Washington and Lee Law Review Online

Volume 76 | Issue 1 Article 2

3-2-2020

In re Government Attorney-Client Privilege: A Categorical Rule to Settle the Issue

Luke Charette
Washington and Lee University School of Law, charette.l@law.wlu.edu

In re Government Attorney-Client Privilege: A Categorical Rule to Settle the Issue

Luke Charette*

Table of Contents

* J.D. Candidate May 2020, Washington and Lee University School of Law. I would like to thank the *Washington and Lee Law Review* Editorial Board for their guidance as well as Professor Mary Natkin for her investment in both this Note and my future as an attorney. Thank you also to my family for your endless support and teaching me everything that is important. Finally, I want to thank my wife, Chandler, for loving and inspiring me every day.

I. Introduction

Imagine you are called to serve on a federal grand jury.[1] You sit all day listening to the prosecutor present evidence concerning an alleged criminal offense committed by a government official.[2] Along with your fellow jurors, you decide that before issuing an indictment, you want more documents produced or a government official to come testify before you.[3] The prosecutor then issues a criminal grand jury subpoena to that government lawyer or official. Instead of those documents being presented to you, or a government official coming and testifying before you, the official evades the subpoena by asserting the government attorney-client privilege. You may think it a fundamental maxim of common law that a federal government entity could not assert the common law attorney-client privilege to "withhold information relating to a federal criminal offense," but it is not.[4] As well-established as the attorney-client privilege is in our legal system, the government attorney-client privilege is diametrically unsettled.[5] This Note

1. *See* HANDBOOK FOR FEDERAL GRAND JURORS 6 (2012), https://perma.cc/VE29-MJL8 (PDF) (discussing how federal grand jurors are selected at random from lists of registered voters).

2. *See id.* at 8 (outlining how federal prosecutors present evidence to grand jurors).

3. *See id.* (authorizing the grand jurors to request additional witnesses); *see also In re* Lindsey, 158 F.3d 1263, 1267 (D.C. Cir. 1998) (issuing a subpoena to a government attorney to answer questions before the grand jury).

4. *Lindsey*, 158 F.3d at 1266.

5. *See id.* at 1272 (discussing the unsettled nature of the government attorney-client privilege and the differences between the government and ordinary attorney-client privilege); Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 836 (1871) (describing the ordinary attorney-client privilege rule as

proposes the adoption of a categorical rule that neither a state nor the federal government may invoke the attorney-client privilege in response to a criminal grand jury subpoena.

The attorney-client privilege is an evidentiary principle and a longstanding creature of common law.[6] The privilege is meant to encourage open and honest communication between lawyer and client, and it protects the disclosure of those communications.[7] The privilege promotes the administration of justice by allowing individuals to confidentially communicate with skilled attorneys and receive sound legal advice.[8] The privilege is not without limitations though, and should be applied narrowly due to its power to prevent the production of evidence in criminal cases.[9] Government attorneys and employees remain uncertain about whether the attorney-client privilege will apply to their communications when faced with a criminal grand jury subpoena.[10] The U.S. Court of Appeals for the First Circuit had a chance to weigh in on the issue in 2018 for the first time, but it left many questions unanswered.[11]

---

well-settled).

6. *See* FED. R. EVID. 501 (explaining that the common law "governs a claim of privilege" unless the Constitution, a federal statute, or rule prescribed by the Supreme Court applies); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.").

7. *See Upjohn*, 449 U.S. at 389–90 (discussing the history and purpose of the attorney-client privilege).

8. *See id.* (describing how sound legal advice serves public ends, and sound advice requires full disclosure); Fisher v. United States, 425 U.S. 391, 403 (1976)

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

9. *See Fisher*, 425 U.S. at 403 (contending that testimonial privileges should be applied narrowly); *see also In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973) (stating that because the privilege acts as an obstacle to evidence being heard in a court, it should be constrained).

10. *See Lindsey*, 158 F.3d at 1272 (resigning that the government attorney-client privilege is uncertain).

11. *See In re* Grand Jury Subpoena, 909 F.3d 26, 27 (1st Cir. 2018) [hereinafter *R.I. Grand Jury*] (discussing the lower court's adoption of "what it viewed to be the majority position on a difficult issue of first impression in this

The First Circuit rejected the application of a categorical rule that the Rhode Island government could not assert the attorney-client privilege in response to a federal grand jury subpoena.[12] Instead of applying a categorical rule, the court addressed a number of factors to determine the applicability of the privilege.[13] The First Circuit court went so far as to say that the government attorney-client privilege analysis may hinge on who is the target or subject of the grand jury investigation.[14] The First Circuit is the fifth court of appeals since 1997 to address the application of the attorney-client privilege to government attorneys when faced with a grand jury subpoena stemming from a criminal investigation.[15] Each circuit took its own analytical approach to decide the issue, creating a split in the five circuits' reasoning and holdings.[16]

---

circuit").

12. *See R.I. Grand Jury*, 909 F.3d at 32 (failing to provide answers to more specific factors raised in the opinion and instead choosing to "simply reject the categorical rule that a state government has no attorney-client privilege that can be invoked in response to a grand jury subpoena").

13. *See id.* at 31–32 (including whether there is a federal-state conflict, whether the government is the subject of the investigation itself, and where the public interest lies).

14. *See id.* (stating that if the alleged crimes had been committed by government actors, the argument against upholding the privilege would carry more weight).

15. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 924 (8th Cir. 1997) [hereinafter *Whitewater Investigation*] (failing to apply the attorney-client privilege in order to protect the White House Counsel from having to disclose relevant communications in light of a federal grand jury subpoena); *In re* Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 295 (7th Cir. 2002) [hereinafter *Ill. Grand Jury*] (finding that faced with a federal criminal investigation, no attorney-client privilege exists between state employee and state lawyer); *In re* Lindsey, 158 F.3d 1263, 1283 (D.C. Cir. 1998) (finding that Deputy White House Counsel could not rely on the attorney-client privilege to decline answering questions presented by a grand jury). *But see* United States v. Doe, 399 F.3d 527, 536 (2d Cir. 2005) (failing to abrogate the attorney-client privilege by compelling chief legal counsel to disclose communication with the governor of Connecticut); *R.I. Grand Jury*, 909 F.3d at 32 (holding that no categorical rule exists precluding government attorneys from asserting the privilege when faced with a criminal grand jury subpoena).

16. *See, e.g.*, *R.I. Grand Jury*, 909 F.3d at 32 (failing to sustain a broad no privilege rule, reasoning that something more is required to prevent the state from having the right to assert the privilege); *Lindsey*, 158 F.3d at 1283 (stating that "government officials have responsibilities not to withhold evidence relating to criminal offenses from the grand jury").

This Note explores the reasoning and factors used by each of the circuits in deciding whether or not to uphold the privilege. After considering those factors, this Note argues that there should be a categorical rule that neither a state nor the federal government may invoke the attorney-client privilege in response to a criminal grand jury subpoena. To justify this conclusion, this Note outlines how current government attorney-client privilege case law, as well as the policy underpinnings of the privilege itself, dictate that a categorical rule is appropriate.

Part II discusses the historical foundation of the attorney-client privilege. The attorney-client privilege is one of the oldest privileges, but its applicability in specific instances has been left to the courts to decide.[17] Part II then moves on to describe the purpose and importance of the attorney-client privilege. The purpose of the privilege is to encourage individuals needing legal assistance to consult attorneys with openness and honesty.[18] The importance of the privilege rests on promoting the "broader public interests in the observance of law and administration of justice."[19] Finally, Part II briefly discusses the mechanics of applying the privilege in everyday practice.

Part III discusses the government attorney-client privilege. Part III highlights the recent developments in the government attorney-client privilege doctrine and lack of legal history to rely on in determining the scope of the privilege's application in the government context.[20] Part III then discusses whether the application of the government attorney-client privilege in the criminal investigation context would be an extension of the privilege or an exception to the privilege. Part III concludes that allowing the privilege to apply in this context would be an extension of the privilege.[21]

---

17. *See* Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981) (discussing the history of the privilege and its common law foundation).

18. *See id.* at 389 (outlining how consistent the purpose of the privilege has been throughout American jurisprudence).

19. *Id.*

20. *See* Ross. v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) (noting how little case law there is concerning this issue).

21. *See, e.g.*, *In re* Lindsey, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (discussing that the court needed to determine if this instance was captured by the outer

Part IV analyzes the five U.S. Court of Appeals' opinions that have created a split in the government attorney-client privilege doctrine. The First Circuit rejected the categorical application of a rule that the attorney-client privilege would not be available to a government in response to a federal grand jury subpoena.[22] The Second Circuit also ruled in favor of allowing the privilege to apply in this context.[23] The D.C. Circuit, in arguably the most robust of the circuit opinions, held that government attorneys could not assert the privilege in order to withhold evidence sought in connection to a criminal grand jury investigation.[24] The Eighth Circuit relied heavily on the public's interest in disclosure by government officials when it denied the White House's use of the attorney-client privilege to avoid the disclosure of communications to a federal grand jury.[25] The Seventh Circuit also primarily relied on the duty government lawyers have to act in the interest of the public when it denied the application of the privilege in this context.[26] While each of the circuits approached the issue in light of unique facts, each court provided analysis that can be used to find a more permanent solution to the issue as discussed in Part VI.[27]

Part V discusses a solution to the circuit split that will help simplify the government attorney-client privilege doctrine while upholding the "logic of its principle."[28] Specifically, whether the

---

limits of the privilege).

22. *See R.I. Grand Jury*, 909 F.3d 26, 32 (1st Cir. 2018) (stating that the facts of this case led to the conclusion that there should not be a categorical rule).

23. *See* United States v. Doe, 399 F.3d 527, 536 (2d Cir. 2005) (finding that a government attorney can assert the privilege when faced with a federal grand jury subpoena).

24. *See Lindsey*, 158 F.3d at 1282–83 (determining that government officials have a responsibility to the public that includes assisting criminal investigations).

25. *See Whitewater Investigation*, 112 F.3d 910, 920 (8th Cir. 1997) (denying that the result of their holding would be a chilling effect on government employees with respect to their candor with government counsel).

26. *See Ill. Grand Jury*, 288 F.3d 289, 293 (7th Cir. 2002) (holding that none of the conversations between the General Counsel and Secretary of State were privileged "in the face of a federal grand jury subpoena").

27. *See, e.g.*, *R.I. Grand Jury*, 909 F.3d at 31 (factoring in federalism concerns, who is the target of the investigation, as well as the public's interest in allowing government employees to communicate confidentially with government attorneys).

28. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291

applicability of the government attorney-client privilege in the face of a federal grand jury subpoena should rest on a factors test or a categorical approach. Part V first explores whether it should matter if the government entity is a state or federal government actor.[29] Second, Part V discusses the First Circuit's hypothesis that the prosecutor may need to reveal certain information concerning the scope of the grand jury's investigation in order to pierce the privilege.[30] Finally, Part V analyzes whether the answer to the question of the privilege's application is the creation of an ad hoc balancing test weighing the public's interest.

