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Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)

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2003]

REVOKING OUR PRIVILEGES:
FEDERAL LAW ENFORCEMENT'S MULTI-FRONT ASSAULT ON THE
ATTORNEY-CLIENT PRIVILEGE (AND WHY IT IS MISGUIDED)

LANCE COLE*

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I. INTRODUCTION

OVER the past two decades federal law enforcement has faced formidable challenges: the Wall Street insider trading scandals of the 1980s;¹ the “S&L crisis” of the early 1990s;² the “War on Drugs” to combat the importation and distribution of cocaine and other controlled substances;³ and, most recently, a series of acts of international terrorism that culminated in the horrific September 11 attacks on the World Trade Center and the Pentagon.⁴ In addition to the threat of international terrorism, federal law enforcement authorities are presently grappling with a new crisis in confidence in the management and conduct of corporate

1. See generally, e.g., CONNIE BRUCK, *THE PREDATORS' BALL: THE JUNK-BOND RAIDERS AND THE MAN WHO STAKED THEM* (1988) (discussing insider trading scandals of 1980s); JAMES B. STEWART, *DEN OF THIEVES* (1991) (same); DAVID A. VISE & STEVE COLL, *EAGLE ON THE STREET* (1991) (same).

2. See generally, e.g., MARTIN MAYER, *THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY* (1990) (discussing savings and loan scandals of early 1990s); PAUL Z. PILZER, *OTHER PEOPLE'S MONEY: THE INSIDE STORY OF THE S&L MESS* (1989) (same); STEPHEN PIZZO ET AL., *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS* (1989) (same); L. WILLIAM SEIDMAN, *FULL FAITH AND CREDIT: THE GREAT S&L DEBACLE AND OTHER WASHINGTON SAGAS* (1993) (same).

3. See generally, e.g., Symposium, *New Voices on the War on Drugs*, 47 VILL. L. REV. 747 (2002) (analyzing challenges enforcing drug laws while simultaneously maintaining civil liberties); Symposium, *The Sentencing Controversy: Punishment and Policy in the War Against Drugs*, 40 VILL. L. REV. 301 (1995) (examining implications of United States Federal Sentencing Guidelines on drug war).

4. See, e.g., N.R. Klienfield, *U.S. Attacked*, N.Y. TIMES, Sept. 12, 2001, at A1 (reporting 9/11 terrorist attacks); Roberto Suro & Thomas E. Ricks, *Blast in Yemen Kills U.S. Sailors: Terrorism Suspected in Harbor Explosion*, WASH. POST, Oct. 13, 2000, at A1 (describing attack on USS Cole).

America, precipitated by the failure of Enron and exacerbated by financial reporting scandals and bankruptcies at other large U.S. corporations, such as Global Crossing and WorldCom.⁵

One important consequence of the extraordinary challenges facing federal law enforcement agencies in the past two decades has been a more aggressive stance on the part of federal law enforcement officials toward the attorney-client privilege, with accompanying efforts to overcome the confidentiality protections the privilege provides. This aggressive opposition to the privilege on the part of law enforcement authorities has been evidenced in a variety of contexts and appears to have been gaining momentum since the September 11 terrorist attacks and the new wave of corporate financial scandals. While no one should question the importance of appropriate law enforcement responses to these threats to national security and economic well being, it is fair to question some of the tactics that law enforcement officials have been employing as they combat crime in this increasingly complex and challenging environment.

This Article focuses on federal law enforcement authorities' approach to attorney-client privilege issues and concludes that important public policy interests that are served by the privilege are being unnecessarily put at risk. Other commentators have recognized this trend and have criticized it in increasingly strident terms.⁶ Most of those commentators have fo-

5. See, e.g., John R. Wilke & Robert Gavin, *Brazen Trade Marks New Path of Enron Probe*, WALL ST. J., Oct. 21, 2002, at C1 (noting investigation into questionable accounting practices of company); *WorldCom Comments on Indictment Reports*, WALL ST. J., July 26, 2002, at A4 (discussing criminal case against WorldCom executives).

6. See Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 51 ALA. L. REV. 163, 164-65 (1999) ("Of greater practical importance at the moment . . . is the fact that health care lawyers understand that they no longer can remain anonymous advisors. Instead, in providing their advice, they sail between the Scylla of zealous federal law enforcement agents and prosecutors who *attack* privilege under the guise of the so-called "crime-fraud" exception and the Charybdis of besieged clients who readily *wave* privilege in an attempt to show that they acted pursuant to the advice of counsel and not with any intent to violate the law or to minimize financial and prosecutorial risk by participating in government voluntary disclosure programs.") (emphasis in original); Matthew P. Harrington & Eric A. Lustig, *IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering*, 24 HOFSTRA L. REV. 623, 626 (1996) ("Attorneys are forced to provide information which will in all likelihood lead to the indictment of their own clients. In a sense, lawyers are now being drafted as informants against clients who pay in cash."); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000) ("Once-celebrated goals of our legal system—the client's right of confidentiality and freedom from self-incrimination—are giving way to the government's powerful demands for the swift disclosure of all evidence relevant to its investigations of corporate misconduct."); see also Aviva Abramovsky, Comment, *Traitors in Our Midst: Attorneys Who Inform on Their Clients*, 2 U. PA. J. CONST. L. 676, 677-78, 709 (2000) ("In the past ten to fifteen years, the use of criminal defense attorneys as informants against their clients has become more and more widespread. This practice has its roots in several larger trends in the criminal justice system, including the increasing number of defense attorneys who are themselves under criminal

cused on a particular area of law and emphasized the threats to the privilege that have arisen in that area.⁷ This Article examines a broad range of areas in which federal law enforcement activities are encroaching on the privilege, and in doing so seeks to demonstrate that the threat to the privilege is even greater than the examination of any one particular area would suggest. In other words, the whole of the potential effect of the federal government's multi-front assault on the privilege is greater than the sum of its parts, in that the net result may be to create such uncertainty that the privilege is terminally wounded.⁸ This Article examines recent attacks on the privilege by federal law enforcement authorities and concludes that a number of these attacks have been misguided or overzealous. Finally, the Article closes with suggested changes in the manner in which federal law enforcement officials should analyze and respond to privilege issues. It also proposes a new approach for law enforcement officials to follow in developing and administering cooperation and voluntary disclosure programs, an approach that is intended to further legitimate law enforcement interests without threatening the important policy interests that are served by the attorney-client privilege.

investigation and the growing tendency of prosecutors to use high-pressure tactics and to view the defense bar as criminals rather than colleagues. Moreover, despite their verbal condemnation of this practice, the courts' weak response has had the effect of enabling prosecutors to use attorney-informants with immunity."); Kathleen N. Allen, Note, *Turning Lawyers into Witnesses: Does Forced Client Disclosure Breach the Attorney-Client Privilege?*, 30 SUFFOLK U. L. REV. 795, 824 (1997) ("The government has many effective resources to use in the war against crime. It is unnecessary to threaten the long standing privileged relationship between attorneys and their clients by turning lawyers into witnesses."); Avidan Y. Cover, Note, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233, 1235-37 (2002) (discussing government intrusion into communications between attorneys and clients in interest of preventing future terrorist acts); Brian M. Smith, Note, *Be Careful How You Use it or You May Lose it: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389, 390 (1998) ("The judicial system is in the middle: determining whether a corporate agent has disclosed enough privileged information during interactions with the government regulator so as to create a waiver of the corporate attorney-client privilege.").

7. See Gerson & Gladieux, *supra* note 6, at 165-66 (focusing on federal health care law); Harrington & Lustig, *supra* note 6, at 626 (focusing on IRS reporting); Zornow & Krakaur, *supra* note 6, at 149 (focusing on corporate criminal investigations); see also Abramovsky, *supra* note 6, at 678 (focusing on federal crimes); Allen, *supra* note 6, at 795 (focusing on IRS use of attorneys to discover criminal activities); Cover, *supra* note 6, at 1234-35 (focusing on terrorism); Smith, *supra* note 6, at 390-91 (focusing on corporate attempts to comply with government regulations).

8. Then-Associate Justice and now Chief Justice Rehnquist recognized this danger over twenty years ago in the opinion he wrote for a unanimous Supreme Court in *Upjohn Co. v. United States*, in which he warned that "[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." 449 U.S. 383, 393 (1981).

II. THE IMPORTANCE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE AMERICAN LEGAL SYSTEM

A. *Relevant Historical Background*

Almost every article, case, and treatise on the attorney-client privilege begins with the observation that the attorney-client privilege is the oldest evidentiary privilege recognized in Anglo-American common law.⁹ By noting that observation at the outset this Article follows the usual convention, but the focus of this Article is the other end of the privilege's life span—is the long life of the attorney-client privilege rapidly coming to an end? The recent developments at the federal level of law enforcement that are the subject of this Article suggest that the end may be nearer than we might previously have thought (or would prefer). The significance of these developments, and what they portend for the privilege, can best be appreciated if viewed in the context of the privilege's long history, so a brief historical overview of the privilege is provided for that purpose.

1. *Origins and Historical Development of the Privilege*

The attorney-client privilege is recognized in the federal judicial system and in all state judicial systems.¹⁰ The roots of the privilege extend back to Roman law and the notion that the loyalty a lawyer owes to a client disqualifies the lawyer from serving as a witness in the client's case.¹¹ In

9. See, e.g., *id.* at 389 ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."); 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton Rev. 1961) [hereinafter 8 WIGMORE] (discussing history of attorney-client privilege); Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 603 (1980) (explaining that attorney-client privilege may be traced back to Roman law); Julianna M. Thomas, *Fifteen Years After Weintraub: Who Controls the Individual's Attorney-Client Privilege in Bankruptcy?*, 80 B.U. L. REV. 635, 635 (2000) (stating that attorney-client privilege is one of oldest privileges protecting professional communications); Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 475-87 (1987) (discussing historical development of attorney-client privilege); Jacqueline A. Weiss, *Beyond Upjohn: Achieving Certainty by Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 FORDHAM L. REV. 1182, 1185-86 (1982) (same); Steven J. Wood, Comment, *Bankruptcy: Waiver of a Corporate Debtor's Attorney-Client Privilege—A New Power for the Trustee* [Commodity Futures Trading Commission v. Weintraub, 105 S. Ct. 1986 (1985)], 25 WASHBURN L.J. 565, 566 (1986) (stating that privilege's purpose is to promote complete attorney-client communication).

10. See 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE §§ 76.1-76.2 (John W. Strong, ed., 5th ed. West 1999) (discussing existence of attorney-client privilege in federal and state courts). The only other privilege that is recognized so uniformly in our legal system is the husband-wife marital privilege. See *id.* § 76.2 (describing state patterns of privilege).

11. See *id.* § 87 (citing Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928)). Radin observed that it is not possible to establish a link between Roman law and the common law origin of the attorney-client privilege. See Radin, *supra*, at 489 ("That the Roman precedent was the origin of the English rule as far as attorneys are concerned, cannot be proved."). Radin continued to note that "from the eighteenth century on, the

English common law the rule of confidentiality for attorney testimony came to be grounded in the client's right to have his secrets protected, rather than the lawyer's right not to be compelled to testify.¹² Although the existence of the privilege was established in English common law by the beginning of the nineteenth century, its scope and boundaries were not well settled.¹³

The early American cases recognizing the privilege did little to resolve the ambiguities surrounding it, although they did establish the availability of the privilege when legal advice was "related directly to pending or anticipated litigation."¹⁴ In the United States, two principal influences served to define the privilege and establish the policy grounds upon which it came to rest during the twentieth century. One of those influences, not surprisingly, was the United States Supreme Court. The other, and perhaps the more important, influence was the treatise on evidence published by then-Professor and later Dean John Henry Wigmore of the Northwestern Law School shortly after the turn of the century.¹⁵

Wigmore's original treatise on evidence made two especially significant contributions to the development of attorney-client privilege law in the United States.¹⁶ First, and most relevant to this Article, Wigmore sought to articulate a policy basis for the privilege that both justified its

duty of loyalty conceived in terms of the attorney's duty to his employer, has overwhelmed the notion of the gentleman-barrister's honor." *Id.*

12. Professor Hazard traced this development in a 1978 article on the historical development of the privilege. See Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070-80 (1978) (discussing historical development of attorney-client privilege). The original rule appears to have been one in which "the privilege was that of the lawyer (a gentleman does not give away matters confided to him), [but] as the rule developed the privilege became that of the client to have his secrets protected." *Id.* at 1070; see also Radin, *supra* note 11, at 487 (noting that similar to master-servant relationship, clients' secrets were expected to be protected); 8 WIGMORE, *supra* note 9, § 2286 (discussing underlying policy of attorney privilege as it existed in English common law). In the first edition of his treatise, Wigmore observed that "[t]he privilege is designed to secure subjective freedom of mind for the client in seeking legal advice." 4 JOHN HENRY WIGMORE, EVIDENCE § 2317 (1st ed. 1904) (internal cross-reference omitted) [hereinafter 4 WIGMORE].

13. See Hazard, *supra* note 12, at 1083-85 (discussing English cases *Bolton v. Corporation of Liverpool*, 39 Eng. Rep. 614 (Ch. 1833), and *Greenough v. Gaskell*, 39 Eng. Rep. 618 (Ch. 1833), which Professor Hazard describes as enlarging potential scope of privilege while creating confusion about its boundaries).

14. Hazard, *supra* note 12, at 1091.

15. See, e.g., 4 WIGMORE, *supra* note 12, §§ 2290-2329 (discussing attorney-client privilege as it applies to communications between clients and their attorneys).

16. For discussion of the significance of Wigmore's contributions to the law of evidence generally, see Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 241 (2002) ("Theory plays such a prominent role in privilege doctrine in large part due to the continuing influence of that giant of American evidence law, Dean John Henry Wigmore.").

continued existence and answered the arguments of its critics.¹⁷ That policy basis is discussed below. Second, and perhaps most important to the orderly development of privilege law, Wigmore sought to define the privilege in terms of its essential elements and “to group them in natural sequence.”¹⁸ This undertaking, which Wigmore described as “a matter of some difficulty,”¹⁹ led to the now-classic definition of the privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant 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 client waives the protection.²⁰

Wigmore organized the discussion and analysis of the privilege in his treatise according to these numbered elements.²¹ The influence and acceptance of Wigmore’s treatise as the leading authority in the field resulted in a widely accepted definition of the privilege and contributed to an orderly development of the law in this area.²²

17. See 4 WIGMORE, *supra* note 12, § 2291 (describing various rationales for attorney-client privilege).

18. *Id.* at § 2292.

19. *Id.*

20. *Id.* This definition was refined in subsequent editions of the Wigmore treatise. In the treatise’s second edition, parts 3 and 8 were changed to read “the communications relating to that purpose” and “except the protection be waived,” respectively. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (2d ed. 1923). The fourth edition retained the changes made to the definition by the second edition. See 8 WIGMORE, *supra* note 9, § 2292 (listing relevant criteria).

21. See 4 WIGMORE, *supra* note 12, §§ 2294-2329 (discussing elements of attorney-client privilege).

22. A widely cited judicial test for application of the privilege is that of Judge Wyzanski in *United States v. United Shoe Machinery Corp.*:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

89 F. Supp. 357, 358 (D. Mass. 1950). Judge Wyzanski did not cite Wigmore (or any other authority) in support of his test for application of privilege, but both the organization (numbered elements) and content (generally tracking Wigmore’s definition) suggest Wigmore’s influence. Judge Wyzanski appears to have been reading Wigmore at the time. Although he did not cite Wigmore in that case, Judge Wyzanski repeatedly cited Wigmore, referring to him as one of “the masters of the law of evidence” in a companion case involving the same parties and decided the same day addressing an issue arising under the hearsay rule. See *United Shoe*, 89 F. Supp. at 351-52 (citing Wigmore); cf. David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*,

The elements of the privilege and the many issues that arise in its application are not the subject of this Article, so that aspect of Wigmore's important contributions to privilege law are not addressed here.²³ As noted above, the contribution by Wigmore that is most relevant to this Article is his articulation of the policy basis that supports the attorney-client privilege. In the first edition of his treatise, Wigmore identified four elements that must be present before any privilege should be recognized:

- (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.²⁴

He concluded that all four elements were present in the case of the attorney-client privilege.²⁵ He also stated categorically that the "modern theory" of the policy underlying the privilege was to promote freedom of consultation of legal advisers by clients.²⁶

In embracing the modern theory of the privilege, Wigmore defended the privilege against its most influential nineteenth century critic, Jeremy Bentham.²⁷ Bentham's argument against the privilege, in short, was that deterring a guilty client from seeking legal advice was not cause for concern, while an innocent client had nothing to fear if the privilege were not

64 N.C. L. REV. 443, 443 n.1 (1986) ("Judge Wyzanski's statement of the rule of privilege is an expansion of Professor Wigmore's version.") (Wigmore quotation omitted). For a contemporary definition of the privilege, see the RESTATEMENT (THIRD) OF LAW GOVERNING LAW. § 68 (2000) ("[T]he attorney-client privilege may be invoked . . . with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.").

23. For comprehensive analysis of the elements of attorney-client privilege and its application, see EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 45-263 (4th ed., A.B.A. Publishing 2001) (explaining four core elements of attorney-client privilege and their application in various contexts); see also PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* § 2:1 (2d ed., West Group 1999) (same).

24. 4 WIGMORE, *supra* note 12, § 2285 (citation omitted). For an analysis of Wigmore's policy arguments in the context of broader societal interests, see Saltzburg, *supra* note 9, at 605-12.

25. See 4 WIGMORE, *supra* note 12, § 2291 (discussing four elements within context of privilege's policy).

26. See *id.* ("In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.")

27. See *id.* (refuting "Benthamic argument"). For a discussion of Wigmore's refutation of Bentham's argument, see Radin, *supra* note 11, at 491.

available, and thus would not be deterred.²⁸ Wigmore exposed both the naivete and the flawed premises underlying Bentham's argument. First, Wigmore observed that (even in the relatively simpler times in which he wrote), "[t]here is in civil cases often *no hard-and-fast line between guilt and innocence*," and in many cases neither party will be completely in the right or completely in the wrong in a moral sense.²⁹ Wigmore made the case that in actual practice, unlike in Bentham's abstract argument, the reality of the legal system is much more complex, and the costs of depriving one party of confidential legal advice are higher, than Bentham's argument would suggest.³⁰

A second flaw in Bentham's argument, exposed by Wigmore, was the assumption that no social good would be served by fostering access to legal counsel by those with weak or wrongfully advanced causes. Wigmore made the point that in many cases principled legal counsel would persuade clients not to pursue such causes or would pursue an appropriate settlement of cases that had limited merit.³¹ Wigmore's careful refutation of Bentham's attack on the privilege provided a compelling and influential catalogue of the utilitarian benefits of a broadly available privilege.³² Thanks to the broad acceptance of the arguments made by Wigmore, throughout the twentieth century there has been a widespread acceptance that those benefits outweigh the costs, in terms of withheld testimony, imposed by a widely available attorney-client privilege.³³

The second major influence on the development of the attorney-client privilege in the United States was the Supreme Court. The Court's views on the subject were in accord with the arguments Wigmore advanced in his treatise. It appears that by the late nineteenth century the

28. See 4 WIGMORE, *supra* note 12, § 2291 (summarizing Bentham's argument against maintaining attorney-client privilege).

29. *Id.*; see also McCORMICK, *supra* note 10, § 87 ("Bentham's apocalyptic division of the client world into righteous and guilty seems somewhat naïve in a time when even the best-intended may doubt their compliance with an ever more overwhelming body of law.")

30. Wigmore observed that "the abstinence from seeking legal advice in a good cause is by hypothesis an evil which is fatal to the administration of justice; and even Bentham does not go so far as to question this hypothesis." 4 WIGMORE, *supra* note 12, § 2291. The United States Supreme Court expressed a similar view in *Upjohn Co. v. United States*, 449 U.S. 383, 393 n.2 (1981) ("[A]n individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications."). The Court's privilege analysis in *Upjohn* is discussed further *infra* Part II.B.1.a.

31. 4 WIGMORE, *supra* note 12, § 3203 ("To guarantee for clients of unjust causes a freedom of consultation with legal advisers cannot be deemed an evil except to the extent that the bar is unprincipled; and in that condition more radical remedies are needed than the denial of the privilege.")

32. *Cf.* McCORMICK, *supra* note 10, § 87 (describing modern "clearly utilitarian justification" for attorney-client privilege).

33. See *id.* (referring to Wigmore as "the great champion and architect of the privilege").

Supreme Court had enthusiastically embraced the “modern” rationale for the attorney-client privilege. In an 1876 case involving a dispute over a life insurance policy, *Connecticut Mutual Life Ins. Co. v. Schaefer*,³⁴ the Court described the interests served by the privilege in particularly strong terms: “If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.”³⁵ The Court made this statement in support of its conclusion that the attorney-client privilege had been properly invoked to block testimony by an attorney about conversations with a client whom he had represented in a divorce.³⁶ The defendant insurance company had sought to examine the attorney about statements the client had made to him about her deceased ex-husband that, if admitted into evidence, might have proved that false statements were made in the insurance application.³⁷ The Court upheld the assertion of privilege and applauded the protection of confidential communications to one’s attorney as dictated by the “wise and liberal policy” quoted above.³⁸ This case indicates that by the late nineteenth century the Supreme Court had enthusiastically embraced the attorney-client privilege.

Subsequent cases support this conclusion and demonstrate that the regard in which the Court holds the privilege has not wavered, despite considerable criticism of the privilege by academics and commentators.³⁹ In 1888 the Supreme Court described the policy grounds for the privilege as “founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure.”⁴⁰ Several important points are implicit in this description. First, the Court recognized that laypersons cannot function in our legal system without the expert ad-

34. 94 U.S. 457 (1876).

35. *Id.* at 458.

36. *See id.* at 457-58 (discussing broad policy of permitting confidential communication to professional advisers).

37. *See id.* at 458 (discussing facts of case).

38. *See id.* (determining federal law to be applicable).

39. As discussed above, the leading nineteenth century critic of the privilege was Jeremy Bentham. *See* 8 WIGMORE, *supra* note 9, § 2291 (describing and refuting “Benthamic argument” on variety of grounds, including important point that, in Bentham’s time, parties were disqualified from testifying and, therefore, cost of attorney-client privilege was high, but now that parties can be called to testify, “the loss to truth is comparatively small, in modern times”); *cf.* McCORMICK, *supra* note 10, § 75 (“Until very recently, the heavy consensus among commentators has favored narrowing the field of privilege, and attempts have been made, largely without success, to incorporate this view into the several 20th century efforts to codify the law of evidence.”) (citation omitted).

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

vice that can be obtained only from those with special training in law.⁴¹ In other words, one can no longer be “self-taught” in law—it is simply too complex a field to master without expert assistance.⁴² Second, our justice system will not function properly if laypersons do not seek out and obtain such expert advice. Our legal system is neither particularly user-friendly nor self-executing, and the legal advice provided by trained attorneys is what keeps the system functioning.⁴³ Finally, and perhaps most important, laypersons will not seek out this advice if the system creates impediments to their doing so or if they believe that doing so will have adverse consequences for them.⁴⁴ Each of these points raises important issues with respect to the recent actions by federal law enforcement authorities that threaten to limit the availability of the attorney-client privilege and the work product doctrine.

2. *The Attorney Work Product Doctrine Described and Distinguished*

Another important historical development involving the Supreme Court that merits discussion before reviewing the Court’s more recent attorney-client privilege cases is the Court’s approval of the attorney work product doctrine in 1947 in *Hickman v. Taylor*.⁴⁵ The concept of protecting attorney work product—such as an attorney’s notes of witness interviews—from discovery by opponents in litigation was a new development in the law of evidence. Prior to the liberalization of pre-trial discovery rules, work product protection was not needed because adversaries generally did not seek information from one another.⁴⁶ In *Hickman* the Court held that attorney work product has a qualified immunity from discovery

41. As one commentator has observed: “Although a lay person can read law and gather legal knowledge to represent herself, most observers recognize that a nonprofessional, especially if involved in formal litigation, will have better success with a lawyer’s assistance.” Saltzburg, *supra* note 9, at 605 (citation omitted).

42. *See id.* (discussing attorney’s essential role in litigation).

43. *See* McCORMICK, *supra* note 10, § 72 (describing this rationale as “utilitarian” justification for attorney-client privilege); *see also* Allen, *supra* note 6, at 805-06 (discussing attorney-client relationship within context of utilitarian justification to promote good for entire legal system).

44. *See* McCORMICK, *supra* note 10, § 72 (observing that, with respect to privileges intended to protect communications in the context of professional relationships, “[t]he rationale traditionally advanced for these privileges is that public policy requires the encouragement of the communications without which these relationships cannot be effective”).

45. 329 U.S. 495 (1947).

46. *See* Saltzburg, *supra* note 9, at 612 (citing 4 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 26.63[3], at 354 n.1 (2d ed. 1979) for the point that “[b]efore *Hickman*, ‘[f]ederal court decisions were almost non-existent’”); *see also* McCORMICK, *supra* note 10, § 96 (“Thus, under the old chancery practice of discovery, the adversary was not required to disclose, apart from his own testimony, the evidence which he would use, or the names of the witnesses he would call in support of his own case.”) (citation omitted).

in litigation.⁴⁷ The protection is qualified because the Court was careful to note that if written statements and documents in an attorney's files contain facts that are "essential to the preparation of [an adversary's] case, discovery may properly be had."⁴⁸ A detailed analysis of the protections provided by the doctrine is not necessary for purposes of this Article, and a brief overview of the work product doctrine, focusing on the important distinctions between the work product doctrine and the attorney-client privilege, will suffice.⁴⁹ What is more important for purposes of this Article is a comparison of the policy grounds underlying the privilege and the work product doctrine, and an analysis of how those policy grounds may be undermined by recent federal law enforcement attacks on the privilege.

Since *Hickman* was decided the work product doctrine has been codified in the Federal Rules of Civil Procedure⁵⁰ and the Federal Rules of Criminal Procedure.⁵¹ As it has evolved, the work product doctrine recognizes a distinction between so-called "opinion work product"—an attorney's mental impressions and legal theories—and the underlying factual information contained in an attorney's work product.⁵² The work product doctrine does not limit or deter independent efforts by adversaries to collect factual information, even if the same information has previously been collected by an adversary and incorporated into her work product. As a leading commentator has explained the difference, "[m]ental impressions are fully protected; facts, on the other hand, seem to be fully discoverable."⁵³

47. See *Hickman*, 329 U.S. at 509-10 (concluding that discovery of attorney work product "falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims"). Although *Hickman* involved civil litigation, subsequent cases have extended work product protection to criminal cases and regulatory investigations. See, e.g., EPSTEIN, *supra* note 23, at 485-87 (collecting cases).

48. *Hickman*, 329 U.S. at 511; see also Sherman L. Cohn, *The Work-Product Doctrine: Protection Not Privilege*, 71 GEO. L.J. 917, 929-32 (1983) (discussing different methods for overcoming work product protection); Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 30 (1997) (discussing loss of protection of work product doctrine through waiver).

49. For thorough treatments of the work product doctrine, see EPSTEIN, *supra* note 23, at 477-641; 1 McCORMICK, *supra* note 10, § 96; Jeff A. Anderson, et al., Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 760-893 (1983); Cohn, *supra* note 48, at 932-35; John Soumilas, Comment, *Compilations: Truth, Privacy, and the Work-Product Doctrine*, 73 TEMP. L. REV. 227, 227-68 (2000).

50. See FED. R. CIV. P. 26(b)(3).

51. See FED. R. CRIM. P. 16(b)(2).

52. See McCORMICK, *supra* note 10, § 96 n.35 ("The work product defined by this phrase is today often referred to as 'opinion' (as opposed to 'fact') work product.") (citation omitted).

53. Saltzburg, *supra* note 9, at 613-14; see also Anderson, et al., *supra* note 49, at 783-84 ("[T]he rule singled out for special protection 'opinion work product': the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative of the client. This added protection suggested the existence

Another distinguishing aspect of the work product doctrine is the extent of the protection provided. The attorney-client privilege applies only to confidential communications between an attorney and a client for the purpose of giving or receiving legal advice,⁵⁴ while the work product doctrine protects a broader range of materials prepared by or at the direction of an attorney in preparation for or in anticipation of litigation.⁵⁵ For example, an attorney's notes of an interview or discussion with a third-party witness would not be protected by the attorney-client privilege, but would be protected by the work product doctrine.⁵⁶ Similarly, an attorney's notes of her legal analysis or litigation strategy, assuming they did not reflect communications with her client,⁵⁷ would not be protected by the privilege but would be subject to the highest level of protection as "opinion work product."⁵⁸

of some ill-defined bifurcation within the rule."); Soumilas, *supra* note 49, at 239-40 ("Opinion work product, which tends to show mental impressions, conclusions, legal theories, or opinions, is distinct from ordinary work product presumably because it always lies well within the zone of privacy that is available to the attorney operating within the adversarial system.");

54. For a more detailed analysis of the scope of the privilege, see EPSTEIN, *supra* note 23, at 45-263 (discussing four elements of attorney-client privilege); MC-CORMICK, *supra* note 10, §§ 88-92 (discussing general application of privilege); Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 967-1005 (1999) (same); Bufkin Alyse King, Comment, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 621-38 (2002) (discussing application of privilege in context of corporations).

55. See Saltzburg, *supra* note 9, at 615 ("The work-product doctrine extends to third persons and objects that an attorney might examine, while the attorney-client privilege is limited exclusively to the lawyer and her client.") (citations omitted); see also Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of the Attorney-Client and Work-Product Privileges*, 49 BAYLOR L. REV. 33, 38 (1997) ("Courts generally construe the work product doctrine to provide broader protection than the attorney-client privilege."); Cohn, *supra* note 48, at 922-23 ("Although information obtained by an attorney directly from a client is, in the broad sense, work product, the work-product doctrine encompasses much more than the attorney-client privilege: work product includes information obtained by the attorney from persons other than a client.") (emphasis in original).

56. Attorney interview notes and related materials were the subject of *Hickman*, which established the work product doctrine. See *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (discussing scope of documents entitled to protection); see also Cohn, *supra* note 48, at 924 ("[O]pinion work product includes the attorney's personal recollections, memoranda, handwritten notes, legal opinions, and litigation strategy and is discoverable only in the rarest situations."); Soumilas, *supra* note 49, at 241 ("Drafts of legal memoranda, summaries of conferences, and settlement proposals plainly represent opinion work product.");

57. See, e.g., RICE, *supra* note 23, § 5.9 (discussing application of attorney-client privilege to attorneys' notes and files).

58. Anderson, et al., *supra* note 49, at 789 ("[O]pinion work product, presents a clearer view of the attorney's thought processes than does ordinary work product, and therefore receives near absolute protection."); Cohn, *supra* note 48, at 923-24 ("Although documents and tangible things are subject to discovery upon the proper showing under rule 26(b)(3), the opinions and mental impressions of counsel germane to the case *sub judice* are rarely discoverable even if they are writ-

The differences between the protections provided by the two legal doctrines are significant, particularly in the real world of litigation practice, and analytically it is important always to distinguish between the two separate and distinct legal doctrines.⁵⁹ Commentators have tended to focus on the differing policy grounds that are promoted by the two doctrines.⁶⁰ The attorney-client privilege is often described as promoting the interests of the client in access to legal advice,⁶¹ while the work product doctrine is often described as serving the interests of the attorney in preparing for litigation.⁶² Most commentators do recognize, albeit implicitly in many instances, that both policy grounds ultimately promote the same core value of efficient administration of justice and effective functioning of our legal system.⁶³ What is often not adequately considered, however, is another core value that both doctrines serve—protecting the interest of the client in effective legal representation.

This latter value, which was explicitly embraced by the Supreme Court in *Hickman*, is one that merits attention when analyzing the effects of law enforcement efforts to curtail availability of the privilege and the work product doctrine.⁶⁴ A fundamental policy objective underlying the

ten or otherwise recorded. Indeed, any tangible attorney work product containing opinions of counsel receives a higher degree of protection even if the items contain otherwise discoverable information.”); Soumilas, *supra* note 49, at 239-43 (“Work product immunity, therefore, is almost always assured in cases involving opinion work product.”).

59. *See, e.g., In re Sealed Case*, 676 F.2d 793, 812 n.72 (D.C. Cir. 1982) (“Where, as here, the documents involved all reflect the opinions, judgments, etc. of a lawyer, the work product privilege is for practical purposes as absolute as the attorney-client privilege, and it extends to a larger class of material.”).

60. *See* EPSTEIN, *supra* note 23, at 2-3, 477 (discussing different focuses of both doctrines); Cohn, *supra* note 48, at 936 (discussing intent of work product and attorney-client privilege doctrines); Saltzburg, *supra* note 9, at 614-16 (discussing differing policies promoted by both doctrines); *cf.* Cynthia B. Feagan, *Issues of Waiver in Multiple-Party Litigation: The Attorney-Client Privilege and the Work Product Doctrine*, 61 UMKC L. REV. 757, 773-75 (1993) (discussing general distinctions between work product doctrine and attorney-client privilege).

61. For a discussion of the development of and policy considerations served by the attorney-client privilege, see *supra* notes 10-44 and accompanying text; *see also* EPSTEIN, *supra* note 23, at 2-3 (discussing policy behind privilege); RICE, *supra* note 23, § 2.3 (discussing purpose and rationale of privilege).

62. *See* EPSTEIN, *supra* note 23, at 477 (discussing policy behind work product doctrine).

63. *See id.* (“The protection given to both attorney-client communications and ‘work product’ arises from a common assumption—that an attorney cannot provide full and adequate representation unless certain matters are kept beyond the knowledge of adversaries.”); RICE, *supra* note 23, § 2:3 (arguing that privilege increases law’s effectiveness); *cf. Sealed Case*, 676 F.2d at 812 (observing in context of crime-fraud exception analysis that “the coverage and purposes of the attorney-client privilege are completely subsumed into the work product privilege”) (citation omitted).

64. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (“And the interests of the clients and the cause of justice would be poorly served [without the protections of the work product doctrine].”).

work product doctrine is protection of the attorney-client relationship—the same policy objective that underlies the “modern theory” of the attorney-client privilege.⁶⁵ The Supreme Court’s enthusiastic embrace of the work product doctrine in *Hickman* and thereafter demonstrates its respect and concern for the attorney-client relationship, and its desire to protect that relationship from unnecessary outside interference.⁶⁶ That is precisely what the recent law enforcement initiatives that are the subject of this Article seek to do—invade the attorney-client relationship. The fundamental interest that must be preserved is that clients are adequately and effectively represented—an overarching policy interest that is essential to our adversarial system of justice. As the discussion above demonstrates, the Supreme Court has been consistently protective of this interest, in both its attorney-client privilege and work product doctrine jurisprudence. The same is true of the Court’s application of the privilege and the work product doctrine in the corporate context.

3. *Development of the Attorney-Client Privilege and the Work Product Doctrine in the Corporate Context*

As one influential commentator has observed: “In the modern era, the principal arena in which the value of the privilege is being contested is in connection with the assertion of the privilege by a corporation.”⁶⁷ Although the application of the privilege to a corporate entity, which cannot itself communicate with counsel and can act only through employees and other agents,⁶⁸ has presented a great many issues for resolution by the courts,⁶⁹ there no longer is any question that the privilege is available to corporations and other collective entities when they seek confidential legal advice.⁷⁰ This result is consistent with the modern theory of the policy interests that are furthered by the privilege.

65. For a further discussion of the modern theory of attorney-client privilege, see *supra* note 26 and accompanying text.

66. See *Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981) (expressing importance of preserving confidential attorney-client communications); *United States v. Nobles*, 422 U.S. 225, 236-40 (1975) (holding that, although generally applicable in criminal cases, work product did not apply where defendant waived such privilege). The *Upjohn* Court itself stated that, “[t]he ‘strong public policy’ underlying the work product doctrine was reaffirmed recently in *Nobles* and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).” *Upjohn*, 449 U.S. at 398 (citation omitted).

67. 3 WEINSTEIN’S FEDERAL EVIDENCE, § 503.03[3] (2d ed. 1997).

68. Cf. RICE, *supra* note 23, § 4:22 (noting that “corporations can only speak through their agents about corporate matters that are within the scope of those agents’ employment responsibilities”).

69. See EPSTEIN, *supra* note 23, at 99-109 (collecting cases).

70. See *id.* at 99 (distinguishing attorney-client privilege from Fifth Amendment, which does not extend to corporate entities).

In the leading case shaping the corporate attorney-client privilege, *Upjohn Co. v. United States*,⁷¹ the Supreme Court recognized that full and frank disclosure by the client is required in order for the attorney effectively to serve the client as either adviser or advocate.⁷² Guided by those policy objectives, the Court concluded that the attorney-client privilege and the work product doctrine are available to corporate clients as well as to individuals.⁷³ In *Upjohn*, the Court identified a series of factors supporting application of the privilege when corporate employees communicate with corporate counsel:

The communications at issue were made by [corporate] employees to counsel for [the corporation] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel The communications concerned . . . matters within the scope of the employees' corporate duties [T]he communications were considered "highly confidential" when made . . . and have been kept confidential by the company.⁷⁴

In a subsequent case, the Supreme Court concluded that the attorney-client privilege belongs to the corporate entity itself, rather than to any individual corporate officer or employee, and that consequently only the

71. 449 U.S. 383 (1981). In some ways *Upjohn* is the paradigmatic case illustrating the aggressive stance of federal law enforcement officials in seeking to overcome the attorney-client privilege and the work product doctrine. In *Upjohn*, the defendant corporation had voluntarily disclosed to the government, in a Securities and Exchange Commission filing, potentially illegal payments to or for the benefit of foreign government officials. *See id.* at 387-88 (The SEC's "Voluntary Disclosure Program" and the post-Watergate foreign payments scandal are described *infra* Part III.F.). Subsequently, the Internal Revenue Service undertook an investigation of the payments and issued an investigative summons for all interview memoranda, notes and other files of the internal investigation conducted by the company's general counsel. *See Upjohn*, 449 U.S. at 383-84. As the Supreme Court pointed out, the government could have sought to obtain the same factual information for itself through independent investigation, but the IRS instead sought to override the company's privilege and obtain the information the easy and "more convenient" way—through the fruits of the company's legal counsel's investigation. *See id.* at 396, 399. The Court rejected the government's approach in the circumstances of the *Upjohn* case but, as discussed *infra* Part III, twenty years later the government continues to pursue the same approach, albeit through more sophisticated means. Today, in addition to seeking to overcome the protections of the privilege through judicial proceedings, see *infra* Parts III.A and III.B, law enforcement authorities instead seek to compel its waiver through "cooperation" policies and aggressive use of the sentencing guidelines, see *infra* Parts III.C-F.

72. *See Upjohn*, 449 U.S. at 389 (discussing importance of confidential attorney-client communications); *see also* *United States v. Zolin*, 491 U.S. 554, 562 (1989) (same); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (same); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (same).

73. *See Upjohn*, 449 U.S. at 396-97 (addressing attorney-client privilege); *see also id.* at 401-02 (addressing work product protection). For a further discussion of the policy issues addressed in the *Upjohn* case, see *infra* Part II.B.1.a.

74. *Upjohn*, 449 U.S. at 394-95.

corporation can assert or waive the privilege.⁷⁵ The lower federal courts have since recognized the corporate attorney-client privilege in a wide variety of contexts.⁷⁶

Although government investigators and prosecutors frequently are frustrated by corporate assertions of the attorney-client privilege, the privilege serves a vital purpose in the corporate context.⁷⁷ In *Upjohn*, the Supreme Court warned that attacks on the corporate attorney-client privilege could “limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”⁷⁸ As the Court’s admonition indicates, the policy reasons that underlie the attorney-client privilege are particularly strong in the attorney-corporate client context: “In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law’”⁷⁹ The government’s effort to invade a corporation’s privilege thus implicates societal interests larger than the prosecutor’s desire to prove criminal charges in a single case.

Courts have recognized that, as a matter of policy, corporations should be encouraged to investigate and correct internal wrongdoing.⁸⁰ Failing to afford the protection of the attorney-client privilege to communications between business entities and their legal counsel would have a chilling effect on internal investigations of corporate activities.⁸¹ Thus,

75. See *Weintraub*, 471 U.S. at 348 (stating that waiving attorney-client privilege can only be done by those with power to act on corporation’s behalf); see also *In re Richard Roe, Inc.*, 168 F.3d 69, 72 (2d Cir. 1999) (finding that privileged document written by former in-house counsel belonged to corporation, not to former employee); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997) (stating that to assert attorney-client privilege, corporate officers must actually seek legal advice); *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (finding joint attorney-client privilege exists where corporate officers seek advice to comply with law); *United States v. Keplinger*, 776 F.2d 678, 700-01 (7th Cir. 1985) (finding no privilege where individuals never sought individual representation from corporate attorneys); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 49 (S.D.N.Y. 1989) (finding joint privilege where attorney represented both corporation and its subsidiary).

76. See, e.g., EPSTEIN, *supra* note 23, at 99-109 (collecting cases).

77. See *King*, *supra* note 54, at 623 (“Corporations today especially need the assistance of attorneys to help them comply with the numerous government regulations applicable to corporations.”).

78. *Upjohn*, 449 U.S. at 392; see also *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 Civ. 2217 (RO), 1996 WL 306576, at *2 (S.D.N.Y. Jun. 7, 1996) (“Strong public policy considerations . . . militate against finding a waiver of the privilege. A finding that publication of an internal investigative report constitutes waiver might well discourage corporations from taking the responsible step of employing outside counsel to conduct an investigation when wrongdoing is suspected.”).

79. *Upjohn*, 449 U.S. at 392 (quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969)).

80. See generally *Upjohn* 449 U.S. at 383 (finding attorney-client privilege necessary to advise client on potential legal difficulties).

81. See *id.* at 398 (noting lack of degree of privacy causes justice to be poorly served).

although the corporate attorney-client privilege may be the most recent battleground in the ongoing privilege wars, the same core values that have prevailed throughout the historical development of the privilege in this country remain paramount. From Wigmore's initial articulation at the beginning of the twentieth century of the "modern theory" of the policies underlying the privilege, to the federal courts' application of the privilege to corporations at the end of the century, the consistent message has been that the privilege plays a vital role in our legal system and should be retained and respected. That important lesson gleaned from review of the historical development of the privilege is reiterated by the Supreme Court's more recent cases applying and analyzing the privilege.

