

# Congressional Investigations: Bank of America and Recent Developments in Attorney-Client Privilege

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For more than a hundred years, Congress has steadfastly maintained that it is not obligated to recognize the attorney-client privilege in the context of congressional oversight investigations. For almost as long, private practitioners have advised clients on strategies for avoiding privilege fights with Congress. This equilibrium generally has worked well, and Congress—despite its strong pronouncements to the contrary—usually has respected the right of private parties to maintain the confidentiality of legal advice. Thus, high-profile privilege battles that resulted in subpoenas and even congressional contempt proceedings were typically reserved for disputes between Congress and the executive branch, such as Congress's access to materials from the Office of the White House Counsel.

In 2009, however, House Committee on Oversight and Government Reform Chairman Edolphus Towns (D-NY-10), engaged in a lengthy privilege dispute with Bank of America. Chairman Towns sought direct disclosure of confidential legal advice provided by Bank of America's inside and outside legal counsel concerning the bank's purchase of Merrill Lynch in 2008. In a highly unusual move, Chairman Towns even sought confidential information from the lawyers who assisted Merrill Lynch in responding to part of the Committee's investigation. The dispute concluded with Bank of America delivering to Congress a substantial

quantity of privileged documents and with Bank of America's former general counsel testifying publicly about the legal advice that he and others provided to the company.

The Bank of America dispute is perhaps the most noteworthy recent development concerning Congress's approach to attorney-client privileged information in oversight investigations. It is unclear whether the dispute signals a new, more aggressive approach by congressional investigators or whether the episode simply serves as confirmation that the best strategy is to avoid privilege battles with Congress.

In this article, we first describe Congress's historical approach to privilege questions. Second, we describe the recent privilege dispute involving Bank of America. Finally, we assess the lessons that can be drawn from the recent Bank of America experience.

## *Congress's View of the Attorney-Client Privilege*

Congress has long maintained that it need not recognize common law privileges established by courts, such as the attorney-client privilege. According to this view, separation of powers dictates that Congress is not bound by the courts' common law practices. Congress also bases its authority to disregard the attorney-client privilege

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on its inherent legislative right to investigate. The Supreme Court has held that Congress has nearly limitless powers to investigate anything within the "legitimate legislative sphere."<sup>1</sup> The scope of the attorney-client privilege in congressional investigations has never been addressed directly by the courts, and it is unlikely that it will be in the near term.<sup>2</sup> Congress is, of course, required to recognize constitutional privileges. Congress has regularly recognized, and courts have confirmed, witnesses' rights under the First, Fourth, and Fifth Amendments to the U.S. Constitution during congressional investigations (although sometimes with limitations).

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. The Congressional Research Service (CRS) has identified a number of factors that Congress has used when assessing claims of attorney-client privilege. The factors include (1) whether the document or information is pertinent to the investigation, (2) the availability of the privileged information from another source, (3) whether the claim of privilege would succeed in a court proceeding, and (4) whether the witness has otherwise been cooperative with the committee.<sup>3</sup> However, CRS has noted, "it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege," balancing the legislative need for the information against the committee's perception of the potential harm from disclosure.<sup>4</sup> In a full privilege battle, Congress almost always views the witness's protestations about potential harm as far outweighed by the investigator's need for the privileged information.

For example, in 1868, Congress held in contempt and imprisoned attorney Charles W. Woolley for refusing to answer questions "as to certain subjects which were under the seal of professional confidence, and in regard to which, by the rules of

law, no court in England or the United States could have permitted him to testify."<sup>5</sup> A few days later, Woolley answered the questions—related to the impeachment of President Andrew Johnson—and was released.<sup>6</sup>

More recently, during 1997 and 1998, Congress sought attorney-client privileged documents from Franklin L. Haney, a developer with ties to then-Vice President Al Gore, in an investigation concerning the construction of an office building to be leased by the General Services Administration for the Federal Communications Commission. Haney and his lawyers refused disclosure, and the Subcommittee on Oversight and Investigations of the House Commerce Committee promptly found Haney in contempt. Eventually, Haney relented in exchange for Congress withdrawing the contempt citation.<sup>7</sup>