Part VI offers the conclusion that a categorical rule against the application of the government attorney-client privilege in response to a criminal grand jury subpoena is appropriate. This conclusion is supported by the need for a certain and consistent privilege.[31] It is also supported by the concern that a testimonial privilege may prevent relevant evidence from being presented to a grand jury concerning potential criminal activity known to government officials.[32] A categorical rule would also prevent the use of a balancing test, or arbitrary search for whether public interest favors the privilege or not.[33] A categorical rule also benefits individuals working in the government by allowing them

---

(John T. McNaughton ed., 1961).

29. *See R.I. Grand Jury,* 909 F.3d at 31 ("Moreover, the federal-state conflict that the availability of the attorney-client privilege implicates may cut in favor of respecting the state's view of the best balance between the public's interest in government transparency and the beneficial aspects of the privilege."); *Ill. Grand Jury*, 288 F.3d at 295 (recognizing that federalism is an important aspect of our system of governing, but failing to see how it is relevant in this instance).

30. *See R.I. Grand Jury*, 909 F.3d at 32 (discussing the issue of the court not knowing whether the government entity was itself a target or subject of the grand jury's investigation).

31. *See* Swidler & Berlin v. United States, 524 U.S. 399, 402–03 (1998) (overturning the lower court's decision who had made the determination "that the uncertainty introduced by its balancing test was insignificant in light of existing exceptions to the privilege").

32. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (highlighting the reasons why testimonial privileges should be interpreted narrowly).

33. *See Swidler*, 524 U.S. at 409 (discussing the Supreme Court's resistance to creating balancing tests to define the outer limits of the privilege); *Doe*, 399 F.3d at 531 (declining to adopt a balancing test, but then holding that the privilege will apply, without adopting or setting forth any judicially manageable test).

to make informed decisions regarding their legal representation before consulting with a government attorney about conduct that could lead to a criminal investigation.[34]

II. Introduction to the Attorney-Client Privilege

A. Historical Foundation of the Attorney-Client Privilege

The attorney-client privilege originated in the sixteenth century and is one of the "oldest common law privileges."[35] An exception to testimonial compulsion, the privilege belonged to the lawyer and was meant to protect an attorney's honor by not forcing them to reveal private confidences in public.[36] This "moral honor" reasoning lasted until the end of the 1700s.[37] The theoretical underpinnings that replaced it are much more familiar, looking to "the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal advisor."[38] This major shift in policy meant that the privilege came to be understood to belong to the client and not the attorney.[39]

United States case law concerning the privilege developed slowly prior to the early 1800s.[40] The first reported case concerning the attorney-client privilege in the United States was *Dixon v.*

---

34. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (discussing the vital need for privileges to be consistent and for individuals to know confidently what will be covered before consulting with an attorney).

35. United States v. Bank of N.Y. Mellon, 66 F. Supp. 3d 406, 409 (S.D.N.Y. 2014); *see also Upjohn*, 449 U.S. at 389 (discussing the privilege as "the oldest of the privileges for confidential communications known to the common law").

36. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (AM. LAW INST. 2000) ("The modern attorney-client privilege evolved from an earlier reluctance of English courts to require lawyers to breach the code of a gentleman by being compelled to reveal in court what they had been told by clients.").

37. *See* WIGMORE, *supra* note 28, § 2290 (stating that the honor doctrine was "entirely repudiated" in the late 1700s).

38. *Id.*

39. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("But the privilege is that of the client alone . . . .").

40. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1087 (1978) (discussing the lack of case law on this issue in the United States prior to the 1820s).

Parmelee.[41] Judge Paddock denied the specific assertion of the attorney-client privilege in that case, but strongly supported its place in American jurisprudence.[42] The privilege continued to develop in the United States with utilitarian justifications as its underpinnings.[43] By the middle of the nineteenth century, the Virginia Supreme Court declared that there was "no rule of law better settled than" attorneys not being allowed to disclose client confidences.[44] The attorney-client privilege has remained a stable piece of our common law system of justice with relatively few modifications.[45]

Presently, there is no question whether the attorney-client privilege should exist, merely what the scope of the privilege should be.[46] Courts have contoured the privilege by recognizing important limitations to the privilege, such as the crime-fraud exception.[47] The crime-fraud exception is triggered when communications between client and lawyer are made for the purpose of getting advice or assistance in the commission of a crime or fraud.[48] Another recent issue concerning the scope of the attorney-client privilege arose in the corporate context.[49] The

---

41. *See* Dixon v. Parmelee, 2 Vt. 185 (1829) (discussing the privilege in detail and at length in dictum).

42. *See id.* at 188 (stating that the privilege is an established principle, and "it is declared repugnant to the policy of the law, to permit the disclosure of secrets by him whom the law has intrusted therewith").

43. *See* KENNETH S. BROUN et al., MCCORMICK ON EVIDENCE 151 (6th ed. 2006) (resting on utilitarian justifications that allow for franker disclosure by clients).

44. Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 836 (1871).

45. *See* Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1239 (2003) (discussing how the justifications for the privilege have changed slightly, but noting the consistent survival of the privilege).

46. *See* Hazard, *supra* note 40, at 1062 (describing how there is no reasonable argument to be made for abolition of the privilege).

47. *See* United States v. Zolin, 491 U.S. 554, 556 (1989) (concluding the privilege does not apply to communications made for the purpose of furthering future wrongdoing).

48. *See id.* at 563 (discussing the purpose of the exception).

49. *See* Upjohn Co. v. United States, 449 U.S. 383, 394 (1981) (questioning whether the privilege only applied to the members of the management "control group" of a corporation).

Supreme Court determined that the attorney-client privilege extends to communications between corporate counsel and employees.[50] Notwithstanding the foregoing examples, the standard attorney-client privilege doctrine has remained remarkably steady in American jurisprudence, while the government attorney-client privilege has been in flux during its short tenure.[51]

B. The Purpose and Importance of the Privilege

It is essential to understand the purpose of allowing communications to remain privileged in light of a criminal investigation in order to develop an informed opinion regarding whether communications between government lawyers and government actors should be privileged under the same circumstances.[52] John Wigmore identified four fundamental conditions that must be met to establish a privilege against disclosure:

> (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*. (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.[53]

Wigmore believed that only when these conditions were present could a privilege be recognized.[54]

---

50. *See id.* (extending the privilege beyond just the members of the upper-echelon of a company).

51. *Compare R.I. Grand Jury*, 909 F.3d 26, 31 (1st Cir. 2018) (allowing the privilege to shield government attorney communications), *with In re* Lindsey, 158 F.3d 1263, 1283 (D.C. Cir. 1998) (finding that the privilege could not be used to shield government attorney communications).

52. *See Ill. Grand Jury*, 288 F.3d 289, 292–93 (7th Cir. 2002) (stating that the court's decision will rest on "whether the policy reasons for recognizing an attorney-client privilege in other contexts apply equally when the United States seeks information from a government lawyer").

53. WIGMORE, *supra* note 28, § 2285.

54. *See id.* (noting that the privileges that exist possess each of these conditions, and ones that have been rejected were missing at least one).

The foundation of the attorney-client privilege is built on allowing individuals to seek the counsel of legal experts free from the apprehension of future disclosure of those communications.[55] While the underlying rationale for the attorney-client privilege has changed since its original inception, its main concern has always been "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[56] Recognizing a privilege that allows for the withholding of evidence is juxtaposed by the need for all relevant evidence to be presented during a trial to ensure an equitable outcome.[57] Long established in American jurisprudence, it has "been recognized as a fundamental maxim that the public . . . has a right to every man's evidence."[58]

While there is extensive scholarly support for the recognition of the attorney-client privilege, Jeremy Bentham, a notable scholar, opposed the privilege.[59] Bentham believed that because the innocent had nothing to fear, the individual would not be deterred from seeking legal advice and that the guilty not seeking legal advice did not harm the administration of justice.[60] This reasoning has been rejected by American courts, which have instead remained steadfast in their protection of communications made by both the innocent and guilty.[61] While the privilege is

---

55. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (saying the rule is "founded upon the necessity" for these communications to be protected from disclosure).

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

57. *See* United States v. Bryan, 339 U.S. 323, 331 (1950) (discussing how as a principle, the public has a right to all evidence, and exclusionary rules are exceptions).

58. *Id.* (quoting 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1940)).

59. *See* WIGMORE, *supra* note 28, § 2291 (declaring Bentham, Lord Langdale, and Chief Justice Appleton as the only important names to oppose the privilege).

60. *See id.* (opposing this reasoning, Wigmore went on to provide three detailed arguments for why Bentham was incorrect).

61. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (making no distinction between the guilty and innocent).

without doubt an important piece of our justice system, it is an exception to the general rule that all evidence shall be presented.[62]

C. The Attorney-Client Privilege Application

The attorney-client privilege is held by the client, who may invoke the privilege to protect: "(1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purpose of obtaining or providing legal assistance to the client."[63] The Federal Rules of Evidence do not provide the substance to the privilege, but instead direct courts to interpret the privilege with principles of common law "in the light of reason and experience."[64] Federal courts use common law to determine if the attorney-client privilege exists in the specified context.[65] The Supreme Court has noted "that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."[66] The flexibility of our common law structure is met head-on by the Court's call for surety and consistency in the application of the privilege.[67]

III. The History and Purpose of the Grand Jury

The Fifth Amendment states that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[68] The grand jury

---

62. *See Bryan*, 339 U.S. at 331 (discussing how exceptions from the general rule may be justified under certain circumstances).

63. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

64. FED. R. EVID. 501. *See* Winton v. Bd. of Comm'rs, 188 F.R.D. 398, 399 (N.D. Okla. 1999) ("Rule 501 creates no substantive privileges by its own force. Rule 501 simply informs federal courts of how they are to determine whether a particular privilege exists.").

65. *See Winton*, 188 F.R.D. at 399 (discussing the various sources courts will look to, such as "state law or common law").

66. Funk v. United States, 290 U.S. 371, 383 (1933).

67. *See* Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996) (rejecting the lower court and some state's decisions to implement a balancing component to the privilege because in some circumstances that would leave a client unsure if the communications would be confidential).

68. U.S. CONST. amend. V.

operates as an investigatory body responsible for "determining whether or not a crime has been committed."[69] A 1635 grand jury in Massachusetts was the first to be used in the United States.[70] Notably, the grand jury was not provided for in the Constitution or the Judiciary Act of 1789.[71] Grand juries were instead adopted in 1791 as part of the Bill of Rights.[72] The grand jury was established "as a primary security to the innocent against hasty, malicious and oppressive persecution . . . ."[73] The grand jury operates in secrecy, justified by the need to protect the reputation of innocent people, to prevent warning offenders, and to protect witnesses.[74]

The grand jury is a unique body within the criminal justice system, broadly inquiring into all relevant facts surrounding suspected criminal conduct.[75] The grand jury is unique because unlike an Article III court that only has jurisdiction over specific cases or controversies, the grand jury can investigate simply to ensure the law is not being violated.[76] Prosecutors in the relevant jurisdiction request for a judge to impanel a grand jury.[77] The

---

69. United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991).

70. *See* RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 6 (1963) (discussing how slowly the Colonies were to import the grand jury concept from England); *see also* HANDBOOK FOR FEDERAL GRAND JURORS, *supra* note 1, at 1 (describing the origination of the grand jury in the Magna Carta, which was adopted by King John in 1215).

