

Government Officials as Attorneys and Clients: Why Privilege the Privileged?

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INTRODUCTION

In February of this year, Congress's General Accounting Office ("GAO") filed suit against Vice President Richard Cheney. The GAO sought to require the Vice President to produce information concerning meetings between members of the National Energy Policy Development Group (hereinafter "energy task force"), of which Cheney was chair,¹ and executives in the energy industry. Cheney declined to produce the information. Although the executive branch's first line of defense was to argue that the GAO was overstepping its statutory authority,² Cheney's main concern was safeguarding the government's need for secrecy in formulating policy. Cheney emphasized the need for frank discussion among government officials, and stated that he wanted to "protect the ability of the President and Vice President to get unvarnished advice from any source we want."³ President Bush echoed Cheney's view, insisting that it was critical that the President be able to get information and confidential, forthright advice "from anyone at anytime."⁴

Of course government officials prefer to conduct business in secret. There is little doubt that assurances of confidentiality ease conversation among public officials, and between public officials and select citizens. The law provides government officials with several doctrines that together create a large zone of secrecy in which the officials conduct official business. Among these doctrines are the executive privilege, the deliberative process privilege, the investigatory privilege, and the attorney-client privilege.

But as Watergate and the Clinton scandals have shown us, secrecy in government comes at a cost. The promise of confidentiality may facilitate bad behavior, such as corruption and influence peddling. In fact, the very point of the GAO's request to

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1. Among the government officials included in the task force were the Secretaries of the Treasury, Interior, Agriculture, Commerce, Transportation, and Energy, and the EPA Administrator. Dana Milbank, *GAO Sues Administration for Task Force Records*, WASH. POST, Feb. 23, 2002, at A7.

2. Dana Milbank, *White House Girds for Protracted Fight; GAO Lawsuit Seeks Energy Information*, WASH. POST, Feb. 22, 2002, at A4 (quoting a Bush aide stating, "All we're trying to do is make sure the GAO operates within its statutory authority.").

3. Mike Allen, *GAO to Sue Cheney Within 2 or 3 Weeks; Hill Agency Seeks Energy Panel Records*, WASH. POST, Jan. 31, 2002, at A4; David M. Walker, *Man in the News; Pressing the President*, N.Y. TIMES, Jan. 31, 2002, at C6 (stating that Cheney opposed disclosure of the requested information because such disclosure would inhibit "open and robust" policy discussions).

4. Howard Fineman et al., *A New Capital Clash*, NEWSWEEK, Feb. 11, 2002, at 28.

Cheney is to determine whether energy companies that made significant campaign contributions had a strong hand in formulating the administration's energy policy.⁵ Too much government secrecy negatively affects the democratic process; citizens are deprived of the information they need to make informed choices. And when the government is involved in litigation, privileges that keep evidence from the fact finder hamper the judiciary's ability to come to just results.

This Article examines one of the tools the government regularly invokes to shield information from the public and the courts—the government attorney-client privilege. Since the Eighth and D.C. Circuits rejected President Clinton's invocation of the attorney-client privilege (the "Clinton cases"),⁶ scholars have defended the government attorney-client privilege with renewed energy. Characterizing the Clinton cases as radical departures from precedent, most critics argue that anything less than an absolute attorney-client privilege will chill government speech to the government's detriment. They worry that limits on the privilege will compel government employees in possession of potentially troublesome facts to be silent or turn to private counsel, thereby depriving government agencies and executives of the information they need to protect the government's legal interests and conform government conduct to the law.⁷ Calls for a renewed judicial commitment to a broad government attorney-client

5. Elizabeth Bumiller, *Enron's Many Strands: The Vice President; Cheney Is Set to Battle Congress to Keep His Enron Talks Secret*, N.Y. TIMES, Jan. 28, 2002, at A1.

6. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th. Cir. 1997); see also *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998).

7. See Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 673 (1999) (arguing that "one consequence of the D.C. Circuit's decision in *Lindsey* is that presidents or other government officials may be required to retain private counsel in order to obtain confidential legal advice"); see also Lance Cole, *The Government Attorney-Client Privilege After Office of the President v. Office of the Independent Counsel*, 22 J. LEGAL PROF. 15 (1997) (worrying that the opinion creates uncertainties in privilege law that makes it difficult to determine when privilege protection might apply); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998) (arguing that the government has the same need as a corporation for an absolute attorney-client privilege); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999) (arguing that the government attorney-client privilege is necessary even in criminal investigations); Amanda J. Dickmann, Note, *In re Lindsey: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291 (1999) (criticizing *In re Lindsey*); Katherine L. Kendall, Note, *In re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Government Realm?*, 1998 UTAH L. REV. 421 (1998) (arguing that *In re Grand Jury Subpoena Duces Tecum* was wrongly decided); Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995 (1999) (arguing that both cases were improperly reasoned to the extent that they suggest a limitation on the government's attorney-client privilege); Lisa E. Toporek, Comment, *"Bad Politics Make Bad Law": A Comment on the Eighth Circuit's Approach to the Governmental Attorney-Client Privilege* 86 GEO. L.J. 2421, 2436-39 (1998) (criticizing *In re Grand Jury Subpoena Duces Tecum* as putting the government employee to the choice of remaining silent or getting private counsel); *An Unnecessary Defeat for the President and Presidents*, ARK. DEMOCRAT-GAZETTE, June 25, 1997, at 10B, available at LEXIS, News Library, Arkdem File (stating that the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum* "will

privilege are increasingly common.⁸

surely cast a chill over conversations at the White House long after the present occupants have moved on"); Harvey Berkman, *Lindsey Ruling Impact: Outsourcing*, NAT'L L.J., Aug. 10, 1998, at A12 (writing that "the July 26 federal appellate court ruling that commands Mr. Lindsey to testify about his conversations with Mr. Clinton will, if it stands, affect government workers far more than anything Mr. Clinton tells Mr. Starr"); Marcia Coyle, *In the 8th Circuit: Privilege Ruling Could Touch All Gov't Attorneys*, NAT'L L.J., May 19, 1997, at A1 (quoting attorney critical of Eighth Circuit's opinion as stating that a government privilege "is essential to getting the information needed to provide legal advice"); Geoffrey C. Hazard, Jr., *Don't Confuse Two Different Client Privileges*, NAT'L L.J., June 2, 1997, at A15 (calling the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum* "wrong, or clearly wrong," and stating that it "poses serious risks for public officials in need of legal advice"); Michael Higgins, *Was Decision a Whitewater-Shed?: Supreme Court Lets Stand Ruling that Lawyer's Notes Were Not Privileged*, 83 A.B.A. J. 32 (Sept. 1997) (quoting law professor Kathleen Clark as stating that the Eighth Circuit's opinion has "huge implications" because "[i]t should cause government officials to pause before they reveal anything to their government lawyers," and quoting attorney W. Neil Eggleston as saying that the Eighth Circuit opinion is part of an "eroding of confidentiality" that makes it harder for this White House—and future White Houses—to make good decisions); Terence Hunt, *Privacy Slipping Away? Clinton's Problems May Affect Future Presidents*, ASHEVILLE CITIZEN-TIMES, Aug. 5, 1998, at A3 (writing that "[s]eeking advice on sensitive matters, presidents will not be able to turn to their senior aides, to their own counsel or even to former presidents, if current rulings are upheld"); Abbe David Lowell, *Lawyer-Client Privilege Is Absolute*, NAT'L L.J., May 26, 1997, at A21 (criticizing the Eighth Circuit's reasoning on several grounds); Gary V. Murray, *Attorney-Client Privilege Sacrosanct, Lawyers Say*, TELEGRAM & GAZETTE (Worcester, Mass.), Aug. 5, 1998, at A1 (quoting various attorneys who argue that the decision would have a negative effect on the President's ability to "be legally informed"); Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 GREEN BAG 2D 269 (Spring 2001) (criticizing the Eighth Circuit's direction that employees whose actions implicate the criminal law should seek private counsel) [hereinafter Pincus, *No Clear Legal Answer*]; Walter Pincus, *Past Attorney-Client Issue Resonates; White House Lawyer Invoked Privilege in Iran-Contra Investigation*, WASH. POST, June 7, 1997, at A3 (quoting former independent counsel Laurence E. Walsh as defending a government attorney-client privilege because "[w]e want to encourage truth"); Robert Schmidt, *No Longer Privileged Characters: Will Lindsey Ruling Chill All Federal Lawyers?*, LEGAL TIMES, Aug. 3, 1998, at 1 (quoting law professor Thomas Sargentich as warning that the Clinton cases are "potentially a real chill on government lawyering" and criticizing the idea that some government employees should be referred to private attorneys); Herman Schwartz, *Executive Restraint*, NATION, June 30, 1997, at 4 (arguing that allowing independent counsel to pierce the attorney-client privilege "would also seriously interfere with governmental operations. Government employees need legal advice even more than private citizens, to negotiate the often treacherous territory of what they can or must do in carrying out their duties."); Sandra Torrey, *The Court Took Notes, and Some Attorneys Take Exception*, WASH. POST, May 12, 1997, at F7 (reporting that "[s]ome called the [Eighth Circuit] opinion a perverse invasion of the long-standing lawyer-client privilege and said it threatens to erode the assurance of confidentiality on which all lawyers and their clients rely"). *But see* Schmidt, *supra*, at 1 (quoting law professor Paul R. Rice as stating that "the inhibitions it will create probably should have been there anyway").