B. *The Supreme Court's Recent Decisions Affirming the Importance of the Attorney-Client Privilege and the Work Product Doctrine*

1. *Privilege Issues Decided by the Court Since 1980*

In view of the historical importance attached to the attorney-client privilege in our adversarial system of justice,⁸² it is perhaps surprising that the United States Supreme Court has addressed attorney-client privilege issues on relatively few occasions.⁸³ What is remarkable about the Supreme Court's privilege jurisprudence is not its quantity, but rather the

82. See David A. Nelson, *Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?*, 86 Nw. U. L. REV. 368, 368 (1992) (noting that attorney-client privilege has "become a cornerstone of the American legal system"); Michel Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations*, 33 HASTINGS L.J. 495, 495-96 (1982) ("The prominence and visibility of the [attorney-client] privilege in American jurisprudence today can be attributed to its ability to encompass several of the essential threads that structure the American legal process.").

83. See generally, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding that privilege survives death of client); *United States v. Zolin*, 491 U.S. 554 (1989) (discussing crime-fraud exception to attorney-client privilege); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (discussing waiver of attorney-client privilege in corporate context); *F.T.C. v. Grolier*, 462 U.S. 19 (1983) (discussing Freedom of Information Act and work product); *Upjohn*, 449 U.S. at 383 (discussing scope of attorney-client privilege in corporate context); *United States v. Nobles*, 422 U.S. 225 (1975) (discussing work product in criminal context); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (discussing Freedom of Information Act and work product); *Tierney v. United States*, 409 U.S. 1232 (1972) (pointing to potential conflict between search warrant obtained under Fourth Amendment and confidentiality of attorney-client communications under Sixth Amendment regarding application for bail); *Massey v. Georgia*, 401 U.S. 964 (1971) (Douglas, J., dissenting) (linking attorney-client privilege with Sixth and Fourteenth Amendments); *Hickman v. Taylor*, 329 U.S. 495 (1947) (providing origin for work product doctrine); *Clark v. United States*, 289 U.S. 1 (1933) (analogizing to attorney-client privilege and crime-fraud exception); *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318 (1915) (mentioning attorney-client privilege); *Glover v. Patten*, 165 U.S. 394 (1897) (discussing testamentary exception to attorney-client privilege); *Hunt v. Blackburn*, 128 U.S. 464 (1888) (discussing policy underlying attorney-client privilege and waiver); *Vogel v. Gruaz*, 110 U.S. 311 (1884) (applying attorney-client privilege); *Connecticut Mutual Life Ins.*

consistency with which the Court has upheld both the application of the privilege and the policy grounds, discussed above, that underlie it. In recent decades the Supreme Court has decided four significant attorney-client privilege cases.⁸⁴ Each of those cases has been the subject of extensive scholarly commentary and analysis,⁸⁵ and this Article does not seek to analyze further the specific legal issues presented by those cases. This Article instead reviews the cases from a different perspective, seeking to ascertain what those cases, taken together, tell us about the Court's general

Co. v. Schafer, 94 U.S. 457 (1876) (discussing policy underlying attorney-client privilege) .

84. See generally *Swidler & Berlin*, 524 U.S. at 399 (holding that attorney-client privilege survives death); *Zolin*, 491 U.S. at 562 (discussing crime-fraud exception); *Weintraub*, 471 U.S. at 348 (discussing waiver of privilege within corporation); *Upjohn*, 449 U.S. at 383 (evaluating attorney-client privilege within corporation).

85. For analysis and commentary on the *Upjohn* case, see generally Darrell Anthony Baldwin, *Evidence—Attorney-Client Privilege—Rejection of the Corporate Control-Group Test: Upjohn v. United States*, 449 U.S. 383 (1981), 48 TENN. L. REV. 1024, (1981); Jeanne Andrea Di Grazio, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney-Client Communications Via E-mail and the Internet—From Upjohn Co. v. United States and Its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553 (1998); Stanley A. Freedman, *Corporate Attorney-Client Privilege Since Upjohn, at Home and Abroad*, 9 U. DAYTON L. REV. 425 (1984); James Heckmann, *Evidence—Upjohn v. United States—Corporate Attorney-Client Privilege*, 7 J. CORP. L. 359 (1982); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982); Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181 (1987); Waldman, *supra* note 9, at 473; Weiss, *supra* note 9, at 1182; Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665 (1983).

For analysis and commentary on the *Weintraub* case, see, for example, Thomas, *supra* note 9, at 635; Wood, *supra* note 9, at 565. For analysis and commentary on the *Zolin* case, see, for example, Christopher Paul Galenek, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115 (1990); Rachel A. Hutzler, *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 (1990); S. Aftab Sharif, *Another Independent Evidence Rule Goes Up in Smoke: The Supreme Court Strikes a Balance in United States v. Zolin*, 109 S. Ct. 2619 (1989), 16 T. MARSHALL L. REV. 127 (1990).

For analysis and commentary on the *Swidler & Berlin* case, see, for example, Jason Greenberg, *Swidler & Berlin v. United States. . . and Justice for All?*, 80 B.U. L. REV. 939 (2000); Aquanetta A. Knight, *Swidler & Berlin v. United States: The Derogation of the Attorney-Client Privilege*, 43 HOW. L.J. 243 (2000); Clint Langer, *Evidence—The Attorney-Client Privilege: Nearly Breached: Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998), 34 LAND & WATER L. REV. 479 (1999); Kenneth K. Lee, *Attorney-Client Privilege—Dead or Alive?: A Post-mortem Analysis of Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998), 22 HARV. J.L. & PUB. POL'Y 735 (1999); Rob Shumaker, *Failing to Recognize the Need for an Exception to the Attorney-Client Privilege: The Supreme Court's Decision in Swidler & Berlin v. United States*, 524 U.S. 399 (1998), 24 S. ILL. U. L.J. 645 (2000); Julie Peters Zamacona, *Evidence and Ethics—Letting the Client Rest in Peace: Attorney-Client Privilege Survives the Death of the Client: Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998), 21 U. ARK. LITTLE ROCK L. REV. 277 (1999); Paul A. Gordon, Note, *Evidence/Professional Responsibility—Life After Death: The Attorney-Client Privilege—Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998), 72 TEMP. L. REV. 493 (1999).

disposition toward the privilege and the propriety of the recent efforts by federal law enforcement authorities to overcome assertions of privilege.⁸⁶ As the discussion below indicates, those cases make clear that the Court is strongly “pro-attorney-client privilege” and therefore is unlikely to look with favor on actions by federal law enforcement that unnecessarily undercut or curtail the availability of the privilege.

a. *Upjohn Co. v. United States* and the Corporate Attorney-Client Privilege

In 1981⁸⁷ the Supreme Court decided the *Upjohn* case and unanimously rejected the “control group” test for availability of the privilege in the corporate context.⁸⁸ In *Upjohn*, then-Associate Justice William H. Rehnquist emphasized the public policy basis for the privilege. He recognized that by encouraging full and frank communication between attorneys and clients the privilege promotes broader public interests in

86. For a further discussion of these concepts, see *infra* Part III.

87. This date was selected as a starting point for analysis of the Court’s recent privilege jurisprudence because prior to 1981 the Court had not decided a significant attorney-client privilege or attorney work product case since its 1947 decision in *Hickman v. Taylor*. See *Hickman*, 329 U.S. 495 (1947) (establishing the work product doctrine); cf. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191, 294-305 (1989) (noting historical context prior to 1981’s *Upjohn*); Baldwin, *supra* note 85, at 1024-25 n.2 (discussing decisions in *Upjohn & Hickman*). In *Trammel v. United States*, 445 U.S. 40 (1980), the Supreme Court considered the witness spouse privilege. Additionally, *Fisher v. United States*, 425 U.S. 391 (1976), addressed the Fifth Amendment privilege against self-incrimination.

88. See *Upjohn*, 449 U.S. at 392 (stating that control group test “frustrates the very purpose of the privilege”). The Court was unanimous in rejecting the control group test. Then-Chief Justice Burger did not join in part II of the Court’s opinion, which declined to articulate a general rule for application of the privilege in the corporate context, but the Chief Justice made clear that he “agree[d] fully with the Court’s rejection of the so-called ‘control group’ test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged.” *Id.* at 402. Chief Justice Burger believed that under Federal Rule of Evidence 501, which “provides that the law of privileges ‘shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,’” the Court had a special duty to clarify the law in this area by articulating a rule of general application, rather than merely deciding the facts of the case before it. *Id.* at 403-04 (quoting FED. R. EVID. 501). Justice Rehnquist and the other seven members of the Court disagreed, and concluded that articulating such a rule would violate the spirit of Rule 501’s “case-by-case” approach to the law of privilege. See *id.* at 396 (citing S. REP. NO. 93-1277, at 13 (1974)) (stating that “the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis”). This reluctance of the Court to articulate rules of general application in the attorney-client privilege area arguably has contributed to uncertainty in this area of law. This Article stresses the need for the lower federal courts to recognize and respect the guiding principles that the Supreme Court has articulated in this area and carefully weigh attempts by federal law enforcement officials to curtail the privilege against those fundamental guiding principles. See *infra* Part IV.

compliance with the law and the administration of justice.⁸⁹ He described the privilege as “recognizing that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”⁹⁰ His opinion for the Court concluded that the control group test was inconsistent with these public policy objectives because it would limit the persons within a corporation who received confidential legal advice from the corporation’s attorneys while at the same time limiting the amount of information that corporate attorneys received from employees and agents of the corporation.⁹¹ The opinion acknowledged that complications arise when the attorney-client privilege is applied to an artificial entity such as a corporation,⁹² particularly where middle-level and lower-level employees are involved.⁹³ Nevertheless, the Court concluded that limiting application of the privilege to the high-level “control group” of a corporation was untenable because to do so would frustrate “the very purpose of the privilege” and could “limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”⁹⁴

89. See *Upjohn*, 449 U.S. at 389 (noting purpose of attorney-client privilege).

90. *Id.*

91. See *id.* at 392-93 (illustrating drawbacks of control group test); see also RICE, *supra* note 23, § 4:13 (“Even if the application of the control group test were predictable, a more telling criticism is that it unnecessarily restricts the free flow of information to corporate counsel by arbitrarily limiting the privilege protection to those who make decisions for the corporation and excluding equally, if not more, important classes of employees—those to whom the legal advice may be most important because they must act upon it, and those who acquired the relevant information through their job performance that is critical to the legal assistance being sought.”); Alexander, *supra* note 87, at 319 (“[E]xpansion of the corporate attorney-client privilege beyond the control group at least has the potential for encouraging management to authorize open channels of communication between all employees and the corporation’s attorneys in an effort to comply with the law.”); Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 356 (1987) (citations omitted) (“The attorney-client privilege is applicable to corporations and preserves the confidences of communications between the attorney and his clients on the theory that effective legal advice will be furthered by the creation of this zone of confidentiality.”); Stahl, *supra* note 85, at 1194, 1198 (“[T]he Supreme Court recognized that it is the nature of the communication, and not the rank, position or status of the employee who is a party to the communication, that is critical in determining the applicability of the attorney-client privilege [T]o the extent enterprise employees do not feel free to communicate with counsel and/or counsel is inhibited in inquiring of and advising the employees of an enterprise, the effectiveness of representation of counsel is inevitably reduced. When denied the effective representation of counsel, the enterprise may be prejudiced in asserting its legitimate interests and protecting its legal rights.”).

92. See *Upjohn*, 449 U.S. at 389-90 (noting distinction between corporations and individuals).

93. See *id.* at 391 (discussing potential for certain classes of employees to “embroil the corporation in serious legal difficulties”).

94. *Id.* at 392 (rejecting control group test).

Significantly, the core rationale of the *Upjohn* decision is the belief that confidentiality is essential if the societal interest in fostering compliance with the law is to be served. Without an assurance of confidentiality, clients are unlikely to confide in their attorneys and, if they do not obtain fully informed legal advice, they are less likely to comply with the law.⁹⁵ Any doubt that the Court wished to emphasize this point is dispelled by the frequently quoted statement in *Upjohn* that, “[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.”⁹⁶ This rationale has remained constant in the Court’s other privilege cases that have been decided since *Upjohn*, notwithstanding the passage of over two decades and the changes in the make-up of the Court that have occurred in that time.

b. *Commodity Futures Trading Comm’n v. Weintraub* and Bankruptcy Trustees

In 1984 the Court revisited the application of the privilege to a corporate entity, this time in the context of a corporate bankruptcy. In *Commodity Futures Trading Comm’n v. Weintraub*⁹⁷ the Court held that control over a bankrupt corporation’s attorney-client privilege passes to the bankruptcy trustee.⁹⁸ Justice Marshall, writing for a unanimous Court,⁹⁹ concluded that in the case of a corporate bankruptcy, the trustee in bankruptcy, by virtue of the management powers the trustee assumes, is analogous to the board of directors of a solvent corporation.¹⁰⁰ Because the officers and directors of a solvent corporation exercise the power to waive the corporation’s attorney-client privilege,¹⁰¹ the trustee should assume that power when the bankruptcy court has appointed a trustee and stripped managerial power from the bankrupt company’s officers and directors.¹⁰²

95. *See id.* (observing that need for legal advice is particularly great for corporate entities in today’s regulatory environment because “compliance with the law in this area is hardly an instinctive matter”); *see also* H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1195-96 (1999) (“In order for the privilege to be effective in achieving the goal of compliance with law resulting from sound legal advice based on client candor, . . . there must be predictable certainty that the confidentiality of client communications will be preserved.”); King, *supra* note 54, at 623 (“Corporations today especially need the assistance of attorneys to help them comply with the numerous government regulations applicable to corporations.”).

96. *Upjohn*, 449 U.S. at 393.

97. 471 U.S. 343 (1984).

98. *See id.* at 354 (pointing to power of trustee in corporate bankruptcy proceedings).

99. Justice Powell did not participate in the case. *See id.* at 358.

100. *See id.* at 352-53.

101. *See id.* at 348 n.4 (citing DEL. CORP. ANN. Tit. 8, § 141 (1983); N.Y. BUS. CORP. LAW § 701 (McKinney Supp. 1983-1984); and MODEL BUS. CORP. ACT. § 35 (1979)).

102. *See id.* at 351-52 (listing powers and duties of bankruptcy trustee).

Like Justice Rehnquist in *Upjohn*, Justice Marshall in *Weintraub* recognized that the administration of the attorney-client privilege raises “special problems” in the corporate context because a corporation is an inanimate entity and cannot speak directly to its lawyers.¹⁰³ He described *Upjohn* and *Weintraub* as presenting “related” questions arising out of the application of the privilege to corporations.¹⁰⁴ The key point from *Weintraub* for purposes of this Article is that Justice Marshall based his analysis on the same core rationale that Justice Rehnquist relied on in *Upjohn*—that by promoting full and frank communications between attorneys and their clients the privilege “encourages observance of the law and aids in the administration of justice.”¹⁰⁵

This concern with not unduly interfering with attorney-client communications is evident in the portion of the *Weintraub* opinion that dismisses the argument that vesting power to waive the privilege in the trustee of a bankrupt corporation “will have an undesirable chilling effect on attorney-client communications.”¹⁰⁶ Rather than rejecting the underlying premise that chilling attorney-client communications should be avoided, Justice Marshall dismissed the argument because the chilling effect with a bankruptcy trustee is no greater than in the case of solvent corporation that undergoes a change of management.¹⁰⁷ In both cases the corporation’s prior management loses its control over assertion and waiver of the corporation’s attorney-client privilege. In essence, the *Weintraub* Court began its analysis with explicit approval of the public policy objectives identified in *Upjohn* that are served by the attorney-client privilege¹⁰⁸ and concluded its analysis with an implicit recognition of the importance of those same public policy objectives.¹⁰⁹

c. *United States v. Zolin* and the Crime-Fraud Exception

Five years later, the Supreme Court’s next venture into the attorney-client privilege arena resulted in an even stronger affirmation of the rationale underlying the privilege and the public policy objectives the privilege

103. *See id.* at 348 (explaining that corporations must use agents to communicate with their lawyers).

104. *See id.* (considering whether privilege covers only communications between counsel and top management).

105. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

106. *Weintraub*, 471 U.S. at 357. The respondents in *Weintraub* argued that corporate managers would “be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy” of the corporation. *Id.*

107. *See id.* (rejecting second argument of respondents).

108. *See id.* at 348 (approving policy of communication between attorney and clients).

109. *See id.* at 357 (accepting, implicitly, *Upjohn* policy objectives).

promotes. In *United States v. Zolin*¹¹⁰ the Court grappled with the “crime-fraud exception” to the attorney-client privilege, which arguably is one of the most vexing areas of privilege law.¹¹¹ In yet another unanimous decision,¹¹² the Court concluded that a court may use *in camera* review to determine whether the crime-fraud exception applies to attorney-client communications—but only if the party challenging the privilege presents evidence sufficient to support a reasonable belief that *in camera* review may establish that the exception is applicable.¹¹³ The *Zolin* Court also rejected the “independent evidence rule” that the purportedly privileged communications themselves cannot be considered by the court *in camera*, concluding that such a rule would create “too great an impediment to the adversary process.”¹¹⁴

On first examination, *Zolin* might appear to signal diminished support for the privilege by the Supreme Court, but a close reading of the opinion proves that is not the case. In *Zolin*, as it had done in *Upjohn* and *Weintraub*, the Court began its attorney-client privilege analysis by explaining that the privilege is intended to encourage full and frank communications between attorneys and their clients, which promotes the broader public policy interests in observance of law and administration of justice.¹¹⁵ The *Zolin* Court expressed its support of this core principle, which it articulated as “the centrality of open client and attorney communication to the proper functioning of our adversary system of justice.”¹¹⁶ Rather than departing from this concept of the role and importance of the attorney-client privilege in our legal system, the *Zolin* opinion recognized an important limitation on it: the privilege does not apply if the purpose of

110. 491 U.S. 554 (1989).

111. For a further discussion of the crime-fraud exception, see *infra* Part II.C.1.

112. The decision in *Zolin* was unanimous, but Justice Brennan took no part in the consideration or decision of the case. See *Zolin*, 491 U.S. at 575. It is noteworthy that three of the Supreme Court’s four recent major attorney-client privilege cases have been unanimous. That fact, coupled with the point that all four cases share a common rationale and conception of the role of the attorney-client privilege, as discussed herein, supports the conclusion that the attorney-client privilege is a particularly important doctrine in our legal system and thus should be guarded zealously against unnecessary encroachment by law enforcement authorities.

113. See *id.* at 574-75 (accepting *in camera* review determination).

114. *Id.* at 569. As the *Zolin* Court explained, “the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.” *Id.* at 575.

115. See *id.* at 562 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The *Zolin* Court also pointed out that the underlying rationale for the privilege has evolved over time. *Id.* (citing 8 WIGMORE, *supra* note 9, § 2290; Hazard, *supra* note 12, at 1455-58 (noting development, over time, of objectives behind attorney client privilege). For a brief summary of this evolution and the historical developments leading up to the modern rationale for the attorney-client privilege, see *supra* Part II.A.

116. *Zolin*, 491 U.S. at 562.

the communications is to further future wrongdoing.¹¹⁷ In those circumstances, the policy reasons for recognizing the privilege are not present, and therefore the privilege should not be available.

The conclusion in *Zolin* that the privilege should not be available to shield communications in furtherance of a future crime or fraud is neither remarkable nor inconsistent with the policy interests the privilege is intended to serve.¹¹⁸ Further, it does not detract from the Court's strong support for the privilege when properly invoked to shield the confidentiality of legitimate legal advice. The *Zolin* Court made this point clear in its analysis of whether *in camera* judicial review should be conducted whenever a party asserts that the crime-fraud exception is applicable to attorney-client communications. The primary reason that the Court rejected a blanket rule that *in camera* judicial review should always be conducted when a party challenged the privilege on crime-fraud grounds was concern that such a rule "would place . . . legitimate disclosure between attorneys and clients at undue risk."¹¹⁹ Accordingly, the Court was unwilling to endorse a rule that would discourage full and frank communications between clients and their lawyers. The Court went so far as to condemn any approach to the crime-fraud problem that would "permit opponents of the privilege to engage in groundless fishing expeditions."¹²⁰ This refusal to permit such fishing expeditions, even when it is alleged that the privilege has been misused to further an ongoing or future crime or fraud, is consistent with the Court's prior support for the privilege and the policy interests it serves, as previously demonstrated in *Upjohn* and *Weintraub*.

The test that the Court adopted in *Zolin* for when an *in camera* review should be conducted also reflects the Court's concern that the availability of the privilege not be unduly curtailed. A requirement that evidence sufficient to support a "reasonable belief" that *in camera* review may yield evi-

117. *See id.* at 562-63 (explaining crime-fraud exception to attorney-client privilege).

118. In fact, the Supreme Court itself subsequently stated that the crime-fraud exception applied in *Zolin* is consistent with the purposes of the privilege. *See Swidler & Berlin v. United States*, 524 U.S. 399, 409-10 (1998) (discussing crime-fraud exception). For a more detailed discussion of the crime-fraud exception, see *infra* Part II.C.1.

119. *Zolin*, 491 U.S. at 571.

120. *Id.* The Court also pointed out that, as the Government had "reluctantly" conceded at oral argument, a court would be mistaken to review purportedly privileged documents *in camera* simply because a party requested it to do so, without presenting any evidence of a crime or fraud. *See id.* (asserting that *in camera* review cannot be used in all circumstances). The Court therefore required a showing of "a factual basis adequate to support a good faith belief by a reasonable person" that legal advice was being used to further a crime or fraud as the standard for *in camera* review. *Id.* at 572 (citing *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)). The Court concluded that this standard struck an appropriate balance between protecting legitimate assertions of privilege, including advice concerning past crimes or misconduct, and preventing misuse of the privilege when legal advice is used to further an ongoing or future crime or fraud. *See id.* For a further discussion of this aspect of the *Zolin* case, see *infra* Part II.C.1.

dence establishing that the crime-fraud exception is applicable to the privilege communications at issue means that a court must be presented concrete evidence of criminal or fraudulent conduct—mere unsubstantiated allegations will be insufficient to breach the privilege.¹²¹ Moreover, the use of the term “reasonable belief” demonstrates that the Court intended that an objective standard should apply to the initial determination of whether a legitimate crime-fraud exception challenge to the privilege is being advanced.¹²²

An objective standard limits the discretion of individual judges and screens out weak and spurious challenges to the privilege. Thus, both the rejection of a blanket rule permitting *in camera* review and the objective standard that the Court established for availability of such review indicates that the Court’s primary concern in *Zolin* was to avoid any unwarranted invasion of the privilege. This solicitude for the continued vitality of the privilege and hesitance to formulate a rule that might deter legitimate attorney-client communications demonstrates that the *Zolin* Court remained committed to the core principle that the privilege is a vital element of our legal system.

d. *Swidler & Berlin v. United States* and the Deceased Client

The Court’s most recent attorney-client privilege case provides even stronger confirmation that the Court remains strongly opposed to any unnecessary encroachment on the protections provided by the attorney-client privilege. In *Swidler & Berlin v. United States*,¹²³ the office of Independent Counsel Kenneth W. Starr sought to obtain the handwritten notes taken by Swidler & Berlin attorney James Hamilton during an initial interview with a client, then-Deputy White House Counsel Vincent W. Foster, Jr., shortly before Foster committed suicide.¹²⁴

121. See *Zolin*, 491 U.S. at 571 (“There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.”). See also Brown, *supra* note 95, at 1226 (“[I]n order to establish the predicate crime or fraud, more must be shown than mere allegations of misconduct or simply the fact that a party to the communication is a target of a grand jury investigation.”); Sharif, *supra* note 85, at 127, 141 (“The newly adopted reasonable belief standard requires that opponents of the privilege can present any relevant non-privileged evidence to support a reasonable belief that an *in camera* review may yield evidence that established the exceptions to trigger such a review.”).

122. The use of the word “reasonable” denotes an objective standard of review that can readily be subjected to appellate review if a trial court overreaches and allows invasion of the privilege based on inadequate evidence. Cf. RICE, *supra* note 23, §§ 4:32 at 170-71 (discussing joint representation of corporations and individual corporate officers, directors and employees, and noting that reasonable belief standard indicates that subjective belief alone is insufficient to meet that standard).

123. 524 U.S. 399 (1998).

124. See *id.* at 401 (noting facts of case).

Two unusual aspects of this case made for a dramatic confrontation between the public interests served by the privilege and the evidentiary costs it imposes by excluding potentially relevant evidence. First, the case involved that most sacred form of attorney work product recording client communications: an attorney's handwritten notes of an initial interview with a client.¹²⁵ Second, the information was sought in connection with a criminal investigation of the President of the United States. The combination of these two factors created a test case with a unique juxtaposition of competing public policy interests: those served by the privilege and those presented by allegations of wrongdoing by the country's chief law enforcement officer. Perhaps surprisingly to those who question the importance of the privilege in our modern legal system,¹²⁶ the Supreme Court lined up squarely behind the attorney-client privilege.¹²⁷

Read as a whole, the *Swidler & Berlin* opinion reflects an overwhelming reluctance on the part of the Court to accept a change to existing privilege law that would be contrary to the interest of clients and therefore might undermine clients' reliance on the privilege, as well as their willingness to provide their attorneys with full and frank disclosure of relevant information.¹²⁸ In rejecting the Independent Counsel's argument for ex-

125. *See id.* at 401-02 (discussing issues involved in case). Because the Court upheld the attorney-client privilege claim with regard to the notes, it did not address the claim of work product protection. *See id.* at 403 n.1 (declining to review "the claim of work product privilege"). For a further discussion of the work product doctrine and the distinction between the protections provided by the attorney-client privilege and the work product doctrine, see *supra* Part II.A.2.

126. For recent commentary criticizing the role of the attorney-client privilege and the costs it imposes in terms of keeping potentially relevant evidence from finders of fact, see, for example, Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993).

127. The Court voted 6-3 to uphold the privilege, in an opinion written by Chief Justice Rehnquist, who, as an Associate Justice, had authored the *Upjohn* opinion almost two decades earlier. The Chief Justice began his analysis by citing *Upjohn*, and never retreated from the principles he had articulated in that earlier case. *See Swidler & Berlin*, 524 U.S. at 403. Although *Swidler & Berlin* is the Supreme Court's only recent attorney-client privilege case not to be decided unanimously, it is not surprising that unanimity was not forthcoming in a case that presented such a direct conflict between competing public interests and that involved a matter as polarizing and politicized as the Starr investigation.

128. *See id.* at 410 (declining opportunity to narrow privilege). The Court emphasized the strong weight of existing authority deciding—or assuming—that the privilege survives the death of the client in cases other than those involving disputes among a deceased client's heirs. *See id.* at 404-05 (collecting cases). The Court also relied upon Federal Rule of Evidence 501, to conclude that in light of this weight of contrary authority, "at the very least the burden is on the Independent Counsel to show that 'reason and experience' require a departure from this rule." *Id.* at 405-06. This concern over compliance with Rule 501 is consistent with the approach Chief Justice (then Associate Justice) Rehnquist followed almost twenty years earlier in *Upjohn* when he declined to articulate a general rule governing attorney-client communications in the corporate context because to do so would be inconsistent with Rule 501. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981) (discussing the "spirit" of Rule 501 as requiring "case-by-case"

tending “posthumous curtailment of the privilege” beyond cases involving disputes among a deceased client’s heirs,¹²⁹ the Court emphasized that the rationale for overcoming the privilege in those cases is that doing so furthers the client’s intent.¹³⁰

The Court’s concern with protecting the interest of the client in maintaining the confidentiality of communications with counsel was most evident in its response to the argument advanced by the Independent Counsel that after the client’s death “the interest in determining whether a crime had been committed should trump client confidentiality.”¹³¹ Here the Court focused on the concerns a client might have, beyond concern about criminal prosecution, that could cause that client to withhold information from counsel if confidentiality was not assured. The Court identified concerns about “reputation, civil liability [and] possible harm to friends or family as reasons why a client might withhold information.”¹³² The Court was unwilling to accept the risk that clients’ willingness to confide in counsel would be impaired, even if the exception to the privilege applied only in criminal cases.¹³³

The *Swidler & Berlin* Court also expressed concern about injecting additional uncertainty into the privilege’s application.¹³⁴ This concern is consistent with the Court’s core objective, consistently applied since its decision in the *Upjohn* case, that the application of the privilege should encourage clients to communicate frankly and fully with their lawyers.¹³⁵ In advancing this objective, the Court embraced a broad concept of the privilege, extending beyond client concerns about prosecution in criminal

development of privilege law). For a further discussion of Federal Rule of Evidence 501, see *supra* note 88 and accompanying text.

129. See *Swidler & Berlin*, 524 U.S. at 402, 410-11 (discussing the principle that attorney-client privilege survives death of client in certain cases).

130. See *id.* at 406.

131. *Id.*

132. See *id.* at 407 (noting reasons client may withhold information).

133. See *id.* at 409 (refusing to forsake interests of clients and forego application of attorney-client privilege). The Court rejected a posthumous exception in criminal cases as “at odds with the goals of encouraging full and frank communication and of protecting the client’s interests.” *Id.* at 410. It is noteworthy that the Court’s approach was not to balance one interest against another, but rather to reject the criminal investigation interest—even in an investigation of wrongdoing by the President of the United States!—because it was inconsistent with the interests promoted by the attorney-client privilege. See *id.* at 409 (refusing to use balancing test in defining contours of privilege). This suggests that the Court may view the societal interests served by the privilege as paramount to the public interest in investigation and prosecution of particular crimes, even crimes of national importance. If this is indeed how the Supreme Court views the privilege, it should make law enforcement officials hesitate before implementing investigatory procedures or prosecutorial policies that tend to undercut the privilege. For further discussion of this point, see *infra* Part III.A.3.

134. See *Swidler & Berlin*, 524 U.S. at 409.

135. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”).

cases to client confidences about personal and family matters that must be revealed to obtain appropriate legal advice.¹³⁶ Even these kinds of client confidences, perhaps only tangentially related to the legal advice provided in the course of such communications, were deemed worthy of protection by the Court. Taken as a whole, the *Swidler & Berlin* case represents perhaps the strongest affirmation yet of the value ascribed to attorney-client privilege by the Supreme Court.¹³⁷

2. Conclusion

For purposes of this Article, it is important to note that all of these cases involved efforts by law enforcement officials to overcome assertions of privilege by parties subject to government regulatory proceedings or criminal prosecutions.¹³⁸ In all instances, the Court sustained the availability of the privilege¹³⁹ and rejected efforts by the government to limit its protections.¹⁴⁰ Moreover, as discussed above, in all four of the cases, the Court consistently upheld the policy grounds that historically have been recognized as supporting the privilege. In short, these cases demonstrate consistent support of the privilege by the Supreme Court over the past two decades.

C. Existing Checks on Abuse and Unwarranted Assertion of the Attorney-Client Privilege and the Work Product Doctrine

Both the long history of the attorney-client privilege in the Anglo-American legal system and the recent strong support of the privilege by the United States Supreme Court suggest that hostility to the privilege and attempts to undermine its protection by law enforcement authorities are misguided and unwise. The policy grounds supporting the privilege and

136. See *Swidler & Berlin*, 524 U.S. at 408 (noting situation where confidences are revealed to assure sound legal advice).

137. See Knight, *supra* note 85, at 254-59 (noting fashion in which Court reinforces vitality of attorney-client privilege in *Swidler & Berlin*); Zamacona, *supra* note 85, at 296-97 (discussing significance of *Swidler & Berlin* decision for principle of attorney-client privilege); Gordon, *supra* note 85, at 511-16 (discussing Court's refusal to find exception to attorney-client privilege in *Swidler & Berlin* for deceased client).

138. *Zolin* and *Upjohn* involved Internal Revenue Service (IRS) investigations and efforts to enforce IRS summonses. See *United States v. Zolin*, 491 U.S. 554, 556-61 (1989); *Upjohn*, 449 U.S. at 386-88. *Weintraub* involved a formal investigation by a government agency, the Commodity Futures Trading Commission. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 345-46 (1985). *Swidler & Berlin* involved a criminal grand jury investigation supervised by an Independent Counsel. *Swidler & Berlin*, 524 U.S. at 401-02.

139. See, e.g., *Weintraub*, 471 U.S. at 343 (holding that attorney-client privilege is controlled by bankruptcy trustee and not by former management of bankrupt company).

140. See, e.g., *Swidler & Berlin*, 524 U.S. at 404-11 (holding that attorney-client privilege survives death of client, despite arguments by Office of Independent Counsel that in case of deceased client law enforcement interests should overcome privilege).

the work product doctrine, discussed above, are integral to the United States legal system. Although these considerations are sufficient reasons to oppose overbroad attacks on the privilege by government law enforcement authorities, there is another compelling reason to oppose such efforts: the checks on the privilege that already are in place in our system are adequate to ensure that information is not wrongfully withheld from law enforcers.

Four important checks on abuse and unwarranted assertion of the privilege are discussed below. The most important is the “crime-fraud exception” to the attorney-client privilege, which ensures that the confidentiality otherwise provided by the privilege does not protect communications that are misused to further an ongoing or future crime or fraud. Another important check on improper assertion of privilege is imposed by the limitations that have evolved under the “common interest” doctrine. A third doctrine that prevents improper assertion of privilege or work product protection is the law of waiver, which has developed in such a way as to protect against unwarranted assertions of privilege or work product protection. Finally, the work product doctrine, from its inception in the Supreme Court’s *Hickman* decision to the present day, has featured built-in protections against unwarranted withholding of information. All of these limitations, working together, are sufficient to ensure that in cases where law enforcement has a legitimate need for information, and the policy interests underlying the privilege and the work product doctrine would not be served by confidentiality, the information will be made available to law enforcement.

Another important preliminary consideration concerning existing limitations on assertion of privilege and work product protection is that all of these existing limitations provide for judicial oversight and involvement in the decision to abrogate the protections of the privilege. Many of the efforts by law enforcement to overcome—or do an “end run” around—the privilege seek to obtain access to privileged information without invoking judicial process.¹⁴¹ This is a disturbing trend that threatens to undermine important values in our legal system without the checks provided by judicial review and orderly development of judicial precedents in an area that Congress intended to “be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of

141. Perhaps the most dramatic recent example of this trend is the new Department of Justice policy on “eavesdropping” on conversations between prisoners and their counsel if the prisoner is found to pose a threat of terrorism. For a further discussion of this policy, see *infra* Part III.D.1; see also National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 and 501) [hereinafter *Prevention*] (stating that communications between inmates and their attorneys are not always entitled to protection); Cover, *supra* note 6, at 1238 (determining that application is complicated by possible crime-fraud exception in context of future terrorist attacks).

reason and experience.”¹⁴² These points are discussed in greater detail below in the context of each of these existing limitations.

1. *The Crime-Fraud Exception*

The crime-fraud exception protects against the most egregious class of abuses of the privilege: instances in which a client misuses legal advice to commit a crime or perpetrate a fraud.¹⁴³ The Supreme Court has stated that “the purpose of the crime-fraud exception to the attorney-client privilege [is] to assure that the ‘seal of secrecy’ . . . between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’ or a crime.”¹⁴⁴ The rationale for the exception is well established and follows from the policy goals that underlie recognition of the attorney-client privilege in the first instance: the attorney-client privilege is intended to promote the administration of justice, and any use of the privilege that is inconsistent with that end should not be permitted.¹⁴⁵ The crime-fraud exception prevents use of the privilege to protect communications that do not further legitimate

142. FED. R. EVID. 501; *see also* Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (applying Rule 501). For a discussion of the importance of judicial involvement in the development of the law of privileges, *see* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853, 868-88 (1998) (reviewing involvement of courts in development of attorney-client privilege).

143. *Cf.* 8 WIGMORE, *supra* note 9, § 2290 (“It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with an attorney a *crime* or other evil enterprise.”); *see also* Brown, *supra* note 95, at 1218 (“Today, communications which would otherwise be considered privileged . . . are excepted from the privilege if the communication furthers an ongoing or future crime. Indeed, it is to prevent abuse of the secrecy accorded bona fide attorney-client communications that the modern crime-fraud exception has been fashioned.”) (citations omitted); Hutzler, *supra* note 85, at 372 (“The purpose of the crime-fraud exception is generally to prevent the attorney-client privilege from shielding from prosecution the client who uses his attorney’s advice to initiate or continue a fraudulent or criminal activity.”) (citation omitted).

144. *United States v. Zolin*, 491 U.S. 554, 563 (1989) (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933) and *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)). The lower federal courts have formulated the exception in similar terms: “[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud.” *In re Grand Jury Proceedings (Company X) v. United States*, 857 F.2d 710, 712 (10th Cir. 1988); *see also United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (stating that attorney client privilege does not extend to communications made to lawyer involving future criminal purpose); *In re Impounded*, 241 F.3d 308 (3d Cir. 2001) (holding that when legal advice is sought in furtherance of crime or fraud, attorney-client privilege is waived); *Alexander v. FBI*, 198 F.R.D. 306, 310 (D.C. Cir. 2000) (noting requirements for crime-fraud exception).

145. *See generally* EPSTEIN, *supra* note 23, at 418-22 (reviewing policy reasons for the exception and collecting cases); RICE, *supra* note 23, § 8:2 (asserting that one must question invocation of privilege that would not further policy concerns); *see also Zolin*, 491 U.S. at 569 (discussing “policies underlying the privilege” and “the proper functioning of the adversary process”).

purposes and therefore do not promote the administration of justice.¹⁴⁶ It is important to recognize, however, that the exception applies even if the attorney is completely innocent and unaware of the client's wrongdoing;¹⁴⁷ it is the intent and actions of the client that determine whether or not the exception applies.¹⁴⁸ Of course, the exception also

146. The communication must actually further wrongdoing; however, merely coinciding in time with client wrongdoing is not sufficient. Rather than relying upon a mere "temporal nexus" to hold that the crime-fraud exception applies, a court must find that the "requisite purposeful nexus" exists between the communications and the crime or fraud. See *In re Grand Jury Subpoena Duces Tecum*, 798 F.2d 32, 34 (1986) (finding that documents provided temporal nexus but did not give rise to probable cause to allow belief that communications were made to advance criminal activity); see also Fried, *supra* note 22, at 482-83 (decrying "a tendency in this area for the courts to assert that the cock's crowing made the sun rise, or at least that the client's purpose must have been unlawful because the consultation was followed by the commission of a crime," and suggesting that "courts have lost sight of the principle of causation"). To meet this requirement, a prosecutor often will attempt to rely upon the communications themselves as proof that the exception applies. Commentators have criticized "the circularity of relying upon the confidential communication itself to prove the client's fraudulent intent, which in turn serves as the necessary justification for disclosure." *Id.*, at 460; see also Galenek, *supra* note 85, at 1124 (stating that "circular proof problem" has "plagued the judicial system since the birth of the [crime-fraud] exception"); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 461 (1993) ("The circularity in asserting that the communication is dispositive of whether the privilege applies to it is compounded by the fact that prosecutors arguing for the crime-fraud exception will necessarily have only a limited amount of information about the content of the discussions on which to move for disclosure."). The mere fact that the privileged communications at issue might aid the prosecution in proving its case-in-chief does not make the crime-fraud exception applicable. See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 (8th Cir. 1984) ("That the [attorney-client communication] may help *prove* that a [crime or] fraud occurred does not mean that it was *used* in perpetrating the [crime or] fraud.").

147. For a recent, high-profile example of a case where the crime-fraud exception was invoked even though the lawyer was innocent of any wrongdoing, see *In re Grand Jury Subpoena to Francis D. Carter*, 1998 U.S. Dist. LEXIS 19497, at *4-5 (D.D.C. Apr. 28, 1998) (unpublished opinion) (applying crime-fraud exception to Monica Lewinsky's communications with attorney who assisted her with preparation of affidavit stating that she did not engage in sexual relations with President Clinton and observing that, "[t]he attorney does not need to know about his client's potential wrongdoing for the exception to apply"), *aff'd in part and rev'd in part sub nom., In re Sealed Case*, 162 F.3d 670 (D.C. Cir. 1998). This is discussed in more detail *infra* Part III A.1.

148. See generally RICE, *supra* note 23, § 8.5 (explaining when exception applies); see also Allison E. Beach et al., *Procedural Issues*, 38 AM. CRIM. L. REV. 1151, 1198 (2001) ("The crime-fraud exception to the attorney-client privilege permits an attorney to disclose communications that indicate a client intends future criminal behavior. Because it is controlled by the client's intent, this exception applies even when the attorney has no actual or constructive knowledge of the crime."); Brown, *supra* note 95, at 1232 ("[I]t is the client's intent at the time of the communication that is considered determinative of whether the crime-fraud exception will apply."); Fried, *supra* note 22, at 499 ("[T]he crime-fraud exception is predicated on the blameworthiness of the intention with which counsel was con-

applies if the attorney acts in furtherance of criminal or fraudulent activity.¹⁴⁹

Although the rationale for the crime-fraud exception is widely accepted, the application of the exception in actual cases poses difficulties.¹⁵⁰ As one appellate court has explained, “[t]he crime/fraud exception to the attorney-client privilege cannot be successfully invoked merely upon a showing that the client communicated with counsel while the client was engaged in criminal activity.”¹⁵¹ The party seeking to overcome the privilege must present evidence of something more than ongoing criminal activity involving the client to establish that the crime-fraud exception applies to communications between a client and an attorney.¹⁵²

sulted.”). The importance of the client’s motivation is illustrated by an articulation of a two-part test for application of the exception by the Eleventh Circuit:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel’s advice. Second, there must be a showing that the attorney’s assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

In re Federal Grand Jury Proceedings 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991) (quoting *In re* Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987)).