71. *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 12–13 (1996) (discussing the history of the grand jury in the United States).

72. *See id.* at 11 (discussing how "the centralized government was created without a federal grand jury"); U.S. CONST. amend. V. (stating that the federal government must utilize the grand jury to charge someone with a federal crime).

73. Wood v. Georgia, 370 U.S. 375, 390 (1962).

74. *See* United States v. Providence Tribune Co., 241 F. 524, 526 (D.R.I. 1917) (discussing the need for secrecy and the harm that could come from a newspaper publishing information about the body).

75. *See* Branzburg v. Hayes, 408 U.S. 665, 701 (1972) ("A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" (quoting United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970))).

76. *See* United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950) (allowing grand jury investigations "merely on suspicion that the law is being violated").

77. *See* Amber Phillips, *Grand juries, explained for those who kinda sorta know what they are*, WASH. POST (Dec. 9, 2017) https://perma.cc/669Z-V96Q (last

grand jury ordinarily consists of sixteen to twenty-three citizens, needing twelve votes to issue an indictment based on a finding of probable cause.[78] The grand jury, unlike a petit jury, does not determine guilt or innocence.[79] The grand jury is instead tasked with determining whether probable cause exists to "believe that a crime was committed and that a specific person or persons committed it."[80] Also unique to the grand jury is that it may issue subpoenas without first identifying a specific offender or offense.[81] Allowing the attorney-client privilege to shield government attorneys and employees from answering grand jury subpoenas violates the duty public entities have to participate in criminal investigations.[82]

IV. The Government Attorney-Client Privilege

A. History of the Government Attorney-Client Privilege

The government attorney-client privilege is difficult to apply because there is no longstanding governmental attorney-client privilege in legal history.[83] The first time a court considered whether the federal government was entitled to claim the attorney-client privilege was 1963.[84] The court provided almost no analysis on the issue of whether the government may claim the

---

visited Oct. 23, 2019) (listing the mechanics of the grand jury) (on file with the Washington and Lee Law Review).

78. *See id.* (discussing the normal procedures for a federal grand jury); HANDBOOK FOR FEDERAL GRAND JURORS, *supra* note 1, at 6.

79. *See* HANDBOOK FOR FEDERAL GRAND JURORS, *supra* note 1, at 3 (describing how a petit jury, or normal trial jury, hears evidence from both the prosecution and defense).

80. *Id.*

81. *See* Blair v. United States, 250 U.S. 273, 282 (1919) (explaining that the specific offender and offense are normally developed at the end of the grand jury's investigation not at the beginning as in court cases).

82. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 709 (1974) (describing the critical nature of criminal investigations in our justice system).

83. *See* Patricia E. Salkin, *Beware: What You Say to Your (Government) Lawyer May Be Held Against You – The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283, 287 (2003) ("Unlike the private attorney-client privilege, there is no legal tradition of a government privilege.").

84. *See* United States v. Anderson, 34 F.R.D. 518, 522 (D. Colo. 1963) (holding that the documents at issue were not privileged).

privilege, simply implying that the government could assert the privilege just like a corporation.[85] Case law is scarce prior to 1967, the same year Congress passed the Freedom of Information Act (FOIA).[86] After FOIA was enacted, government officials had to find other ways to protect confidential information.[87] While FOIA led to an increase in the volume of case law, that case law did not necessarily produce a clear justification for the government attorney-client privilege.[88] Instead, courts applied the privilege in the government context through analogy, giving the government the privilege because other clients and entities are entitled to the privilege.[89] The Sixth Circuit in 2005 upheld the government attorney-client privilege in the civil context but noted how little case law there was on the issue.[90] The government, like a corporation, is an organizational entity who maintains the attorney-client privilege as the client.[91] One of the crucial differences between corporations and government agencies though, is that government agencies are not subject to criminal liability.[92]

The lack of common law jurisprudence adds to the difficulty in the privilege's application, requiring a close look at the guiding

---

85. *See id.* at 522–23 (citing case law holding corporations have the privilege).

86. *See* 5 U.S.C. § 552 (2012) (forcing government agencies to make certain information available to the public).

87. *See* Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 480 (2002) (discussing the impact of FOIA on the development of the government attorney-client privilege).

88. *See id.* at 481 ("[N]either courts nor scholars have made a compelling case for a government attorney-client privilege.").

89. *See id.* at 481–82 (discussing instances of courts applying the corporate privilege to the government); *see also* Galarza v. United States, 179 F.R.D. 291 (S.D. Cal. 1998) (applying previous Supreme Court holdings that upheld the privilege in the corporate context).

90. *See* Ross. v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) (noting that the little case law that did exist upheld the governmental attorney-client privilege in the civil context).

91. *See* Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 474 (1998) (discussing who controls the privilege in the entity context).

92. *See Ill. Grand Jury*, 288 F.3d 289, 293–94 (7th Cir. 2002) (noting that while the state agency may not be criminally liable, individual employees could be).

principles of the privilege itself.[93] These guiding principles include the danger of testimonial privileges violating the long held belief that individuals have a right to every man's evidence.[94] Federal courts have only recognized privileges in rare circumstances.[95] The need for evidence is of course contrasted by the desire for individuals to be able to openly communicate with their attorney.[96]

The attorney-client privilege is meant to "encourage full and frank communication between attorneys and their clients . . . ."[97] Sound legal advice is said to serve public ends and receiving such advice requires confidentiality.[98] The privilege must be narrowly construed, though, because it withholds potentially relevant evidence during a trial.[99] Unlike the private attorney-client privilege, the governmental attorney-client privilege is still very unsettled.[100]

B. Would the Government Attorney-Client Privilege in the Criminal Investigation Context be an Extension of the Privilege or an Exception?

The starting point for analysis in this unsettled area of the privilege doctrine is to determine whether permitting the application of the government attorney-client privilege in light of

---

93. *See Ross*, 423 F.3d at 600 (evaluating the application of the privilege based on the principles underlying the privilege).

94. *See Whitewater Investigation*, 112 F.3d 910, 918 (8th Cir. 1997) (relying on the words of Lord Hardwicke and over three centuries of this guiding principle being recognized).

95. *See id.* (listing thirteen federal cases where privileges have been allowed or contoured); *see e.g.*, *In re* Grand Jury Proceedings, 103 F.3d 1140, 1147 (3d Cir. 1997) (rejecting a parent-child privilege); Couch v. United States, 409 U.S. 322, 335 (1973) (rejecting an accountant-client privilege).

96. *See* Cohn, *supra* note 45, at 1254 (discussing the need for open communication as a rationale for the privilege).

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

98. *See id.* (reviewing precedent for the need to keep such disclosures confidential).

99. *See* United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997) (discussing the reduction in discoverable material that will be available during a lawsuit).

100. *See* Salkin, *supra* note 83, at 287 ("Although most courts agree that there is a government attorney-client privilege there is no clear precedent for courts to use in determining its scope.").

a criminal investigation would be an exception to, or an extension of the attorney-client privilege.[101]

When the Supreme Court held in *Swidler & Berlin v. United States*[102] that confidences could not be disclosed after a client's death, the Court noted that not protecting the communications would amount to an exception to the attorney-client privilege.[103] The Court stated that when the privilege is well-established in common law tradition, an argument with strong supporting evidence is needed to justify an exception.[104] In the instance of the privilege applying after death, the Court held that the "Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the prevailing caselaw."[105] A privilege that has a long history of being recognized should not be set aside casually.[106]

Prior to the *In re Lindsey*[107] decision, there was essentially no body of case law to look back on like the Court had in *Swidler*.[108] Accordingly, the D.C. Circuit determined it was its duty to decide whether the privilege extended to government attorneys in the criminal grand jury subpoena context "in the light of reason and experience."[109] Compare this approach with the one taken by the

---

101. *See In re* Lindsey, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (noting that the Office of the President contended that the court would have to find an exception to the privilege in the grand jury context, while the Independent Counsel argued that allowing the privilege to apply in the grand jury context would be an extension).

102. 524 U.S. 399 (1998).

103. *See id.* at 410 ("[H]ere we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to 'construe' the privilege, but to narrow it, contrary to the weight of the existing body of caselaw.").

104. *See id.* at 410–11 (asking for more than speculation in the arguments against the survival of the privilege after death, and noting that empirical research would have been helpful).

105. *Id.* at 411.

106. *See* Trammel v. United States, 445 U.S. 40, 47–48 ("Although Rule 501 confirms the authority of the federal courts to reconsider the continued validity of the *Hawkins* rule, the long history of the privilege suggests that it ought not to be casually cast aside.").

107. 158 F.3d 1263 (D.C. Cir. 1998).

108. *See Swidler*, 524 U.S. at 405 (stating that there was a "great body" of case law holdings and dicta to refer to).

109. FED. R. EVID. 501. *See Lindsey*, 158 F.3d at 1272 ("[W]e believe this case poses the question whether, in the first instance, the privilege extends as far as

Second Circuit several years later.[110] The Second Circuit reasoned that an exception to the privilege rule needed to be carved out; this reasoning is in line with the dissent in the D.C. Circuit.[111] While acknowledging a lack of on-point case law, the Second Circuit instead relied on the common-law roots of the privilege generally, the traditional rationales underlying the privilege, and "the existence of a governmental attorney-client privilege in civil suits between government agencies and private litigants."[112] These diverging approaches seem to come from differing philosophical views regarding whether the privilege should apply narrowly or broadly.[113]

Because the attorney-client privilege is a product of common law, the creation of a rule of privilege is done on a case-by-case basis.[114] The Supreme Court has expressed a desire to exercise the Court's authority to develop rules of privilege in a disciplined manner.[115] The Second Circuit's approach is too far out of line with the precedent set forth by the Supreme Court to be accepted.[116] The

---

the Office of the President would like.").

110. *See* United States v. Doe, 399 F.3d 527, 531 (2d Cir. 2005) (beginning their analysis from the perspective that the privilege applies in this context).

111. *See id.* at 536 (saying they did not see the question before the court to be whether to "extend" the privilege); *Lindsey*, 158 F.3d at 1284 (Tatel J., dissenting) ("Denying that they are creating an exception, my colleagues say that they are 'defining the particular contours of the government attorney-client privilege,' but no court has suggested that the attorney-client privilege must be extended client by client to each new governmental entity, proceeding by proceeding.").

112. *See Doe*, 399 F.3d at 531–32 ("[O]ur application of the privilege in a 'new' context remains informed by the long-standing principles and assumptions that underlie its application in more familiar territory.").

