# The Applicability of Common Law Privileges in Legislative Hearings

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While the recent decision in *Trump v. Mazars USA* is worthwhile reading for legislative attorneys, one questionable statement in the majority opinion should be handled with care. Addressing the privileges available to recipients of Congressional subpoenas, the opinion states: "And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications...."[1]

Evaluating that statement requires some understanding of both constitutional and common law privileges. What are they, and how were they created?

Constitutional privileges include protections such as the right against self-incrimination contained in the Fifth Amendment. These privileges are based on constitutional language, structure, or principles. This aspect of the quoted statement is not controversial: witnesses in congressional hearings are entitled to assert applicable constitutional privileges.[2]

Common law privileges are a different matter. These privileges are judicial creations, not based in constitutional provisions. They are designed to protect confidential communications between parties in certain relationships, such as the attorney-client, doctor-patient, and spousal privileges.[3]

Congress has long maintained that it is not required to respect common law privileges asserted by witnesses. Discretion to require testimony or materials despite common law privileges rests entirely with Congress, since courts cannot dictate Congress's rules of proceedings. As Andy Wright observed,

> In sum, the Supreme Court's assertion in *Mazars* that it has "long been understood" that parties retain common law privileges in congressional investigations is not supported by Congress's historical practice, litigation precedent, legal advice provided clients by the private bar, or bar association concerns about Congress's dismissiveness of these privileges.

The majority opinion statement that witnesses can use common law privileges in has been criticized as a "small, inaccurate assertion" ignoring "stacks of contrary evidence"; as "poorly researched"; and as "easily cast as dicta."[4]

How should you respond, if a witness asserts a common law privilege in response to a legislator's question during a hearing? It always helps to know if the courts of your state have addressed this issue. Some state courts appear at least open to allowing the assertion of common law privileges in legislative proceedings, perhaps balancing the asserted privilege against the legislative need for information.[5]

What if your state has no controlling law on this topic, and the reluctant witness relies on the *Trump v. Mazars* majority opinion statement? The summary above identifies a number of problems with the statement: it is contradicted by congressional practice and precedent, poorly researched, and characterized as dicta (that is, it is not essential to the decision reached in the case, and therefore of perhaps limited value). But there is another argument against the majority opinion statement, which may be useful if your courts have not addressed the matter, or if they have not considered this particular argument.

In 49 state constitutions, each legislative chamber is granted the power to adopt its own rules of proceeding (only North Carolina's constitution lacks such a provision). For example, the Arkansas constitution provides that "[e]ach house shall have power to determine the rules of its proceedings...." The term "rules of proceeding" has been interpreted broadly, to include internal operating procedures which may apply to the exercise of any power, transaction of any business, or performance of any duty conferred by the state constitution.[6]

Under these "rules of proceeding" provisions, it is entirely a legislative prerogative to make, interpret, and enforce procedural rules, all without judicial interference unless another constitutional provision is offended. As the Supreme Court of Florida noted in *Moffitt v. Willis*, "It is the final product of the legislature that is subject to review, not the internal procedures."[7]

Of course, common law privileges aren't grounded in state constitutions – they are judicial creations, perhaps codified, that are designed for use in judicial proceedings. In another context, the Arkansas Supreme Court observed that "the attorney-client privilege, A.R.E. Rule 502, is an evidentiary rule limited to court proceedings. It has no application outside of court proceedings...."[8]

Thus, when presented with the *Trump v. Mazars* majority opinion statement supporting use of a common law privilege in a legislative hearing, respond with reference to your legislature's power to adopt its own rules of proceeding under the state constitution. Common law privileges are judicial creations meant for judicial proceedings. Courts should not interfere with the legislative prerogative to establish legislative rules of proceeding, by requiring compliance with judicial common law privileges.

A couple of Congressional Research Service publications are worth quoting on this point, because they provide support for state-level arguments in favor of the legislative power to set rules of proceedings. The CRS *Congressional Oversight Manual* notes:

> ... Although CRS found no court case directly on point, it appears that congressional committees are not legally required to allow a witness to decline to testify on the basis of these other, similar testimonial privileges. In addition, the various rules of procedure generally applicable to judicial proceedings, such as the right to cross-examine and call other witnesses, need not be accorded to a witness in a congressional hearing. The basis for these determinations is rooted in Congress's Article I, Section 5, rulemaking powers, under which each house is the exclusive decision maker regarding the rules of its own proceedings. This rulemaking authority and general separation of powers considerations suggest that Congress and its committees are not obliged to abide by rules established by the courts to govern their own proceedings.

