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Principles, Politics and Privilege: How the Crime-Fraud Exception Can Preserve the Strength of the Attorney-Client Privilege for Government Lawyers and Their Clients

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**PRINCIPLES, POLITICS AND PRIVILEGE:
HOW THE CRIME-FRAUD EXCEPTION CAN
PRESERVE THE STRENGTH OF THE
ATTORNEY-CLIENT PRIVILEGE FOR
GOVERNMENT LAWYERS AND THEIR
CLIENTS**

*Michael W. Glenn**

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[W]e can attest to the vital importance of candor and confidentiality in the Solicitor General's decisionmaking process Our decisionmaking process require[s] the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking requires candor, and candor in turn requires confidentiality.¹

INTRODUCTION

Government lawyers are regulated by the ethical rules of the state in which they are members of the bar.² In most states, professional responsibility rules of confidentiality do “not distinguish between government and private sector lawyers.”³ As a result, government lawyers are under an ethical obligation to comply with their clients' instructions.⁴ The scope of protections provided by asserting the attorney-client privilege in the face of a grand jury subpoena, however, is not clear.⁵ Given that over 40,000 lawyers serve our federal government in some capacity, a clear ethical obligation should be provided.⁶ An expanding government in the current regulatory regime will require more lawyers to provide counsel to government

1. Letter from Seth P. Waxman et al., Wilmer, Cutler & Pickering, to Patrick Leahy, Chairman, Senate Comm. on the Judiciary (June 24, 2002), available at <http://www.gpo.gov/fdsys/pkg/CREC-2002-10-07/html/CREC-2002-10-07-pt1-PgS10031.htm>.

2. Jennifer Wang, Note, *Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel*, 8 GEO. J. LEGAL ETHICS 115, 131–32 (1994).

3. See Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1035 (2007).

4. William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 563 (1986).

5. John Damin, Comment, *Thawing the Chill Between Government Attorneys and Their Clients: The Need for Legislative Intervention in Protecting the Governmental Attorney-Client Privilege*, 111 PENN ST. L. REV. 1009, 1010–11 (2007).

6. See Cornell W. Clayton, *Introduction: Politics and the Legal Bureaucracy*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 1 (Cornell W. Clayton ed., 1995).

officials so the government can “function efficiently and effectively.”⁷ Leaving the attorney-client privilege without clear boundaries for these lawyers is a cause for great professional concern.

Government lawyers advise on policy issues, issue legal advice on various matters, and serve as counselors at the highest levels of government.⁸ Shouldn't the privilege apply to them in the same manner as those lawyers serving in the private sector? What if the government official seeking legal advice may face incarceration due to illegal policies or public corruption? Some would point to the recent “torture memos” as a means of cautioning against a desire for equal ethical obligations.⁹ Others suggest that whistleblower statutes and other mandated reporting requirements reduce the efficacy of this argument.¹⁰ However, a different set of rules for government lawyers can be confusing when implemented in practice.¹¹ Further, systematically reducing the privilege could have great consequences for the profession of lawyering. As Michael Greco, former President of the American Bar Association (ABA) stated,

In the end, erosion of the attorney-client privilege will marginalize the lawyer and the lawyer's ability to defend liberty and pursue justice. Erosion of the lawyer-client relationship will lead to the diminishment of the lawyer's role in society because clients will no longer entrust confidences with and seek counsel from their lawyers. And such diminishment will lead to a less effective, less respected, and greatly reduced lawyer's role in society not only in particular client matters, but more broadly.¹²

7. See Nathan P. Hansen, Note, *Attempting to Cure Conflicts of Interests in the Federal Government: One Federal Agency's Attempt to Recapture the Trust of Americans*, 27 *HAMLIN J. PUB. L. & POL'Y* 163, 164 (2005).

8. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1335 (2009); see also Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis*, 5 *J. NAT'L SEC. L. & POL'Y* 507, 511 (2012).

9. See generally Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 *U. COLO. L. REV.* 1 (2006).

10. James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 *TEMP. POL. & CIV. RTS. L. REV.* 633, 634 (2005).

11. Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 *GREEN BAG 2D* 269 (2001) (arguing that recent decisions by several circuit courts have left “government attorneys . . . in a legal no-man's land”).

12. Michael S. Greco, President, Am. Bar Ass'n, Address at Am. College of Trial Lawyers on Defense of Attorney Client Privilege (Apr. 8, 2006).

Although the notion of an attorney-client privilege for government lawyers is relatively new,¹³ the underlying principles remain the same.¹⁴ Dean Wigmore provides one of the fundamental descriptions of the privilege in his oft-cited treatise:

(1) Where legal advice of any kind 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.¹⁵

Government lawyers inherently share the “same broad confidentiality obligation” as private sector attorneys.¹⁶ However, this obligation is “tempered by the fact that [the lawyer] has a deeper obligation to the public.”¹⁷ Completely abrogating the privilege would have the effect of placing the government lawyer at a disadvantage in both civil and criminal litigation.¹⁸ Courts have not been clear as to how far the privilege should extend given the unique obligations of government lawyers.¹⁹ Before 1996, there was no legal precedent available on whether the government attorney-client privilege applied in the criminal context.²⁰ This is an important consideration in the assertion of the privilege for government clients

13. See Patricia E. Salkin & Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561, 564 (2006) (noting that prior to 1967 “there was little application of the privilege in the government context at all”).

14. See STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 348 (4th ed. 1986) (explaining that “[o]rganizations like corporations and government entities may claim privilege”).

15. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton rev. 1961); see also Kerri R. Blumenauer, Note, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75, 79 (2006) (listing the elements of the privilege).

16. Clark, *supra* note 3, at 1035.

17. Jack B. Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807, 810 (1966).

18. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE SECOND § 191 (1994) (stating that “[d]enial of the privilege would put public entities at an unfair disadvantage in both criminal prosecutions and civil litigation”).

19. Compare *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (holding that privilege did not extend to the White House), and *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (holding that the President could not invoke the privilege before a federal grand jury), with *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (holding that the Office of the Governor could invoke the privilege in a federal grand jury investigation).

20. Amanda Dickmann, Note, *In re Lindsey: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291, 299–300 (1999).

because “they need the candid legal advice that only the attorney-client privilege can guarantee.”²¹

This idea then ignites the debate as to who exactly is the government attorney’s client.²² Among the possibilities listed by one commentator are the public, the government as a whole, branches of government, agencies, and agency heads.²³ Others have suggested the President as a potential client due to his role as the head of the Executive branch.²⁴ The ABA has clarified that the duty of an organizational lawyer, and therefore representation of a client, extends to governmental organizations as well.²⁵ Identifying the client is critical, as it serves as the “triggering event” for a wide gamut of professional responsibilities.²⁶

A former Attorney General argued for recognizing a higher calling to the public in the performance of a government lawyer’s duty.²⁷ This idea that a government lawyer possesses “a higher duty to the public is not limited to the criminal context.”²⁸ One rationale for this duty could be that the privilege serves to “encourag[e] internal

21. Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1686 (1999).

22. See, e.g., Michael Stokes Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 489 (1998) (“The client is the United States Government.”); Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 710–11 (1999) (recognizing courts’ assumption that “only the government entity, and not its individual employees, has the power to invoke or waive the privilege”). Scholars have long debated who qualifies as the client of the government civil litigator. See Geoffrey P. Miller, Essay, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987) (arguing that the agency or department should be seen as the client).

23. Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991).

24. James R. Harvey, III, Note, *Loyalty in Government Action Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1570 (1996).

25. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 9 (2012) (“The duty defined in this Rule applies to governmental organizations.”). The ABA also notes that defining the client in the government context is an arduous task. *Id.*

26. Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of A Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541, 543 (2004).

27. Griffin Bell, *The Attorney-General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1069 (1978) (“Although our client is the government, in the end we serve a more important constituency: the American people.”).

28. Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 140 (2003).

investigations . . . and ensur[es] future compliance with the law.”²⁹ Others acknowledge the historical justifications for serving the public interest offered by courts and legislatures.³⁰ Further, it is argued that the “government lawyer represents a public-abiding client whose genuine interests” cannot be protected “by the same level of secrecy” as a private client.³¹ For state and municipal government lawyers, this also causes unique concerns when determining whose interests to serve during representation.³²

Another unique circumstance facing government lawyers is the divide over whether the attorney-client privilege can be equally exerted in civil and criminal cases.³³ Most courts have assumed the privilege exists in areas involving civil litigation.³⁴ The Supreme Court has insisted that there is “there is no case authority” justifying a different application “in criminal and civil cases.”³⁵ However, there exists a circuit split regarding the assertion of the government attorney-client privilege before a federal grand jury.³⁶

The Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum* recognized the existence of a government attorney-client privilege but

29. Lisa E. Toporek, Comment, “*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).

30. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 794–97 (2000).

31. Moliterno, *supra* note 10, at 634.

32. See, e.g., *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005) (involving city police department promotion process); State *ex rel* *Thomas v. Schneider*, 130 P.3d 991 (Ariz. Ct. App. 2006) (involving testimony by attorney before grand jury); *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33 (Mass. 2007) (involving conflict with public records law and privilege).

33. See 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, 289–90 (2003) (asserting that there is a “sharp distinction” between applying the privilege in civil and criminal cases despite the warnings this would create a “uncertain privilege”).

34. See *In re Grand Jury Investigation*, 399 F.3d 527, 532–33 (2d Cir. 2005) (citing several cases to support the assumption); *In re Lindsey*, 158 F.3d 1263, 1271 (D.C. Cir. 1998).

35. *Swidler & Berlin v. United States*, 524 U.S. 399, 408–09 (1998) (noting that only “one commentator ventures such a suggestion”).

36. Compare *In re Lindsey*, 158 F.3d 1263 (holding that the President could not invoke the privilege before a federal grand jury), and *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (holding that privilege did not extend to the White House), with *In re Grand Jury Investigation*, 399 F.3d 527 (holding that the Office of the Governor could invoke the privilege in a federal grand jury investigation).

did not find that it extended to the federal grand jury context.³⁷ The court's rationale focused on a weighing of interests and an assertion that the public interest is best served by not recognizing the privilege in "criminal proceedings inquiring into the actions of public officials."³⁸ The D.C. Circuit in *In re Lindsey* also ruled against the privilege utilizing a balancing test.³⁹ There, the court found that the necessity of open government and the sake of the public interest outweighed the potential harms of "chill[ing] some communications between government officials and government lawyers."⁴⁰ The Seventh Circuit, in a case involving state officials, also ruled that the privilege does not extend because government lawyers have a "responsibility to act in the public interest."⁴¹ On the other hand, the Second Circuit has held that the government attorney-client privilege does exist and should be extended in the federal grand jury context.⁴²

Part I of this Note explores the history and fundamental justifications of the attorney-client privilege. Further, it looks at the evolution of the attorney-client privilege as an organizational privilege. Finally, this Part focuses on the limitations of the privilege and its impact on public policy considerations. It specifically highlights the crime-fraud exception as one of the paramount limitations on the attorney-client privilege.