113. *See id.* at 531 ("[W]e believe it best to proceed cautiously when asked to narrow the privilege's protections in a particular category of cases."); *In re* Lindsey, 158 F.3d 1263, 1272 (D.C. Cir. 1998) ("[T]he attorney-client privilege must be strictly confined within the narrowest possible limits consistent with the logic of its principle . . . ." (quoting *In re* Sealed Case, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982))).

114. *See* FED. R. EVID. 501 (providing courts with the authority to create rules of privilege); *Lindsey*, 158 F.3d at 1268 ("Rule 501 manifests a congressional desire to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis . . . .").

115. *See* Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (reasoning that while Rule 501 "provide[s] the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively").

116. *See Doe*, 399 F.3d at 536 (declining to adopt a 'public interest' or balancing test, but then simply stating that they will allow the privilege to apply

Second Circuit acknowledged that its approach was in direct conflict with several other circuits and that it would create an inconsistent application of the rules of privilege.[117] When a court is facing a new area that the attorney-client privilege could be applied to, the court should begin by determining if the privilege is applicable at all, not assume it does apply and then look for an exception.[118]

V. Circuit Court Split: Privileged or Not?

A circuit court split has developed over the last twelve years regarding whether a governmental attorney-client privilege exists in the face of a federal criminal investigation.[119] The First and Second Circuits ultimately concluded that the government could assert the attorney-client privilege when faced with a criminal grand jury subpoena.[120] The D.C., Seventh, and Eighth Circuits all concluded that the government actors in their cases could not utilize the attorney-client privilege to refuse answering criminal grand jury subpoenas.[121]

---

in this circumstance).

117. *See id.* at 536 n.4 (noting that uniformity is important and prevents issues such as forum shopping).

118. *Compare Lindsey*, 158 F.3d at 1272 (attempting to determine if this instance was captured by the outer limits of the privilege), *with Doe*, 399 F.3d at 531 (beginning their analysis from the perspective that the privilege does apply in this context).

119. *See R.I. Grand Jury*, 909 F.3d 26, 30 (1st Cir. 2018) (acknowledging the existence of a split in circuit opinions).

120. *See id.* at 30–31 (refusing to uphold the lower court's holding that there is a categorical rule forbidding governments from asserting the privilege); *Doe*, 399 F.3d at 536 (declining to create what the court viewed as an exception to the privilege, thus allowing the government to assert the privilege).

121. *See Lindsey*, 158 F.3d at 1272 (holding that government lawyers could not rely on the privilege to shield information from a grand jury); *Ill. Grand Jury*, 288 F.3d 289, 293 (7th Cir. 2002) (refusing to extend the attorney-client privilege to communications between government lawyers and government employees when the investigation concerns criminal matters); *Whitewater Investigation*, 112 F.3d 910, 921 (8th Cir. 1997) (finding that the governmental attorney-client privilege would violate the principle that government officials should assist in criminal investigations).

A. First Circuit

In July 2018, a three judge panel sitting in the Moakley courthouse overlooking Boston Harbor heard oral arguments from two parties, the United States of America and the state of Rhode Island.[122] Nearly sixty minutes of strong advocacy from each side followed.[123] Four months later, the judges issued their opinion with Chief Judge Kayatta authoring the writ of mandamus.[124] Beyond being the most recent circuit to issue an opinion concerning this topic, the First Circuit opinion also highlighted serious problems with the doctrine as it stands today.[125]

The Rhode Island Department of Labor and Training (Department) appealed a decision by the U.S. District Court for the District of Rhode Island holding that the attorney-client privilege is "categorically unavailable to a state government in receipt of a federal grand jury subpoena."[126] The U.S. Court of Appeals for the First Circuit held that there is no categorical rule that a state government "has no attorney-client privilege that can be invoked in response to a grand jury subpoena."[127]

While portions of the record remain sealed, the First Circuit provided some underlying factual context to the district court case.[128] A federal grand jury subpoenaed records from the Department, who in turn moved to partially quash the subpoena on the grounds that it would compel the production of privileged communications between government counsel and government staff.[129] The U.S. District Court for the District of Rhode Island

---

122. *See R.I. Grand Jury*, 909 F.3d at 27 (arguing for Rhode Island was Neil Kelly, Assistant Attorney General for the State of Rhode Island, arguing for the United States was Donald Lockhart, Assistant United States Attorney).

123. *See* Oral Argument at 57:00, *R.I. Grand Jury*, 909 F.3d 26 (1st Cir. 2018), https://perma.cc/URR2-N34C (last visited Oct. 23, 2019) (noting that the arguments were meant to be only half of that time) (on file with the Washington and Lee Law Review).

124. *See R.I. Grand Jury*, 909 F.3d at 27 (issuing an advisory mandamus and providing his reasoning for why an advisory mandamus is appropriate in this case).

125. *See id.* at 31–32 (failing to resolve these serious uncertainties).

126. *Id.* at 27.

127. *Id.* at 32.

128. *See id.* at 27 (discussing the sealed nature of the records but offering a brief synopsis of the lower court case).

129. *See id.* (providing no further details due to a presumably still on-going

ordered the Department to turn over the documents, denying the motion to quash.[130] Instead of being held in contempt for not complying with a court order, the Department petitioned the First Circuit Court of Appeals for a writ of advisory mandamus.[131] The First Circuit dedicated a significant portion of their opinion to deciding whether a writ of advisory mandamus was available in this case, ultimately concluding that it was.[132]

The court began its substantive analysis by laying a historical foundation highlighting how "well-established" the privilege is, but also noting that the privilege is not "limitless."[133] The court also acknowledged the competing public interests at stake when determining the application of the privilege to government officials.[134] The court cited the four circuits who had previously weighed in on this issue.[135] Significantly, the court preemptively stated that the split in decisions is more even than it appears because only the Second and Seventh Circuits involved federal grand juries seeking privileged communications from state officials.[136]

The court continued its analysis by considering the most familiar arguments that a government lawyer should not have the privilege, "because the lawyers ultimate duty is to the public, that the governmental entity need not fear prosecution, and that the privilege need be overborne by the public interest in transparent

---

grand jury investigation).

130. *See id.* (holding that "the attorney-client privilege does not shield communications between government lawyers and their clients from a federal grand jury" (quoting Order at 2, *In re* Grand Jury Subpoena (R.I. Dep't of Labor and Training), No. 18-4 WES (D.R.I. Apr. 25, 2018))).

131. *See id.* at 27–28 (forgoing the option of violating the court order, the Department sought a writ available only in rare cases).

132. *See R.I. Grand Jury*, 909 F.3d 26, 28–29 (1st Cir. 2018) (ruling that the requisites for a writ of advisory mandamus were satisfied, namely the "novelty of the question, its substantial public importance, and its likeliness to recur").

133. *See id.* at 30 (discussing the need to narrowly construe the privilege because of the obstacle it presents to the search for truth).

134. *See id.* (discussing the pros and cons of confidentiality for the public).

135. *See id.* (citing the Seventh, D.C., Eighth, and Second Circuit opinions).

136. *See id.* (stating that the split is essentially even because the Seventh Circuit found that the privilege did not apply, and the Second Circuit found that it did).

government."[137] The court determined that these arguments were not dispositive because if taken literally they would not allow government attorneys to assert the privilege in response to civil subpoenas or discovery requests, violating Supreme Court precedent.[138] Instead, Judge Kayatta said that more than the public nature of the Department is needed.[139] The court rejected the United States' argument that the "something more" is a subpoena from a criminal grand jury investigating a crime.[140] The court effectively rejected the proposition that there is a broad no-privilege rule for government attorneys.[141]

The court further distinguished this case from others that have held that the privilege does not apply in this context by saying that the Eighth and D.C. Circuit cases turned on a federal statute requiring federal employees to report wrongdoing.[142] Continuing this federal-state argument, the court cited the Second Circuit's apparent deference to Connecticut and the state's decisions concerning how to run its own government.[143]

Finally, the court addressed a question that was raised during oral arguments; should it matter if the grand jury is investigating possible criminal conduct by government officials themselves, as

---

137. *See id.* (highlighting the D.C. and Seventh Circuits use of these arguments).

138. *See id.* at 31 ("Unless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys." (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 170 (2011))).

139. *See id.* ("We take from this precedent the conclusion that the public nature of the Department cannot itself deem the privilege inapplicable.").

140. *See id.* (noting that criminal subpoenas are also served on private entities who are allowed to assert the attorney-client privilege).

141. *See id.* ("So none of the United States' principal arguments for sustaining the broad 'no privilege' rule that the district court adopted can carry the day on their own.").

142. *See R.I. Grand Jury*, 909 F.3d at 31 (distinguishing the cases by saying that state employees do not have the same reporting requirements as federal employees under 28 U.S.C. § 535(b)). Section 535(b) states that any information received by an "agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General." 28 U.S.C. § 535(b) (2012).

143. *See id.* (stating that this conflict "may cut in favor of respecting the state's view of the best balance between the public's interest in government transparency and the beneficial aspects of the privilege").

opposed to the instances in which a grand jury is subpoenaing information from the government but in connection to a private entities conduct?[144] Judge Kayatta stated that the United States' argument would have been much more persuasive if they had shown that the grand jury's subpoena was "targeted at wrongdoing by government officials themselves."[145] Judge Kayatta stated that in that instance, the public interest would be in "uncovering and stopping" crime when it is present in the government itself.[146] He believed that it was no coincidence that in all three of the circuit court decisions holding that the privilege did not apply, there was potential wrongdoing by government actors.[147] During oral arguments, the attorney for the United States would not discuss the specific nature of the subpoena, making it clear that they opposed a level of judicial oversight that would require prosecutors to tell a state whether they were a target, subject, or simply a holder of information needed in a criminal investigation.[148] Because the United States did not argue that the wrongdoing being investigated was by a government actor, the court found the federal government did not tip the balance of public interest in its favor.[149]

Because Rhode Island's Attorney General stated that it would not be their practice to assert the privilege if they knew the investigation was targeted at government misconduct, the court did not need to lay out a specific balancing test of when the

144. *See id.* (stating that the United States would have a much better argument if the potentially criminal conduct was effectuated by a government employee).

145. *Id.* at 32.

146. *Id.*

147. *See id.* (outlining how in the Seventh Circuit the suspected wrongdoer was a governor, and in the D.C. and Eighth Circuits it was the President of the United States).

148. *See* Oral Argument at 34:40, *R.I. Grand Jury*, 909 F.3d 26 (1st Cir. 2018), https://perma.cc/URR2-N34C (last visited Oct. 23, 2019) (arguing that this level of oversight was not appropriate) (on file with the Washington and Lee Law Review).