As these examples demonstrate, the most contentious privilege disputes with private parties usually occur when Congress is investigating the executive branch and seeks information from a private party in the context of that investigation. Congress has been more likely to insist on privileged materials when operating within the highly charged political atmosphere of interbranch disputes. In more routine investigations, Congress generally respects claims of privilege and seeks to avoid direct conflicts over privilege. For example, modern congressional document requests routinely (but, importantly, not always) include instructions on providing a privilege log for documents withheld from production. Ironically, many companies are hesitant—rightly so—to provide a log for fear that it will lead to a privilege dispute if an investigator spots something in the log that looks interesting.

### *Bank of America*

Congress's recent privilege dispute with Bank of America did not follow this traditional approach. To be sure, the dispute began rather innocuously when, in the fall of 2008, Congress sought

information from a number of banks concerning the companies' compensation practices during a period in which they were receiving federal funds. By the time the dispute ended a year later, the House Committee on Oversight and Government Reform (Committee) had held five full hearings specifically targeting Bank of America—an astounding number, given Congress's penchant for moving quickly to new matters. The investigation resulted in the production of materials that were plainly privileged, and it concluded with Bank of America's former general counsel testifying in a public hearing about the legal advice that he and other lawyers provided to the company.

The Committee's attention turned from a general review of bank compensation practices to a targeted focus on Bank of America when, in the spring of 2009, the New York Attorney General claimed, in the context of ongoing state litigation, that Merrill Lynch's response to the Committee's compensation inquiry in 2008 had been misleading (Merrill had been acquired by Bank of America in the intervening time). In response to these allegations, Congressman Towns, the then-new Chairman of the Committee, sent a sternly worded letter, dated March 17, 2009, to Bank of America's CEO requesting information about Merrill's response to the compensation inquiry. In an unusual move, Chairman Towns specifically asked Bank of America for privileged communications from Hogan & Hartson lawyers who prepared Merrill's response: "Please provide ... copies of all communications between and among officers and employees of Merrill Lynch; Bank of America; partners, associates, and other personnel employed by Hogan and Hartson; and any other entities and individuals."<sup>8</sup> Even more unusual, Chairman Towns sent a nearly identical letter to the Hogan & Hartson partner who had signed the letter responding to the compensation inquiry on behalf of Merrill Lynch.<sup>9</sup>

While the public record is silent on what became of the Committee's attempt to obtain Hogan & Hartson materials, the Committee quickly shifted its

focus from the Merrill Lynch compensation issue to an investigation of the details of Bank of America's merger with Merrill Lynch. On June 11, 2009, Bank of America's CEO, Kenneth D. Lewis, testified before the Committee about the merger. Lewis discussed Bank of America's reaction to discovering billions of dollars of additional losses at Merrill before the merger closed, including his consideration of whether to invoke a material adverse change clause or disclose the additional losses to shareholders. In answering questions, Lewis stated that he relied on the advice of his inside and outside lawyers when assessing whether to invoke the clause or disclose the losses.<sup>10</sup>

In an August 6, 2009, letter to Lewis, Chairman Towns went straight after this privileged information. The letter requested, among other things, "[r]ecords, including legal advice, that relate in any way to the Material Adverse Change clause" and "[r]ecords of legal advice . . . related to disclosure of the financial condition of Merrill Lynch."<sup>11</sup> On September 9, 2009, Bank of America's lawyers sent a cautious and well-written letter to the Chairman. Bank of America acknowledged that "Congress has long asserted the right of each chamber to make its own independent determination as to whether to recognize the attorney-client privilege."<sup>12</sup> Nonetheless, the bank requested that the Committee withdraw the request for privileged materials and avoid forcing "the bank [to take] actions that could result in the waiver of its privilege."<sup>13</sup> At the time, Bank of America was also facing investigations from the New York Attorney General and the Securities and Exchange Commission; disclosure of the privileged materials to Congress would risk waiving the privilege in these other investigations.