149. *See, e.g., In re* Grand Jury Proceedings, (Company X), 857 F.2d 710, 712 (10th Cir. 1988) (stating that law firm was used to “cover up and perpetuate” crimes). To establish a causal connection between the privileged communications and criminal activity, the prosecution can make a showing that privileged communications were intended to aid, further, or conceal criminal activity. *See Martin*, 278 F.3d at 1001 (stating standard for crime-fraud exception); *In re* Richard Roe, Inc., 168 F.3d 69, 70 (2d Cir. 1999) (asserting standard for crime-fraud exception); *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (setting standard for where crime-fraud exception applies); *Federal Grand Jury Proceedings 89-10 (MIA)*, 938 F.2d at 1581 (stating standard for crime-fraud exception).

150. *See, e.g.,* Fried, *supra* note 22, at 461-69 (discussing controlling court decisions concerning requisite showing of criminal intent necessary to negate attorney-client privilege); Henning, *supra* note 146, at 406-13 (explaining how complex white collar crime investigations have led to “fragmentation in the decisions” and incomplete set of rules that apply to crime-fraud exception); Ronald L. Motley & Tucker S. Player, *Issues in “Crime-Fraud” Practice and Procedure: The Tobacco Litigation Experience*, 49 S.C. L. REV. 187, 209-12 (1998) (arguing that tobacco industry has created confusion concerning crime-fraud exception through use of suspect arguments “loosely based on the language of certain courts”). For a recent, high-profile case that grapples with the application of the crime-fraud exception to both the attorney-client privilege and the work product doctrine, and discusses the “somewhat different inquiry” required in the work product context, see *Carter*, 1998 U.S. Dist. LEXIS 19497, at *4-8 (applying crime-fraud exception to Monica Lewinsky’s communications with attorney who assisted her with preparation of affidavit stating that she did not engage in sexual relations with President Clinton and to attorney’s work product), discussed in more detail *infra* Part III.A.1.

151. *Subpoena Duces Tecum*, 798 F.2d at 34.

152. *See In re* Sealed Case, 754 F.2d 395, 402 (D.C. Cir. 1985) (stating that “mere coincidence in time, without more, cannot support the invocation of the exception”); *see also* *United States v. White*, 887 F.2d 267, 271-72 (D.C. Cir. 1989) (stating that “[i]t does not suffice that communications may be related to a crime”

Defining precisely what evidence must be presented to trigger application of the exception and what process should be followed in evaluating that evidence has proved difficult for the courts.¹⁵³

and defendant's "failure to heed his lawyer's counsel does" not render communication in furtherance of crime); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) (stating that "merely because some communications may be related to a crime is not enough to subject that communication to disclosure").

153. One troublesome issue is that of "circularity," referred to in *supra* note 146. The argument that the client is guilty of a crime and therefore the crime-fraud exception applies is an argument that prosecutors often will present to a court, as evidenced by the Supreme Court's first encounter with the crime-fraud exception in *Alexander v. United States*, 138 U.S. 353 (1891). In *Alexander*, the Court reversed a murder conviction solely because the trial court had admitted into evidence ambiguous privileged communications between the defendant and an attorney. *See id.* at 360. The defendant consulted counsel regarding property owned jointly with a partner. *See id.* at 358. The partner was later found to have been murdered before the consultation occurred. *See id.* At the defendant's murder trial the court relied upon the crime-fraud exception to permit the prosecution to introduce the privileged consultation with counsel as evidence that the defendant knew the deceased was missing and would profit from his murder. *See id.* The Supreme Court held that it was reversible error to admit into evidence privileged communications that would be subject to the crime-fraud exception only if the defendant in fact was guilty:

Now the communication in question was perfectly harmless upon its face. If it were true that his partner was missing, and he had not heard from him, and that [the partner] had taken off [with] the money, there was no impropriety in his consulting counsel for the purpose of ascertaining if he could hold the horses, so as to secure his part of it *It is only by assuming that he was guilty of the murder that his scheme to defraud his partner becomes at all manifest.*

Id. at 360 (emphasis added). The *Alexander* Court refused to assume that the defendant was guilty and interpret ambiguous privileged communications as evidence of guilt:

It is evident from [the attorney's testimony] that defendant consulted with [the attorney] as a legal advisor, and while, if he were guilty of the murder, it may have had a tendency to show an effort on his part to defraud his partner's estate, and to make profit out of his death, by appropriating to himself the partnership property, it did not necessarily have that tendency and was clearly a privileged communication.

Id. at 358. To approach the situation otherwise—and assume prior to trial that a defendant is guilty of the crime charged—would emasculate the attorney-client privilege whenever criminal conduct is charged. As Justice Cardozo later observed, "it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." *Clark v. United States*, 289 U.S. 1, 15 (1933) (quoting *O'Rourke v. Darbishire*, [1920] A.C. 581, 604). As the Court concluded in *Alexander*, invocation of the crime-fraud exception is inappropriate in cases where the exception would be applicable only if the defendant is assumed to be guilty. A flaw in the *Alexander* Court's reasoning, unrelated to the "circularity" problem, has limited the influence of the case, however. The clarity of the holding in *Alexander* was obscured by a discussion distinguishing the facts of *Alexander* from an English case, *Queen v. Cox*, 14 Q.B.D. 153 (1884), and suggesting that the crime-fraud exception should only be invoked when the attorney-client communication furthered the same crime which is being tried. *Alexander*, 138 U.S. at 359-60 (distinguishing case at bar from *Cox*, because *Cox* involved defendant consultation with attorney prior to commission of crime, while *Alexander* consulted attorney after crime was committed). Courts discussing *Alexander* have accurately characterized this portion of

The Supreme Court weighed in on the issues presented by application of the crime-fraud exception in 1989 with its decision in *Zolin*, discussed above.¹⁵⁴ *Zolin* did not answer every question concerning application of the exception, but it did provide guidance on the points that are most relevant to this Article. The focus of the Court's opinion in *Zolin* was not "the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception,"¹⁵⁵ but rather the showing required to obtain *in camera* judicial review of the privileged communications at issue so that a court can make the determination of whether or not the exception applies.¹⁵⁶ As noted in Part II.B.1.c above, the *Zolin* Court concluded that to obtain *in camera* review the party opposing the privilege "must present evidence sufficient to support a reasonable belief that *in camera* review [of the purportedly privileged communications (tape recordings in the *Zolin* case)] may yield evidence that establishes the exception's applicability."¹⁵⁷ The *Zolin* Court also rejected the "independent evidence rule" that had been applied by the appellate court below, concluding that "evidence directly but incompletely reflecting the content of the contested communications" (partial transcripts of the tape record-

the opinion as dicta and declined to follow that suggestion. See *In re Grand Jury Investigation* (Schroeder), 842 F.2d 1223, 1228 (11th Cir. 1987) (claiming *Alexander* rule was dictum and that it "has never been used to deny application of the crime-fraud exception"); *In re Berkley & Co.*, 629 F.2d 548, 554-55 (8th Cir. 1980) (noting characterization of *Alexander* as dictum); *In re Sawyer's Petition*, 229 F.2d 805, 808-09 (7th Cir. 1956) (arguing distinction in *Alexander* was dictum and stating that all courts have adopted rule that communication between attorney and client is not privileged if in pursuit of crime or fraud). Nothing in these cases undercuts the teaching of *Alexander* that a trial court should not assume a defendant is guilty and interpret ambiguous attorney-client communications as furthering crime and therefore unprivileged. See *Berkley*, 629 F.2d at 554 n.11 (stating that *Alexander* held that crime-fraud exception was inapplicable because "the client's communication with the attorney was harmless on its face and did not necessarily relate to any future intended wrong-doing").

154. For a discussion of the support for the attorney-client privilege evidenced by the Supreme Court's opinion in *Zolin*, see *supra* Part II.B.1.c.

155. *United States v. Zolin*, 491 U.S. 554, 563 (1989) (citations omitted).

156. See *id.* at 563-65 (listing relevant inquiry courts should apply before granting *in camera* review of privileged material). The Court also addressed the related questions of what kind of evidence the party opposing the privilege may present in support of an application for *in camera* review. See *id.* at 573-74 (concluding that "any nonprivileged evidence" may be used to support request for *in camera* review, regardless of whether it is independent of communications in question). For more detailed analysis of the *Zolin* case, see Galanek, *supra* note 85, at 1132-40 (analyzing *Zolin* and its impact on crime-fraud exception); Hutzel, *supra* note 85, at 365 (arguing that policy concerns of attorney-client privilege were not given adequate consideration when Supreme Court lowered evidentiary burden on parties raising crime-fraud exception); Sharif, *supra* note 85, at 127 (concluding that *Zolin* Court followed trend of eliminating defendant safeguards in favor of prosecuting criminals).

157. *Zolin*, 491 U.S. at 574-75.

ings) could be used by a court to determine whether *in camera* review of the privilege communications themselves would be appropriate.¹⁵⁸

Zolin's adoption of the reasonable belief standard and rejection of the independent evidence rule removes significant procedural obstacles for parties seeking to establish that the crime-fraud exception applies, while retaining the important safeguard of judicial review—*in camera* to protect the confidentiality of the privileged communications if the challenge fails—in determining whether the exception should be applied. Unfortunately, the *Zolin* opinion does not provide further guidance as to what constitutes sufficient proof to establish applicability of the crime-fraud exception and does not suggest how that quantum of proof exceeds the showing necessary to obtain an *in camera* inspection.¹⁵⁹ The lower federal courts have been left to grapple with those issues,¹⁶⁰ and the law in this

158. *Id.* at 573. The Court concluded that “the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review, even if its evidence is not ‘independent’ [of the contents] of the contested communications” *Id.* at 574. In a footnote to the quoted statement, the Court also concluded that such evidence “may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies.” *Id.* at n.12.

159. The Supreme Court noted that use of “the phrase ‘*prima facie* case’ to describe the showing needed to defeat the privilege has caused some confusion.” *Id.* at 563 n.7. Additionally, the Court quoted criticism of courts which “‘have allowed themselves to be led into holding that only a superficial, one-sided showing is allowable on any admissibility controversy.’” *Id.* at 564 n.7 (quoting Maguire & Epstein, *Preliminary Questions of Fact in Determining Admissibility of Evidence*, 40 HARV. L. REV. 392, 400 (1927)). The Court also acknowledged that “[t]he quantum of proof needed to establish admissibility was then, and remains, subject to question.” *Id.* The greater “quantum of proof” needed to establish applicability of the crime-fraud exception may be demonstrated by the Ninth Circuit’s opinion after *Zolin* was remanded by the Supreme Court. The Ninth Circuit found that the parties to the taped conversations at issue “admit on the tapes that they are attempting to confuse and defraud the U.S. Government.” *United States v. Zolin*, 905 F.2d 1344, 1345 (9th Cir. 1990). The Ninth Circuit thus held that the crime-fraud exception is applicable when an *in camera* review revealed explicit admissions of an intent to defraud. *See id.* at 1345-46 (suggesting that tapes showing intent to defraud are within crime-fraud exception). *But cf.* Henning, *supra* note 146, at 462 (“While *Zolin* thus rejects the proposition that it is addressing the issue of what quantum of proof is necessary to vitiate a claim of privilege, the Court’s analysis of how much evidence must be introduced to have a district court conduct an *in camera* review effectively resolves the issue of what proof is sufficient to establish the application of the crime-fraud exception.”).

160. For a high-profile example of a case in which a district court struggles with the issue of what is the standard for application of the crime-fraud exception, see *In re Grand Jury Subpoena to Francis D. Carter*, 1998 U.S. Dist. LEXIS 19497, at *5 (D.D.C. Apr. 28, 1998) (unpublished opinion) (comparing approaches of Second Circuit and D.C. Circuit and noting that “[t]here is some confusion over which of these standards the D.C. Circuit finds controlling”), *aff’d in part and rev’d in part sub nom.*, *In re Sealed Case*, 162 F.3d 670 (D.C. Cir. 1998). In addition to the authorities cited in *Carter*, the D.C. Circuit addressed the crime-fraud exception in *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989). The defendant in *White* was on trial for conspiring to defraud the United States. *See id.* at 269. Over his objection, *White's* attorney was required to testify as to conversations in which he told *White*

difficult area is still evolving.¹⁶¹

The crime-fraud exception is a difficult area of the law, but it provides an important limitation on availability of the attorney-client privilege. Moreover, the procedure for asserting a claim that the exception applies is sufficiently clear, at least since the Supreme Court's *Zolin* decision, to permit government officials readily to obtain judicial review of improper assertions of privilege.¹⁶² The relatively low showing required by *Zolin* to obtain *in camera* review, coupled with *Zolin*'s rejection of an independent evidence rule, means that if law enforcement authorities have credible evidence that legal advice is being or has been misused, they can obtain judicial review to determine if the crime-fraud exception should be invoked.¹⁶³ Although law enforcement authorities may be frustrated if

that certain actions would be illegal. *See id.* The Court held that the crime-fraud exception did not justify admission of the attorney's testimony. *See id.* at 271. In the words of the court: "Far from showing that [the attorney's] advice was intended to further a crime or fraud, the evidence suggests . . . that [the attorney's] advice was intended to prevent unlawful conduct." *Id.* *White* is consistent with the concerns for protection of the attorney-client relationship demonstrated by the Supreme Court in *Zolin* and other recent cases, see *supra* Part II.B, because the court refused to assume the guilt of the defendant and rely upon ambiguous privileged communications as the basis for applying the crime-fraud exception.

161. *See* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 80-81 (1999) (noting that "*Zolin* does not identify any new substantive dividing line for assessing when communications fit the crime-fraud definitions. *Zolin* is procedural in nature"). For post-*Zolin* applications of the crime-fraud exception by the lower federal courts, see *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (quoting *United States v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997)) (stating that government must show "that the communications with the lawyer were 'in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality' [in order to make] a prima facie case"); *In re Richard Roe, Inc.*, 168 F.3d 69, 70 (2d Cir. 1999) (quoting *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995)) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (quoting *In re Grand Jury Proceedings (The Corporation)*, 87 F.3d 377, 380 (9th Cir. 1996)) ("To invoke the crime-fraud exception successfully, the government has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality.").

162. Even prior to the *Zolin* decision the crime-fraud exception served this important purpose. For a pre-*Zolin* example of a court overruling a claim of privilege (and work product protection) based upon the applicability of the crime-fraud exception, see *In re Sealed Case*, 676 F.2d 793, 812-16 (D.C. Cir. 1982).

163. One commentator has asserted that growth of government regulation of business and increased reporting requirements incorporating criminal penalties for failure to comply or for providing false information has expanded the availability of the crime-fraud exception:

Not only can more acts be labeled "criminal" or "fraudulent," but lawyers play such a pervasive role in advising clients on complying with or avoiding regulatory schemes that the opportunity to use legal advice to commit an illegal act has increased correspondingly. Moreover, the improper act does not have to be a violation of a specific criminal provision, and the

courts do not always conclude that the exception is applicable, that frustration is both predictable and desirable in our adversary system of justice. In light of the importance of the policies served by the attorney-client privilege, it is appropriate that decisions about its availability be made by neutral judicial officers, rather than by government officials who are responsible for law enforcement. Absent some evidence that the crime-fraud exception is not adequate to protect against abuses of the system, law enforcement officials should rely upon it to overcome wrongful assertions of privilege on a case-by-case basis, and should not seek to undercut the overall availability of the privilege in our legal system.

2. *The Law of Waiver*

The crime-fraud exception to the privilege is only one of several established doctrines that serve to prevent unfounded or abusive assertions of privilege. Another such limitation is provided by the extensive body of law regarding waiver of the privilege.¹⁶⁴ The waiver concept has always been a part of attorney-client privilege law, and Wigmore included the element of client waiver in his original, classic definition of the privilege.¹⁶⁵ A client¹⁶⁶ can waive the protection of the privilege by voluntary disclosure of the privileged communications or by other conduct, such as partial disclosure, that is inconsistent with subsequent invocation of the privilege.¹⁶⁷ Determining whether or not a waiver has taken place in a particular case often is difficult, and an examination of all the circum-

act only has to be one objective of seeking the legal advice for the exception to apply. Therefore, the question of whether an alleged course of conduct qualifies as a crime or fraud is rarely at issue because the breadth of white collar criminal law encompasses most acts which are of questionable legality.

Henning, *supra* note 146, at 460-61 (citations omitted).

164. For an argument that recent developments in the law of waiver "have seriously undercut the exercise of the privilege and adversely affected judicial administration," see generally George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637 (1986). For a comprehensive analysis of the law of waiver, see RICE, *supra* note 23, ch. 9.

165. For a further discussion of the development of Wigmore's definition of privilege, see *supra* notes 18-33 and accompanying text. Wigmore's first edition defined the privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant 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 when the client waives the protection*.

4 WIGMORE, *supra* note 12, § 2292 (emphasis added). Wigmore also noted that "it has always been recognized that a *waiver may be made*." *Id.* (citation omitted) (emphasis in original).

166. Wigmore notes that "since the domination of the modern theory [it has] been perfectly plain that the waiver, like the privilege, belongs solely to the client, and not to the attorney." 8 WIGMORE, *supra* note 9, § 2327 (internal cross-references omitted).

167. See MCCORMICK, *supra* note 10, § 93.

stances that may constitute a waiver is beyond the scope of this Article.¹⁶⁸ Discussion of a few examples of circumstances where waiver of the privilege is routinely held to have occurred is sufficient to illustrate the point that is relevant to this Article: that the waiver doctrine serves as a check on abusive or unwarranted assertions of the privilege.

Several established categories of waiver serve to prevent governmental law enforcement agencies from being disadvantaged by assertions of privilege that are not entitled to confidentiality. For example, if the subject of a civil governmental enforcement proceeding or a criminal prosecution asserts reliance on advice of counsel as a defense, the privilege will be deemed to have been waived and the government will be permitted full access to the privileged communications in which the advice was conveyed.¹⁶⁹ Similarly, if the subject of an enforcement proceeding seeks to make “offensive” use of privileged communications in presenting a defense, such use will be construed as a waiver and the communications will

168. For a detailed discussion of the circumstances that can constitute waiver, see EPSTEIN, *supra* note 23, at 292-391 (discussing seventeen different categories of attorney-client privilege waiver and collecting cases), 607-41 (discussing categories of waiver of the work product doctrine and collecting cases). A distinction should be noted between waiver of the attorney-client privilege and waiver of the work product doctrine:

The waiver of the attorney-client privilege for a communication does not automatically waive whatever work-product immunity that communication may also enjoy, as the two are independent and grounded on different policies. Waiver of the privilege should always be analyzed distinctly from waiver of work product, since the privilege is that of the client and the work product [doctrine] essentially protects the attorney’s work and mental impressions from adversaries and their parties even when communicated to the client.

Id. at 608. For further discussion of the distinction between the attorney-client privilege and the work product doctrine, see *supra* Part II.A.2.

169. See Cohn, *supra* note 48, at 924-25, 936 (“There are certain situations . . . in which the attorney’s files or papers are not merely a record of some other evidence They are instead facts at issue in the case The attorney’s files may be relevant to th[e] issue and therefore discoverable. [This] situation arises when counsel’s specific advice is relevant to a party’s claim that he acted ‘on advice of counsel.’”); Jared Goff, Comment, *The Unpredictable Scope of the Waiver Resulting from the Advice-of-Counsel Defense to Willful Patent Infringement*, 1998 BYU L. REV. 213, 218 (“The defendant may then assert the advice-of-counsel defense, stating that the infringement was not willful. However, by asserting this defense, the defendant waives the attorney-client privilege and possibly the work product protection for all documents related to the infringement.”). The same waiver doctrine applies to attorney work product when the client asserts an “advice of counsel” defense, and even “opinion work product” is subject to discovery; moreover, some courts have required disclosure of all work product related to the representation, and not just work product that was conveyed to the client. See EPSTEIN, *supra* note 23, at 347-62 (collecting cases).

no longer be protected.¹⁷⁰ The rationale for this rule is that “the attorney-client privilege cannot at once be used as a shield and a sword.”¹⁷¹

The waiver rule also applies if otherwise protected work product is voluntarily disclosed to the government in an adversarial proceeding.¹⁷² If a party who is potentially subject to an agency civil enforcement proceeding or criminal prosecution makes a strategic decision to provide work product documents to law enforcement authorities in order to obtain an advantage in that proceeding, then work product protection for those documents likely will be found to have been waived.¹⁷³ Significantly, the waiver extends to other parties, in addition to the party who was provided the documents, such as other governmental authorities and private civil litigants, and even to other proceedings.¹⁷⁴ This outcome is con-

170. See, e.g., *Johnson Matthey, Inc. v. Research Corp.*, 2002 U.S. Dist. LEXIS 13560, at *8 (S.D.N.Y. 2002) (holding that waiver is implied where party asserts information is privileged, but relevant information is necessary to prove asserting party's claim); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 472-74 (S.D.N.Y. 1996) (holding that offensive use of attorney's investigative notes of employee interviews waived privilege). For a strict application of this rule, see generally *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991) (holding that attempted use of communications with counsel to show “good faith” effort to comply with law waived privilege).

171. *Bilzerian*, 926 F.2d at 1292.

172. See, e.g., *In re Sealed Case*, 676 F.2d 793, 817-22 (D.C. Cir. 1982) (“Company has promulgated a carefully worded story in the form of a full disclosure, and its apparent consent to letting the SEC staff evaluate its disclosure, by examining the relevant underlying material, has lent credence to its representation of full candor. Yet at the same time it has withheld crucial documents that reveal a different, highly embarrassing, version of events. If we were to allow corporations to use the work product privilege to accomplish such a slight-of-hand, it would severely limit the effectiveness of voluntary disclosure programs.”). See generally EPSTEIN, *supra* note 23, at 626-27 (collecting cases on “affirmative use” of work product and resulting waiver). Waiver of work product protection differs in important respects, however, from waiver of the attorney-client privilege. Most important for purposes of the points discussed here, waiver of the attorney-client privilege generally is held to apply to all communications with counsel relating to the same matter, while work product protection generally is not subject to such a broad “subject matter waiver” rule. For a further discussion of the attorney-client privilege and the work product doctrine in the corporate context, see *supra* at Part II.A.3. It therefore is essential to treat the attorney-client privilege and the work product doctrine separately when analyzing a waiver or potential waiver.

173. See *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-36 (2d Cir. 1993) (finding that voluntary disclosure of work product to adversary waives privilege); see also Cohn *supra* note 48, at 936 (discussing development of waiver of work product protection due to voluntary disclosure); Goldsmith & King, *supra* note 48, at 29-30 (categorizing waiver into three types: through disclosure of information to anyone who lacks common interest; when work product is prepared to further crime or fraud; and when work product is used to refresh memory of witness before or during trial).

174. See *Steinhardt*, 9 F.3d at 235 (“Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Courts therefore accept the waiver doctrine as a limitation on work-product protection. The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties.”).

sistent with the view of most courts that a “selective” disclosure of privileged documents in one proceeding or as to one governmental agency waives the privilege for those documents in other proceedings and before other agencies.¹⁷⁵

The law of waiver, both as to the attorney-client privilege and the work product doctrine, therefore protects law enforcement from unfair,¹⁷⁶ one-sided assertions of privilege by the subjects of law enforcement investigations and legal proceedings. This protection, taken together with the other limitations on the privilege discussed in this Part, is sufficient to guard against abuses of the privilege and assertions of privilege that do not further the administration of justice. When law enforcement seeks to go beyond these protections and override assertions of privilege or force waivers of the privilege in the ways that are the subject of Part III of this Article, the policy objectives that underlie the privilege are frustrated and the legal system may be adversely affected. Before turning to a discussion of recent government actions that threaten to undermine the privilege, however, two additional checks on abuse and unwarranted assertion of the privilege and the work product doctrine should be noted.

3. *The Common Interest Doctrine*

Like the crime-fraud exception and the law of waiver, the “common interest privilege” or “joint defense privilege”¹⁷⁷ also provides protections

175. The leading case is *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (holding that corporation waived privilege when it voluntarily disclosed documents to SEC); see also *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302-03 (6th Cir. 2002) (stating that attorney-client privilege was never designed to protect conversations between client and government); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424-26 (3d Cir. 1991) (holding that voluntary cooperation with government agency does not promote intended purpose of attorney-client privilege). But see *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (producing privileged documents in response to Securities and Exchange Commission investigative subpoena did not waive privilege). For a detailed analysis of the “selective waiver” doctrine, see EPSTEIN, *supra* note 23, at 619-626 (collecting cases); RICE, *supra* note 23, § 9:86; Burke, *supra* note 55, at 34. For a recent decision by an influential court holding that disclosures to law enforcement agencies pursuant to a confidentiality agreement do not constitute a waiver, see generally *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002) (unpublished opinion).

176. Cf. 8 WIGMORE, *supra* note 9, § 2327 (“A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.”).

177. Although the terms “common interest privilege” and “joint defense privilege” sometimes are used interchangeably, their origins differ. The “joint defense privilege” developed in criminal cases in which co-defendants cooperated in presenting a defense, and later expanded to encompass cooperating parties in civil litigation. See, e.g., RICE, *supra* note 23, §§ 4:35-38 (collecting cases). The “common interest privilege” is a broader concept that does not require a pending case and extends to cover parties with common interests in nonlitigated matters. See James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement:*

against unwarranted assertions of privilege. The common interest doctrine is an exception to the law of waiver in that sharing of privileged information¹⁷⁸ that otherwise would constitute a waiver does not relinquish the protections of the privilege, so long as the parties maintain the confidentiality of the shared information.¹⁷⁹ The common interest doctrine is applicable in a wide variety of situations, and there is an extensive body of case law deciding issues relating to the common interest doctrine's application.¹⁸⁰

Although some prosecutors and government enforcement attorneys are hostile to "joint defense agreements" and information sharing pursuant to a common interest doctrine,¹⁸¹ the extension of the confidentiality

Protecting Confidences While Exchanging Information for Mutual Gain, 16 REV. LITIG. 631, 640-44 (1997) (arguing that no reason exists to limit common interest privilege to litigation matters). The Restatement (Third) of the Law Governing Lawyers adopts the latter, broader definition. See RESTATEMENT (THIRD) OF LAW GOVERNING LAW. § 76 cmt. c (2000) (stating that "[e]xchanging communications" may involve matters other than litigation). This Article will use the term "common interest doctrine" to encompass both concepts.

178. See, e.g., RICE, *supra* note 23, § 4:35. The common interest doctrine applies to sharing of both attorney-client privileged information and attorney work product. See, e.g., LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc., 209 F.R.D. 112, 117 (D. Md. 2002) (citing *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d 244, 249 (4th Cir. 1990)) (noting that "the 'common interest' rule applies not only to the attorney-client privilege but also to communications protected by the work product doctrine"); IBJ Whitehall Bank & Trust Co. v. Cory & Assocs. Inc., 1999 U.S. Dist. LEXIS 12440, at *11 (N.D. Ill. 1999) (noting that "as with the attorney-client privilege, work product may be created or shared with another party that has a 'common interest' without a waiver of the protection"); see also Feagan, *supra* note 60, at 757-58 ("[T]he [attorney-client] privilege is not waived by disclosure to a co-party or his attorney if there is an 'agreement' among the parties to pursue a 'common interest.' . . . [C]ourts have allowed the sharing of work product among co-parties, who share a 'common interest' without the waiver of the work product doctrine.").

179. See EPSTEIN, *supra* note 23, at 211-13 (collecting cases); RICE, *supra* note 23, §§ 4:35-38 (same).

180. See generally EPSTEIN, *supra* note 23, at 196-219 (collecting cases on common interest privilege); RICE, *supra* note 23, § 4:36 (same).

181. For discussion of two cases in which federal prosecutors aggressively challenged assertions of a common interest doctrine, see the discussion of the Starr investigation cases involving White House attorneys *infra* Part III.A.2. The hostility of the United States Department of Justice (DOJ) to information sharing among targets of criminal investigations is evidenced by a statement in the DOJ's formal policy on "Federal Prosecution of Corporations." Part VI of that policy states that one factor a prosecutor should use in "weighing the extent and value of a corporation's cooperation" in a criminal investigation is whether the corporation has provided "support to culpable employees and agents . . . through providing information to the employees about the government's investigation pursuant to a joint defense agreement." Memorandum from the Deputy Attorney General, United States Department of Justice, *Policy Statement on Federal Prosecution of Corporations*, Part VI.B, at www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (June 16, 1999). This statement suggests a profound hostility to joint defense agreements, and is consistent with the views of many prosecutors, who appear to regard joint defense agreements among subjects and targets of criminal investiga-

protection to such information sharing is “consistent with the modern rationale for the attorney-client privilege.”¹⁸² Moreover, and most relevant to this Article, the courts have carefully limited expansion of the common interest doctrine beyond the limits of the modern rationale for the attorney-client privilege. The limits that have been imposed by the courts ensure that the common interest doctrine will not be abused or asserted in a manner that is inconsistent with the administration of justice. A few examples involving criminal prosecutions or investigations and civil governmental enforcement proceedings illustrate this point.

Perhaps the most prominent recent example of a court’s willingness to reject a claim of the common interest doctrine is the decision of the Eighth Circuit refusing to apply the privilege to meetings among then-First Lady Hillary Rodham Clinton, her private attorneys and attorneys in the White House Counsel’s Office who were government employees.¹⁸³ A divided panel of the Eighth Circuit, over a strong dissent, concluded that the requisite “common interest” was lacking between Mrs. Clinton and her private lawyers, who were primarily concerned with her exposure to criminal prosecution, and the lawyers representing the Office of the President,

tions as a barely legal form of obstruction of justice. The Justice Department Memorandum is discussed in more detail *infra* Part III.C.2.

182. Patricia Welles, Comment, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321, 325 (1981) (“If the privilege exists to promote full disclosure of the truth between a client and his attorney, the purpose is not impaired by merely multiplying the number of truth-tellers and confidence-receivers (the result of an extension of the privilege to joint defense). Full disclosure of the truth between client and attorney was said to increase the effectiveness of the administration of justice. This part of the rationale provides compelling reason to extend the attorney-client privilege to joint defense.”); see *In re Grand Jury Subpoena Duces Tecum*, Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975), cited in Welles, *supra*, at 325 (“The privilege is, after all, born of the law’s own complexity. The layman’s course through litigation must at least be evened by the assurance that he may, without penalty, invest his confidence and confidences in a professional counselor. That assurance is no less important or appropriate where a cooperative program of joint defense is helpful or, *a fortiori*, necessary to form and inform the representation of clients whose attorneys are each separately retained.”) (citations omitted); Michael W. Tankersley, Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 838-43 (1980) (analyzing justification for joint defense privilege); cf. Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1280 (1990) (“The policy underlying the joint-defense privilege, then, is to promote the general efficiency of legal representation by giving parties the tactical advantage of access to information in the possession of others.”).

183. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir. 1997) (holding that common interest doctrine did not apply because there existed no common interest between First Lady in her personal capacity and White House as institution). The Supreme Court subsequently denied certiorari in *Office of the President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997). The ruling allowed the decision of a divided Eighth Circuit panel to stand. See generally RICE, *supra* note 23, §§ 3:13, 4:35 (analyzing *Subpoena Duces Tecum*).

which in the court's view could not legitimately share that concern.¹⁸⁴ In a subsequent case the D.C. Circuit reached a similar conclusion with respect to President Clinton's communications with Deputy White House Counsel Bruce Lindsey.¹⁸⁵ Although commentators have criticized both the Eighth Circuit and D.C. Circuit opinions,¹⁸⁶ they provide striking examples—in high-profile cases—of the willingness of courts to reject assertions of the common interest doctrine.

They also demonstrate the point that judicial relief is available to law enforcement officials when the subjects of government enforcement proceedings attempt to stretch the protections of the common interest doctrine too far.¹⁸⁷ This provides an important check on unwarranted assertions of privilege and is adequate to protect the legitimate interests of law enforcement officials who oppose such assertions of privilege.

4. *Limits on Work Product Protection*

A final safeguard under existing law should be noted briefly. It is well settled that under *Hickman* and its progeny, as well as both Rule 26(b)(3) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure, work product protection is not absolute.¹⁸⁸ In both civil and criminal proceedings, a party, including the government in a criminal prosecution or civil enforcement proceeding, can obtain otherwise protected work product by showing "substantial need" and that the information is not otherwise available without "undue hardship."¹⁸⁹ If the

184. See *Subpoena Duces Tecum*, 112 F.3d at 924 (noting separability of interests of First Lady and White House). The Eighth Circuit opinion and the issues presented by the Independent Counsel's position in that litigation are discussed in greater detail *infra* Part III.A.2.

185. See *In re Lindsey*, 158 F.3d 1263, 1278-80 (D.C. Cir. 1998) (per curiam) (holding that common interest doctrine did not protect information known to President's official attorney simply because that attorney acted as intermediary between President and his personal attorney). As was the case with the Eighth Circuit case, the Supreme Court denied certiorari. For a further discussion of the D.C. Circuit's opinion and the issues presented by the Independent Counsel's position in that litigation, see *infra* Part III.A.2.

186. See *infra* note 215 (referencing scholarly criticism of *Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1998) and *Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998)).

187. For further discussion of the use of existing legal doctrines to challenge unwarranted assertions of privilege, see *infra* Part IV.B.1.

188. See Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution: United States v. Armstrong*, 116 S.Ct. 1480 (1996), 87 J. CRIM. L. & CRIMINOLOGY 932, 949-50 (1997) (stating that defendant may circumvent FED. R. CRIM. P. 16 by meeting "significant barrier" created to eliminate unsubstantial claims); Max D. Stern & David Hoffman, *Legitimate Means or "Chilling Wedges?" Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1796-1804 (1988) (recognizing gaps in attorney-client privilege and work product doctrine).

189. See, e.g., *In re Grand Jury (Impounded)*, 138 F.3d 978, 982-83 (3d Cir. 1998) (discussing government overcoming work product protection by obtaining file of adversary and refusing to return it); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231-32 (3d Cir. 1979) (discussing government need to obtain private counsel's memorandum of interview with deceased employee). See generally Feagan,

government can make this showing to the satisfaction of a reviewing court, work product protection can be overcome.¹⁹⁰ Although this exception to work product protection applies only to factual information and not to “opinion work product,”¹⁹¹ it nonetheless provides another important “safety valve” limiting confidentiality protections for information that in the interests of efficient administration of justice should not be protected from disclosure. If law enforcement officials have a substantial need for factual information and cannot obtain that information from other sources without undue hardship, the present system allows them to obtain such information from opposing counsel after making that showing to a court.

This exception to the work product doctrine is particularly important for purposes of this Article because a number of the recent governmental efforts to overturn or force waivers of the privilege that are described below would be more appropriately pursued through this avenue. For example, requiring a wholesale waiver of all attorney-client privilege and work product protection as a condition of leniency in corporate prosecutions by the Department of Justice¹⁹² or in civil enforcement actions by a government regulatory agency¹⁹³ is contrary to the policy interests that underlie those legal doctrines. As the Supreme Court pointed out in *Upjohn*,¹⁹⁴ where witnesses are available to the government, it is not necessary to override work product protection and allow the government to obtain from opposing counsel information it could obtain directly. As discussed in Parts III and IV below, a policy that promotes such a result is misguided.

supra note 60, at 758 (“[W]ork product can be discovered by the opposing party upon a showing of ‘substantial need and undue hardship in obtaining the substantial equivalent’ of the document.”); Soumilas, *supra* note 49, at 241 (“Drafts of legal memoranda, summaries of conferences, and settlement proposals plainly represent opinion work product.”) (citations omitted).

190. This point is important. As is the case with the crime-fraud exception, discussed *supra* Part II.C.1, the fact that judicial intervention is necessary protects against overreaching by the government and ensures that, in most cases, the exception will be properly applied. It seems likely that the recent governmental attacks on the privilege that are the subject of this Article are inspired, at least in part, by a desire to circumvent the judicial review requirement and overcome the privilege without seeking judicial intervention. For a further discussion of this point, see *infra* Part IV.B.2.

191. For a further discussion of the distinction between factual information contained in an attorney’s work product and opinion work product that reflects an attorney’s legal analysis or litigation strategy, see *supra* notes 54-60 and accompanying text.

192. For a further discussion of the Department of Justice Policy on prosecuting corporations, see *infra* Part III.C.2.

193. For a further discussion of civil enforcement actions by a government regulatory agency, see *infra* Part III.F.

194. For a further discussion of *Upjohn*, see *supra* Part II.B.1.a.

5. *Conclusion*

As the four examples of limitations on privilege discussed above suggest, the government has adequate means at its disposal under existing law to guard against unwarranted assertions of privilege and to overcome its protections in appropriate cases. Further weakening of the privilege is unnecessary and will undermine core values in our legal system. Part III of this Article examines recent governmental attacks on the privilege and argues that in many of these instances the privilege has been unnecessarily weakened by misguided efforts to overcome its confidentiality protections. These attacks often occur to achieve prosecutorial objectives in a particular case and without adequate consideration of the cumulative effect of such actions on our justice system.

III. RECENT ATTACKS ON THE PRIVILEGE BY FEDERAL LAW ENFORCEMENT OFFICIALS

A. *The Starr Investigations*

Perhaps the most widely publicized governmental attacks on the privilege in recent years have been the actions of the Office of Independent Counsel Kenneth W. Starr. Starr's office fought vigorously to overcome assertions of attorney-client privilege and work product protection on a number of occasions during the long course of its several investigations of President Clinton.¹⁹⁵ The actions of Starr's office are instructive in that they encompass the entire range of governmental attacks on the privilege: from conventional to questionable to excessive. Three examples serve to illustrate each of these points on the continuum of privilege challenges and are useful for purposes of analyzing law enforcement authorities' more recent actions that are the principal focus of this Article. These three examples all involve legal doctrines discussed above, so they can be treated briefly here.

195. For a summary of the various efforts of Starr's office to overcome assertions of privilege by the Clinton White House in the Monica Lewinsky investigation, see Robert W. Ray, *Final Report of the Independent Counsel for In Re: Madison Guaranty Savings & Loan Association, Regarding Monica Lewinsky and Others*, App. C, at 113-18 ("The Courts Ruled in Every Case that the Independent Counsel and the Grand Jury Were Entitled to Evidence from White House Employees.") (Filed May 18, 2001; Modified Sept. 20, 2001; Released Mar. 6, 2002) [hereinafter Ray Report App. C]. This report describes only privilege disputes pertaining to the Monica Lewinsky investigation. It does not, however, describe efforts by Starr's office to overcome the privilege in its other investigations, such as the successful efforts to overcome privilege assertions by attorneys in the White House Counsel's Office, discussed *infra* Part III.A.2, and the unsuccessful attempt to obtain the notes taken by Deputy White House Counsel Vincent Foster's attorney, discussed *supra* Part II.B.1.d and examined further *infra* Part III.A.3.

1. *Starr's Conventional Attack on the Privilege: Monica Lewinsky and the Crime-Fraud Exception*

Oddly enough, Starr's most conventional and least objectionable—by current standards of prosecutorial behavior—efforts to overcome the attorney-client privilege and the work product doctrine occurred in the context of what probably was the most widely criticized of the several separate and discrete investigations conducted by Starr's office during the course of its more than seven-year life: the Monica Lewinsky investigation.¹⁹⁶ The major events leading up to that investigation are well-known, so it is unnecessary to review them here.

For purposes of this discussion, the key event in the Monica Lewinsky saga is her retention of Washington, D.C. attorney Francis D. Carter to represent her in connection with the Paula Jones lawsuit and to prepare an affidavit stating that she did not engage in a sexual relationship with

196. This Article does not take on the Herculean task of assessing the wisdom and propriety of all of Starr's actions as Independent Counsel. A great deal has been written on that subject, and much more will be written before history makes a final judgment. For a recent and comprehensive examination of Starr's work as Independent Counsel, see BENJAMIN WITTES, *STARR: A REASSESSMENT* (2002). For purposes of this Article's focus on the propriety of the attacks on the privilege by Starr's office, it is sufficient to note that the actions of Starr's office have been criticized and questions have been raised concerning his conduct as Independent Counsel. For example, one commentator has argued that Starr's conduct in acting as Independent Counsel while continuing to represent private clients with interests adverse to the Clinton administration breached legal ethics rules and even if it did not, "it was so obviously inappropriate, under any reasonable understanding of the roles of lawyers and government officials, and particularly of independent counsels, that it was irresponsible for Starr to engage in it." David Halperin, *Ethics Breakthrough or Ethics Breakdown? Kenneth Starr's Dual Roles as Private Practitioner and Public Prosecutor*, 15 *GEO. J. LEGAL ETHICS* 231, 234 (2002). Of the many criticisms leveled at Starr, some of the most vehement have been based on the conduct of his office in the Monica Lewinsky investigation. See, e.g., Sanford Levinson, *Structuring Intimacy: Some Reflections on the Fact that the Law Generally Does Not Protect Us Against Unwanted Gazes*, 89 *GEO. L.J.* 2073, 2074 (2001) (criticizing Starr's decision to compel Lewinsky's mother to testify before grand jury); Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 *STAN. L. REV.* 269, 279-80 (2000) (criticizing Starr for not adequately supervising his office's contacts with Linda Tripp). Even the Chief Judge of the United States District Court for the District of Columbia expressed "concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel" See *In re Grand Jury Subpoena to Francis D. Carter*, 1998 U.S. Dist. LEXIS 19497, at *28 (D.D.C. Apr. 28, 1998) (unpublished opinion), *aff'd in part and rev'd in part sub nom., In re Sealed Case*, 162 F.3d 670 (D.C. Cir. 1998); see also Rhode, *supra* at 335-36 (criticizing Starr's office for disrupting Lewinsky's attorney-client relationship with Carter). *But see* Ray Report App. C, *supra* note 195, at 113-18 (defending actions of Starr's office and rejecting findings of Department of Justice Special Counsel, Jo Ann Harris, finding that poor professional judgment was exercised in planning and executing office's initial contact with Lewinsky). For a thoughtful and comprehensive criticism of Starr's conduct and professional judgment in connection with the Lewinsky investigation, see generally Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639 (1999).