149. *See R.I. Grand Jury*, 909 F.3d at 32 ("[T]he United States made no attempt to persuade the district court that the grand jury's subpoena is targeted at wrongdoing by government officials themselves.").

privilege would be usurped by a grand jury subpoena.[150] The court granted the writ of mandamus, "directing the district court to vacate its denial of the motion to quash."[151] The court declining to adopt a broad no-privilege rule was not overly alarming.[152] On the other hand, the court's pursuit of identifying where the public's interest lies did lead to alarming results; with the court asking for access to secret grand jury information in order to determine whether the privilege should apply.[153] The court held that there is no categorical rule precluding state governments from asserting the attorney-client privilege in response to a federal grand jury subpoena.[154]

B. Second Circuit

In 2004, a federal grand jury subpoena was issued pursuant to an investigation into possible criminal violations by Connecticut public officials and employees.[155] The U.S. Attorney's Office was investigating whether the governor of Connecticut and his staff had received kickbacks for doing public favors.[156] The testimony of Anne George, the former legal counselor to the Connecticut Governor's Office, was subpoenaed.[157] George appeared before the

150. *See id.* (leaving that question to presumably be decided by a future opinion only if the state attorney general's office asserted the privilege even after being informed that a state agency was believed to be the offender).

151. *Id.*

152. *See id.* at 31 (declaring that the United States did not make an argument that would sustain the lower courts categorical no privilege rule).

153. *See id.* at 30 (continuing other circuits' discussions of public interest being a major factor in the determination of the government attorney-client privilege issue).

154. *See id.* at 32 (qualifying the holding by saying it was on the record as it has been compiled in this case).

155. *See* United States v. Doe, 399 F.3d 527, 528 (2d Cir. 2005) ("[I]n the course of investigating possible criminal violations by Connecticut public officials and employees, and by private parties with whom the state had done business, a federal grand jury subpoenaed the testimony of Anne C. George, former chief legal counsel to the Office of the Governor of Connecticut.").

156. *See id.* (investigating specifically "whether Governor Rowland and members of his staff had received gifts from private individuals and entities in return for public favors, including the favorable negotiation and awarding of state contracts").

157. *See id.* (explaining that Anne George was the "former chief legal counsel"

grand jury and after testifying that conversations did in fact take place concerning the receipt of gifts, she asserted the attorney-client privilege on behalf of her client, the governor.[158] The U.S. District Court for the District of Connecticut, ordering George to testify, stated that the grand jury's mission to investigate criminal activity clearly outweighed the interest of the attorney-client privilege.[159] Governor Rowland and the Office of the Governor appealed.[160] Even though Governor Rowland announced his resignation before oral arguments, the court confirmed that his successor, Governor Rell, would also decline to waive the privilege.[161]

The Second Circuit begins its analysis from the standpoint that it would "proceed cautiously when asked to narrow the privilege's protections in a particular category of cases."[162] This starting point can be contrasted to that taken by other circuits who instead proceeded cautiously to expand the privilege's protections.[163] The Government made arguments that fall in line with the three previous circuits' holdings.[164] The court was skeptical about the assumption that the public interest lies in disclosure.[165] According to the Second Circuit, the balancing of

---

to the Office of the Governor).

158. *See id.* at 530 ("Accordingly, asserting the privilege on behalf of her client, George refused to answer questions pertaining to the content of the conversations.").

159. *See id.* ("[T]he district court concluded that '[r]eason and experience dictate that, in the grand jury context, any governmental attorney-client privilege must yield because the interests served by the grand jury's fact-finding process clearly outweigh the interest served by the privilege.'").

160. *See id.* ("Both the Office of the Governor and Rowland, as interested parties, appealed the district court's decision.").

161. *See id.* ("On August 6, 2004, the newly appointed counsel to the Office of the Governor informed us that Governor Rell declined to waive the privilege.").

162. *Id.* at 531.

163. *See In re* Lindsey, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (beginning on the basis that the privilege would need to be extended); *Ill. Grand Jury*, 288 F.3d 289, 293 (7th Cir. 2002) (same).

164. *See Doe*, 399 F.3d at 533 (arguing that the client being a public entity is a big difference from private clients, and that revealing information about criminal activity is in the public interest).

165. *See id.* ("We cannot accept the Government's unequivocal assumption as to where the public interest lies.").

public interest lies between government officials receiving legal counsel and the truth-seeking function of the grand jury.[166] The court settled the balancing of interest question by stating that the public interest lies with public officials seeking out and receiving competent legal counsel.[167] The court quoted a Connecticut state statute that it believed showed that the people of Connecticut had "concluded that the public interest is advanced by upholding a governmental privilege even in the face of a criminal investigation."[168] The court in no way held that the state statute was dispositive though, and specifically pointed out that they were just citing the statute as support for where the public interest lies.[169]

The court held that the attorney-client privilege applies to communications between government actors and government lawyers because the public interest is best served by it, and the importance of its protections.[170] The court also decided that it would not adopt some type of balancing test that would determine on a case-by-case basis if there was a specific need for evidence that the privilege should yield to, citing Supreme Court guidance calling for the need for reliable enforcement of the privilege.[171]

---

166. *See* United States v. Doe, 399 F.3d 527, 534 (2d Cir. 2005) ("Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.").

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

168. *Id.*

169. *See id.* ("But we cite the Connecticut statute to point out that the public interest is not nearly as obvious as the Government suggests.").

170. *See id.* ("Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.").

171. *See id.* ("The Supreme Court has instructed that, where the attorney-client privilege applies, its protections must be reliably enforced in order to effectuate its goal of promoting compliance with the law.").

C. D.C. Circuit

During an investigation by Independent Counsel Kenneth Starr into the conduct of Monica Lewinsky and President Bill Clinton, a grand jury subpoena was issued to Bruce Lindsey.[172] Bruce Lindsey was Deputy White House Counsel and an Assistant to the President.[173] When Lindsey testified before the grand jury, he refused to answer certain questions, believing that the questions asked for information "protected from disclosure by a government attorney-client privilege applicable to Lindsey's communications with the President as Deputy White House Counsel . . . ."[174] The U.S. District Court for the District of Columbia rejected Lindsey's government attorney-client privilege claim, ruling that "the privilege is qualified in the grand jury context and may be overcome upon a sufficient showing of need for the subpoenaed communications and unavailability from other sources."[175] The Office of the President appealed the district court order compelling Lindsey's testimony.[176]

The U.S. Court of Appeals for the District of Columbia began its analysis by acknowledging that the government attorney-client privilege exists.[177] The court took the approach that under Rule 501 of the Federal Rules of Evidence, it is the court's duty to define "the particular contours of the government attorney-client privilege."[178] The court noted that the Supreme Court has not

---

172. *See Lindsey*, 158 F.3d at 1267 (investigating financial transactions by then President Clinton and whether witnesses had obstructed justice in a civil lawsuit against President Clinton).

173. *See id.* (working as a government attorney).

174. *See id.* (refusing to testify, citing the executive privilege as well as the attorney-client privilege in his capacity as President Clinton's personal attorney).

175. *Id.*

176. *See id.* (challenging the district court's interpretation of the government attorney-client privilege).

177. *See id.* at 1270 (discussing how it certainly does exist foundationally, but saying whether the Office of the President can assert it in this instance requires further analysis).

178. *See id.* at 1272 ("[P]ursuant to our authority and duty . . . to interpret privileges 'in light of reason and experience,' we view our exercise as one in defining the particular contours of the government attorney-client privilege." (quoting FED. R. EVID. 501)).

articulated a test for courts to use to determine if an evidentiary privilege exists.[179] The Supreme Court has stated, though, that exclusionary privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[180] The D.C. Circuit insinuated that as a starting point this meant that it was not trying to find an exception to the attorney-client privilege, but instead trying to determine if the privilege extended broadly enough to encompass this issue.[181]

The court questioned whether Lindsey's conversations with the President even met the basic requirements for asserting the privilege, such as being for the purpose of seeking legal advice or an opinion of law, from a member of the bar, who was acting as an attorney.[182] The court reasoned that at least a few of the privileged conversation claims would meet the requirements, and the court was not precluded from deciding the bigger government attorney-client privilege issue.[183]

The court also distinguished the role of a government lawyer from that of a private attorney.[184] The court reasoned that government attorneys' loyalties are to members of the public and not solely to their clients or government agencies.[185] The court also

---

179. *See id.* at 1268 (discussing alternatively, though, that the Supreme Court has "placed considerable weight upon federal and state precedent" (quoting *In re* Sealed Case, 148 F.3d 1073, 1076 (D.C. Cir. 1998))).

180. Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 346 U.S. 206, 234 (1960) (Frankfurter J., dissenting)).

181. *See In re* Lindsey, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (explaining that the Office of the President contended that not upholding the privilege in this instance would amount to an exception, but then going on to say that the court viewed it as an extension).

182. *See id.* at 1270 (stating that the record provided by the district court was centered more broadly on whether the attorney-client privilege existed, not whether it would actually apply to the conversations in question).

183. *See id.* at 1271 ("The parties, we believe, are entitled now to a ruling to govern Lindsey's future grand jury appearance.").

184. *See id.* at 1272 ("With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar.").

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

noted that the public's interest is in "uncovering illegality among its elected and appointed officials."[186] Concerned about these public interests, the court proclaimed that "[t]he obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government."[187] As evidence of where the public's interest lies, the court also cited a federal statute that requires government agencies to report criminal violations.[188] 28 U.S.C. § 535(b) requires that if a government agency finds evidence of criminal violations by government employees, they should be reported to the Attorney General.[189] The D.C. Circuit made clear that this code section did not control this case though, because the Office of the President is not a department as defined in this statute.[190]

In rejecting the Office of the President's arguments, the court relied heavily on the decision in *United States v. Nixon*.[191] The Supreme Court in *Nixon* created a qualified privilege for executive communications, denying the executive full privilege in light of a criminal investigation.[192] The Court in *Nixon* laid out how committing to the rule of law requires protecting our adversarial system of criminal justice, including the presentment of all relevant facts.[193] The D.C. Circuit explained that it saw no reason

---

186. *Id.*

187. *Id.*

188. *See id.* at 1274 ("[G]overnment officials holding top legal positions have concluded, in light of section 535(b), that White House lawyers cannot keep evidence of crimes committed by government officials to themselves.").

189. *See* 28 U.S.C. § 535(b) (2012) (requiring the reporting of violations of title 18 of the U.S. Code).

190. *See Lindsey*, 158 F.3d at 1274 (discussing the definition of the statute and its inapplicability to this case).

191. *See* United States v. Nixon, 418 U.S. 683, 708 (1974) (recognizing a qualified privilege for the executive's communications).

192. *See id.* (determining that criminal investigations are important enough that in certain instances other important rights and privileges would need to step aside).

193. *See id.* at 709 (delving into the history of the United States' criminal justice system and the importance of protecting the compulsory process of presenting evidence).

why a President's conversations seeking legal advice should be given higher protection than those for policy or political advice.[194] While the court did acknowledge that their decision may cause communication to be chilled between government actors and attorneys, the privilege will not apply only if the communications are about criminal wrongdoing.[195]

The D.C. Circuit went on to conclude that "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."[196] The court held that government lawyers "may not rely on [the] government attorney-client privilege to shield such information from disclosure to a grand jury."[197] The effect of the opinion was to contour the outer bounds of the government attorney-client privilege.[198]

D. Eighth Circuit

President Bill Clinton, and First Lady Hillary Rodham Clinton were being investigated by Independent Counsel Kenneth Starr for their ties to several corporations in an investigation that became known as "Whitewater."[199] The Whitewater investigation began years prior to this case and involved business transactions that occurred prior to Mr. Clinton's election as President.[200] A

194. *See In re* Lindsey, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (discussing how only a conceited lawyer could explain why legal advice is more important to the executive than policy or political advice).