8. See, e.g., Todd A. Ellinwood, "In the Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege, 2001 WIS. L. REV. 1291 (2001); Mark J. Biros & Andrew L. Wexton, *Can a Corporate Officer Waive the Corporate Attorney-Client Privilege*

But the Clinton cases were not the first in which courts balked at applying traditional privilege doctrine to government communications. Government attorney-client privilege doctrine is laced with cases where courts departed from established privilege law or manipulated doctrine to deny government attorney-client privilege claims.⁹ The trouble lies with the government privilege's shaky foundation. There is

Against the Wishes of the Corporation?, MET. CORP. COUNS., January 2001, at 16 (referring to the privilege as "sacred," and arguing that "the corporate attorney-client privilege is at risk"); Linda Greenhouse, *A Question of Privilege*, N.Y. TIMES, May 18, 1997, § 4, at 2 (arguing that "every Government agency that relies on the free flow of information" has much at stake in the attorney-client privilege); Hazard, *supra* note 7, at A15 (calling the Eighth Circuit's decision in *In re Grand Jury Subpoena Duces Tecum* "wrong, or clearly wrong"); Robert G. Morvillo, *The Decline of the Attorney-Client Privilege*, N.Y. L.J., Dec. 2, 1997, at 3 (writing that "it is disturbing to me that the privilege-unfriendly federal forum is sculpting the privilege to be less and less protective..."); David S. Rudolf & Thomas Maher, *Behind Closed Doors: Supreme Court Lets Stand Subpoena for White House Counsel's Notes*, 21 CHAMPION 40 (Aug. 1997) (stating that under current law, the White House "basically has no attorney-client privilege"); Schmidt, *supra* note 7, at 1 (quoting law professor Christopher Mueller as saying of the Clinton cases that "the [D.C. Circuit] is using the independent counsel law to distort the law of attorney-client privilege").

9. For example, in *Lee v. Federal Deposit Insurance Corp.*, 923 F. Supp. 451 (S.D.N.Y. 1996), the court denied the government's attorney-client privilege claim because the government did not show that it was "acting in a capacity similar to a 'private party seeking advice to protect personal interests.'" *Id.* at 457-58 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980)). Professor Paul R. Rice points out that the court's meaning is unclear, and that it might create a new limitation on the government privilege that would cause "great confusion." PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:28, at 128-29 (2d ed. 1999) [hereinafter RICE, TREATISE]. And in *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997), the court denied the government's attorney-client privilege claim because the information communicated by the IRS employees to government attorneys was acquired from third parties. As Professor Rice points out, this decision, as well as prior cases that have followed this limitation on the privilege, departs from established privilege law. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 983-88 (1999) [hereinafter Rice, *Continuing Confusion*]. As Rice points out, "[t]he nature of the information contained in the communications from the client to the attorney is irrelevant to the communications' privileged status. Regardless of where the client acquired the information, or the information's confidential or public nature, the content of the client's communication with his attorney is privileged." *Id.* at 985 (emphasis in original).

Another example is *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998). In *Reed*, the court held that two city council members were not "clients" of the city attorney, and thus the city waived the attorney-client privilege when two employees shared confidential attorney-client communications with them. *Id.* In a previous case, *In re Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135, 138 (6th Cir. 1989), the same court had held that the Detroit City Council was a client of the city's attorney, when council members met with the attorney in condemnation hearings. Reading the two opinions together, it appears that whether a particular government employee can be termed a "client" of the entity's lawyer depends on the subject matter of the conversation. If the privilege were necessary to encourage employees to consult with counsel, the Sixth Circuit's approach would be highly problematic, because employees could not predict whether their interests might later be viewed as "divergent" from other employees with whom they shared the privileged information.

a fault line where the instrumental justification meets the realities of the government structure. This uneven ground prevents courts from constructing a structurally sound body of government privilege law. Quite simply, the entrenched assumption that a government attorney-client privilege is necessary to encourage candor in employee-attorney communications has never been seriously questioned.¹⁰ Instead, courts and most scholars blindly accept a conclusory two-step argument: a corporate attorney-client privilege is justified, and government entities are sufficiently similar to corporate entities to justify a government privilege.¹¹ But on closer inspection, the argument collapses.

First, the instrumental justification is weak even in the corporate context. At best, the attorney-client privilege generates only a marginal increase in candor by high level corporate executives. Second, the analogy between corporate and government entities does not hold. Given the unique structure and objectives of government entities, the instrumental justification is much weaker in the government setting. The promise of a government attorney-client privilege will have no impact on most government employees' calculations regarding whether and to what extent to confide in government counsel, and whether to consult private counsel. Although a few highly placed executive branch employees, most notably the President, might rely on the promise of confidentiality when communicating with government counsel, the executive privilege, uniquely calibrated to balance the need for confidentiality with the public welfare, is the best mechanism for promoting candor by high executive branch officials. Although the President might occasionally have to turn to private counsel in the absence of a government privilege, that result is appropriate. In sum, there is simply no justification for a broad attorney-client privilege that protects all communications between government employees and attorneys made for the purpose of obtaining legal advice.

If the government privilege is not necessary to induce candor in government employees, is a government privilege justifiable on any other ground? Yes, given the current framework of our adversary system. The government must often protect its interests in litigation or administrative proceedings. Its adversaries are able to shield litigation strategy and legal analysis by invoking both the work product doctrine and the attorney-client privilege. If the government has no comparable ability to prepare its case in private, the government's (and by extension, the public's) interests will be compromised. A limited privilege is therefore necessary in order to preserve a level playing field for government litigators and the employees who communicate with them in preparing a case.

If only a limited government litigation privilege is justified, how did a broad government privilege develop? First, courts often misread precedent, quoting the language but ignoring the facts of the earliest cases sustaining government privilege claims. In fact, cases decided from 1965 (the year of the first reported opinion sustaining a federal government attorney-client privilege) to the early 1980s are consistent with a level-playing-field justification,¹² and are often blatantly inconsistent with the traditional instrumental justification. But because those courts

10. See *infra* Part I.

11. *Id.*

12. See *infra* Part IV.

used perfunctory reasoning and broad language that seemed to validate a government privilege identical to the corporate one, the privilege slowly expanded. In the 1980s, as the Freedom of Information Act ("FOIA") provided a new source of privilege litigation, courts increasingly ignored the factual details of the early cases and began to validate broad government privilege claims.

Second, lawyers and scholars aggressively facilitated the trend toward a broad privilege. For example, twenty years ago, with fewer than a handful of government attorney-client privilege cases on the books, the drafters of the Proposed Federal Rules of Evidence decided to include public officers, agencies, and entities in the definition of "client."¹³ This radical departure from earlier evidence codes occurred with little discussion, and was roundly applauded by members of the bar. Most recently, the Restatement of the Law Governing Lawyers¹⁴ puts the stamp of approval on the broadest possible government attorney-client privilege,¹⁵ even though it offers no justification for the government privilege aside from the level-playing-field argument.¹⁶ Though the drafters implicitly recognize that a broader privilege is problematic, they are content to adopt "the generally prevailing rule"¹⁷ with no

13. See 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 37-38 (1986). Specifically, rejected rule 503 defines "client" as "a person, public officer, or corporation, association, or other organization or entity, either public or private." The Advisory Committee's Note cites three cases, *Connecticut Mutual Life Insurance Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955), *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio Ct. App. 1942), and *People ex rel. Department of Public Works v. Glen Arms Estate, Inc.*, 41 Cal. Rptr. 303 (Cal. Ct. App. 1964), as dispositive of its contention that "the definition of 'client' includes government bodies." FED. R. EVID. 503(a)(1) advisory committee's note (Proposed Preliminary Draft 1969). Each of those cases disposes of the attorney-client privilege issue in a conclusory sentence.

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

15. Section 74 reads as follows: "[T]he attorney-client privilege extends to a communication of a governmental organization as stated in section 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in sections 68-72." *Id.*

16. The comments suggest that

the legal system has recognized the strategic concerns of a public agency or officer in establishing and asserting public legal rights. . . . The public acting through its public agencies is entitled to resist claims and contentions that the agency considers legally or factually unwarranted. To that end, a public agency or employee is entitled to engage in confidential communications with counsel to establish and maintain legal positions. . . . [courts have recognized that without a privilege in this scenario] governments would be at an unfair disadvantage in litigation, handling claims and in negotiations. . . .

A privilege that would cover only litigation, including claims or investigations, would be a plausible alternative.

Id. at cmt b.

17. After asserting that the privilege is justified when the government is preparing for litigation, the authors simply conclude, "This Section, however, states the generally prevailing rule that governmental agencies and employees enjoy the same privilege as non-governmental counterparts." *Id.* The authors note, "Some decisions have suggested that a 'contemplation of litigation' limitation . . . should be imposed on the governmental attorney-client privilege. That suggestion is not followed in the Section or Comment." *Id.*

attempt to explain or justify it. As others have observed, attorney self-interest has been a motivating force for expansion of the privilege.

Though a few scholars have appreciated the differences between the government and corporate entities for privilege purposes, their voices have largely gone unheard. For example, the drafters of the 1974 revisions to the Uniform Rules of Evidence withheld the attorney-client privilege from government entities *unless* the government could show that the attorney-employee communication “concern[ed] a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.”¹⁸ But the drafters did not offer a compelling justification for limiting the privilege in this way, and the provision was disregarded by scholars and all but a few states.

Part I charts the development of the government attorney-client privilege, and shows how the privilege developed by analogy to the corporate entity. Part II examines the corporate analogy, and shows that the instrumental justification for the corporate privilege is weak at best. Part III shows how the promise of a government attorney-client privilege is unlikely to factor into a government employee’s decision regarding how forthcoming to be with government counsel. Part III pays particular attention to the question of the President, and shows why there is no principled reason for allowing the President, or any other highly placed government executive, to claim a government attorney-client privilege. Part IV examines other possible justifications for a broad government attorney-client privilege, and concludes that such a privilege is defensible only when necessary to provide the government with a level playing field in litigation. Part V explores how the broad attorney-client privilege has developed, and shows how the cases that served as the foundation for the privilege are consistent with the level-playing-field justification, but inconsistent with the popular—and broader—instrumental justification.

I. THE EVOLUTION OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

The most stunning feature of the government attorney-client privilege’s history is the absence of thought and analysis accompanying the privilege’s recognition. Although writers of the leading evidence treatises have expressed doubts about whether a government privilege is justifiable,¹⁹ few courts have seemed intrigued by, or even mildly interested in, the question whether the traditional justifications for the attorney-client privilege provide a sufficient basis for extending it to the government.

Until the latter half of the twentieth century, the Federal Housekeeping Act²⁰

18. UNIF. R. EVID. 502(d)(6) (1974).

19. See 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 503(a)(1)[01], at 503-20 (1996) (“[A]lthough the privilege arose in the context of the private client, courts . . . extend the privilege to organizations and entities. This is somewhat surprising. An insensible, artificial entity can act only through its agents. Who then is the client?”); WRIGHT & GRAHAM, *supra* note 13, § 5475, at 125 (“It is unfortunate that courts and commentators have not given more consideration to this issue because there are a number of considerations that militate against the expansion of the privilege to all governmental entities.”).