Part II of this Note will explore the rationales of both courts and commentators rejecting the government attorney-client privilege in this context. The rationales supporting an extension of the government attorney-client privilege will then be presented for analysis.

Part III offers a solution for government lawyers who seek to assert the attorney-client privilege. First, it is paramount that government lawyers' clients be clearly identified in the beginning of their representation. To facilitate this process and remove the murkiness that exists, this Note suggests that the client should be defined as the government organization represented by the duly appointed constituents the lawyer seeks to represent. By limiting the representation to this capacity, the lawyer can effectively counsel his

37. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910.

38. *Id.* at 921.

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

40. *Id.* at 1276.

41. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 294 (7th Cir. 2002).

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

or her client and avoid the uncertainty of trying to ascertain what is “in the public interest.” Second, this Note also rejects the balancing test offered by some commentators as impractical and not logically supported by the traditional principles of the attorney-client privilege. Additionally, this Note disputes the idea that the government duty of an official implicates a reduction of the privilege in a criminal context. Finally, this Note argues that a faithful application of the crime-fraud exception would allow the “twin aims” of public interest to be served. A strict adherence to the crime-fraud exception still allows the client to maintain confidentiality and preserve the ethical integrity demanded by public service. It also serves to negate any need for special procedures because the crime-fraud exception serves the necessary limiting function.

I. ATTORNEY-CLIENT PRIVILEGE BACKGROUND AND POLICY JUSTIFICATIONS

This Part is intended to provide a brief introduction to the attorney-client privilege. To fully understand the role of the attorney-client privilege for government lawyers, “a thorough review of the private attorney-client privilege is necessary.”⁴³ This Part will examine the historical background and policy justifications of the attorney-client privilege, recognize the unique nature of entities claiming the privilege, and finally discuss several limitations placed on the privilege.

A. Historical Background and Constitutional Justifications

The attorney-client privilege has deep historical roots in the profession of lawyering.⁴⁴ Dean Wigmore suggested the privilege was “unquestioned” in Elizabethan times and was the “oldest of the privileges for confidential communications.”⁴⁵ It was originally thought to be a way to protect “the oath and honor of the attorney

43. Todd A. Ellinwood, *“In the Light of Reason and Experience”: The Case for A Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291, 1296 (2001).

44. See Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928) (“Advocates equally from very ancient times could not be called as witnesses against their clients while the case was in progress. Cicero in prosecuting the Roman governor of Sicily regrets that he cannot summon the latter’s [attorney].”); see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES* § 5.8 (2d ed. 1999).

45. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290 (John T. McNaughton rev. 1961).

rather than for the apprehensions of his client.”⁴⁶ Blackstone stated in 1768 that no attorney should be forced to reveal secrets entrusted to him by virtue of his position.⁴⁷ The Supreme Court acknowledged early on that the privilege serves as a “seal of secrecy” and is based “upon the necessity, in the interest and administration of justice” to allow for “assistance [that] can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”⁴⁸

Professor Hazard argues that the historical record is best served as an “invitation for reconsideration” of the strength and validity of the privilege.⁴⁹ Other scholars have been resolute in their reliance upon the historical significance of the privilege.⁵⁰ Despite the debate underlying the privilege’s historical foundations, Justice Holmes suggests that understanding the strength of this doctrine requires such an analysis.⁵¹

In addition to the historical analysis of the privilege, there is also a recognition of the constitutional implications of the privilege, particularly in criminal cases.⁵² Courts have found Sixth Amendment violations when there is direct interference with the attorney-client privilege.⁵³ In these cases, the concern is that for effective counsel to

46. *Id.* (emphasis omitted).

47. 3 WILLIAM BLACKSTONE, COMMENTARIES *370 (1768).

48. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

49. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1070 (1978) (“But beyond this, the historical foundations of the privilege are not as firm as the tenor of Wigmore’s language suggests. On the contrary, recognition of the privilege was slow and halting until after 1800 Taken as a whole, the historical record is not authority for a broadly stated rule of privilege.”); *see also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE § 5472 (1st ed. 2012) (“There is no adequate history of the attorney-client privilege.”).

50. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (noting that “the attorney-client privilege has existed for hundreds of years”); Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 480 (2002) (“Attorney-client privilege cases trace back to the 16th century.”).

51. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know.”).

52. *See* Joel D. Whitley, Comment, *Protecting State Interests: Recognition of the State Government Attorney-Client Privilege*, 72 U. CHI. L. REV. 1533, 1536 (2005).

53. *See* *Weatherford v. Burse*, 429 U.S. 545, 554 n.4 (1977); *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) (“Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.”).

exist, “any advice received as a result of a defendant’s disclosure to counsel must be insulated from the government.”⁵⁴ The privilege also draws its constitutional roots in the Fifth Amendment protections against self-incrimination.⁵⁵ Scholars argue that the Fifth Amendment offers “perhaps the clearest support for the attorney-client privilege.”⁵⁶ This argument relies on the fact that “[n]o rational defendant would disclose damning evidence” and therefore the attorney-client privilege plays an integral part in preserving that capacity.⁵⁷

B. Attorney-Client Privilege Promotes Public Policy Through Disclosure and Effective Legal Advice

Among the purposes of the privilege is to “encourage clients to make full disclosure to their attorneys.”⁵⁸ Confidential information obtained in the course of providing legal advice is protected.⁵⁹ Recognizing the public’s interest in achieving justice, the law seeks to safeguard the confidential nature of discussions between a lawyer and a client by “encourag[ing] full and frank communication.”⁶⁰ The principle remains that “[u]nhibited confidence in the inviolability of the relationship is . . . essential to the protection of a client’s legal rights, and to the proper functioning of the adversary process.”⁶¹ As a result, the attorney-client privilege serves to promote the “broader public interests in the observance of law and administration of justice.”⁶²

54. *Levy*, 577 F.2d at 209.

55. *See* Whitley, *supra* note 52, at 1536.

56. Michael Jay Hartman, Comment, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases*, 10 U. PA. J. CONST. L. 867, 872 (2008).

57. Whitley, *supra* note 52, at 1536.

58. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

59. *See id.*

60. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985) (“[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice.”); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

61. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

62. *Upjohn*, 449 U.S. at 389.

The party “seeking to invoke the privilege” has the burden of “establish[ing] all the essential elements.”⁶³ Due to the privilege’s restrictive impact on the fact-finding process, the Court has asserted that evidentiary privileges should “not [be] lightly created nor expansively construed, for they are in derogation of the search of the truth.”⁶⁴ Accordingly, courts have recognized the need to narrowly constrain the attorney-client privilege to a point that is consistent with its underlying purposes.⁶⁵ This constraint is necessary to balance the judicial “tension” caused by an assertion of the privilege.⁶⁶ It also serves to prevent abuse of the privilege.⁶⁷

C. As an Entity Privilege

The government attorney-client privilege is an organizational privilege.⁶⁸ Many commentators often analogize it to the privilege of a corporation.⁶⁹ The privilege was extended in the corporate context as early as 1915.⁷⁰ The Seventh Circuit reiterated that the privilege

63. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991); *see also* *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (“The burden is on the proponent of the attorney-client privilege to demonstrate its applicability.”).

64. *United States v. Nixon*, 418 U.S. 683, 710 (1974); Damin, *supra* note 5, at 1015.

65. *See* *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997).

66. John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 446 (1982) (noting that a “tension exists between the secrecy required to effectuate the privilege and the openness demanded by the factfinding process”).

67. *Clark v. United States*, 289 U.S. 1, 15 (1933) (“The privilege takes flight if the relation is abused.”); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (noting that “the attorney-client privilege cannot at once be used as a shield and a sword”).

68. *See* Ellinwood, *supra* note 43, at 1303.

69. Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 *DRAKE L. REV.* 655, 664 (2000) (“Private corporations provide a setting somewhat analogous to the [government] setting because both involve the privilege as it relates to an organizational client.”). *But see* Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 *IND. L.J.* 469, 494 (2002) (“Even if corporations and government entities were structurally similar, the justification for extending the attorney-client privilege to government would rest on questionable foundations.”).

70. *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915) (“The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known . . . to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.”).

“in its broad sense” should be “available to corporation[s].”⁷¹ The ABA also addresses the concept of entity privilege in the Model Rules of Professional Conduct.⁷² Courts have continued to apply the government attorney-client privilege through the “entity” lens, paralleling the corporate privilege.⁷³ One commentator has asserted that for entities “nearly all the case law concerning the attorney-client privilege . . . involve[s] corporate clients.”⁷⁴

The unique nature of a corporation requires that it “must act through agents.”⁷⁵ As a result, under the corporate privilege, entities hold the privilege, not specific individuals.⁷⁶ This raises difficulties for application of the privilege as there are “often hundreds or even thousands of agents” in one corporation.⁷⁷ Early cases dealing with the corporate privilege developed a variety of tests to determine who could claim the corporation’s privilege.⁷⁸ One of the predominant tests employed was the control-group test.⁷⁹

The leading Supreme Court case involving a claim of corporate privilege, *Upjohn Co. v. United States*,⁸⁰ involved “an internal investigation” by a corporation of “questionable payments” to a

71. *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314, 323 (7th Cir. 1963) (holding that “based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporation[s]”).

72. See MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2012) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

73. *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 621 (D.D.C. 1979); see also Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1734 (1988).

74. See Pincus, *supra* note 11, at 278.

75. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985) (“[A] corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation.”); see also David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 956 (1956).

76. See *Weintraub*, 471 U.S. at 348; see also *In re Richard Roe, Inc.*, 168 F.3d 69, 72 (2d Cir. 1999).

77. See Sexton, *supra* note 66, at 449.

78. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (holding that the privilege applied to any employee within the organization).

79. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (“[I]f the employee making the communication . . . is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.”).

