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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. Many thanks to Professor Bruce A. Green for his guidance. Eternal gratitude to my family, especially my parents, Paul D. Blumenauer and Rosemary Blumenauer, for their continuous love and support. Thank you Ryan F. Kenny for always making me smile. Your love and patience are endless. I would also like to thank my friends for their constant encouragement and willingness to edit, especially Amy Mikolajczyk.

NOTES

PRIVILEGED OR NOT? HOW THE CURRENT APPLICATION OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE LEAVES THE GOVERNMENT FEELING UNPRIVILEGED

*Kerri R. Blumenauer**

INTRODUCTION

On February 19, 2004, in the course of investigating possible criminal violations by Connecticut state employees, "a federal grand jury subpoenaed the testimony of Anne C. George, former chief legal counsel to the Office of the Governor of Connecticut."[1] Prior to seeking the subpoena for George's testimony, the U.S. Attorney's Office in New Haven had been investigating whether Governor John Rowland and his staff accepted gifts in return for public favors, such as awarding government contracts.[2] The Government requested that George submit to a voluntary interview.[3] George declined after the Governor's Office informed her that it believed the information sought by the investigators was protected by the attorney-client privilege because the communications were in confidence and conducted for the purpose of providing legal advice.[4] In her appearance

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1. *In re* Grand Jury Investigation, 399 F.3d 527, 528 (2d Cir. 2005). Anne C. George served in that capacity from August 2000 to December 2002. *Id.* Beforehand, she served as deputy legal counsel. *Id.*

2. *Id.* at 528-29. The Government sought to gain access to certain specified communications between Governor John Rowland, his staff, and legal counsel. *Id.* at 529. "The identity of former Governor Rowland was initially protected by the 'John Doe' appellation and by various orders sealing the district court proceedings and those in this court." *Id.* at 528-29 n.1. After Rowland pleaded guilty to one count of conspiracy to commit honest services mail fraud and tax fraud on December 23, 2004, the court revoked the sealing orders because there was no purpose served in adhering to them. *Id.*

3. *Id.* at 529.

4. *Id.* at 529-30. The attorney-client privilege is a common law evidence rule. It applies to communications between a lawyer and her client regarding legal advice, but only when the client communicates with her lawyer for the purpose of securing legal advice, legal

before the grand jury in April 2004, George confirmed that she had discussions with the Governor and his staff about Connecticut's ethics laws pertaining to the receipt of gifts.[5] George also testified that she had spoken with Rowland's former co-Chief of Staff about a practice of state contracts being sent to the Governor's Office for approval;[6] however, she refused to divulge the content of these conversations.[7] Later that month, a federal district court entered an order compelling George's testimony.[8] Judge Robert Chatigny reasoned that "'in the grand jury context, any governmental attorney-client privilege must yield because the interests served by the grand jury's fact-finding process clearly outweigh the interest served by the privilege.'"[9]

Before George could respond to the district court's order, a shake-up at the Governor's mansion intervened. Governor Rowland pleaded guilty to one count of conspiracy to commit honest services mail fraud and tax fraud and announced that he would resign as Connecticut's Governor, effective July 1, 2004.[10] The federal government requested that Rowland's successor, Governor M. Jodi Rell, waive the attorney-client privilege between George and the Governor's Office.[11] Shortly thereafter, the newly appointed counsel to the Office of the Governor informed the court that Governor Rell declined to waive the attorney-client privilege.[12] On August 25, 2004, the U.S. Court of Appeals for the Second Circuit issued an order

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services, or assistance in some legal proceeding. *See infra* notes 25-30 and accompanying text (providing definitions of the attorney-client privilege); *see also* Model Rules of Prof'l Conduct R. 1.6 (1983) (discussing confidentiality of information relating to the representation of a client); Model Code of Prof'l Responsibility Canon 4 (1983) (discussing the preservation of a client's confidences).

5. *In re Grand Jury Investigation*, 399 F.3d at 529. Prior to George's appearance before the grand jury, the government moved to compel George to testify about the contents of her confidential communications with Governor Rowland and members of his staff, but the district court withheld decision until George's actual appearance and assertion of the privilege before the grand jury. *Id.*

6. *Id.*

7. *Id.* at 529-30. George asserted the attorney-client privilege on behalf of her client because she testified that all of these conversations were in confidence and conducted for the purpose of providing legal advice. *Id.*; *see infra* Part I.A (discussing the definition and purpose of the attorney-client privilege).

8. *In re Grand Jury Investigation*, 399 F.3d at 530.

9. *Id.* (quoting District Court Judge Robert Chatigny). Summarizing the lower court decision, the Second Circuit stated,

> The district court distinguished the "governmental" attorney-client privilege from the privilege in the context of a private attorney-client relationship, by explaining that "unlike a private lawyer's duty of loyalty to an individual client, a government lawyer's duty does not lie solely with his or her client agency," but also with the public.

Id. (quoting District Court Judge Robert Chatigny).

10. *Id.* at 528 n.1, 530.

11. *Id.* at 530. This request was made because the privilege is not held by the Governor as an individual but by the Office of the Governor. *Id.* For a detailed discussion of the entity privilege, see *infra* Part I.B.

12. *In re Grand Jury Investigation*, 399 F.3d at 530.

reversing the district court decision compelling George to testify.[13] The court stated that while "it is in the public interest for the grand jury to collect all the relevant evidence it can[,] . . . it is also in the public interest for high state officials to receive and act upon the best possible legal advice."[14] The Second Circuit noted that its decision is in "conflict" with the Seventh Circuit's decision in *In re A Witness Before the Special Grand Jury*,[15] "and is in sharp tension"[16] with the decisions of the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*,[17] and the D.C. Circuit in *In re Lindsey*.[18]

The Second Circuit's recognition of a government attorney-client privilege in a criminal investigative proceeding has led some commentators to believe that the Second Circuit is now at odds with three other federal appeals courts. This Note argues that although the Second Circuit reached a different conclusion, its decision is not necessarily in conflict with the Eighth, D.C., and Seventh Circuits.[19] In analyzing the government attorney-client privilege, circuit courts have framed the issue in terms of balancing the public interest: Is the public interest better served by recognizing the privilege, thereby encouraging open communication between government officials and their attorneys, or is this interest overcome by the grand jury's need to access relevant information to adequately serve its truth-seeking function?[20] The U.S. Supreme Court has noted that if the intended purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[21] This Note argues that the courts are improperly analyzing whether the government attorney-client privilege should be recognized in the context of grand jury proceedings. Currently, courts control the privilege and decide whether to apply the privilege based on their determination of whether asserting or waiving the privilege will better serve the public

13. *Id.*

14. *Id.* at 534; *see infra* Part II.C (providing a detailed explanation of the court's rationale).

15. 288 F.3d 289 (7th Cir. 2002). For a more in-depth discussion of the case, see *infra* Part II.A.3.

16. *Grand Jury Investigation*, 399 F.3d at 536 n.4.

17. 112 F.3d 910 (8th Cir. 1997). For a detailed case discussion, see *infra* Part II.A.1.

18. 158 F.3d 1263 (D.C. Cir. 1998). For a more detailed case discussion, see *infra* Part II.A.2. The Second Circuit acknowledged in a footnote that its decision "conflicted" with the other circuits, stating, "We are mindful that uniformity among the circuits fosters predictability in the invocation of the privilege and suppresses forum shopping. . . . We are in no position however, to resolve this tension." *Grand Jury Investigation*, 399 F.3d at 536 n.4 (citations omitted).

19. *See infra* Part III (proposing a resolution for the said conflict).

20. *See infra* note 121 (providing examples of the courts' analyses).

21. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). For a detailed case discussion, see *infra* Part I.B.

interest. This Note argues that instead, control of the privilege should shift to the government entity asserting it. This shift could be successfully achieved by aligning the power to assert or waive the privilege with other litigating authority that exists within the entity. Allowing the government entity to control the privilege would not lead to a derogation of the public interest because government entities have public obligations. Therefore, when determining whether to assert or waive the attorney-client privilege, the government entity must consider the relevant public interests. This shift would align the government privilege with that of other organizational entities. Additionally, this analytical framework would effectively eliminate the circuit split.

Part I of this Note provides the history and purpose of the attorney-client privilege, which will serve as a framework for understanding the ambiguity surrounding the government attorney-client privilege. The nature and scope of the attorney-client privilege will be analyzed for both individual and entity clients. Part I also describes the development and current state of the government attorney-client privilege in the context of a civil proceeding.

Part II of the Note examines the circuit cases that have addressed whether to recognize the government attorney-client privilege in criminal investigative proceedings. The rationales of the circuits rejecting the government privilege are discussed, as well as the Second Circuit's reasoning in upholding the privilege. In addition to presenting the courts' rationales, this part summarizes commentary on both sides of the issue.

Part III of the Note critiques the current test used by the courts in determining whether to recognize the government attorney-client privilege. This part proposes that control of the privilege should shift to the government entity, thus aligning the government privilege with that of other organizational entities. Finally, this part discusses the benefits of such a change.

I. BACKGROUND

This part provides background information for understanding the attorney-client privilege generally and the way its application varies in different contexts. Part I.A analyzes the nature and scope of the private attorney-client privilege. Part I.B discusses the privilege in the entity context, particularly focusing on the corporate privilege. Part I.C describes the origins of the government attorney-client privilege. Finally, Part I.D describes the current state of the government attorney-client privilege in the civil context and contrasts it with the government attorney-client privilege in the criminal investigative context.

A. *History and Purpose of the Attorney-Client Privilege*

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[22] In 1889, the Supreme Court in *Hunt v. Blackburn*[23] stated that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[24] In his treatise on evidence, John Henry Wigmore defined the attorney-client privilege by separating it into eight elements:

> (1) [w]here legal advice is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[25]

The Restatement (Third) of Law Governing Lawyers[26] provides another definition which states that the privilege protects: (1) a communication;[27] (2) made between privileged persons;[28] (3) in confidence;[29] (4) for the purpose of obtaining or providing legal assistance for the client.[30]

The privilege is designed to encourage full and frank communication between attorneys and their clients, enabling an attorney to properly represent the client by making it more likely that the client will disclose all relevant facts.[31] Another persuasive justification for the privilege is that it "promote[s] broader public interests in the observance of law and administration of justice" by recognizing that sound legal advice "depends upon the lawyer[] being fully informed by the client."[32] It is the lawyer's

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22. *Upjohn*, 449 U.S. at 389 (citing 8 John Henry Wigmore, Evidence in Trials at Common Law § 2290 (John T. McNaughton ed., 4th ed. 1961)).

23. 131 U.S. 403 (1889).

24. *Id.* at 470.

25. 8 Wigmore, *supra* note 22, at 542.

26. Restatement (Third) of the Law Governing Lawyers § 68 (2000).

27. *Id.* § 69 (defining communication as "any expression through which a privileged person . . . undertakes to convey information to another privileged person and any document or other record revealing such an expression").

28. *Id.* § 70 (defining a privileged person as "the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agent of the lawyer who facilitate the representation").

29. *Id.* § 71 (stating that any communication is in confidence if "at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person").

30. *Id.* § 72 (including any communication made to, or to assist, a person "(1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and (2) whom the client or prospective client consults for the purpose of obtaining legal assistance").

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

32. *Id.*; *see also* Model Code of Prof'l Responsibility EC 4-1 (1980) ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.").

responsibility to exercise his professional judgment to separate the "relevant and important from the irrelevant and unimportant. The observance . . . of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance." [33]

B. *Entity Privilege*

The government attorney-client privilege is an organizational privilege. Therefore, it is often analogized to other organizational entities, including the corporation.[34] The elements of the entity privilege are the same as the individual attorney-client privilege except that the entity is considered the client of the attorney.[35] Thus, individuals within the entity do not hold the privilege personally. The entity, acting through its agents, determines whether to assert or waive the privilege.[36] While the justifications for extending the privilege in the entity context are the same as in the private setting, questions regarding the privilege's scope frequently arise because, unlike the individual client, it is not always the case that the information provider is the person acting on the lawyer's advice.[37] Oftentimes, when the client is an entity, various agents or officers within the entity supply the information that counsel needs to advise effectively.[38]

For example, in *Upjohn Co. v. United States*, independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business.[39] In deciding to conduct an internal investigation, Upjohn's attorneys prepared a questionnaire that was sent to "All Foreign General and Area Managers" stating that the Chairman was seeking detailed information concerning payments made by Upjohn or any of its subsidiaries to any employee or official of a foreign

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33. *Upjohn*, 449 U.S. at 391 (quoting the Model Code of Prof'l Responsibility EC 4-1).