President Clinton.¹⁹⁷ In early 1998, shortly after Starr's office began investigating the Lewinsky matter, grand jury subpoenas were issued to Carter calling for him to provide testimony and produce documents relating to his representation of Lewinsky.¹⁹⁸ Carter moved to quash the subpoenas, arguing, among other things, that the subpoenas improperly sought to pierce Lewinsky's attorney-client privilege and work product doctrine protection.¹⁹⁹ Starr's office countered with the argument that the crime-fraud exception applied and therefore Carter should be compelled to produce the subpoenaed documents and testify before the grand jury.²⁰⁰

Chief Judge Norma Holloway Johnson analyzed the application of the crime-fraud exception to Lewinsky's engagement of Carter to prepare the affidavit.²⁰¹ Based upon an *in camera* submission of evidence by Starr's office,²⁰² Judge Johnson concluded that the crime-fraud exception was applicable and overruled the assertions of attorney-client privilege.²⁰³ The evidence contained in the *in camera* submission was sufficient to convince the court that "Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice."²⁰⁴ Judge Johnson also concluded that the crime-fraud exception should overcome the assertion of work product doctrine protection because Lewinsky consulted Carter for the purpose of committing perjury and obstruction of justice, and used his work product for that purpose.²⁰⁵ Based upon those conclusions, the court ordered Carter to testify and to produce the subpoenaed documents.²⁰⁶

197. See *Sealed Case*, 162 F.3d at 672 (describing Lewinsky's retention of Carter and quoting affidavit that Carter prepared for Lewinsky); see also Ray Report App. C, *supra* note 195, at 117-18 (summarizing litigation arising out of Carter subpoenas).

198. See *Sealed Case*, 162 F.3d at 672 (discussing issuance of grand jury subpoenas).

199. See *Carter*, 1998 U.S. Dist. LEXIS 19497, at *1-2 (listing Carter's arguments to quash subpoenas).

200. See *id.* at *4 (noting response of OIC).

201. See *id.* at *3-18 (discussing application of crime-fraud exception).

202. For a discussion of the use of *in camera* submissions in crime-fraud exception cases, see *supra* Part II.C.1.

203. See *Carter*, 1998 U.S. Dist. LEXIS 19497, at *5-6 (concluding crime-fraud applied).

204. *Id.* at *6-7. In a footnote to the quoted statement, Judge Johnson explained that she was not concluding that Lewinsky necessarily had committed those crimes: "The Court finds here that the OIC has met its burden under the crime-fraud exception. It expressly does not find, however, that Ms. Lewinsky in fact committed these crimes." *Id.* at *7 n.2. In another portion of the opinion Judge Johnson made clear that "there is no suggestion that Mr. Carter knew about any alleged wrongdoing." *Id.* at *5.

205. See *id.* at *7-8 (discussing crime-fraud exception).

206. The court did accept Carter's arguments that forcing him to produce certain items that Lewinsky had given to him would violate Lewinsky's Fifth Amendment right against self-incrimination. See *id.* at *18-20 (analyzing Carter's Fifth Amendment argument). That portion of Judge Johnson's opinion was re-

The crime-fraud exception ruling, and the success of Starr's office in overcoming the privilege, requiring Carter to testify and produce documents relating to his representation of Lewinsky did not generate significant attention or controversy.²⁰⁷ As discussed in Part II.C.1 above, the crime-fraud exception is a well-established doctrine, and Starr's use of it in this instance was not inconsistent with existing case law under the doctrine.²⁰⁸ Although commentators have raised a number of serious concerns about excessive use of attorney subpoenas by federal prosecutors,²⁰⁹ Starr's attack on the privilege in this particular instance is not subject to other criticisms that are a primary focus of this Article. In relying upon the crime-fraud exception to compel Carter to testify and produce documents, Starr's office did not seek to overcome existing privilege law or extend recognized exceptions to the privilege beyond their prior applications.²¹⁰ The approach that Starr's office employed by invoking the

versed by the D.C. Circuit. See *In re: Sealed Case*, 162 F.3d 670, 675 (D.C. Cir. 1998) (citing *Fisher v. United States*, 425 U.S. 391 (1976)) (concluding that, because no attorney-client privilege existed, there would be no compulsion in violation of Lewinsky's Fifth Amendment privilege in forcing Carter to produce subpoenaed items). The D.C. Circuit affirmed Judge Johnson's ruling that the crime-fraud exception applied, rejecting Lewinsky's materiality and intent arguments. See *id.* at 673-74 (finding that Lewinsky's statements contained in her affidavit were material and thus "predictably capable of affecting" lower court's holding).

207. Cf. *Attorney-Client Privilege at Stake in Lewinsky Grand Jury Inquiry*, 22 CHAMPION 7, 7 (1998) (noting that matter had "received only cursory notice by the media").

208. See *Carter*, 1998 U.S. Dist. LEXIS 19497, at *8-9 (noting that "case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply"). Judge Johnson rejected as "merely alarmist" the amicus brief arguments of the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers that application of the "exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings." *Id.* at *10. She noted that the message of her decision was simply "that clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged." *Id.* at *11. Of course, one can agree with Judge Johnson's crime-fraud exception analysis and ruling in favor of Starr's office on that issue without necessarily agreeing that Starr's office acted properly in obtaining and using the Linda Tripp tapes, which were part of the *in camera* presentation. See *Sealed Case*, 162 F.3d at 674 (analyzing crime-fraud exception); see also Gordon, *supra* note 196, at 646 (claiming that Starr's OIC performed "very badly" with regard to ethical standards in investigating Lewinsky matter).

209. For a discussion of the "attorney subpoena problem" and what many commentators believe is a trend toward excessive use of attorney subpoenas, coupled with crime-fraud exception arguments to overcome assertions of privilege, as an investigative tool by federal prosecutors, see *infra* Part III.D.2. It likely is because this trend has made attorney subpoenas appear more commonplace that Starr's office's subpoena of Carter did not generate more controversy or criticism by practitioners and commentators.

210. For an example of an attack on the privilege that fails to meet this test, see *infra* Part III.A.3 (discussing Foster notes case) and *infra* Part III.B (discussing Marc Rich pardon case).

crime-fraud exception also provided for an adversary process and prior judicial determination of whether the privilege should be overcome.²¹¹ In light of these considerations, it seems appropriate to place the actions of Starr's office in this case at the "conventional" end of the spectrum of governmental efforts to overcome the privilege. Unfortunately, however, in other efforts to overcome assertions of privilege Starr's office would seem to have moved well toward the opposite end of that spectrum. Those actions are discussed below.

2. *Starr's Questionable Attacks on the Privilege: White House Attorneys and the Governmental Attorney-Client Privilege*

In two cases, Starr's office convinced federal appeals courts to reject assertions of attorney-client privilege by government attorneys.²¹² These cases involved assertions of privilege by White House attorneys regarding communications with President Clinton and First Lady Hillary Rodham Clinton. In simplest terms, Starr's office convinced the courts in both cases that federal government attorneys should not be permitted to assert a governmental attorney-client privilege as a basis for withholding information from a federal grand jury conducting a criminal investigation.²¹³ The legal issues involved in the cases are complex, however, and the reviewing courts were deeply divided as to the appropriate resolution of those issues.²¹⁴ This Article does not undertake an in-depth analysis of

211. For examples of Department of Justice policies that seek to avoid these safeguards against unwarranted invasion of the privilege, see *infra* Part II.D.1 (discussing prison inmate attorney-client monitoring policy) and *infra* Part III.D.3 (discussing "Thornburgh Memorandum" policy on contacts with unrepresented persons and its successors).

212. See *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (per curiam) (noting that while "an attorney-client privilege may not be asserted by Lindsey to avoid responding to the grand jury if he possesses information relating to possible criminal violations, he continues to be covered by the executive privilege to the same extent as the President's other advisers"); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) (arguing that government attorneys remain free to discuss "anything with a government official—except for potential criminal wrongdoing . . .").

213. See *Lindsey*, 158 F.3d at 1278 ("In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel."); *Subpoena Duces Tecum*, 112 F.3d at 925-26 ("To sum up, we hold that neither the attorney-client privilege nor the attorney work product doctrine is available to the White House in the circumstances of this case.").

214. Although Starr's office prevailed in both cases at the court of appeals level and the Supreme Court denied certiorari in both cases, leaving the court of appeals opinions as the final authorities, the reviewing courts were more deeply divided than this outcome might suggest at first glance. In both cases the federal district judge that initially heard the case concluded that a governmental attorney-client privilege could be asserted by the White House. Nevertheless, it should be noted that the lower court in the *Lindsey* case ruled that Starr's office had made a sufficient showing of need and unavailability to overcome the privilege. See *Lindsey*, 158 F.3d at 1267 (discussing applicability of attorney-client privilege). Additionally, in both cases, the appellate panels that ruled in favor of Starr's office did

those issues; other commentators have already done so,²¹⁵ and it is unnecc-

so by 2-1 votes over vigorous dissents. By simply doing the math, one is left with the result that the eight federal judges at the district court and appeals court levels who reviewed the cases were evenly divided four-to-four on the key question of whether White House attorneys could assert a governmental attorney-client privilege in response to a grand jury subpoena. That fact alone demonstrates that the cases involved an extremely difficult legal judgment on the core privilege issue. The Supreme Court's denial of certiorari is not inconsistent with this conclusion, as two justices objected strongly to the denial of certiorari in the *Lindsey* case. See *Office of President v. Office of Indep. Counsel*, 525 U.S. 996, 997 (1998) (Breyer, J., joined by Ginsburg, J., dissenting) (arguing for granting of certiorari in *Lindsey* case). As Justice Breyer aptly observed: "The divided decision of the Court of Appeals makes clear that the legal question presented by this petition has no clear legal answer and is open to serious legal debate." *Id.* For purposes of this Article, however, the importance of noting the deep division of the courts is not merely "scorekeeping," but rather that Starr's office did more in these two cases than simply request the courts to apply well-settled privilege law. *But see* Ray Report App. C., *supra* note 195, at 113 ("The Independent Counsel repeatedly faced invalid assertions of legal privileges that were either well recognized but unavailable under the circumstances or previously unrecognized."). Reasonable minds certainly can differ as to whether the Breyer version or the Ray version is the better characterization of the privilege disputes in these cases, but that potential for disagreement alone distinguishes the action Starr's office took in these cases from the more conventional application of the crime-fraud exception in the *Carter* case, discussed *supra* Part III.A.1.

215. See generally Todd A. Ellinwood, "In the Light of Reason and Experience": *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291 (proposing that governmental attorney-client privilege be identical to private attorney-client privilege regardless of nature of proceedings); Michael K. Forde, *The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications*, 16 YALE L. & POL'Y REV. 109 (1997) (examining governmental attorney-client privilege); Katherine L. Kendall, *In re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Government Realm?*, 1998 UTAH L. REV. 421 (criticizing majority's holding in *Supoena Duces Tecum*); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege*, 83 MINN. L. REV. 473 (1998) (arguing that government has "same attorney-client privilege that exists for a corporation or other organizational entity"); Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 GREEN BAG 2D 269 (2001) (analyzing apparent "legal no-man's land" created by Eighth and D.C. Circuits and fostered by Supreme Court's denial of certiorari in *Lindsey* case); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999) (arguing against "blanket prohibition on the application of the attorney-client privilege to a government attorney representing a government client. . ."); Amanda J. Dickmann, Note, *In re Lindsey: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291 (1999) (explaining how *Lindsey* altered status of governmental attorney-client privilege by restricting its application for use in criminal investigations); Sara A. Rana, Note, *Restricting the Attorney-Client Privilege: Necessary Limitations or Distorting the Privilege?*, 32 SUFFOLK U. L. REV. 687 (1999) (examining inherent problems of applying attorney-client privilege to government entities and resulting policy implications, and questioning "the limitations recently imposed on the privilege, and whether these restrictions undermine the policy on which the privilege is founded"); 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 (1998) (examining *Supoena Duces Tecum*); see also Lance Cole, *The Government-Client Privilege After Office of the President v. Office of the Independent Counsel*, 22 J. LEGAL PROF. 15 (1997-98) (analyzing impact of

essary to do so here. For purposes of this Article, the important aspect of these two cases is that Starr's office took an aggressive position in opposition to the privilege and succeeded both in overcoming assertions of privilege in a particular context and, most important, creating new uncertainty about the availability of the privilege in future cases.²¹⁶ The following discussion of the two cases focuses on those points, not on the factual details or the merits of the legal disputes in the cases.

Starr's office's first attack on the governmental attorney-client privilege arose out of a Whitewater investigation grand jury subpoena for handwritten notes taken by attorneys in the White House Counsel's office at two meetings with Hillary Clinton.²¹⁷ Starr's office took the position that applying the attorney-client privilege to those meetings "would be tantamount to establishing a new privilege," while the White House took the position that under established privilege law the communications that took place at the meetings should be protected.²¹⁸ The federal district court concluded that both the attorney-client privilege and the work product doctrine applied to the notes, and Starr's office appealed to the Eighth Circuit Court of Appeals.²¹⁹

Finding little case law on point, the appeals court relied on "general principles," to analyze the privilege issue,²²⁰ and concluded that the governmental attorney-client privilege should not be available to thwart a federal grand jury subpoena because of the "important differences between

Subpoena Duces Tecum holding on attorneys working in state or local government departments).

216. For a further discussion of the deep division of the courts on difficult legal issues presented by Starr's office's challenges to privilege in these two cases, see *supra* note 214 and accompanying text.

217. See *Subpoena Duces Tecum*, 112 F.3d at 913-14 (discussing Starr's office's request for grand jury subpoenas for certain documents). The court described the attorney notes at issue as follows:

The first set of documents comprises notes taken by Associate Counsel to the President Miriam Nemetz on July 11, 1995, at a meeting attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, and Mrs. Clinton's personal attorney, David Kendall. The subject of this meeting was Mrs. Clinton's activities following the death of Deputy Counsel to the President Vincent W. Foster, Jr. The documents in the second collection are notes taken by Mrs. Sherburne on January 26, 1996, during meetings attended by Mrs. Clinton, Mr. Kendall, Nicole Seligman (a partner of Mr. Kendall's), and, at times, John Quinn, Counsel to the President. These meetings, which took place during breaks in and immediately after Mrs. Clinton's testimony before a federal grand jury in Washington, D.C., concerned primarily the discovery of certain billing records from the Rose Law Firm in the residence area of the White House.

Id. at 914.

218. *Id.* at 915.

219. See *id.* at 914 (arguing that attorney-client privilege applied because White House and First Lady possessed "a genuine and reasonable. . . belief" that relevant communications were privileged).

220. See *id.* at 918 (noting that all privileges are exceptions to general rule of disclosure).

the government and non-governmental organizations such as business corporations."²²¹ The key differences identified by the court were that a business corporation may be subjected to criminal liability based upon the actions of its agents, while a governmental agency like the Office of the President cannot,²²² and that a "general duty of public service" requires government employees, including White House attorneys, "to favor disclosure over concealment."²²³ These considerations were sufficient to cause the court to agree with Starr's office that the White House should not be able to rely upon the attorney-client privilege to withhold the notes from a grand jury conducting a criminal investigation.²²⁴

Employing essentially the same reasoning, the court also concluded that the attorney work product doctrine did not apply to the attorneys' notes. Because the White House attorneys were not working in anticipation of litigation involving the White House, and because the White House as a governmental entity was not the subject or target of the grand jury investigation, the court concluded that the work product doctrine was inapplicable.²²⁵ In the court's view, the "essential element" necessary for attorney work product protection, preparation for an adversarial proceeding involving one's client, was not present because the White House lawyers did not represent Mrs. Clinton in her personal capacity; and, it was in that capacity that she was being investigated by Starr's office.²²⁶

Finally, the court rejected applying the common interest doctrine based upon the presence of Mrs. Clinton's private counsel at the meetings at which the notes were taken. In what was perhaps the most remarkable assertion in the entire opinion, the court categorically declared: "The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution."²²⁷ The court went on to reject de-

221. *Id.* at 920 (distinguishing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). For additional discussion of the court's privilege analysis, see Cole, *supra* note 215, at 19-21.

222. See *Subpoena Duces Tecum*, 112 F.3d at 920 (finding that significant differences exist between governmental and nongovernmental organizations that exclude or severely limit application of legal principles of *Upjohn* to government entities).

223. See *id.* (noting that this distinction alone may be substantial enough to find *Upjohn* unpersuasive).

224. See *id.* at 921 ("An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.").

225. See *id.* at 924 (holding that work product doctrine did not apply because White House attorneys were not preparing for trial, nor could they have because OIC could not investigate White House).

226. See *id.* at 924-25 (finding that White House bore burden of adequately demonstrating that work product immunity is applicable and that this burden was not met).

227. *Id.* at 923. The OIC's subsequent criminal referral to the House of Representatives in the Lewinsky matter, and the resulting impeachment trial of President Clinton by the Senate, certainly seem to call into question the validity of the court's categorical statement, but presumably the court's response would be that

mands upon the time of White House staff, vacancies in positions if staff members were indicted, and other “political concerns” as legitimate “common interests” between the White House and Mrs. Clinton in her personal capacity.²²⁸ Accordingly, the court rejected the application of the common interest doctrine to the White House attorneys’ notes.

The Eighth Circuit’s rejection of any governmental attorney-client privilege, work product doctrine or common interest doctrine protection for the White House attorneys’ notes has been widely criticized by commentators.²²⁹ It also was the subject of a strongly worded dissenting opinion by one of the three judges on the appellate panel that heard the case.²³⁰ Whether or not one agrees with the court’s decision, however, it

those events affected only President Clinton personally and not “the White House as an institution.” *Id.* That response seems dubious at best, however. *Cf. In re Lindsey*, 158 F.3d 1263, 1282 n.16 (D.C. Cir. 1998) (per curiam) (“Impeachment may remove the person, but no one could reasonably controvert that it affects the Office of the President as well. Even if there will always be a President and an Office of the President, it is unrealistic to posit that the Presidency will not be diminished by an impeachment The possibility of impeachment implicates institutional concerns of the White House, and White House Counsel, representing the Office of the President, would presumably play an important role in defending the institution of the Presidency.”). As with so many other aspects of the Clinton presidency and the Starr investigation, history will be the final judge of whether the OIC’s actions had any effect on the White House as an institution. *Cf. BOB WOODWARD, SHADOW FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* (1999) (outlining effect of Watergate scandal on five successors to Nixon presidency).

228. *See Subpoena Duces Tecum*, 112 F.3d at 923 (“But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake.”).

229. *See generally* Ellinwood, *supra* note 215 (criticizing “weak” governmental attorney-client privilege resulting from decision and arguing for stronger privilege protection); Forde, *supra* note 215 (arguing that attorney-client privilege, work product doctrine and common interest privilege should apply); Paulsen, *supra* note 215 (arguing that United States government possesses same attorney-client privilege as corporation or other organization and proposing new approach for determining when that privilege should be overcome); Pincus, *supra* note 215 (asserting that “government attorneys are in a legal no-man’s land” with respect to privilege rules); Toporek, *supra* note 215 (criticizing “chilling effect of the decision” and advocating requirement for showing need and relevance, with in camera judicial inspection of subpoenaed material, before overcoming privilege).

230. In a lengthy dissenting opinion, Judge Kopf argued that “[t]he White House, no less than state government or a corporation, is entitled to the privilege in all types of cases, including criminal cases, so that the White House can comply with the law.” *Subpoena Duces Tecum*, 112 F.3d at 926 (Kopf, J., dissenting). Judge Kopf agreed that the privilege might be overcome by a grand jury subpoena, but only if the prosecutor could show that the subpoena information was specifically needed, relevant and admissible, as the Supreme Court had required to overcome executive privilege in *United States v. Nixon*, 418 U.S. 683 (1974). *See Subpoena Duces Tecum*, 112 F.3d at 927, 935-38 (Kopf, J., dissenting). Judge Kopf also would have applied the common interest doctrine as “a complete defense to the grand jury subpoena.” *Id.* at 927. Despite these differences between Judge Kopf and the two judges in the majority, and despite the importance of the issues involved, the Su-

is indisputable that the case introduced new uncertainty into the application of the attorney-client privilege to a huge category of attorney-client communications—those that involve government lawyers. That uncertainty was compounded by a subsequent case in which Starr's office sought to overcome the assertions of a governmental attorney-client privilege.

Starr's office's second attempt to overcome assertions of governmental attorney-client privilege involved another White House attorney, Deputy White House Counsel Bruce Lindsey, and a different investigation, the Monica Lewinsky investigation.²³¹ In seeking to compel Lindsey's testimony about discussions with President Clinton concerning Lewinsky, Starr's office took the position that permitting Lindsey to assert a governmental attorney-client privilege before the grand jury "would be inconsistent with the proper role of a government lawyer," and that President Clinton should be required to rely only upon "his private [attorneys] for fully confidential counsel."²³² The district court concluded that the President does possess a governmental attorney-client privilege for official consultations with White House attorneys, but ruled that the privilege was qualified in the grand jury subpoena context and could be overcome by a showing of sufficient need and unavailability of the subpoenaed information from other sources.²³³ The district court concluded that Starr's office had made a sufficient showing to overcome the qualified governmental attorney-client privilege, and the parties appealed to the D.C. Circuit Court of Appeals.²³⁴

The D.C. Circuit undertook its own analysis of the governmental attorney-client privilege issue, and did not base its conclusions on the Eighth Circuit's prior opinion on that issue.²³⁵ After a detailed review of the relevant authorities, the D.C. Circuit concluded that a federal government attorney should not be permitted to assert the governmental attorney-client privilege in response to a federal grand jury subpoena:

preme Court denied certiorari in the case. *See* Office of the President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

231. *See generally* Lindsey, 158 F.3d at 1263 (holding that no absolute attorney-client privilege exists between President and Deputy White House Counsel in face of grand jury subpoena).

232. *See id.* at 1268 (discussing position of Independent Counsel).

233. *See id.* at 1267 (describing district court decision).

234. *See id.* (ruling "President's personal attorney-client privilege and work product immunity inapplicable to Lindsey's testimony"). The parties on appeal were the Office of Independent Counsel, the Office of the President and President Clinton in his personal capacity.

235. *See id.* at 1267-78 (noting that question of whether government attorney-client privilege is applicable in context of federal grand jury investigation was issue of "first impression" in D.C. Circuit). The D.C. Circuit did cite the Eighth Circuit opinion on the governmental attorney-client privilege issue, albeit well into the D.C. Circuit's independent analysis of the issue. *See id.* at 1274 (citing Eighth Circuit opinion's conclusion that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets").

In sum, it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel. When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.²³⁶

President Clinton also argued that Lindsey's interactions with the President's private counsel should be protected by the common interest doctrine.²³⁷ In analyzing the common interest doctrine issue, the D.C. Circuit, unlike the Eighth Circuit in the case involving Mrs. Clinton,²³⁸ seemed to accept the proposition that "the President in his private persona" may share some common interests with the Office of the President as an institution, such as concerns relating to impeachment.²³⁹ In the court's view, however, "the overarching duties of Lindsey in his role as a government attorney prevent him from withholding information about possible criminal misconduct from the grand jury."²⁴⁰ As a result, the D.C. Circuit, like the Eighth Circuit, refused to permit use of the common interest doctrine by government attorneys to frustrate a grand jury subpoena in a criminal investigation.²⁴¹

Also like the Eighth Circuit's government attorney-client privilege decision,²⁴² the D.C. Circuit opinion provoked a vigorous dissent²⁴³ and has

236. *Id.* at 1278.

237. *See id.* at 1282 (describing President's arguments).

238. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir. 1997) (asserting that Independent Counsel investigation "can have no legal, factual, or even strategic effect on the White House as an institution"). For a further discussion of the Eighth Circuit's view of the Independent Counsel investigation's scope, see *supra* note 227 and accompanying text.

239. *See Lindsey*, 158 F.3d at 1282 & n.16 (recognizing common interests of President's private life and Office of President, particularly with respect to impeachment).

240. *Id.* at 1283.

241. An interesting aspect of the D.C. Circuit's analysis, although not significant to this Article, is the court's application of the "intermediary doctrine" to the *Lindsey* case. The court stated that "in light of the President's undisputed right to have an effective relationship with personal counsel, consonant with carrying out his official duties, we hold that the intermediary doctrine can still protect a government official when that official acts as a mere intermediary." *Id.* at 1282. To this limited extent, therefore, the D.C. Circuit was willing to grant some confidentiality protections to communications between the President and a government attorney working in the White House, even in response to a grand jury subpoena.

242. For a further discussion of commentators' criticism of the Eighth Circuit case, see *supra* note 229 and accompanying text. For a further discussion of the dissent in the Eighth Circuit case, see *supra* note 230 and accompanying text.

243. Judge Tatel dissented from the portions of the majority opinion that concluded the governmental attorney-client privilege did not apply to President Clinton's communications with Lindsey and that denied those communications

been widely criticized by commentators.²⁴⁴ The extent of the disagreement over these cases would seem to be sufficient to justify categorizing them as “questionable” efforts on the part of Starr’s office to overcome assertions of privilege. As noted above, however, the purpose of this Article is not to weigh in on the dispute over whether the governmental privilege cases were correctly decided in favor of Starr’s office. Instead, this Article seeks to highlight what is not disputed about the cases—that their outcome has diminished the confidentiality protections that are provided by the attorney-client privilege and the work product doctrine, at least for communications with government lawyers.²⁴⁵ In some class of cases—large or small, depending on how broadly these two cases are interpreted and applied—those protections are no longer available. Thus they serve as examples of the trend that is the focus of this Article—actions by federal law enforcement officials that have eroded the extent of the protections provided by the attorney-client privilege and the work product doctrine.

3. *Starr’s Excessive Attack on the Privilege: The Foster Notes and Deceased Clients*

Starr’s office’s most aggressive effort to override the privilege was in the Foster notes case,²⁴⁶ described in Part II.B.1.d above. Unlike the

protection under the common interest doctrine. See *Lindsey*, 158 F.3d at 1283 (Tatel, J., dissenting). Most important for purposes of this Article, Judge Tatel argued that recognizing a governmental attorney-client privilege even in the context of a criminal grand jury investigation would not be inappropriate because the potential application of the crime-fraud exception was sufficient to protect against abuse of the privilege. See *id.* at 1287. For a discussion of the role of the crime-fraud exception in preventing abuse and unwarranted assertions of privilege, see *supra* Part II.C.1.

244. See Ellinwood, *supra* note 215, at 1317-31 (criticizing “weak” governmental attorney-client privilege resulting from decision and arguing for stronger privilege protection); Paulsen, *supra* note 215, at 494-512 (arguing that United States government possesses same attorney-client privilege as corporation or other organization and proposing new approach to determining when that privilege can be asserted); Pincus, *supra* note 215, at 269 (asserting that because of D.C. Circuit and Eighth Circuit opinions, “government attorneys are in a legal no-man’s land” with respect to privilege rules); Dickmann, *supra* note 215, at 306-10 (describing potential “detrimental consequences” of opinion, “such as ‘chilling effects,’ outsourcing of governmental legal work, revelation of military, diplomatic, or sensitive national security secrets, and slippery slope concerns”). Not all commentators disagree with the holdings in the two cases, however. See, e.g., William H. Simon, *The Professional Responsibilities of the Public Official’s Lawyer: A Case Study from the Clinton Era*, 77 NOTRE DAME L. REV. 999, 1006-14 (2002) (“In two Whitewater-related cases . . . the Eighth and D.C. Circuits held that White House officials had no attorney-client privilege against a federal prosecutor’s grand jury subpoena The circuit court opinions differ, and they are controversial, but their holdings are supported by powerful logic.”) (citations omitted).

245. For an analysis of how the Eighth Circuit decision may affect lawyers for state and local governmental entities, see Cole, *supra* note 215, at 26-27.

246. See generally *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

Eighth Circuit²⁴⁷ and the D.C. Circuit²⁴⁸ in their discussions of the positions of the parties in the governmental attorney-client privilege cases, the Supreme Court in the *Foster notes* case made clear that in subpoenaing the notes Starr's office was seeking to "overturn the common-law rule embodied in the prevailing case law."²⁴⁹ That is the important aspect of the *Foster notes* case for purposes of this Article: among the attorney-client privilege challenges pursued by Starr's office, it is the case in which Starr's office most clearly sought to overcome existing privilege law and create a new exception to the privilege. It also is the only instance in which the final reviewing court squarely rejected Starr's office's position on an attorney-client privilege issue.²⁵⁰ For those reasons, it is categorized here as an "excessive" attack on the privilege by Starr's office.

As discussed in Part II.B.1.d and here, the Supreme Court rejected Starr's argument that the privilege should not be available when the client is deceased and a federal grand jury is seeking the privileged information in connection with a criminal investigation.²⁵¹ In doing so, the Court disagreed with the D.C. Circuit,²⁵² which had accepted Starr's argument that creating an exception in such circumstances "would have little to no chilling effect on client communication," and therefore was appropriate in light of the "relative importance to criminal litigation" of such an exception.²⁵³ The Supreme Court appeared to be very concerned about the policy interests underlying the privilege,²⁵⁴ and at the same time very re-

247. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997) (describing disagreement between White House and Office of Independent Counsel as to whether "recognizing an attorney-client privilege in these circumstances would be tantamount to establishing a new privilege").

248. See *Lindsey*, 158 F.3d at 1272 (describing conflict between Office of President and Office of Independent Counsel as to whether the OIC was seeking to disturb "the status quo" of privilege law).

249. *Swidler & Berlin*, 524 U.S. at 411.

250. The Supreme Court also rejected Starr's office's position on the application of the Fifth Amendment privilege against self-incrimination to the production of documents by an immunized witness. See *United States v. Hubbell*, 530 U.S. 27, 38-40 (2000) (discussing Fifth Amendment privilege of witness granted immunity). For an analysis of the impact of the *Hubbell* decision, see generally Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 AM. CRIM. L. REV. 123 (2002).

251. See *Swidler & Berlin*, 524 U.S. at 409-11 (holding that attorney-client privilege survives death of client). *But cf.* Knight, *supra* note 85, at 260-61 (arguing that by failing to categorically reject posthumous exception to privilege Court weakened confidentiality protection provided by privilege).

252. See *In re Sealed Case*, 124 F.3d 230, 232-34 (D.C. Cir. 1998).

253. *Swidler & Berlin*, 524 U.S. at 402.

254. See *id.* at 407-08 (expressing concerns about potential withholding of information from counsel by clients). *But cf.* generally Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolfinbarger*, 55 BUS. LAW. 735 (2000) (arguing that concerns about predictability expressed by *Swidler & Berlin* Court are not applicable in corporate context, because in that context privilege protects only corporate entity, not individual officers, directors and employees who speak for corporation).

luctant to elevate law enforcement interests in a criminal investigation over those policy interests.²⁵⁵ In short, as it has done in every recent case,²⁵⁶ the Supreme Court sided with the attorney-client privilege over the interests of federal law enforcement authorities seeking to overcome the privilege to gain information in a criminal investigation.²⁵⁷ That is the important lesson of the Foster notes case, and that is the reason the case is significant to an analysis of attacks on the privilege by Starr's office. Starr's office successfully invoked the crime-fraud exception to obtain testimony and documents from Monica Lewinsky's first attorney. In two other cases Starr's office narrowly succeeded in convincing appeals courts to abrogate the privilege in a relatively narrow area of law, the governmental attorney-client privilege. In the Foster notes case, however, the Supreme Court rejected Starr's office's attempt to create a new exception to the privilege. The Foster notes case is important because it demonstrates that efforts by federal prosecutors to overcome the privilege are not always well founded and should be carefully scrutinized by the federal courts.

4. Conclusion

Viewed in its entirety, the conduct of Starr's office with regard to the attorney-client privilege presents an excellent microcosmic example of the larger trend in the conduct of federal prosecutors that this Article condemns. It appears that at every opportunity to do so, Starr's office put its investigative needs and ends ahead of the systemic interests that are served by the attorney-client privilege and the work product doctrine. The lawyers in Starr's office devised creative, innovative and untested legal arguments to support their attacks on the privilege, and then simply put those arguments before the federal courts and took whatever the courts would give them.²⁵⁸ The only effective check on the excessive zeal of Starr's office to overcome assertions of privilege (whenever those assertions im-

255. See *Swidler & Berlin*, 524 U.S. at 408-09 (declining to apply privilege differently in criminal and civil cases).

256. For a further discussion of the Supreme Court's recent attorney-client privilege cases, see *supra* Part II.B.

257. The Court also implicitly expressed approval for use of "established exceptions" to the privilege, such as the crime-fraud exception, in criminal cases. See *Swidler & Berlin*, 524 U.S. at 409-10 (stating that "established exceptions are consistent with the purposes of the privilege"). That aspect of the Court's opinion is consistent with the Part of this Article arguing that existing privilege law is sufficient to protect against inappropriate and unwarranted assertions of privilege. See *supra* Part II.C.

258. A good example is the governmental privilege cases, where the arguments of Starr's office in opposition to the privilege were so novel that the appellate courts in both cases acknowledged that there was little or no relevant case law on point. See *In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (per curiam) ("The question whether a government attorney-client privilege applies in the federal grand jury context is one of first impression in this circuit, and the parties dispute the import of the lack of binding authority."); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir. 1997) ("Lacking persuasive direction in the case law, we turn to general principles.").

peded their investigations) proved to be the reluctance of the Supreme Court to accept legal arguments that would weaken the privilege and endanger the vital public policy interests that the privilege protects.

As discussed in Part IV below, this Article takes the position that responsible prosecutors should take a less self-serving approach and should consider the effects of the legal arguments they make in particular cases on the broader systemic interests served by the privilege, rather than simply trying to overcome all assertions of privilege in all cases. This more enlightened approach to privilege issues is in accord with both recent Supreme Court case law on the privilege and the greater public interests that prosecutors are expected to serve.²⁵⁹ Unfortunately, the actions of Starr's office in its various assaults on the privilege are consistent with recent actions of other federal law enforcement authorities in this area and are discussed in the remainder of this Part. Part IV returns to the systemic dangers posed by these assaults on the privilege and suggests new approaches for federal law enforcement officials to follow when addressing privilege issues.

B. *The Marc Rich Pardon Investigation*

The Starr investigation cases are not the only instances in which federal prosecutors investigating President Clinton aggressively sought to overcome assertions of attorney-client privilege and work product doctrine protection in a criminal investigation. On his last day in office in January 2001, President Clinton granted 177 presidential pardons and reprieves.²⁶⁰ The end-of-term pardons generated enormous controversy and widespread criticism and were the subject of a grand jury investigation conducted by the United States Attorney's Office for the Southern District of New York.²⁶¹ The grand jury investigation focused on Clinton's par-

259. For a further discussion of recent Supreme Court case law on attorney-client privilege, see *supra* Part II.B.1. For a further discussion of the interests served by prosecutors, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 226-28 (2000) (describing "Prosecutors' Higher Obligations" and observing that federal prosecutors "are charged with an overarching duty to seek justice—a duty recognized for well over a century").

260. See David Johnston & Don Van Natta, Jr., *Clinton's Brother Pursued Clemency Bids for Friends*, N.Y. TIMES, Feb. 23, 2001, at A1 (discussing Roger Clinton's efforts in seeking pardons for acquaintances as well as other potentially scandalous pardons and clemency bids); Richard A. Serrano & Stephen Braun, *Clemency Inquiry is Expanded to all 177 of Clinton's Last Minute Pardons*, L.A. TIMES, Mar. 13, 2001, at A1 (detailing Attorney General John Ashcroft's decision to investigate all 177 pardons and commutations granted by President Clinton on January 20, 2001).

261. See *In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 273-74 (S.D.N.Y. 2001) (describing commencement of investigation); see also David Johnston, *U.S. Is Beginning Criminal Inquiry in Pardon of Rich*, N.Y. TIMES, February 15, 2001, at A1 (same); Susan Schmidt & Dan Eggen, *Pardons Probe Course a Mystery; Case Could Be Huge If N.Y. Prosecutor Pursues Aggressively*, WASH. POST, March 14, 2001, at A4 (stating that many FBI agents are investigating last-minute

dons of fugitive international financiers Marc Rich and Pincus Green.²⁶² Then-United States Attorney Rudolph Giuliani's office had obtained an indictment of Rich and Green in the Southern District of New York in September 1983 for alleged violations of federal income tax and oil price controls, but Rich and Green fled the country shortly before the indictment was returned and never returned to face trial.²⁶³ Because of the manner in which the court addressed the attorney-client privilege and work product issues that arose in the grand jury investigation of the Rich and Green pardons, it is helpful to review briefly the sequence of events that led up to investigation.

Between 1983 and 1999 various attorneys representing Rich and Green sought unsuccessfully to negotiate a resolution of the criminal case, but Justice Department attorneys refused to negotiate unless Rich and Green returned to the U.S. and surrendered themselves to the jurisdiction of the court, which they refused to do.²⁶⁴ In early 1999 Rich and Green and their legal advisers decided to explore the possibility of seeking a presidential pardon, and in July 1999 Rich retained former Clinton White House Counsel John Quinn, then a partner at the Washington law firm of Arnold & Porter, to represent him.²⁶⁵ The retainer agreement between Rich and the law firm stated that the firm was being retained "to provide legal services and in connection with Mr. Rich's potential negotiations with the Department of Justice."²⁶⁶

Quinn met with Deputy Attorney General Eric H. Holder, Jr. and wrote to then-United States Attorney for the Southern District of New York Mary Jo White seeking to negotiate a resolution of the case against Rich, but, like his predecessors, he was unsuccessful in initiating negotiations

presidential pardons); Serrano & Braun, *supra* note 260 (discussing preliminary investigation into President Clinton's pardons).

262. See James Vicini, *U.S. Prosecutors to Study Clinton's Pardons*, REUTERS, Mar. 15, 2001 (describing Rich and Green pardons); Johnston, *supra* note 261 (detailing investigation into Rich pardon); Richard Cohen, Editorial, *The Rich Pardon: Messy? Yes. Crazy? No.*, WASH. POST, Mar. 15, 2001, at A25 (discussing reasoning behind Rich pardon).

263. See *Grand Jury Subpoenas*, 179 F. Supp. 2d at 274 (explaining departure of Rich and Green from United States during indictment proceedings in 1983). On January 5, 2001, in a letter from Quinn to President Clinton, Quinn stated that he "became convinced of both Marc's innocence and the outrageously prejudicial and unfair treatment of him by the then-new U.S. Attorney in New York, Mr. G[iu]liani." *Id.* at 279. Additionally, on December 19, 2000, Quinn wrote a letter to Bruce Lindsey citing "adverse and prejudicial publicity" generated by then-U.S. Attorney Rudolph Giuliani at time of Rich and Green indictments as justification for their failure to return to U.S. for trial." *Id.* at 280 n.4.

264. See *id.* at 275-76 ("[I]f your clients genuinely believe that they have done nothing wrong, they should board the next plane to New York and subject themselves to the jurisdiction of the Court.").

265. See *id.* at 276.

266. *Id.* (citing letter from K.A. Behan of Arnold & Porter to Marc Rich, dated July 21, 1999).

with the Justice Department.²⁶⁷ In March 2000 efforts to negotiate with the Justice Department ceased, and Rich's attorneys and advisers began working on a presidential pardon request.²⁶⁸ On December 11, 2000, Quinn submitted a pardon petition and supporting memorandum to the White House.²⁶⁹ After the petition was submitted, Rich's ex-wife Denise Rich and others contacted President Clinton and other White House officials in support of the petition.²⁷⁰ On January 19, 2001, Quinn spoke directly with President Clinton about the petition, and in response to a request by Clinton subsequently provided a letter confirming that Rich and Green would waive the statute of limitations for any civil claims the government might pursue against them.²⁷¹ After receiving the statute of limitations waiver for civil claims, Clinton granted Rich and Green full and unconditional pardons on January 20, 2001, his last day in office.²⁷²

In February 2001 a grand jury in the Southern District of New York began investigating the circumstances surrounding the Rich and Green pardons.²⁷³ In the course of the grand jury investigation, subpoenas were issued to the attorneys representing Rich and Green for all documents relating to their efforts to resolve the Justice Department's criminal case and to obtain presidential pardons for Rich and Green.²⁷⁴ The attorneys withheld certain documents on grounds of attorney-client privilege and work product doctrine, and the Justice Department sought to compel production.²⁷⁵ Two of the arguments advanced by the government are particularly relevant to this Article and merit examination here, because they represent extremely aggressive attacks on the privilege by Department of Justice prosecutors.

The first argument advanced by the government was that the "fugitive disentitlement" doctrine should be applied to deprive Rich and Green of the protection of the work product doctrine because they were fugitives and had no intention of returning to the United States to face the charges against them.²⁷⁶ Under the fugitive disentitlement doctrine, which originated in the nineteenth century, "the fugitive from justice may not

267. *See id.* at 276-77 (discussing Quinn's unsuccessful efforts in attempting to negotiate with federal prosecutors).

268. *See id.* at 277 (describing decision to seek pardon).

269. *See id.* at 278 (detailing filing of pardon petition).

270. *See id.* at 279-80 (illustrating post-petition lobbying efforts).

271. *See id.* at 280 (expressing President's request that Rich and Green waive statute of limitations defense for civil claims).

272. *See id.* (stating President Clinton's grant of pardons to Rich and Green).

273. *See id.* at 280-81 (detailing commencement of investigation into pardons).

274. *See id.* at 281 (stating issuance of subpoenas for all documents related to pardon requests).

275. *See id.* (discussing Justice Department's motion to compel).

276. *See id.* (raising "fugitive disentitlement" argument).

seek relief from the judicial system whose authority he or she evades.”²⁷⁷ The noteworthy aspect of the Justice Department’s attempt to use this doctrine to deprive Rich and Green of work product protection is that the two federal courts that had previously considered the matter both held that fugitive status alone was not a sufficient reason to deny a party the right to invoke the attorney-client privilege.²⁷⁸ Moreover, no case had ever applied the doctrine (which, as noted above, had been in existence since the nineteenth century) to a party’s effort to invoke the work product doctrine.²⁷⁹ Even though the court concluded that Rich and Green indeed were fugitives, the court wisely declined to apply the fugitive disentanglement doctrine because Rich and Green were not seeking affirmative relief and instead were merely asserting the work product doctrine defensively in response to the government’s subpoenas.²⁸⁰

The government’s unsuccessful attempt to rely upon the fugitive disentanglement doctrine is an example of one of the problems this Article seeks to highlight: aggressive attacks on the privilege by Justice Department prosecutors, often involving novel legal arguments and efforts to overcome existing law or extend recognized legal doctrines beyond their prior applications, in order to gain an advantage in a particular investigation.²⁸¹ Although it is not surprising that line prosecutors who are heavily invested in a particular case or investigation, such as the Southern District prosecutors who probably were personally outraged by the pardons of Rich and Green, will pursue every available legal argument that can be asserted in good faith, greater restraint should be exercised by more senior Justice Department officials.²⁸² Those officials should look beyond the particular case and consider the overall, long-term effect of the Department’s actions on the privilege and on the justice system as a whole. In the long run, repeated efforts to overcome the privilege at every availa-

277. *Id.* at 285 (quoting Martha B. Stolley, *Sword or Shield: Due Process & the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 752 (1997)).