80. 449 U.S. 383 (1981).

foreign government.⁸¹ To determine the scope of the illegal action, Upjohn's general counsel sent out a questionnaire asking for detailed information.⁸² The IRS subsequently requested this material and the corporation denied access, claiming attorney-client privilege.⁸³ The lower court held the corporate context unique and limited the privilege to "senior management."⁸⁴

The Supreme Court recognized the practical difficulties of applying the control-group test.⁸⁵ Chief Justice Rehnquist noted that the questionnaires provided to employees were necessary for the corporation to obtain legal advice.⁸⁶ Each employee's scope of responsibility impacted the investigation "concerning compliance with securities and tax laws, foreign laws."⁸⁷ The Court held that the employee communications were protected against disclosure and supported by the underlying principles of the attorney-client privilege.⁸⁸

D. Limitations on the Attorney Client Privilege

The attorney-client privilege is not absolute.⁸⁹ The exceptions that do exist are few because the privilege itself is inherently embedded with limitations.⁹⁰ One way for the privilege to be pierced is through the client's waiver of the privilege.⁹¹ Clients may impliedly waive the

81. *Id.* at 386.

82. *See id.* at 387.

83. *See id.* at 388.

84. *Id.* at 390 (citations omitted).

85. *Id.* at 393 ("[A]n 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.").

86. *See id.* at 394.

87. *Id.*

88. *See id.* at 395.

89. *See* Jason Greenberg, Comment, Swidler & Berlin v. United States. . . . *And Justice for All?*, 80 B.U. L. REV. 939, 946 (2000) ("Over the years, courts have carved out three main exceptions to the attorney-client privilege.").

90. *See* WRIGHT & GRAHAM, *supra* note 49, § 5501 ("[There are] 'well-established' exceptions to the attorney-client privilege. These exceptions are few in number because, unlike the hearsay rule, most of the policy limitations on the privilege are embedded in the definition of the privilege. It is, therefore, important that lawyers understand that in seeking access to allegedly privileged materials, the exceptions are a last resort.").

91. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("[I]f the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) ("As a general rule, the attorney-client privilege is waived by voluntary

privilege through their conduct or “consent to disclosure.”⁹² The privilege is also waived when a client “voluntarily discloses privileged information to a third party.”⁹³ Testifying at trial is another method of waiving the privilege.⁹⁴

Many other limitations on the government attorney-client privilege originate in the need for open government.⁹⁵ One such limitation is the Freedom of Information Act (FOIA).⁹⁶ Enacted in 1966, FOIA’s primary goal is to create “an open government accountable to the citizenry.”⁹⁷ This allows any citizen to request information from the federal government unless it is specifically excluded under one of nine enumerated exceptions.⁹⁸ Many courts find that exemption five—stating that an agency is permitted to withhold “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”⁹⁹—encompasses the attorney-client privilege.¹⁰⁰ As with the privilege in general, the burden rests on the agency when invoking the exemption.¹⁰¹

disclosure of private communications by an individual or corporation to third parties.”).

92. *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999); *In re Von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987).

93. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991); Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982).

94. Mathew S. Miller, Note, *The Costs of Waiver: Cost-Benefit Analysis as a New Basis for Selective Waiver of Attorney-Client Privilege*, 83 N.Y.U. L. REV. 1248, 1254–55 (2008).

95. See generally Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 189 (2007).

96. 5 U.S.C. § 552 (2006).

97. See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 652 (1984). Wald argues that “[a]n excessive, and sometimes obsessive, passion for governmental secrecy can threaten a secure constitutional democracy.” *Id.* at 654.

98. 5 U.S.C. § 552(b).

99. *Id.* § 552(b)(5).

100. See *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980); *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

101. *Coastal States Gas Corp.*, 617 F.2d at 863.

E. Crime-Fraud Exception

Another frequently invoked exception to the attorney-client privilege is the crime-fraud exception.¹⁰² According to the *Restatement (Third) of the Law Governing Lawyers*, the crime-fraud exception applies when a client:

- (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
- (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.¹⁰³

The purpose of the crime-fraud exception is to keep the attorney-client privilege from "shielding from prosecution" a client who uses his attorney's advice "to initiate or continue a fraudulent or criminal activity."¹⁰⁴ It functions to prevent abuses and "secur[e] the integrity of the trial process."¹⁰⁵ A myriad of options can give rise to the need for the crime-fraud exception.¹⁰⁶ The fact that a client may be culpable or engaging in other criminal activity does not automatically invoke the exception.¹⁰⁷ An attorney's knowledge or awareness of his client's intent does not matter for purposes of the exception.¹⁰⁸ The client's specific understanding of whether the act he is communicating about is criminal is also irrelevant.¹⁰⁹ What does matter for the purposes of the exception is the "client's intent at the time he sought

102. See Geraldine Gauthier, Note, *Dangerous Liaisons: Attorney-Client Privilege, the Crime-Fraud Exception, ABA Model Rule 1.6 and Post-September 11 Counter-Terrorist Measures*, 68 BROOK. L. REV. 351 (2002).

103. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

104. Rachel A. Hutzler, Note, *Evidence: The Crime Fraud Exception to Attorney-Client Privilege—United States v. Zolin*, 109 S. Ct. 2619 (Interim Ed. 1989), 15 U. DAYTON L. REV. 365, 372 (1990).

105. Colin Miller, *The Purpose-Driven Rule: Drew Peterson, Giles v. California, and the Transferred Intent Doctrine of Forfeiture by Wrongdoing*, 112 COLUM. L. REV. SIDEBAR 228, 235 (2012).

106. Hutzler, *supra* note 104, at 372 (listing conspiracy, "solicitation of illegal assistance," and "performance of legal services without the attorney knowing of the client's tortious or criminal purpose" as possible actions warranting the exception).

107. *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[T]he crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud.").

108. *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001).

109. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 cmt. c (2000) ("The client need not specifically understand that the contemplated act is a crime or fraud.").

the attorney's advice."¹¹⁰ One should not be able to obtain protection for communications that were received through bad faith.¹¹¹

The Court first addressed the crime-fraud exception in *Clark v. United States*.¹¹² *Clark* involved the issue of a juror being charged with criminal contempt for providing misleading statements.¹¹³ The Court recognized a need for the privilege to be overcome in circumstances of that nature.¹¹⁴ Over fifty years later, the Court expanded its jurisprudence in this area in *United States v. Zolin*, a case involving an IRS investigation into L. Ron Hubbard, the Church of Scientology founder.¹¹⁵

The *Zolin* Court created a two-part test for determining whether the crime-fraud exception applies.¹¹⁶ In doing so, the Court did not rule on "the quantum of proof necessary ultimately to establish . . . the crime-fraud exception."¹¹⁷ It first ruled that in camera inspections of privileged materials could be an appropriate method of reviewing privileged materials.¹¹⁸ Before allowing the in camera inspection, the Court determined a threshold should be met.¹¹⁹ To properly invoke this exception, the moving party must establish a prima facie case.¹²⁰

110. Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583, 585 (2003).

111. H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191, 1216-17 (1999).

112. 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.")

113. *Id.* at 6.

114. *Id.* at 14 ("[T]he privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued.")

115. *United States v. Zolin*, 491 U.S. 554 (1989).

116. *Id.* at 572 (requiring first "a showing of a factual basis adequate to support a good faith belief by a reasonable person" that an in camera review of materials "may reveal evidence to establish the claim" and second, allowing for an "in camera review to determine the applicability of the crime-fraud exception").

117. *Id.* at 563.

118. *Id.* at 565 ("We conclude that no express provision of the Federal Rules of Evidence bars . . . in camera review, and that it would be unwise to prohibit it in all instances as a matter of federal common law.")

119. *Id.* at 570 ("In addressing this question, we attend to the detrimental effect, if any, of in camera review on the policies underlying the privilege and on the orderly administration of justice in our courts. We conclude that some such showing must be made.")

120. *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (noting that a prima facie case has "[evidence] [s]uch as will suffice until contradicted and overcome by other evidence . . . [a] case which has proceeded upon sufficient

Professor Fried notes that courts recently have begun to favor a “lesser burden.”¹²¹ This may be in part due to the fact that courts struggle with determining what reaches this “required evidentiary level.”¹²² What is clear is that courts have repeatedly held conclusory allegations of fraud to be insufficient to invoke the crime-fraud exception.¹²³

II. DISPUTE OVER WHETHER THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE SHOULD EXIST IN A FEDERAL GRAND JURY PROCEEDING

Most courts agree that government attorneys can claim attorney-client privilege in a civil context.¹²⁴ Where the circuits split is whether that same privilege can be invoked when a government attorney is called before a grand jury.¹²⁵ Cases arising out of the Eighth and D.C. Circuits during the Whitewater investigation rejected the extension of the privilege between confidential communications of the Office of the White House Counsel and the Office of the President.¹²⁶ The Seventh Circuit, following the rationale of these two circuits, also denied the privilege in a case involving an investigation into a potential “licenses for bribes” scheme by the Illinois Secretary of State.¹²⁷ The Second Circuit, however, broke from the ranks in 2005 and upheld the government attorney-client privilege in the grand jury

proof to that stage where it will support [a] finding if evidence to the contrary is disregarded” (citation omitted)).

121. David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 462 (1986).

122. Christopher Paul Galanek, Note, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1125 (1990).

123. *Clark v. United States*, 289 U.S. 1, 15 (1933) (“It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.” (citations omitted)); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1997) (finding it insufficient when the government “allege[s] that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud”).

124. Damin, *supra* note 5, at 1010.

125. See discussion *infra* Part II and accompanying notes.

126. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

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

setting.¹²⁸ Shortly thereafter, they again reiterated support for the government attorney-client privilege in *In re County of Erie*.¹²⁹

Courts recognize that the purpose of the attorney-client privilege is to promote a broad public interest by encouraging client candor and increasing the frankness of communications between clients and their attorneys.¹³⁰ Government entities are also seen as being “well-served by the privilege” in the civil context.¹³¹ In a criminal grand jury proceeding, however, courts and commentators have questioned the rationale for the privilege claimed by government officials and the entities they represent.

Part II of this Note presents and analyzes the arguments for and against the recognition of the government attorney-client privilege in the federal grand jury context. Part II.A provides the rationale of the courts and commentators that have declined to extend the government attorney-client privilege in that context. Part II.A.1 presents the argument that the underlying rationale for the corporate privilege does not justify its application in the government context. Part II.A.2 analyzes the argument that creating an open and honest government is the paramount public interest that should be weighed. Part II.A.3 offers the viewpoint that client candor is not increased through an application of the attorney-client privilege. Part II.A.4 articulates the argument that other privileges provide adequate protection to confidential matters between a government attorney and his client.

Part II.B presents an integrated analysis of the opposing rationales provided in support of extending the government attorney-client privilege in the federal grand jury context. Part II.B.1 asserts that the corporate analogy is relevant to the consideration of a government attorney-client privilege. Part II.B.2 articulates the argument that denying open discussions has a detrimental impact on society as a whole. Part II.B.3 presents the position that full and frank communications are just as important in the public context as the private context. Finally, Part II.B.4 argues that other recommended privileges are insufficient to guard the confidential information protected via the attorney-client privilege.