20. 5 U.S.C. § 822, R.S. § 161 (1875).

enabled government officials to prohibit government employees from testifying in court. There was therefore little or no need for a governmental attorney-client privilege.²¹ However, following the amending of the Act in 1958,²² and increased efforts to allow the public access to government information (culminating in the enactment of the FOIA), government officials began to assert new doctrines to prohibit disclosure of information in court. The attorney-client privilege was one such doctrine.

Prior to 1963, only two courts had held that communications between government employees and government attorneys could be protected by the attorney-client privilege.²³ Both opinions concerned state or municipal government officials, and both courts simply assumed without reflection that the privilege applied to governmental entities, even though neither the Model Rules of Evidence nor the Uniform Rules of Evidence expressly provided for a government privilege.²⁴ In *Connecticut Mutual Life Insurance Co. v. Shields*,²⁵ the court rejected the plaintiff's argument that the privilege did not attach to communications between government employees and attorneys, stating that the "[p]laintiffs cite no cases in support of this position," and reasoning that "[t]he policy of the privilege seems to me to provide no ground for the distinction which plaintiffs suggest."²⁶ Similarly, in *Rowley v. Ferguson*,²⁷ the case upon which the *Connecticut Mutual Life* court relied, the court flatly concluded in two sentences that the documents at issue "were confidential communications between attorney and client," and that "[t]he fact that both attorney and client were public officials should make no difference."²⁸ Both cases appear to reflect the common assumption among practitioners that the attorney-client privilege should apply to government clients.²⁹

*United States v. Anderson*³⁰ was the next case to confront the government attorney-client privilege issue, and the first to consider whether the federal government ought to be able to claim the privilege. The court sustained the federal government's claim, simply assuming that the government was entitled to the privilege's protection. In *Anderson*, the government was sued by the guarantors of a note held by the Small Business Administration ("SBA").³¹ After the debtor filed for bankruptcy, the

21. See Brian S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 706 (1999).

22. See *id.*

23. *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955); *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio Ct. App. 1942).

24. See MODEL CODE OF EVIDENCE § 209 (1942); UNIF. R. EVID. 26 (1953); see also WRIGHT & GRAHAM, *supra* note 13, § 5475, at 124-25 ("[I]t is far from clear that the common law attorney-client privilege could be claimed by governments; the case law is skimpy. Neither the Model Code of Evidence nor the Uniform Rules of Evidence seem to provide for this.").

25. 18 F.R.D. 448 (S.D.N.Y. 1955).

26. *Id.* at 450.

27. 48 N.E.2d 243 (Ohio Ct. App. 1942).

28. *Id.* at 248.

29. See WRIGHT & GRAHAM, *supra* note 13, § 5475, at 125 ("[M]ost courts have assumed, with little attention to the issue, that governments can claim the benefits of the privilege.").

30. 34 F.R.D. 518, 522-23 (D. Colo. 1963).

31. *Id.* at 519.

guarantors asserted that certain actions that the government took in connection with the debtor's bankruptcy relieved the guarantors of liability on the note.³² During discovery, the guarantors demanded government documents, which had been generated during the debtor's reorganization proceedings, that contained communications among government counsel and officials of the SBA and the Securities and Exchange Commission.³³ The government resisted discovery on the grounds that the documents were protected by the attorney-client and work product privileges.³⁴

For a case of first impression, the *Anderson* opinion is remarkably short on analysis. The court quickly rejected the debtor's argument that a government attorney-client privilege was unjustifiable,³⁵ citing as dispositive *Radiant Burners, Inc. v. American Gas Ass'n.*,³⁶ and *United States v. United Shoe Machinery Corp.*,³⁷ two cases that had sustained corporate attorney-client privilege claims.³⁸ The court seemed not to consider whether the instrumental justification for the privilege made sense in the government context, or whether there were other compelling reasons to deny or tailor a government privilege.³⁹ The court's broad language led future courts to read the case as sanctioning a broad government attorney-client privilege that the government could invoke to protect communications between any government attorney and any government employee in any situation.⁴⁰

In the decade following *Anderson*, only four published opinions considered federal government claims of attorney-client privilege.⁴¹ In the first two cases to follow *Anderson*, courts sustained the government's privilege claim perfunctorily.⁴² In the third case, *General Electric Co. v. United States*,⁴³ the court at least acknowledged General Electric's argument that the instrumental justification for the privilege did

32. *Id.* at 520.

33. *Id.*

34. *Id.*

35. *Id.* at 522.

36. 320 F.2d 314 (7th Cir. 1963).

37. 89 F. Supp. 357 (D. Mass. 1950).

38. *Anderson*, 34 F.R.D. at 522-23.

39. *Id.* at 523.

40. The following year, California adopted an evidence code that included "public entities" within the definition of client. CAL. EVID. CODE §§ 175, 951 (1964).

41. *United States v. Bd. of Trade of Chicago*, No. 71 C 2875, 1973 U.S. Dist. LEXIS 11307 (N.D. Ill. Oct. 30, 1973); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 57 F.R.D. 133 (E.D. Wisc. 1972); *Detroit Screwmatic Co. v. United States*, 49 F.R.D. 77 (S.D.N.Y. 1970); *Gen. Elec. Co. v. United States*, No. 81-70, 1972 U.S. Ct. Cl. LEXIS 442 (Ct. Cl. Sept. 19, 1972). The court in *United States v. Gates*, 35 F.R.D. 524 (D. Colo. 1964), recognized in dicta that the government could assert the attorney-client privilege. *Id.* at 526. In addition, a California appellate court sustained a government attorney-client privilege claim in *People ex rel. Department of Public Works v. Glen Arms Estate, Inc.*, 41 Cal. Rptr. 303 (Ct. App. 1964).

42. *Thill*, 57 F.R.D. at 133; *Detroit Screwmatic Co.*, 49 F.R.D. at 78 (sustaining the government's attorney-client privilege claim on the ground that the document in question was "so clearly ... a privileged communication between attorney and client"). In *Thill*, the court simply cited *Anderson* as precedent. See 57 F.R.D. at 139.

43. 1972 U.S. Ct. Cl. LEXIS 442 (Ct. Cl. Sept. 19, 1972).

not hold in the government context,⁴⁴ but dismissed it in a whirl of conclusory reasoning as “unpersuasive, since under such reasoning nothing transmitted to the Justice Department [from defendant Department of the Navy] would be exempt from discovery.”⁴⁵ By assuming without discussion that a broad government attorney-client privilege existed, the courts in those cases laid the foundation for a privilege doctrine lacking in justification or coherence.

In only one of the four cases decided in the decade following *Anderson* did the court reject the government’s privilege claim. In *United States v. Board of Trade of Chicago*,⁴⁶ the United States invoked the privilege to shield from discovery documents prepared for the Commodities Exchange Authority by the Department of Agriculture’s Office of General Counsel.⁴⁷ The memoranda were a response to the Commodity Exchange Authority’s request for a legal analysis of provisions of the Commodity Exchange Act.⁴⁸ The defendant, the Chicago Board of Trade, sought discovery of the documents to establish that the rates the Board charged were consistent with the government’s own interpretation of the Commodities Exchange Act.⁴⁹ The government argued that an administrator’s report that it had previously produced to defendants contained all the relevant information, and that the documents sought were protected by the government attorney-client privilege.⁵⁰

The court vehemently rejected the government’s claim that the legal memoranda were protected by the attorney-client privilege, flatly stating that neither “law nor logic” supported extending the attorney-client privilege to the government realm.⁵¹ After dismissing precedent as nonbinding and “conclusory, unsupported and unexplained,”⁵² the court decreed that “novel privileges should be grounded upon more pertinent and persuasive precedent than this.”⁵³ Finally, it found the prototypical attorney-client relationship envisioned by the privilege simply did not exist in the particular government context, because the association between government employees and counsel in this case “is more akin to the functioning of a high-level corporate officer seeking the views of other corporate division chiefs than to the traditional lawyer and client relationship.”⁵⁴

Ultimately, however, the court backed away from a broad holding rejecting the government privilege in its entirety, and settled on a narrow ruling denying privilege protection because, “[e]ven assuming that a privilege exists,” the government had failed to meet the confidentiality requirement.⁵⁵ The case, however, was largely

44. Because a statute required Navy personnel to make the communications to the Justice Department, General Electric reasoned, the privilege was not necessary to encourage the communication and thus should not apply. *Id.* at *11.

45. *Id.*

46. 1973 U.S. Dist. LEXIS 11307 (N.D. Ill. Oct. 30, 1973).

47. *Id.* at *1.

48. *Id.* at *7.

49. *Id.* at *2.

50. *Id.* at *1.

51. *Id.* at *7.

52. *Id.* at *8.

53. *Id.*

54. *Id.* at *9-10.

55. *Id.* at *10.

ignored. The government privilege deflected this minor blow and marched on. In 1975, the Supreme Court tacitly endorsed the government attorney-client privilege in dicta,⁵⁶ and the concept became settled law.

No doubt, the complacency of most courts in addressing this issue was caused in part by the simultaneous development of the Proposed Federal Rules of Evidence in the very late 1960s and early 1970s. When the first draft of Proposed Rule 503 (codifying attorney-client privilege) was completed in 1969, there existed a total of five scattered state and federal opinions that perfunctorily recognized a government attorney-client privilege,⁵⁷ and one published article by Professor James Gardner that concluded that the extension of the privilege to any entity was not supportable.⁵⁸ Nonetheless, with little fanfare, the drafters defined "client" for privilege purposes broadly, as "a person, public officer, or corporation, association, or other organization or entity, either public or private."⁵⁹ Although the drafting process for the Federal Rules generated years of intense discussion and debate among academics, judges, lawyers, and law students, it appears the bulk of debate on privilege issues related to attorneys' efforts to expand the corporate privilege.⁶⁰ There is, strangely, no evidence to indicate that the drafters or those commenting on the drafts gave more than a moment of thought to the Proposed Rule's radical expansion of the definition of "client" to include government entities. For example, the Association of the Bar of the City of New York had this to say: "[Proposed Rule 503] gives a very broad definition as to what constitutes a client, including within it a public organization or entity. We believe this is desirable."⁶¹ Compared to other comments on the client issue, this remark is relatively expansive. Congress ultimately refused to enact Rule 503, preferring to leave the development of privilege law to the courts. However, courts since 1973 have cited Proposed Rule 503 as persuasive authority justifying an extremely broad definition of "client."⁶² Proposed Rule 503, never having been sufficiently justified, now serves as a major justification for a government attorney-

56. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-49, 154 (1975) (discussing whether the government could withhold documents in response to a FOIA request by invoking the government deliberative process privilege and the attorney work-product doctrine).