278. *See In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 286 (S.D.N.Y. 2001) (citing *United States v. Hurley*, 728 F. Supp. 66 (D. Mass. 1990), and *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029 (S.D.N.Y. 1975)) (declining to use fugitive disentanglement doctrine to deprive parties of attorney-client privilege).

279. *See Grand Jury Subpoenas*, 179 F. Supp. 2d at 287-88 (detailing government’s “fugitive disentanglement” argument). The prosecution’s effort to apply the doctrine to work product, with absolutely no direct supporting authority and the only analogous authority, in the attorney-client privilege cases, in opposition, is an excellent example of the kind of prosecutorial overreaching in privilege cases that this Article argues should be curtailed.

280. *See id.* at 288 (defining purpose of work product doctrine).

281. Another example is Independent Counsel’s attempt, thwarted by the Supreme Court, to overcome the protections of the attorney-client privilege when the client is deceased, discussed *supra* Part III.A.3.

282. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 3.1 (1983) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

ble opportunity are inconsistent with the best interests of our adversarial system of justice. Unfortunately, as the examples collected in this Article demonstrate, it appears that prosecutorial restraint is being exercised less frequently, and more often the only protection available against prosecutorial overreaching is the federal judiciary. Here that protection proved effective, as the court rebuffed the government's effort to extend the fugitive disentitlement doctrine.

The prosecutors' other principal attack on the privilege in the Rich case, however, survived judicial scrutiny and was successful in overcoming the privilege. In addition to the fugitive disentitlement argument, the prosecutors argued that the privilege and the work product doctrine should not apply because the lawyers for Rich and Green were acting primarily as lobbyists and not as lawyers providing traditional legal services.²⁸³ The court accepted this argument, based upon its conclusions that the pardon process was not adversarial, that the lawyers were acting primarily as lobbyists, and that the "litigation" of the criminal charges against Rich and Green "was over."²⁸⁴ For those reasons, the court ordered the attorneys to produce the subpoenaed documents to the government.²⁸⁵

The Rich case is important for purposes of this Article because it creates yet another exception to the protections provided by the attorney-client privilege and the work product doctrine. Although the circumstances of the Rich case certainly are unusual, and perhaps unique, the holding that the privilege does not apply when lawyers seek a pardon for a person who is the subject of a criminal prosecution has broad implications beyond that particular case.²⁸⁶ One cannot predict with any certainty

283. See *Grand Jury Subpoenas*, 179 F. Supp. 2d at 281 (introducing government's second argument concerning why materials are not protected by work product doctrine).

284. See *id.* at 288-91 (listing court's conclusions).

285. See *id.* at 291 (ordering subpoenaed documents). The discussion above summarizes the complex and important legal issues that the court addressed in connection with the privilege claims asserted by the lawyers for Rich and Green. Although those issues, and the validity of the court's conclusions, certainly merit more detailed analysis, this Article is not the appropriate occasion to do so. As discussed below, the important point for purposes of this Article is that this case is yet another example of an instance in which federal law enforcement authorities succeeded in overcoming the protections of the attorney-client privilege and the work product doctrine, not the intricacies of the legal arguments that permitted the government to do so.

286. For a discussion of the potential implications of the court's decision for practicing attorneys, see Louis Jacobson, *Lobbying & Law: Were They Lawyers or Lobbyists?*, NAT'L J., Jan. 12, 2002, at 109. In that article, Professor Charles Tiefer suggests that the case may require some clients to establish two legal teams to represent them, a litigation team and a non-litigation lobbying and government relations team, an arrangement that he calls "highly impractical." See *id.* (discussing district court decision requiring Rich's attorney to hand over documents to federal grand jury). "Stanley M. Brand, a veteran white-collar defense lawyer and lobbyist in Washington, agrees and says that [the] ruling is likely to 'chill a client's ability to be fully candid with the people representing them.'" *Id.*

whether this exception will be expanded to preclude assertions of privilege in other situations where lawyers and clients now understand that the privilege is available.²⁸⁷ The likelihood, however, is that it will be expanded, as aggressive prosecutors in other cases try to use the exception to overcome the privilege and obtain information.

It also is difficult to evaluate the importance of the information obtained by the government in the Rich case. The fact that no charges were brought in the case, however, suggests that this was merely another prosecutorial "fishing expedition" in pursuit of the mythical "smoking gun" document that would confirm the prosecutors' worst suspicions. The government did not succeed in their objective of obtaining information that supported bringing criminal charges, but they did manage to further weaken the attorney-client privilege and the work product doctrine, with potential long-term damage to our justice system. As discussed in Part IV below, the time has come for federal law enforcement officials to take a more enlightened approach to privilege issues, and to stop attacking the privilege at every opportunity.

C. *The Federal Organizational Sentencing Guidelines, the Department of Justice Policy on Prosecution of Corporations and Pressures on Corporations to Waive Privilege Protections*

Perhaps no area of the law has seen as concerted an attack on the attorney-client privilege and work product doctrine as corporate criminal law enforcement by the United States Department of Justice (DOJ). Two former federal prosecutors have characterized recent Department of Justice initiatives as marking "the death of privilege in corporate criminal investigations."²⁸⁸ Although reports of the death of privilege in this area may be slightly exaggerated,²⁸⁹ there can be little doubt that the attorney-client privilege and the work product doctrine are the targets of a multi-front assault by the Justice Department, which is not limited to the corpo-

287. Professor Tiefer noted that the rationale of the ruling might be applied to "a Wall Street lawyer who had come to Washington to make a pitch to the Securities and Exchange Commission, because it was considered lobbying." *Id.* at 110. *But cf.* *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002) (holding that communications corporation shared with its public relations and government affairs consultants were protected by attorney-client privilege).

288. Zornow & Krakaur, *supra* note 6, at 147.

289. The authors of this statement, although former federal prosecutors, are partners in a large corporate law firm and acknowledged that they write "from the vantage point of the criminal defense attorney." *Id.* at 149. They therefore can perhaps be expected to advocate the interests of corporations; even if that is so, however, their concerns about the continued viability of privilege in the corporate context are valid, and are shared by the author of this Article. This Article takes the view that the corporate attorney-client privilege remains a viable legal doctrine, but it has been significantly weakened over the last two decades and its continued survival is no longer free from doubt.

rate arena.²⁹⁰ President Bush's July 2002 creation of a new Corporate Fraud Task Force, headed by Deputy Attorney General Larry D. Thompson, is likely to lead to further attacks on the privilege in the corporate context.²⁹¹ President Bush stated that the new Task Force "will target major accounting fraud and other criminal activity in corporate finance . . . [and] will function as a financial crimes SWAT team, overseeing the investigation of corporate abusers and bringing them to account."²⁹² President Bush's "SWAT team" rhetoric, coupled with the other recent developments that are discussed below, does not bode well for the future of the privilege in corporate criminal cases.

1. *The Corporate Sentencing Guidelines*

One of the most significant governmental controls on organizational behavior in the United States is the Federal Sentencing Guidelines for Organizations (Corporate Sentencing Guidelines), which have been in effect since November 1, 1991.²⁹³ These Corporate Sentencing Guidelines govern the way in which corporations and other business entities are sentenced for criminal violations of federal law. A noteworthy characteristic of the Guidelines is the burden they place on business entities to self-police their activities and, as a practical matter, to self-report violations of law. Under the Guidelines, if a corporation pleads guilty to or is convicted of a federal crime, it is subject to much harsher fines and remedies if it has

290. For example, the Justice Department's controversial new policy permitting eavesdropping on suspected terrorists' conversations with their attorneys is merely the latest in a long series of actions by the Department that are likely to significantly weaken the protections provided by the privilege. For a discussion of the new attorney-client eavesdropping policy and other Justice Department policies and practices that have impinged upon the attorney-client privilege and the work product doctrine in recent years, see *infra* Part III.D.

291. See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002) (detailing purpose and functions of Corporate Fraud Task Force); see also Mike Allen, *Bush Urges Crackdown on Business Corruption; More Resources for Regulators; Increased Jail Terms Proposed*, WASH. POST, July 10, 2002, at A1 (summarizing President Bush's proposals for stiffer penalties for dishonest executives); Nicholas Kulish, *Senate Penalties for Executives Are Tougher Than Bush's Plan*, WALL ST. J., July 10, 2002, at A8 (outlining President Bush's plan for tough penalties for those found defrauding investors).

292. President George W. Bush, Remarks by the President on Corporate Responsibility at the Regent Wall Street Hotel, New York, New York (July 9, 2002), reprinted in 38 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1158-61 (July 15, 2002).

293. Although this Article uses the term "corporate sentencing guidelines," the guidelines apply to all "organizations." The guidelines define the word "organization" to mean "a person other than an individual." U.S. SENTENCING GUIDELINES MANUAL § 8A1.1, cmt. n.1 (1991). This includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments, political subdivisions and nonprofit organizations. See *id.* (defining term "organization").

not implemented a compliance program and has not “fully cooperated” with the government’s investigation of the criminal activity.²⁹⁴

a. Relevant Provisions of the Corporate Sentencing Guidelines

The United States Sentencing Commission²⁹⁵ approved criminal sentencing guidelines for organizations in 1991 after years of debating the proper means of imposing criminal sanctions on business entities.²⁹⁶ The Corporate Sentencing Guidelines provide for restitution to victims by convicted corporations and impose heavy fines and intrusive corporate probation on companies that commit federal crimes.²⁹⁷ The Guidelines set out detailed procedures for federal judges to use in determining the fines to impose on corporations. The fine calculation provisions require the court first to determine the “offense level” of the specific violation, that is based upon the nature of the particular crime and the circumstances surrounding the violation. The court uses an “Offense Level Fines Table” which lists dollar amounts, to calculate the base fine.²⁹⁸ The base fine is the greatest of: (1) the amount obtained from the Offense Level Fines Table; (2) the pecuniary gain to the corporation from the offense; or (3) the pecuniary loss from the offense that is intentionally, knowingly or recklessly caused by the corporation. Consequently, if the pecuniary gain or loss exceeds the amount obtained in the Offense Level Fines Table, the base fine amount will be that amount of gain or loss.²⁹⁹

After arriving at an amount for the base fine, a sentencing court must still calculate the actual range within which a fine may be imposed. In this calculation, the court takes into account a complicated array of factors to determine the convicted corporation’s “culpability score” from which the actual range of fines will be calculated. The court uses the culpability score to obtain minimum and maximum values that will be applied to the base fine, thus establishing a range for the fine.³⁰⁰

294. *See id.* § 8C2.5(g)(1)(B) (listing burdens on business entities). The corporation also must “clearly demonstrate [] recognition and affirmative acceptance of responsibility for its criminal conduct.” *Id.*

295. For background on the United States Sentencing Commission, see *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding constitutionality of Commission and guidelines it promulgates).

296. *See, e.g.*, Richard Gruner, *Corporate Sentencing Guidelines*, 2 WHITE-COLLAR CRIME REP. 1, 2-6 (1988) (explaining that topics of debate included how monetary fines should be set for corporate and other organizational defendants, to what extent organizational fines should be imposed, and how properly to integrate individual and organizational sanctions).

297. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (1991) (listing fines for convicted corporations).

298. *See id.* § 8C2.4(d) (explaining calculation of base fine).

299. If the calculation of gain and loss would unduly complicate or prolong the sentencing, however, the Corporate Sentencing Guidelines provide that these values should not be used to determine the base fine. *See id.* § 8C2.4(c) (discussing methods for determining base fine).

300. *See id.* § 8C2.5 (same).

Several aggravating factors may increase the culpability score. The first and most significant aggravating factor is whether or not the court finds evidence of corporate involvement in or tolerance of the criminal activity. Such a finding by the sentencing court will substantially increase the culpability score. If an individual within “high-level personnel”³⁰¹ of either the corporation or a corporate unit³⁰² participated in, condoned, or was willfully ignorant of the offense, or if tolerance of the offense by “substantial authority personnel”³⁰³ was pervasive, points will be added to the culpability score.

Another significant aggravating factor is the extent to which the corporation has previously engaged in similar misconduct. Points are added to the culpability score if the corporation (or a separately managed line of business) committed any aspect of the crime less than ten years after an earlier criminal, civil or administrative adjudication of similar misconduct.³⁰⁴ The number of points to be added depends on how recently the similar misconduct occurred. The remaining factors that may increase the culpability score under the Corporate Sentencing Guidelines consist of violating existing judicial orders, violating conditions of probation or obstructing justice.³⁰⁵ Points will be added to the culpability score for each of these actions.

b. Mitigation of Sentences Under the Corporate Sentencing Guidelines

Under the Corporate Sentencing Guidelines, two significant mitigating factors will result in a lower culpability score and, consequently, a lower range of potential fines for a convicted corporation. The first such factor is the extent to which the corporation took the following actions: (1) reported the violation prior to an imminent threat of disclosure or investigation; (2) fully cooperated in the investigation; and (3) clearly

301. The term “high-level personnel” is defined by the Corporate Sentencing Guidelines as individuals who “have substantial control over the organization or who have a substantial role in the making of policy within the organization.” *Id.* § 8A1.2, cmt. n.3(b).

302. The Corporate Sentencing Guidelines define “unit of the organization” as “any reasonably distinct operational component of the organization.” *See id.* at § 8C2.5, cmt. n.2. This includes subsidiaries and divisions, and may include distinct smaller components as well. *Cf. id.* (indicating smaller units such as specialized manufacturing, marketing or accounting operations are encompassed within term “unit of the organization”).

303. “Substantial authority personnel” are defined by the Corporate Sentencing Guidelines as “individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of the organization.” *Id.* § 8A1.2, cmt. n.2(c).

304. *See id.* § 8C2.5(c) (discussing culpability score). The Guidelines provide that, for purposes of adding points to the culpability score, any prior history of a corporation will survive mergers and reorganizations (but not asset purchases). *See id.* § 8C2.5, cmt. n.6 (clarifying effect of organizations legal structure on culpability score).

305. *See id.* §§ 8C2.5(d)-(e) (detailing factors that increase culpability scores).

demonstrated recognition of the criminal conduct and affirmatively accepted responsibility.³⁰⁶ A corporation can benefit substantially from taking some or all of these actions. These provisions of the Guidelines obviously exert substantial pressure on a corporation to cooperate with a government investigation of possible criminal wrongdoing. In the years since the adoption of the Guidelines, federal prosecutors have become more and more demanding in their assessment of what constitutes “cooperation” by a corporate offender.³⁰⁷ The most noteworthy aspect of these heightened prosecutorial demands is the expectation that a corporation will waive its attorney-client privilege and work product doctrine protection, and reveal to the prosecution any information it has collected concerning criminal violations. The information may include attorney work product prepared by the corporation’s counsel in an internal investigation and even records of counsel’s interviews with potential witnesses.³⁰⁸

c. Effects of the Guidelines on Corporate Behavior and Accompanying Threats to Privilege Protections

Commentators have recognized the significant effects of the Guidelines on corporate behavior generally and on corporate internal investigations in particular.³⁰⁹ Professor Richard S. Gruner has described the

306. See *id.* § 8C2.5(g) (listing mitigating factors decreasing culpability scores).

307. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 718-19 (1997) (proposing set of mixed liability regimes in conjunction with policing measures to evaluate corporate cooperation); V. S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1264 (2000) (arguing that type of strict liability imposed on corporations through Organizational Sentencing Guidelines may in effect deter corporations from keeping effective policing measures and precautionary measures in place because of strict liability imposed once corporation admits to any wrongdoing); cf. David N. Zornow & Keith D. Krakaur, *supra* note 6, at 154 (observing that in applying Corporate Sentencing Guidelines, “federal prosecutors more and more frequently go so far as to state that unless a company provides its privileged information to the government, the company will be deemed not to have cooperated”).

308. This result arguably is inconsistent with the role of the attorney-client privilege and the work product doctrine in corporate internal investigations that was articulated by the Supreme Court in the *Upjohn* case. For a further discussion of *Upjohn*, see *supra* Part II.B.1.

309. See Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 463-71 (1994) (discussing effect of Guidelines on criminal law enforcement in corporations); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 651 (2002) (“Freedom from self-incrimination and rights of confidentiality are being increasingly sacrificed in the name of efficient law enforcement.”); see also Zornow & Krakaur, *supra* note 6, at 153-54 (describing effect of Corporate Sentencing Guidelines on corporate behavior in criminal investigations). A former United States Attorney for the Southern District of New York has observed that the Corporate Sentencing Guidelines create “an enforced partnership between prosecutors and corporations.” Otto G. Obermaier, *Drafting Companies to Fight Crime*, N.Y. TIMES, May 24, 1992, at C11. For additional discus-

corporate sentencing guidelines as imposing a “public trustee” role on corporations by making them responsible for promoting organizational compliance with the law and even aiding law enforcement investigations after a crime has been committed within an organization.³¹⁰ He applauds this result for being both consistent with agency principles and an efficient private policing mechanism.³¹¹ Professor Gruner acknowledges, however, that the sentencing guidelines provisions rewarding cooperation and self-reporting are inconsistent with privilege rules in that those rules provide “little or no protection” for firms that comply with the guidelines.³¹² In other words, complying with the guidelines may require waiving privileges, which has significant potential adverse consequences for both employees and the corporation in subsequent criminal and civil proceedings involving the same conduct.³¹³

Professor Ellen S. Podgor also has analyzed the effects of the sentencing guidelines on corporate internal investigations and cooperation with law enforcement authorities.³¹⁴ While Professor Podgor is more skeptical than Professor Gruner about the benefits of the guidelines’ corporate cooperation provisions, she too recognizes that the cooperation-inducing provisions of the organizational sentencing guidelines may be inconsistent with privilege protections.³¹⁵ Thus, whether or not one agrees that the cooperation and self-reporting provisions of the guidelines are good pub-

sion of the impact of the Corporate Sentencing Guidelines, see OTTO G. OBERMAIER AND ROBERT G. MORVILLO, *WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSE* § 15.08 (1998) (discussing current perspective that organization guidelines may have less desirable consequences).

310. See Gruner, *supra* note 309, at 463 (explaining that Guidelines impose criminal penalties on corporations to encourage attention to preventing and detecting abuses).

311. See *id.* at 464-67 (citing “sound underpinnings” in agency principles for such interpretations).

312. See *id.* at 465 n.343 (arguing that Guidelines send mixed messages). Professor Gruner does not assess the significance of this conflict with privilege rules or propose any changes in the corporate sentencing guidelines to address it. It is not surprising that he does not do so, however, because when viewed solely in the context of the efficacy of the corporate sentencing guidelines the privilege issue may well not be significant enough to warrant substantial attention, particularly when balanced against the perceived benefits of corporate self-policing. When viewed as one of a number of independent legal developments that threaten the continued vitality of the attorney-client privilege—the perspective taken by this Article—the privilege conflict created by the corporate sentencing guidelines assumes greater importance.

313. See *id.* (recognizing that compliance with guidelines results in “greater risk in later civil or criminal investigations”). For a further discussion of the law of waiver, see *supra* Part II.C.2.

314. See generally Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 *CARDOZO L. REV.* 795 (2002) (examining cooperation’s role in effectiveness of guidelines).

315. See *id.* at 802-08 (describing Professor Podgor’s skepticism regarding Guidelines and her recognition that “evidentiary issues also arise when either the individual or the organization takes the role of cooperator. To what extent will the work-product privilege and the attorney-client privilege survive?”).

lic policy, it is clear that the practical effect of those provisions is to exert considerable pressure on corporations to waive privilege protections.

A significant issue affecting the corporate attorney-client privilege, recognized by both Professor Gruner³¹⁶ and Professor Podgor,³¹⁷ arises out of the rewards the guidelines bestow upon corporations that self-report criminal offenses.³¹⁸ Such corporate self-reporting places the corporation and its counsel in an adversarial posture to the corporate employees who were involved in the wrongdoing. Professor Gruner characterizes this result as changing the relationship between a corporation and culpable employees to “one between adversaries, not confederates.”³¹⁹ Professor Podgor makes a similar observation about the cooperation provisions of the guidelines, noting that “[p]lacing the employer and employee in an adversarial position, in an attempt to secure the benefits of cooperation, interferes with the overriding fiduciary employment relationship.”³²⁰ This changed relationship may make it more difficult for corporations to obtain information and cooperation from employees,³²¹ and in this regard

316. See Gruner, *supra* note 309, at 434-36 (outlining negative impact of Guidelines on employment relationships).

317. See Podgor, *supra* note 314, at 803-04 (describing how cooperation by individuals and organizations can prove problematic).

318. See generally Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 675 (1995) (citing U.S. SENTENCING GUIDELINES MANUAL § 8A2.5(g) (1991)) (“Organizations that voluntarily report violations prior to government investigation or other disclosure and actively cooperate with government investigations will have a substantial number of points subtracted from their culpability score.”).

319. See Gruner, *supra* note 309, at 435. Professor Gruner also observes that this potential adversarial relationship makes it essential that counsel interviewing employees warn the employees that information that they provide may be passed on to government authorities. See *id.* This observation is consistent with the oft-repeated admonition that when corporate counsel interviews corporate employees, she must explain to the employees that she represents the corporation, not the employee personally, and that the attorney-client privilege applicable to those communications is between the corporation and counsel, not the individual employee and counsel. See MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (1983) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”); Gary G. Lynch, *Internal Investigations*, SD79 A.L.I.-A.B.A. 317, 334 (1999) (advising that counsel conducting internal investigation should be sure to inform employee that she is attorney for corporation, not individual employee, to ensure that employee will not later contend that counsel also represents him and that their communications are protected by employee’s personal attorney-client privilege).

320. See Podgor, *supra* note 314, at 803 (citations omitted). Professor Podgor also points out that the guidelines “may influence a corporation to cooperate with the government despite its negative effect on employees of the corporation.” *Id.* at 796.

321. See Gruner, *supra* note 309, at 435-36 (suggesting that one solution to conflict of interest between corporations and employees that is created by sentencing guidelines may be joint defense agreement between the corporation and its employees). Professor Gruner acknowledges, however, that “such an agreement may be problematic under the corporate sentencing guidelines” and will only be

the guidelines arguably conflict with the policy goals underlying the attorney-client privilege in the corporate context that were identified and approved by the Supreme Court in the *Upjohn* case.³²²

In *Upjohn* the Supreme Court confirmed that the attorney-client privilege and the work product doctrine protect communications between corporate counsel and the corporation's employees, so long as the purpose of the communications is to provide legal advice to the corporation and prepare for potential litigation.³²³ *Upjohn* has been widely hailed as an affirmation of the vitality of the attorney-client privilege and work product doctrine in the corporate context.³²⁴ By extending the availability of the attorney-client privilege beyond a corporation's "control group" and by extending work product protection to interviews of lower level employees by corporate counsel, *Upjohn* markedly increased the confidentiality protections available to corporations in criminal investigations and civil litigation.³²⁵

In rejecting the "control group test" for application of the attorney-client privilege to corporate communications, the *Upjohn* Court emphasized the importance of employees at all levels communicating with corpo-

advantageous if the company fights the charges. *Id.* at 436. As Professor Gruner implicitly recognizes, a joint defense agreement will not save a corporation from being forced to waive privileges if it wishes to obtain sentencing leniency under the guidelines (and will not save the corporation's employees from the consequences of a waiver by corporation). Professor Podgor has also recognized that joint defense agreements do not eliminate the underlying conflict of interest between the corporate entity and its employees that is created by the cooperation provisions of the guidelines. See Podgor, *supra* note 314, at 806 ("Although joint-defense agreements may offer some relief in some situations, cooperation by one of the parties to the joint-defense agreement can raise additional issues."); see also *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (reversing convictions when government selected co-defendant who had been part of joint defense agreement to testify at trial and new counsel was not appointed to represent defendants, thus creating conflict of interest).

322. For a further discussion of the policy goals underlying the Supreme Court's decision in *Upjohn* and other recent attorney-client privilege cases, see *supra* Part II.B.

323. See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (concluding attorney-client privilege and work product doctrine protect communications between counsel and employees of corporation).

324. For a further discussion of the significance of *Upjohn*, see *supra* part II.B.1.a.

325. See Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 754 (1997) ("The Court's opinion clearly supports the idea that corporations need privacy to the extent afforded by the attorney-client privilege to comply with laws, and that internal investigations should be protected as a corporate effort to monitor compliance."); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 51 (citing *Upjohn*, 449 U.S. at 392) (concluding that Court "emphasized that the [control group test] frustrated the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation").

rate counsel and obtaining advice on compliance with the law.³²⁶ The Court also rejected the argument that “the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege.”³²⁷ The Court was concerned that without the confidentiality protections of the attorney-client privilege and the work product doctrine, the depth and quality of investigations to ensure compliance would suffer and employees might be deterred from seeking advice on how to comply with the law.³²⁸

Ironically, the outcome that the Supreme Court sought to avoid in *Upjohn* in 1981 appears to have been promoted, albeit indirectly, by the Sentencing Commission in 1991 through the cooperation and self-reporting provisions of the corporate sentencing guidelines. The protections that the Court gave corporations and other business entities in *Upjohn* are undercut by the corporate sentencing guidelines if a corporation must waive those protections in order to obtain a reduced fine or other lenient treatment for self-reporting and cooperating with government investigators. This inconsistency with *Upjohn*, coupled with the broader and more important issue of the potential incremental erosion of the attorney-client privilege and work product doctrine that is the subject of this Article, invites reconsideration of the self-reporting and cooperation provisions of the guidelines.³²⁹ Even if one concludes that they should be retained, however, those provisions of the guidelines have weakened the application of the attorney-client privilege and the work product doctrine in the corporate context.

2. *The Department of Justice Policy on Prosecution of Corporations*

The pressure that the Sentencing Guidelines put on corporations to waive privileges and cooperate with law enforcement was increased in 1999, when then-Deputy Attorney General Eric H. Holder, Jr. distributed a memorandum within the Department of Justice on “Federal Prosecution of Corporations” (Holder Memorandum).³³⁰ The Holder Memorandum “provides guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case.”³³¹ Part II of the memorandum identifies eight specific factors that prosecutors should consider in making a charging decision in a corporate

326. See *Upjohn*, 449 U.S. at 392 (“The control group test . . . frustrates the very purpose of the privilege by discouraging the communication of relevant information . . .”).

327. *Id.* at 393 n.2.

328. See *id.* (rejecting government’s argument).

329. Cf. generally, Podgor, *supra* note 314 (scrutinizing corporation in contextual setting).

330. Memorandum from the Deputy Attorney General of the United States of America, to All Component Heads and United States Attorneys, Part IV (Jun. 16, 1999), at www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html [hereinafter Holder Memorandum].

331. *Id.* at Introduction.

criminal case.³³² The fourth factor is: "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, *including, if necessary, the waiver of the corporate attorney-client and work product privileges.*"³³³ Part VI of the Holder Memorandum, entitled "Charging the Corporation: Cooperation and Voluntary Disclosure," reiterates that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness . . . to waive the attorney-client and work product privileges."³³⁴

These statements in the Holder Memorandum go quite far toward effectively forcing a corporation to waive privilege protections if it hopes to obtain favorable charging treatment at the hands of DOJ prosecutors. In complex corporate criminal cases federal prosecutors have enormous prosecutorial discretion to decide the nature and the number of charges, if any, that they will bring against the responsible corporate entity and culpable individuals.³³⁵ Moreover, the manner in which that prosecutorial discretion is exercised is not subject to legal challenges or judicial review.³³⁶ This combination of broad discretion and limited accountability presents the potential for misguided policy decisions and, in the worst cases, even abuses of governmental power. Of particular concern is the potential for prosecutors to intrude unnecessarily into the attorney-client relationship³³⁷ and frustrate the important policy objectives

332. *See id.* at Part II (listing factors). The cover memorandum points out that the factors identified in the policy statement "are, however, not outcome-determinative and are only guidelines." *Id.* at *1. The comments at Part II.B also stress that "[s]ome or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others." *Id.* at Part II.B. Notwithstanding these caveats, the factors represent an official policy statement by the Department of Justice, and as such they are intended to influence federal prosecutors in corporate criminal cases throughout the country. *See* Jim Oliphant, *The Holder Memorandum*, LEGAL TIMES, Feb. 4, 2002, at 11 ("The memo, in which Holder established guidelines for bringing criminal charges against a corporation, remains in effect as official department policy.").

333. Holder Memorandum, *supra* note 330, at Part II.A.4 (emphasis added).

334. *Id.* at Part VI.A.

335. *See* Podgor, *supra* note 314, at 799 ("Prosecutors have enormous discretion in the charging process. They have the ability to choose who will receive immunity and who will not be charged with criminal conduct."); Zornow & Krakaur, *supra* note 6, at 154-55 (discussing influence of Holder Memorandum on federal prosecutors' determination of whether or not to bring charges). *See generally* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995) (analyzing whether body of federal criminal law and role national police power can be reconciled with federalism principles).

336. *See* Holder Memorandum, *supra* note 330, at *1 (acknowledging explicitly and seeking to protect exercise of prosecutorial discretion by stating that "[f]ederal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision").

337. Commentators have recognized that expansion of federal criminal jurisdiction in recent decades has increased the power of federal prosecutors and put new pressures on privilege protections. *See generally* Fried, *supra* note 22 (analyzing expansion of crime-fraud exception through increase in number of available pred-

that underlie the attorney-client privilege and the work product doctrine.³³⁸ Unfortunately, the approach to evaluating cooperation and voluntary disclosure that is set forth in the Holder Memorandum does not reflect appropriate sensitivity to privilege issues.³³⁹

The Holder Memorandum's commentary on the "Cooperation and Voluntary Disclosure" factor suggests that a principal objective underlying the policy statement may be overcoming the difficulties involved in successfully prosecuting corporate crime.³⁴⁰ The commentary points out that in developing a criminal case against a corporation "a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself."³⁴¹ After discussing the difficulties of assessing responsibility for misconduct within a large corporate entity, the commentary concludes with the observation that "a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence."³⁴²

The type of cooperation and voluntary disclosure that is most specifically sought by the Holder Memorandum is waiver of attorney-client privilege and work product doctrine protection. The commentary makes clear that the kind of waiver the DOJ wishes to obtain is full disclosure of all legal advice provided to the corporation and its officers and employees in connection with the conduct under investigation, as well as all work product developed by counsel in the company's internal investigation.³⁴³ In other words, the commentary indicates that DOJ prosecutors will not be satisfied with disclosure of the relevant underlying factual information—they want to obtain communications between attorneys and clients and

icate crimes, particularly in federal arena). Professor Fried warned in 1986 of the potential for increasing intrusion into attorney-client relationships by federal prosecutors. *See id.* at 499 ("The modern tendency of federal criminal law is to federalize state crimes and to criminalize common-law torts. This trend has placed a new power in the hands of federal prosecutors, which they have not been reluctant to exploit. One mode of exploitation has been unprecedented intrusions into attorney-client relationships."). The Holder Memorandum is yet another development in this disturbing trend. *See* Podgor, *supra* note 314, at 801-02 (discussing Holder Memorandum); *see also* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1382-83 (1999) (questioning efficacy of "carrot and stick" methodology to enhance corporate compliance with law and arguing that real effect of approach is to shift risk of noncompliance away from corporation).

338. For a further discussion of the policy objectives of privilege legislation, *see supra* Parts II.A and II.B.

339. For a discussion of the Securities and Exchange Commission's adoption of a new "cooperation policy" that reflects somewhat more sensitivity to privilege issues, *see infra* Part III.E.

340. Other commentators have criticized this aspect of the Holder Memorandum's approach to cooperation and voluntary disclosure. *See* Zornow & Krakaur, *supra* note 6, at 155 ("This memorandum reflects the view that the ends justify the means in corporate [criminal] investigations.").

341. Holder Memorandum, *supra* note 330, at Part VI.B.

342. *Id.*

343. *See id.* (calling for assessment of adequacy of corporation's cooperation).

opinion work product developed by counsel.³⁴⁴ This, however, is more than prosecutors need to do their job. In the typical investigation prosecutors need facts, not privileged communications providing legal advice or opinion work product reflecting counsel's legal analysis,³⁴⁵ and in those few cases where the advice or work product of attorneys is relevant to a determination of criminal responsibility the government can use the crime-fraud exception to obtain access to privileged communications.³⁴⁶

The Holder Memorandum's treatment of this important issue is inadequate. A footnote to the commentary states that the waiver sought by the government "should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue."³⁴⁷ The first part of this statement reflects some appreciation of the more subtle aspects of the privilege issues involved, in that it suggests the focus of the cooperation policy should be obtaining facts that were collected during the corporation's internal investigation. The second part of the statement, however, inappropriately suggests that the government generally has a legitimate need to compel a waiver for privileged communications of legal advice relating to the conduct at issue. Contrary to the position taken by the Holder Memorandum, however, prosecutors need access to attorney-client communications and opinion work product only if the corporation is relying on the advice of counsel as a defense or if the government believes the crime-fraud exception is applicable.³⁴⁸ In both of those situations, the government is entitled to obtain the privileged communications under recognized exceptions to the privilege. Thus, compelling a waiver by the corporation is unnecessary. More-

344. The commentary does state that the Justice Department "does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation." *Id.* It is difficult to view this caveat as a significant limitation on the otherwise strong pressure that the Holder Memorandum puts on corporations to waive privileges, especially if one reads the caveat as applying only when waiver is not "necessary" to provide information that prosecutors wish to obtain.

345. The critical distinction here is the one that was emphasized by the Supreme Court in *Upjohn*, between privileged communications, on the one hand, and underlying factual information, on the other. See *United States v. Upjohn Co.*, 449 U.S. 383, 395-96 (1981) (noting that privilege extends only to communications and not to underlying factors). The latter is not protected by the attorney-client privilege, as the Court made clear in *Upjohn*, and can be communicated to a government law enforcement agency (or any other party) without waiving the privilege. As discussed below, obtaining the underlying factual information, rather than requiring waiver of privilege, should be the objective of government cooperation and voluntary disclosure programs.

346. For a further discussion of the crime-fraud exception, see *supra* Part II.C.1.

347. Holder Memorandum, *supra* note 330, at n.2.

348. For a further discussion of the circumstances where prosecutors need access to attorney-client and work product information, see *supra* Part II.C.1. and Part II.C.3., respectively.

over, in both of those instances the applicability of an exception to the privilege would be decided by a neutral judge, not by a prosecutor whose objective is a successful criminal prosecution. Unfortunately, it appears that the involvement of a neutral judge may be what the DOJ is seeking to avoid by compelling waivers of the privilege in all corporate criminal investigations, rather than relying upon the crime-fraud exception or other established judicial doctrines as appropriate on a case-by-case basis.³⁴⁹

That, however, is not the full extent of the shortcomings in the Holder Memorandum's treatment of the privilege waiver issue. The same footnote in the Memorandum goes on to state that "[e]xcept in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."³⁵⁰ This statement suggests the possibility of a serious abuse of the government's power in seeking to compel corporations to waive privilege protections. To suggest that a corporate client should be required to waive privileges with respect to legal advice provided in connection with an ongoing criminal investigation and potential prosecution, as opposed to legal advice provided in connection with the past conduct that is the subject of the pending criminal investigation, is effectively to deny that client effective assistance of counsel in the pending proceeding. Because of the breadth of the waiver doctrine,³⁵¹ a corporate client that waives privileges for advice and opinion work product provided in an ongoing investigation is likely to lose the benefits of a confidential attorney-client relationship for all litigation and proceedings arising out of or related to that investigation.³⁵² The Holder Memorandum does not

349. Cf. Zornow & Krakaur, *supra* note 6, at 155 ("The government, of course, is the sole decision maker as to what is 'necessary' to its investigation, and it is the rare prosecutor who would find that any available evidence-gathering tool is not 'necessary' to further his criminal investigation"); Cover, *supra* note 6, at 1236 (discussing application of crime-fraud exception to Department of Justice rule on monitoring of prison inmates' communications with their attorneys and criticizing lack of judicial involvement in determination of whether to monitor because "[w]here the government intrudes on the privilege without judicial approval, it clearly violates privilege's utilitarian and humanistic goals"). As discussed *infra* Part IV.B.2, the Justice Department's practice of avoiding judicial review when seeking to obtain access to privileged information is unwise and should be reconsidered.

350. Holder Memorandum, *supra* note 330, at n.2.

351. For a discussion of the breadth of the waiver doctrine, see *supra* Part II.C.2.

352. See Zornow & Krakaur, *supra* note 6, at 156 ("Thus unfettered [by the Holder Memorandum], federal prosecutors are authorized by Justice Department policy to rend the fabric of confidential communications ranging from those that occurred around the time of the conduct at issue to those that occurred during and in connection with the criminal investigation itself. And once these privileges have been waived, they will likely become fair game for plaintiffs in civil suits.") (internal cross-reference omitted). The exception would be a situation in which a court was willing to recognize a "limited waiver" for purposes of the governmental investigation only. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (concluding that employee interviews were confidential and enti-

describe what “unusual circumstances” might justify requiring a waiver that would in effect result in an across-the-board denial of counsel, and it is difficult to envision a circumstance in which it would be appropriate to do so. In fact, the kind of circumstances that might justify interfering with the attorney-client relationship, such as misuse of counsel’s advice to obstruct an investigation or destroy evidence, would almost certainly be subject to the crime-fraud exception to the privilege. In those cases, as discussed above, the government can overcome the privilege under existing law without compelling a waiver.

As the discussion above suggests, the Holder Memorandum suffers from two fundamental flaws. First, it inappropriately focuses on obtaining privilege waivers in all cases, rather than on obtaining relevant underlying factual information, which is what government investigators should be seeking in the typical case and which usually can be obtained without requiring a waiver of privilege.³⁵³ Second, it threatens to intrude inappropriately into ongoing attorney-client relationships by suggesting that in some cases prosecutors should seek a waiver with respect to attorney-client communications and opinion work product relating to current representation in the pending criminal investigation. Both of these flaws unnecessarily jeopardize the continued viability of the attorney-client privilege in corporate criminal cases, and both are inconsistent with the Supreme Court’s recent treatment of the privilege in the corporate context, discussed in Part II.B above.

Not surprisingly, the Holder Memorandum has been criticized for the threat it presents to privilege protection in the corporate context. Commentators have questioned whether the Holder Memorandum ultimately will be self-defeating because corporate counsel will be unable to conduct effective internal investigations if employees come to understand that all information they provide will be turned over to prosecutors.³⁵⁴ Others have criticized the Holder Memorandum for threatening the quality of

tled to attorney-client privilege); *see also* Burke, *supra* note 55, at 71-72 (observing that in applying limited waiver doctrine in government investigations, courts are likely to adopt case-by-case analysis in which application of “the doctrine of limited waiver probably will depend on the scope and nature of the privileged disclosure in each specific case”); Gerson & Gladieux, *supra* note 6, at 193 (noting that court is more likely to recognize limited waiver when disclosure is made to government entity rather than to private party). For a recent decision by an influential court holding that that disclosures to law enforcement agencies pursuant to a confidentiality agreement do not constitute a waiver, *see generally Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002) (unpublished opinion).

353. For a further discussion of this important issue, and for an example of a government cooperation policy that more adequately addresses it, *see infra* Part III.E. (discussing Securities and Exchange Commission’s new cooperation policy).

354. *See* National Institute on White Collar Crime, *DOJ Guideline on Corporations’ Waiver of Privilege Criticized*, 16 CORP. COUNS. WKLY. (BNA) 112, 112 (April 4, 2001) [hereinafter *DOJ Guideline*] (reporting concerns about Holder Memorandum raised by participants in American Bar Association’s 15th Annual National Institute on White Collar Crime).

legal representation available to corporations and “driving a wedge between senior management and employees.”³⁵⁵ This Article shares those concerns,³⁵⁶ but also seeks to emphasize that the Holder Memorandum is only one of a number of recently adopted government law enforcement policies and practices that threaten the privilege and should be considered together and *in toto*. The greater concern addressed by this Article is that the federal government’s various efforts to undermine privilege protections represents a situation in which the whole is greater than the sum of the parts. The cumulative effect of these policies and practices ultimately may undermine the continued vitality of the privilege, even if each policy or practice might reasonably be defended when analyzed separately. To appreciate the significance of this issue, it is necessary to consider other recent government policies and practices that have unnecessarily impinged upon the attorney-client relationship, beyond the corporate criminal context. The Parts that follow describe those policies and practices.

D. *Other Department of Justice Policies and Practices that Undermine the Attorney-Client Privilege*

1. *The New Prison Inmate Attorney-Client Eavesdropping Policy*

On October 31, 2001, in the immediate aftermath of the September 11 terrorist attacks, the Justice Department’s Bureau of Prisons amended the federal regulations governing “special administrative measures” that can be imposed on federal prison inmates.³⁵⁷ Among other things,³⁵⁸ the amendments gave the Attorney General the power, in cases where “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism,” to order monitoring of communications between that inmate and his attorneys or attorneys’ agents.³⁵⁹ The regulations apply to all per-

355. Zornow & Krakaur, *supra* note 6, at 161.

356. One former Department of Justice official has defended the Holder Memorandum and challenged critics to articulate a different policy. *See DOJ Guideline*, *supra* note 354, at 112 (“James K. Robinson, former assistant attorney general for the DOJ’s Criminal Division . . . challenged critics of the waiver guideline to articulate a different policy.”). This Article seeks to do so *infra* Part IV, which describes a more appropriate approach to cooperation and voluntary disclosure, based in part on the Securities and Exchange Commission’s new cooperation policy, described *infra* Part III.E.