A. Declining to Extend the Government Attorney-Client

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

129. 473 F.3d 413 (2d Cir. 2007).

130. See Blumenauer, *supra* note 15, at 93.

131. *Ross v. City of Memphis*, 423 F.3d 596, 603 (6th Cir. 2005).

Privilege in the Federal Grand Jury Context

Two prominent cases arose during the Clinton Whitewater scandal that laid the foundation for the rationale that the government attorney-client privilege should not extend in matters before a federal grand jury. The Seventh Circuit followed this rationale in denying the privilege in a case involving a state official in a “licenses for bribes scandal.”¹³² The reasoning that each court followed is presented in chronological order as a framework to highlight how the concept of the privilege evolved between the three cases.

1. *In re* Grand Jury Subpoena Duces Tecum

In 1996, while serving as Independent Counsel during the Whitewater investigation, Kenneth Starr served a grand jury subpoena upon the White House requiring the production of documents created in meetings that “pertain[ed] to several Whitewater-related subjects.”¹³³ The White House failed to produce the requested documents asserting the materials were protected by the attorney-client privilege in addition to other privileges.¹³⁴ The Office of the Independent Counsel (OIC) then moved to compel disclosure of two previously requested sets of documents.¹³⁵

The first set of notes in question involved a meeting on July 11, 1995, between Mrs. Clinton, Jane Sherburne (Special Counsel to the President), and Mrs. Clinton’s private attorney, David Kendall.¹³⁶ The subject matter of this meeting was Mrs. Clinton’s activities following the untimely death of Vincent Foster.¹³⁷ The second set of notes was taken at various meetings on January 26, 1996 between Mrs. Clinton, Mr. Kendall, Ms. Seligman, and John Quinn (Counsel to the President).¹³⁸ These meetings involved the topic of the discovery of billing records from the Rose Law Firm in the White House residency.¹³⁹ Judge Wright held that the attorney-client

132. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d at 289.

133. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 913 (8th Cir. 1997). In his role as Independent Counsel, Kenneth Starr was assigned to investigate the Whitewater matter and to pursue evidence of any related crimes involving President and Mrs. Clinton’s relationship to certain banking and investing organizations. *Id.*

134. *Id.* at 913–14. The White House did note the existence of nine sets of documents that were responsive to the subpoena request. *Id.* at 913.

135. *Id.* at 914.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

privilege applied because “Mrs. Clinton and the White House had a ‘genuine and reasonable (whether or not mistaken)’ belief that the conversations at issue were privileged.”¹⁴⁰ The OIC appealed this decision and the Eighth Circuit reversed and remanded.¹⁴¹

The Eighth Circuit began its explanation by acknowledging the need to “apply the federal common law of attorney-client privilege to the situation presented by this case.”¹⁴² Using Proposed Federal Rule of Evidence 503 as “a useful starting place,” the Eighth Circuit noted that the rule and other commentary would only serve the “broad proposition” that a governmental body may be a client.¹⁴³ Noting a lack of case law supporting the White House’s position that the privilege exists in the criminal context, the Eighth Circuit then looked to general principles regarding privileges.¹⁴⁴ Noting that privileges are exceptions,¹⁴⁵ rather than standards, the court then focused on the main underlying principles that lie at the heart of the case.¹⁴⁶

The Eighth Circuit recognized that organizations had privileges in criminal cases, but noted there are “important differences” between governments and corporations and therefore rejected the argument offered by the White House based on the *Upjohn* rationale.¹⁴⁷ The court noted in particular that the White House could not be subject to criminal liability.¹⁴⁸ The court also found significant the existence of a statutory reporting requirement for executive officials regarding criminal wrongdoing.¹⁴⁹ Central to the opinion was the idea that the

140. *Id.* (citations omitted).

141. *Id.* at 925–26.

142. *Id.* at 915.

143. *Id.* at 915–16. The Eighth Circuit also conducted an analysis of the *Restatement (Third) of the Law Governing Lawyers* and the *Uniform Rules of Evidence* regarding the specific issue at hand. *Id.* at 916. The court noted the Restatement provided instructive language regarding the complexities of the exercise of the attorney-client privilege in intra-governmental conflicts, but looked to case law to refine the principles. *Id.*

144. *Id.* at 918.

145. *Id.* (“Federal common law recognizes a privilege only in rare situations.”). Among the exceptions the court cited to: psychotherapist-patient privilege, corporation attorney-client privilege, and qualified executive privilege. *Id.*

146. *See id.* at 919.

147. *Id.* at 920.

148. *Id.*

149. *Id.* The statute in question is 28 U.S.C. § 535(b) (2006). The relevant portion states: “[a]ny information . . . received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General.” *Id.*

weight of the public interest is greater than the need for confidentiality for the government attorney.¹⁵⁰ The court ultimately held that “the White House may not use the attorney-client privilege” to avoid producing the documents the OIC requested under subpoena.¹⁵¹

2. *In re Lindsey*

The prosecutorial jurisdiction for the OIC was expanded in 1998 to consider matters beyond the financial issues surrounding Whitewater, namely possibly perjured testimony in the lawsuit by Paula Jones against President Clinton.¹⁵² The grand jury issued a subpoena for Bruce Lindsey, Deputy White House Counsel and the President’s personal attorney, to testify regarding any information he may have related to the perjury claims surrounding the Jones lawsuit.¹⁵³ In three appearances before the grand jury, Lindsey invoked the attorney-client privilege and failed to address the questions presented to him.¹⁵⁴ Chief Judge Johnson, on a motion by the OIC, compelled disclosure of the requested documents.¹⁵⁵ The President appealed the decision, and the case proceeded to the D.C. Circuit.¹⁵⁶

The D.C. Circuit, in a per curiam opinion, recognized that a government attorney-client privilege exists for public requests for information, and is guided by recognized common law principles.¹⁵⁷

150. *Id.* at 921 (“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.”).

151. *Id.* at 924.

152. *In re Lindsey*, 158 F.3d 1263, 1266–67 (D.C. Cir. 1998) (stating the order expanding jurisdiction authorized investigation into “whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law”).

153. *Id.*

154. *Id.* Lindsey also claimed executive privilege, personal attorney-client privilege and work product privilege. *Id.* This Note focuses only on the government attorney-client privilege, though the other claimed privileges do raise interesting constitutional and ethical concerns as well.

155. *Id.* (“[T]he privilege is qualified in the grand jury context and may be overcome upon a sufficient showing of need for the subpoenaed communications and unavailability from other sources.”).

156. *Id.*

157. *See id.* at 1268–69. The court provides as examples cases involving the Freedom of Information Act (FOIA), and the use of exemption five. *Id.* at 1268. Additionally, the D.C. Circuit looked to Proposed Rule 503 as evidence of the federal common law. *Id.* at 1269.

In addition, the court noted in practice that government attorneys evinced a “common understanding” of the privilege’s function in litigation involving FOIA requests and individual suits against government officials.¹⁵⁸ The court noted, however, that the claimed privilege applied only to legal advice provided.¹⁵⁹ Finding at least one occasion of legal advice, the D.C. Circuit attempted to decide “whether the government attorney-client privilege could be invoked in these circumstances.”¹⁶⁰

The court first rejected the line of cases arising out of the FOIA exemption as “not necessarily control[ing] the application of the privilege.”¹⁶¹ The court’s analysis focused on the competing considerations presented when two government entities face each other in litigation.¹⁶² The court reasoned that the complex structure, tradition, and function of government operations should be considered when deciding upon an “expansion of the privilege to all governmental entities” across all types of litigation.¹⁶³

The main policy argument presented again revolved around the public interest in disclosure.¹⁶⁴ The court asserted that public trust “strongly militates” against allowing the privilege to exist in a criminal investigation of government wrongdoing.¹⁶⁵ Invoking Madisonian principles, the D.C. Circuit argued that “transparent and accountable government” protects the public trust.¹⁶⁶ Citing to Robert Bork, among others, the court also strongly suggested the government counsel’s role in reporting wrongdoing is instrumental in

158. *Id.* The court cited to letters provided by Theodore Olson and Antonin Scalia in their former official capacities as Assistant Attorney Generals in the Office of the Legal Counsel (OLC). *Id.*

159. *Id.* at 1270 (“Thus, Lindsey’s advice on political, strategic, or policy issues . . . would not be shielded from disclosure by the attorney-client privilege.”).

160. *Id.* at 1271.

161. *Id.*

162. *Id.* at 1271–72.

163. *Id.* at 1272.

164. *See id.* at 1273 (“Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.”).

165. *Id.*

166. *Id.* at 1273–74 (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910))).

protecting the public trust.¹⁶⁷ While the court noted that limiting the privilege in the grand jury context may “chill some communications” between the client and advocate, it found this to be an acceptable course of action.¹⁶⁸ The court ultimately held that government attorneys could not invoke the attorney-client privilege in the same manner as private counsel, especially in the grand jury context, due to significant public interest concerns.¹⁶⁹

3. *In re* A Witness Before the Special Grand Jury

The issue of attorney-client privilege in the context of a federal criminal investigation was expanded beyond federal executive officials in a case before the Seventh Circuit.¹⁷⁰ The federal government during “Operation Safe Road” was investigating the Illinois Secretary of State’s Office for an alleged “licenses for bribes” scheme.¹⁷¹ The federal government sought the cooperation of Roger Bickel, who had been serving as the Secretary of State’s legal counsel.¹⁷² However, the former Secretary (and later Governor), George Ryan, informed Bickel that he had not waived the attorney-client privilege regarding any of his prior conversations with Bickel.¹⁷³ After serving a subpoena for Bickel to appear before the grand jury, the government moved to compel him to testify.¹⁷⁴ Chief Judge Aspen granted the motion and Ryan appealed.¹⁷⁵

The Seventh Circuit held that the client for whom the privilege applies is the State of Illinois.¹⁷⁶ This presented a unique challenge to the court in addressing the issue of whether the privilege differs

167. *Id.* at 1275. While serving as Solicitor General during the Nixon Administration, Bork, when offered a position on the President’s legal team, stated: “A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I’ll have to turn it over. I won’t be able to sit on it like a private defense attorney.” *A Conversation with Robert H. Bork*, 1998 D.C. BAR REP. 9.

168. *See In re Lindsey*, 158 F.3d at 1276.

169. *Id.* at 1278.

170. *See In re* A Witness Before the Special Grand Jury 2000–2, 288 F.3d 289, 290 (7th Cir. 2002).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 290–91.