In another CRS publication, Morton Rosenberg observed that "the necessity to protect the individual interest in the adversary process is less compelling in an investigative setting where a legislative committee is not empowered to adjudicate the liberty or property interests of a witness." Concerning common law privileges, he continued:

> Indeed, the suggestion that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules developed by the judicial branch to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each House of Congress to determine its own rules. …

There arguments could obviously be used at the state level, too.[9]

It may be worth considering the adoption of a legislative rule addressing the availability of common law privileges in legislative proceedings. Regardless of the policy adopted, that would be a clear signal to your state's courts that the legislature exercised its constitutional prerogative to adopt rules of proceedings. However, even if your legislature does not address these common law privileges by rule, it would remain questionable for a court to force their use.

And, legislative committees retain the discretion to respect common law privileges, if the issue is not addressed by a rule of proceeding. Morton Rosenberg notes that "Congress has been sparing in its attempts to challenge claims of attorney-client privilege," for example. The point is that this decision is at the legislature's discretion, and not determined by judicial fiat.[10]

The early commentary on the Supreme Court's assertion – that witnesses retain common law privileges in congressional hearings – is not favorable. Hopefully, future development of the law will clarify and sustain legislative rule-making power. In the meantime, state legislative counsel should study the majority opinion statement in *Trump v. Mazars*, as well as the arguments in opposition.

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[1] *Trump v. Mazars USA*, 140 S. Ct. 2019, 2032 (2020). For a brief summary of the case, see Leading Cases, *Separation of Powers – Congressional Oversight – Presidential Subpoenas* – Trump v. Mazars USA, LLP, 134 Harv. L. Rev. 540 (2020).

[2] Morton Rosenberg, *When Congress Comes Calling* 39 (2017) [hereinafter *Congress Calling*]; Andy Wright, *Supreme Court's Trump v. Mazars Ruling Gave Attorney-Client Privilege a Boost in Congress*, Just Security (August 12, 2020), https://www.justsecurity.org/71970/supreme-courts-trump-v-mazars-ruling-gave-attorney-client-privilege-a-boost-in-congress/

[3] Rosenberg, *Congress Calling*, supra, at 65; Wright, supra.

[4] Congressional Research Service, RL30240, *Congressional Oversight Manual* 39-41 (2020); Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 Harv. J. L. & Pub. Pol'y 897, 901-02, 932 (2012); Wright, supra; 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/; Robert Kelner and Perrin Cooke, *The Supreme Court's Mazars Decision Contains a Significant Suggestion That Congress May Be Bound by the Attorney-Client Privilege in Congressional Investigations*, Inside Political Law (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/

[5] *Ward v. Peabody*, 405 N.E.2d 973, 978, 981 (Mass. 1980) (citations omitted); *Sullivan v. Hill*, 79 S.E. 670, ___ (W. Va. 1913); *Joint Select Committee v. Potholm*, 1984 Me. Super. LEXIS 191, at *15-18 (Superior Court of Maine, Kennebec County).

[6] 72 Am. Jur. 2d *States, Territories, and Dependencies* § 47 (___); Ark. Const. art. 5, § 12; *Des Moines Register v. Dwyer*, 542 N.W.2d 491, 496-503 (Iowa 1996).

[7] *Dwyer*, 542 N.W.2d at 496-503; *Moffitt v. Willis*, 459 So. 2d 1018, 1021 (Fla. 1984).

[8] Wright, supra; *McCambridge v. Little Rock*, 766 S.W.2d 909, 912 (Ark. 1989) (citation omitted).

[9] Congressional Research Service, supra, 41 (footnotes omitted); Morton Rosenberg, Congressional Research Service, 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* 35-36 (1995) (footnotes omitted).

[10] Rosenberg, *Congress Calling*, supra, at 65, 69.

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