357. *See* Prevention, *supra* note 141 (authorizing Bureau of Prisons to impose special administrative measures for specified inmates in order to prevent acts of violence or terrorism).

358. *See id.* (providing another important change—giving Attorney General power to impose special administrative measures, including monitoring of attorney-client communications, for up to one year, when previous regulations had limited time period to 120 days).

359. 28 C.F.R. § 501.3(d) (2001). This Article examines the new monitoring regulations as one of a number of recent federal law enforcement policies and practices that threaten to undermine the attorney-client privilege, but it does not

sons in custody under the authority of the Attorney General, which includes both persons held by Department of Justice agencies other than the Bureau of Prisons, such as the Immigration and Naturalization Service, and "persons held as witnesses, detainees, or otherwise."³⁶⁰

The regulations do provide important limitations on their use and availability. Most important, the regulations require that the Director of the Bureau of Prisons must "provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring."³⁶¹ They also contain a set of safeguards that are intended to ensure that no inappropriate use is made of information obtained through the monitoring. The regulations require that the monitoring will be conducted by a "privilege team" that consists of persons who are not involved in the underlying investigation or prosecution of the monitored inmate.³⁶² The regulations further require approval of a federal judge prior to disclosure of information obtained through the attorney-client monitoring "[e]xcept in cases where the person in charge of the privilege team determines that acts of

provide a detailed analysis or critique of the new regulations. For a detailed analysis and critique, see generally Cover, *supra* note 6. For a judicial decision analyzing special administrative measures (SAMs) not involving monitoring of communications with counsel and ordering that SAMs requiring "affirmations" from counsel not be imposed, see *United States v. Reid*, 214 F. Supp. 2d 84, 194-95 (D. Mass. 2002) (addressing SAMs imposed upon alleged "shoe bomber" Richard Reid and taking judicial notice of indictment of attorney Lynne Stewart for alleged false statements in signing SAM affirmation and "chilling effect" of that indictment on defense counsel); see also generally *United States v. Sattar*, 2002 U.S. Dist. LEXIS 14798 (S.D.N.Y. Aug. 6, 2002) (describing Stewart indictment).

360. 28 C.F.R. § 500.1(c) (2001). The latter provision, making the regulations applicable to witnesses and detainees, is significant because the DOJ has been criticized for holding a large number of persons in custody as material witnesses or detainees and for not releasing to the public any information about those persons. See Dan Eggen, *About 600 Still Detained in Connection with Attacks, Ashcroft Says*, WASH. POST, Nov. 28, 2001, at A15 (reporting that DOJ detained 548 unidentified people on immigration charges and undisclosed number of people as material witnesses in connection with September 11 attacks); Jodi Wilgoren, *Michigan "Invites" Men from Mideast to be Interviewed*, N.Y. TIMES, Nov. 27, 2001, at A1 (reporting on DOJ initiative in Michigan to interview hundreds of young Middle Eastern men following September 11 attacks).

361. 28 C.F.R. § 501.3(d)(2). This requirement is not absolute, however. The regulation provides an exception for cases in which there is "prior court authorization," in which no prior written notice is required. *Id.* For a judicial decision discussing the prior notice requirement, see *Sattar*, 2002 U.S. Dist. LEXIS 14798, at *9-12 (discussing assurance given by government that monitoring was not taking place in case in which no prior notice had been provided).

362. See 28 C.F.R. § 501.3(d)(3) (discussing role of "privilege teams" for monitoring attorney-client privilege). For a critique of the effectiveness of this and the other supposed safeguards in the regulations, see Cover, *supra* note 6, at 1255 (observing that "[g]iven the Justice Department's recent plans to focus FBI efforts on thwarting acts of terrorism, rather than on prosecuting cases, it is unclear whether a valid separation can exist now between prosecution, investigation, monitoring, and other ostensibly preventative law enforcement efforts").

violence or terrorism are imminent.”³⁶³ The regulations also provide that “any properly privileged materials (including, but not limited to, recordings of privileged communications) are not retained during the course of the monitoring.”³⁶⁴ The Department of Justice views these restrictions as adequate to protect the interests served by the attorney-client privilege.³⁶⁵

Despite the restrictions on availability, use, and retention, the monitoring provisions of the new regulations immediately provoked widespread criticism. Commentators noted that the Justice Department had put the new regulations into place on an emergency basis, without the usual waiting period for public comment.³⁶⁶ One law professor, who had previously represented a client in an espionage case in which the government sought to monitor his discussions with his client, professed to be “astonished” by the new regulations and predicted that “[t]he chilling effect of this will be positively glacial.”³⁶⁷ Another law professor observed that “monitoring, even with these qualifications, seriously undermines people’s constitutionally guaranteed right to counsel of their choice when they are accused of a

363. 28 C.F.R. § 501.3(d)(3). The prior judicial approval requirement may not be as effective as it first appears, however, because military tribunal judges may be able to provide the approval. See Paul R. Rice & Benjamin Parlin Saul, *Is the War on Terrorism a War on Attorney-Client Privilege?*, 17 CRIM. JUST. 22, 24 (2002) (“In the military tribunal context, therefore, the executive branch will be sanctioning the conduct of its own members. As a result, the apparent judicial check on the executive branch is gossamer.”).

364. 28 C.F.R. § 501.3(d)(3).

365. The Justice Department’s position was described by a Department official as follows:

The Department of Justice recognizes concerns that monitoring may chill attorney-client communications and undermine the lawyer’s representation of his or her client. However, in the rare cases in which monitoring occurs, it should not chill legitimate communications about the client’s case. Given the protections that are in place, detainees should understand that they are free to discuss legitimately privileged matters with their counsel without fear of disclosure. The only communications the regulation should inhibit are those that may further or facilitate acts of terrorism because the monitoring team is walled off from any prosecutors or investigators working on the case; is prohibited from retaining any legitimately privileged communications; and, absent imminent danger, must go to court before making any use of information obtained through monitoring.

John P. Elwood, *Prosecuting the War on Terrorism: The Government’s Position on Attorney-Client Monitoring, Detainees, and Military Tribunals*, 17 CRIM. JUST. 30, 33 (2002).

366. See George Lardner, Jr., *U.S. Will Monitor Calls to Lawyers; Rules on Detainees Called ‘Terrifying’*, WASH. POST, Nov. 9, 2001, at A1 (quoting Justice Department spokesperson) (explaining that emergency basis implementation of regulations prior to comment “was necessary ‘in view of the immediacy of the damages to the public’”); Frank Rich, Editorial, *Wait Until Dark*, N.Y. TIMES, Nov. 24, 2001, at A27 (criticizing Attorney General John Ashcroft for having “discreetly slipped his new directive allowing eavesdropping on conversations between some lawyers and clients into the Federal Register”).

367. Jim Oliphant & Deirdre Davidson, *DOJ Eavesdropping: History Lessons*, LEGAL TIMES, Nov. 12, 2001, at 3 (quoting George Washington University law professor Jonathan Turley) (quotations omitted).

crime: only the most trusting prisoner will be willing to discuss defense strategy candidly with his lawyer if he knows that agents from the organization that is trying to convict him are listening."³⁶⁸ Leading academic experts on the attorney-client privilege characterized concerns about the regulations' effect on the attorney-client relationship as "enormous because monitoring of attorney-client communications pursuant to the order will have significant implications for subsequent trials, whether in civilian or military courts."³⁶⁹

The hue and cry of criticism of the monitoring regulations has extended well beyond the halls of academia. The President of the American Bar Association condemned the new regulations as violating the Constitution's rights "to counsel and to be free from unreasonable searches."³⁷⁰ The President of the National Association of Criminal Defense Lawyers denounced them as "an abomination."³⁷¹ An American Civil Liberties Union official said the new regulations are a "terrifying precedent."³⁷² The Center for National Security Studies has stated that the monitoring scheme interferes with and undermines the lawyer-client relationship and "will cause the ethical lawyer to advise her client against the kind of disclosure that is necessary for adequate representation."³⁷³

The Department of Justice's defense of the monitoring regulations is essentially that the end (protecting against further terrorist attacks) justifies the means (an undeniable intrusion into the attorney-client relationship and interference with the constitutional right to counsel in criminal cases).³⁷⁴ Attorney General Ashcroft defended the regulations in congressional testimony by emphasizing the importance of the objectives of the monitoring policy: "None of the information that is protected by attorney-client privilege may be used for prosecution. Information will only be used to stop impending terrorist attacks and to save American lives."³⁷⁵

368. Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. OF BOOKS, Feb. 28, 2002, at 44.

369. Rice & Saul, *supra* note 363, at 23.

370. Neil A. Lewis & Christopher Marquis, *Longer Visa Waits for Arabs; Stir Over U.S. Eavesdropping*, N.Y. TIMES, Nov. 10, 2001, at A1 (quoting American Bar Association President Robert E. Hirshon).

371. Lardner, Jr., *supra* note 366 (quoting National Association of Defense Lawyers President Irwin Schwartz) (quotations omitted).

372. *Id.* (quoting Laura W. Murphy of the American Civil Liberties Union) (quotations omitted).

373. *Comments of the Center for National Security Studies on the Attorney General's Order Regarding the Monitoring of Lawyer-Client Communications* (Dec. 31, 2001) (copy on file with author).

374. For a contrary conclusion, see Rice & Saul, *supra* note 363, at 29 (observing that: "Although punishment is a prominent and immediate objective, a longer-term goal of our justice system is both to appear and to be fair to those accused of crimes. Maintaining certain baselines of fairness instills confidence in our justice system both at home and abroad. In other words, the ends cannot justify the means").

375. *Anti-terrorism Policy Review: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (Dec. 6, 2001) (statement of Att'y Gen. John Ashcroft), *available at*

Another senior Justice Department official has sought to deflect criticism of the monitoring regulations and other Justice Department actions in response to the September 11 attacks by arguing that “[t]he dichotomy between freedom and security is not new, but it is false.”³⁷⁶ This clever argument seeks to justify intrusions into personal freedoms and infringements of constitutional rights, such as the monitoring regulations, as necessary to achieve the greater “freedom” of security of our persons and absence of fear.³⁷⁷

Despite these defenses, and even taking into account the horrific nature of the September 11 terrorist attacks and the need to take all appropriate steps to prevent future attacks, several things about the monitoring regulations are troubling from a legal perspective.³⁷⁸ First, the very terms of the regulations, such as “reasonable suspicion,”³⁷⁹ “future acts that could result in death or serious bodily injury to persons”³⁸⁰ and “properly privileged materials”³⁸¹ are inherently elastic and give enormous discretion to the Attorney General and his subordinates to decide whether a particular case is subject to the regulations. Concern about the extent of the discretion the regulations give to Justice Department officials is heightened by the fact that the regulations do not require or provide for judicial involvement in the decision to monitor attorney-client privileged communications. This effort to avoid judicial oversight is particularly troubling in light of the Supreme Court’s recent resistance to governmental efforts to impinge upon the privilege³⁸² and, in particular, the Court’s treatment of the crime-fraud exception in *United States v. Zolin*.³⁸³

2001 WL 26188084 (cited in Rice & Saul, *supra* note 363, at 23); see also Elwood, *supra* note 365, at 32 (explaining that “[t]he principal purpose of the amendment [to the Bureau of Prisons regulations] is not to develop leads on attacks that have already occurred, but to prevent attacks from happening in the first place”).

376. Viet D. Dinh, *Freedom and Security after September 11*, 25 HARV. J. L. & PUB. POL’Y 399, 400 (2002). Mr. Dinh is Assistant Attorney General, Office of Legal Policy, United States Department of Justice. See *id.* at 399 n.*. Mr. Dinh has not demonstrated particular sensitivity to the civil liberties implications of DOJ’s actions in the wake of the September 11 tragedies, however. When asked in a CNN interview about detainees being held in custody after September 11, he said: “What we are doing is simply using our process or our discretion to the fullest extent to remove from the streets those we suspect to be engaging in terrorist activity.” *CNN Presents: The Enemy Within* (CNN television broadcast, Jan. 12, 2002), quoted in Dworkin, *supra* note 368, at n.2.

377. See Dinh, *supra* note 376, at 400 (using mandate to protect Americans as justification for DOJ actions).

378. For additional criticisms of the monitoring regulations, including an explanation of why the safeguards they contain are unlikely to be adequate, see Rice & Saul, *supra* note 363.

379. 28 C.F.R. § 501.3(d) (2001) (emphasis added).

380. *Id.* (emphasis added).

381. 28 C.F.R. § 501.3(d)(3) (emphasis added).

382. For a further discussion on recent Supreme Court decisions on attorney-client privilege, see *supra* Part II.B.

383. 491 U.S. 554 (1989). For a further discussion of the *Zolin* case, see *supra* Parts II.B.1.c. and II.C.1. It is perhaps noteworthy that the Department of Justice

As discussed in Part II.B.1.c above, the Supreme Court in *Zolin* was unwilling to accept an approach to the crime-fraud problem that would “permit opponents of the privilege to engage in groundless fishing expeditions”³⁸⁴ The Court required judicial involvement in the determination of the applicability of the exception and concluded that to obtain *in camera* review of privileged communications the party opposing the privilege “must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability.”³⁸⁵ As another commentator has noted,³⁸⁶ by seeking to avoid

did not cite to the *Zolin* case in the analysis supporting the announcement of the new regulations, even though it did cite a 1933 Supreme Court case on the crime-fraud exception (the only other Supreme Court case directly addressing the crime-fraud exception) and three circuit court cases (two of which were decided prior to *Zolin*). See Prevention, *supra* note 141 at 55,064 (citing *In re Grand Jury Proceedings (The Corporation)*, 87 F.3d 377, 382 (9th Cir. 1996); *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986); *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975); *Clark v. United States*, 289 U.S. 1, 15 (1933)). Presumably the Department of Justice attorneys who prepared the legal analysis supporting the regulations would have been aware of the most recent of only two Supreme Court cases directly addressing the crime-fraud exception and would have cited it if it had supported the Department’s position. If they concluded that it did not support the Department’s position and omitted mention of it for that reason, then their failure to disclose and, if appropriate, distinguish such an important contrary authority is troubling, even in a non-judicial tribunal context. Cf. RESTATEMENT, *supra* note 22, § 111(2) (“In representing a client in a matter before a tribunal, a lawyer may not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.”). The analysis supporting the monitoring regulations would inspire far greater confidence if it included a straightforward analysis of how the regulations measure up to the most recent Supreme Court guidance on the precise legal theory that is advanced. Unfortunately, the analysis does not do so.

384. *Zolin*, 491 U.S. at 571. Of course, the comments of the *Zolin* Court in the context of routine litigation and criminal investigations arguably are inapposite to the law enforcement challenges facing the federal government after the September 11 terrorist attacks, but some consideration of the most recent relevant Supreme Court authority nonetheless seems appropriate. Cf. Cover, *supra* note 6, at 1240-41 (“It is true that the BOP rule contemplates a context different from the traditional evidentiary concerns that *Zolin* addresses. Yet notwithstanding national security interests, the BOP rule will adversely affect the attorney-client relationship and will have ramifications within the traditional evidentiary context. Security concerns cannot justify a complete abandonment of any judicial role.”); cf. also *supra* note 383 and accompanying text (discussing failure of Department of Justice to include analysis of *Zolin* case in legal analysis supporting new monitoring regulations).

385. *Zolin*, 491 U.S. at 574-75.

386. See Cover, *supra* note 6, at 1239-41 (discussing application of crime-fraud exception to DOJ monitoring rule and concluding that “[g]iven the *Zolin* Court’s resistance to blanket *in camera* review for determining the crime-fraud exception’s applicability, it stretches credulity to think that the Attorney General’s unilateral review is acceptable”); cf. Rice & Saul, *supra* note 363, at 26-27 (describing potential application of crime-fraud exception to communications between suspected terrorists and their counsel and concluding that Justice Department has offered only “an unsubstantiated theory,” with no evidentiary support, that crime-fraud

judicial involvement and engage in fishing expeditions based upon “reasonable suspicion,” the monitoring regulations arguably run afoul of the Supreme Court’s teachings in *Zolin*.

In conclusion, the widespread criticism that the new monitoring regulations have provoked, even in the post-September 11 environment of support for government efforts to protect against future terrorist attacks, suggest that they are a misguided, even if well-intentioned, exercise of governmental power. Disregarding the important policy interests served by the attorney-client privilege and seeking to avoid judicial review or oversight of government intrusion into the attorney-client relationship is not the course of action that the Justice Department should follow, and alternative approaches should be explored.³⁸⁷ Unfortunately, the approach that the Department has taken with the new regulations is consistent with the lack of regard it has shown for the attorney-client privilege in other contexts, two of which are discussed below.

2. *Attorney Subpoenas in Criminal Cases*

The Justice Department’s willingness to invade the attorney-client privilege in order to enhance, perhaps marginally, its ability to prevent terrorism is consistent with recent Department practice in another area of federal law enforcement: grand jury subpoenas to attorneys in white collar criminal investigations. The Department’s practice of subpoenaing attorneys in criminal investigations of matters in which the attorneys are providing legal advice has been a source of alarm and dismay to the defense bar and academic commentators for almost twenty years.³⁸⁸ Ten years ago

exception may be applicable to those communications). *But see* Elwood, *supra* note 365, at 31 (quoting al-Qaeda training manual that appears to provide instruction on using hidden messages to “communicate with brothers outside of prison”).

387. *See* Cover, *supra* note 6, at 1241-45 (discussing “Other Options” for preventing acts of terrorism, which would provide for judicial review of law enforcement intrusions into attorney-client relationship).

388. For a thorough analysis of the attorney subpoena problem, see Stern & Hoffman, *supra* note 188, at 1796-1804. The authors of that article described the genesis of the attorney subpoena problem as follows:

In the criminal context, prior to 1980, federal prosecutors generally believed that lawyers were not potential sources of information in criminal investigations. Subpoenas to lawyers were rare and the government was generally not successful in enforcing them. However, Justice Department officials in the Reagan administration reexamined traditional assumptions about attorney subpoenas as they formulated aggressive approaches to criminal investigation. They concluded that prosecutors had wrongly assumed this investigative technique to be unavailable. The Department then took the position that the attorney subpoena was a “new investigative tool” that could be used if nonprivileged information in the hands of the attorney could be identified. This change in prosecutorial doctrine coincided with developments in substantive criminal liability that made it more feasible to characterize the provision of legal services as relevant to proof of a criminal enterprise.

Id. at 1787 (citations omitted).

a leading commentator on the subject succinctly described the problem: "Grand jury subpoenas of lawyers raise a legitimate concern: lawyer testimony about client affairs may undermine clients' trust."³⁸⁹ Other commentators have focused more directly on the potential harm to the attorney-client privilege.³⁹⁰ Despite widespread criticism and concern about the practice, the Justice Department's approach in this area has been similar to that described above in connection with the prison inmate attorney-client eavesdropping regulations: argue that the law enforcement end justifies the investigative means and adopt regulations that purport to contain the damage to the attorney-client relationship within acceptable (to the Department) bounds. That approach, and why it is misguided, is discussed briefly below.³⁹¹

Department of Justice regulations provide that "[p]rior approval of the Assistant Attorney General of the Criminal Division is required before a grand jury subpoena may be issued to an attorney for information relating to the representation of a client or the fees paid by such client."³⁹² The Department's regulations acknowledge "the potential effects upon an

389. Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 918 (1992). Professor Zacharias goes on to point out that "[t]he response by the bar and scholarly commentators has been uniformly negative." *Id.* at 921 & n.14 (collecting authorities). The response has not changed in the ten years since Professor Zacharias made that observation. See, e.g., Allison E. Beach, et al., *Procedural Issues, in Sixteenth Survey of White Collar Crime*, 38 AM. CRIM. L. REV. 1151, 1193 (2001) ("Subpoenas served by United States Attorneys on counsel for the target of a grand jury investigation pose two problems. First, they may threaten the attorney-client relationship. Second, they may become a tool of prosecutorial abuse, permitting United States Attorneys to go on a 'fishing expedition' without first exhausting alternative means specified by DOJ guidelines to obtain the desired information.") (footnote references omitted); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 361, 427 (1996) (addressing ethical concerns over giving federal prosecutors too much authority to compel information from private defense attorneys).

390. See, e.g., Henning, *supra* note 146, at 465 ("The use of grand jury subpoenas to attorneys has grown in use, and has been decried by commentators as placing an unfair burden on the attorney-client relationship by turning lawyers into informants about their clients."); Stern & Hoffman, *supra* note 188, at 1794-95 ("Clients will hesitate to consult lawyers unless absolutely necessary and will delay retaining counsel as long as possible Lawyers will insulate themselves from all but the bare minimum of knowledge that seems necessary for discrete legal services, thus increasing the risk of mistake and ineffective representation.") (citations omitted).

391. As with the Justice Department's monitoring regulations discussed above, this Article does not seek to provide an exhaustive analysis of the issues presented by the attorney subpoena problem. Instead, this Article points out this practice as one of several federal law enforcement policies and practices that most directly impinge upon the attorney-client privilege, argues that the threat these practices collectively present to the continued vitality of the privilege is greater than may be apparent from analysis of any single practice and, most importantly, suggests, *infra* Part IV, a more appropriate approach for federal law enforcement officials to follow in seeking to balance legitimate investigative needs with the important policy interests that underlie the attorney-client privilege.

392. U.S. ATTORNEYS' MANUAL § 9-11.255 (June 2000).

attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client" and for that reason require prior approval for all such subpoenas (for both criminal and civil matters).³⁹³ This approval requirement, much like the Attorney General approval requirement in the inmate monitoring regulations discussed above, reflects a judgment by the Department that despite the potential intrusion on the attorney-client relationship, attorney subpoenas are a legitimate investigative tool in appropriate cases. In other words, the law enforcement end justifies the investigative means, despite the risk posed to some of the most important values and policies of our legal system.³⁹⁴ Having made that judgment, the Department then seeks to prevent abuses and contain damage to the attorney-client relationship by adopting guidelines that limit the availability of attorney subpoenas as an investigative tool—subject to the discretion of the Assistant Attorney General of the Criminal Division and with the express proviso that the publication of those guidelines do not create any substantive legal rights.³⁹⁵

The Department's guidelines do impose significant limitations on the use of attorney subpoenas.³⁹⁶ They emphasize that (1) an attorney sub-

393. *Id.* § 9-13.410(A).

394. For a further discussion of the "end justifies the means" mentality of some federal law enforcement authorities in the area of attorney-client privilege, see *infra* Part IV.

395. See U.S. ATTORNEYS' MANUAL § 9-13.410(E) (Nov. 1999) (limiting purpose of Guidelines). The relevant section of the Manual provided:

No Rights Created by Guidelines. These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

Id.

396. The Department of Justice guidelines are generally consistent with the relevant provision of Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct, which provides that a criminal prosecutor should not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

MODEL RULES OF PROF'L CONDUCT R. 3.8(e) (2002). See generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996) (arguing that each alternative contains vague rules and that instead federal judiciary should develop single set of highly detailed rules of professional conduct); Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473 (1995) (proposing two alternative solutions to federal rules versus local rules: creating national federal bar with uniform ethics rules or ceding primary responsibility for disciplinary matters originating in federal courts to states); Casey P. McFaden, *Prosecutorial Misconduct*, 14 GEO. J. LEGAL ETHICS 1211 (2001) (collecting recent case law applying Model

poena should not be used to obtain information that is protected by a valid claim of privilege; (2) all reasonable effort should be made to obtain the information from alternative sources; and (3) an attorney subpoena should only be used to obtain information that is “reasonably needed for the successful completion of the investigation or prosecution” and not to obtain “peripheral or speculative information.”³⁹⁷ Most important for purposes of this Article, the guidelines state that:

The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.³⁹⁸

Reasonable minds can debate—and have done so, extensively—whether these regulations are sufficient to protect against undue interference with the attorney-client relationship and unnecessary erosion of the attorney-client privilege.³⁹⁹ Even with these regulations in place, however, concern about the Justice Department’s use of attorney subpoenas as an investigative tool has continued to grow. A recent survey of reported cases found that federal prosecutors’ use of attorney subpoenas and the crime-fraud exception had “significantly increased” between 1995 and 1998.⁴⁰⁰

Rule 3.8); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 *FORDHAM L. REV.* 429 (1996) (suggesting that DOJ preemption process instead of ABA’s model rules may prompt Congress, “the most suitable decision-maker,” to intervene in debate over who has control over attorney professional conduct). The final requirement of Rule 3.8(e), that there be “no other feasible alternative to obtain the information,” arguably is considerably more restrictive than the Justice Department’s requirement that all reasonable efforts should be made to obtain the information from alternative sources, however. *MODEL RULES OF PROF’L CONDUCT R. 3.8(e)* (2002). Moreover, the commentary to Model Rule 3.8 states that “[p]aragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.” *Id.* at 3.8(e) cmt. 4.

397. *U.S. ATTORNEY’S MANUAL* § 9-13.410(C) (Nov. 1999). The guideline forbidding use of attorney subpoenas to obtain information that is protected by a valid claim of privilege obviously implicates the crime-fraud exception to the privilege. For a further discussion of the attorney-client privilege and the crime-fraud exception, see *supra* Parts II.B.1.c and II.C.1, respectively. For a further discussion of the Justice Department’s increasing reliance on that exception to overcome the privilege, see *infra* Part III.

398. *U.S. ATTORNEY’S MANUAL* § 9-13.410(c) (Nov. 1999).

399. See Green, *supra* note 396, at 460. (arguing that DOJ regulations are too vague); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 *VAND. L. REV.* 381, 384 n.4 (2002) (collecting recent authorities relevant to question of whether federal courts should adopt state rules that would restrict federal prosecutors’ authority to issue grand jury subpoenas to criminal defense attorneys).

400. Gerson & Gladieux, *supra* note 6, at 198 (surveying reported federal cases in which attorneys were subpoenaed to testify before grand jury and finding increase in percentage in which government invoked crime-fraud exception from

Concerns about misuse of attorney subpoenas prompted the American Bar Association to adopt a Model Rule of Professional Conduct on the "Special Responsibilities of a Prosecutor" that, among other things, limits the discretion of criminal prosecutors to subpoena attorneys.⁴⁰¹ These concerns about abuse of attorney subpoenas also have precipitated a "debate over whether such practices should be supervised by the federal district courts."⁴⁰² The case law is divided over the power of the federal courts to do so⁴⁰³ and the debate over whether federal prosecutors should

8.33% in 1995 to 38.01% in 1998). The findings of this survey are consistent with observations of commentators since the Department of Justice began using attorney subpoenas as investigative tools, which have consistently raised concerns about increases in the number of attorney subpoenas issued. See Abramovsky, *supra* note 6, at 682 ("According to statistics compiled by the American Bar Association and published in the New York Law Journal, the number of subpoenas issued to attorneys by federal prosecutors rose from approximately 420 per year during 1985-87 to 645 per year between 1988 and 1990.") (citations omitted); William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 805-15 (1988) (reporting results of National Association of Criminal Defense Lawyers survey of prosecutorial investigative practices, including attorney subpoenas, which showed "a consistent increase in the practices over time"); Ross G. Greenberg, et al., *Attorney-Client Privilege*, 30 AM. CRIM. L. REV. 1011, 1021 (1993) ("The growing trend toward subpoenaing attorneys, rather than employing less destructive discovery techniques, has troubled both practitioners and legal scholars."); Stern & Hoffman, *supra* note 188, at 1787-89 (noting "an explosion of subpoenas to lawyers" and citing Department of Justice statistics reflecting "a steady increase in the number of attorney subpoenas approved by the Criminal Division").

401. See MODEL RULES OF PROF'L CONDUCT R. 3.8(e) (explaining special responsibilities of prosecutor). The Model Rules were amended in February 2002, and the provision on attorney subpoenas, previously Rule 3.8(f), became Rule 3.8(e); no changes were made to the text of the attorney subpoena provision of the rule or the commentary on that provision. See *id.* at Rule 3.8 (showing 2002 changes to Rule 3.8 and accompanying commentary). The ABA had approved resolutions in 1986 and 1988 "that denounced the practice of subpoenaing lawyers to testify in grand jury proceedings about clients, [and] in February 1990 the ABA added a paragraph (f) to its existing Model Rule 3.8 on the ethical duties of prosecutors." ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT § 55:1302 (1997). Versions of Model Rule 3.8 have been adopted in only a few states. See *id.* § 55:1303 (describing ethics rules in Alaska, Colorado, Louisiana, Massachusetts, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee and Virginia that restrict prosecutors' use of subpoenas to obtain information from lawyers about their clients). Most of those states (Alaska, Colorado, Louisiana, Massachusetts, Pennsylvania, Rhode Island, Tennessee and Virginia) require prior judicial approval before a subpoena. See *id.* The original rule approved by the ABA in 1990 required prior judicial approval and an opportunity for an adversarial proceeding before issuance of a subpoena, but that provision was removed in 1995 after prosecutors and others who opposed the provision successfully argued "that defense lawyers and bar associations should attempt to secure amendments to the state and federal rules of criminal procedure rather than try to curb attorney subpoenas through ethical rules." *Id.* § 55:1302. For a further discussion of the role of courts in the attorney subpoena process, see *supra* notes 388-400 and *infra* notes 402-403 and accompanying text (discussing role of courts in reviewing prosecutors' claims that crime-fraud exception should be applied to compel testimony by subpoenaed attorneys over claims of privilege).

402. Beach, et al., *supra* note 389, at 1193.

403. See *id.* at 1193 n.251 (collecting cases).

be subject to state rules of professional responsibility—such as the rule on attorney subpoenas in criminal cases—continues.⁴⁰⁴

For purposes of this Article, the important point about the Department of Justice's practice of using attorney subpoenas as an investigative tool, often accompanied by use of the crime-fraud exception to overcome assertions of privilege by subpoenaed attorneys, is that the practice clearly has contributed to a perception of continuing and significant erosion of the privilege.⁴⁰⁵ The most troubling aspects of the Department's position in the nearly two decades of debate over the attorney subpoena issue are its willingness to brush aside concerns about the effect of its actions on the privilege and its apparent willingness to rely more and more heavily on the practice in the face of repeated criticism by courts, commentators and practitioners. Unfortunately, the Justice Department's position on this issue, under administrations of both political parties, is consistent with the lack of sensitivity to privilege issues that the Department has shown in developing its policy on prosecution of corporations and, more recently, the prison inmate attorney-client monitoring policy. As discussed in Part IV below, it is time for the Department of Justice and other federal law enforcement agencies to reexamine the effects of their policies on the privi-

404. For a further discussion of the "McDade Amendment," see *infra* notes 415-20 and accompanying text.

405. One saving grace of the Justice Department's attorney subpoena practice should be noted. Unlike the prison inmate attorney-client monitoring policy discussed above, an attorney subpoena cannot overcome the attorney-client privilege without judicial intervention. So long as the subpoenaed attorney asserts the privilege on behalf of his or her client, whether in the context of a motion to quash the subpoena or in grand jury testimony, the government must seek judicial intervention to overcome the assertion of privilege and compel the testimony. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 20 (1983) ("If a lawyer is called as a witness to give testimony concerning a client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."). Whether the government relies upon the crime-fraud exception or some other legal theory to challenge the attorney's assertion of privilege, see *supra* Part II.C (discussing various ways in which prosecutors can legitimately overcome assertions of privilege), the final decision on the privilege issue will be made by a court, not by a prosecutor. Although this is a significant safeguard against prosecutorial overreaching and unwarranted invasion of the privilege, as a practical matter it is limited by the extremely disruptive effect of an attorney subpoena on a client's ability to defend against a government investigation or prosecution. See Stern & Hoffman, *supra* note 188, at 1789-95 (describing disruptive effects of attorney subpoena and "considerable opportunities for abuse" that exist when attorney is subpoenaed); Richard Cooper, *Business Crime: Raising the Stakes*, NAT'L L.J., June 18, 2001, at A10 ("The threats such subpoenas pose to the attorney-client relationship are serious. Service of the subpoena may chill communications between client and lawyer. A grand jury appearance by the lawyer may make the client suspicious of betrayal. The subpoena may lead to a diversion of the lawyer's time and energies from concentration on defense of the client."). For this reason, the significance of the attorney subpoena problem and its potential to erode the privilege should not be minimized, notwithstanding the ultimate judicial resolution of the privilege issue in many such cases.

lege, and to consider how those policies can be improved to avoid unnecessary and unwise erosion of the privilege.

3. *Department of Justice Policy on Contacts with Represented Persons*

One other controversial Department of Justice policy relating to the attorney-client relationship should be briefly recognized for its contribution to the growing perception that the attorney-client privilege is under attack by federal law enforcement authorities. In a 1989 memorandum to "All Justice Department Litigators," then-Attorney General Richard Thornburgh took the position that state rules of professional responsibility limiting contacts with persons represented by counsel do not apply to Justice Department attorneys.⁴⁰⁶ Known as the "Thornburgh Memorandum," this new policy⁴⁰⁷ was enormously controversial and drew protests from the ABA, the courts, and the chief justices of several states.⁴⁰⁸ Congress

406. See *Matter of Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992) (reprinting "Thornburgh Memorandum"). Relying in part upon the Supremacy Clause of the Constitution, the Thornburgh Memorandum took the position that Department of Justice attorneys and law enforcement officers they supervise are not subject to state rules of professional responsibility:

Accordingly, an attorney employed by the Department, and any individual acting at the direction of that attorney, is authorized to contact or communicate with any individual in the course of an investigation or prosecution unless the contact or communication is prohibited by the Constitution, statute, Executive Order, or applicable federal regulation.

Id. at 493; see also Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855, 865 (1995) ("The second point asserted by the Department for prosecutors' exemption from the anti-contact rule is that the Supremacy Clause of the Constitution bars the enforcement of the ethics rule at the state or local level.") (citation omitted); Sapna K. Khatiwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 GEO. J. LEGAL ETHICS 111, 116 (1999) (discussing Thornburgh Memorandum's reliance on Supremacy Clause).

407. The Thornburgh Memorandum purported to build upon an April 1980 Carter Administration memorandum issued by the Justice Department's Office of Legal Counsel, which took the position that federal prosecutors were limited only by the Constitution and federal statutes in carrying out their duties. See *Doe*, 801 F. Supp. at 491 (discussing Thornburgh Memorandum); see also Delker, *supra* note 406, at 865 n.61 (citing 4B Op. Off. Legal Counsel 576 (1980)). Regardless of the validity of its claim to having been an extension of the policy of a prior administration, the Thornburgh Memorandum provoked a firestorm of criticism when it was announced.

408. See Delker, *supra* note 406, at 866 n.67 ("The American Bar Association House of Delegates voted in its February 1990 Midyear Meeting to reject the Thornburgh Memorandum.") (citations omitted); Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1260-61 (2001) (describing opposition to new policy by many groups that were "quick to condemn the Thornburgh Memorandum"). Although this Article does not seek to provide a detailed examination of the history and legal issues relating to the Thornburgh Memorandum, it probably is important to note that Attorney General Thornburgh's action was prompted, at least in part, by a decision of the United States Court of Appeals for the Second Circuit that raised important questions about the extent to which Department of Justice attorneys are subject to state professional responsibility rules. See *Doe*, 801 F. Supp. at 490-91 (reprinting portions of Thorn-

also expressed its disapproval of the Justice Department's position, although it did not take legislative action at that time to overturn the policy.⁴⁰⁹

Although it was implemented by a Republican administration and was the subject of widespread criticism, the Clinton administration Justice Department and Attorney General Janet Reno continued to embrace the core principles of the Thornburgh Memorandum and eventually adopted a final regulation that in large measure adopted those principles.⁴¹⁰ The "Reno Rules,"⁴¹¹ as they were called, did not diminish the criticism and controversy over the Justice Department's position, nor did they receive a ringing endorsement from the federal courts⁴¹² or state bar author-

burgh Memorandum that discuss *United States v. Hammad*, 846 F.2d 864 (2d Cir. 1988), later revised 858 F.2d 834 (2d Cir. 1988)); see also Delker, *supra* note 406, at 862-65 (describing *Hammad* and its effect on Department of Justice policy); Khatiwala, *supra* note 406, at 115-16 (describing *Hammad* and stating that Attorney General Thornburgh "responded to Hammad" by issuing his memorandum on contacts with represented persons).

409. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 213-14 & n.31 (2000) (citing House Comm. on Gov't Operations, Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H.R. REP. NO. 101-986, at 32 (1990)) ("We disagree with the Attorney General's attempts to exempt Department attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal Courts before which they appear.").

410. See Mick, *supra* note 408, at 1258-59 (describing process by which regulations were proposed, revised and adopted, and observing that even though "Reno Rules" were "significantly more temperate than Thornburgh Memorandum's original assertions," they "continued to grant federal prosecutors significant freedom from state ethics rules in their investigative pursuits") (citations omitted); see also Delker, *supra* note 406, at 871-73 (describing evolution of regulations and concluding that "the fundamental defect in the Department's position—regulation of federal prosecutors by the Department of Justice instead of by state tribunals and federal courts—remains unchanged") (citations omitted); Khatiwala, *supra* note 406, at 119 ("In a surprising move, however, the Department of Justice, under the guidance of Attorney General Janet Reno, republished the Thornburgh memorandum making only minor changes.").

411. The Reno Rules, which have since been rescinded, were previously published. See *Ethical Standards For Attorneys for the Government*, 28 C.F.R. § 77.1 (1999), reprinted in Khatiwala, *supra* note 406, at 119 n.77.

412. See *State v. Miller*, 600 N.W.2d 457, 465 (Minn. 1999) (asserting that ruling in *O'Keefe* was "based upon a violation of the separation of powers principle by U.S. Attorney General's internal 'housekeeping' rules which permitted such interviews [of corporate employees by government officials], and was not based upon the ethical no-contact rule"); Brenna K. Devaney, Note, *The "No-Contact" Rule: Helping or Hurting Criminal Defendants in Plea Negotiations*, 14 GEO. J. LEGAL ETHICS 933, 936 (2001) (discussing *McDonnell* court's challenge to validity of Reno Rules and subsequent decision by state chief justices to declare federal policy invalid); Khatiwala, *supra* note 406, at 120-21 (describing invalidation of regulation by court in *United States ex rel. O'Keefe v. McDonnell Douglas Corporation*, 132 F.3d 1252 (8th Cir. 1998)). One commentator summed up the dispute as follows:

By 1998, the war over ethics regulations had reached a stalemate. Whereas the DOJ insisted that it needed the power to exempt its prosecutors from certain rules, the federal judiciary, although sometimes siding with the DOJ, rejected the argument that the Attorney General had the

ities.⁴¹³ Neither the courts nor the Department of Justice were to have the last word on the matter, however.

In 1998, under unusual circumstances,⁴¹⁴ Congress had the last word—so far—on the question of whether state professional responsibility rules apply to federal prosecutors. Congressman Joseph McDade (previously the subject of a Justice Department investigation and ultimately acquitted of all charges), succeeded in attaching to the annual appropriations bill for fiscal year 1999 a rider entitled the Citizens Protection Act (CPA).⁴¹⁵ The CPA, or the “McDade Amendment” as it became known, survived Senate debate on the appropriations bill and ultimately became law.⁴¹⁶ As presently in effect, the McDade Amendment prescribes “Ethical standards for attorneys for the Government” and provides that federal government attorneys “shall be subject to State laws and rules, and local federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”⁴¹⁷ Critics in Congress, who support the Department of Justice position that attorneys for the federal government should be exempted from state ethics rules, have tried unsuc-

authority to create blanket ethics exemptions for federal prosecutors. At the same time, state courts and local ethics regulators demanded that federal prosecutors conform to the same standards as other attorneys in their jurisdictions.

Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2088 (2000) (citations omitted) [hereinafter Note, *Federal Prosecutors*].

413. See Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707, 714 (2001) (describing Missouri Bar Chief Disciplinary Counsel advisory opinions applying Missouri no-contact rule even to former employees of represented corporate party).

414. See Zacharias & Green, *supra* note 409, at 208 (“With the 1998 federal appropriations bill, Congress passed a remarkable rider regulating federal government attorneys. The rider was entitled the Citizens Protection Act (CPA) and encapsulated a previously proposed statute that had not survived the committee process.”) (citations omitted); Note, *Federal Prosecutors*, *supra* note 412, at 2080 (“Buried within a 920-page appropriations act passed by Congress in October 1998 was the most significant change in the ethics regulation of federal prosecutors in more than twenty years.”).

415. For a detailed review and analysis of the enactment of the CPA and Congressman McDade’s prior efforts to have the legislation enacted, see Zacharias & Green, *supra* note 409, at 211-15.

416. See *id.* at 215 & n.53 (noting that President signed appropriation bill into law on October 21, 1998). The effective date of the CPA was stayed until April 19, 1999, but despite efforts to repeal or revise it by Senator Orrin Hatch, it took effect on that date. See *id.* at 209.

417. 28 U.S.C. § 530B(a) (2002). The CPA also requires the Attorney General to “make and amend rules of the Department of Justice to assure compliance with [the law]”. *Id.* § 530B(b). The Justice Department implemented new regulations in April 1999, see Ethical Standards Recognizing State Laws and State and Local Federal Court Rules, 64 Fed. Reg. 19,273 (Apr. 20, 1999), which superseded the “Reno Rule” regulations, see *supra* note 416. The current regulations are at 28 C.F.R. pt. 77 (2002) (discussing ethical standards for government attorneys).

cessfully to overturn or revise the McDade Amendment.⁴¹⁸ At present, however, the McDade Amendment remains law, and for now the courts are left with the task of interpreting and applying it.⁴¹⁹

For purposes of this Article, the important point concerning the debate over whether Justice Department attorneys should be subject to state ethics rules is not the merits of the arguments on either side or even the ultimate outcome. The important point is that the Department of Justice adopted a policy and practice that, at least until it was curtailed by the McDade Amendment, represented (or was perceived to represent, which has the same negative effects) a significant intrusion into the attorney-client relationship. For a decade before the McDade Amendment became law the express policy of the Justice Department was to decide for itself whether or not to comply with state “no-contact” rules that forbid direct contacts with represented persons. The no-contact rules serve a variety of purposes that are central to our adversarial system of justice, including protecting clients from disclosing privileged information.⁴²⁰ As the huge outpouring of criticism described above—from the bar, the courts, Congress (which ultimately “overruled” the Justice Department), and scholarly commentators—demonstrates, the Justice Department’s policy was perceived as an attack on the attorney-client relationship that threatened the same interests that underlie the attorney-client privilege. For that reason, this policy merits inclusion with the other Department of Justice policies

418. See Note, *Federal Prosecutors*, *supra* note 412, at 2093-97 (describing and evaluating efforts to amend McDade Amendment). For a thoughtful analysis of the McDade Amendment’s effects on the activities of federal prosecutors, see Zacharias & Green, *supra* note 409, at 215-24. Professors Zacharias and Green, who have probably devoted more thought and scholarly attention to this issue than any other commentators, have concluded that Congress should authorize the federal courts to assume control of the regulation of federal prosecutors’ ethics, through a cooperative mechanism that provides for input by the Justice Department, the defense bar, and state ethics regulators. See Green & Zacharias, *supra* note 399, at 478 (arguing for regulation of prosecutorial ethics by federal judiciary).