Towns replied to the bank on September 18, 2009. He said that the Committee had "given careful consideration to the arguments" advanced by Bank of America. Towns concluded, however, "the materials for which you claim privilege go to the heart of the issues most critical to our

investigation.... I am, therefore, expressly denying your request to withdraw all or part of the Committee's August 6 request."<sup>14</sup> Towns also released this letter to the press, and it generated significant press attention.

Almost immediately, Bank of America wisely sent a senior corporate official to meet with Towns. After the meeting, Towns announced that the bank had agreed to provide a detailed log of the privileged documents "that we will review and use to determine which documents are critical to the Committee's ongoing investigation." Press reports indicate that Bank of America delivered a privilege log in the first week of October 2009 and then produced more than 1,000 documents the following week. Immediately and over the next month, Bank of America's privileged documents were continuously and systematically provided to the press. The company faced a series of press reports that described in vivid detail the legal advice that Bank of America's internal and outside lawyers provided to the company.

On November 17, 2009, the Committee held its fourth hearing on the Bank of America-Merrill Lynch merger. Among other witnesses, the Committee called Timothy J. Mayopoulos, the bank's former general counsel. He began his testimony with the following:

Like all lawyers, I am bound by professional ethics rules not to reveal any confidential communications I have had with my clients. However, Bank of America has recently waived its attorney-client privilege as to various issues relating to the Merrill Lynch merger, and has instructed me that I am free to answer questions that the Committee or other authorities may have for me with regard to those issues. In the hope that it will aid the Committee in its important work, and to avoid continued speculation about these matters, I have set forth below in considerable detail the legal

advice I and other attorneys gave to the Company.<sup>15</sup>

#### *Lessons from Bank of America*

It is unclear whether the Bank of America privilege dispute signals a more aggressive approach by congressional investigators or simply confirms the long-held belief that privilege battles with Congress are rarely won by private parties. It was unusual for Chairman Towns to target immediately and quickly Bank of America's legal advice regarding the compensation inquiry. The Chairman's unusual action came, however, in response to allegations that Congress had been misled by the bank. Allegations that a company misled Congress almost always prompt the most aggressive and antagonistic responses from congressional investigators.<sup>16</sup>

As the focus of the investigation shifted from the compensation inquiry to the details of the merger, Chairman Towns continued to seek privileged information specifically. Although it was again unusual for the Chairman to demand the disclosure of privileged advice about the merger, Lewis's testimony and his references to legal advice may have inadvertently contributed to the Chairman's decision. Nonetheless, in both stages of the investigation, Chairman Towns directly and specifically sought confidential communications with lawyers.

In the end, the company produced a privilege log, and the Committee forced the disclosure of documents that it determined were central to the inquiry. Indeed, the Bank of America dispute followed a predictable cycle of contentious congressional privilege battles: First, Congress seeks the information and the company's lawyers balk, usually driven by concerns about privilege waivers in ancillary proceedings. Next, Congress raises the temperature through aggressive posturing and statements in the press. Finally, under the threat of reputational harm, the company agrees to

disclosure. In the end, business concerns about reputational harm outweigh the lawyers' concerns about waiver.

This cycle has been repeated many times in contentious congressional privilege battles. Because the probability of this undesirable end-point is so high, it is far better for companies to employ strategies specifically designed to avoid confrontations over privilege. For example, it is often advisable to give congressional investigators the core nonprivileged documents—even the painful documents—early in the process. This can establish a record of cooperation and can sometimes satisfy the inquiry before the investigators seek privileged materials. In addition, if Congress specifically requests a document that is privileged, a company should consider alternative responses that are designed to meet the objectives of the inquiry while avoiding a dispute over privilege.

### *Conclusion*

Because the scope and applicability of the attorney-client privilege in congressional investigations remain within the discretion of the investigator, responding to a congressional request for documents or information requires a very different approach from the strategies companies are accustomed to pursuing in court proceedings or other government investigations. As the Bank of America episode and other disputes demonstrate, private 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. With the applicability of the privilege depending on the particular facts and circumstances of a given investigation, it is essential that companies and other targets of congressional investigations obtain sound advice from lawyers with deep experience navigating the unique environment of congressional investigations.