34. *See* Todd A. Ellinwood, *"In the Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege*, 2001 Wis. L. Rev. 1291, 1303 (advocating the need for a strong attorney client privilege similar to the privilege of other entity organizations); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 Minn. L. Rev. 473, 474 (1998) (applying the principles of the corporate privilege to the government context).

35. *See generally* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (stating that the entity holds the privilege); *Upjohn*, 449 U.S. 383.

36. *Weintraub*, 471 U.S. at 349.

37. *See Upjohn*, 449 U.S. at 391 ("[I]t will frequently be employees beyond the control group as defined by the court below—'officers and agents . . . responsible for directing [the company's] actions in response to legal advice'—who possess the information needed by the corporation's lawyers." (quoting *Upjohn*, 600 F.2d 1223, 1225 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981)).

38. *Id.*

39. *Id.* at 386. Upjohn Company manufactures and sells pharmaceuticals in the United States and abroad. *Id.*

government.[40] The recipients of the questionnaire and thirty-three other officers or employees were interviewed by in-house and outside counsel.[41] The company then submitted a voluntary report to the Securities and Exchange Commission disclosing certain questionable payments.[42] Immediately following this disclosure, the Internal Revenue Service launched an investigation to determine the tax consequences of the "questionable payments" and issued a summons requesting "all files relative to the investigation conducted under the supervision of Gerard Thomas."[43] The summons stated that the records should include all "written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries."[44]

Prior to *Upjohn*, courts limited the scope of the attorney-client privilege by applying the "control group" test.[45] Only those employees who played a substantial role in deciding and directing a corporation's legal response were protected.[46] In *Upjohn*, the Supreme Court reversed the Sixth Circuit decision[47] and expanded the privilege to all subordinate employees. The Court stated that the control group test

> overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.... [Thus,] "[i]n a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives."[48]

The Court also noted that often the attorney's advice will be more significant to non-control group members than to those who officially

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40. *Id.* at 386-87. The letter that accompanied the questionnaire noted that "recent disclosures that several American companies made 'possibly illegal' payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn." *Id.* at 387.

41. *Id.* at 387.

42. *Id.*

43. *Id.* at 387-88.

44. *Id.* at 388 (quoting the summons issued by the Internal Revenue Service pursuant to 26 U.S.C. § 7602).

45. *See* Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962) (articulating the "control group test").

46. *Id.* (describing that the inquiry is whether the employee making the communication is in a position to control corporate actions).

47. *Upjohn*, 449 U.S. at 402. The United States District Court for the Western District of Michigan adopted the recommendation of a Magistrate who concluded that the summons requesting production of all files should be enforced because there had been a waiver. *Id.* at 388. The Sixth Circuit reversed the district court but ultimately agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice ... for the simple reason that the communications were not the 'client's.'" *Id.*

48. *Id.* at 390-91 (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1978)).

utilize the advice, "and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy."[49] Thus, after *Upjohn*, the attorney-client privilege for a corporate entity extends to communications between officers and corporate counsel, for purposes of obtaining legal advice for the entity. The privilege also extends to communications from lower echelon employees to counsel made for such purpose, concerning matters within the scope of the employee's duties for the entity.[50] It is important to note that while *Upjohn* expands the attorney-client privilege to all employees within the organization, it is the corporation that possesses the privilege, not the individual employee.[51]

In the entity context, the decision whether to invoke or waive the privilege is controlled by the present management. When the management of a corporation changes hands, former management's claims of privilege on behalf of the corporation are without effect.[52] In *Commodity Futures Trading Commission v. Weintraub*, the Court held that former management cannot assert the privilege against successor management.[53] The Court reasoned that because the privilege belongs to the entity, and the successor group is the group currently working on behalf of the entity's interests, the successor group has control of the privilege.[54]

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49. *Id.* at 392.

50. *Id.* at 394-95; *see also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985).

51. *Weintraub*, 471 U.S. at 348-49 ("The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."); *see also* 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure Evidence 37-38 (1986) (defining "client").

52. *See Weintraub*, 471 U.S. at 349.

53. *Id.*

54. *Id.* The parties agreed that when control of a corporation is transferred to new management, the authority to assert and waive the corporation's attorney-client privilege is also transferred. *Id.* at 349. The dispute in this case was over who has control of the privilege of a bankrupt corporation. *Id.* The Court held that the bankruptcy trustee has control because she "plays the role most closely analogous to that of a solvent corporation's management." *Id.* at 353.

C. *Origins of the Government Attorney-Client Privilege*

Like corporations, government agencies are entity "clients"[55] that seek legal advice and can be parties to litigation. Following *Upjohn,* commentary on the attorney-client privilege in the government context has often asserted that the government client needs assurances of confidentiality equivalent to a corporation's need for confidential advice.[56] Like a corporation's in-house counsel, government lawyers are the legal experts within their entities. To ensure sound legal advice, it is necessary that government officials communicate freely and keep government lawyers fully informed.[57] The government lawyers' responsibilities often include evaluating the legal consequences of proposed courses of action and performing the legal work necessary to implement the government entity's policies.[58] Government entities seek expert legal advice from their lawyers in various situations including: determining the requirements of legislation, assessing the legality of proposed actions, and evaluating possible avenues of enforcement.[59] Because these duties are essential to the functioning of most government entities, lawyers are integral to an entitty's ability to accomplish its goals successfully.[60]

A government lawyer's practice differs from a private attorney's practice with respect to the duty of confidentiality because much of the information government lawyers are working with is governed by pervasive regulations.[61] Government lawyers are subject to extensive regulation

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55. *See* Ross v. Memphis, 423 F.3d 596, 600 (6th Cir. 2005) ("This court has twice assumed without deciding that a government entity such as a municipal corporation can invoke the attorney-client privilege."); *see also In re* Grand Jury Investigation, 399 F.3d 527, 534 (2d Cir. 2005) (applying the definition of client that includes governmental bodies from Fed. R. Evid. 503 (Proposed 1973)); *In re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 291 (7th Cir. 2002) (stating that the client is the State of Illinois represented through one of its agencies); *In re* Lindsey, 158 F.3d 1263, 1273-76 (D.C. Cir. 1998) (citing Fed. R. Evid. 503(a)(1) advisory committee note (proposed 1973), which included governmental bodies as clients); *In Re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 916 (8th Cir. 1997) (citing commentary for Proposed Federal Rule Evidence 503(a)(1) for the proposition that "the definition of 'client' includes governmental bodies"); *see also* Melanie Leslie, *Government Officials As Attorneys and Clients: Why Privilege the Privileged?*, 77 Ind. L.J. 469, 474 n.13 (2002). The Advisory Committee's note cites three cases for its contention that the definition of client includes government bodies. *See* Fed. R. Evid. 503(a)(1) advisory committee's note (proposed 1973) (citing People *ex rel.* Dep't of Pub. Works v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303 (Ct. App. 1964), Rowley v. Ferguson, 48 N.E.2d 243 (Ohio Ct. App. 1942), Conn. Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955)).

56. Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U. L. Rev. 1003, 1021 n.111 (1982) (urging the extension of government attorney-client privilege to parallel corporate privilege).

57. Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 Harv. L. Rev. 1170, 1178 (2002) [hereinafter *Rethinking*].

58. *Id.* at 1178-79.

59. *Id.*

60. *Id.* at 1178.

61. *See* Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal Ethics 291, 294-95 (1991).

because the information they handle can include "military secrets, sensitive negotiations with foreign governments, grand jury minutes dealing with investigation of federal crimes, and millions of records dealing with the most private matters of individuals and corporations."[62] There are detailed regulations limiting government lawyers' use of this information and prohibiting its improper dissemination.[63]

In addition to the large amount of government information that is a matter of public record, the Freedom of Information Act (FOIA),[64] enacted in 1967, broadened the public's access to a wide range of government documents. In effect, the government has essentially "consented to disclosure," thus limiting the government lawyer's duty of confidentiality.[65]

Although the purpose of the FOIA was "'to permit access to official information long shielded unnecessarily from public view' and . . . 'to create a judicially enforceable public right to secure such information from possibly unwilling official hands,'"[66] Congress created nine exemptions to the FOIA that allow the government to keep documents from the public.[67]

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62. *Id.* at 294-95. Tax records, medical records, and trade secrets are all included in the last category. *Id.* at 295.

63. *Id.* (citing 26 U.S.C §§ 6103, 6104, 6108, 6110 (1988); 5 U.S.C. §§ 552, 552(a) (1988); 18 U.S.C. § 1905 (1988)).

64. 5 U.S.C. § 552 (2003).

65. *See* Cramton, *supra* note 61, at 294 ("[T]he duty of confidentiality does not extend to information that the government has made available . . . to the public."); *see also* Model Rules of Prof'l Conduct R. 1.6(a) (1983) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .").

66. Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 Urb. Law. 283, 287 (2003) (quoting EPA v. Mink, 410 U.S. 73, 80 (1973)). "*Mink* was the first (Freedom of Information Act (FOIA)] case heard by the Supreme Court." *Id.* at 287 n.36.

67. *See* 5 U.S.C. § 552(b) (2003). In relevant part, this section provides the following exemptions to the FOIA:

> (1)(A) specifically authorized under . . . an Executive order to be kept secret in the interest of national defense or foreign policy . . . ;
>
> (2) related solely to the internal personnel rules and practices of any agency;
>
> (3) specifically exempted from disclosure by statute . . . ;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of an individual;

Most of the law on the government attorney-client privilege has developed from litigation concerning the fifth exemption of the FOIA.[68] Under this exemption, "'inter-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency' are excused from mandatory disclosure to the public."[69] While "[e]xemption five does not itself create a government attorney-client privilege,"[70] it creates an effective government privilege only when "'the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors . . . .'"[71] The need for full and frank communications between government officials and the government lawyer is the primary justification used to analogize the government privilege to the corporate privilege. While courts and commentators have almost universally agreed that the attorney-client privilege exists for government entities generally,[72] they have widely debated whether the government attorney-client privilege in the criminal investigative context conforms to the historical rationale for the attorney-client privilege.[73]

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(8) . . . reports prepared by . . . or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Id.

68. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975); Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977); Porter County Chapter of Izaak Walton League v. U.S. Atomic Energy Comm'n, 380 F. Supp. 630, 637 (N.D. Ind. 1974).

69. *In re* Lindsey, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (quoting 5 U.S.C. § 552(b)(5) (1994)).

70. *Id.* at 1269.

71. *Id.* (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980)).

72. *See* Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 Fla. L. Rev. 695, 696 n.4 (1999) (citing *In re Lindsey*, 148 F.3d at 1104); *see also* Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1457 (1st Cir. 1992); Ferrell v. U.S. Dep't of Hous. & Urban Dev., 177 F.R.D. 425, 432 (N.D. Ill. 1998); FDIC v. Ernst & Whinney, 137 F.R.D. 14, 16 (E.D. Tenn. 1991); Coastal Corp. v. Duncan, 86 F.R.D. 514, 520 (D. Del. 1980); Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138-39 (E.D. Wis. 1972); Unif. R. Evid. 502(a)(1) (1974); Fed. R. Evid. 503(a)(1) (Proposed 1973); Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996); Steven I. Friedland, Paul Bergman, & Andrew E. Taslitz, Evidence Law and Practice 642 (2000) (stating Proposed Fed. R. Evid. 503(a)(1)); Charles W. Wolfram, Modern Legal Ethics 6.5.6, at 289-91 (1986); Ronald I. Keller, Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U. L. Rev. 1003 (1982).

73. See *infra* Part II for commentors' arguments regarding the government attorney-client privilege in the criminal investigative context.