419. Review and analysis of cases interpreting and applying the McDade Amendment is not necessary for purposes of this Article. Recent articles that analyze the case law include Green & Zacharias, *supra* note 399, at 423-24; Radack, *supra* note 413, at 719-20; Zacharias & Green, *supra* note 409, at 228-30; Khatiwala, *supra* note 406, at 128-29.

420. See Roger C. Crampton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 325 (1992) (discussing reasons for anti-contact rule); Khatiwala, *supra* note 406, at 114 (discussing number of policy justifications for no-contact rule, including that “[t]he rule reduces the likelihood that clients will disclose privileged or other information that might harm their interests”). Although an argument can be made that the no-contact rule should not apply to the investigatory activities of law enforcement officials, see Crampton & Udell, *supra*, at 326 (citing H. Richard Uviler, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM L. REV. 1137 (1987)), that argument has not gained sufficient currency to overcome the perception that the Justice Department’s policy was an inappropriate intrusion into the attorney-client relationship.

and practices described in this Article that have collectively achieved a critical mass as a threat to the continued viability of the privilege.

E. *The Securities and Exchange Commission's New Cooperation Policy*

The Department of Justice is not the only federal agency that has recently taken actions that significantly affect the attorney-client relationship in general and the attorney-client privilege in particular. In 2001, the Securities and Exchange Commission adopted a formal agency policy of granting leniency in exchange for cooperation in appropriate cases—an approach that the agency previously had applied on a case-by-case basis, although expert practitioners have long been aware of the practice.⁴²¹

The SEC announced its new policy in connection with an October 2001 enforcement proceeding, *In the Matter of Gisela de Leon-Meredith*.⁴²² In *de Leon-Meredith*, the Commission took action against an individual corporate official for misstating her employer's financial results, but did not take any action against the corporate entities whose financial results had been misstated.⁴²³ The lack of enforcement action against the corporate parent

421. For an example from over a decade ago of an SEC administrative proceeding in which the agency gave favorable consideration to the subject's voluntary and proactive cooperation with the Commission's investigation, see *In the Matter of M.D.C. Holdings, Inc.*, Exchange Act Release No. 27,208, Fed. Sec. L. Rep. (CCH) ¶ 73,714 (Sept. 1, 1989), in which the administrative order stated:

In resolving this matter by the entry of this Order, the Commission has considered the affirmative corrective steps MDC has taken. As noted above, in response to the Commission's investigation, the Company voluntarily initiated an extensive internal review that identified the accounting matters described in this Order. The Company advised its independent auditors of the results of its review and, after consulting with its auditors, recorded the accounting adjustments noted above. At the conclusion of its internal review, the Company implemented new control procedures which it asserts are intended to improve the Company's accounting and financial reporting. The Company also advised the Commission staff of the outcome of its internal review and the reasons for the accounting adjustments recorded. *The Company's proactive response to the Commission's investigation and cooperation with the Commission's staff were taken into account in resolving this matter through the entry of this Order.*

Id. (footnote omitted and emphasis supplied).

422. In the Matter of Gisela de Leon-Meredith, Exchange Act Release No. 44969, Fed. Sec. L. Rep. (CCH) ¶ 74,986 (Oct. 23, 2001) [hereinafter *de Leon-Meredith Release*], available at <http://www.sec.gov/litigation/investreport/34-44969.htm> (last visited Jan. 8, 2003).

423. The *de Leon-Meredith* case, at least as reported by the SEC, was a relatively "easy" corporate cooperation case because of its somewhat unusual and uncharacteristic facts as compared to more typical financial fraud cases. First, the SEC order indicates that *de Leon-Meredith* alone was responsible for the misstated financial results. Second, the SEC order indicates that the wrongdoing was confined to a single subsidiary unit of the corporate parent, which was the reporting entity. See *id.* Third, the restatements required to correct the misstatements of prior years earnings, while significant, did not appear to change the overall trend of earnings over the relevant period, and the price of the company's stock did not decline after the restatement was made public. All of these factors combined to make it easy for parent company management to promptly and fully report the

was particularly noteworthy because the company was publicly traded and its financial statements had been misstated for five years in amounts that were significant in relation to previously reported earnings.⁴²⁴ In such circumstances, a reporting company normally would do well to avoid fraud charges by the SEC and be “let off” with financial reporting and record

matter to the SEC and cooperate with its investigation. Such cooperation is most likely to be forthcoming when senior management's own conduct is not at issue or when new senior management discovers evidence of improper actions by predecessor management. An example of the latter circumstances, in which the SEC also gave lenient enforcement treatment in exchange for cooperation, is *In the Matter of Cendant Corporation*, Exchange Act Release No. 42933, available at <http://www.sec.gov/litigation/admin/34-42933.htm> (June 14, 2000) [hereinafter *Cendant Release*]. In *Cendant*, two companies merged and after the merger management of one company discovered that a “massive financial fraud” had been conducted by former management of the other company. See *id.* at n.2. They promptly reported the fraud to the SEC, cooperated in its investigation, and in determining to settle with the company on favorable terms (i.e., not fraud charges) “the Commission considered remedial acts promptly undertaken by Cendant and cooperation afforded the Commission and other authorities.” *Id.* at Part VI; see also *In re Cendant Corp. Securities Litigation*, 264 F.3d 201 (3d Cir. 2001) (approving \$3.2 billion settlement of private securities fraud class action), cert. denied *Mark v. Cal. Pub. Employee Ret. Sys.*, 122 S.Ct. 1300 (2002). Cooperation is less likely to be forthcoming when the actions of current management are under investigation, although it may occur in such circumstances and may result in significant benefits for the affected company. An example is *M.D.C. Holdings, Inc.*, in which the company cooperated with the SEC staff's investigation and was charged with reporting and recordkeeping violations, but not fraud, by the SEC. See Exchange Act Release No. 27,208, *supra* note 421. For a further discussion of *M.D.C. Holdings, Inc.*, see *supra* note 421 and accompanying text.

424. See *de Leon-Meredith Release*, *supra* note 422 (noting that company's books were inaccurate and its financial reports were misstated). For example, the restatement negated some eighty percent of reported 1999 results, reducing net earnings from \$240,000 to \$47,000. For 1995 net earnings were reduced by over eight percent, from \$20.2 million to \$18.5 million. Another indicator of the unusually lenient treatment the company received is that nowhere in the Cease and Desist Order did the agency characterize the amounts of these misstatements as “material”—instead, the Order merely states that the company's “annual and quarterly financial reports from December 31, 1995 through March 31, 2000 did not comply with Generally Accepted Accounting Principles.” *Id.* It is likely that the Commission's actions in not bringing an enforcement proceeding against the reporting entity and not characterizing the amounts involved as “material” would be beneficial to the company in seeking to defend or settle any private shareholder securities litigation based upon the same facts. See generally RALPH C. FERRARA & MARC I. STEINBERG, *SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT* § 3:62 (2001) (describing benefits of negotiated settlements with SEC, including avoidance of adverse findings of fact that could be used against settling company in subsequent private damages action). The Commission's failure to characterize the misstatements in the *de Leon-Meredith* case as material to prior reported financial results is a particularly striking concession, in light of the fact that the agency had recently issued a Staff Accounting Bulletin cautioning reporting companies that even a two percent overstatement of earnings may be deemed material by the Commission. See Staff Accounting Bulletin 99, 17 C.F.R. § 211 (1999) [hereinafter SAB 99]. For an in-depth analysis of SAB and the SEC's views on materiality, see MARC I. STEINBERG, *SECURITIES REGULATION: LIABILITIES AND REMEDIES* § 1.11 (Law Journal Press 1984 & 2002 Update).

keeping charges,⁴²⁵ but for the corporate entity not to be charged at all was a significant act of leniency on the part of the Commission and a notable departure from usual practice at the agency.

Apparently recognizing the significance of its action (or, more accurately stated, inaction) in not bringing an enforcement action against the corporate issuer, the SEC took the unusual step⁴²⁶ of explaining itself in a separate "Report of Investigation" (Section 21(a) Report) that described the reasons for its leniency toward the issuer in the *de Leon-Meredith* case.⁴²⁷ In its press release announcing the report, the SEC identified

425. For examples of negotiated administrative settlements with the SEC in which the corporate issuers were charged with reporting and record keeping violations, but not violations of the antifraud provisions of the federal securities laws, because of the company's cooperation and voluntary institution of corrective measures, see *supra* notes 421-24 and accompanying text and *infra* notes 426-38 and accompanying text (discussing *M.D.C. Holdings* and *Cendant*). The *Cendant* case illustrates the point that obtaining lenient settlement terms from the SEC does not necessarily ensure success in related private securities fraud class action litigation, in which plaintiffs' counsel often will seek to make use of the factual allegations and other information in SEC settlement documents. See *Cendant*, 264 F.3d at 201 (approving \$3.2 billion private securities fraud class action settlement—largest securities class action recovery in history at that time—after negotiated settlement with the SEC in which company was charged with reporting and recordkeeping violations but was not charged with fraud).

426. Publication by the Commission of a "Report of Investigation" pursuant to section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a), is an unusual agency action that typically is reserved for matters of broad public importance extending beyond the individual interests of the parties involved in a particular enforcement action. See The Commission's Practice Relating to Reports of Investigations and Statements Submitted to the Commission Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 15,664, 1979 SEC LEXIS 1939 (Mar. 21, 1979); see also FERRARA & STEINBERG, *supra* note 424, § 3:37 (describing SEC practice with respect to Section 21(a) Reports). For example, the Commission used a Section 21(a) Report to discuss its investigation of New York City's financial crisis in the 1970's, a matter of widespread public interest and importance not only to the holders of New York City municipal bonds, but to the State of New York and the entire country. See Final Report in the Matter of Transactions in the Securities of the City of New York, SEC Exchange Act Release No. 6021, Exchange Act Release No. 15,547, 1979 SEC LEXIS 2210 (Feb. 10, 1979). A more recent example is the SEC's Section 21(a) Report on the Orange County California bond crisis. See Report of Investigation In the Matter of County of Orange, California, Exchange Act Release No. 36,761, 52 S.E.C. 681, 1996 LEXIS 132 (Jan. 24, 1996). The SEC has said that such reports "can appropriately be issued where a question of public importance is involved and the public, or at least the financial community, should be informed concerning the nature of the situation and the Commission's response to it." *In re Spartek*, Exchange Act Release No. 15,567 (Feb. 14, 1979) (quoted in FERRARA & STEINBERG, *supra* note 424, at 46-47). The use of a Section 21(a) report to announce the Commission's cooperation policy, in an otherwise insignificant (at least in terms of importance to the investing public and the financial markets generally) and unremarkable enforcement proceeding, suggests that the agency wished to go to unusual lengths to publicize its new cooperation policy.

427. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23,

“four broad measures of a company’s cooperation” that may influence the agency’s decision as to what enforcement action, if any, should be brought against the company.⁴²⁸ The four measures are:

Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;

Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulators, and to self-regulators;

Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and

Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company’s remedial efforts.⁴²⁹

These measures of cooperation are unremarkable, and for the most part are consistent with the policies of other agencies⁴³⁰ and the cooperation provisions of the Federal Organizational Sentencing Guidelines.⁴³¹

2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>. [hereinafter Section 21(a) Report]. The report outlines the steps taken by the publicly traded parent company, Seaboard Corporation, after it discovered potential violations of the federal securities laws. See *id.* The Section 21(a) Report states that within a week of learning about the misconduct, the company’s internal auditors had conducted a preliminary investigation and advised the parent company’s senior management of the problems. See *id.* Senior management then advised the board’s audit committee. See *id.* Consequently, Seaboard’s full board of directors authorized the company to engage independent outside counsel to conduct an investigation. See *id.* Four days later, Seaboard dismissed de-Leon Meredith, who, as the controller of a subsidiary, had caused the earnings overstatements, as well as two other employees who had inadequately supervised her. See *id.* A day later, Seaboard publicly disclosed that its financial statements would be restated. Furthermore, Seaboard cooperated fully with the SEC staff’s investigation and produced the details of its internal investigation, including notes and transcripts of interviews, and declined to invoke its attorney-client privilege, work product protection or other privileges or protections with respect to the investigation. See *id.*

428. SEC Press Release No. 2001-117, *SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion* (Oct. 23, 2001) (providing “framework for evaluating cooperation in determining whether and how to charge violations of the federal securities laws”), available at <http://www.sec.gov/news/headlines/prosdiscretion.htm>.

429. *Id.* (emphasis in original).

430. For a further discussion of the Voluntary Disclosure Programs, see *infra* Part III.F.

431. For a further discussion of the Organizational Sentencing Guidelines, see *supra* Part III.C.1.

The manner in which the application of these factors was described in the accompanying Section 21(a) Report, however, is somewhat troubling, particularly if the reader is not extremely attentive to the details of the Commission's Report. The troubling aspect of the Section 21(a) Report is that on its first page, in the second, key paragraph⁴³² describing the SEC's reasons for not taking action against the parent company in the *de Leon-Meredith* case, it emphasizes that "[a]mong other things, the company produced the details of its internal investigation, including notes and transcripts of interviews of Meredith and others; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation."⁴³³

This language about privilege, and the prominence it was given in what was clearly intended to be a major policy statement by the federal agency with principal responsibility for policing the financial markets and regulating corporate America,⁴³⁴ is unfortunate because it tends to distort an important nuance in what is otherwise a very carefully considered and well-crafted policy statement by the SEC. The language could easily be read to suggest that waiving privileges is necessary in order to obtain credit for cooperation.⁴³⁵ That interpretation is incorrect, however, because a close reading of the entire Section 21(a) Report makes clear that waiver of privileges, as such, is neither an objective of the SEC nor a condition for receiving full credit for cooperating with the agency.

Near the end of the Section 21(a) Report the Commission provides a non-exclusive list⁴³⁶ of thirteen criteria that it may consider in determining whether to give the subject of an enforcement action credit for cooperation. The eleventh listed criterion identifies the relevant issues with

432. For a further description of the extent of the company's cooperation as described in the Section 21(a) Report, see *supra* note 427 and accompanying text.

433. Section 21(a) Report, *supra* note 427, at 1 (emphasis added).

434. For a further discussion of the significance of the SEC's use of a Section 21(a) Report to announce its new cooperation policy, see *supra* note 427 and accompanying text.

435. See Frank C. Razzano, *To Cooperate With the Securities and Exchange Commission or Not to Cooperate, That is The Question*, 30 SEC. REG. L.J. 241, 248 (2002) ("Finally, cooperation means providing the Commission with all relevant information, which includes not invoking any privileges."); see also Stephen J. Crimmins, *SEC's New Cooperation Policy May Create Opportunities for Counsel and Issuers*, 33 SEC. REG. & L. REP. (BNA) 1581, 1582 (Nov. 5, 2001) ("The Commission's statement appears to encourage privilege waiver without explicitly requiring it."); cf. generally Richard A. Spehr & Claudius O. Sokenu, *SEC Self-Policing Policy Presents Benefits and Pitfalls*, 16 ANDREWS WHITE-COLLAR CRIME REP. 1 (July 2002) (discussing "The Downside: Waiving Attorney-Client Privilege" and noting that "the prudent course would be to cooperate fully with the SEC investigation while preserving the company's privilege").

436. The Section 21(a) Report states that the intent of the Commission is not to "limit ourselves to the criteria we discuss below" and that it will continue to exercise its judgment in determining what enforcement action is appropriate in a particular case. See Section 21(a) Report, *supra* note 427, at 2.

respect to assertion of attorney-client privilege and work product doctrine protection:

11. Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?⁴³⁷

Unlike the gratuitous reference to not invoking privileges found on the first page of the Section 21(a) Report,⁴³⁸ this language neither emphasizes waiving privileges nor implies that doing so is necessary to obtain credit for cooperation. Instead, the language appropriately focuses on voluntary disclosure of all relevant underlying factual information,⁴³⁹ including information that might not otherwise be discovered by government investigators, and cooperation by the corporate entities involved, such as by encouraging employees to cooperate with the investigation. Moreover, the omission of any references to waiving privileges in this criterion clearly is both a considered and intentional decision by the agency, as an accompanying footnote explains.⁴⁴⁰

437. *Id.* at 3.

438. Another unfortunate example of language implying that waiver of privileges is necessary to obtain credit for cooperation can be found in the Commission's cease-and-desist order in the *Cendant* case, see *Cendant* Release, *supra* note 423 ("Cendant management promptly reported the discovery of the fraud and its attendant accounting irregularities to the SEC staff; conducted a thorough internal investigation and compiled an extensive report thereon; *waived privileges as to the report* and filed the report, and the accompanying exhibits, as Exhibits to a Report on Form 8-K; and cooperated with the staff in its investigation of this matter.") (emphasis added).

439. Once again, this was the critical distinction that was emphasized by the Supreme Court in *Upjohn* between privileged communications, on the one hand, and underlying factual information, on the other. See *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (scope of privilege protection). The latter is not protected by the attorney-client privilege, as the Court made clear in *Upjohn*, and can be communicated to a government law enforcement agency (or any other party) without waiving the privilege. The discussion in footnote 3 of the SEC's Section 21(a) Report implicitly recognizes and is consistent with this important distinction. See Section 21(a) Report, *supra* note 427, at n.3. The broader language on the first page of the Report, discussed above, unfortunately is likely to obscure this distinction, especially if it is read out of context and without the fuller explanation provided later in the Report.

440. See Section 21(a) Report, *supra* note 427, at n.3. (recognizing that attorney-client privilege, work product doctrine and other privileges serve important social interests).

In its footnote on privileges, the Section 21(a) Report takes a more cautious and meticulous approach to addressing the relationship between corporate cooperation and privilege protections. The footnote stresses the Commission's recognition that the attorney-client privilege and the work product doctrine, as well as other privileges, "serve important social interests."⁴⁴¹ The footnote goes on to state explicitly that "the Commission *does not view a company's waiver of a privilege as an end in itself*, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff."⁴⁴² Here, in a footnote at the end of the Section 21(a) Report, the SEC took the right approach. As the discussion in the footnote implicitly recognizes, it is possible (and probably possible in most cases) for a party under investigation to cooperate fully with the government and provide investigators with all relevant underlying factual information without waiving privileges. Nothing in the SEC's carefully articulated analysis of the privilege issue in the footnote suggests hostility to the privilege or implies that waiver is necessary to obtain credit for cooperation. To the contrary, the footnote demonstrates sensitivity to the importance of the compelled privilege waiver issue and a willingness to work with parties to avoid unnecessary waivers that might undermine the continued vitality of the privilege. Unfortunately, this subtle point may not be appreciated by those who do not read the entire Section 21(a) Report carefully, and instead only rely on the language on its first page.

The Commission's solicitous approach to the privilege and its desire to avoid unnecessary waiver is further evidenced, although very subtly, by the carefully chosen wording that is used in the text at page one of the Section 21(a) Report and in the privilege footnote. The text at page one says that the company under investigation "did not invoke"⁴⁴³ the privilege, while the footnote says that companies under investigation by the SEC may "consider choosing not to assert"⁴⁴⁴ the privilege. The Commission's use of this very precise language, rather than referring to "waiver" or "waiving" the privilege, is consistent with the overall conclusion that the SEC did not intend to require wholesale waivers of privilege by companies under investigation in order to obtain the benefits of the new cooperation

441. *Id.* The footnote does not further identify or describe those interests, but it hardly need do so in light of the near-universal acceptance of the "modern theory" of the policy interests that are served by the privilege. For a further discussion of the policy interests identified by Wigmore and the Supreme Court, see *supra* Part II.A.

442. *Id.* (emphasis added). The footnote also points out that the Commission has taken the position in litigation that "the provision of privileged information to the Commission staff pursuant to a confidentiality agreement did not necessarily waive the privilege as to third parties." *Id.* This language reinforces the point, discussed below, that the SEC did not intend to suggest that waiving privileges is necessary to obtain credit for cooperation. In fact, it appears that the Commission would not regard providing even privileged information (as opposed to underlying factual information) under such circumstances as necessarily constituting a waiver.

443. *Id.* at 1.

444. *Id.* at n.3.

policy.⁴⁴⁵ In fact, the footnote indicates that in at least one litigated case the SEC has taken the position that voluntarily providing information to the SEC pursuant to a confidentiality agreement should not operate as a waiver as to third parties.⁴⁴⁶

This is an important point that should be noted both by companies that are under investigation by the SEC and by other federal law enforcement authorities that are developing or applying cooperation policies. The approach taken by the SEC in its new cooperation policy statement, properly understood, is consistent with the approach to privilege issues employed by the Supreme Court in its recent privilege cases, which is discussed in Part II.B, above. In most cases it is not necessary or appropriate for law enforcement officials to require waiver of privileges by parties under investigation. If they do so, they risk undermining the important public policy interests that underlie the attorney-client privilege and the work product doctrine.

F. Other Federal Agencies' Cooperation and Voluntary Disclosure Programs

Although its discussion of the compelled privilege waiver issue could be more prominent and explicit, the SEC's new cooperation policy is still very important as a source of guidance for other federal agencies because of the SEC's long history of success with cooperation policies and voluntary disclosure programs.⁴⁴⁷ The SEC created a voluntary disclosure program in the 1970s to deal with the "questionable and illegal corporate payments" scandal that was exposed by the Watergate Special Prosecutor's investigation.⁴⁴⁸ The scope of the questionable payments problem and

445. Again, however, it is unfortunate that this subtle nuance of wording is likely to be lost on many readers of the Section 21(a) Report.

446. See Section 21(a) Report, *supra* note 427, at n.3. For a recent judicial decision by an influential court holding that providing information to law enforcement agencies pursuant to a confidentiality agreement does not constitute a waiver, see generally *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002) (unpublished opinion).

447. See Harvey L. Pitt & Karen Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 187 n.157 (1990) ("A particularly effective program of the 1970s was the Commission's Voluntary Disclosure Program."). *But cf.* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1584 (1990) (describing criticism of SEC's foreign payments investigations by academics and government officials).

448. See Senate Comm. on Banking, Housing, and Urban Affairs: Report of the Securities and Exchange Comm'n on Questionable and Illegal Corporate Payments and Practices, 94th Cong., 2d Sess. (1976) (discussing creation program); see also Edward D. Herlihy & Theodore A. Levine, *Corporate Crisis: The Overseas Payment Problem*, 8 LAW & POL'Y IN INT'L BUS. 547, 584-94 (1976) (discussing SEC's voluntary disclosure program); Pitt & Groskaufmanis, *supra* note 447, at 1582-87 (describing SEC program and legislative response to foreign payments scandal). For a judicial description of the SEC's foreign payments voluntary disclosure program, see Judge J. Skelly Wright's opinion in *In re Sealed Case*, 676 F.2d 793, 800-01 (D.C. Cir. 1982).

the number of companies involved was so great that the SEC did not have the resources to investigate each case individually.⁴⁴⁹ To deal with this glut of cases, the SEC devised a voluntary disclosure program and announced that the Commission “would be less inclined to bring enforcement proceedings against companies that issued a ‘declaration of cessation’” of questionable payments and took appropriate investigative and remedial steps.⁴⁵⁰ The effectiveness of the SEC’s program was widely publicized,⁴⁵¹ and other government agencies have since developed their own versions of voluntary disclosure programs.⁴⁵² Unfortunately, some of those programs are structured in a manner that unnecessarily and inappropriately pressure participants in the program to waive privileges. The discussion that follows briefly describes those programs and highlights the privilege waiver issues they present.

1. *The Department of Justice Antitrust Division Voluntary Disclosure Program*

In 1978, shortly after the SEC’s successful utilization of a voluntary disclosure program to resolve the questionable payments cases, the Anti-trust Division of the Department of Justice instituted a voluntary disclosure program.⁴⁵³ The program became known as the corporate “amnesty” policy because under the program a corporation (the original program did

449. See *Sealed Case*, 676 F.2d at 800 n.10 (citing Herlihy & Levine, *supra* note 448, at 577-79, and Abuses of Corporate Power: Hearings Before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, 94th Cong., 1st and 2d Sess. 23 (1976) (testimony of R. Hills, Chairman, SEC)).

450. See Pitt & Groskaufmanis, *supra* note 447, at 1582 (documenting SEC’s institution of voluntary disclosure program); see also Walsh & Pyrich, *supra* note 318, at 651-52 (same). The SEC program required companies to appoint a committee of independent outside directors, retain independent counsel to conduct an internal investigation for the committee, and file with the SEC a public report on Form 8-K describing in general terms the investigation conducted, management’s knowledge of the questionable payments, and the impact of the company’s decision to abandon the payment practice. See Richard H. Porter, *Voluntary Disclosures to Federal Agencies—Their Impact on the Ability of Corporations to Protect From Discovery Materials Developed During the Course of Internal Investigations*, 39 CATH. U. L. REV. 1007, 1020 (1990) (noting that to encourage participation in program, SEC provided incentives such as relief from expense of formal investigation and litigation and, promised “leniency” to companies participating in program).

451. As one pair of commentators noted:

In the end, four hundred companies admitted to questionable or illegal payments totaling \$300 million. In the wake of public disclosures about payments made to foreign officials by American-based companies, three foreign governments collapsed, American relations with some of its western allies became strained, and a monarchy was weakened.

Pitt & Groskaufmanis, *supra* note 447, at 1583 (citations omitted).

452. See generally Stephen R. Geisler, *Voluntary Disclosure of Corporate Violations of Federal Law*, 51 ALA. L. REV. 375, 376-79 (1999) (discussing various voluntary disclosure programs); Porter, *supra* note 450, at 1018-020 (describing development of Securities and Exchange Commission and Department of Defense voluntary disclosure programs).

453. See, e.g., Geisler, *supra* note 452, at 377 (citing Gary G. Lynch & Eric F. Grossman, *Disclosure of Corporate Wrongdoing*, SC73 ALI-ABA 155, 186 (1998)).

not apply to individuals) could “avoid criminal prosecution, i.e., obtain ‘amnesty,’ by confessing its role in illegal activities, fully cooperating with the Division, and meeting other specified conditions.”⁴⁵⁴ Under the original program leniency was available only if a corporation voluntarily disclosed a violation before the Antitrust Division had commenced an investigation of the matter, but the Antitrust Division revised and expanded the program in August 1993 to provide amnesty even in cases in which an investigation already had been commenced by the Division.⁴⁵⁵ The 1993 revision to the program also provided amnesty for individual corporate directors, officers and employees of the self-reporting corporation who admit wrongdoing and assist the Division with its investigation.⁴⁵⁶ In August 1994, the Division further revised and expanded the amnesty program by establishing a new leniency policy for individuals who approach the Division on their own behalf, and not as part of a corporate voluntary self-report.⁴⁵⁷

The Antitrust Division program essentially rewards corporations who voluntarily report an antitrust violation, which by definition involves collective activity and similar violations by other corporations, thereby providing amnesty only to the first corporation to come forward, whether or not an investigation already is underway.⁴⁵⁸ The requirements for receiving

454. UNITED STATES DEPARTMENT OF JUSTICE ANTITRUST DIVISION MANUAL III-93 (3d ed. rev. 2002), available at <http://www.usdoj.gov/atr/foia/divisionmanual/ch3.htm.pdf> [hereinafter ANTITRUST DIVISION MANUAL]; see also Laurence A. Urgenson, *Voluntary Disclosure: Opportunities and Issues for the mid-1990's*, 943 P.L.I./CORP. 225, 236 (1996) (citing DEPARTMENT OF JUSTICE ANTITRUST DIVISION MANUAL (2d ed. 1987)).

455. See Antitrust Division, U.S. Department of Justice, *Corporate Leniency Policy*, (Aug. 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/len corp.htm> [hereinafter *1993 Corporate Leniency Policy*] (describing revised corporate amnesty policy). The policy granting amnesty for voluntary self-reporting before the Division has commenced an investigation is usually referred to as “Type A” amnesty. See ANTITRUST DIVISION MANUAL, *supra* note 454, at III-112 n.266 (discussing “Type A” amnesty). Alternatively, the policy granting amnesty for voluntary reporting after the Division is aware of the illegal activity is usually referred to as “Type B” amnesty. See *id.* III-113 n.267 (discussing “Type B” amnesty).

456. See *1993 Corporate Leniency Policy*, *supra* note 455, at Part C (listing who within company may receive leniency if corporation qualifies for leniency).

457. See ANTITRUST DIVISION MANUAL, *supra* note 454, at III-111 (describing changes implemented in 1994). Individuals who approach the Division on their own behalf also must meet specified criteria in order to obtain amnesty. See *id.* at III-114, 15 (listing criteria).

458. See *1993 Corporate Leniency Policy*, *supra* note 455, at A.1, B.1 (emphasizing importance of voluntary disclosure for corporations); see also ANTITRUST DIVISION MANUAL, *supra* note 454, at III-112 (“Only the first corporation to come forward with regard to a particular violation may be considered for leniency as to that violation.”). Because the Antitrust Division program applies only to the first reporting company, and therefore likely will lead to convictions of other participating companies who are ineligible for amnesty after the first company self-reports, the program can promise something that other voluntary disclosure companies cannot promise—full amnesty from prosecution. According to one commentator, “[n]o other government voluntary disclosure program offers as great an opportunity or

amnesty under the program differ depending on whether or not an investigation is underway at the time of the self-reporting; but, for purposes of this Article, the important provisions are those relating to cooperation with the Division's investigation, the relevant provisions of which are identical. When the self-reporting occurs before an investigation has begun, the cooperation requirement is: "The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation" ⁴⁵⁹ When the self-reporting occurs after an investigation has begun, the cooperation requirement is: "The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation" ⁴⁶⁰ Thus, in both instances, the reporting corporation must provide full, continuing and complete cooperation, which suggests that the corporation may be required to waive privileges.

Nevertheless, the Antitrust Division has sought to address the privilege waiver problem. After enacting the new corporate leniency policy in 1993, the Antitrust Division published a model corporate conditional leniency letter. ⁴⁶¹ The model letter specifically states that disclosures made in furtherance of an amnesty application under the program will not constitute a waiver of either the attorney-client privilege or the work product privilege. ⁴⁶² In a 1998 speech to the American Bar Association Antitrust Section, the Deputy Assistant Attorney General for the Antitrust Division referred to the model letter and reassured his audience that "the Division will not consider disclosures made in furtherance of the amnesty application to constitute a waiver of the attorney client privilege or the work product privilege." ⁴⁶³

The Antitrust Division's policy of not considering disclosures made under the amnesty program to constitute a waiver does not resolve all potential waiver issues, however. Even if the Division does not assert that a waiver has occurred, it is still possible that third parties will be able to assert that a waiver has occurred and thereby obtain the privileged materi-

incentive for companies to self report and cooperate." Gary R. Spratling, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update*, presented at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2247.pdf>.

459. 1993 Corporate Leniency Policy, *supra* note 455, at A.3.

460. *Id.* at B.4.

461. Model Corporate Conditional Leniency Letter reprinted in James M. Griffin, *Status Report: International Cartel Enforcement*, SF63 ALI-ABA (2000), available in LEXIS, Combined ALI-ABA Course of Study Materials.

462. *See id.* (discussing effect of disclosures on confidentiality).

463. Gary R. Spalding, *The Corporate Leniency Policy: Answers to Recurring Questions*, presented at the ABA Antitrust Section 1998 Spring Meeting (April 1, 1998) reprinted in James M. Griffin, *Status Report: International Cartel Enforcement*, SF63 ALI-ABA (2000), available in LEXIS, Combined ALI-ABA Course of Study Materials.

als.⁴⁶⁴ The same issue exists with respect to the Department of Defense (DOD) voluntary disclosure program, which takes a similar position regarding waiver of privileges. The Department of Defense program is described below, and the third-party waiver issue that both programs present is examined in greater detail in connection with that program.

2. *The Department of Defense Voluntary Disclosure Program*

After the SEC and the Department of Justice Antitrust Division, the government agency with the longest history of developing and implementing voluntary disclosure programs is the Department of Defense. In July 1986, the DOD adopted regulations to encourage voluntary reporting by defense contractors of "any suspected or possible violation of law" in connection with contractual relationships with the DOD.⁴⁶⁵ The regulations

464. For a discussion of the law of waiver, see *supra* Part II.C.2. A recent health care fraud case illustrates the potential adverse consequences of voluntarily providing privileged materials to law enforcement officials, even when the government agrees that doing so will not constitute a waiver of privilege. In *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, Columbia/HCA provided internal audit results to the Department of Justice in an effort to settle a criminal fraud investigation, after initially withholding the materials based on the attorney-client privilege and the work product doctrine. 293 F.3d 289, 292 (6th Cir. 2002). The company agreed to cooperate and turn over the privileged documents only after reaching an agreement with the Justice Department that doing so "does not constitute a waiver of any applicable privilege or claim under the work product doctrine." *Id.* The company ultimately settled the case and paid an \$840 million fine, which represented criminal penalties as well as civil remuneration to the government for overcharges. *See id.* Not surprisingly, after the settlement was announced, private parties sued the company and sought access to the privileged materials that had been voluntarily provided to the government. *See id.* at 292-93. In an opinion affirming the trial court's order to produce the materials, the Sixth Circuit applied a strict waiver rationale and concluded that voluntary production by the company waived both the attorney-client privilege and work product doctrine protection as to the materials produced. *See id.* at 294-307. In applying its waiver analysis the court rejected the company's selective waiver argument, based upon *Diversified Indus. v. Meredith*, that voluntary disclosure to the government pursuant to a confidentiality agreement should not waive the privilege as to third parties. *See Columbia/HCA*, 293 F.3d at 302-04 (citing *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978)). The *Columbia/HCA* case illustrates both the potential adverse consequences of "voluntary" disclosure of otherwise privileged information and the willingness of courts to enforce strict waiver rules in such circumstances. For further discussion of voluntary disclosure in health care cases, see *infra* Part III.F.4. For a recent judicial decision by an influential court holding that providing information to law enforcement agencies pursuant to a confidentiality agreement does not constitute a waiver, see generally *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002) (unpublished opinion).

465. Letter from William H. Taft, IV, Deputy Secretary of Defense, with attachment detailing the Department of Defense Voluntary Disclosure Program (dated July 24, 1986) reprinted in *Voluntary Disclosure: 1994 Update*, Report by the Special Committee on Voluntary Disclosure, American Bar Association Section of Public Contract Law (August 1994) [hereinafter Taft Letter]; see also Department of Defense Federal Acquisition Regulation Supplement; Implementation of Recommendations Made by the President's Blue Ribbon Commission on Defense

required “[f]ull cooperation with any Government agencies responsible for either investigation or corrective actions.”⁴⁶⁶ The DOD took the position that “early voluntary disclosure, coupled with full cooperation and complete access to necessary records are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability.”⁴⁶⁷

Compliance with the DOD voluntary disclosure program presents privilege issues, particularly if the company involved has relied on attorneys to investigate the potential wrongdoing that is the subject of the voluntary disclosure.⁴⁶⁸ Voluntary disclosure and cooperation under the DOD program may constitute a waiver if materials provided to the government are subject to the attorney-client privilege or the work product doctrine.⁴⁶⁹ The DOD has made an effort to address this problem with language in its standard voluntary disclosure agreement, known as the “XYZ Agreement.”⁴⁷⁰ The XYZ Agreement provides that:

The Government will not contend that the Company’s production of the report and its underlying documents, or the furnishing of additional information relating to this disclosure will constitute a waiver of the attorney-client and work-product privileges as may be applicable.⁴⁷¹

Although this language may address the waiver issue with respect to the government, it does not ensure that third parties will not be able to assert that a waiver has occurred and thereby obtain the privileged materials.⁴⁷² Moreover, disclosure of particular privileged material may constitute a “subject matter” waiver of the attorney-client privilege that applies to

Management, 52 Fed. Reg. 34386 (Sept. 11, 1987) (stating that internal controls are means to ensure companies conduct themselves with high degrees of integrity and honesty). The new regulations were published in the Federal Acquisition Regulations System at 48 C.F.R. §§ 203.7000, 209.406-1, 252.203-7003 (1987). See also Porter, *supra* note 450, at 1020 (describing implementation of program); Walsh & Pyrich, *supra* note 318, at 657-58 (describing program).

466. 48 C.F.R. § 203.7000(g).

467. Taft Letter, *supra* note 465; see also Walsh & Pyrich, *supra* note 318, at 657 (citing Taft Letter).

468. See generally Special Committee on Voluntary Disclosure, American Bar Association Section of Public Contract Law, *Voluntary Disclosure: 1994 Update* (August 1994) [hereinafter 1994 ABA Report] (discussing DOD voluntary disclosure program).

469. See Porter, *supra* note 450, at 1029-32 (discussing waiver and analyzing application of “limited waiver doctrine” to such disclosures).

470. Form of Agreement Between XYZ Company and Inspector General, Department of Defense [hereinafter XYZ Agreement], reprinted in 1994 ABA Report, *supra* note 468, at Tab 7, App. C.; see also Porter, *supra* note 450, at 1020-21 (noting that government contractors have strong incentive to participate in program because felony conviction can result in debarment for up to three years).

471. XYZ Agreement, *supra* note 470, ¶6.

472. See 1994 ABA Report, *supra* note 468, at III-1 (discussing XYZ Agreement waiver provision and noting that “[i]n collateral litigation, however, a third party

undisclosed privileged communications related to the same subject matter as the disclosed material.⁴⁷³ A subject matter waiver is somewhat less likely to be found if the voluntarily disclosed material is work product, such as attorney interview notes, rather than attorney-client privileged communications. Nevertheless, the case law is unsettled and there can be no assurance that a court will not conclude that a subject matter waiver has occurred.⁴⁷⁴

The XYZ Agreement provides some relief from the potential waiver problem by not generally requiring that voluntary disclosure reports contain copies of counsel's notes or summaries of interviews.⁴⁷⁵ The XYZ Agreement does provide, however, that the DOD may seek such materials after reviewing a company's voluntary disclosure report, "if it believes that it is necessary [to] obtain further details beyond that provided in the report."⁴⁷⁶ A report by the American Bar Association Section of Public Contract Law has noted that "the Government should not seek such materials simply as a means to avoid conducting its own interviews" and "even where the contractor provides such materials, the Government should expect that they will include factual information only and not counsel's impressions."⁴⁷⁷ This ABA position is consistent both with the Supreme Court's analysis in *Upjohn*,⁴⁷⁸ and the position taken in this Article that law enforcement authorities administering voluntary disclosure and cooperation policies should not require waiver of privileges as a condition of obtaining credit under those programs so long as all relevant underlying factual information is provided to the authorities.⁴⁷⁹

By including language in its cooperation agreement stating that it does not regard submission of information as a waiver of privilege, and by not generally requiring that voluntary disclosure reports contain copies of counsel's notes or summaries of interviews, the DOD voluntary disclosure policy has sought to address the privilege waiver problem. The DOD approach is generally consistent with that of the SEC's cooperation policy, discussed in Part III.E above, in that both recognize, more or less explicitly, that waiver of privileges is not a necessary condition of cooperation. As noted above, these two federal agencies have the longest and most successful experiences with voluntary disclosure and cooperation policies, so other agencies should look to the SEC and DOD policies as models. Un-

may claim that disclosure to the Government constituted a waiver of any privileges that otherwise would have applied").

473. *Id.* at III-7 & n.11 (collecting cases on subject matter waiver).

474. *See id.* at III-8, 15 (same).

475. *See id.* at II-28 (discussing scope of agreement).

476. XYZ Agreement, *supra* note 470, ¶ A.5.b.

477. 1994 ABA Report, *supra* note 468, at II-29.

478. For a further discussion of the *Upjohn* decision, see *supra* Part II.B.1.a.

479. For a further discussion of this Article's position on the administration of voluntary disclosure and cooperation policies by law enforcement authorities, see *infra* Part IV.B.3. For an analysis of the SEC's cooperation policy noting that waiver of privileges is not required by the SEC's policy, see *supra* Part III.E.

fortunately, the voluntary disclosure programs at other agencies do not address the compelled waiver problem as effectively as the SEC and the DOD have done. Those programs are discussed below.

3. *The Environmental Protection Agency Voluntary Disclosure Program*

In 1985 the Environmental Protection Agency published an Interim Policy Statement on environmental auditing which provided that in evaluating enforcement responses to violations, the agency would “take into account, on a case-by-case basis,” compliance efforts and remedial actions.⁴⁸⁰ The Policy Statement emphasized that consideration of leniency “applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.”⁴⁸¹ A Final Policy Statement, published by the EPA in July 1986, contained the same provisions.⁴⁸²

In July 1994, the EPA announced that the agency would reevaluate its policy regarding environmental auditing and self-policing.⁴⁸³ After eighteen months of evaluation, the EPA produced a new policy statement on voluntary disclosure entitled “Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations” that took effect in January 1996.⁴⁸⁴ The new policy statement set out specific conditions that must be met for a company to be eligible for reduced civil based penalties and to avoid a recommendation of criminal prosecution.⁴⁸⁵ For purposes

480. Environmental Auditing Policy Statement: Interim Guidance, 50 Fed. Reg. 46,504 (Nov. 8, 1985).

481. *Id.* Although the Policy Statement provided that EPA would give favorable consideration, on a case-by-case basis, to voluntary compliance, remediation, and self-reporting, it also stated that “EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental practice. Indeed, a creditable enforcement program provides a strong incentive for regulated entities to audit.” *Id.*

482. *See* Environmental Auditing Policy Statement: Final Statement, 51 Fed. Reg. 25,004 (July 9, 1986).