57. *United States v. Anderson*, 34 F.R.D. 518, 522-23 (D. Colo. 1963); *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955); *People ex rel. Dep't of Pub. Works v. Glen Arms Estate, Inc.*, 41 Cal. Rptr. 303 (Cal. Ct. App. 1964); *Riddle Spring Realty Co. v. New Hampshire*, 107 N.H. 271 (1966); *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio Ct. App. 1942).

58. See James A. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?*, 40 U. DET. L.J. 299, 309, 379 (1963) (finding "no well-reasoned argument" that would justify the extension of the attorney-client privilege to a corporation, and that extension of the privilege to government entities is "even more fallacious").

59. WRIGHT & GRAHAM, *supra* note 13, at 37-38 (text of Rejected Rule 503). The Advisory Committee's Note to Rule 503 cites *Connecticut Mutual Life*, 18 F.R.D. at 448, *Rowley*, 48 N.E.2d at 243, and *People ex rel. Dep't of Pub. Works*, 41 Cal. Rptr. at 303, as dispositive of its contention that "the definition of 'client' includes government bodies." FED. R. EVID. 503(a)(1) advisory committee's note (Proposed Preliminary Draft 1969).

60. WRIGHT & GRAHAM, *supra* note 13, § 5471, at 43-64 (chronicling lawyers' campaign to expand the corporate attorney-client privilege).

61. See Ass'n. of City Bar, Comments, Proposed Federal Rules of Evidence (1969).

62. See, e.g., *In re Lindsey*, 148 F.3d 1100, 1105 (D.C. Cir. 1998).

client privilege.⁶³

Simultaneously with the development of the Federal Rules, other scholars were revising the Uniform Rules of Evidence. The drafters of Uniform Rule 502, which governs attorney-client privilege, took a substantially different approach to the government privilege issue. The Rule provides that public entities may not claim an attorney-client privilege *unless* the attorney-employee "communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest."⁶⁴ Despite this profound disparity between the Uniform Rules and Proposed Federal Rule 503, there is no evidence that this attempt to drastically limit the privilege for state and municipal governments created even a ripple in scholarly discourse.⁶⁵ Although a handful of states adopted the Uniform Rules with their limited recognition of government privilege,⁶⁶ most either took the Federal Rules as their model, or adopted the Uniform Rules but dropped the provision limiting the government privilege, rendering their rules consistent with the Federal Rules.⁶⁷

As the 1980s began, cases addressing the existence and scope of the federal government's attorney-client privilege increased dramatically, in part because courts interpreted the FOIA, enacted in 1967, as containing exceptions for documents protected by the attorney-client privilege and work product doctrines.⁶⁸ The impact of FOIA cases on the development of the government attorney-client privilege cannot be understated. In ordinary litigation, courts evaluating privilege claims are mindful that the privilege carries a cost; it deprives the court of relevant evidence and may obstruct a just determination. The damage is far less extreme when the government asserts the attorney-client privilege as a basis for refusing a FOIA request because the

63. See, e.g., *Winton v. Bd. of Comm'rs*, 188 F.R.D. 398, 400 (N.D. Okla. 1999) (holding that because "Proposed Rule 503 recognizes an attorney-client privilege for public entities and officers like the Defendants in this case," and because "[t]he Court finds Rule 503's statement to be a sound reflection of the common law[,] Defendants may, therefore, exercise an attorney-client privilege").

64. UNIF. R. EVID. 502(d)(6).

65. This may be due, in part, to the fact that the Commissioners' rationale for drastically limiting the government's privilege was based entirely on the importance of open government. According to the records, there was no debate regarding whether the privilege's instrumental justification was persuasive in the government context. See *Proceedings of the Annual Conference Meeting in Its Eighty-third Year*, 1974 NAT'L CONF. OF COMM'RS ON UNIF. ST. LAWS 57-58; see also *Proceedings of the Annual Conference Meeting in Its Eighty-second Year*, 1973 NAT'L CONF. OF COMM'RS ON UNIF. ST. LAWS 74-75.

66. At least four states, Arkansas, Maine, North Dakota, and Oklahoma, have adopted the narrowed government privilege advocated by Uniform Rule 502(d)(6). See ARK. CODE ANN. § 16-41-101 (Michie 1987); ME. R. EVID. 502(d)(6); N.D. R. EVID. 502(d)(6); OKLA. STAT. ANN. tit. 12, § 2502(D)(6) (West 1993).

67. IDAHO R. EVID. 502; KY. R. EVID. 503; MISS. R. EVID. 502; S.D. CODIFIED LAWS § 19-13-2 through 5 (Michie 1994); TX. R. EVID. 503; UTAH R. EVID. 504; VT. R. EVID. 502.

68. See Gowdy, *supra* note 21, at 710 (noting that "many lower courts have cited [*NLRB v. Sears*] for the proposition that the government is entitled to an attorney-client privilege," despite the fact that the *Sears* court did not hold that Exemption 5 incorporated that privilege, but rather addressed the deliberative process and work-product privileges).

documents often are not necessary to a case. Thus, courts adjudicating government privilege claims in the face of FOIA requests were likely to sustain the government's claim with little hand wringing.⁶⁹ Unfortunately, the large number of FOIA cases sustaining government claims of attorney-client privilege created a large body of precedent and validated the doctrine.

The fact remains, however, that neither courts nor scholars have made a compelling case for a government attorney-client privilege.⁷⁰ Instead, courts, scholars, and students recite, like a mantra, two justifications: first, that the government is an entity like a corporation, and if a corporate privilege is justified, so is a government privilege.⁷¹ The second is that the privilege is necessary to ensure that government actors communicate freely with government lawyers to ensure that government actors receive the sound legal advice necessary to the successful functioning of the government.⁷²

II. THE THEORETICAL FOUNDATION FOR THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

In developing the government attorney-client privilege, courts relied heavily on a familiar but dangerous legal technique: reasoning by analogy. If other "clients" are

69. See *infra* notes 352-362 and accompanying text.

70. Only one article and a smattering of student notes have addressed the question whether the government should have an attorney-client privilege. Professor Gardner argued that the attorney-client privilege was, and should remain, personal in nature. See Gardner, *supra* note 58; see also Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1738-42 (1988) (arguing that the government should not be able to assert the privilege, and rejecting the corporate analogy); Gowdy, *supra* note 21 (arguing that the privilege is not necessary in the government context because public officials have a duty to faithfully execute the laws).

71. See, e.g., *Galarza v. United States*, 179 F.R.D. 291, 295 (S.D. Cal. 1998) (applying *Upjohn Co. v. United States*, 449 U.S. 383 (1981), to sustain the government's claim of attorney-client privilege); see also RICE, TREATISE, *supra* note 9, at 137 (stating that "[t]he U.S. Government is the largest employer in the world. Its agency structures and problems are as complex as those of any private enterprise. To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater"); Paulsen, *supra* note 7, at 495-98 (arguing that the government has the same need for the privilege as a corporation does).

72. See, e.g., *Galarza*, 179 F.R.D. at 295 (sustaining the United States' privilege claim because the government attorney "needs full and frank disclosure by the employee/physician in order to properly give sound legal advice to the United States"); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 784 (N.D. Cal. 1997) (stating that "[u]ltimately, the attorney-client privilege helps improve the quality of agency decisionmaking by safeguarding the free flow of information that is a necessary predicate for sound advice"); Chud, *supra* note 7, at 1711-13 (arguing that the privilege is necessary to ensure that government employees make full disclosure to government attorneys); Ronald I. Keller, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U.L. REV. 1003, 1025 (1982) (arguing against "an overly constricted [government] attorney-client privilege . . . because such a privilege might deter agencies from seeking essential legal advice").

entitled to a privilege for communications with their lawyers, government clients should receive the same benefit. More particularly, if the privilege is available to corporations—which, like the government, can act only through agents—then the government, as an entity, should be entitled to a comparable privilege.

Evaluation of these analogies, however, requires an examination of the justifications for the attorney-client privilege with respect to individuals and corporations. The analogies do not hold at all if the justifications for the individual and corporate privileges are not equally applicable in the government setting. Moreover, if the justification for the corporate privilege itself rests on shaky foundations, analogy to the corporation provides a weak basis for creating a comparable privilege for government clients.

This Part examines the general justifications for the attorney-client privilege and the justifications for extending the privilege to corporate clients. This examination reveals that the privilege rests most comfortably on the need to encourage clients to be open and honest with their lawyers, and that when corporate clients are involved, agency costs reduce the likelihood that the privilege will encourage clients to communicate openly with their lawyers. These conclusions serve as a background for evaluation of the government attorney-client privilege.

A. Justifications for the Attorney-Client Privilege

Justifications for the attorney-client privilege have changed over time.⁷³ Currently, the prevalent justification for the privilege is instrumental; the privilege is necessary to encourage clients to reveal all facts within their knowledge to their attorneys to enable attorneys to give sound legal advice to their clients.⁷⁴ In the planning context, the privilege enables clients to conform conduct to the law;⁷⁵ in the litigation context, the privilege facilitates thorough and efficient case preparation.⁷⁶ Although accepted as gospel among attorneys today, the instrumental justification has had its critics. From Bentham on,⁷⁷ scholars have argued that the justification is on shaky ground; while it is certain that the privilege obstructs the search for truth, whether it actually encourages client candor cannot be empirically verified.⁷⁸ Moreover, clients who do

73. See Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 48-50 (tracing the evolving justifications for the privilege).

74. See 8 JOHN HENRY WIGMORE, EVIDENCE § 2291, at 550 (John T. McNaughton ed. 1961) (urging that the privilege is necessary to free clients from fear of compelled disclosure of attorney-client communications to enable them to speak freely to attorneys); see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

75. *Upjohn*, 449 U.S. at 392.