D. *Government Attorney-Client Privilege in the Civil Context*

In his treatise on the attorney-client privilege, Paul Rice states that "the attorney-client privilege should protect communications with [the government attorney] by appropriate representatives of his government client for the purpose of obtaining legal advice or assistance."[74] Unlike the private attorney-client privilege, there was little use of the government privilege prior to 1967 when Congress enacted the FOIA.[75] The federal courts were faced with a surge of attorney-client privilege claims by government agencies when exemption five, "permit[ting] the government to assert certain evidentiary privileges," was implemented.[76] While the government privilege lacks the force of historical support that exists for the private attorney-client privilege, "most courts agree that there is a government privilege."[77] Following *Upjohn*, many courts accepted a government privilege without addressing the policy behind it. It was often assumed with minimal discussion that a functional similarity existed between public and private bureaucratic organizations.[78]

In 2005, the Sixth Circuit addressed whether a municipality could assert the attorney-client privilege for communications between the city's director of police and several city attorneys in a civil proceeding.[79] The court held that despite the "surprisingly little case law on the issue," the "[r]eview of both our sister circuits' precedents and outside authority confirm that a government entity can assert attorney-client privilege in the civil context."[80] The court cited the four circuits that had decided whether the privilege could be asserted in the criminal investigative context and concluded that the available case law "'generally assumes the existence of a governmental attorney-client privilege in civil suits between government agencies and private litigants.'"[81] The court used as evidence the fact that parties seeking to prevent application of the privilege in other areas, such as grand jury

74. Paul R. Rice, Attorney-Client Privilege in the United States § 3:12 (2d ed. 1999).

75. Salkin, *supra* note 66, at 287; *see also supra* Part I.C.

76. Leslie, *supra* note 55, at 541; *see also supra* notes 68-70 (discussing FOIA exemption five).

77. Salkin, *supra* note 66, at 287.

78. *See, e.g.*, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (finding that the government needs the same assurance of confidentiality when using an attorney as any private party seeking advice to protect personal interests); SEC v. World-Wide Coin Invs., Ltd, 92 F.R.D. 65, 67 (N.D. Ga. 1981) (citing *Upjohn* to extend the privilege to communications between SEC staff and counsel); *see also* Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (stating that the privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"), *aff'd mem.*, 734 F.2d 18 (7th Cir. 1984).

79. Ross v. Memphis, 423 F.3d 596 (6th Cir. 2005).

80. *Id.* at 601.

81. *Id.* (quoting *In re* Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 291 (7th Cir. 2002)); *see also In re* Grand Jury Investigation, 399 F.3d 527, 532 (2d Cir. 2005); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 917 & n.7 (8th Cir. 1997) (acknowledging government entities' successful assertions of the privilege in civil cases where "the party seeking [the] information was a private litigant adversarial to the government").

proceedings, have conceded its applicability in the civil context to demonstrate that the government privilege is sufficiently entrenched in the civil setting.[82] The court also found secondary sources extending the privilege to government entities persuasive. For example, the court stated that because Proposed Federal Rule of Evidence 503[83] restates, rather than modifies, the common-law attorney-client privilege, the Proposed Rule has considerable utility as a guide to the federal common law.[84] Lastly, the Sixth Circuit used the principles articulated by the Supreme Court in *Weintraub* as its ultimate justification for recognizing the existence of the government privilege in the civil context:

> As the Supreme Court has observed regarding the corporate privilege, "[b]oth for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients . . . ." We see no reason that the function is no longer served simply because the corporation is a municipality or, more broadly, that the organization or agency is a government entity.[85]

Based on the Sixth Circuit's rationale in *Ross v. Memphis*, it may be argued that the government privilege in the civil context is analogous to that of other organization entities.

Despite the courts' recognition of a government entity's ability to assert or waive the government attorney-client privilege in the civil context, a different set of rules has been employed by the courts in determining the applicability of the government privilege in criminal proceedings.[86] This deviation from the principles that ordinarily dictate the entity privilege has likely arisen from the existing tension between the government lawyer's public role and the private relationship basis of traditional conceptions of legal ethics.[87] Unlike the private sector where lawyers are expected to serve as zealous advocates, promote their clients' interests, and seek the best results possible, there is a widely shared perception among lawyers, judges, and various public officials that government lawyers have greater responsibilities to serve the public interest than lawyers in private practice.[88] This view was first articulated by the Supreme Court in *Berger*

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82. *Ross*, 423 F.3d at 601.

83. *See* Friedland et al., *supra* note 72, at 642 (including government bodies as clients in Proposed Federal Rule of Evidence 503(a)(1) (including government bodies as clients)); *see also supra* note 55.

84. *Ross*, 423 F.3d at 601 (citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.02 (1975)).

85. *Id.* at 602 (quoting Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985)).

86. Salkin, *supra* note 66, at 284-85.

87. *Rethinking*, *supra* note 57, at 1170.

88. *See In Re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 293 (7th Cir. 2002) (stating that government lawyers have responsibilities and obligations different from those facing members of the private bar); *see also In re* Lindsey, 158 F.3d 1263, 1272 (D.C. Cir 1998) (stating that "[w]hen an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence"); Leslie,

v. United States.[89] While describing the role of government prosecutors, the Court recognized that a United States prosecutor's client is not an individual or a private entity, but a sovereignty: the local, state, or federal government.[90] The Court stated that because the prosecutor must act as both counsel for the government and a government official, she must serve the government's aim of "seeking justice."[91] Today, there is a strong sense among those in the legal profession and the public that all government lawyers, not simply those involved in criminal litigation, owe special duties to the public.[92] If government lawyers owe special duties to the public in all contexts, it is curious that a different analysis for the government privilege exists only in the context of a criminal investigative proceeding. Before discussing whether the courts should recognize the government attorney-client privilege in the criminal context, it is important to understand why a grand jury proceeding affects courts' analyses regarding the applicability of the government attorney-client privilege. The following section describes the functions and features of the grand jury.

E. *Function of the Grand Jury*

To understand why courts treat the government attorney-client privilege differently in the criminal investigative context, it is necessary to review the purpose and unique attributes of a federal grand jury. The Fifth Amendment requires that charges for all capital and infamous crimes be brought by an indictment returned by a grand jury.[93] The Amendment has been interpreted to require that an indictment be used to charge federal felonies, unless a defendant waives his or her right to be indicted by a grand jury.

Many of the hallmarks of our modern grand jury system originated in England.[94] The grand jury was recognized in the Magna Carta[95] and

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supra note 55, at 497-98; James R. Harvey, III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 Wm. & Mary L. Rev. 1569, 1594 (1996) (analyzing Model Rules of Professional Conduct Rule 1.13 which states government attorneys may have the "authority to represent the public interest in circumstances where a private lawyer would not be authorized to do so"); *Rethinking*, *supra* note 57, at 1176-78.

89. 295 U.S. 78 (1935).

90. *See id.* at 88.

91. *See generally* Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 Widener J. Pub. L. 235 (2000).

92. *Id.* (arguing that government lawyers have a duty to seek justice in both civil and criminal litigation).

93. U.S. Const. amend. V (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."); *see* Paul S. Diamond, Federal Grand Jury Practice and Procedure 1 (Anderson Pulishing Co. 4th ed. 2001) (1990).

94. Diamond, *supra* note 93, at 2-4.

95. The Juror's Website, *http://jctmac.tripod.com/fgj.html#ORIGIN%20AND%20HISTORY* (last visited Aug. 26, 2006). In 1215, granted by King John, the Magna Carta became the first English Constitutional document.

operated in strict secrecy because it was initially a tool of the Crown.[96] Secrecy was required "to encourage witnesses to come forward and to prevent guilty parties from fleeing before they could be brought to justice."[97] By the seventeenth century, the grand jury's role had slowly evolved, and it became independent of the Crown.[98] British colonists brought to America the concept of the independent grand jury, and it was well established in the American colonies prior to the Revolution.[99]

Historically, grand juries have performed three distinct functions: investigating possible criminal activity, bringing charges if they find there is probable cause to believe such activity has occurred, and reporting on criminal activity or other serious misconduct.[100] In *United States v. R. Enterprises, Inc.*,[101] the Supreme Court described the function of the grand jury:

> [T]he grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred . . . .[102]

Grand juries are favored by prosecutors because when investigating criminal activity a grand jury has "virtually unlimited access to persons and things that interest them."[103] Moreover, the grand jury is not controlled by a judge but is technically independent.[104]

Grand juries use subpoenas to gather the evidence that they need to use in deciding whether crimes have been committed.[105] They can subpoena

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96. *See* Diamond, supra note 93, at 2-4 (describing the origins of the grand jury). The first English grand jury consisted of twelve men selected from the knights or other freemen, who were called to inquire into crimes alleged to have been committed in their local community. *Id.*; *see also* George J. Edwards, The Grand Jury 1-44 (Richard H. Ward & Austin Fowler eds., 1973) (1906).

97. Edwards, *supra* note 96, at 21 (noting that the principle of secrecy survived as a feature of the modern federal grand jury and has aroused the strongest criticism).

98. Diamond, *supra* note 93, at 3. After two grand juries defied King Charles II by refusing to return indictments, the grand jury was regarded as "a protector of the citizenry against arbitrary prosecution." Nixon v. Sirica, 487 F.2d 700, 789 (D.C. Cir. 1973) (Wilkey, J., dissenting); *see also* The Juror's Website, *http://jctmac.tripod.com/fgj.html#ORIGIN%20AND%20HISTORY* (last visited Aug. 26, 2006).

99. The Juror's Website, *http://jctmac.tripod.com/fgj.html#ORIGIN%20AND%20HISTORY* (last visited Aug. 26, 2006).

100. *Id.* at 101-23.

101. 498 U.S. 292 (1991).

102. *Id.* at 297 (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).

103. Diamond, *supra* note 93, at 1 (noting that privileges do not typically encumber a grand jury investigation).

104. *Id.* at 7.

105. *See* The Juror's Website, *http://jctmac.tripod.com/fgj.html#ORIGIN%20AND%20HISTORY* (last visited Aug. 26, 2006).

documents and physical evidence (including videotapes, guns, etc.) as well as witnesses to testify.[106] If the grand jurors decide that the evidence creates probable cause to believe that the persons named in an indictment committed the crimes charged therein, the grand jurors vote to return the indictment.[107] A witness that ignores a grand jury subpoena will be held in contempt unless she can appropriately assert her Fifth Amendment privilege against self-incrimination, the attorney-client privilege, or an applicable evidentiary privilege "as the basis for refusing to comply with a grand jury's directive to provide testimony."[108] Another way a witness can avoid a grand jury subpoena is to show that the grand jury is being used for an improper purpose.[109] For example, it is improper to use a grand jury solely to gather evidence to be used at the trial of one who has already been indicted.[110]

It has become increasingly common for federal prosecutors to subpoena attorneys who represent "grand jury targets, subjects or witnesses before a grand jury."[111] Attorney subpoenas are often viewed as problematic for several reasons. First, an attorney subpoena is potentially troublesome because it may cause a client to doubt her attorney's loyalty, thereby jeopardizing the attorney-client relationship.[112] Second, a conflict of interest may be present, requiring the attorney to withdraw from the representation.[113] Finally, the attorney subpoena is often viewed as "an instrument of abuse" employed by prosecutors "to breach the attorney client privilege and/or undermine an attorney's ability to represent her client."[114]

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106. In the federal system, witnesses cannot be accompanied into the grand jury room by her attorney. *See* American Bar Association, Frequently Asked Questions About the Grand Jury System, http://www.abanet.org/media/faqjury.html (last visited July 28, 2006).

107. Susan W. Brenner & Gregory G. Lockhart, Federal Grand Jury: A Guide to Law and Practice 30 (2006) ("Since it investigates to determine the existence of probable cause, the grand jury is not required to demonstrate probable cause for its inquiries. 'Mere suspicion' is enough. And a grand jury can base its investigation on 'tips, rumors, hearsay, speculation or any other source of information.'" (quoting *In re* Special February 1975 Grand Jury, 565 F.2d 407, 410 (7th Cir. 1977))).

108. *Id.*

109. *Id.*

110. *See, e.g.*, United States v. Badger, 983 F.2d 1443, 1458 (7th Cir. 1993). There are some limitations on the grand jury. For example,

> [i]f one from whom the grand jury seeks testimony or other evidence can show that the only purpose of the investigation is to gain evidence for his trial on pending charges, he can ask the district court to quash the grand jury's request on the grounds that it constitutes an abuse of the grand jury.

Brenner & Lockhart, *supra* note 107, at 30-31.

111. Brenner & Lockhart, *supra* note 107, at 186.

112. *Id.*

113. *Id.*

114. *Id.* In *United States v. Perry*, the Ninth Circuit observed,

> The government's apparently increasing use of grand jury subpoenas on a target's counsel . . . has been almost universally criticized by courts, commentators and the defense bar because it is viewed as a tool of prosecutorial abuse and as an unethical tactical device US Attorneys employ to go on a "fishing expedition" with legal counsel without first pursuing alternative avenues to get the information.