### *Postscript*

As this article was going to press, Republicans secured sufficient seats in the 2010 elections to take the majority of the House of Representatives in the next Congress. Control of the Committee on Oversight and Government Reform will therefore shift next year. The current ranking Republican member, Darrell Issa (R-Cal.-49), is likely to become the Committee's next chairman. Congressman Issa did not play a prominent role in the privilege dispute with Bank of America. In February 2010, however, Congressman Issa joined Chairman Towns in supporting a subpoena of documents held by a former lawyer for Toyota.<sup>17</sup> In that case, the Committee posted on its website documents that were plainly marked as privileged, but it then removed the documents from the website at the request of Toyota's lawyers.<sup>18</sup>

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<sup>1</sup> *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

<sup>2</sup> For reasons too lengthy to address here, resolving such disputes in the courts almost always requires the witness to draw a subpoena and endure a congressional finding of criminal contempt before the judiciary will entertain a legal challenge.

<sup>3</sup> See MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 53 (2008).

<sup>4</sup> *Id.* at 53, 56.

<sup>5</sup> *The Case of Charles W. Wooley, the Contumacious Witness*, N.Y. TIMES, June 9, 1868 (quoting Woolley's petition before the House; Wolley's name is spelled inconsistently in the article).

<sup>6</sup> 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 32 (1907).

<sup>7</sup> See ROSENBERG & TATELMAN, *supra* note , at 55; see also H.R. REP. NO. 105-792 (1998).

<sup>8</sup> Letter from Edolphus Towns, Chairman, H. Comm. on Oversight and Gov't Reform, to Kenneth D. Lewis, Chairman, President, and CEO, Bank of America (March 17, 2009), available at <http://oversight.house.gov/images/stories/documents/20090317130949.pdf> (last visited November 23, 2010).

<sup>9</sup> Letter from Edolphus Towns, Chairman, H. Comm. on Oversight and Gov't Reform, to Raymond S. Calamaro, Partner, Hogan & Hartson (March 17, 2009), available at <http://oversight.house.gov/images/stories/documents/20090317130145.pdf> (last visited November 23, 2010).

<sup>10</sup> *Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?: Joint Hearing Before the H. Comm. on Oversight on Gov't Reform, Full Comm. and Subcomm. on Domestic Policy*, 111th Cong. 73 (2009) (statement of Kenneth D. Lewis, Chief Executive Officer, Bank of America).

<sup>11</sup> Letter from Edolphus Towns, Chairman, H. Comm. on Oversight and Gov't Reform, to Kenneth D. Lewis, Chief Executive Officer and President, Bank of America (August 6, 2009), available at

<http://oversight.house.gov/images/stories/documents/20090806165928.pdf> (last visited November 23, 2010).

<sup>12</sup> Letter from Reginald J. Brown et al. to Edolphus Towns, Chairman, H. Comm. on Oversight and Gov't Reform (Sept. 9, 2009), available at <http://dealbook.nytimes.com/2009/09/21/bank-of-americas-back-and-forth-with-house-oversight/> (last visited on December 1, 2010).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Bank of America and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout? Part IV: Joint Hearing Before the H. Comm. on Oversight on Gov't Reform, Full Comm. and Subcomm. on Domestic Policy*, 111th Cong. 22 (2009) (statement of Timothy J. Mayopolous, Former General Counsel, Bank of America).

<sup>16</sup> See, e.g., *Yahoo! Inc.'s Provision of False Information to Congress: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. (2007).

<sup>17</sup> See Press Release, Oversight and Government Reform Committee, Oversight Committee Issues Subpoena for Toyota Documents, (Feb. 18, 2010), available at [http://oversight.house.gov/index.php?option=com\\_content&view=article&id=4788:oversight-committee-subpoenas-toyota-documents&catid=3:press-releases&Itemid=49](http://oversight.house.gov/index.php?option=com_content&view=article&id=4788:oversight-committee-subpoenas-toyota-documents&catid=3:press-releases&Itemid=49) (last visited December 1, 2010).

<sup>18</sup> See *Documents Critical of Toyota Pulled Off Web*, THE DETROIT NEWS, Mar. 2, 2010, at B5.