175. *Id.* at 291.

176. *Id.*

between civil and criminal contexts.¹⁷⁷ The Seventh Circuit asserted that “government lawyers have a higher, competing duty to act in the public interest.”¹⁷⁸ The court also noted that government lawyers are funded by the public and this would be a “misuse of public assets” to allow the privilege in a criminal investigation.¹⁷⁹ The court reasoned that because the privilege extends to the office, and not an individual, to offer it as an incentive for compliance is unnecessary.¹⁸⁰ The court asserted that the public interest and “lack of criminal liability for government agencies” balanced against any potential need for the privilege.¹⁸¹

4. *Categorical Arguments Against Extending the Government Attorney-Client Privilege in the Federal Grand Jury Context*

a. *Corporate Privilege Rationale Does Not Extend to the Government Context*

Professor Melanie B. Leslie argues that the premise that a government entity is similar to a corporate entity is based upon a “shaky foundation.”¹⁸² Other scholars have argued that justifying a privilege to government organizations is “even more fallacious” when compared to a corporate entity privilege.¹⁸³ The Eighth Circuit reasoned that there exist “important differences between the government and nongovernmental organizations” which caution “against the application of the principles of *Upjohn*.”¹⁸⁴

Professor Leslie asserts through an analysis of pre-conduct and post-conduct legal advice the instrumental distinctions that mar the comparison between corporate and government entities.¹⁸⁵ One such distinction that can be drawn is that government officials serve in

177. *See id.* at 291–92 (discussing other courts and leading treatises treatment of the privilege regarding private parties in a criminal context and how the government attorneys privilege is viewed differently).

178. *Id.* at 293.

179. *Id.*

180. *Id.* at 294.

181. *Id.*

182. Leslie, *supra* note 69, at 472–73.

183. James A. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 309, 379 (1963).

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

185. *See* Leslie, *supra* note 69, at 498–511 (discussing the differences between corporate entities and government entities in the rationale for seeking pre-conduct and post-conduct legal advice).

positions of public trust.¹⁸⁶ This position of trust weighs against using a corporate based rationale for government officials as they are not driven by the same “profit motives of corporations.”¹⁸⁷ The government’s obligation to serve the public interest in litigation serves as a key distinction between government and private lawyers.¹⁸⁸ Further, government officials possess “little incentive to push official conduct to or past the law’s boundaries.”¹⁸⁹ Rather, because government officials serve in a public capacity, they should “favor disclosure over concealment.”¹⁹⁰ The Eighth Circuit found this difference to be “perhaps, by itself, reason enough to find [the corporate analogy] unpersuasive in this case.”¹⁹¹

According to the Eighth Circuit, another key difference is that government entities cannot be subject to criminal penalties like those a corporation could possibly face.¹⁹² A corporation has a distinct interest in discovering employee misconduct in order to protect itself.¹⁹³ On the contrary, government entities have a statutory responsibility to report employee misconduct.¹⁹⁴ In fact, the “investigation and punishment of wrongdoing” by government officials is a central “function[] of the executive branch of government.”¹⁹⁵ The existence and survival of a government entity does not rest upon their pursuit of “competitive success” by eliminating wrongdoing.¹⁹⁶ Due to mandatory reporting requirements, there is no justification for using the “attorney-client privilege as an incentive to increase compliance with the laws.”¹⁹⁷

186. *Id.* at 496.

187. *See* Barsdate, *supra* note 73, at 1740–41.

188. *Id.* at 1738.

189. Leslie, *supra* note 69, at 498–99.

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

191. *Id.*

192. *Id.* (“A corporation, in contrast, may be subject to both civil and criminal liability for the actions of its agents, and corporate attorneys therefore have a compelling interest in ferreting out any misconduct by employees.”).

193. Leslie, *supra* note 69, at 521–22.

194. *In re* *Grand Jury Subpoena Ducus Tecum*, 112 F.3d at 920.

195. Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 34 (2003).

196. Barsdate, *supra* note 73, at 1741.

197. *In re* A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 293–94 (7th Cir. 2002).

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b. Open and Honest Government Is the Paramount Public Interest

Another argument against the government attorney-client privilege is that “[p]rivileges are in direct conflict with open government.”¹⁹⁸ The government possesses a unique responsibility to provide information to the public “concerning government operations.”¹⁹⁹ If the people are not aware of what the government is doing, “then this premise is little more than an empty promise.”²⁰⁰ Maintaining an open government is often recognized as being “crucial to ensuring that the people remain in control.”²⁰¹ This has been a central tenet of our government since the beginning of the democracy.²⁰² Courts have recognized allowing government secrecy will cause “[d]emocracies [to] die behind closed doors.”²⁰³

Supporting this idea, Professor Moliterno argues that the government has taken steps to avoid a secretive government.²⁰⁴ Among the significant steps taken is the passage of federal open government laws like FOIA.²⁰⁵ These laws help to “ensure an informed citizenry” and assist in “check[ing] against corruption.”²⁰⁶ These laws do not make all government-related information available to the public, however, and thus have a limited reach.²⁰⁷

c. Client Candor Is Not Increased Through Preservation of the Privilege

Further distinguishing the government privilege is the rationale that the “disincentives to candor” do not apply to government employees.²⁰⁸ This argument centers on the government’s claim of

198. See Gowdy, *supra* note 22, at 720.

199. See Barsdate, *supra* note 73, at 1735.

200. See Clark, *supra* note 3, at 1047.

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

202. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (“In the ultimate, an informed public opinion is the most potent of all restraints upon misgovernment.”).

203. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

204. See Moliterno, *supra* note 10, at 636 (“The government has expressed this preference by enacting statutes that either command or encourage revelation of government wrongdoing.”).

205. Clark, *supra* note 3, at 1046 (listing FOIA, the Privacy Act of 1974, Government in the Sunshine Act, Federal Advisory Committee Act, and the Presidential Records Act of 1978 as examples of open government statutes).

206. *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

207. Mika C. Morse, Note, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 *GEO. J. LEGAL ETHICS* 421, 435 (2010).

208. See Leslie, *supra* note 69, at 499.

privilege involving materials that are not confidential, which would “serve[] no compelling purpose.”²⁰⁹ In the post-conduct context, Leslie argues that the government structure impacts an employee’s desire to even claim the privilege.²¹⁰ Leslie finds it more likely, during litigation, that the government entity would waive the privilege, thus reducing an employee’s reliance on it.²¹¹ Berenson expands on this idea by arguing that “the government attorney’s responsibility to serve the public interest” is clarified in areas traditionally litigated by the government attorney.²¹² This requires the government attorney to “determine whether the public official is acting in accord with the law” and only represent those individuals.²¹³

Another commentator, Bryan Gowdy, argues that the idea of encouraging client candor is “too speculative” in the government context.²¹⁴ This relationship fails because the government employee’s communications with government attorneys often “do not contain confidential facts about the agency.”²¹⁵ Noting the distinctive interests served by corporate and government attorneys, it is argued that government officials possess “a constitutional duty to faithfully execute the laws.”²¹⁶ They have a duty to “seek a fair result beyond . . . the interests of the government client.”²¹⁷ This has the effect of forcing the “government lawyer to yield[] to the moral force pressing for revelation.”²¹⁸ As a result, the privilege is rendered unnecessary for the government official who has uncertainty about the applicable law.²¹⁹

Leslie supports the Eighth Circuit’s reasoning by arguing that “a broad government attorney-client privilege is not justified.”²²⁰ Leslie instead argues for a “level[ing] of the playing field” as the limited justification for the government attorney-client privilege.²²¹ This

209. *Id.*

210. *See id.* at 506 (“The government employee in serious trouble is unlikely to talk to government counsel, privilege or no privilege, because she knows that if she does, her superiors will shortly learn the truth.”).

211. *See id.* at 507.

212. *See* Berenson, *supra* note 30, at 801.

213. Josephson & Pearce, *supra* note 4, at 556.

214. *See* Gowdy, *supra* note 22, at 718.

215. *See* Leslie, *supra* note 69, at 499.

216. *See* Gowdy, *supra* note 22, at 719.

217. *See* Barsdate, *supra* note 73, at 1738.

218. *See* Moliterno, *supra* note 10, at 635.

219. *See* Gowdy, *supra* note 22, at 719–20.

220. Leslie, *supra* note 69, at 526.

221. *Id.* at 527.

justification, however, would only be allowed in cases of trial preparation.²²² Ultimately, Leslie argues that the underlying assumptions of the government attorney-client privilege are a “fiction.”²²³ Instead, she contends that by limiting the privilege it “would make government entities more accountable to the citizens they serve.”²²⁴

d. Other Privileges Can Provide Sufficient Protection to Confidential Materials

Gowdy does recognize the government’s need for secrecy in some respects, but argues there are more appropriate tools than the attorney-client privilege to protect that need.²²⁵ The work-product doctrine is suggested as one way to protect the “government party’s strategic interests in litigation.”²²⁶ This protection stems from the needs of the attorney to adequately prepare a client’s case without “undue and needless interference.”²²⁷ The work product doctrine drastically reduces an opponent’s access to materials “prepared in anticipation of litigation or for trial.”²²⁸ Information may fall under both the work-product and attorney-client privileges, creating overlap in protection of the information.²²⁹ Failure to protect this information would run afoul of strong public policy considerations.²³⁰ Moliterno also recognizes certain “discrete areas of protection” but otherwise suggests, in cases of wrongdoing, a “government lawyer should reveal information about a client that a private lawyer would protect.”²³¹

Professor Leslie suggests that “top government officials” may be encouraged to openly communicate with their counsel as a result of the attorney-client privilege, but the executive privilege adequately

222. *Id.* at 528 (“The need to provide a level playing field in litigation also justifies extending work-product-like protection to oral statements made by government employees . . . in preparation of litigation.”).

223. *Id.* at 550.

224. *Id.*

225. Gowdy, *supra* note 22, at 720 (“Government lawyers need confidentiality when preparing strategies for upcoming litigation. The work product privilege serves this need by protecting an attorney’s mental impressions.”).

226. Barsdate, *supra* note 73, at 1743.

227. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

228. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (quoting FED. R. CIV. P. 26(b)(3)).

229. *See* Salkin & Phillips, *supra* note 13, at 604.

230. *See id.* at 605.