76. *Id.* at 390-92.

77. See 7 JEREMY BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE, in THE WORKS OF JEREMY BENTHAM 473-75, 477, 479 (Bowring ed., n.p. 1842) (1827), quoted in WIGMORE *supra* note 74, at 549-51. As Bentham famously put it, the consequence of a denial of the attorney-client privilege will be “[t]hat a guilty person will not in general be able to derive quite so much assistance from his law advisor, in the way of concerting a false defence, as he may do at present.”

78. See generally Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (questioning whether current strict confidentiality rules are necessary to ensure that

not feel "guilty" will not hesitate to disclose to counsel even without assurances of confidentiality, while "guilty" clients who intend to withhold the truth during discovery may be the privilege's primary beneficiaries.⁷⁹

The utilitarian justification seems most defensible when the client is a defendant in a criminal case; the client is most unlikely to be familiar with the details of controlling law, is likely to be in possession of facts that she may be hesitant to reveal absent assurances of confidentiality, and the lawyer's lack of knowledge of those facts might seriously compromise her ability to defend the case or reach an appropriate plea agreement. Moreover, the client is protected by the Fifth Amendment and is under no compunction to reveal compromising facts to his adversary. The client, and more importantly, the lawyer who advises the client about what the client should disclose, both know that the facts communicated will not be revealed to the prosecutor unless the lawyer could be compelled to reveal them. As a result, the lawyer is likely to advise the client not to reveal compromising facts critical to the defense unless the revelations are privileged.

In the civil context, however, the instrumental justification is more problematic; discovery rules require disclosure of every relevant fact. Thus, the client with something to hide is usually required to reveal it to opposing counsel during a deposition or in response to interrogatories. If a lawyer explains that fact to a client, there is no reason why the client should hesitate to reveal the facts to her own attorney, the person she is paying to represent her best interests. Therefore, Bentham's charge that the privilege protects only the wrongdoer has some force in the civil context. The privilege affords the greatest benefit to those clients who intend to lie or skirt the truth. Thus, although it seems intuitively correct that the privilege encourages some individual clients to make full disclosure to counsel, reasonable minds could differ regarding whether the benefits of the privilege outweigh its costs.⁸⁰

clients make full disclosure to lawyers, and discussing the necessity for further empirical evidence to test underlying assumptions of confidentiality rules).

79. WIGMORE, *supra* note 74, at 553-55; see also Edmund M. Morgan, *Forward to MODEL CODE OF EVID. 25, 26-27* (1942); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 23 (1998) (agreeing with Bentham, but going further to state that "the privilege in fact harms the innocent. The harm exists because the privilege makes it more difficult for the innocent credibly to communicate that they have nothing to hide."); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 568 (1989) (arguing that the privilege reduces the expected sanction that a party faces for an unlawful act).

80. Professors Ronald J. Allen, Mark F. Grady, Daniel D. Polsby, and Michael S. Yashko offer an interesting spin on the instrumental justification; in their view, the fact that the privilege is costly is not a detriment, but a benefit. See Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 363-66 (1990). The privilege makes the opponent's fact gathering more expensive, and thus encourages the client to confide fully in her attorney. See *id.* at 363. This increased candor is useful to the extent that it encourages clients to reveal facts that the client may perceive as damaging, but which the attorney must know to develop "contingent legal claims." The authors define certain legal claims as "contingent" because their "validity is contingent on the existence of unfavorable information about the client." *Id.* at 362. The privilege is valuable because it enables the attorney to develop such claims, which, in turn, furthers the instrumental objectives underlying those claims. See *id.* at 365-66.

Modern scholars have offered other justifications for the attorney-client privilege. Charles Fried, for example, views the privilege as a necessary extension of client autonomy.⁸¹ Others argue that the privilege flows from the client's right to privacy,⁸² or the attorney's moral obligation of loyalty.⁸³ It is not clear why those morality-based concerns justify elevating attorney-client relationships above other social and intimate relationships to which the same concerns apply.⁸⁴ Nonetheless, morality-

The authors give the example of the contributory negligence defense: If a driver hits a pedestrian, the driver can deny she was negligent, or argue that the pedestrian was contributorily negligent. *Id.* A client who does not understand the law might be likely to simply deny she was negligent. However, if the attorney can assure the client that their communications will be privileged, the client may admit negligence and offer facts that indicate that the pedestrian was contributorily negligent. *Id.* In this instance, the privilege has facilitated a just outcome, has reduced perjury, and the policy underlying the contributory negligence defense has been furthered. *Id.* at 366.

According to the authors, the privilege also reduces perjury in litigation because it encourages clients to assert truthful affirmative defenses rather than to simply deny the charges in the complaint. *Id.* at 365-66. Thus, "[r]educing the cost of litigating contingent claims" by privileging the facts the client relays to the lawyer "gives potential clients an incentive to substitute away from dishonest details." *Id.* at 366. Thus, "[t]he question is not whether the privilege increases perjury but whether the increased costs created by the privilege can be justified by the *reduced* perjury that the privilege brings about and by the greater number of contingent claims that it allows to be litigated, with their beneficial real-world effects." *Id.* at 368 (emphasis in original). They further argue that, where a claim cannot be contingent (such as in the case of a creditor's action for money owed that does not depend upon the existence of some problematic fact about the creditor), the privilege is not justified. *Id.* at 367. Thus, privilege claims should not be sustained "[w]hen the lawyer could not possibly use information to develop a contingent claim, and even a relatively ignorant client would know it." *Id.* at 368. The authors argue that their analysis explains a fair number of privilege cases. *Id.* at 374-83.

Although the authors' analysis is persuasive, it is premised on the validity of the privilege's instrumental justification. If the instrumental justification is sound, then the article suggests a basis for narrowing the scope of privilege doctrine. If the privilege does not in fact encourage clients to reveal damaging facts to attorneys, however, then the privilege cannot be justified at all.

81. Charles Fried, *Correspondence*, 86 YALE L.J. 573, 586 (1977) (stating that it is "immoral for society to constrain anyone from discovering what the limits of [the rule of law's] power over him are").

82. David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956) (arguing that the right to be left alone by the state with respect to certain relationships is "more important to human liberty than accurate adjudication").

83. See CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 87, at 205-06 (Edward W. Cleary ed., 1984). McCormack argues that:

Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding personal business.

Id.

84. See *id.* § 77, at 186 (noting that "the ultimate strategic significance of evidentiary

based concerns may provide some justification for the privilege when the client is an individual.

B. The Corporate Privilege

Although some scholars have argued that a corporate attorney-client privilege can be justified on noninstrumental grounds,⁸⁵ the morality-based arguments are even weaker when the corporation is the client.⁸⁶ For example, it is difficult to perceive an entity as having a right to privacy akin to an individual's. At any rate, moral justifications for the attorney-client privilege have been superceded by instrumental objectives and have fallen out of favor in judicial discourse. In *Upjohn v. United States*,⁸⁷ the Supreme Court unequivocally embraced instrumental objectives as the controlling justification for the corporate attorney-client privilege.⁸⁸ Yet the

privilege as a bastion for defending privacy values may be doubted"); see also Allen et al., *supra* note 80, at 373-74 (arguing that neither privacy nor client autonomy are successful justifications for the attorney-client privilege); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 190 (1993) [hereinafter Thornburg, *Sanctifying Secrecy*] (arguing that the privacy argument, in the context of corporate secrets, is "merely a myth" and that the law, in favoring attorneys and other professionals over family members and others, "denigrates the general importance of private intimate relationships"). Professor Daniel R. Fischel puts it well:

Lawyers are not the only people in society who learn secrets. Friends, partners, relatives and business associates, among countless others, learn private information, frequently with the express or implied understanding that the information will be kept confidential. No doubt those other groups also face the occasional dilemma of whether to maintain confidentiality or to disclose the information in order to prevent harm to a third party. ... And regardless of what nonlawyers would do voluntarily, they are subject to compelled disclosure by subpoena and face civil or criminal penalties if they refuse. Not so with attorneys.

Fischel, *supra* note 79, at 2.

85. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer Client Relation*, 85 YALE L.J. 1060, 1076 (1976) (arguing that the corporate privilege is justified by concerns for client autonomy).

86. For a thorough and compelling argument regarding why the leading nonutilitarian arguments in favor of the attorney-client privilege are not compelling when the client is a corporation, see Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 182-92.

87. 449 U.S. 383 (1981).

88. *Id.* at 389-90. Specifically, the Court stated that the purpose of the attorney-client privilege

is 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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their

instrumental justification for the privilege is weak. At most, the privilege's effect on client candor is marginal. First, in most business settings sufficient incentives for client candor exist—there is simply no compelling need for the additional incentive that is allegedly provided by the privilege. Second, in many situations in which some additional incentive might be necessary to encourage corporate employees to be fully forthcoming with corporate counsel, the privilege does not supply that incentive. Only when high-level executives engage in highly sensitive transactions is the privilege likely to provide sufficient incentives for disclosure. Given the substantial costs that the privilege imposes, speculative gains from increased disclosure to lawyers provide a shaky justification for the corporate privilege.

Two distinct situations give rise to attorney-client communications. The first situation arises when the client seeks advice regarding prospective conduct—contract negotiations, business planning, acquisitions, or mergers (the “preconduct” setting). The second situation occurs after certain conduct: for example, a corporation may fear that certain actions it has already taken may be actionable, or a corporation learns that an employee has engaged in questionable conduct (the “postconduct” setting). The following sections explore each context in turn.

1. The Privilege and Preconduct Advice

The justification for the corporate attorney-client privilege in the preconduct stage is that the privilege encourages clients to make full disclosure to counsel and thereby obtain the legal advice necessary to enable the corporation to conform its conduct to the law.⁸⁹ Yet, scholars have argued that the attorney-client privilege is largely irrelevant to clients engaged in routine business transactions and planning. The empirical research (admittedly scant) offers support for that view.⁹⁰

attorneys.” This rationale for the privilege has long been recognized by the Court. [citations omitted] Admittedly, complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation [citation omitted], and the Government does not contest the general proposition.

Id.