195. *See id.* at 1276 ("[A]lthough the privacy of these communications may not be absolute before the grand jury, the Supreme Court has not been troubled by the potential chill on executive communications due to the qualified nature of executive privilege.").

196. *Id.* at 1278.

197. *Id.*

198. *See id.* at 1283 (finding that the attorney-client privilege does not extend to this outer limit).

199. *See Whitewater Investigation*, 112 F.3d 910, 913 (8th Cir. 1997) (investigating their relationships with "Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." (quoting *In re* Madison Guar. Sav. & Loan Assn, Div. No. 94-1, Order at 1–2 (D.C. Cir. Sp. Div. Aug. 5, 1994))).

200. *See* Dan Froomkin, *Untangling Whitewater*, WASH. POST, https://perma.cc/RV8C-VAT9 (last visited Oct. 23, 2019) (outlining the Whitewater investigation and events that led to grand jury subpoenas) (on file

grand jury issued a subpoena requiring the production of documents that were created during meetings between Office of Counsel to the President's attorneys and Hillary Clinton regarding Whitewater subjects.[201] The White House refused to produce the notes pertinent to the subpoena "citing executive privilege, attorney-client privilege, and the attorney work product doctrine."[202] The U.S. District Court for the Eastern District of Arkansas did not reach the question of whether the government attorney-client privilege protected the documents, but instead held that because the First Lady thought her conversations were privileged, the attorney-client privilege applied.[203] The Office of Independent Counsel appealed.[204]

The U.S. Court of Appeals for the Eighth Circuit began by asking "whether a governmental attorney-client privilege exists at all in the context of a federal criminal investigation."[205] This approach is similar to the one taken in *Lindsey*, where as a starting point, the court was not deciding whether these communications fit an exception to the privilege but whether a privilege existed at all.[206] The court found that current case law lacked a clear direction on the issue and instead turned to "general principles."[207] The court discussed general principles such as the right the public has to every man's evidence.[208]

---

with the Washington and Lee Law Review).

201. *See Whitewater Investigation*, 112 F.3d at 913 (requiring the documents to be produced no matter who else was present at the meetings).

202. *Id.* at 913–14.

203. *See id.* at 914 ("The District Court found it unnecessary to reach the broadest question presented by the OIC, whether a federal governmental entity may assert the attorney-client privilege or the work product doctrine in response to a subpoena by a federal grand jury.").

204. *See id.* ("The OIC appealed, and we granted expedited review.").

205. *Id.* at 915.

206. *See In re* Lindsey, 158 F.3d 1263,1272 (D.C. Cir. 1998) (discussing the competing starting points argued for by the Office of the President and the Independent Counsel).

207. *See Whitewater Investigation*, 112 F.3d at 918 ("Lacking persuasive direction in the case law, we turn to general principles.").

208. *See id.* (starting their analysis from the policy position that individuals have a duty to provide testimony in criminal matters).

The court reviewed a broad array of potential evidence, including Supreme Court decisions in *Nixon* and *Upjohn*.[209] The court distinguished *Upjohn* by pointing out that unlike corporations, the White House cannot be exposed as an entity to criminal liability.[210] The second distinction the court made was that "executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General."[211] Lastly, concerning the *Upjohn* case, the court pointed out that it is in the public's best interest to have an open and honest government.[212] The Eighth Circuit acknowledged that *Nixon* was distinguishable because President Nixon never asserted the attorney-client privilege.[213] The court still found *Nixon* "indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes."[214] This emphasis on the importance of the criminal justice system and its ability to overcome testimonial privileges is another one of the foundational "general principles" the Eighth Circuit considered.[215]

The court believed that "strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials."[216] The court made clear that

---

209. *See id.* at 920 (discussing Supreme Court jurisprudence).

210. *See Whitewater Investigation*, 112 F.3d 910, 920 (8th Cir. 1997) ("[T]he actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability."); Upjohn Co. v. United States, 449 U.S. 383, 386 (1981) (determining the "scope of the attorney-client privilege in the corporate context").

211. *Whitewater Investigation,* 112 F.3d at 919.

212. *See id.* at 921 ("We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.").

213. *See id.* at 919 ("It is true, as the White House responds, that the President did not assert an attorney-client privilege in *Nixon*, and so the case is not directly controlling.").

214. *Id.*

215. *See id.* at 919–20 (discussing the argument the White House made in response to this assertion and the reasons why the court believes the personal attorney-client privilege analogies are incorrect).

216. *Id.* at 921.

government actors can still maintain privileged communications with government attorneys, as long as they do not include criminal activity that could be investigated by a grand jury in the future.[217] The court also determined that the Office of Independent Counsel was not trying to invade the privilege the First Lady had in her personal capacity with her personal lawyer.[218]

The court went on to hold that the First Lady's belief that her conversations were privileged did not make them privileged,[219] that the presence of other individuals at the meetings did not affect the privilege,[220] and that the work product doctrine did not apply in this case.[221]

This case is significant because as Judge Kopf suggested in his dissent, the Eighth Circuit could have adopted an approach that more closely mirrored the Supreme Court's in *Nixon*.[222] Judge Kopf believed the government should be entitled to the attorney-client privilege and a showing of necessity and relevancy would need to be given by the prosecutor in order for the privilege to be set aside.[223] The court instead held the privilege inapplicable to

---

217. *See id.* ("Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation.").

218. *See id.* at 915 (highlighting the White House as the actual party of interest); *see also In re* Lindsey, 158 F.3d 1263, 1276 (D.C. Cir. 1998) (making clear that government officials retain the attorney-client privilege when confidentially communicating with personal counsel).

219. *See Whitewater Investigation*, 112 F.3d at 923–24 ("Without delving into the policy reasons behind these exceptional legal doctrines, we are satisfied that there is no compelling reason that a reasonable-mistake-of-law rule should apply in the realm of privileges.").

220. *See id.* at 922 (refusing to extend the common-interest doctrine because the requisite common-interest between clients was missing in this case).

221. *See Whitewater Investigation*, 112 F.3d 910, 924 (8th Cir. 1997) ("The White House's claim of work product immunity founders on the 'anticipation of litigation' requirement of the doctrine.").

222. *See id.* at 926–27 (Kopf J., dissenting) (discussing certain procedural requirements that should be imposed on the Independent Counsel before the documents could be turned over to a grand jury); United States v. Nixon, 418 U.S. 683, 707 (1974) (resolving the case in a way that allowed for both the judiciary and the executive branches to retain the proper level of respect).

223. *See Whitewater Investigation,* 112 F.3d at 926 (Kopf J., dissenting) (suggesting that the special prosecutor should have production requirements and

government attorneys in the face of criminal proceedings inquiring into the actions of government officials.[224]

E. Seventh Circuit

Federal prosecutors investigating a scandal in the Illinois Secretary of State's office attempted to question Roger Bickel, the Chief Legal Counsel to the Secretary of State's office.[225] Bickel had provided legal counsel and advice to the Illinois Secretary of State, George Ryan, who later became the governor of Illinois.[226] The scandal consisted of alleged bribe taking, obstruction of justice, and the improper use of campaign funds.[227] Even after Bickel was served with a grand jury subpoena, Ryan continued to fight for Bickel to not testify, claiming their communications were privileged.[228] The U.S. District Court for the Northern District of Illinois, Eastern Division, granted a motion to compel Bickel's testimony, "finding that no attorney-client privilege attached to the communications at issue, and, alternatively, that if a privilege did attach, White had effectively waived it."[229] Ryan appealed the district court's ruling, and the U.S. Court of Appeals for the Seventh Circuit reviewed the question de novo.[230]

---

then an *in camera* review would be conducted as well).

224. *See id.* at 921 (majority opinion) (stating in the next sentence 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").

225. *See Ill. Grand Jury*, 288 F.3d 289, 290 (7th Cir. 2002) ("Because of his role in advising then-Secretary Ryan, federal prosecutors sought to discuss these matters with Bickel.").

226. *See id.* ("Roger Bickel was employed by the state of Illinois as Chief Legal Counsel to the Secretary of State's office during the first four years of former Secretary (now Governor) George Ryan's administration.").

227. *See id.* (involving a three-year investigation by federal prosecutors).

228. *See id.* at 291 ("Ryan continued to oppose all efforts to obtain allegedly privileged information from Bickel.").

229. *See id.* (finding that White, the current Illinois Secretary of State, could waive the privilege that would have applied to Bickel and Ryan in their official capacities).

230. *See id.* ("We review de novo the question whether Ryan may invoke the attorney-client privilege to shield Bickel's testimony before the federal grand jury.").

Opening its analysis in a similar way as the D.C. Circuit and Eighth Circuit, the court began by stating that a decision to protect government official's communications with government attorneys in light of a federal grand jury subpoena would be an extension of the attorney-client privilege.[231] Because there are no "deep historical roots" or common law traditions for applying a government attorney-client privilege that survives a criminal investigation, the court resorted to whether policy reasons favor the application of the privilege.[232]

The first reason the court articulated for not upholding the government attorney-client privilege in the wake of a criminal investigation is that government lawyers have a "higher competing duty to act in the public interest."[233] The court noted that government attorneys take an oath to uphold the laws of our country or their respective state, and they are paid by the taxpayers of that jurisdiction.[234] The second reason the court provided was that unlike individuals and corporations, "[a] state agency . . . cannot be held criminally liable by either the state itself or the federal government."[235] This is true because the privilege does not attach to the government employee, but to the government office itself.[236] Because the privilege runs to the office and a state agency cannot be held criminally liable, "[t]here is thus no need to offer the attorney-client privilege as an incentive to

231. *See id.* at 293 ("While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue.").

232. *See id.* at 292–93 ("Our decision here instead must rest on whether the policy reasons for recognizing an attorney-client privilege in other contexts apply equally when the United States seeks information from a government lawyer.").

233. *Id.* at 293.

234. *See id.* ("It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.").

235. *Id.* at 294.

236. *See Ill. Grand Jury*, 288 F.3d 289, 294 (7th Cir. 2002) ("But the privilege with which we are concerned today runs to the office, not to the employees in that office.").

increase compliance with the laws."[237] The court's final analysis centered on the fact that "the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context."[238] The court expressly stated that the public interest is best served by "good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure."[239] A government employee can also still be protected by the attorney-client privilege in the criminal context if they were to consult with a private attorney instead.[240] The D.C. Circuit has also stated that government officials could consult with private counsel and retain the traditional privileges protecting their confidential communications.[241]

While not part of the holding, the Seventh Circuit also responded to a federalism argument made by Ryan.[242] Ryan argued "that even if federal attorneys lack an attorney-client privilege in criminal proceedings, state-employed attorneys should receive one."[243] This argument was Ryan's attempt to distinguish this case from those previously heard in the D.C. Circuit and Eighth Circuit.[244] The court found no reason to distinguish between state and federal attorneys, and refused to recognize an evidentiary privilege that would impair legitimate federal interests.[245] Because the court ruled that none of the

---

237. *Id.*

238. *Id.*

239. *Id.*

240. *See id.* ("An officeholder wary of becoming enmeshed in illegal acts may always consult with a private attorney, and there the privilege unquestionably would apply.").