483. *See generally* Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455 (July 28, 1994) (clarifying EPA’s current policies on and approach to auditing).

484. 60 Fed. Reg. 66,706 (Dec. 22, 1995) (effective Jan. 22, 1996) [hereinafter Final Policy Statement]. For a general description of the EPA program, see Geisler, *supra* note 452, at 378. A number of states have followed the EPA’s lead and enacted their own voluntary disclosure programs. *See generally* Andrew M. Reidy, et al., *Strategies Choosing Between EPA’s and a State’s Voluntary Disclosure Plan: Maybe Not a Hobson’s Choice; Business Interruption Coverage: Issues to Consider When Disaster Strikes*, BUS. CRIMES L. REP., Oct. 2001, at 1 (discussing voluntary disclosure programs at state level).

485. *See* Final Policy Statement, *supra* note 484, at Parts I.D.3 and II.D (setting forth nine conditions that company must meet to evade criminal action by EPA); *see also* Geisler, *supra* note 452, at 378 (“The EPA will not recommend criminal prosecution of the disclosing entity if all the conditions are satisfied and ‘so long as the violation does not demonstrate or involve: (i) a prevalent management philosophy or practice that concealed or condoned the environmental violations; (ii)

of this Article, the most important of those conditions is section D(9), entitled "Cooperation," requiring that:

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.⁴⁸⁶

Neither the "Explanation of Policy" section nor the "Statement of Policy: Incentives for Self-Policing" section of the 1996 EPA Policy Statement addressed assertion or waiver of attorney-client privilege and work product doctrine protections. Concerns about the degree of cooperation required and waiver of privileges apparently contributed to a reluctance on the part of potentially eligible companies to participate in the program.⁴⁸⁷

In April 2000, the EPA issued a revised final policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations."⁴⁸⁸ The revision maintained the basic structure and terms of the policy that took effect in 1996 "while clarifying some of [the policy] language, broadening its availability, and conforming the provisions of the Policy to actual Agency practice."⁴⁸⁹ The revised policy statement's section on cooperation omits the requirements pertaining to providing documents and access to employees, requiring only that: "The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this Policy."⁴⁹⁰ The Explanation of Policy section of the Final Policy Statement, however, clarifies that the agency may require disclosure of more information when potential criminal violations are voluntarily disclosed, including at a minimum:

high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.") (citing Final Policy Statement, *supra* note 484, at 66,711).

486. Final Policy Statement, *supra* note 484, at 66,712.

487. See Jacqueline C. Wolff, *How to Protect Your Client Under The EPA's Voluntary Disclosure Policy*, BUS. CRIMES BULL., Dec. 1998, at 2 ("Since [adoption of the 1996 policy], 325 companies have disclosed violations under the Policy and 137 received penalty waivers (or substantial mitigation). This is a small fraction of the millions of potentially eligible companies that fall under the EPA's complex regulatory scheme. Why have so few companies availed themselves of this seemingly beneficial Policy? The problem may be in the nature of the 'cooperation' required.").

488. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

489. *Id.*

490. *Id.* at 19,628.

access to all requested documents; access to all employees of the disclosing entity; assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations; access to all information relevant to the violations disclosed, including that portion of the environmental audit report or documentation from the compliance management system that revealed the violation; and access to the individuals who conducted the audit or review.⁴⁹¹

Unfortunately, like the 1996 Policy Statement, the new EPA Policy Statement does not provide sufficient guidance as to the EPA's position on waiver of attorney-client privilege or work product doctrine protection,⁴⁹² and does not contain provisions like those in the DOD voluntary disclosure program and the SEC cooperation policy, described above, that to some degree protect against unnecessary coercion of privilege waivers.

4. *The Department of Health and Human Services Provider Self-Disclosure Protocol*

In 1998, the Office of Inspector General of the Department of Health and Human Services (OIG) implemented a new voluntary disclosure program called the "Provider Self-Disclosure Protocol."⁴⁹³ The 1998 Protocol evolved from an "Operation Restore Trust" pilot program developed by the Department of Health and Human Services (HHS) and the Department of Justice to encourage voluntary disclosures of fraud by health care providers.⁴⁹⁴ The 1998 Protocol was developed to provide guidance to health care providers on what HHS considers to be the appropriate elements of an effective investigative and audit plan to address potential violations of law.⁴⁹⁵ Participation in the program is entirely voluntary, and precise compliance with the Protocol is not mandatory, but HHS cautions

491. *Id.* at 19,623.

492. The Explanation of Policy section of the Final Policy Statement does contain a strong statement in opposition to the audit privilege and immunity laws that exist in some states, taking the position that those laws "are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards." *Id.* Although that portion of the Explanation of Policy contains some anti-privilege statements, it appears that those statements are directed at state laws creating audit privileges and immunities and not at assertions of attorney-client privilege or work product doctrine protection. *See id.* at 19,623-24.

493. Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (Oct. 30, 1998).

494. *See id.* at 58,400 (describing origin of protocol); *see also* Gerson & Gladioux, *supra* note 6, at 195-96 (describing operation of 1998 Protocol); Lewis Morris & Gary W. Thompson, *Reflections on the Government's Stick and Carrot Approach to Fighting Health Care Fraud*, 51 ALA. L. REV. 319, 357-59 (1999) (describing development of HHS Provider Self-Disclosure Protocol).

495. *See* Provider Self-Disclosure Protocol, 63 Fed. Reg. at 58,400 (noting intentions of OIG and HHS in enacting protocol).

that failure to conform to each element of the Protocol “will likely delay resolution.”⁴⁹⁶

The Protocol sets out a detailed procedure for health care providers to follow in conducting an internal investigation of a potential violation of federal criminal, civil or administrative law and voluntarily reporting the results of the internal investigation to HHS.⁴⁹⁷ For purposes of this Article, the most important element of the Protocol is its provision on verification by HHS Office of Inspector General. The “OIG’s Verification” provision of the Protocol states that the extent of verification will depend on the “quality and thoroughness of the internal investigative and self-assessment reports” that are submitted by providers pursuant to the Protocol.⁴⁹⁸ The Protocol then addresses assertion of privileges in connection with the voluntary disclosure of the results of a provider’s internal investigation:

To facilitate the OIG’s verification and validation processes, the OIG must have access to all audit work papers and other supporting documents without the assertion of privileges or limitations on the information produced. In the normal course of verification, the OIG will not request production of written communications subject to the attorney-client privilege. There may be documents or other materials, however, that may be covered by the work product doctrine, but which the OIG believes are critical to resolving the disclosure. The OIG is prepared to discuss with provider’s counsel ways to gain access to the underlying information without the need to waive the protections provided by an appropriately asserted claim of privilege.⁴⁹⁹

This provision of the Protocol recognizes the potential privilege waiver problem and addresses it in a general way, but it provides no assurance that the production of privileged material will not be required by the HHS in order for the health care provider to obtain the liability mitigation benefits of voluntary disclosure. Moreover, once the initial step of voluntary disclosure is taken, it is unlikely that a provider will refuse to provide re-

496. *Id.*

497. *See id.* An important exception to the application of the Protocol is an ongoing fraud. The Protocol states that providers who discover “an ongoing fraud scheme” should immediately contact the HHS Office of Inspector General, but should not follow the internal investigation procedures set out in the Protocol because doing so creates a “substantial risk that that the Government’s subsequent investigation will be compromised.” *Id.* Thus, it appears that the internal investigation procedures in the Protocol are only intended to apply to past, completed violations of law, and any ongoing violations should be reported to HHS for investigation by the agency.

498. *Id.* at 58,403.

499. *Id.*

quested material and in doing so risk much harsher government enforcement action.⁵⁰⁰

Practitioners have recognized that the HHS Provider Self-Disclosure Protocol, like the other voluntary disclosure programs discussed in this Part, puts substantial pressure on participants to waive privileges and, in so doing, undermines the continued viability of the privilege in our legal system.⁵⁰¹ Practitioners also realize that a waiver in the context of the HHS Protocol is likely to constitute a waiver with respect to other government agencies in collateral investigations.⁵⁰² As was the case with the EPA voluntary disclosure program discussed above, it appears that concerns about privilege waivers and exposure to liability in collateral lawsuits prompted by voluntary disclosure may have discouraged participation by health care providers in the HHS program.⁵⁰³

For purposes of this Article, however, the important point is not the success of the HHS program as a means to curtail health care fraud. Rather, the important point is that (as presently structured) the effect of the program is to coerce waivers of privilege by health care providers who choose to participate in the program. In so doing the HHS program, like

500. Two practitioners have described the impact on health care lawyers of these developments in particularly dramatic terms, as follows:

they sail between the Scylla of zealous federal law enforcement agents and prosecutors who *attack* privilege under the guise of the so-called 'crime-fraud' exception and the Charybdis of besieged clients who readily *wave* privilege in an attempt to show that they acted pursuant to the advice of counsel and not with any intent to violate the law or to minimize financial and prosecutorial risk by participating in government voluntary disclosure programs.

Gerson & Gladieux, *supra* note 6, at 164-65 (emphasis in original).

501. *See id.* at 195-96 (observing that "real interest" of potential self-discloser in HHS program "is that any potential liabilities will be mitigated and be reflected in a potential settlement agreement between the provider and OIG," and that as consequence attorney providing health care transactional advice or conducting internal investigation cannot assume client confidentiality will be maintained, in part because government may force disclosure, but also because of "even greater likelihood that the client itself will make a voluntary disclosure"). Gerson and Gladieux conclude that the health care attorney "must come to realize that the traditional expectations of near absolute confidentiality of attorney advice and communications no longer are assured." *Id.* at 204.

502. See Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization*, 51 ALA. L. REV. 205, 226 (1999) ("Regardless of the decision on the duty to disclose, the organization does have a duty to discontinue any conduct that violates the law. If the organization does not discontinue the activities revealed as a result of the investigation, that inaction itself becomes fraud."). For a recent example of a health care fraud case in which disclosure of privileged materials to the Department of Justice pursuant to a confidentiality agreement was held to constitute a waiver of privilege that permitted private plaintiffs to obtain the privileged materials, see generally *In re Columbia Healthcare/ HCA Healthcare Corp. Billing Practice Litig.*, 293 F.3d 289 (6th Cir. 2002), discussed in more detail, *supra* note 464 and accompanying text.

503. *See* Morris & Thompson, *supra* note 494, at 360-61 (describing concerns about collateral litigation).

the other voluntary disclosure programs discussed in this Part, has contributed to the substantial erosion of the privilege that has occurred over the past two decades.

G. Internal Revenue Service Form 8300 Reporting Requirements

One final federal law enforcement initiative that has adversely affected the attorney-client privilege should be noted briefly. For almost twenty years now, federal law has required persons who are “engaged in a trade or business” and in the course of that trade or business “receive more than \$10,000 in cash in [a single] transaction, (or two or more related transactions),” to report their cash receipts to the Internal Revenue Service.⁵⁰⁴ The relevant statute and the Internal Revenue Service form for reporting cash transactions—Form 8300—requires the filer to provide identifying information about the person from whom the cash was received.⁵⁰⁵ Sanctions for failure to comply with the reporting requirements include both civil and criminal penalties.⁵⁰⁶

Congress did not exempt attorneys from the coverage of the cash transaction reporting law, and the Internal Revenue Service refused to exempt attorneys by regulation, so the Form 8300 reporting requirement applies to attorneys in the same manner as other trades and businesses.⁵⁰⁷

504. 26 U.S.C. § 6050I(a) (2002). For a detailed analysis of the history, enactment and application of section 6050I and the Internal Revenue Service form used to report cash transactions, see generally Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485 (1992). Another federal statute, enacted in 2001, imposes a similar reporting requirement for coin and currency receipts of more than \$10,000 received by a non-financial trade or business. See 31 U.S.C. § 5331 (2002).

505. See 26 U.S.C. § 6050I(b) (listing requirements necessary to file form); see also Internal Revenue Service Form 8300 [hereinafter Form 8300], available at http://www.irs.gov/forms_pubs/forms.html (last visited Jan. 8, 2003) (providing manner for reporting executed cash transactions). The current version of Form 8300 requires that the filer provide the name, address, taxpayer identification number, and occupation, profession, or business of the individual from whom the cash was received. See *id.*, at items 2-13. The form also requires the filer to verify the identity of the person from whom cash was received by “examination of a document normally accepted as a means of identification when cashing checks.” *Id.* at item 14 and Instructions.

506. See 26 U.S.C. §§ 6050I, 7203 (2002) (providing that “a willful violation of any provision of section 6050I” is felony punishable by imprisonment for up to five years).

507. In fact, as Professor Podgor has noted, the original implementing regulations for section 6050I even used attorneys as the recipient of funds in the examples of how the statutory provision was to operate. See Podgor, *supra* note 504, at 487 n.10; see also Harrington & Lustig, *supra* note 6, at 634-35 (noting that “[r]ather than promulgating an attorney-client exception, however, the IRS flatly rejected any idea that lawyers should be treated differently than others subject to section 6050I”) (citation omitted). Subsequent efforts to amend the law to exempt attorneys also have been unsuccessful. See Podgor, *supra* note 504, at 492 & n.45 (discussing American Bar Association’s adoption of formal resolution opposing application of section 6050I to attorneys); cf. Katrina R. Abendano, *The Role of Lawyers in the Fight Against Money Laundering: Is a Reporting Requirement Appropriate?*, 27 J.

Attorneys have challenged the application of the reporting requirement to members of the legal profession on a variety of legal grounds, including the attorney-client privilege and state rules of professional responsibility requiring attorneys to maintain the confidences and secrets of clients, but the courts have declined to strike down the reporting requirement's application to attorneys.⁵⁰⁸ Of particular concern to those who oppose application of the reporting requirement to attorneys is federal law enforcement authorities' use of Form 8300 reports to investigate criminal activity other than tax law violations based upon unreported income, which was the original purpose of the reporting requirement.⁵⁰⁹

Commentators have argued that requiring attorneys to file Form 8300 reports about their clients is inconsistent with the practice of law as a pro-

LEGIS. 463, 465-66 (2001) (describing continuing applicability of Form 8300 to lawyers).

508. See Aurelle S. Locke & Patricia Nodoushani, *Can Attorneys Ever Escape Section 60501's Cash Reporting Requirements?*, 85 J. TAX'N 361, 364-66 (1996) (collecting section 60501 cases); see also Ronald K. Vaske, *Uncertain Attorney-Client Privilege Provides No Assurance: The IRS Form 8300 Dilemma in United States v. Sindel*, 29 CREIGHTON L. REV. 1323, 1357-60 (1996) (analyzing Eighth Circuit case holding, after *in camera* review, that attorney-client privilege may apply to Form 8300 reporting by attorney if providing information would reveal subject matter of confidential communication).

509. See Harrington & Lustig, *supra* note 6, at 637 (noting that section 60501 is used as monitoring mechanism for drug control enforcement); Podgor, *supra* note 504, at 494-500 (describing four sections of Form 8300 and its questions concerning "suspicious activities"). Professor Podgor points out that section 60501 is not a "money laundering" statute because money laundering is "a process of changing illegal funds into legitimate money." Podgor, *supra* note 504, at 487 n.12; cf. Harrington & Lustig, *supra* note 6, at 674-75 (comparing section 60501 to federal money laundering statute). Section 60501, in contrast, applies to all cash transactions, regardless of the legitimacy by which the cash was obtained (and requires attorneys and others to report the receipt of the cash in excess of the statutory amount, without regard to the source of the funds). Another federal statute more directly targets money laundering. See 18 U.S.C. § 1957 (2002). For a discussion of the money laundering statute and the issues it presents with respect to criminal defense lawyers, see generally Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYRACUSE L. REV. 1165 (1992); Paul G. Wolfteich, *Making Criminal Defense a Crime Under 18 U.S.C. Section 1957*, 41 VAND. L. REV. 843 (1988). Because the money laundering law prohibits transactions involving the proceeds of criminal activities, it arguably represents less of an intrusion into the attorney-client relationship than the cash transaction reporting requirement, which applies to all transactions in excess of the statutory amount whether or not the funds were derived from criminal activity. The money laundering statute also contains a "safe harbor" for "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." 18 U.S.C. § 1957(f)(1). Despite these limitations, however, the money laundering statute is perceived as a serious threat to the attorney-client privilege by defense counsel, particularly since the Justice Department has used the statute to prosecute a lawyer for a fee transaction with a client. See Daniel E. Rovella, *Going From Bad to Worse: Defense Bar Fears Jail Over Tainted Fees*, NAT'L J., Mar. 11, 2002, at A1 (reporting that "[e]fforts . . . to make lawyers 'gatekeepers' of the financial system may further impede the ability of criminal defense lawyers to properly represent their clients").

fession,⁵¹⁰ has a detrimental effect on attorney-client relations⁵¹¹ and is misguided as a tax policy because a law that was “designed to capture a part of the underground economy has become a tool in the war against a wide variety of crimes.” Despite these criticisms, Congress has declined to exclude attorneys from the reporting requirement and attorneys appear to have accepted, or become resigned to, the application of the reporting requirement. The significance of the Form 8300 controversy for purposes of this Article is that it represents yet another chink in the armor of the attorney-client privilege inflicted by federal law enforcement authorities willing to subjugate the privilege to their agencies’ law enforcement goals.⁵¹² Even accepting the premise that a valid issue exists as to whether the objectives of the cash reporting requirement (whether the original objective of capturing unreported income for tax enforcement purposes or the subsequent objective of using the reports to ferret out other criminal activity) might have been frustrated by an attorney exemption, it would seem that the government could have given the benefit of the doubt to the privilege and later amended the form to apply to lawyers if the cost of protecting the privilege proved too high. In failing to do so there can be no doubt that federal law enforcement took yet another step to undermine and erode the privilege. The long-term results of that step are difficult to predict, but at least two potential adverse effects are identifiable. The first, discussed at numerous points in this Article, is that the cumulative effect of the many injuries inflicted upon the privilege ultimately may prove fatal.⁵¹³ A second, more immediate, concern is the “camel’s nose in the tent” effect—that, as often is the case, the initial invasion into the pro-

510. See Podgor, *supra* note 504, at 492 (noting sacrosanct nature of attorney-client relationship).

511. See Harrington & Lustig, *supra* note 6, at 634 n.48 & n.49 (explaining section 60501’s effects on attorneys). Professors Harrington and Lustig conclude, however, that notwithstanding the detrimental effect of section 60501 on the attorney-client relationship, there is no justification in the case law for permitting attorneys to refuse to comply with the reporting requirements, and therefore the only available remedy is for Congress to amend the statute to provide an exclusion for attorneys. See *id.* at 626 (arguing that Congress should amend section 60501 because it is inconsistent with its initially intended policy). To date, Congress has not seen fit to do so.

512. Although at first blush it might appear that Congress, rather than federal law enforcement agencies, is responsible for the impact of section 60501 and Form 8300 on the legal profession, the agencies could have exempted attorneys from coverage under the form. See 26 U.S.C. § 60501(b)(1) (2002) (granting authority to Secretary of Treasury to prescribe form for required report); see also Harrington & Lustig, *supra* note 6, at 634-35 (describing IRS’s adoption of regulations under section 60501 and noting that IRS “initially contemplated the possibility that the attorney-client privilege might prevent attorneys from making the required disclosures” but later “flatly reject[ing] any idea that lawyers should be treated differently”) (citations omitted).

513. Other commentators have recognized this “collective impact” threat with respect to federal money laundering laws. Professors Gaetke and Welling analyzed how money laundering laws apply to criminal defense lawyers and concluded that “there is a legitimate, if undocumented, concern about their practical impact on

tected sphere of the privilege will be followed with additional encroachments and the eventual harm to the privilege will be much greater than even the most vocal critics initially anticipated.⁵¹⁴

IV. CONCLUSION

A. *The Risks of an Eroded Attorney-Client Privilege*

The discussion above of federal law enforcement policies and practices over the past two decades demonstrates that the protections provided by the attorney-client privilege and the work product doctrine have been significantly diminished in recent years. Commentators have recognized this trend toward diminished privilege protections,⁵¹⁵ and have analyzed its impact on particular areas of law.⁵¹⁶ This Article has examined the areas in which the privilege has been under attack at the federal level, with the objective of highlighting the cumulative effect of these attacks. While it is not possible to quantify, or even to measure with precision, this cumulative effect, the extent of the erosion of privilege protections and the level of concern about that erosion suggest that the system may be nearing a

our criminal justice system." Gaetke & Welling, *supra* note 509, at 1167. They identified significant concerns regarding attorney-client communications:

It is likely that the laws and the publicity surrounding them cause clients to be more circumspect in the information they disclose to their lawyers, which may lead to defense lawyers being less informed. Defense lawyers' fear of the laws may hamper them from giving lawful advice to clients or otherwise reduce their zeal.

Id. at 1243. They also identified overall systemic concerns: "At the personal level, the laws may be reducing the quality of the representation received by some defendants charged with serious crimes. More importantly, at the systemic level the laws may tip the present balance of the adversary process significantly in favor of the prosecution." *Id.* This Article shares those concerns, but also seeks to demonstrate that the overall cumulative effect of federal law enforcement authorities' many attacks on the attorney-client privilege raises similar concerns with respect to our entire—civil and criminal—justice system.

514. There is some evidence that this may be the case with attorney Form 8300 reports. The Justice Department reportedly is considering requiring attorneys (and accountants, which of course does not raise the attorney-client privilege issue) to file "suspicious activity reports" or "SARs" if they know of or suspect a money laundering violation or other financial crime. See R. Christian Bruce, *Justice Eyeing Attorneys, Accountants for New Anti-Money Laundering Duties*, 34 SEC. REG. & L. REP. (BNA) 175, 175-76 (Feb. 4, 2002) (discussing Justice Department "efforts to craft a new response to money laundering that could require attorneys and accountants to file reports of suspicious client activity . . ."). Financial institutions already are required to file such reports, see 31 U.S.C. § 5318(g) (2002), but it is difficult to imagine how those requirements could be imposed upon attorneys without significant intrusion into the attorney-client relationship and accompanying invasion of the attorney-client privilege. The fact that such reporting by attorneys even is being seriously considered is a consequence, at least in part, of the precedent established by the Form 8300 reporting requirement.

515. For a list of articles discussing the trend toward diminished privilege protections, see *supra* note 6.

516. For a further discussion of the impact of this trend on particular areas of law, see *supra* note 7.

turning point—a point at which the continued viability of the privilege is at risk.

Most commentators, and certainly most practicing lawyers, agree that the attorney-client privilege is an integral element of our legal system.⁵¹⁷ In 1978 Professor Geoffrey C. Hazard, Jr. offered a compelling articulation of the modern rationale for the attorney-client privilege:

The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as an advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.⁵¹⁸

A review of the Supreme Court's attorney-client privilege cases over the past two decades demonstrates that Professor Hazard's assessment of the importance of the privilege remains valid today.⁵¹⁹ A review of federal law enforcement actions over the past two decades, however, demonstrates that the privilege is increasingly under attack and at risk.⁵²⁰ If one agrees that the attorney-client privilege and, perhaps to a lesser extent, the attorney work product doctrine are central to our adversarial system of justice

517. An American Bar Association publication described the importance of the attorney-client privilege and the work product doctrine, and the concerns of practicing lawyers regarding loss of the protections provided by those doctrines, as follows:

Lawyers fret that the protections of the attorney-client privilege and the work-product protection are being eroded. That concern is hardly surprising. Of all the evidentiary and discovery rules, these two go to the heart of both the attorney's relationship with a client and with [sic] the attorney's jealously guarded right to develop litigation strategies without fear of compelled disclosure to an adversary.

EPSTEIN, *supra* note 23, at 700.

518. Hazard, *supra* note 12, at 1061. At about the same time, Professor Saltzburg aptly described the consequences of unchecked erosion of the attorney-client relationship:

To imagine what the relationship between an attorney and her client would be like if no privilege existed, suppose an attorney began a relationship with a client by giving her the equivalent of *Miranda* warnings. An attorney would tell the client that anything the client says could be used against her and that the lawyer might have to testify about the statement. This obviously seems to be a counter-productive beginning to a relationship in which one person renders personal help to another.

Saltzburg, *supra* note 9, at 606-07.

519. For a further discussion of recent Supreme Court decisions affirming the importance of the attorney-client privilege and work product doctrine, see *supra* Part II.B.

520. For a further discussion of recent attacks on the privilege by federal law enforcement officials, see *supra* Part III.

and therefore worth preserving, then the recent developments that are discussed in this Article beg the question of what should be done to stop unnecessary attacks on the privilege and prevent further erosion of the protections that the privilege provides. Some suggested changes in the policies and practices of federal law enforcement officials are described below.

B. *Suggested Refinements to Federal Law Enforcement Policies and Practices Relating to the Attorney-Client Privilege*

It is unrealistic and unreasonable to assume that law enforcement officials will simply stop challenging assertions of privilege by the subjects of investigations and prosecutions, and this Article does not take the position that those officials should do so. It is realistic and reasonable, however, to argue that law enforcement officials should consider the cumulative effect on the justice system of their efforts to overcome assertions of privilege, and should not simply attack the privilege at every opportunity if doing so is likely to have an adverse long-term effect on our legal system. When considered together, the attacks on privilege described in Part III above and the criticisms that those attacks have provoked suggest three possible refinements to the approach to privilege issues that federal law enforcement authorities have demonstrated over the past two decades. These refinements are subtle, but if consistently employed by law enforcement officials they should go quite far toward curtailing further erosion of the privilege.

1. *Refinement One: Rely Upon Existing Legal Doctrines, Rather Than Seeking to Create New Exceptions to the Privilege*

As discussed in Part II.C above, a number of existing legal doctrines are available to protect the interests of law enforcement in instances where the privilege is abused or its assertion is unwarranted. These checks on the privilege are already in place in our legal system and are adequate to ensure that information is not wrongfully withheld from law enforcement authorities. If a client is misusing legal advice, the crime-fraud exception is available to overcome assertions of the privilege. The *in camera* review procedure and “reasonable belief” standard that the Supreme Court mandated in *Zolin* gives law enforcement authorities the ability to establish that the crime-fraud exception is applicable without having to overcome unduly burdensome procedural requirements.⁵²¹ The limitations that have evolved under the law of waiver⁵²² and the “common interest” doctrine⁵²³ also are available to prevent unwarranted assertions of privilege. Finally,

521. For a further discussion of the crime-fraud exception, see *supra* Part II.C.1.

522. For a further discussion of the law of waiver, see *supra* Part II.C.2.

523. For a further discussion of the common interest doctrine, see *supra* Part II.C.3.

the work product doctrine features a built-in protection against unwarranted withholding of information through the “substantial need and undue hardship” exception.⁵²⁴ In most cases these exceptions and limitations on confidentiality protections should be adequate to ensure that information is not wrongfully or unfairly withheld from law enforcement officials.

If one of the established exceptions and limitations has not been applicable in a particular case, however, some federal law enforcement officials have demonstrated a disturbing enthusiasm for advocating that the courts create new exceptions to the privilege in order to further law enforcement interests in that particular case. This Article takes the position that elevating the interests of law enforcement in a particular case over the important systemic interests that are served by the privilege is inappropriate and, in the most egregious cases, an abuse of government power. Two examples that are discussed in greater detail above illustrate this troubling trend. The unsuccessful effort of Independent Counsel Kenneth Starr’s office to create a “posthumous exception” to the privilege in the Foster notes case is an example of prosecutorial overreaching in an effort to overcome a valid assertion of privilege, as demonstrated by the Supreme Court’s emphatic rejection of Starr’s arguments and the Court’s strong affirmation of the importance of the privilege in our legal system.⁵²⁵ A second example, in which law enforcement officials succeeded in overcoming an assertion of privilege—and by doing so created new uncertainty about the application of the privilege to an important area of legal practice—is the Marc Rich pardon case.⁵²⁶ Although the prosecutors in the Rich case convinced a federal judge that the privilege should not apply to activities the prosecutors characterized as “lobbying” rather than “lawyering,” they apparently gained nothing of value to their investigation and in the process further weakened the confidentiality protections provided by the attorney-client privilege.

Reasonable minds can differ about the merits of the legal arguments presented to overcome the privilege in these two cases, and fair-minded commentators can debate the propriety of the prosecutors’ decisions to advocate new exceptions to the privilege, but there can be no doubt that the cumulative effect of advocating new exceptions in such cases will be a weakened privilege. At a minimum, responsible law enforcement officials should advocate a new exception to the privilege only when a new exception is consistent with the policies underlying the privilege and will benefit, rather than harm, the justice system as a whole. Advocating an

524. For a further discussion of the “substantial need and undue hardship” exception to the work product doctrine, see *supra* Part II.C.4.

525. For a further discussion of recent privilege issues decided by the Court, see *supra* Part II.B.1. For a further discussion of the OIC’s attack on the attorney-client privilege while investigating President Clinton, see *supra* Part III.A.3.

526. For a further discussion of the Marc Rich pardon investigation, see *supra* Part III.B.

exception to the privilege simply to gain either information or a tactical advantage in a particular case is inconsistent with the responsibility of law enforcement officials to seek justice rather than simply trying to “win” cases. Applying this standard, it will be a rare and unusual case in which advocating a new exception to the privilege will be an appropriate course of action for a responsible law enforcement official.

2. *Refinement Two: Rely Upon Judicial Review, Rather Than Seeking to Avoid Judicial Scrutiny*

Analysis of the attacks on privilege that are described in Part III above and the criticisms that those attacks have provoked suggests another potential refinement to the approach to privilege issues that should be employed by responsible law enforcement officials. The law enforcement policies and practices that have generated the most forceful and widespread criticism are those that have sought to avoid judicial review. The Justice Department’s new prison inmate attorney-client eavesdropping policy,⁵²⁷ its practice of increased use of attorney subpoenas in criminal investigations,⁵²⁸ and its policy on contacts with represented persons⁵²⁹ all sought to avoid a requirement of prior judicial approval before engaging in the controversial practices at issue. In all three instances the Department’s efforts to avoid judicial review generated substantial criticism and contributed to widespread concerns and misgivings about the Department’s policies. This experience suggests that the Department’s efforts to rely on self-regulation alone, with no procedure for prior judicial review, to oversee and control practices that are perceived to threaten the attorney-client relationship has been misguided. The better approach, and the one advocated by this Article, is for responsible law enforcement officials to embrace judicial review procedures and utilize them whenever there is a need to challenge attorney-client privilege.

3. *Refinement Three: Rely Upon Cooperation and Voluntary Disclosure Programs That Are Based Upon Factual Disclosure, Rather Than Waiver of Privileges*

A final refinement suggested by the recent attacks on the privilege by federal law enforcement officials arises out of an analysis of the differing ways federal agencies have developed and administered voluntary disclosure and cooperation policies. This point is best illustrated by a comparison of two relatively recent policy statements in this area—the Justice

527. For a further discussion of the new prison inmate attorney-client eavesdropping policy, see *supra* Part III.D.1.

528. For a further discussion of attorney subpoenas in criminal investigations, see *supra* Part III.D.2.

529. For a further discussion of the Department of Justice’s policy on contacts with represented persons, see *supra* Part III.D.3.

Department's policy on prosecuting corporations⁵³⁰ and the SEC's policy statement on cooperation in enforcement cases.⁵³¹ The critical difference between the approaches the two agencies have taken is that the SEC policy recognizes that a waiver of privilege, as such, need not and should not be the goal of law enforcement. Rather, the goal should be obtaining relevant underlying factual information. The Justice Department policy, in contrast, treats waiver of privileges as a condition of obtaining credit for cooperation. Fortunately, this important difference in the two policies presents an opportunity for federal law enforcement authorities to choose the better of two approaches, rather than a situation in which a complete change in existing policy is required.

A requirement that all relevant factual information be disclosed (perhaps including factual attorney work product, but not opinion work product or attorney-client communications) is sufficient to meet the needs of law enforcement authorities in all cases except those in which there is credible evidence of attorney involvement in wrongdoing. In those cases the law enforcement authorities can overcome the privilege under existing law, through the crime-fraud exception, without coercing waiver in all cases. The SEC's cooperation policy represents a substantial step toward recognition of these important considerations, but the Justice Department's corporate prosecution policy does not adequately address these issues. Moreover, the cooperation and voluntary disclosure policies of other federal agencies, such as the EPA⁵³² and the HHS,⁵³³ also do not adequately address these considerations. The consequence of that failure is voluntary disclosure programs that create excessive and unnecessary pressure to waive the protections of the attorney-client privilege and the work product doctrine. When waivers of privilege are required or coerced, even indirectly, fundamental values in our legal system are unnecessarily undermined. Responsible government officials should not pursue that course of action. Rather, they should clarify—as the SEC to some extent has done—that waiver *per se* is neither a requirement nor an objective of these programs.

For all of these reasons, voluntary disclosure and cooperation policies should require only that relevant factual information be provided to law enforcement authorities. Those authorities have no need for legal analysis of private defense counsel unless the subject of the investigation is seeking to make some improper use of that advice or the law enforcement authorities have reason to believe that the crime-fraud exception applies to the

530. For a further discussion of the Department of Justice's policy on the prosecution of corporations, see *supra* Part III.C.2.

531. For a further discussion of the Security and Exchange Commission's new cooperation policy, see *supra* Part III.E.

532. For a further discussion of the Environmental Protection Agency's voluntary disclosure program, see *supra* Part III.F.3.

533. For a further discussion of the Department of Health and Human Services' provider self-disclosure protocol, see *supra* Part III.F.4.

advice. In either of those cases, current law provides the means for law enforcement authorities to overcome the privilege⁵³⁴ without coercing waivers in all cases through a voluntary disclosure or cooperation policy. Moreover, withholding or revoking the benefits of cooperation if facts are withheld or presented inaccurately should provide sufficient protection against incomplete or misleading disclosures. This more refined and carefully calibrated approach to voluntary disclosure and cooperation policies both furthers law enforcement objectives and protects the policies underlying the attorney-client privilege and the work product doctrine.

C. *Concluding Observations*

In addition to the three specific refinements of law enforcement policies and practices that are discussed above, analysis of federal law enforcement authorities' attacks on the privilege over the past two decades prompts some general observations. First, this is not an area in which the end (law enforcement objectives) always will justify the means (overriding and eroding the protections provided by the attorney-client privilege and the work product doctrine). The values underlying the privilege and the work product doctrine are simply too important to our legal system, as the Supreme Court has consistently recognized over the past twenty years. Second, misguided and overzealous attacks on the privilege are inconsistent with the responsibility of law enforcement officials to support our system of justice. Attacking the privilege to gain information or an advantage in a particular case poses real and substantial risks to the system as a whole and is an inappropriate course of action for federal law enforcement officials to pursue. These risks have been unnecessarily magnified over the past two decades, as shortsighted law enforcement officials have pursued policies that have resulted in significant erosion of the protections provided by the privilege. In sum, responsible law enforcement officials should respect and protect the privilege, rather than attacking it at every opportunity.

As a final observation, there can be no doubt that the attorney-client privilege today is a significantly diminished legal doctrine compared with the state of the law even twenty years ago. The legal developments that are analyzed in this Article without question have eroded the confidentiality protections provided by the privilege. Two decades ago a lawyer could have a high level of confidence that his or her communications with clients and opinion work product were—and would remain—immune from discovery by adversaries and government investigators. Today, it is unwise for any lawyer to make that assumption. To the contrary, a prudent attorney today will assume that there is a significant risk that the same materials may be discovered by adversaries or obtained by government investigators and will counsel clients and conduct himself or herself accordingly. The

534. For a further discussion of the crime-fraud exception, see *supra* Parts II.C.1. For a further discussion of waiver, see *supra* Part II.C.2.

question that remains is whether this erosion of the privilege will continue unchecked, with the ultimate outcome that the presumption of confidentiality is completely reversed and the privilege is lost entirely. The objective of this Article is to help avoid that unfortunate result.

V. ADDENDUM: THE SARBANES-OXLEY ACT OF 2002

In July of 2002, as this Article was being completed, Congress passed and President Bush signed into law sweeping corporate reform legislation, the Sarbanes-Oxley Act of 2002.⁵³⁵ The passage of that legislation was precipitated, at least in part, by the corporate financial scandals that are referenced at the beginning of this Article.⁵³⁶ Among other things, the Sarbanes-Oxley Act provides for the creation of a new public accounting oversight board, imposes new reporting and corporate governance rules on public companies, imposes new rules and requirements on accounting firms that audit public companies, and establishes new criminal penalties for securities fraud, destruction of documents, and knowingly filing false certifications of the accuracy of public company periodic reports that contain financial statements.⁵³⁷ One provision of the Act, however, is particularly relevant to the attorney-client privilege issues that are the subject of this Article. Section 307 of the Act provides as follows:

Not later than 180 days after the date of enactment of this Act, the [Securities and Exchange] Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

- (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
- (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.⁵³⁸

535. 15 U.S.C. § 7201, *et seq.* (2002) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h3763enr.txt.pdf (last visited Feb. 7, 2003) [hereinafter Sarbanes-Oxley Act].

536. For a further discussion of the corporate and financial scandals of the 1980s and 1990s, see *supra* Part I.

537. See Sarbanes-Oxley Act, *supra* note 535.

538. *Id.* § 307 (2002) (providing rules of professional responsibility for attorneys).

As this Article was being prepared for publication, the Securities and Exchange Commission proposed implementing rules that go beyond the “reporting up the corporate ladder” requirement in the text of section 307, set forth above.⁵³⁹ The initial SEC rule proposal also imposed a “reporting out” requirement on counsel who do not receive an “appropriate response” to their internal reporting of a violation. Under the initial SEC proposal, outside counsel who do not receive an appropriate response from the company are required to effect a so-called “noisy withdrawal” by withdrawing from the representation and disaffirming any submissions to the Commission that they have participated in preparing that are tainted by the violation.⁵⁴⁰ In-house attorneys are not required to resign, but they are required to disaffirm any tainted submission they have participated in preparing.⁵⁴¹ In addition, the initial proposed rule provided that an attorney who reasonably believes that he or she has been discharged by a company for fulfilling the reporting obligations imposed by the rule may, but is not required to, notify the Commission and disaffirm in writing any submission to the Commission that he or she participated in preparing that is tainted by the violation.⁵⁴² Remarkably, the SEC has taken the position that “notification to the Commission under [the proposed rules] does not breach the attorney-client privilege.”⁵⁴³

This Addendum obviously is not an appropriate vehicle for examining the SEC’s attorney-client privilege position. Courts and commentators will no doubt expend considerable energy doing so if a “reporting out” rule is ultimately adopted. Two points that are of particular relevance to the issues discussed in this Article should be noted, however. First, it is

539. *See Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys*, 17 CFR Part 205, SEC Rel. Nos. 33-8150, 34-46868 (Nov. 21, 2002) [hereinafter 2002 SEC Release] available at <http://www.sec.gov/rules/proposed/33-8150.htm>. On January 24, 2003, the SEC approved a “reporting up” rule, but extended the comment period on the “noisy withdrawal” provisions of the original proposed rule and approved the publication for comment of an alternative proposal. *See SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act*, SEC Press Release 2003-13, Jan. 23, 2003, available at <http://www.sec.gov/news/press/2003-13.htm> (“The Commission voted to extend for 60 days the comment period on the ‘noisy withdrawal’ and related provisions originally included in proposed Part 205. Given the significance and complexity of the issues involved, including the implications of a reporting out requirement on the relationship between issuers and their counsel, the Commission decided to continue to seek comment and give thoughtful consideration to these issues. The Commission also voted to propose an alternative to ‘noisy withdrawal’ that would require attorney withdrawal, but would require an issuer, rather than an attorney, to publicly disclose the attorney’s withdrawal or written notice that the attorney did not receive an appropriate response to a report of a material violation.”). At the time of this writing it is unclear precisely what form the final rule will take.

540. *See* 2002 SEC Release, *supra* note 539, § IV.B (summarizing “noisy withdrawal” and related provisions of Part 205).

541. *See id.* (comparing and contrasting differences in obligations of “outside” attorneys and “in-house” attorneys).

542. *See id.* (discussing obligations of formerly employed attorneys).

543. *Id.*

noteworthy that the text of the statute, quoted above, imposes only internal reporting requirements. Compliance with the requirements does not raise attorney-client privilege issues, while both the SEC's initial proposed rule and the revised rule announced on January 23, 2003 go beyond the statute⁵⁴⁴ and require external reporting requirements that raise serious attorney-client privilege issues. In this regard, the SEC's proposed rules are a striking example of the trend that is the subject of this Article—the recent willingness of federal law enforcement agencies to adopt policies that threaten and undermine the attorney-client privilege.⁵⁴⁵

Second and finally, whether adopted in the initial proposed form or in the revised form announced by the SEC on January 23, 2003,⁵⁴⁶ the SEC rules no doubt will have a significant effect upon the relationship between attorneys and clients in the context of corporate representations. While it is impossible to predict the magnitude of that effect at this time—before final rules are adopted and subjected to judicial review—it is unlikely that the SEC's "noisy withdrawal" outside reporting approach could have a positive effect on the attorney-client privilege. In fact, if enacted in a form that mandates an "involuntary reporting out" obligation, whether by the attorney or by the client, the SEC rules implementing section 307 of the Sarbanes-Oxley Act could well prove to be the law enforcement straw that breaks the metaphorical attorney-client privilege camel's back, at least in the context of attorneys representing publicly held companies.

544. The SEC presumably reads the "including a rule" language in section 307, set out above, as providing the agency with statutory authority to promulgate rules in addition to the "reporting up" through the corporate hierarchy rule that is specifically required by the Act. Even if that is the case, whether the SEC's proposed "noisy withdrawal reporting out" rule is a wise exercise of the agency's rulemaking authority is a separate question.

545. It is particularly disappointing that this proposal comes from a federal agency that in other contexts has shown greater sensitivity to, and sophistication in addressing, privilege issues. For a further discussion of the SEC's new cooperation policy, see *supra* Part III.E.

546. For a further discussion of initial proposed rule and the revised rule announced on January 23, 2003, see *supra* note 539.