857 F.2d 1346, 1347 (9th Cir. 1988).

Due to a growing concern among the courts, the Department of Justice (DOJ) adopted a policy governing the issuance of attorney subpoenas in 1985.[115] The policy mandates that no subpoena be "issue[d] to an attorney that seeks information about his representation of a client, including fees paid by the client, unless it has been approved by the Assistant Attorney General of the Department's Criminal Division."[116]

In *Branzburg v. Hayes*,[117] the Supreme Court stated that the grand jury "has a right to every man's evidence, except for those persons protected by a constitutional, common-law or statutory privilege."[118] While most other evidentiary rules generally do not apply in grand jury proceedings, the attorney-client privilege is applicable and can provide the basis to quash a grand jury subpoena.[119] Because the primary purpose of the grand jury is to discover the truth, "evidentiary privileges are anomalous in that they shield the truth from discovery."[120] Despite the DOJ's view that the attorney-client privilege "operates in a manner likely to impede the truth-seeking function of the grand jury"[121] the privilege applies to "verbal statements, documents and tangible objects conveyed by both individual and corporate clients to an attorney in confidence for the purpose of any legal advice."[122] The applicability of the attorney-client privilege in grand jury proceedings is firmly rooted in the American legal system in order to encourage and protect confidential communications between lawyer and client. Conversely, due to the unique issues that are implicated by subpoenaing

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115. Brenner & Lockhart, *supra* note 107, at 342.

116. *Id.* (citing U.S. Dep't of Justice (DOJ), The Department of Justice Manual § 9-2.161(a)(D) (added July 18, 1985)). In deciding whether a grand jury subpoena should be issued, the Assistant Attorney General must apply these principles:

> (1) [T]here must be reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information;
>
> (2) In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation;
>
> (3) All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful;
>
> (4) The reasonable need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney will be disqualified from representation of the client as a result of having to testify against the client;
>
> (5) Subpoenas shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonably limited period of time; and
>
> (6) The information sought shall not be protected by a valid claim of privilege.

U.S. Dep't of Justice, The Department of Justice Manual § 9-2.161(a)(E)(1)-(5) (1993); *see also* Diamond, *supra* note 93, at 187-90 (discussing the DOJ's policy).

117. 408 U.S. 665 (1972).

118. *Id.* at 688 (internal quotations omitted).

119. Fed. R. Evid. 501, 1101(d)(2); Diamond, *supra* note 93, at 175.

120. Diamond, *supra* note 93, at 180. "After the privilege against self-incrimination, the attorney-client privilege likely shields evidence of greatest interest to prosecutors." *Id.*

121. *Id.* at 176.

122. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992).

government counsel, the law remains unsettled on the question of whether a government attorney can assert the attorney-client privilege in a criminal grand jury proceeding.

II. DETERMINING WHETHER TO RECOGNIZE THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE IN A GRAND JURY PROCEEDING

The circuit courts that have considered whether the government attorney-client privilege applies in a criminal investigative proceeding have used a judicial balancing test to make their determination. In the process, two different views of the government attorney-client privilege have emerged among courts and commentators. The "methodology employed by courts . . . involves a 'weighing of the values'"[123] test to establish whether recognizing the government privilege will serve the public interest.[124] Because courts have identified two values that appear to be in open conflict when a government entity claims an attorney-client privilege,[125] the court chooses the value that is most important and selects the rule that seems most likely to encourage that value.[126] For example, granting an absolute government privilege will "serve the value of promoting full and candid communication between the client and the attorney," while dissolution of the government privilege in the face of a grand jury "will promote open and honest government and prevent wrongdoers from gaining assistance at public expense."[127] Part II of this Note identifies and discusses the arguments for and against the recognition of the government attorney-client privilege in a criminal investigative proceeding.

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123. *See* Ellinwood, *supra* note 34, at 1292. Ellinwood criticizes this approach because

> [it] fails to consider the incentives created by different rules. But both the *Grand Jury* and *Lindsey* opinions used this methodological approach—at least implicitly . . . . At least implicitly, this approach identifies the more important value and then assumes this analysis justifies the chosen rule. A superior methodology would require a consideration of the impact that various rules will have on the behavior of people facing similar situations in the future.

Id. at 1292-93.

124. *See, e.g.*, *In re* Grand Jury Investigation, 399 F.3d 527, 534 (2d Cir. 2005) ("[I]t is in the public interest for the grand jury to collect all the relevant evidence it can. However it is also in the public interest for high state officials to receive and act upon the best possible legal advice."); *In re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 293 (7th Cir. 2002) ("While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue."); *In re* Lindsey, 158 F.3d 1263, 1273-76 (D.C. Cir. 1998) (noting that the privilege would contribute to the public good by encouraging candor and frank communications between officials and counsel but ultimately deciding that the public interest is served by uncovering illegality among officials); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920-21 (8th Cir. 1997) (noting the importance of the privilege in encouraging the full and frank presentation of legal advice but rejecting the application of the *Upjohn* principles due to the strong public interest in honest government).

125. Ellinwood, *supra* note 34, at 1292.

126. *Id.*

127. *Id.*

Part II.A describes the rationales of courts and commentators that assert that the public interest is better served by not recognizing the government privilege in the criminal investigative context. By analyzing both circuit court opinions and scholarly interpretation of these opinions, this section provides reasons why courts should place a higher value on the public interest in encouraging open and honest government and disregard a government privilege in a criminal investigative proceeding.

Part II.B discusses the rationales offered in support of a government attorney-client privilege in the grand jury context. The primary justifications for recognizing the privilege center on the belief that the public interest is better served by promoting full and frank communications between government officials and government attorneys. The Second Circuit's opinion upholding the privilege is described, as are arguments set forth by commentators in favor of this view. Part II.A.1-3 discuss the circuit cases where the courts chose encouraging open and honest government as the more important value and therefore, did not recognize the government privilege in the grand jury context.[128] Following the description of the courts' rationales, Part II.A.4 details a scholarly interpretation for why the Eighth, D.C., and Seventh Circuits weighed the value of open and honest government more heavily than promoting full and frank communications between government officials and counsel. Part II.B.1 describes the Second Circuit case that employed the same balancing test as the other three circuits but instead the court recognized the government privilege in the grand jury context.[129] The Second Circuit's application of the balancing test was different because it decided that promoting full and frank communications between government officials and government counsel is the more important value. Finally, Part II.B.2 provides the arguments offered by commentators for why the Second Circuit's decision reflects a different application of the judicial balancing test than the other three circuits.

A. *The Public Interest Is Better Served by Not Recognizing the Government Attorney-Client Privilege in a Grand Jury Proceeding*

In the corporate context, courts have acknowledged that the purpose of the privilege is to promote broader public interests in the observance of law and administration of justice by encouraging full and frank communications.[130] This rationale has been extended to the government

128. *See infra* Part II.A.1 (describing *In re Grand Jury Subpoena Duces Tecum*); Part II.A.2 (discussing *In re Lindsey*); Part II.A.3 (detailing *In re A Witness Before the Special Grand Jury 2000-2*).

129. *See infra* Part II.C (describing *In re Grand Jury Investigation v. Doe*).

130. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) (stating that the purpose of privilege is served equally whether a corporation or an individual is asserting the privilege); *see also supra* Part I.C (discussing the expansion of the corporate privilege in *Upjohn Co. v. United States*).

attorney-client privilege in the civil context.[131] However, in a criminal investigative proceeding, this justification has been challenged by both courts and commentators. Part II.A focuses on the reasons why the principles for the government privilege are distinguishable from the principles that typically dictate the private attorney-client privilege. The rationales for not recognizing the privilege center around the idea that the public interest is better served by promoting open and honest government, instead of encouraging full and frank communications between government officials and their government attorneys. By examining the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum*, Part II.A.1 describes the view that a government attorney-client privilege should not exist at all in the context of a federal criminal investigation because of the "strong public interest in honest government and in exposing wrongdoing by public officials."[132] Part II.A.2 discusses *In re Lindsey*, where the D.C. Circuit acknowledged the existence of the government attorney-client privilege, but, like the *Duces Tecum* Court, stated that the privilege recedes in the face of a grand jury subpoena.[133] Through a description of the Seventh Circuit case, *In re: A Witness Before the Special Grand Jury,* Part II.A.3 discusses the idea that because a government lawyer owes ultimate allegiance to the public, the attorney-client privilege does not attach for the government lawyer and his or her official client where there are criminal proceedings.[134] Based on scholarly interpretation of the rationales for not recognizing the government attorney-client privilege, Part II.A.4 suggests possible reasons why the courts chose promoting open and honest government as the more important public interest.

1. Eighth Circuit: *In re Grand Jury Subpoena Duces Tecum*

In 1996, Independent Counsel Kenneth Starr served a grand jury subpoena on the White House requiring the production of all Whitewater related documents created during meetings attended by an attorney from the Office of Counsel to the President and the First Lady, Hillary Clinton.[135] The White House identified nine sets of notes but claimed that such

131. Ross v. Memphis, 423 F.3d 596, 603 (6th Cir. 2005) (holding that the historical justification for the attorney-client privilege applies to the government privilege in civil proceedings); *see also supra* Part I.D (describing the government privilege in the civil setting).

132. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997).

133. *In re* Lindsey, 158 F.3d 1263, 1274 (D.C. Cir. 1998).

134. *In re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002).

135. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913. The task assigned to Kenneth Starr was "to investigate and prosecute matters 'relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty [sic] Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.'" *Id.* (quoting In re Madison Guar. Sav. & Loan Ass'n, No. 94-1, 1994 WL 913274, at *1 (D.C. Cir. Aug 5, 1994)).

documents were privileged.[136] The Office of Independent Counsel (OIC) filed a motion before the district court to compel production of two of the nine sets of notes.[137] The White House dropped the executive privilege claim, relying solely on the attorney-client privilege and work product doctrine.[138] The district court found that the conversations at issue were privileged because Mrs. Clinton and the White House Counsel had a "genuine and reasonable belief" that the attorney-client privilege would apply.[139] The OIC appealed the district court's order, and the Eighth Circuit reversed and remanded.[140]

The Eighth Circuit recognized that the government attorney-client privilege does exist by stating that "[p]roposed Federal Rule of Evidence 503[141] would have defined 'client' to include 'a person, public officer, or corporation, association, or other organization or entity, either public or private.'"[142] The court went on to state that "[t]he commentary makes it clear that '[t]he definition of "client" includes governmental bodies.'"[143] However, the majority then pronounced that Proposed Rule 503 only stands for "the broad proposition that a governmental body may be a client for purposes of the attorney-client privilege" and that it does not address the particular situation of this case, that is a federal government entity being subpoenaed by a federal grand jury.[144] The majority stated that because the privilege has not been applied in this context, the question is whether the privilege should be expanded to cover this situation.[145]

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136. *Id.* at 913-14.

137. *Id.* at 914. The first set of documents comprised notes taken by Associate Counsel to the President Miriam Nemetz at a meeting attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, and Mrs. Clinton's personal attorney David Kendall. *Id.* The second set of documents was notes taken by Special Counsel during meetings attended by Mrs. Clinton, her personal attorney, and at times, John Quinn, Counsel to the President. *Id.*

138. *Id.*

139. *Id.* The focus of the Eighth Circuit's opinion was not on whether Mrs. Clinton reasonably believed that her conversations with White House lawyers were privileged. The court concluded that this issue was irrelevant to the inquiry at hand. *Id.* at 923.

140. *Id.* at 925-26 (case remanded for the entry of an order granting the OIC's motion to compel).

141. *Id.* at 915 (stating that Proposed Federal Rule of Evidence 503 is a "'useful starting place' for an examination of the federal common law of attorney-client privilege" (quoting *In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994)).

142. *Id.* (quoting Fed. R. Evid. 503(a)(1) (Proposed 1973)).

143. *Id.* at 915-16 (quoting Fed. R. Evid. 503(a)(1) (Proposed 1973)).

144. *Id.* at 916. The majority criticized Judge Richard Kopf's dissenting opinion because he relied "too heavily" on the precise wording of Proposed Rule 503. *Id.* at 916 n.3. *But cf.* Katherine L. Kendall, Note, In Re *Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Governmental Realm?*, 1998 Utah L. Rev. 421, 431-32 (arguing that the privilege need not be extended to federal criminal investigations because the government already has the right to assert the privilege without exception as Proposed Rule 503 is the embodiment of the attorney-client privilege at common law).

145. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915-16.

The Eighth Circuit rejected the argument that the entity privilege established in *Upjohn* should govern the White House privilege.[146] The court stated,

> The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive in this case . . . . We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.[147]

The majority believed that its decision would not affect the ability of a government lawyer advising an official who is contemplating a future course of conduct; so long as "the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice, which would be unlikely anyway."[148] After weighing the interests at stake the court determined that the attorney-client privilege should not be recognized in the grand jury context because a "general duty of public service calls upon government employees and agencies to favor disclosure over concealment."[149] This Eighth Circuit opinion establishes the different public interests at issue in cases involving public officials, holding inapplicable *Upjohn's* "full and frank" disclosure rationale[150] for allowing attorney-client privilege in cases involving alleged wrongdoing by public officials.[151]

2. D.C. Circuit: *In re Lindsey*

The D.C. Circuit's version of *In re Grand Jury Subpoena Duces Tecum* came in 1998 when Starr began his investigation into President Clinton's involvement in Whitewater and expanded the investigation to include the Monica Lewinsky scandal.[152] Bruce Lindsey, Deputy White House

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146. *Id.* at 920 ("[W]e believe that important differences between the government and nongovernmental organizations such as business corporations weigh against the application of the principles of *Upjohn* in this case."); *see also supra* Part I.B (discussing *Upjohn*).

147. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920-21.

148. *Id.* at 921.

149. *Id.* at 920. To emphasize the importance of the public interest in questions of disclosure versus the privilege, the court quoted a Supreme Court case involving a private accountant:

> "By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility with the client . . . . To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's roles as a disinterested analyst charged with public obligations."

Id. at 920-21 (quoting United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984)).

150. *See supra* notes 31-32 and accompanying text (describing *Upjohn's* rationale for the entity privilege).

151. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920-21.

152. *In re* Lindsey, 158 F.3d 1263, 1267 (D.C. Cir. 1998). Previously, the main focus of Starr's inquiry had been on financial transactions involving President Clinton when he was Governor of Arkansas, known as the Whitewater inquiry. *Id.* In 1998, Starr was authorized

Counsel and Assistant to the President, was subpoenaed to testify before the grand jury.[153] Lindsey asserted the attorney-client privilege, and the Independent Counsel sought a court order requiring him to disclose the requested information.[154] The District Court for the District of Columbia granted the OIC's motion to compel the testimony of Bruce Lindsey, and the Office of the President appealed to the D.C. Circuit.[155]

While the D.C. Circuit acknowledged that the government attorney-client privilege is recognized in some contexts, the court immediately limited the privilege's scope by stating that the privilege "is not recognized in the same way as the personal attorney-client privilege."[156] The court then followed with a discussion of numerous policy considerations, heavily relying on the basic duties of government attorneys and officials when defining the boundaries of the government privilege in the context of a criminal investigation:

> When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence . . . . [I]f there is wrongdoing in government, it must be exposed . . . . [The government attorney's] duty to the people, the law, and his own conscience requires disclosure.[157]

While the court did not identify the public as the client of the government lawyer,[158] the court stated that "the obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government."[159] Using the government prosecutor as an example, the court emphasized that government lawyers' special professional

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to investigate "'whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law'" in connection with Paula Jones' civil lawsuit against the President. *Id.* (quoting *In re* Motions of Dow Jones & Co., 142 F.3d 496, 497-98 (D.C. Cir. 1998)).

153. *Id.*

154. *Id.* Lindsey also claimed that the communication was protected by the executive privilege. However after the district court concluded that the "President's executive privilege claim failed in light of the Independent Counsel's showing of need and unavailability," the issue was not challenged on appeal. *Id.*

155. *Id.*

156. *Id.* at 1272. The court noted that exemption five of FOIA protects materials which would be protected under the attorney-client privilege if applied to private parties. *Id.* at 1268; *see also supra* notes 69-71 (describing exemption five).

157. In re *Lindsey*, 158 F.3d at 1272-73.

158. *Id.* The Court stated,

> [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.

Id. at 1273.

159. *Id.*

responsibilities to the public have long governed the actions they can take on behalf of their client:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done.[160]

To further demonstrate the duties a government lawyer owes to the public, the court pointed to the government lawyer's obligation in a civil action to "seek justice" and "avoid unfair settlements or results."[161] Although the court recognized that "if the government attorney-client privilege does not apply in certain contexts this may chill some communications between government officials and government lawyers," the court ultimately stated that the public interest in uncovering illegality among elected and appointed officials outweighs the potential chill.[162]

White House Counsel pointed to *Swidler & Berlin v. United States*, where the Supreme Court held that the attorney-client privilege is not to be applied differently in the civil and criminal contexts.[163] The D.C. Circuit rejected the argument that *Swidler* compelled the court to find an absolute privilege in the government criminal context merely because there is a government attorney-client privilege in the civil setting.[164] Despite the Supreme Court's finding that there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, the court held that this is only controlling in the case of private parties.[165]

The majority's conclusion that the attorney-client privilege is qualified forced Lindsey to testify because the government attorney's proper allegiance is to the public.[166] Like the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, the D.C. Circuit distinguished the public interest served in allowing the attorney-client privilege in private contexts, ruling

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160. *Id.* at 1273 n.4 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

161. *Id.* (citing Model Code of Prof'l Responsibility EC 7-14 (1980)).

162. *Id.* at 1276 (noting that despite the potential chill, government officials have the benefit of "fully confidential communications with their attorneys unless the communications reveal information relating to possible criminal wrongdoing"). The court's rationale has been criticized because it assumes that government officials will always be able to know what is criminal ex ante. *See* Ellinwood, *supra* note 34, at 1320. Ellinwood provides an example to illustrate the difficulty in foreseeing a criminal investigation:

> [S]uppose the Commerce Secretary needs to make a decision on export licenses, and he consults a government attorney in the process of deciding whether to issue licenses to U.S. companies who want to launch their satellites using Chinese rockets. After consulting with an attorney, he makes his decision and foresees no criminal investigation. Nevertheless, a congressional investigation into Chinese influence over administration decisions later commences and includes the export license issue.

Id.

163. Swidler & Berlin v. United States, 524 U.S. 399 (1998).

164. *In re Lindsey*, 158 F.3d at 1272.

165. *Id.*

166. *Id.* at 1278.

that the public interest in full disclosure outweighed the possible "chill" the *Upjohn* court sought to prevent.

3. Seventh Circuit: *In Re A Witness Before the Special Grand Jury*

The controversy surrounding the government attorney-client privilege has not been limited to the federal government. In 2002, attorney Roger Bickel, who was employed as legal counsel to the Secretary of State's Office when Illinois Governor George Ryan was Secretary of State, was subpoenaed to testify before a federal grand jury.[167] The federal government was investigating "Operation Safe Road" and alleged the existence of a "licenses for bribes" scandal in the Secretary of State's Office.[168] Because Bickel had advised Governor Ryan when Ryan was Secretary of State, federal prosecutors sought to interview him. When Ryan stated that he did not waive the attorney-client privilege of the Governor's Office, the federal government obtained a letter from Ryan's successor as Secretary of State, which "purported to waive the Office's attorney-client privilege as to all of Bickel's official conversations with all personnel and officials of the Secretary of State, regardless of their particular position or office."[169]

The Seventh Circuit explicitly stated that the client is the "State of Illinois itself, represented through one of its agencies."[170] However, the court's opinion primarily focused on the government lawyer's "general duty of public service."[171] In discussing the government lawyer's duty the court stated,

> With this responsibility comes also the responsibility to act in the public interest. It follows that interpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinated to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure.[172]

The court never addressed whether the purported waiver was valid, but instead relied on the public interest rationale in compelling the testimony: "It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers

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167. *In re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 290-91 (7th Cir. 2002). Roger Bickel served as Chief Legal Counsel during the first four years of the former Secretary's administration and as a personal lawyer to Governor George Ryan, his wife, and Ryan's campaign committee since 1989. *Id.*

168. *Id.* at 290 ("The alleged (and in some instances admitted) corruption extends to the improper issuance of commercial drivers' licenses, specialty license plates, leases, and other contracts; the improper use of campaign funds for the personal benefit of Secretary of State employees; and obstruction of justice in connection with internal office investigations.").

169. *Id.* at 291 (internal quotations omitted).

170. *Id.*

171. *Id.* at 294.

172. *Id.*

themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power."[173]

Despite Ryan's federalism argument,[174] the court stated that notions of federalism did not prevent them from agreeing with the *In re Grand Jury Subpoena Duces Tecum* and *In re Lindsey* that there was "no privilege in the criminal context between a federal government lawyer and a federal public official as applied to the current case involving a state government lawyer and a state public official."[175] By extending the Eighth and D.C. Circuit Courts' "public interest" rationale to cases involving state officials and state lawyers, the Seventh Circuit in *In re A Witness Before the Special Grand Jury* strengthened the current majority position that the rationale supporting the privilege in other contexts is largely unimportant when weighed against the duty of full disclosure to the public.

These three cases when taken together suggest that the protections of the attorney-client privilege necessary to promoting the public interest as defined by *Upjohn*, and consistently applied in other contexts, are not as important as the government attorney's duty to the public. In fact, although these decisions acknowledge the rationale behind the government attorney-client privilege in many situations, they ignore these considerations with respect to government attorneys in criminal cases, creating a separate justification for not allowing the privilege.

4. Arguments Supporting Open and Honest Government as the Stronger Value

It is interesting to note that despite the historical justification for the privilege,[176] the Eighth, D.C., and Seventh Circuits held that the public interest is better served by not recognizing the government attorney-client privilege in the grand jury setting. Based on scholarly interpretation of the three opinions, this section suggests possible reasons why these circuits chose promoting open and honest government as the more important public interest. While the significance of having fully informed government lawyers is rarely disputed, commentators have questioned whether the attorney-client privilege actually encourages clients to have full and frank communications with their lawyers.[177] Part II.A.4.a articulates the general

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173. *Id.* at 293.

174. Ryan argued that even if federal attorneys lack an attorney-client privilege in criminal proceedings, the privilege should be recognized for state-employed attorneys. *Id.* at 294-95 (citing *In re* Grand Jury Subpoena, 886 F.2d 135, 138 (6th Cir. 1989) (implicitly finding that the attorney for the Detroit City Council could assert the privilege)); *see In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 917 (8th Cir. 1997) (noting in dicta that assertion by a state attorney "implicates potentially serious federalism concerns").

175. *See* Salkin, *supra* note 66, at 299 (summarizing the Seventh Circuit's response to the federalism argument offered by Ryan); *see also In re A Witness Before the Special Grand Jury 2000-2*, 288 F. 3d. at 294-95.

176. *See supra* notes 127-28 and accompanying text.

177. *See* Leslie, *supra* note 55, at 482-511; Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 Yale L.J. 1725, 1731-32, 1739 (1988).

argument that client candor is less clear in the entity context. Using the corporate entity framework, Part II.A.4.a also provides arguments to rebut this criticism. Part II.A.4.b details specific arguments asserting that although the corporate privilege is said to increase client candor, this justification is inapplicable to the government structure due to the differences between corporate and government entities. Finally, Part II.A.4.c describes the argument that the existence of the crime-fraud exception makes the privilege less likely to have an impact on candor in the government setting.

a. *Client Candor in the Entity Context*

Because individual employees of an entity are not the "client" of the attorney and do not personally hold the privilege with regard to their communications to the attorney, some commentators argue that the incentives for client candor in all entity contexts are less clear than in the individual setting.[178] One commentator argues that it seems unlikely that the attorney-client privilege provides any incentive for entity employees to divulge information to the attorney.[179] One possible response to that criticism in the corporate arena is that the corporate privilege promotes "institutional" communication with counsel.[180] The theory is that assurances of confidentiality provide incentives for the entity client to investigate within its own ranks.[181] The Supreme Court has endorsed this rationale for the corporate privilege noting that the attorney-client privilege for corporations "'encourages observance of the law and aides in the administrations of justice' by promoting full and frank communications between attorneys and corporate clients."[182] In addition, corporate executives often believe that their interests are sufficiently aligned with the entity's to avoid a corporate decision to waive the privilege over the executive's objections.[183] Because disclosure of the confidential information would likely hurt the corporation as well as the individual

178. Leslie, *supra* note 55, at 489; Barsdate, *supra* note 177, at 1739 ("As in the corporate setting, but to an even greater degree, it is unclear how the attorney-client privilege for governmental entities can promote candor from individuals who are unable to prevent the ultimate waiver of the privilege.").