241. *See In re* Lindsey, 158 F.3d 1263, 1276 (D.C. Cir. 1998) (discussing how government counsel in this case was trying to say they were assisting the President in a personal capacity).

242. *See Ill. Grand Jury*, 288 F.3d at 294 ("Ryan makes one final argument in favor of his assertion of a governmental privilege: in a word, federalism.").

243. *Id.* at 294–95.

244. *See id.* at 295 ("Neither of the cases on which Ryan relies offered a square holding that an attorney-client privilege exists between state government lawyers and their state clients that can override the interests of a federal grand jury."); *Lindsey*, 158 F.3d at 1274 (attempting to distinguish that all of the government actors in this case were federal); *Whitewater Investigation*, 112 F.3d 910, 913 (8th Cir. 1997) (same).

245. *See Ill. Grand Jury*, 288 F.3d at 295 ("Having already determined that

communications between Bickel and Ryan were privileged, there was no reason for it to decide if the new Illinois Secretary of State could waive the privilege for conversations that took place prior to him assuming office.[246]

VI. Resolving the Circuit Split: Is a Factors Test or Categorical Approach Appropriate?

A. Should it Matter Whether the Grand Jury Subpoena is Issued to a Federal versus State Government?

Several of the circuit court opinions involved a federal grand jury issuing a subpoena to a state government or actor.[247] While not part the court's holding, the First Circuit briefly addressed the federal-state conflict.[248] Judge Kayatta stated that the federal-state nature of the conflict may favor allowing a state to best address the balance of transparency and confidentiality for themselves.[249] The court went on to rhetorically ask why a federal grand jury should be able to "overrule a state's decision on how best to operate its own government when there is no claim of wrongdoing by state officials?"[250] The court pointed to the Second

---

the policy reasons behind the attorney-client privilege do not justify its extension to government attorneys in the context of criminal investigations, we decline the invitation to make any distinction between state and federal attorneys for ill-defined reasons of federalism.").

246. *See id.* (expressing no opinion on the determination made by the district court concerning this issue).

247. *See R.I. Grand Jury*, 909 F.3d 26, 27 (1st Cir. 2018) (discussing whether a state government can invoke the attorney-client privilege against a federal grand jury subpoena); United States v. Doe, 399 F.3d 527, 528 (2d Cir. 2005) (discussing whether the Office of the Governor of Connecticut was required to reveal to a federal grand jury the contents of private conversations); *Ill. Grand Jury*, 288 F.3d 289, 290 (7th Cir. 2002) (discussing whether a state government lawyer could refuse to disclose communications in light of a federal grand jury subpoena).

248. *See R.I. Grand Jury*, 909 F.3d at 31–32 (rejecting a categorical rule that a state cannot assert the attorney-client privilege in response to a grand jury subpoena).

249. *See id.* at 31 (stating that it would be respecting the state's own views, but not citing any Rhode Island guidance).

250. *Id.*

Circuit opinion for support, but the Second Circuit decision did not address that question directly.[251]

The Second Circuit specifically discussed how it is not bound by the laws of privilege in the states.[252] Furthermore, when the court discussed a state statute that would uphold the governmental privilege for state prosecutors in light of a criminal investigation, it simply discussed it as context for where the public interest may lie.[253] Even in upholding the governmental attorney-client privilege, the Second Circuit did not create a distinction between state and federal actors being served with a federal grand jury subpoena.[254]

The Seventh Circuit specifically addressed whether it should matter that the federal grand jury subpoena was directed to a state government.[255] The State argued that even if a federal attorney lacked the privilege, federalism concerns should mean that a state attorney would retain the privilege.[256] The court acknowledged that the Eighth Circuit, in dicta, noted that a serious federalism problem could have been implicated in the case if the subpoena had been issued to a state attorney.[257] Recognizing federalism as being important in general, the Seventh Circuit still saw no reason why state lawyers should be treated differently from federal lawyers.[258] The court cited Supreme Court precedent saying it is clear that "the United States may still sue a state to enforce the nation's

---

251. *See Doe*, 399 F.3d at 530 (discussing how the federal court is not bound by the law of privilege in the state, and never explicitly presenting a federalism argument).

252. *See id.* (citing Rule 501 of the Federal Rules of Evidence saying it requires the application of federal law).

253. *See id.* at 534 (conceding that if it was a state prosecutor seeking the information in state court, then the privilege would not apply).

254. *See id.* at 536 (refusing to qualify the privilege under these circumstances).

255. *See Ill. Grand Jury*, 288 F.3d at 295 (discussing both recent case law and an argument made by the state attorney).

256. *See id.* (arguing that leading case law concerned federal agencies not state agencies).

257. *See id.* at 294–95 (discussing the argument in detail, but dismissing the Eighth Circuit quote as dicta); *Whitewater Investigation*, 112 F.3d 910, 917 (8th Cir. 1997) (discussing a Sixth Circuit case by saying that the federal-state conflict "implicates potentially serious federalism concerns").

258. *See Ill. Grand Jury*, 288 F.3d 289, 295 (7th Cir. 2002) (finding that a different result is unjustified by this nuance).

laws."[259] The court reasoned that this "structural fact" concerning the federal system implies that there is no immunity enjoyed by state lawyers from a federal grand jury subpoena.[260] The court went on to note that "federal courts have never afforded an evidentiary privilege to the states that is not also afforded to the federal government."[261] Affording the state this privilege would impair the legitimate federal interest in enforcing criminal statutes, and no distinction should be made between state and federal attorneys.[262]

B. Should the Court Exercise Judicial Oversight over the Grand Jury?

In Judge Kayatta's analysis of whether the public interest weighed in favor of the privilege applying or not, he added to the list of factors whether the suspected wrongdoing was committed by a government actor.[263] The First Circuit was the first of the circuit courts to question whether the analysis should hinge on who is the target of the subpoena.[264]

The Department of Justice's Justice Manual says that the target of an investigation "is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."[265] The subject of an investigation "is a person whose conduct is within the scope of the

---

259. *Id.*

260. *Id.*

261. *Id.*

262. *See id.* (declining to "make any distinction between state and federal attorneys for ill-defined reasons of federalism").

263. *See R.I. Grand Jury*, 909 F.3d 26, 32 (1st Cir. 2018) (saying that the U.S. attorney had not attempted to persuade the court that the subpoena was targeted at government misconduct).

264. *See id.* (highlighting that all three of the circuits who decided that the privilege did not apply were clearly deciding the issue knowing that a government actor was the target of the subpoena).

265. *Justice Manual*, U.S. DEP'T OF JUST., https://perma.cc/G3EQ-SUJ6 (last visited Oct. 23, 2019) (on file with the Washington and Lee Law Review).

grand jury's investigation."[266] The First Circuit opinion does not get into the granularity of subject versus target, or a general person of interest, but clearly states that a lot of weight would be given to a determination that the subpoena is targeted at government wrongdoing.[267]

During the July oral arguments in the First Circuit case, the State of Rhode Island brought up that the Department did not know if it was a target or subject of the federal grand jury's investigation.[268] The judges posited to the Assistant United States Attorney (AUSA) arguing the case, that maybe the judiciary should have oversight over the investigation including finding out if the person or agency being investigated is the subject or the target of the investigation.[269] This determination would then be factored into the judge's decision concerning whether or not the government agency or employee's communications would be privileged or not.[270] Judge Kayatta's opinion indicates that if the United States had revealed who was the target of the investigation, the scales may have tipped in their favor.[271] The AUSA made clear during oral arguments that the government did not believe that this type of hairsplitting judicial oversight over grand jury subpoenas was the correct solution.[272] The AUSA highlighted the broad investigatory powers of the grand jury and

---

266. *Id.*

267. *See R.I. Grand Jury*, 909 F.3d at 32 (stating simply that the balance may have been tipped by this revelation).

268. *See* Oral Argument at 1:27, *R.I. Grand Jury*, 909 F.3d 26 (1st Cir. 2018), https://perma.cc/URR2-N34C (last visited Oct. 23, 2019) (distinguishing this case from the other four circuit opinions where the government actor was the suspected wrongdoer) (on file with the Washington and Lee Law Review).

269. *See id.* at 33:30 (discussing the effect of adopting a categorical no privilege rule, and saying that maybe the government should have to make some further representation for needing the information).

270. *See R.I. Grand Jury*, 909 F.3d at 32 (discussing how this information would have been factored into the decision).

271. *See id.* (stating that a grand jury investigating possible criminal conduct within the government would have "reinforce[d] and heightened" the importance of their arguments).

272. *See* Oral Argument at 34:40, *R.I. Grand Jury*, 909 F.3d 26 (1st Cir. 2018), https://perma.cc/URR2-N34C (last visited Oct. 23, 2019) (claiming that this type of oversight would be "completely unworkable in practice") (on file with the Washington and Lee Law Review).

its pursuit to show innocence not just criminal wrongdoing.[273] Finally, the AUSA emphasized that it makes no sense to have a rule where the "analysis rises or falls on the current status of state employees in the grand jury's investigation."[274]

The grand jury was purposefully separated from the other three branches of government by the Framers.[275] The grand jury is independent from the judiciary "both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised."[276] The Supreme Court has made their cautious approach clear; "given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure."[277] Courts should not adopt a rule that requires them to parse through grand jury proceedings and investigations in order to identify who at the moment of the issuance of a subpoena is a target or subject of the investigation.[278]

Forcing the government to explain too many details surrounding a subpoena could compromise "the indispensable secrecy of grand jury proceedings."[279] Asking for secret grand jury proceeding information is another reason why courts should not continue trying to identify where the public interest lies

---

273. *See id.* at 35:55 (highlighting how practically, the documents being sought very well may shed a favorable light on the parties).

274. *Id.* at 30:01.

275. *See* Roger A. Fairfax, *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 726 (2008) ("While modern grand jury practice may not evidence the fact, the grand jury is its own constitutional entity, which checks each of the three branches of government."); *In re* Lindsey, 158 F.3d 1263, 1278 (D.C. Cir. 1998) ("The grand jury, a constitutional body established in the Bill of Rights, 'belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people[.]'" (quoting United States v. Williams, 504 U.S. 36, 27 (1992))).

276. United States v. Williams, 504 U.S. 36, 48 (1992).

277. *Id.* at 49–50.

278. *See id.* at 48 (discussing the functional independence of the grand jury and their lack of a need to seek the permission of a court to initiate investigations or issue indictments).