89. See, e.g., *id.* at 392 (rejecting the “control group” test and adopting a broader definition of the corporate client for privilege purposes because the control group test “threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law”).

90. To date, there have been only four attempts to test empirically the assumptions of the instrumental justification. Two of those surveys targeted individual, as opposed to corporate, clients, and are thus of limited usefulness here. See Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) (presenting a survey comparing individual clients’ interactions with lawyers and other professionals); see also Zacharias, *supra* note 78 (detailing a survey evaluating the impact of lawyer confidentiality rules on attorney-client communications). One other survey was targeted at studying a range of ethical issues facing corporate attorneys, and so gave insufficient attention to the attorney-client privilege issue to be of much help. See Eric P. Slotter & Anita M. Sorensen, *Corporate Legal Ethics—An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel’s Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601 (1983). The fourth survey was conducted by Professor

It seems reasonable to assume that when corporate actors consult lawyers about routine transactions, they intend to conform corporate conduct to the law.⁹¹ With the pressing concern for the bottom line, not many employees would want to risk exposing the corporation to liability inadvertently. Moreover, many industries are heavily regulated, and compliance with regulations is a necessary feature of any run-of-the-mill transaction.⁹² Corporate actors who wish to comply with the law will not worry that their communications with counsel will eventually be revealed, because revelation would show only that the corporation did not pursue avenues that violated applicable law or regulations.⁹³ Thus, in most preconduct situations, the law need not provide additional incentive to encourage corporate employees to be candid with counsel.⁹⁴

In 1989, Professor Vincent Alexander conducted a survey of corporate executives, corporate in-house attorneys, and partners of large law firms in New York City.⁹⁵ That study offers some admittedly unscientific support for this view.⁹⁶ Among the

Vincent Alexander, and appears to be the only existing in-depth survey evaluating the impact of the corporate privilege. See Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989).

91. See Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 175; see also Morgan, *supra* note 79, at 26; John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 463-64 (1982) (questioning whether the privilege is necessary to induce corporate actors to communicate with corporate counsel); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 474 (1977) (stating that the financial stake that corporations have in their activities render corporations and lawyers "ineluctable bedfellows").

92. See Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 176; see also Zacharias, *supra* note 78, at 364 (stating that the increasing complexity of legal matters would motivate clients to seek out legal advice even absent confidentiality rules).

93. Fischel, *supra* note 79, at 29.

94. See Alexander, *supra* note 90, at 247-48. Professor Alexander's study offers some limited support for critics' argument that other sufficient incentives for full disclosure exist. Survey participants identified eight factors in addition to the attorney-client privilege that might induce client candor: 1) trust or confidence in the particular lawyer, 2) the client's faith in the attorney to solve its problems, 3) trust that the lawyer would obey her ethical obligation to refrain from revealing the client's commercial secrets, 4) the client's understanding that the lawyer needs all the facts to render good advice, 5) a corporate norm that encourages honesty, 6) the employee's fear of reprisals if she is not cooperative with counsel, 7) the understanding that all of the facts may eventually come out in litigation, and 8) the employee's predisposition for honesty. *Id.* In particular, some respondents indicated that the corporation's need for the attorney's problem-solving expertise and the understanding that the attorney can render better advice if she knows all the facts are strong inducements to client candor. *Id.* Ultimately, however, executives noted that their trust or confidence in the particular lawyer was the largest factor affecting candor. *Id.* Because this element of trust could be fostered by the privilege, the study indicates that the privilege might increase candor among upper management at the margins. *Id.* at 248.

95. See Alexander, *supra* note 90, at 202-03.

96. In 1968, Professor Alexander published the only study to attempt to determine whether the corporate attorney client privilege was necessary to encourage corporate actors to make full disclosure to corporate counsel. Alexander sent a survey to members of three groups: in-house counsel for large, New York City-based corporations, partners in large New York City law

attorneys surveyed, nonlitigators often indicated that they paid little notice to the privilege in their daily practice, unless the matter was an unusually "sensitive" transaction or personnel matter.⁹⁷ Clients gave a similar response.⁹⁸ Of course, if upper management is generally aware of the privilege's existence, that awareness may contribute to an atmosphere of openness even in routine attorney-client interactions.⁹⁹

It seems more likely, however, that the privilege has some influence when corporate management engages, not in routine transactions, but in unusual or highly sensitive ones. One survey reveals that corporate attorneys, and many of their clients, believe that the privilege plays a role in encouraging corporate attorney-client communications in this context, at least at the level of upper management.¹⁰⁰

Corporate executives face pressure to generate profits, which creates an incentive to seek every benefit that the law will allow. It is not always clear in advance whether a court or a government regulator will later determine that corporate acts fall within the law's parameters. Thus, a corporation could legitimately seek to push the law to

firms, and corporate executives. *Id.* Responding to the survey were fifty in-house attorneys, fifty-two law firm partners, and fifty-two corporate executives. *Id.* at 206.

97. Among the transactions that executives and attorneys described as "sensitive" were hostile takeovers, mergers, tax planning, and personnel matters. In descending order of frequency, the following transactions were also identified as "sensitive": internal investigations, written opinion letters, compliance with government regulations, and government investigations. *Id.* at 239.

98. *Id.* at 238-39.

99. *Id.* at 244-45.

100. Alexander's study indicates that, as a general matter, a strong majority of corporate executives and corporate attorneys surveyed believed that the privilege plays some role in encouraging client candor. Specifically, 62% of in-house counsel surveyed, 88.5% of outside counsel surveyed, and 75% of executives surveyed believed that the privilege encouraged client candor. *Id.* Moreover, most attorneys believed that most employees in upper management are aware of the privilege. Of the attorneys surveyed, 73.5% believed that all or nearly all upper management was aware of the privilege. Only 18.6% believed that middle managers were aware of the privilege, and only 4.9% believed that lower-level employees were aware of the privilege. *Id.* at 236. But when corporate executives were asked specifically how often, during the past five years, the privilege had played a role in their communications with corporate counsel, 46.2% of the executives responded "never" or "rarely," (specifically, 21.2% of corporate executives stated that the privilege "never" influenced their communications with counsel, and 25% of respondents stated that it "rarely" did. *Id.* at 242. 9.6% said that the privilege "frequently" was of concern, and 3.8% said it "always" was. *Id.*) while 40.4% responded "occasionally." Only 13.4% said "frequently" or "always." *Id.* On the other hand, 78.8% of the corporate executives surveyed indicated that they "had been concerned about the applicability of the privilege at least once in five years." *Id.* Moreover, two-thirds of attorneys indicated that they had raised the issue with clients for the purpose of encouraging candor in communications at least once in the past five years. *Id.* at 243. However, 70% of those lawyers admitted that, often, their primary objective in raising the privilege was tactical; they wanted to ensure that they could later assert the privilege in discovery. *Id.* at 243-44.

Alexander's study, though important, is of limited value, given the small sample. Moreover, it is quite possible that the respondents exaggerated the role that the privilege plays in encouraging candor, given the strong business and tactical advantages the privilege affords. *See id.* at 263 (stating that "[o]ne may reasonably suspect . . . that the role of the privilege as an incentive to candor was exaggerated by the participants").

its limits to maximize profits. Corporate actors in this position might, in fact, be somewhat hesitant to speak to counsel absent assurances that their communications will not later be used against them should the government or some other party later claim that the corporation crossed the line. Such disclosures could have an adverse effect on the bottom line.

Even here, however, the privilege's effectiveness is questionable. Professor Elizabeth Thornburg points out that, given the uncertainties of privilege doctrine, a corporate client cannot be sure at the time of the communication that a court will later find it privileged.¹⁰¹ For example, a different corporate actor might waive the privilege's protection by disclosing the communication to those who do not constitute "the client" for privilege purposes.¹⁰² In addition, she notes, whether the privilege applies to a particular communication will depend on whether a court determines that the communication concerned primarily legal, as opposed to business, advice.¹⁰³ Maintaining confidentiality is out of the speaker's control; the corporation's counsel might inadvertently disclose the communications, which will, in some jurisdictions, constitute a waiver.¹⁰⁴ As a result of these uncertainties, Thornburg argues, corporate actors are unlikely to rely on the privilege in deciding whether to disclose delicate facts.¹⁰⁵

Yet Alexander's survey suggests that employees are simply not aware of the details of privilege law, other than perhaps a vague awareness of the need to keep

101. See Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 166-73. For example, courts take radically different approaches to whether an inadvertent disclosure is a waiver of the privilege. Compare *In re United Mine Workers*, 159 F.R.D. 307, 311 (D.D.C. 1994) (stating that litigant who inadvertently or involuntarily produces a privileged document waives the right to protect all "corresponding communications relating to the responses to and requests for, legal advice on the same subject") (citations omitted), with *Bayer AG & Miles, Inc. v. Barr Labs, Inc.*, No. 92 CIV 0381, 1994 U.S. Dist. LEXIS 17988, *8 (S.D.N.Y. Dec. 16, 1994) (excusing inadvertent waiver where "millions of pages of documents were made available for inspection, thousands of documents were copied, an elaborate screening process was utilized and only a dozen documents slipped through the net," and finding that plaintiff's one-year wait to attempt to retrieve privileged documents was not negligent given the circumstances of the case). For a discussion regarding whether a corporation's voluntary disclosure to a government agency is a waiver of the privilege for all purposes, compare *Permian Corp. v. United States*, 665 F.2d 1214, 1219-1222 (D.C. Cir. 1981), in which the D.C. Circuit held that disclosure of confidential communications to a government agency waives the privilege for all purposes, with *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977), in which the Eighth Circuit allowed a corporation to assert attorney-client privilege in litigation against a private party even though it had revealed the confidential communications to a government agency.

102. Whether a particular employee personifies the "client" may depend on the jurisdiction in which that issue is subsequently litigated. See Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 169-72.

103. See *id.* at 167-68.

104. See, e.g., *Int'l Digital Sys., Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445 (D. Mass. 1988) (finding that attorney-client privilege was waived when party's attorney inadvertently disclosed document); *FDIC v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992).