179. *See* Leslie, *supra* note 55.

180. *See* Barsdate, *supra* note 177, at 1732.

181. *See* Note, *The Attorney-Client Privilege: Where Do We Go After* Upjohn*?*, 81 Mich. L. Rev. 665, 670 n.15 (1983) (arguing that Upjohn management would not have initiated an internal investigation had they believed the government would be able to discover the information collected). *But see* Robert G. Nath, Upjohn*: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations*, 30 Buff. L. Rev. 11, 44-47 (1981) (arguing Upjohn's internal investigation was motivated by potential legal liabilities).

182. Barsdate, *supra* note 177, at 1733 (quoting Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985)); *see also supra* note 31 and accompanying text.

183. Leslie, *supra* note 55, at 507.

executive, the executive is likely to assume that the corporation will assert the privilege.[184]

Professor Melanie Leslie rejects the idea that the justifications for the corporate privilege are applicable in the government context.[185] Due to the unique character of the government structure, Professor Leslie argues, the government privilege is unlikely to encourage client candor, and thus there are no sound justifications for recognizing the government attorney-client privilege.[186]

b. *Justifications for the Corporate Privilege Are Inapplicable to the Government Context*

In her article, *Why Privilege the Privileged?*, Professor Leslie vehemently rejects that the superimposition of the corporate privilege onto the government structure is justified simply because the government, like a corporation, can only act through its agents.[187] Her overarching argument is that in the government context, the attorney-client privilege does not promote client candor.[188] She argues that in the pre-conduct stage, unlike their corporate counterparts, government employees have more motivation to speak freely with counsel because they do not have the ever present push to maximize profits that can sometimes conflict with the incentive to follow the law.[189] In the corporate context, Professor Leslie points out that it is not always clear in advance whether a court or government regulator will later determine that corporate acts fall within the law's parameters. She argues that because

> [a] corporation could legitimately seek to push the law to its limits to maximize profits, [c]orporate actors in this position might, in fact, be somewhat hesitant to speak to counsel absent assurances that their communications will not later be used against them should the government or some other party later claim that the corporation crossed the line.[190]

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184. *Id.*

185. *Id.* at 495-96. *But see* Paulsen, *supra* note 34, at 474 (arguing that "the United States government possesses, as a matter of common law, the same attorney-client privilege that exists for a corporation or other organizational entity").

186. *See generally* Leslie, *supra* note 55.

187. Leslie, *supra* note 55, at 494-96. *But cf.* Paul R. Rice, Attorney-Client Privilege in the United States § 4:28 at 137 (2d ed. 1999) ("The U.S. government is the largest employer in the world. Its agency structures and problems are as complex as those of any private enterprise. To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater.").

188. *See* Leslie *supra* note 55, at 494-96; *see also* Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 Notre Dame L. Rev. 157, 164 (1993) (describing a New York City survey that found that the privilege is not the primary reason that corporate clients consult their lawyers).

189. Leslie, *supra* note 55, at 498-99.

190. *Id.* at 488-89.

Professor Leslie asserts that it is reasonable to assume that compliance with the law is a paramount concern of government employees, and thus they "need no additional incentive to disclose fully to government counsel."[191] Recognizing the government attorney-client privilege in the grand jury context is not necessary to encourage full and frank communications between government officials and counsel because government actors want "to comply with, not stretch or exceed, the law's boundaries."[192] Therefore, officials "will be forthcoming with counsel because they need not fear that later revelation of attorney-client communications will compromise or embarrass them." [193]

To prove that the government attorney-client privilege does not serve the public interest by promoting client candor, Professor Leslie further distinguishes the corporate privilege. She argues that although the entity controls the privilege in both the government and corporate contexts, the fact that the privilege is not personal to the individual has more bite in the government context, than in the corporate arena.[194] Although a corporate employee may rely on the corporation's assertion of the privilege because she is confident that her individual interests are tied to the corporation's interests, Leslie argues that government employees are unlikely to rely on an entity privilege when communicating with government counsel because a particular employee's conduct will not expose the government to entity liability.[195] This argument reflects the rationale offered by the Eighth Circuit when distinguishing the government privilege from the corporate privilege in *In re Grand Jury Subpoena Duces Tecum*.[196] The court noted that unlike a corporation, neither the government nor individual agency is subject to criminal liability.[197] For example, in *In re Grand Jury Subpoena Duces Tecum,* the court stated that while corporate attorneys have a compelling interest in uncovering misconduct by employees, "the White House simply has no such interest with respect to the actions of Mrs. Clinton."[198]

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191. *Id.* at 499.
192. *Id.*
193. *Id.*
194. *Id.* at 506-07; *see also supra* notes 28-32 (describing that in the entity context the entity, not the individual employee, controls the privilege).
195. *Id.* at 507-08. Professor Leslie argues that the government is more likely to waive the privilege over the employee's objection because unlike the corporate employee who knows that he has the power to damage the corporation and all those who work for it, the government employee does not have much leverage: "At worst, the government may have to pay a civil judgment, but payment will not threaten the government's health or the job security of all its employees." *Id.* at 507.
196. *See supra* notes 142-43 and accompanying text (describing the Eighth Circuit's rationale for not applying the corporate privilege in the government context).
197. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir. 1997).
198. *Id.*

c. *Crime-Fraud Exception Makes Client Candor Less Likely*

Professor Leslie argues that the crime fraud exception[199] makes the privilege less likely to have an impact on candor in the government setting which further supports the circuit courts' decisions not to recognize the government privilege in a grand jury setting.[200] Therefore, it seems logical that the circuits weigh the interest in open and honest government more heavily than promoting full and candid communications. She argues that the privilege is likely to have even less impact on candor in the government setting because 28 U.S.C. § 535(b) provides, "Any information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expediously reported to the Attorney General . . . ."[201] Because lawyers are not exempt from the statute,[202] Professor Leslie argues that "a recalcitrant employee is likely to know about it, and will be less likely than her corporate counterpart to mistakenly believe that the government attorney is acting in her best interest."[203] Leslie asserts that the existence of the statute abrogates the government's attorney-client privilege because it undermines the credibility of the privilege's primary justification.[204] When possible criminal wrongdoing is involved, the statute chills attorney-employee speech.[205] Furthermore, she argues that Congress's enactment of the statute is evidence that Congress was not convinced that the privilege encourages the candor necessary to obtain effective legal advice.[206] In sum, Professor Leslie argues that "the reflexive assumption that a government attorney-client privilege is necessary to ensure that government actors communicate openly with government counsel is a fiction."[207] Therefore, like the Eighth, D.C., and Seventh Circuits, Professor Leslie asserts that the government attorney-client privilege should not be recognized in the criminal investigative context because the public interest is better served promoting open and honest government and exposing criminal wrongdoing by elected and appointed officials.

199. 28 U.S.C. § 535(b) (2000).
200. Leslie, *supra* note 55, at 506.
201. 28 U.S.C. § 535(b) (1994).
202. *See In Re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920 (stating that attorneys are bound by the statute).
203. Leslie, *supra* note 55, at 506.
204. *Id.* at 508.
205. *Id.*
206. *Id.* at 525. *But cf.* Paulsen, *supra* note 34, at 497-500 (arguing that at most, the statute constitutes a limited exception to the privilege and is analogous to a corporation's in-house reporting requirement).
207. Leslie, *supra* note 55, at 549-50.

B. *The Public Interest Is Better Served by Recognizing the Government Attorney-Client Privilege in a Grand Jury Proceeding*

In the most recent decision addressing the assertion of the government attorney-client privilege in the context of a grand jury proceeding, the Second Circuit used the same analysis as the Eighth, D.C., and Seventh Circuits but concluded that the assertion of the privilege was valid.[208] The court reasoned that the public interest is not as obvious as the prosecutors contend, and "if anything, the traditional rationale for the privilege applies with special force in the government context."[209] Commentators who believe that it is more important to encourage full and frank communications between government officials and government lawyers than to uncover the illegal actions of elected and appointed officials support the Second Circuit's applications of the balancing test.[210] Part II.B.1 discusses the Second Circuit case and the court's justification for why the public interest is better served by recognizing the government attorney-client privilege in a grand jury proceeding. Part II.B.2 describes commentator arguments for why the government privilege conforms to the historical rationale for the attorney-client privilege.

1. Second Circuit: *In re Grand Jury Investigation v. Doe*

The Second Circuit recognized the government attorney-client privilege in February of 2005 when Anne C. George, former Chief Legal Counsel to the Office of the Governor of Connecticut, was subpoenaed to testify before a grand jury investigating an allegation that former Connecticut Governor Rowland accepted gifts in return for public favors.[211] In compelling George to testify, the district court noted that it was "undisputed that the grand jury need[ed] the information it [sought] to obtain from Ms. George."[212] The Government contended that George's loyalty to the Governor "must yield to her loyalty to the public, to whom she owes ultimate allegiance when violations of the criminal law are at stake."[213]

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208. *In re* Grand Jury Investigation, 399 F.3d 527, 534 (2d Cir. 2005).

209. *Id.* ("It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.").

210. *Id.* at 536. The court stated,

> The Government assumes that "the public interest" in disclosure is readily apparent, and that a public official's willingness to consult with counsel will be only "marginally" affected by the abrogation of the privilege in the face of a grand jury subpoena. Because we cannot accept either of these assumptions, we decline to abandon the attorney-client privilege in a context in which its protections arguably are needed most.

Id.

211. *Id.* at 529-30 (considering favorable negotiation and awarding of state contracts to be public favors).

212. *Id.* at 530.

213. *Id.* at 533 (arguing that because the Office of the Governor serves the public, George, as counsel to that office, must also serve the public).

The court stated that it is implicit in the government's argument that the "public interest in the present circumstances lies with disclosure and the furtherance of the 'truth-seeking' function of the grand jury."[214] Although the Second Circuit, like its sister circuits, focused its inquiry on the public interest, it weighed the values differently than the other three courts:

> We cannot accept the Government's unequivocal assumption as to where the public interest lies. To be sure, it is in the public interest for the grand jury to collect all the relevant evidence it can. However, it is also in the public interest for high state officials to receive and act upon the best possible legal advice.[215]

While the case was decided on the basis of federal law, the court noted that Connecticut state law recognizes the government attorney-client privilege in civil and criminal proceedings.[216] The court used the Connecticut statute[217] as a justification for weighing more heavily the protection of confidential communications: "The people of Connecticut . . . acting through their representatives, have concluded that the public interest is advanced by upholding a governmental privilege even in the face of a criminal investigation."[218] The court made clear that it was not suggesting that the federal courts defer to state statutes in formulating federal common law but instead used the state statute to illustrate the point that "[o]ne could as easily conclude, with the Connecticut legislature, that the protections afforded by the privilege ultimately promote the public interest, even when they might impede the search for truth in a particular criminal investigation."[219]

2. Arguments Supporting Full and Frank Communications as the Stronger Value

Despite the arguments set forth by Professor Leslie, other commentators agree with the Second Circuit decision and argue that the government attorney-client privilege should be recognized in a grand jury proceeding because the justifications that exist for the privilege in other contexts are applicable in the government setting. This section describes the arguments that support the government privilege in the grand jury context. Unlike

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214. *Id.* at 534. The court noted that "to allow the Governor's Office to interpose a testimonial privilege 'as a shield against the production of information relevant to a federal criminal investigation . . . 'would represent a gross misuse of public assets.'" Id. (quoting Brief of United States of America, Appellee at 23, *In re* Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005) (No. 04-2287)).

215. *Id.*

216. *Id.*

217. *See* Conn. Gen. Stat. § 52-146r(b) (2005). The statute states, "In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless authorized representative of the public agency consents to waive the privilege and allow such disclosure." *Id.*

218. *In re Grand Jury Investigation*, 399 F.3d at 534.