279. United States v. Johnson, 319 U.S. 503, 513 (1943).

concerning whether the government attorney-client privilege should apply or not.[280]

C. Should Courts Employ a Balancing Test?

Courts could adopt and utilize a balancing test to determine if the attorney-client privilege should apply in a particular instance as a small number of states have done.[281] This test would weigh the privacy interests of the individual against the evidentiary interests in disclosure.[282] Applying this type of balancing test would require the court to make ad hoc decisions.[283] This would create a privilege contingent on the factors the court chose to introduce to determine public interest and the weight the court gave to those particular factors.[284]

The D.C. Circuit avoided creating a balancing test rule.[285] Instead, it concluded that the attorney-client privilege could not be asserted to avoid turning over information related to possible criminal violations.[286] The Second Circuit also decided that it would not adopt some type of balancing test that would determine on a case-by-case basis if there was a specific need for evidence that the privilege should yield to.[287] Both courts cited Supreme Court

---

280. *See R.I. Grand Jury*, 909 F.3d 26, 32 (1st Cir. 2018) (looking at public interest factors such as who is the target of the grand jury investigation).

281. *See, e.g.,* ME. REV. STAT. ANN., tit. 32, § 7005 (1964) (forbidding social workers from testifying about communications made with a client, unless upon a balancing of administration of justice concerns a court deems it necessary).

282. *See* Jaffee v. Redmond, 51 F.3d 1346, 1357 (7th Cir. 1995) ("Accordingly, we will determine the appropriate scope of the privilege 'by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.'"(quoting *In re* Zuniga, 714 F.2d 632, 640 (6th Cir. 1983))).

283. *See* Jaffee v. Redmond, 518 U.S. 1, 17 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure . . . .").

284. *See id.* (discussing the nature of a balancing test analysis as contingent on a judge's decision).

285. *See Lindsey*, 158 F.3d at 1278 ("Our analysis, in addition to having the advantages mentioned above, avoids the application of balancing tests to the attorney-client privilege—a practice recently criticized by the Supreme Court.").

286. *See id.* (adding that this conclusion avoided the subjective approach proposed by the district court).

287. *See* United States v. Doe, 399 F.3d 527, 535 (2d Cir. 2005) ("Having

case law that cautioned against the creation of a balancing test.[288] Although, the Supreme Court in its seminal executive privilege case essentially employed a balancing test approach.[289] The Court's decision to utilize a balancing test is distinguishable because the Court in *Nixon* was focused on separation of powers issues, which inherently requires the balancing of competing interests.[290]

The biggest problem with employing a balancing test is that it creates uncertainty concerning which communications will be protected by the privilege.[291] Attorneys working for the government need to be able to accurately advise government employees concerning which confidential communications will be privileged and which will not.[292] The Supreme Court has made

---

determined that the attorney-client privilege applies to the communications at issue in this case, we decline to fashion a balancing test . . . .").

288. *See* Jaffee v. Redmond, 518 U.S. 1, 17 (1996) ("We reject the balancing component of the privilege implemented by that court and a small number of States."); 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."); *In re* Lindsey, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (citing specifically to Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998)).

289. *See* United States v. Nixon, 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

290. *See id.* ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.").

291. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) ("Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."); Jaffee v. Redmond, 518 U.S. 1, 17 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); *Upjohn*, 449 U.S. at 393 ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.").

292. *See Swidler*, 524 U.S. at 409 (describing the importance of a certain and irrefutable privilege).

clear that an uncertain privilege "is little better than no privilege at all."[293]

There are two reasons why the application of the attorney-client privilege to government attorneys advising government employees in light of a criminal investigation should not be decided utilizing a balancing test. First, before the client discloses information to their attorney, the attorney should be able to accurately advise their client concerning the privilege's specific application.[294] An uncertain privilege has been characterized as undemocratic, and being no better than having no privilege at all.[295] Second, for any privilege to be effective, it must be administered uniformly.[296] It makes no sense to argue that an absolute privilege is necessary in order for clients to be candid with their attorneys and then argue that the privilege "should turn on the nature of the proceedings in which the privilege is asserted."[297] The correct approach would be to either contour the privilege from extending to these specific communications, or simply say that the privilege will apply.[298]

VII. Conclusion

No matter the underlying rationale chosen to justify the attorney-client privilege, it is an unquestionably "crucial fixture of

---

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

294. *See* Jaffee v. Redmond, 518 U.S. 1, 17 (1996) (stating that an attorney promising confidentiality and then having a trial judge later make a determination of the validity of the privilege in that instance would "eviscerate the effectiveness of the privilege"); *Upjohn*, 449 U.S. at 393 (discussing how an uncertain privilege is not much better than no privilege at all); Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 458 (1876) ("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.").

295. *See Conn. Mut. Life Ins. Co.*, 94 U.S. at 458 (describing an uncertain privilege as "despotic" meaning arbitrary, undemocratic, or even unconstitutional).

296. *See Upjohn*, 449 U.S. at 393 (discussing how the lower court created a difficult to apply test that would create unpredictability in its application by courts).

297. *See* Leslie, *supra* note 87, at 496 (pointing out the inconsistencies in these arguments).

298. *See id.* ("So long as the privilege's concern is with governmental rather than personal needs, there is no need for additional privilege protection.").

the American criminal justice system."[299] An illimitable privilege would prove prejudicial to the administration of justice, though, and the outer contours of the privilege must be clearly defined.[300] The government attorney-client privilege is an area of the privilege doctrine that has been muddied.[301] Five circuits have not been able to provide clear guidance concerning which communications between government lawyers and government employees, in the face of a criminal grand jury subpoena, will remain privileged and which will not.[302] This uncertainty must be resolved in a way that affected parties, prior to engaging in important and consequential conversations, know where the privilege begins and ends.[303] A categorical rule is the most appropriate and equitable answer.

Employing a balancing test would yield inequitable and inconsistent results.[304] Even just the discussion of public interest

---

299. *See* Cohn, *supra* note 45, at 1254 (reciting three rationales for the attorney-client privilege; "professional ethics, the right to privacy or the need to encourage clients to confide fully in their attorneys").

300. *See* United States v. Zolin, 491 U.S. 554, 562 (1989) (discussing the importance of the crime-fraud exceptions and its necessity in maintaining the function of the American adversary system).

301. *See, e.g.*, *R.I. Grand Jury*, 909 F.3d 26, 32 (1st Cir. 2018) (failing to sustain a broad no privilege rule, reasoning that something more is required to prevent the state from having the right to assert the privilege); *In re* Lindsey, 158 F.3d 1263, 1283 (D.C. Cir. 1998) (stating that "government officials have responsibilities not to withhold evidence relating to criminal offenses from the grand jury").

302. *See Whitewater Investigation*, 112 F.3d 910, 924 (8th Cir. 1997) (declining to apply the attorney-client privilege); *Ill. Grand Jury*, 288 F.3d 289, 295 (7th Cir. 2002) (same); *Lindsey*, 158 F.3d at 1283 (same). *But see* United States v. Doe, 399 F.3d 527, 536 (2d Cir. 2005) (failing to abrogate the attorney-client privilege by compelling chief legal counsel to disclose communication with the governor of Connecticut); *R.I. Grand Jury*, 909 F.3d at 32 (failing to uphold a categorical rule that would block states from asserting the privilege in the face of a federal criminal grand jury subpoena).

303. *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (stating that for the privilege to serve its purpose the "attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected").

304. *See* United States v. Doe, 399 F.3d 527, 534 (2d Cir. 2005) (determining that the public interest was in government officials being able to speak openly and honestly with government counsel). *But see Lindsey*, 158 F.3d at 1273 (discussing the public interest in "uncovering illegality among its elected and appointed officials").

factors led the First Circuit into an inappropriate area of judicial oversight.[305] The grand jury is meant to operate as an entity with broad investigatory powers and minimal judicial oversight.[306] This is not meant to imply that the grand jury is without oversight at all, or that it should operate outside of the confines of the Constitution or common law testimonial privileges.[307] Testimonial privileges certainly apply in the grand jury context.[308] This Note in no way suggests that they should not, but also recognizes jurisprudence cautioning against "[f]requent or undue court intervention in the proceedings of a grand jury . . . ."[309] Other issues have arisen when courts attempted to identify public interest including; inconsistent opinions,[310] the use of varying factors,[311] and the underlying need for a certain privilege.[312] In short, the balancing of public interests has not worked and should be declined altogether.[313]

It should not matter whether the federal grand jury has issued a criminal subpoena to a state or federal government person or

---

305. *See R.I. Grand Jury*, 909 F.3d at 32 (discussing how the United States' argument for abrogating the privilege would have been stronger if they had disclosed information normally kept secret by a grand jury).

306. *See* United States v. Dionisio, 410 U.S. 1, 17–18 (1973) (stating that for the grand jury to performs its constitutional function, "it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it"); United States v. Williams, 504 U.S. 36, 50–51 (1992) (highlighting the Court's reluctance for imposing judicial oversight over the grand jury).

307. *See Williams*, 504 U.S. at 48 (discussing the outer limits of the grand jury's power).

308. *See In re* Grand Jury Investigation of Hugle, 754 F.2d 863, 866 (9th Cir. 1985) (finding that the confidential marital communications privilege could be asserted in light of a grand jury subpoena).

309. *Id.* at 864.

310. *See Doe*, 399 F.3d at 534 (discussing the public interest weighing against allowing the privilege). *But see Lindsey*, 158 F.3d at 1273 (stating that the court would not apply a balancing test, but discussing the public's interest in disclosure).

311. *See R.I. Grand Jury*, 909 F.3d at 31–32 (introducing the factor considering who is the target of the investigation); *Lindsey*, 158 F.3d at 1272 (discussing federal statutes calling for federal employees to uphold a constitutional government).

312. *See Upjohn*, 449 U.S. at 393 (calling for a privilege that enables individuals to make informed decisions concerning protected disclosure).

313. *See In re* Lindsey, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (refusing to create a balancing test).

entity.[314] In light of the underlying policy rationales, there is not a compelling reason to extend the attorney-client privilege to government attorneys faced with a criminal grand jury subpoena.[315] The attorney-client privilege comes at a cost.[316] Every time a testimonial privilege is honored, potentially relevant evidence is not presented.[317]

Testimonial privileges should be consistent and certain.[318] Justice O'Connor wrote that the Supreme Court would be reluctant to expand or create a new privilege unless to "do so will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[319] Government attorneys withholding evidence from the purview of a criminal grand jury subpoena is not serving the public good. A categorical rule preventing government attorneys from asserting the attorney-client privilege in response to criminal grand jury subpoenas is the most fitting conclusion.

---

314. *See Ill. Grand Jury*, 288 F.3d 289, 295 (7th Cir. 2002) (concluding federalism concerns were not relevant in this situation).

315. *See id.* (failing to find a justifiable reason for extending the privilege).

316. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) ("[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.").

317. *See id.* (discussing this withholding of evidence as a compelling reason for limiting privileges to those that are necessary).

318. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) (trying to keep uncertainty out of the privilege doctrine).

319. *Id.* at 411 (O'Connor J., dissenting) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).