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D.C. Circuit Dismisses Major Case Concerning Attorney-Client Privilege in Congressional Investigations

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The long saga of the legal challenge by Carl Ferrer, CEO of Backpage.com, to a subpoena issued by the Senate's Permanent Subcommittee on Investigations ("PSI") appears to have reached a conclusion. A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit this week [dismissed the case as moot](#) and additionally vacated a series of prior rulings by the district court in the case. The D.C. Circuit's ruling effectively wipes the slate clean, erasing a district court action that [seemed to open the door](#) to a rare adjudication of Congress's ability to compel the production of documents covered by the attorney-client privilege, while possibly [making it significantly more difficult](#) for individuals and companies to assert the privilege before Congress.

Although it may come as a surprise to many observers, including experienced litigation attorneys, both the Senate and House maintain that they are not required to respect the attorney-client privilege or the related attorney work product doctrine. Congressional lawyers contend that such privileges are judicial, common law privileges that do not bind legislatures. Congress's position is rooted in the Constitution's separation of powers and the inherent legislative authority to conduct investigations.

Congressional investigators often use this dynamic as a source of leverage over corporations and others from whom they seek to obtain documents or testimony. Although it is relatively rare for a committee actually to compel production of privileged documents, it does happen. For example, Congress did so in a [high profile case involving Bank of America](#) some years ago. Over the years, Congress, corporations, and the courts have managed to steer clear of opportunities to test Congress's position that it need not respect the attorney-client privilege, and there has never been a definitive court ruling on the topic, even though Congress has staked out this position for more than a century.

In Ferrer's case, the company withheld attorney-client privileged documents, as well as other documents, but PSI contended that the company had not explicitly asserted the attorney-client privilege until relatively late in the process. The district court agreed and held that Backpage had waived its ability to object based on the attorney-client privilege, and it ordered the company to produce documents. PSI's arguments, however, opened potentially dangerous ground for Congress. In finding that Ferrer had waived the privilege, the court's ruling seemed to suggest that such a privilege existed before Congress. After all, how could Ferrer have waived something that did not exist?

During the weeks and months that the litigation and appeal developed, PSI completed its investigation, issued a final report, and held its final hearing in January 2017. In the D.C. Circuit, PSI informed the court that it would not certify its continued interest in enforcing the subpoena, which was required in this instance because a new Congress convened in January, and it advanced the mootness argument, perhaps in recognition of the risk associated with an appellate ruling on the attorney-client privilege before Congress. Although Ferrer, with the support of various *amici*, continued to press the appeal, the Court determined that the case was moot because PSI no longer was seeking to compel production of documents. The Court then went one step further and actually vacated the decisions of the district court below, so that the lower court's decisions will not have precedential value in future cases involving congressional investigations.



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This outcome essentially restores the *status quo ante*, in which congressional investigation committees and those under investigation will bargain around Congress's position on the attorney-client privilege without any real guidance from a controlling court decision. Given the dramatic impact that would have been felt if the Backpage case had led to a ruling on the applicability of attorney-client privilege in congressional investigations, it is not altogether surprising that PSI in the end sought to avert a ruling by the court on the issue, and that the D.C. Circuit was very willing to oblige.

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