231. *See* Moliterno, *supra* note 10, at 642.

protects the government's need for confidentiality.²³² She argues this is the "best mechanism" to adequately "balance the need for confidentiality with the public welfare."²³³ Barsdate suggests that information should not be disclosed under these circumstances due to the possible "danger to the public interest."²³⁴ The D.C. Circuit asserts that given the circumstances surrounding claims of executive privilege, "the need for secrecy" is arguably greater than for claims under other forms of privilege.²³⁵ It is cautioned, however, that the executive privilege is meant only serve to protect "frank debate between [the] President and advisers."²³⁶

The Eighth Circuit reasoned that the executive privilege may also apply differently in criminal and civil contexts.²³⁷ The *Nixon* court gave rise to the concept of a qualified executive privilege when it reasoned that allowing a claim of executive privilege "would cut deeply into the guarantee of due process of law" and further "gravely impair the basic function of the courts."²³⁸ As a result, the *Nixon* court held that "privilege must yield" to the specific need for evidence in a criminal trial.²³⁹

B. Extending the Government Attorney-Client Privilege in the Federal Grand Jury Context

In 2005, the Second Circuit split from the other circuits in allowing the assertion of the government attorney-client privilege in a grand jury proceeding for subpoenaed documents and communications. Utilizing a rationale similar to that of the other circuit courts, the Second Circuit instead came out on the side of preserving the privilege in this context. Following up shortly on this reasoning, the Second Circuit held in 2007 that the government attorney-client

232. See Leslie, *supra* note 69, at 496.

233. *Id.* at 473.

234. Barsdate, *supra* note 73, at 1744.

235. *In re Lindsey*, 158 F.3d 1263, 1277 (D.C. Cir. 1998). However, the D.C. Circuit did not get a chance to address the claim of executive privilege, as that issue was not on appeal before the court.

236. Dickmann, *supra* note 20, at 296 (citing *In re Lindsey*, 158 F.3d at 1285 (Tatel, J., dissenting)).

237. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 917–18 (8th Cir. 1997).

238. *United States v. Nixon*, 418 U.S. 683, 712 (1974).

239. *Id.* at 713.

privilege could apply “[a]t least in civil litigation between a government agency and private litigants.”²⁴⁰

1. *In re* Grand Jury

The Second Circuit countered the growing restriction of the government attorney-client privilege in 2005 when Anne George, former Chief Legal Counsel to the Office of the Governor of Connecticut was called to testify before a federal grand jury.²⁴¹ The investigation there involved questions over whether then-Governor Rowland had received gifts for “favorable negotiation and awarding of state contracts.”²⁴² The government moved to compel George’s testimony, and the district court withheld decision pending her appearance before the grand jury.²⁴³ Once she appeared, the district court ordered George to testify.²⁴⁴ This decision was appealed by then-Governor Rowland and the Office of the Governor.²⁴⁵

The court began its analysis by framing the issue in terms of whether the Office of the Governor could claim the privilege under the Federal Rules of Evidence.²⁴⁶ The court noted that the principle of the privilege is “well-established” despite the limited application of case law to the specific circumstances before it.²⁴⁷ Although historical determinations of the purpose and scope of the privilege have waived, the court asserted that the fundamental underpinnings remain consistent.²⁴⁸ The Second Circuit agreed with the other circuits that promotion of the public interest is an integral factor in considering the applicability of the privilege.²⁴⁹ The court

240. *In re* County of Erie, 473 F.3d 413, 419 (2d Cir. 2007).

241. *In re* Grand Jury Investigation, 399 F.3d 527, 528 (2d Cir. 2005).

242. *Id.* at 528–29.

243. *See id.* at 529.

244. *See id.* at 530 (noting that it was “undisputed that the grand jury need[ed] the information it [sought] to obtain from Ms. George,” the district court concluded that “[r]eason and experience dictate 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”).

245. *Id.*

246. *Id.* (“Our determination of whether the Office of the Governor may claim a privilege, then, requires us to ascertain ‘the principles of the common law’ and to apply them ‘in the light of reason and experience.’ In doing so . . . Rule 501 plainly requires that we apply the federal law of privilege.”).

247. *Id.*

248. *Id.* at 531.

249. *See id.* (“Nevertheless, courts have by reason and experience concluded that a consistent application of the privilege over time is necessary to promote the rule of

distinguished its opinion by arguing that the public interest is not as clear as other courts contend.²⁵⁰

The court rejected the idea that the privilege should be weaker in the government context.²⁵¹ While recognizing an inherent difference between public and private lawyers, the Second Circuit found no reason to “jettison [the] principle” supporting the attorney-client privilege.²⁵² The court also found the argument that government lawyers could consult private counsel in criminal matters insufficient to weaken the privilege.²⁵³ Rather than creating a balancing test, the court recognized the traditional doctrines that seek to limit “egregious abuses” of the privilege.²⁵⁴ The court found the Government’s arguments over the functionality of the privilege in the grand jury context to be “illusory” and “potentially dangerous.”²⁵⁵ In reversing the district court, the Second Circuit did not “extend” the privilege, but rather argued against its abrogation in the government context.²⁵⁶

2. *In re* County of Erie

The Second Circuit re-visited the government attorney-client privilege in a 2007 case involving a § 1983 claim against unconstitutional strip searches in the Erie County Correctional Facility.²⁵⁷ The exertion of the privilege revolved around e-mail documents concerning the policy and legal ramifications of the program of strip searches.²⁵⁸ While the central focus of the case concerned the content of the “privileged” documents, the court re-asserted the necessity for a government lawyer attorney-client privilege.²⁵⁹ Noting that the privilege “accommodates competing

law by encouraging consultation with lawyers, and ensuring that lawyers, once consulted, are able to render to their clients fully informed legal advice.”).

250. *See id.* at 534 (“One could as easily conclude . . . 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.”).

251. *See id.* (“We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context.”).

252. *Id.* at 535.

253. *See id.*

254. *Id.* (noting that the “crime-fraud exception” is one such traditional limitation).

255. *Id.* at 536.

256. *Id.* (“[W]e have simply refused to countenance its abrogation in circumstances to which its venerable and worthy purposes fully pertain.”).

257. *See In re* County of Erie, 473 F.3d 413, 415–16 (2d Cir. 2007).

258. *See id.* at 416.

259. *Id.* at 416–22.

values,” the Second Circuit reasoned this accommodation is “sharpened” in the government lawyer context.²⁶⁰ According to the court, legal advice given to government officials who formulate policy is fundamental to “promot[ing] broader public interests.”²⁶¹

3. Categorical Arguments for Government Attorney-Client Privilege in Federal Grand Jury Context

Courts and commentators offer varying justifications for support of the government attorney-client privilege generally, as well as in the narrow context of a federal grand jury. One such justification for the government attorney-client privilege can be found in the leading treatise on federal practice and procedure.²⁶² The rationale for the privilege there is:

1) Other governmental privileges do not deal with the unique requirements of attorney confidentiality; 2) the court’s ability to apply the privilege to private parties may be a better source of regulation than expanding other government privileges; 3) denying elected officials open discussions about pending litigation with counsel would be detrimental to society as a whole; 4) full and frank disclosure is just as important in the public context as it is in the private context; 5) without the privilege, government may be required to fight with one hand behind its back; and 6) when a municipality has its own staff of lawyers, courts may analogize the privilege as applied to in-house corporate counsel.²⁶³

Supporters of the government attorney-client privilege in the grand jury context rely upon several of these principles when invoking their arguments. This section will focus upon four predominant rationales upon which courts and commentators consistently rely. They are presented in order of how they are addressed by the opposition against the assertion of a government attorney-client privilege for the sake of continuity.

260. *Id.* at 418–19 (“On the one hand, non-disclosure impinges on open and accessible government. On the other hand, public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest.” (citations omitted)).

261. *Id.* at 419.

262. See Salkin, *supra* note 33, at 288.

263. See WRIGHT & GRAHAM, *supra* note 49, at 127–28.

a. *Corporate Analogy Is Relevant to a Consideration of the Government Attorney-Client Privilege*

Because the government attorney-client privilege is an organizational privilege, it is argued that an understanding of the privilege in the corporate context is relevant.²⁶⁴ The drafters of the *Restatement (Third) of the Law Governing Lawyers* suggest that the rationale and objectives of the organizational attorney-client privilege “apply in general to governmental clients.”²⁶⁵ Supporters of applying the *Upjohn* entity privilege to the government note that the case did not center on the fact that a corporation could not be prosecuted for a crime.²⁶⁶ Rather, they focus on the need for government officials to receive sound legal advice, similar to that of officials in positions of responsibility for corporations.²⁶⁷ Scholars contend that the attorney-client privilege “is intended to encourage employees and officials to disclose the truth” so that their organizations and entities are in “compliance with the law.”²⁶⁸ As Professor Rice argues, for any justification of the privilege in the corporate context, “the need within the government is equal, if not greater.”²⁶⁹

Another aspect of *Upjohn* pointed to by supporters is its consistency with supporting the public interest.²⁷⁰ Allowing a corporation to use the privilege provides corporate counsel an opportunity to make significant efforts to provide legal advice in areas that are “hardly . . . instinctive.”²⁷¹ Judge Tatel found protecting legal advice essential in his dissenting opinion arguing for the preservation of the attorney-client privilege for President Clinton.²⁷²

264. See Ellinwood, *supra* note 43, at 1303.

265. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b (2000).

266. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 931 (8th Cir. 1997) (Kopf, J., dissenting).

267. See Stacy Lynn Newman, Comment, *The Governmental Attorney-Client Privilege: Whether the Right to Evidence in A State Grand Jury Investigation Pierces the Privilege in New York State*, 70 ALB. L. REV. 741, 756–57 (2007).

268. *Id.* at 757.

269. 1 PAUL R. RICE, JOHN BERNARD, & DAVID DRYSDALE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:28 (2d ed. 1999).

270. See Chud, *supra* note 21, at 1710.

271. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

272. *In re Lindsey*, 158 F.3d 1263, 1285 (D.C. Cir. 1998) (Tatel, J., dissenting) (“[T]he unique protection the law affords a President’s communications with White House counsel rests . . . on the special nature of legal advice, and its special need for confidentiality, as recognized by centuries of common law.”).

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To provide sufficient legal advice a steady line of communication between government officials and their lawyers is necessary.²⁷³

b. Denying Elected Officials Open Discussions About Pending Litigation with Counsel Would Be Detrimental to Society as a Whole

The second justification offered is that recognizing “the privilege in the grand jury context is consistent with the public interest.”²⁷⁴ Building upon the reasoning of *Upjohn*, the argument states that a client’s capacity to modify their behavior in accordance with the law clearly supports the public interest.²⁷⁵ One commentator argues “[t]here is no reason why this logic does not apply to government organizations.”²⁷⁶ Applying it there becomes even easier, as the government employee has a duty to comply with the law.²⁷⁷ This is further compounded by acknowledging that the “[p]ublic sentiment that calls for corporate accountability resonates with the public trust” required of government officials.²⁷⁸

Seeking “legal advice early on” also promotes efficient administration of the government by preventing bad policies from being implemented.²⁷⁹ The government lawyer’s role at this stage to “ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant.”²⁸⁰ Further, scholars argue this impacts the capacity of a lawyer to provide zealous representation to the client.²⁸¹ Charles Ruff, former White House Counsel, argued for a recognition of the privilege even in the aftermath of *In re Lindsey*.²⁸²

273. See Blumenauer, *supra* note 15, at 83.

274. See Chud, *supra* note 21, at 1710.

275. *Id.* at 1710–11.