105. See Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 169-72.

communications confidential.¹⁰⁶ Employees who rely on the privilege in speaking candidly to counsel seem to rely not on a thorough knowledge of privilege law, but on vague notions that attorneys are ethically bound to keep confidences and cannot reveal client confidences in court.¹⁰⁷ Even if the corporate attorney-client privilege were abolished entirely, lawyers would still be ethically bound to keep client confidences.¹⁰⁸ If corporate employees have only a hazy understanding of the differences, the privilege is not likely to have an impact on the degree of candor in some employee communications with counsel.¹⁰⁹

In sum, the most that can be said about the privilege's effectiveness is that it may encourage candor among upper-level executives involved in sensitive business transactions. But, even if the privilege might encourage candor in some situations, does it achieve its ultimate objective, which is to encourage compliance with the law?¹¹⁰ The answer is unknown.¹¹¹ In some number of cases, a court or regulator will determine that the corporation's act was within the law's bounds. In those instances, the privilege will have served its purpose. In other cases, the privilege will facilitate lawless behavior.¹¹² As Professor Daniel Fischel has argued, confidentiality rules may

106. Alexander, *supra* note 90, at 240 (indicating that 43.2% of lawyers indicated that they advise corporate clients about the need to keep attorney-client communications confidential); *see also*, Zacharias, *supra* note 78, at 382 (stating that "[p]erhaps the most striking revelation of the Tompkins County survey is that lawyers overwhelmingly do not tell clients of confidentiality rules").

107. Zacharias, *supra* note 78, at 383 (relating that 79.1% of clients who had not been schooled in the confidentiality rules by their attorneys claimed knowledge of confidentiality rules from unknown sources, friends, television, or books).

108. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983) (discussing confidentiality of information relating to the representation of the client); *see also* MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1983) (discussing the preservation of a client's confidences).

109. Zacharias, *supra* note 78, at 365-66 (arguing that if clients have only a vague or limited understanding of confidentiality rules, creating limited disclosure exceptions would probably not affect the candor of clients' disclosure).

110. Professor Thornburg argues that the privilege protects only those corporate planners who wish to push the law past its limits, for they are those who fear later revelation of attorney-client communications. Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 175-77. For the reasons stated in this paragraph, that argument oversimplifies the issue.

111. *See* Zacharias, *supra* note 78, at 365-69 (noting that the claim that confidentiality rules facilitate client compliance with the law is empirically unverified, and arguing that "enabling clients to discuss planned misconduct with impunity might even promote misconduct").

112. Professor Thornburg stresses that corporate management faces far stronger sanctions for failure to perform profitably than it does for illegal behavior, and that a corporation's objective in seeking legal advice might often be to obtain assistance in pushing the law past its limits. *See* Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 176; *see also*, Sexton, *supra* note 91, at 472 (claiming that the less defined the boundaries of protection are, the less likely the privilege will serve its purpose); John C. Coffee, Jr., "No Soul to Damn, No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 394-95 (1981) (stating that the "risk preferer [manager] will be likely to chance profitable illegal behavior" because the chance of being caught is very low). Moreover, an empirical study by Professor Robert L. Nelson reveals that most attorneys tend to share the values of their corporate clients and are happy to accommodate clients' demands in this regard because, in part, they wish to attract future business. *See* Robert L. Nelson, *Ideology, Practice, and*

facilitate noncompliance in one of two ways. First, a client that was disinclined to engage in questionable activity may change his mind after receiving legal advice that more accurately estimates the likelihood that the activity will result in sanctions.¹¹³ Second, the client may use legal advice to his advantage by learning how to decrease the odds of detection or by using the legal advice to lessen the severity of the sanctions.¹¹⁴ Thus, in the preconduct setting, the privilege's costs may well exceed its marginal benefits.

2. The Privilege and the Postconduct Context

The case for a corporate attorney-client privilege in the postconduct setting is even less compelling. In the postconduct setting, management becomes aware that past corporate activity may be actionable or discovers that a particular employee has acted in a way that may expose the corporation to liability. In these instances, the action giving rise to potential liability has already occurred, and corporate counsel needs access to all the facts, either to prepare its case or to respond to and negotiate with government investigators. Attorneys may gather internal facts through informal meetings or interviews. Or, the corporation may launch an organized internal investigation.

Courts have assumed that the privilege is necessary to enable counsel to obtain all the relevant facts necessary to give appropriate legal advice or to conduct litigation. Thus, two questions are relevant. First, is the privilege necessary to encourage the corporation management to set the investigation in motion so that all relevant facts might be discovered? Second, does the privilege encourage particular employees to be forthcoming with counsel regarding facts within their knowledge? The answer to both questions is no.

First, the corporation as an entity already has plenty of incentive to discover all relevant facts. The system, as it currently stands, contains built-in incentives to ensure that management and corporate counsel make every effort to marshal all relevant facts. In the litigation context, counsel will be aware that the broad rules of civil discovery will make revelation of all relevant facts likely.¹¹⁵ The corporate attorney

Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 STAN. L. REV. 503, 504-05 (1985).

113. Fischel, *supra* note 79, at 29.

114. *Id.* at 30.

115. See, e.g., FED. R. CIV. P. 26(a)(1)(A) (requiring parties to disclose information "that the disclosing party may use to support its claims or defenses, unless solely for impeachment"); FED. R. CIV. P. 26(b)(1) (defining the scope of discovery as involving "any matter, not privileged, that is relevant to the claim or defense of any party" and directing that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter"); see also 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001 (2d ed. 1994) (stating that the discovery rules are "an integrated mechanism for narrowing the issues and ascertaining the facts," and that the courts have construed the rules liberally to this end); *id.* § 2007, at 94 (stating that Rule 26(b) allows "broad scope to discovery and this has been well recognized by the courts"). For a general discussion of recent amendments to the discovery rules and their likely impact on practice, see Gregory P. Joseph, *The 2000 Amendments to the Federal Rules of Civil Procedure: A Preliminary Analysis*, SF02 A.L.I.-A.B.A. 1 (2001).

has incentive to inform corporate management of that fact, and to emphasize to her client the importance of revealing all relevant information to her first. As an ethical matter, the litigator must fulfill her duty to represent her client.¹¹⁶ As a practical matter, no litigator wants to be in a position of having her adversary discover facts of which she is unaware.¹¹⁷

The same forces are at work when a corporation faces a government investigation. No attorney worth her salt would relish the thought of government regulators discovering damaging facts before corporate counsel do. Given the government's broad investigatory powers, this scenario could occur if the corporation does not move quickly. Moreover, failure to discover those facts puts the corporation in a position of weakness in working out a settlement or compromise. Of course, the attorney-client privilege makes an internal investigation a more appealing prospect for the corporation, allowing the corporation to gather the facts prior to negotiating or possibly litigating with the government. But it is not clear why giving corporations this advantage is worth suffering the costs the privilege imposes. In most instances, an internal investigation will not serve the lofty purpose of enabling a corporation to conform with the law. If the law has already been violated, the internal investigation simply affords the corporation a mechanism for getting the troops in line and their stories straight, while requiring its adversary to gather the facts in a much more expensive, and less accurate, manner.¹¹⁸ The *Upjohn* Court's reverence for the internal investigation is confusing, at best. Thus, the privilege cannot be justified as providing an incentive for a corporate entity to investigate.

Even though the corporation would investigate if there were no privilege, is the privilege nonetheless necessary to encourage individual employees to be candid with counsel? In most cases, no. First, examine the situation of lower- to middle-level employees. A lower-level employee faces several incentives to be candid with counsel. For one thing, the employee's boss will require her to cooperate, and so she will, in an effort to keep her job.¹¹⁹ Second, corporate counsel should explain to the employee that the facts are discoverable in litigation, so it is better for the

In contrast to the relative accessibility of facts, the corporation's legal strategy will be protected by the work-product doctrine. See generally WRIGHT ET AL., *supra*, § 2026 (stating that an attorney's mental impressions, legal theories, and the like are protected).

116. See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (1999) (stating a lawyer must provide competent representation, including thoroughness and preparation, and must act with reasonable diligence); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(2), EC 7-1 (1980) (forbidding a lawyer from handling a legal matter without adequate preparation, and stating a lawyer's ethical duty to represent his client "zealously").

117. See Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 177.

118. As Professor Fischel puts it,

Confidentiality does create an incentive to investigate by giving the client the ability to hide any negative information discovered. The [*Upjohn*] Court was correct, therefore, in concluding that absent confidentiality, investigations would be less thorough. But this does not mean that more violations of the law would result [absent the privilege]. The opposite is true.

Fischel, *supra* note 79, at 31.

119. Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 175.

corporation, and thus for the employee, to discover them sooner rather than later.¹²⁰

The employee who faces these incentives, yet is still reluctant to be candid may have one or more of the following reasons for being hesitant. First, and most likely, the employee might fear her employer. If her superior becomes aware of the facts, the employee might suffer reprisals. Second, the employee might fear damage to her reputation if the facts become public knowledge. In either case, the employee might also lie or withhold the truth during a deposition. Will the attorney-client privilege encourage such an employee to reveal potentially damaging facts? No. The employee is afraid of her employer, not of a potential revelation in court.¹²¹ The employee will know that the corporate lawyer in whom she confides can, and will, report the substance of their communications to upper-level management. For such an employee, then, the privilege provides no incentive for candor.

The third, and least likely, possibility is that the lower-level employee might fear that the facts will be revealed in court and will cause damage to the corporate entity. Will the corporate attorney-client privilege encourage this employee to be candid? Several scholars have argued that it will not¹²² because the employee does not control the privilege, and the corporation may later waive it over her objection.¹²³ Thus, the argument runs, no reasonable employee would rely on the privilege in deciding whether to confide in corporate counsel. This argument depends on the assumption that corporate employees are aware of the privilege's limits. This assumption, however, is of questionable validity.¹²⁴ As Professor Rice has noted, the perception of corporate executives that the privilege plays an important role in encouraging client candor is based on a misunderstanding of the privilege's limits¹²⁵—a misunderstanding that is facilitated by corporate counsel. This lack of understanding is likely to be more pronounced farther down the chain of command. Thus, the privilege might marginally increase candor of lower- and middle-level employees if, and only if, those employees are reluctant to disclose solely because they fear damaging their employer in court. This benefit is marginal, at best.

120. *Id.* at 172 (stating that, at least in theory, the facts are discoverable by interrogatory or deposition).

121. *See supra* note 93 and accompanying text.

