to establish its own rules of proceedings.[43] Except to the extent that other constitutional provisions limit Congress,[44] this clause empowers Congress to control its own procedural rules.[45] Although the is-

41. Burdett v. Abbot, 104 Eng. Rep. 501; 14 East. 1, 150 (1811); Case of the Sheriff of Middlesex, 11 Ad. & El. 273, 291 (1840); Rex v. Hobhouse, 2 Chitty's L. Rep. 207 (1820).

42. This result seems to be the conclusion of the Senate Report on the proposals following the McCarthy era noted earlier. *See supra* text accompanying notes 35-38.

43. Art. I, § 5, cl. 2 of the Constitution provides: "Each House may determine the Rules of its Proceedings . . . ."

44. *See supra* text accompanying notes 1-4 for a discussion of the limited protections of witnesses before Congress.

45. Indeed, not all constitutional guarantees that limit judicial proceedings apply to congressional inquiries. For example, congressional witnesses have no right to cross-examine witnesses, even though, as a practical matter, a congressional witness can be as much a defendant in a committee investigation as any criminal defendant who enjoys full constitutional guarantees. *See* United States v. Fort, 443 F.2d 670

sue has never been raised, this power would also permit Congress to choose to respect or invade the sanctity of confidential communications as it pleases, provided that no constitutional guarantee is infringed.

Congress' constitutional power to make its own rules of procedure supports this result. The Supreme Court examined the parameters of Congress' constitutional power to adopt rules of procedure in *United States v. Ballin*,[46] a case involving a challenge to the validity of a statute passed unanimously by the House, but with a majority of members not voting.[47] A House rule permitted such a procedure, thus necessitating a review of the validity of the rule. The Supreme Court took an expansive view of the House's power to adopt its own rules:

> [T]he advantages or disadvantages, the wisdom or folly, of such a rule [do not] present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rule ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the method of proceedings established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of either house.[48]

In an effort to avoid discriminating between the two houses, the Supreme Court, in *United States v. Smith*,[49] took an equally expansive view of the power of the Senate, stating that the "Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better." More recently, in *Vander Jagt v. O'Neill*,[50] the District of Columbia Circuit stated that "Article I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt."[51]

It is difficult to square the view that Congress is bound to follow the privileges for confidential communications, especially for privileges that are wholly or partly created by the common law, with the language of these cases.[52] For example, to maintain that the attorney-client privilege applies to Congress as a matter of law admits that the courts can fashion rules that bind Congress because the attorney-client privilege is a common law rule.

(D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

46. 144 U.S. 1 (1892).

47. *Id.* at 5.

48. *Id.*

49. 286 U.S. 6, 33 (1942).

50. 699 F.2d 1166 (D.C. Cir. 1983).

51. *Id.* at 1173.

52. Although the courts will not adopt rules for Congress, they will enforce the rules that Congress has chosen to follow. Christoffel v. United States, 338 U.S. 84 (1949); *Vander Jagt*, 699 F.2d at 1173.

Moreover, this view of the scope of the rights of witnesses in congressional proceedings is consistent with both the precedent of limiting congressional inquiries through constitutional guarantees[53] and the conclusion that Congress is not bound to follow the traditional privileges for confidential communications. Nothing in the Constitution compels Congress to respect privileged communications. Indeed, no one would dispute that Congress could adopt legislation affecting the role of privileges in judicial proceedings.[54] It follows, then, that Congress is not required to follow those privileges in its own arena.

Concluding that Congress' constitutional power to make its own rules means that Congress is not bound to follow traditional rules for privileged communications does not end the matter, especially in light of Congress' historical practice of respecting those privileges. That the intuitive response of most, to the initial query of whether the privileges apply in the first instance to Congress, is most likely an affirmative one simply underscores that the relationships protected enjoy such a special status in society. Clearly, Congress, by its nature, is called upon to respond to concerns and interests beyond simple considerations of the scope of its constitutional authority. The same considerations, which led to the creation of the privileges in the first instance, must necessarily affect congressional decisionmaking in a practical political sense. Moreover, a decision to invade those relationships by compelling witnesses to disclose communications in traditionally protected confidential relationships must necessarily entail adverse responses and raise questions regarding the legitimacy of the inquiries in the first instance. It is this political accommodation of interests, not fundamental limitations on congressional power, that has resulted in the "committee practice to observe the testimonial privileges of witnesses" referred to by the 1054 Senate Report.[55]

V. Conclusion

Recognition of the extent of Congress' constitutional power should guide those involved in these matters. In litigation, the role of privileges is usually clear. Conflict over the assertion of a privilege is familiar, and appeal to a judicial authority able to resolve the matter is available. Once the nature of Congress' power and the role

53. *See supra* text accompanying notes 6-10 for a discussion of the husband-wife and doctor-patient privileges as they relate to forums.

54. Arguably, the sixth amendment restricts Congress in regulating the confidentiality of attorney-client communications in criminal proceedings so as to deny the effective assistance of counsel.

55. *See supra* note 36 and accompanying text for a discussion of an exception to congressional respect for privileged communication.

of privileges are realized, however, it should be clear that a different approach is required before Congress. Posturing for a confrontation is useless because Congress is both the opponent and the judge. Rather than a confrontational approach, the better course is to seek conciliation and compromise with arguments based on the policies underlying the privileges. Confrontations should be avoided because Congress will no doubt ultimately prevail.