276. See Ellinwood, *supra* note 43, at 1330.

277. See Chud, *supra* note 21, at 1711; see also Clark, *supra* note 3, at 1072.

278. Salkin, *supra* note 33, at 287.

279. See Salkin & Phillips, *supra* note 13, at 585–86.

280. See Paulsen, *supra* note 22, at 497 (quoting *Upjohn v. United States*, 499 U.S. 383, 390–91 (1981)).

281. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 986 (1991).

282. Stephen Labaton, *Testing of a President: The Supreme Court; Administration Loses Two Legal Battles Against Starr*, N.Y. TIMES, Nov. 10, 1998, at A19.

c. *Full and Frank Disclosure Is Just as Important in the Public Context as It Is in the Private Context*

It is often asserted that the attorney-client privilege “encourage[s] full and frank communications between attorneys and their clients” by rendering certain communications confidential.²⁸³ One student commentator suggests a focus on this need to “encourage[] open and honest discussion between lawyer and client.”²⁸⁴ This would allow the client to know the full scope of the “testimonial privilege” before divulging otherwise privileged information.²⁸⁵ This may be even more relevant when the client potentially faces adverse action in the scope of a criminal investigation.²⁸⁶ Denying them the fundamental privilege would weaken the efforts for open and honest government as officials would be reluctant “come forward without the protection of the attorney-client privilege.”²⁸⁷

Judge Tatel, in his dissenting opinion, argued that the need for “full and frank communication” allows a government attorney the opportunity to provide “reliable legal advice.”²⁸⁸ In his view, the majority opinion against the government attorney-client privilege will serve to “chill communications” between officials and their government lawyers.²⁸⁹ This would have the impact of putting the government at a disadvantage in litigation.²⁹⁰ Further, contrary to the public interest, it would force government officials to seek private counsel in order to avoid disclosure.²⁹¹ Thus, even though it can potentially block “the factfinder’s access to potentially relevant evidence,” the privilege can “enhance[] the quality of representation and promote[] accurate truth-finding by providing attorneys with more information.”²⁹²

283. Daily & Thornquist, *supra* note 110, at 585 (quoting *United States v. Zolin*, 491 U.S. 554, 562 (1989)).

284. *See* Chud, *supra* note 21, at 1709.

285. *Id.* at 1710.

286. *Id.*

287. Toporek, *supra* note 29, at 2428.

288. *In re Lindsey*, 158 F.3d 1263, 1284 (D.C. Cir. 1998) (Tatel, J., dissenting).

289. *Id.* (“[B]y the rule the court adopts today, the chilling effect is precisely the same. Clients . . . will avoid confiding in their lawyers because they can never know whether the information they share, no matter how innocent, might some day become pertinent to possible criminal violations.” (citations omitted)).

290. Damin, *supra* note 5, at 1034.

291. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 931 (8th Cir. 1997) (Kopf, J., dissenting) (arguing that suggesting an official should seek private counsel “misses the point for extending the privilege to organizations”).

292. *See* Greenberg, *supra* note 89, at 945.

d. Other Privileges Do Not Deal with the Unique Requirements of Attorney Confidentiality

Another justification supporting the privilege is the client's need to determine whether the actions he took will give rise to adverse litigation either in a criminal or civil forum.²⁹³ This focus on the procedural aspect of seeking advice is not always necessarily rooted in an attempt to avoid disclosure.²⁹⁴ For those seeking to obtain advice to shield them from clear violations of the law, it is argued that the privilege should not be allowed.²⁹⁵ This prohibition would apply whether the advice was being obtained for civil or criminal matters.²⁹⁶ Some argue that those who are uncertain of whether their actions are criminal should receive the privilege's protection.²⁹⁷

This process would allow for the client to know whether his actions might result in some form of culpability.²⁹⁸ Supporters of this principle argue that forcing the client to seek the advice of private counsel would "significantly reduce the effectiveness" in seeking the assistance of government counsel.²⁹⁹ It could result in the client seeking private counsel arbitrarily and keeping information from the public, thus undermining the public interest.³⁰⁰ There are adequate mechanisms in place, including the crime-fraud exception, to address any potential wrongdoing.³⁰¹ Scholars argue that the crime-fraud exception "is an effective check on any potential abuse of the attorney-client privilege."³⁰² It would help to prevent government lawyers from using "taxpayer's money" to protect a government official from attempts at "perpetrating criminal activity and fraud."³⁰³ The client of a government attorney has a reduced "legitimate expectation that its lawyers will remain silent" under these

293. See Chud, *supra* note 21, at 1711–12.

294. *Id.* at 1712.

295. Ellinwood, *supra* note 43, at 1326.

296. Salkin & Phillips, *supra* note 13, at 584 ("[T]he Supreme Court has explicitly rejected the notion that the attorney-client privilege should be applied differently in different situations.").

297. See Damin, *supra* note 5, at 1039.

298. Chud, *supra* note 21, at 1712.

299. *Id.*

300. See Damin, *supra* note 5, at 1035; see also Dickmann, *supra* note 20, at 308.

301. See Ellinwood, *supra* note 43, at 1327.

302. See Salkin & Phillips, *supra* note 13, at 588; see also Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 507 (2003).

303. See Damin, *supra* note 5, at 1042.

circumstances.³⁰⁴ Preventing fraudulent use of government resources suffices to protect the public interest.³⁰⁵

III. RESOLVING THE UNCLEAR STANDARD FOR THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE IN THE CRIMINAL CONTEXT

The attorney-client privilege is a historically rooted common law exception that has ethical implications for all lawyers. Private lawyers and their respective clients have long enjoyed the fruits of this privilege. For government lawyers, however, the privilege has not been observed with as much principled certainty despite the similarity in their occupation and professional responsibility requirements. Certainly, extending the privilege to government lawyers in the civil context has not been a contentious issue for the courts.³⁰⁶ The problem that has arisen is whether in the federal grand jury context the government attorney can assert the privilege. While this is a narrow area of law to consider, it highlights just how cautious courts have been when abrogating or extending the privilege. For the jurisdictions that have ruled on this issue, hesitation exists for government lawyers when deciding whether their communications with their clients are protected by the privilege. This hesitation then spirals into an “uncertain privilege,” against which the Supreme Court has emphatically cautioned.³⁰⁷ The unfortunate results would include impeding effective government and subjugating the public interest. Government officials, no matter their level of legal expertise, need adequate legal counsel to make informed decisions regarding their actions, particularly if there is potential for criminal liability.

To avoid this problem, a return to focusing on the fundamental ethical considerations of the attorney-client privilege is necessary. The predominant principles and underlying rationales of the attorney-client privilege support that it applies to all attorneys, not just those in the private sector.³⁰⁸ In fact, it has been argued that it

304. See Moliterno, *supra* note 10, at 645.

305. Ellinwood, *supra* note 43, at 1318 (“Those officials who have clearly violated the law will not receive the benefit of government counsel so government resources will not be used for their assistance.”).

306. See discussion *supra* Part II.

307. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

308. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000).

may even have more validity “in the government context.”³⁰⁹ To see if the underlying principles apply, it is important first to identify who is the client that the lawyer is serving.³¹⁰ Once the client is established, a government lawyer will know to what extent the privilege covers their communications with the client, and what inherent limitations exist. The Supreme Court has made it clear there is no separate privilege that criminal and civil litigators enjoy.³¹¹ This is especially true in the realm of a government lawyer advocating on behalf of their client. Obfuscating the privilege in the criminal context for these attorneys would “be a prohibition upon professional advice and assistance.”³¹²

The crime-fraud exception provides the necessary procedural safeguards to adequately serve the government lawyers potentially dual-hatted role of owing loyalty to the client and a “duty” to the people.³¹³ It is one of the “well-established exceptions” to the privilege that Wright and Graham reference in their treatise.³¹⁴ A faithful application of it would protect the public interest, while still providing the opportunity for “full and frank communications.”³¹⁵ The crime-fraud exception can discourage actions that would undermine the public interest by using the privilege to withhold information. The crime-fraud exception also helps to prevent an abuse of the ethical role and responsibilities stemming from the attorney-client relationship.³¹⁶

A. The Client of a Government Attorney Is the Organization They Serve

According to Model Rule 1.13, an attorney representing an organizational client “represents the organization acting through its duly authorized constituents.”³¹⁷ For the government lawyer, this

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

310. Dickmann, *supra* note 20, at 314–15 (recommending that “government attorneys should warn government officials from the outset that they represent the governmental entity, not the individual official.”).

311. *Swidler & Berlin v. United States*, 524 U.S. 399, 408–09 (1998) (“However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion.”).

312. *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876).

313. *In re Grand Jury Investigation*, 399 F.3d at 535.

314. WRIGHT & GRAHAM, *supra* note 49.

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

316. *See Brown*, *supra* note 111, at 1263.

317. MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2012).

means that the privilege covers “communications made by subordinate officers . . . for purposes of enabling the attorney to give legal advice to the government, as an organization.”³¹⁸ It is important for the government lawyer to avoid any potential conflicts of interest that might arise in representing the organization and/or the duly appointed constituent.³¹⁹

In these situations, the government lawyer should be “subject to the same ethical rules” as those serving in the private sector.³²⁰ The practical implications of this argument, however, are difficult to narrow to such a bright-line rule. Often a government employee who is seeking advice from counsel will not necessarily know what they have done that could ultimately render them culpable. Judge Tatel argues that this would create an unfortunate situation where the client is forced to “shift their trust . . . to private counsel.”³²¹ This would undermine the public interest in open and honest government as the client would not bear the burden of disclosing communications that affect the citizenry. Further, this would complicate the representation of counsel when it is unclear if civil or criminal liability is at stake.³²²

There are times when the government attorney can “stand in the shoes of private counsel” and represent the employee in their individual litigation.³²³ It is important to note, however, that the privilege does not extend to a government official once they are “no longer in office.”³²⁴ A government entity’s capacity to waive the privilege stands as a safeguard in these situations where the public interest would be better served by disclosure of the information. This effectively gives the government entity the ability to decide whether the “relevant public interests” are in line with their ability to assert the privilege.³²⁵ It cannot be presumed that the entity will always

318. See Paulsen, *supra* note 22, at 474.

319. *Id.*

320. Josephson & Pearce, *supra* note 4, at 541.

321. *In re Lindsey*, 158 F.3d 1263, 1284 (D.C. Cir. 1998) (Tatel, J., dissenting).