219. *Id.*

Professor Leslie,[220] Todd Ellinwood and Professor Michael Paulsen argue that the privilege will, in fact, encourage client candor.[221] They argue that open and honest communication between government officials and counsel will enable a government attorney to provide sound legal advice, thereby promoting the observance of the law and administration of justice. Specifically, Part II.B.2.a provides the argument that despite the differences that exist between corporate and government entities,[222] the justifications for the corporate privilege can apply to the government setting. Part II.B.2.b provides counterarguments to Professor Leslie's assertion that the existence of the crime-fraud exception will reduce the likelihood of client candor.

a. *Justifications for the Corporate Privilege Are Applicable in the Government Context*

Although government officials do not face the pressure to maximize profits that sometimes encourages their corporate counterparts to push the law to its limits,[223] Ellinwood claims that government officials still need assurances that their communications will later be disclosed.[224] He argues that while government officials do not have to maximize profits, they desire confidentiality in their communications with counsel because of the potential political difficulties that might result if discussions about potential courses of action are later revealed.[225] Even Professor Leslie recognizes that a potential "political fallout from revelation of such discussions could result even if highly placed agency employees ultimately chose a wholly legitimate course of action."[226] This concern is even more pressing when a government official seeks post-conduct legal advice. Without the promise of confidentiality, fear of political fallout could "muzzle" the client.[227] Like corporate actors, government actors might be tempted to push the law to its limits for political gain.[228] Therefore, in order to ensure that these government actors are complying with the law, assurances of

220. *See supra* Part II.A.4

221. *See* Ellinwood, *supra* note 34; Paulsen, *supra* note 34.

222. *See supra* Part I.B (discussing the corporate privilege).

223. *See supra* notes 185-86 and accompanying text.

224. Ellinwood, *supra* note 34, at 1320-25; *see also* Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 Cornell L. Rev. 1682, 1710 (1999) (arguing that the privilege may be more important in the criminal investigative context because of the possibility that an adverse verdict may lead to incarceration).

225. Ellinwood, *supra* note 34, at 1320-25.

226. Leslie, *supra* note 55, at 511. While Leslie recognizes the possibility of political fallout, she qualifies the statement by implying that this concern is only pressing for highly placed government employees such as an agency head or the President. *Id.*

227. *Id.*

228. *Id.* at 511-12 ("The chance that government actors might be tempted to skirt or stretch the law for political gain is similarly present in government hierarchies.").

confidentiality would encourage government actors to seek the legal advice of government counsel.[229]

Ellinwood rejects the argument that the justifications for the corporate privilege are not applicable to the government privilege because government actors will not rely on the privilege given that the government has no entity liability.[230] Professor Leslie argues that although a corporate employee does not control the privilege, she may rely on the corporation's assertion of the privilege because she is confident that her individual interests are tied to the corporation's interests.[231] Although neither the government nor the individual agency is subject to criminal liability,[232] Ellinwood argues that this does not mean that justifications for the corporate privilege are not applicable in the government setting. First, he argues that the holding in *Upjohn* was not based upon the fact that a corporation could be held criminally liable.[233] Second, he states that it seems odd to suggest that the government has no compelling interest in "ferreting out any misconduct."[234] For example, in *In re Grand Jury Subpoena Duces Tecum*, the court stated that while corporate attorneys have a compelling interest in uncovering misconduct by employees, "[t]he White House simply has no such interest with respect to the actions of Mrs. Clinton."[235] This statement suggesting that a government entity does not have an interest in uncovering misconduct of the First Lady seems to be in "stark contrast with the value of open and honest government."[236]

Professor Michael Paulsen supports Ellinwood's argument by asserting that regardless of whether an entity is likely to be held criminally liable, "entities" have legal interests in the actions of their employees and the

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229. Paulsen, *supra* note 34, at 506.

230. *Id.* at 496-97; *see also* Ellinwood, *supra* note 34, at 1330.

231. *See supra* notes 190-91 and accompanying text.

232. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir. 1997).

233. Ellinwood, *supra* note 34, at 1330; *see also* Paulsen, *supra* note 34, at 496 ("It requires an exceedingly narrow view of the potential legal interests of an organizational client to assume that no such interests exist if the organization itself is unlikely to be indicted or charged, and *Upjohn* does not take such a grudging attitude.").

234. *See* Ellinwood, *supra* note 34, at 1330; *see also* Paulsen, *supra* note 34, at 496-97.

235. *In Re* Grand Jury Subpoena Duces Tecum, 112 F.3d at 920.

236. *See* Ellinwood, *supra* note 34, at 1330. Ellinwood argues that without the privilege, the value of open and honest government will be derogated because government attorneys' efforts to ensure honest government will be restricted by fearful government employees who are worried about possible mistakes but will not "'come forward without the protection of the attorney-client privilege.'" *Id.* (quoting Lisa E. Toporek, "Bad Politics Makes Bad Law": A Comment on the Eighth Circuit's Approach to the Governmental Attorney-Client Privilege, 86 Geo. L.J. 2421, 2428 (1998)). For example,

> [s]uppose an official, who believes he did nothing wrong, suspects that people in his agency might have done something illegal and would like to talk to a government attorney about the situation . . . [T]his potential whistleblower will not come forward if he is worried that there is a small chance he could be in violation of the law. It is irrelevant if his concern is correct—if he thinks this possibility exists, he will not consult a government lawyer because of the potential loss of confidentiality.

Id. at 1330-31; *see also* Paulsen, *supra* note 34, at 496-97.

privilege is necessary to ensure that the entity gathers the facts necessary to obtain legal advice to protect those interests.[237] He provides an example:

> Suppose that employee malefactors have engaged in a course of reprehensible conduct for which there is no reasonable likelihood that the entity will be asked to bear legal responsibility in any way. Information about the conduct might be relevant to legal advice about whether the employee could be fired by the entity on this ground, without risking suit from the chagrined employee.[238]

Professor Paulsen argues that "the policies that animated the *Upjohn* opinion" are not distinguishable in the government context, "at least not on the ground that the United States lacks any legal 'interest' in its employees' actions that would justify resort to the common law privilege."[239]

b. *Crime Fraud Exception Does Not Make Client Candor Less Likely*

In response to Professor Leslie's assertion that the existence of the statute abrogates the government's attorney-client privilege because it undermines the credibility of the privilege's primary justification,[240] Ellinwood argues that when possible criminal wrongdoing is involved, the statute may not chill attorney-employee speech because it is unclear exactly how to read the statute.[241] He points out that some have argued that because the statute refers to "violations" and not evidence of possible violations, the statute only requires the attorney to notify the Attorney General in cases where the attorney is aware of an action that is clearly wrong.[242] When the Eighth Circuit had pointed to the crime-fraud exception as a reason to restrict the application of *Upjohn* in the government context, the court stated a duty merely to report "criminal wrongdoing," which could be interpreted to mean that unless the attorney had explicit knowledge of criminal wrongdoing, a broader waiver of the privilege is improper.[243] While this distinction is slight, the results could vary drastically.

Ellinwood describes another interpretation of § 535(b) that exists among commentators which does not have any effect on the attorney-client privilege.[244] While the language of the statute seems to include lawyers, the DOJ has reasoned that the statute must be read in conformity with the attorney-client privilege.[245] Then-Assistant Attorney General for the Office of Legal Counsel, Antonin Scalia, wrote a memorandum stating, "'Given the absence of any discussion in the legislative history, it would in our view

237. *See* Paulsen, *supra* note 34, at 496-97.
238. *Id.* at 497.
239. *Id.*
240. Leslie, *supra* note 55, at 508.
241. *See* Ellinwood, *supra* note 34, at 1326-27 (describing various interpretations of the crime-fraud exception).
242. *Id.* at 1326.
243. *See* Paulsen *supra* note 34, at 498.
244. Ellinwood, *supra* note 34, at 1326.
245. *Id.*

be inappropriate to infer a congressional purpose to breach the universally recognized and longstanding confidentiality of the attorney-client privilege.'"[246] Todd Ellinwood suggests,

> Based on this statement, the statute should be read as being consistent with the confidentially of the attorney-client privilege. This does not mean, however, that the government attorney should assist a government official who has clearly violated the law. Given the spirit of the statute and the interest in denying government aid to those officials who clearly violated the law . . . [t]he proper interpretation of § 535(b) requires a government lawyer, confronted with a clearly illegal action, to refuse to provide assistance as counsel, but does not require that lawyer to report the illegality.[247]

Ellinwood, however, states that if the action is "less than clearly illegal," the statute does not require that the government attorney violate confidentiality and the attorney-client privilege.[248]

Taken together, Ellinwood and Professor Paulsen argue that despite the differences between corporations and government entities, the justifications for the corporate attorney-client privilege do conform to the government structure.[249] Encouraging full and frank communications is the more important value because even if officials do seek legal advice, it is likely that they will be deterred from fully disclosing all necessary facts due to their fear of revelation.[250] Therefore, by not recognizing the government privilege, the value of open and honest government is not encouraged because government officials will receive inaccurate advice based on incomplete information.

III. GETTING TO THE ROOT OF THE PRIVILEGE

What happens next? If this issue arises in a circuit that has yet to address the issue, how should the court apply the balancing test? Which interest should it choose as the more important public interest? The following section addresses these questions and suggests a resolution that would eliminate the courts having to choose a rule[251] that promotes one public interest over the other. Part III.A critiques the weighing of values test employed by the courts[252] and offers an alternative approach that would better serve both interests that the circuit courts are striving to balance.

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246. *Id.* (quoting Memorandum from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel to the Deputy Attorney General 2 (Nov. 30, 1976)).

247. *Id.* Ellinwood argues that if the statute is interpreted this way, it would create "the perfect chilling effect" because "[t]hose who know they have violated the law will be unwilling to go to government attorneys; those who are well-intentioned, but are simply worried about the legal implications of a decision, will consult with a government attorney." *Id.* at 1327.

248. *Id.* at 1326-27.

249. *Id.*

250. *See supra* note 124 and accompanying text.

251. *See supra* note 124 and accompanying text.

252. *Compare supra* Part II.A.1-3, *with* Part II.B.1.

Instead of allowing the courts to control the government privilege in the criminal investigative context, this section argues that, like other contexts, the entity should control the privilege. To demonstrate the "entity controls" approach, Part III.B reanalyzes the Second Circuit case[253] using the alternative entity controls approach. Part III.C compares the judicial balancing test to the entity controls approach, ultimately demonstrating that by allowing the entity to assert or waive the privilege, the privilege's intended purpose of promoting full and frank communications between government officials and government attorneys is achievable without degrading the public interest.

A. *Entity Controls Approach*

In the private context, "the question of who owns the privilege is easily answered: the client."[254] In order to determine the proper scope of the government attorney-client privilege, at least one commentator argues that "it is critical to identify the 'client' or the owner of the privilege."[255] Although judicial opinions frequently endorse the view that government lawyers owe additional duties to the public by virtue of their position as public servants,[256] courts do not usually identify the public as the *client* of the government attorney.[257] For day-to-day purposes, a government lawyer likely considers the employing agency as the client because officials of that agency "hire the lawyer, provide instructions and supervision, and make decisions concerning change or termination of employment."[258] Although the client of the government attorney is not easily identifiable, a clear cut answer to who controls the privilege is possible. Based on the "complex web of institutional arrangements, regulations, statutes, and constitutional commands"[259] that dictate administrative law, it is almost always clear who has the authority to make litigation decisions. Under current law, adopted in 1966, the DOJ retains all authority for agency litigation, "except as otherwise authorized by law."[260] This exception allows nearly forty-one agency and government corporations to maintain some authority over their litigation.[261] Litigating authority is divided up in many ways: "The options range from agencies that have litigating authority before all courts on all matters to agencies that have limitations on the subject matter on which, or the court before which, the agency can practice."[262] Formal and informal

253. *See supra* Introduction, Part II.B.1 (describing the Second Circuit's judicial balancing approach).
254. *See* Ellinwood, *supra* note 34, at 1315.
255. *Id.*
256. *See supra* note 88 and accompanying text.
257. *See supra* notes 153, 166 and accompanying text.
258. *See* Cramton *supra* note 61, at 301; *see also supra* notes 58-60 and accompanying text.
259. Cramton, *supra* note 61, at 301.
260. Harvey, *supra* note 88, at 1573.
261. *Id.* at 1573-74.
262. *Id.* at 1573.

agreements exist at both the federal and state level dividing the litigating authority among various government entities. By aligning control of the privilege with this litigation authority, the official with the power to assert or waive the privilege within the government entity is easily identifiable. Shifting control of the government privilege away from the courts and to the government entity is not a novel idea and is essentially the approach used to determine the government privilege in the civil context.[263]

Currently, when the circuit courts are deciding whether to recognize the government privilege in a criminal proceeding, their analyses do not focus on identifying the owner of the privilege. Instead, the courts employ a test that attempts to balance the public interest in promoting full and candid communications between client and attorney versus promoting open and honest government while preventing wrongdoers from gaining assistance at public expense.[264] After the court chooses the value that is most important to protect, it selects the rule that it finds most likely to encourage that value.[265] For example, in *In re Grand Jury Subpoena Duces Tecum*, the Eighth Circuit acknowledged that "the strong public interest in honest government and in exposing wrongdoing by public officials"[266] as the more important value and then chose the rule that it assumed logically followed from that value.[267] It seems the courts are concerned that the public interest at stake in a criminal investigative proceeding is greater than that in the civil context.[268] The courts are likely controlling the privilege in the grand jury context because of the greater risk that the public interest will be derogated.