322. See Chud, *supra* note 21, at 1713–15.

323. *In re Lindsey*, 158 F.3d at 1269.

324. Ariel B. Denbo, Comment, *In re Grand Jury Investigation: Do Government Officials Enjoy the Same Attorney-Client Privilege as Private Citizens?*, 30 AM. J. TRIAL ADVOC. 231, 240–41 (2006).

325. Blumenauer, *supra* note 15, at 78.

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waive the privilege, however, and thus this does not render additional safeguards as superfluous.³²⁶

B. The Underlying Principles Support the Privilege in the Federal Grand Jury Context

There is little doubt that the attorney-client privilege is an important evidentiary tool that attorneys use. Critics of the historical importance of the privilege do not dispute the need for the privilege.³²⁷ It is true that the privilege's initial roots of honor and fealty have gone asunder. They have been replaced, however, by ethical obligations, professional responsibility codes, and the desire to encourage "full and frank communications" with the client.³²⁸ Encouraging clients to confide openly to their counsel serves the public interest.³²⁹ This is of paramount importance for a government attorney who advocates for an agency and through this representation represents the public.

Critics of a robust government attorney privilege continually assert that government employees have unique obligations to serve the public.³³⁰ This uniqueness does not abrogate "the traditional duty of zealous advocacy."³³¹ Zealous representation directly conflicts with Professor Leslie's argument that the privilege should be a limited justification employed only in trial preparation.³³² Limiting the privilege to only those situations would deprive the client of the ability to receive the fullest scope of representation. This would certainly impact the public interest, which is promoted when the client "receive[s] well-founded, fact-specific legal advice."³³³ The drafters of the *Restatement (Third) of the Law Governing Lawyers* recognized the privilege as a foundational element that impacts the

326. The Office of the Governor declined to waive the privilege in *In re Grand Jury Investigation*, 399 F.3d 527, 530 (2d Cir. 2005).

327. See Hazard, *supra* note 49, at 1062 ("There is no responsible opinion suggesting that the privilege be completely abolished.").

328. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).

329. *In re Lindsey*, 158 F.3d 1263, 1284 (D.C. Cir. 1998) (Tatel, J., dissenting).

330. See *supra* Part II.A.2 and accompanying notes.

331. Lanctot, *supra* note 281, at 1013.

332. See Leslie, *supra* note 69, at 528.

333. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 926 (8th Cir. 1997) (Kopf, J., dissenting).

adversarial process for both government lawyers and those in the private sector.³³⁴

Though the privilege can stand in “derogation of the search for truth,” it serves as an inherent part of our adversarial system. As noted previously, there are several limitations on the privilege that impact its potentially expansive reach.³³⁵ But even in the face of disclosure requirements for public requests of information, there have been carve-outs to protect the privilege.³³⁶ These exemptions give strength to the argument that the attorney-client privilege is a unique testamentary provision that remains viable even in a system of open government.

Creating an “uncertain privilege” goes against the Court’s precedent and general matters of professional responsibility.³³⁷ Allowing the privilege to be sustained in the federal grand jury context does not create an unnecessary expansion. Though courts often have relied on “reason and experience” to decide the scope of the privilege in these circumstances, it is a fundamental principle of jurisprudence that reasonable minds can differ.³³⁸ This does not bode well for a government lawyer who may be called upon to disclose information during a highly contentious investigation. While there is no doubt that the public has an interest in the fair adjudication of federal crimes, it should be strongly considered that the privilege already serves a narrow role.³³⁹

Not allowing the privilege in the criminal context of a federal grand jury creates two problems. First, it is almost certain to impede the government by imposing a “chilling effect” on attorney-client communications.³⁴⁰ Individuals seeking the counsel of an attorney will not always be certain of their guilt. This uncertainty is certainly not a feature unique to those working with government lawyers. The law is so varied and complex that it is essential for clients to receive information in a candid and confidential manner from attorneys so that they can make informed decisions regarding their prospective courses of action. Though those involved in public corruption cases tend to be unsympathetic representatives of a strong attorney-client

334. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000).

335. *See supra* Part I.D.

336. *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998).

337. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

338. FED. R. EVID. 501.

339. *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977).

340. *In re Lindsey*, 158 F.3d at 1284 (Tatel, J., dissenting).

privilege,³⁴¹ a limitation of the privilege cannot be justified solely on this basis.

Secondly, denying the privilege would lead to the creation of a demarcation line between the privilege asserted in civil litigation and criminal litigation. Fracturing the privilege along types of litigation most likely results in impacting both “good faith” and bad faith requests for counsel.³⁴² The principles supporting extension of the privilege to criminal investigations of government officials are not so far astray from those confronting private lawyers. Judge Kopf argues that the lack of case law on point “is meaningless” in creating a “distinction for criminal cases” under Rule 503.³⁴³ There is little doubt that officials have a need for a “complete and accurate factual picture” in the face of a federal grand jury investigation.³⁴⁴ Forcing an immediate reliance upon private counsel in those situations would only exacerbate the uncertainty surrounding the privilege. There is no principled basis for this proposition under the attorney-client privilege. Our Constitution even offers some valid support to the privilege given its impact upon the assistance of counsel.³⁴⁵

C. The Crime-Fraud Exception Is Sufficient to Protect the Public Interest

Courts that have applied a balancing test to determine if the privilege should be abrogated in the face of a grand jury proceeding have failed to recognize that sufficient safeguards are in place to prevent an abuse of the privilege and a dilution of taxpayer’s funds in bad faith. They argue that the public interest can only be served through full disclosure. The controversy surrounding federal government attorney-client privilege involves the public’s concern over potential government secrecy. James Madison’s letter quite possibly serves as a call to arms for proponents of this argument.³⁴⁶ Courts have questioned how faithfully the public interest would be

341. Steven Yaccino, *Then There Was One: An Illinois Ex-Governor Released from Prison*, N.Y. TIMES, Jan. 30, 2013, at A14 (noting that there have been “four Illinois governors who have been found guilty of wrongdoing in recent history, along with hundreds of public officials and business leaders charged with public corruption in recent decades”).

342. Damin, *supra* note 5, at 1033.

343. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 929 (8th Cir. 1997) (Kopf, J., dissenting).

344. *Id.* at 930.

345. U.S. CONST. amend. VI.

346. *In re Lindsey*, 158 F.3d 1263, 1273–74 (D.C. Cir. 1998).

served by allowing the privilege in the grand jury context.³⁴⁷ But, if this is true, then what becomes of the right to secrecy in what can be considered the most adversarial of proceedings?

The crime-fraud exception addresses the public interest concern wholly. By not allowing the “seal of secrecy” to extend to communications made in furtherance of a crime or fraud, the public’s interest is served.³⁴⁸ This “ensure[s] that the truth is revealed in situations where a compelling public good” is in conflict with a client’s invocation of the privilege.³⁴⁹ Invoking the exception would also avoid any unnecessary judicial balancing in determining competing public interests. All a court would have to do is determine if the party asserting the crime-fraud exception had met their prima facie showing and proceed forward with their inspection of the communication. These procedural protections would allow a neutral member of the court to consider the weight of the evidence in determining if the privilege can be pierced.

It is true that other reporting requirements limit the privilege in criminal investigations of wrongdoing.³⁵⁰ The *Restatement (Third) of the Law Governing Lawyers* does recognize the impact of statutory obligations on the privilege.³⁵¹ The fact that these reporting requirements exist, however, shows the strength of the privilege rather than its weakness. If the privilege were weakened in this context, then having statutorily imposed reporting requirements would be superfluous at best. That is why the crime-fraud exception can be utilized to protect the privilege from abuse. It is not necessary to employ a balancing test to determine if the privilege should be overcome, the crime-fraud exception serves that purpose already.³⁵²

Employing the crime-fraud exception is not a very arduous burden for opposing counsel to overcome if that is necessary. Moreover, it serves as a sufficient safeguard to prevent the privilege from becoming absolute. For those concerned with the abrogation of the privilege, the crime-fraud exception does not result in the immediate release of confidential information to opposing counsel.³⁵³ This

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

348. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

349. *Dickmann*, *supra* note 20, at 295.

350. *In re Lindsey*, 158 F.3d at 1274–75.

351. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b (2000) (“A narrower privilege for governmental clients may be warranted by particular statutory formulations.”).

352. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 936.

353. *United States v. Zolin*, 491 U.S. 554, 572 (1989).

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review of the communications over which confidentiality is claimed allows the court to determine whether the necessity exists under this exception to admit the material. Having this power concentrated in the court keeps the system of employing the exception from becoming arbitrary. Again, while reasonable minds can differ, it is quite possible that courts evaluating communications for evidence of crime or fraud will “know it when [they] see it.”³⁵⁴

CONCLUSION

Government lawyers play an integral part in our democratic system. It is therefore imperative that the officials they serve are able to discuss legal matters with them under the protections of the attorney-client privilege. Depriving them of this capacity would force the government official to seek advice outside the system of public accountability.³⁵⁵ This consequence could make “government[] investigations more difficult” or render them “impossible.”³⁵⁶ The result would contradict the public interest for which these officials and lawyers are duty-bound to serve.³⁵⁷

The fundamental principles of the privilege do not support its limitation for government clients in the face of a federal grand jury subpoena. There is no reason to “jettison a principle” as essential to responsible lawyering as the attorney-client privilege.³⁵⁸ The ability of the agency to waive the privilege only serves to show how critical it is to promoting attorney-client communications. It is unnecessary to create more exceptions to the privilege than necessary.³⁵⁹ The primary role of the privilege is to encourage open and honest dialogue between government lawyers and the individual seeking assistance. Only when the opposing counsel satisfies their prima facie showing should procedural steps be taken to overcome the privilege. The crime-fraud exception to the attorney-client privilege achieves this process. Anything else would be a “derogation of the public interest.”³⁶⁰

354. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

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

356. See 1 PAUL R. RICE, JOHN BERNARD, & DAVID DRYSDALE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* § 4:28 (2d ed. 1999).

357. See Bell, *supra* note 27, at 1069.

358. *In re Grand Jury Investigation*, 399 F.3d at 535.

359. *Id.*

360. Blumenauer, *supra* note 15, at 78.