Because there is a strong public interest in exposing criminal offenses by elected and appointed officials, the courts' concern regarding the assertion of the government privilege in the criminal context is reasonable. However, shifting control away from the courts and towards the government entity would not derogate the public interest. The "government lawyer's 'client' . . . is not a private individual or entity, but a public entity with public obligations that can be summed up in the overall obligation to govern justly."[269] Therefore, when the appropriate government official is deciding whether to assert or waive the privilege, he is obligated to consider the relevant public interests.[270] It is perplexing that the courts do not allow

263. *See supra* notes 78, 80-85 and accompanying text.

264. *See supra* Part II.

265. *Id.*

266. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997).

267. *See supra* note 141 and accompanying text; *see also In re* Lindsey, 158 F.3d 1263, 1278 (D.C. Cir. 1998) ("In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel.").

268. *See supra* Part I.D (discussing the government attorney-client privilege in the civil context).

269. Green, *supra* note 91, at 266; *see also supra* notes 89-91 and accompanying text.

270. Green, *supra* note 91, at 266 (arguing that public entities have obligations to act justly and promote the law).

the government entities to control the privilege when it has been recognized that

> [t]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations.[271]

The Seventh Circuit also reflected this idea when stating that in formulating privileges, the "court cannot ignore the interests and responsibilities of the coordinate entitles within our federal system, all of which are sworn to uphold the public interest and committed to the 'general duty of public service.'"[272] Based on this recognition, it would be logical for the government entities to balance the relevant public interests within the entity. The official controlling the privilege is in a better position to assess the effects of invoking or waiving the privilege—that is, to determine whether a waiver would actually chill communications between officials and the government lawyer or whether it would be worthwhile to have the information open to the public.

Although the entity controlling approach may become more complicated in situations where there is an intra-branch conflict, the inquiry remains the same. In the traditional case, the party seeking the privileged information is usually different than the privilege holder such as the situation when a federal prosecutor requests information from a state. In that instance, the official with the authority for the state decides whether to disclose (thereby waiving the information) or not. In intra-branch conflicts, the analysis is more complex because the person seeking the privileged information and the privilege holder are blurred within the same broad government entity. For example, imagine an Assistant Attorney General in the DOJ engaging in a privileged communication with the President; then imagine that another Assistant Attorney General wants access to that communication for purposes of a criminal investigation. Although this internal conflict adds a layer of complexity, ultimately the question is the same: Who in the federal government has the authority to decide?

B. *Application of the Entity Controls Approach*

Under either the judicial balancing test or the entity controls approach, the end results of a particular case will likely be the same. For example, applying the entity controls approach to *In re Grand Jury Investigation*[273] means that the decision to assert or waive the privilege would be in the

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271. *In re* Lindsey, 158 F.3d at 1273.

272. *In re* A Witness Before the Special Grand Jury, 288 F.3d 289, 294 (7th Cir. 2002) (quoting *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 912, 920 (8th Cir. 1997)); *see also supra* Part II.A.3 (discussing the court's rationale).

273. *See supra* Part II.B.1 (describing *In re Grand Jury Investigation).*

hands of the Office of the Governor.[274] Once the government attorney Anne C. George was subpoenaed to testify before the grand jury, the officials that have litigating authority within the governor's office would employ a balancing test internally.[275] The Governor's Office, as a public entity, with public obligations, would have to determine whether the public would benefit more by disclosure or by protecting the communication.[276] Because Governor Rowland resigned, control of the privilege was passed to his successor, Governor M. Jodi Rell.[277] Governor Rell would then decide whether it is more important to disclose the information, perhaps exposing Governor Rowland's illegal actions, or to protect the communication, thereby encouraging officials within the office to have full and frank communications with the government attorney. Because Rowland pleaded guilty to one count of conspiracy to commit honest services mail fraud and tax fraud and resigned from his position as Governor,[278] under the entity controls approach, it is likely that Governor Rell would not waive the privilege. The public interest in exposing criminality was served without waiving the privilege. Thus, the entity's internal balancing test would clearly weigh in favor of promoting government officials to speak candidly with government counsel. Under the entity controls approach, it is likely that the Governor's office would assert the attorney-client privilege.

Although the Second Circuit reached the same result using the judicial balancing test approach,[279] this will not always be the case. Governor Rowland's guilty plea and his resignation were unique facts that aligned the entity's internal balancing test with the court's balancing test. However, it is easy to imagine situations that would have different results. For example, in many situations, the government official with the authority to make litigation decisions may weigh the public interest differently than the courts. Indeed, this is certainly a possibility considering that the circuit courts themselves valued the interests differently.[280]

C. *Judicial Balancing Test Versus Entity Controls Approach*

The primary benefit of the entity controls approach is that it aligns the government privilege with the privilege that exists for other entities.[281] Furthermore, it creates uniformity in the application of the government privilege in the civil and criminal contexts. While the D.C. Circuit was able

274. *See supra* Part III.A (describing who controls the privilege under the "entity controls" approach).

275. In this case, it is likely that the Governor himself has the authority to make litigation decisions.

276. *See supra* notes 265-66 and accompanying text.

277. *See supra* notes 10-12 and accompanying text.

278. *See supra* notes 10-12 and accompanying text.

279. *See supra* note 211 and accompanying text.

280. *Compare supra* Parts II A.1-3, *with* Part II.B.1

281. *See supra* Part I.B.

to distinguish *Swidler & Berlin v. United States*[282] as only controlling in situations dealing with private parties, there is other evidence in support of a uniform application of the government privilege.[283] In *Upjohn*, the Supreme Court warned against uncertainty surrounding the privilege: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[284] Unlike the circuit cases, the entity controls approach does not focus on the type of proceeding in determining the appropriate test. Regardless of the type of proceeding, the government entity should control the privilege, and it should perform a balancing test internally to determine the ways in which asserting the privilege would affect the public interest. Utilizing a different analysis for the government privilege in the criminal context produces the uncertain application of the attorney-client privilege that the Supreme Court has warned against.[285]

Although balancing the public interest will produce varying results, government officials and attorneys will perceive the privilege as more predictable because they will become accustomed to the types of privileged communications their entity typically waives in order to serve the public interest. This will also help solve the problem of whether the privilege actually promotes client candor.[286] With the entity controlling the privilege, the government official will likely be able to communicate more openly because he or she understands the interests that the entity has at stake and will know whether the entity is likely to assert or waive the privilege. The situation becomes more like that of the corporate privilege, where the corporate executive often believes that his or her interests are sufficiently aligned with the entity to preclude a corporate decision to waive the privilege.[287] Perhaps the government official's interests are not aligned with the entity, but she will know whether the information concerns a subject that the government entity must waive in order to serve the public interest.

The entity controls approach removes the balancing test from the courts and places it within the entity. While the entity may be in a better position to make value-laden policy judgments, it could be argued that there is a risk that the government agency will overvalue its own interest at the expense of the investigative interest. Furthermore, because the entity does not know all of the information that the prosecutor knows, it can also be argued that the government entity is ill-equipped to properly balance the interests at stake. Although the entity may not be completely aware of all the relevant information, the prosecutor cannot disclose this information to anyone.

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282. 524 U.S. 399 (1998) (holding that the attorney-client privilege is not to be applied differently in a civil versus a criminal context).

283. *See supra* notes 159-61 and accompanying text.

284. *See supra* note 21 and accompanying text.

285. *See supra* note 21 and accompanying text.

286. *See supra* Parts II.A.4, II.B.2.

287. *See supra* notes 179-80 and accompanying text.

Therefore, the courts are in no better a position than the government entity to make an informed decision regarding the public interest. The problem of accurately determining which way the public interest lies would not be solved by allowing the prosecutors to control the assertion or waiver of the government privilege. In that situation, there is then the risk that criminal investigative interests will be overvalued. Because there are no risk-free alternatives, it seems that the entity controls approach is the best resolution because it is the only approach with the capability of promoting both public interests at stake. With the judicial balancing test and the prosecutor controls approach, there is an increased likelihood of chilled communications between government officials and counsel.[288] While the grand jury would be able to fulfill its truth-seeking function, the absence of full and frank communications would hinder a lawyer's ability to provide officials with the best possible legal advice to promote the observance of law and the administration of justice. With the entity controls approach, there is a risk that the entity will value its own interests more than the investigative interests. However, it is unlikely that the officials with the authority to assert the privilege would completely abandon their obligations to the public and assert the privilege even when there is a strong public interest in disclosure.[289] Open communication between officials and counsel would also be encouraged because the officials, as part of the entity, would likely know which interests the entity weighs more heavily and be able to predict whether the entity will assert or waive the privilege. Therefore, it is unnecessary to choose one interest over the other under the entity controls approach.

The primary argument for restricting the government privilege in the grand jury proceeding is that the dissolution of the privilege in the face of a grand jury "will promote open and honest government and prevent wrongdoers from gaining assistance at public expense."[290] However, it seems that the crime-fraud exception should sufficiently achieve this objective. It is curious that the courts have focused their analyses of the privilege in the grand jury context on balancing the public interest of full and frank communications with the need for open and honest government when the crime-fraud exception was implemented for the specific purpose of preventing wrongdoers from gaining at the expense of the public.[291] Perhaps, this is evidence that courts have interpreted the exception like the then-Assistant Attorney General for the Office of Legal Counsel Antonin Scalia.[292] If the statute is interpreted to mean that government lawyers are not required to report illegality to the Attorney General, but must only

288. *See supra* notes 31-33 and accompanying text (discussing the significance of open and honest communication).

289. *See supra* notes 265-68 and accompanying text (discussing the public obligations of a government entity).

290. *See* Ellinwood *supra* note 34, at 1292; *supra* note 124 and accompanying text.

291. *See supra* note 197 and accompanying text.

292. *See supra* note 242 and accompanying text.

decline representation, courts may be compensating by changing the analysis of the government privilege in a criminal investigative proceeding. However, if the statute is interpreted to mean that government officials have the duty to report any criminal wrongdoing, allowing the courts to perform a balancing test to determine whether the assertion of the government privilege would derogate the public interest in open and honest government seems redundant.

CONCLUSION

In denying the government attorney-client privilege in a grand jury proceeding, the Eighth, D.C., and Seventh Circuits thought they were creating a rule that, while not promoting full and frank communication between clients and counsel, supported the more significant value of open and honest government. In recognizing the government privilege in a criminal investigative proceeding, the Second Circuit thought the public interest would be better served by encouraging open communication between government officials, enabling the government attorney to provide the best possible legal advice. The judicial balancing test forces courts to choose between promoting one interest over the other. However, courts have overlooked a solution that could promote both interests simultaneously. By shifting control of the privilege to the government entity, the public interest will not be derogated because the government entity has an obligation to the public to govern justly. Therefore, the government entity will be obligated to perform an internal balancing test to consider the public interests at stake. While the government entity may waive the privilege in some circumstances in order to better serve the public interest, open communication between officials and counsel will not be discouraged because the officials, as part of the entity, will likely know which interests the entity weighs more heavily and be able to predict whether the entity will assert or waive the privilege. There may be a risk that the government entity will overvalue its own interest at the expense of the investigative interest; however, the alternatives are not viable options. By continuing to allow the courts to control the government privilege in criminal investigative proceedings, the privilege has little consistency or predictability. Unlike the government entity that is immersed in the situation and is in a good position to assess the specific effects of invoking or waiving the privilege in the particular circumstance, the courts are making decisions based on generalizations. The entity controls approach can promote honest government based on the government officials' position of public trust and simultaneously promote open and candid communication. This approach is consistent with the privilege law that exists for the government privilege in the civil context and for other organizational entities. It is illogical for the courts to begin creating new tests for the availability of the privilege based on the setting in which it was asserted.