122. *See* Sexton, *supra* note 91, at 466-67 (noting that the ability of a corporation to waive the privilege may encourage employees not to speak to an attorney); *see also* Thornburg, *Sanctifying Secrecy*, *supra* note 84, at 173-74 (stating that the employee's interests are not protected by the privilege).

123. *See, e.g.*, *United States v. Sawyer*, 878 F. Supp. 295, 296 (D. Mass. 1995) (holding that a corporation could waive the privilege over the objections of the speaker/corporate employee).

124. In Alexander's study, for example, more than half of the lawyers surveyed believed that "virtually no one at any level of the corporate hierarchy" is aware that the corporation may waive the privilege over the employee's objection. Alexander, *supra* note 90, at 249. The remaining attorneys thought that only a few corporate employees in any given corporation were aware of the limitation. *Id.* A full 59.6% of the corporate executives surveyed answered that they were unaware that the corporation could waive the privilege over the speaker's objection. *Id.* at 250. Perhaps more astounding, fewer than half of the attorneys had ever informed a corporate employee that the privilege was not personal, and a third of those who had done so admitted that they had rarely done so. *Id.* at 252.

125. Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolf*, 55 *BUS. LAW.* 735, 742 n.38 (2000).

Does the privilege encourage upper-level management and those controlling corporate affairs to be more forthcoming with counsel? Perhaps. Executives are often mindful of the privilege when conflict looms.¹²⁶ These employees tend to identify their interests more closely with the corporation's.¹²⁷ They are less likely to assume that their interests and the corporation's will diverge, and are likely to believe that they have sufficient influence to preclude a corporate decision to waive the privilege over their objection.¹²⁸ On the other hand, they are also most likely to understand the importance of full disclosure to counsel, and to understand that a court may later determine that the privilege does not protect their attorney-client communications. Finally, upper-level corporate actors may fear personal liability; if so, the knowledge that the corporation may eventually waive the privilege over their objections may be a reason to keep quiet. Thus, whether the privilege encourages executives and directors to be candid with counsel is unclear.

In sum, then, it seems that the instrumental justification for the corporate privilege is weak at best. Perhaps it affects the candor of upper management at the margins. But it often does so in service of dubious ends. It is not at all clear that giving corporations an attorney-client privilege confers a net benefit on the justice system, or society more generally.¹²⁹

Even if corporations and government entities were structurally similar, the justification for extending the attorney-client privilege to government would rest on questionable foundations. But, as the following sections will show, the case for the attorney-client privilege is even weaker when the government is the client than when the client is a private corporation.

III. THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

Of the few courts or scholars that have bothered to offer a justification for the government attorney-client privilege, none have asserted that the assorted noninstrumental justifications that have been offered in support of the privilege generally could serve as a basis for extending the privilege to the government.¹³⁰ Nor

126. Alexander, *supra* note 90, at 242-43. The same evidence shows that litigators are more likely than other attorneys to inform corporate actors of the privilege's existence. *Id.* at 238.

127. *Id.* at 250-51, 262.

128. *Id.* On the other hand, at least some respondents in Alexander's survey indicated that their newfound understanding of the privilege's limitation would negatively affect their willingness to be candid with counsel. *Id.* at 250-51.

129. A persuasive explanation for the strength and breadth of the privilege lies in the benefits it provides to attorneys. The privilege, combined with ethical rules of confidentiality, gives attorneys a marked advantage over other professionals, and a powerful tool with which to wear down noncorporate adversaries in litigation. Several scholars have persuasively argued this point. *See, e.g.*, Fischel, *supra* note 79, at 18-26; Morgan, *supra* note 79, at 26; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 613-14 (1985); Zacharias, *supra* note 78, at 353 n.7.

130. Although the focus of this Article concerns civil litigation, the analysis presented herein is equally applicable to the criminal context. Generally, government attorney-client invocations of the attorney-client privilege are rarer in the criminal context. Federal Rule of Criminal Procedure 16(a)(2) confers broad protection over most government work product. Specifically,

should they; certainly concerns for client "privacy" or "client autonomy" carry no weight when the client is the government. A proponent of a broad government attorney-client privilege, then, must make the case that the privilege is necessary to enable government employees to obtain sound legal advice.

The government, like a corporation, can act only through its agents. Courts and scholars have assumed that this superficial similarity justifies the superimposition of the corporate privilege onto the government structure.¹³¹ For example, in an article analyzing aspects of the government attorney-client privilege,¹³² Professor Michael Paulsen states simply that "the United States government possesses, as a matter of common law, the same attorney-client privilege that exists for a corporation or other organizational entity"¹³³ and seals the deal by subsequently referring to the government as "USA, Inc.,"¹³⁴ and the President as "the Chief Executive Officer of USA, Inc."¹³⁵

Yet this reflexive assumption leads to bizarre results, both in theory and in practice, as courts and commentators struggle to apply the instrumental justification in the government context. For instance, the point of Paulsen's article is to establish that, in light of *Morrison v. Olson*,¹³⁶ the Independent Counsel may, upon a proper showing, waive the privilege on the government's behalf, even if the White House or other government entity opposes waiver.¹³⁷ This thesis reveals that even Paulsen doubts the extent to which government actors rely on the privilege in consulting with counsel—what President would disclose damaging information to counsel in reliance on a privilege when control of the privilege can flow so easily out of his hands?

Courts, too, have struggled with the lack of fit between the privilege and the operations of government. For example, some recent cases have radically departed from established privilege law to deny government claims of privilege. For example, in *Tax Analysts v. IRS*,¹³⁸ the D.C. Circuit held that confidential communications between the chief counsel for the IRS and field personnel who sought legal guidance in conducting audits are not protected by the attorney-client privilege to the extent

the Rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses except as provided by 18 U.S.C. § 3500 or Rule 16(a)(1)(A), (B), (D) & (E). Given Rule 16, the government does not often need to invoke the common law attorney-client privilege. It is most likely to do so to protect prelitigation communications between agency employees and government attorneys. However, the common law privilege is expressly limited by the *Brady* doctrine, which requires the prosecution to turn over evidence favorable to the accused that is material either to guilt or punishment if the defendant requests it.

131. See, e.g., RICE, TREATISE, *supra* note 9. "The U.S. government is the largest employer in the world. Its agency structures and problems are as complex as those of any private enterprise. To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater." *Id.* at 137.

132. See Paulsen, *supra* note 7.

133. *Id.* at 474.

134. *Id.* at 479.

135. *Id.* at 475.

136. 487 U.S. 654 (1988).

137. Paulsen, *supra* note 7, at 479.

138. 117 F.3d 607 (D.C. Cir. 1997).

that they contain information provided by taxpayers.¹³⁹ According to that court, attorney-client communications are protected only if the facts communicated are unknown to any third parties.¹⁴⁰ Professor Paul Rice, a leading authority on the attorney-client privilege, has strongly criticized the court's decision, and the precedent leading to it, as contrary to established privilege law.¹⁴¹ Says Rice, "The nature of the information contained in the communications from the client to the attorney is irrelevant to the communications' privileged status. Regardless of where the client acquired the *information*, or the information's confidential or public nature, the *content* of the client's communication with his attorney is privileged."¹⁴²

In two recent high-profile cases the courts determined that the Office of the President could not assert the attorney-client privilege in response to federal grand jury requests.¹⁴³ Never before had a court suggested that the availability of the privilege hinged on the setting in which it was asserted. The courts' opinions—if not the results—are inconsistent with privilege law outside the government context, and, to some extent, with the instrumental argument for the privilege. If one truly believes that an absolute privilege is necessary to encourage government actors to be candid with government attorneys, it cannot follow that the availability of the privilege should turn on the nature of the proceedings in which the privilege is asserted.

These are just a few of the many cases where courts betray an underlying unease with the privilege in the government setting. The unease is warranted, for upon close inspection, the justification for a government privilege dissolves like Jell-O. This Part explores how the attorney-client relationship in the government context differs from the relationship in the corporate context, and what impact those differences have on the justification for an attorney-client privilege. The Part first demonstrates that the "public trust" held by government lawyers does not, by itself, provide a sufficient basis for rejecting the attorney-client privilege. The Part then explores the incentives facing government officials—first lower- and middle-level employees, and then agency heads, and ultimately the President. The exploration reveals that the existence of a privilege will have little impact on the behavior of employees at lower and middle levels. For top government officials, the existence of a privilege may encourage open communication with lawyers, but those officials already enjoy a privilege that adequately protects the government's need for confidentiality—the executive privilege. So long as the privilege's concern is with governmental rather than personal needs, there is no need for additional privilege protection.

A. The Public Trust Doctrine

The first, and most obvious, difference between corporate and government actors is that government actors occupy a position of public trust. The few rugged souls who

139. *Id.* at 619.

140. *See id.*

141. Rice, *Continuing Confusion*, *supra* note 9, at 983-88.

142. *Id.* at 985 (emphasis in original); *see also* RICE, TREATISE, *supra* note 9, at 131-33 (noting that the Court's insistence that the attorney-client communication contain confidential information is a misunderstanding of privilege doctrine).

143. *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

have questioned the soundness of the government privilege have leaned heavily on this point.¹⁴⁴ To them, the specter of government employees invoking the privilege against the very citizens they are bound to serve is offensive. Indeed, it was that belief, coupled with concern that government employees would abuse the privilege, that motivated the drafters of the 1974 Uniform Rules of Evidence to recommend only a qualified government attorney-client privilege limited to communications concerning a pending investigation or litigation.¹⁴⁵

144. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920 (“[T]he general duty of public service calls upon government employees and agencies to favor disclosure over concealment. The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive in this case.”); see also WRIGHT & GRAHAM, *supra* note 13, § 5475, at 125-26 (noting that “it can be argued that granting the government the power to suppress evidence of communications between government employees and government lawyers is inconsistent with the openness to scrutiny that is thought by some to be the hallmark of a truly democratic republic”); Barsdate, *supra* note 70, at 1738 (arguing that “the government entity has a unique public function. The government has an obligation to advance the public interest in litigation . . . [t]he government attorney must seek a fair result beyond . . . the interests of the government client”); Gowdy, *supra* note 21, at 720-21; William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 *How. L.J.* 539, 555 (1986) (discussing the position of the Professional Ethics Committee of The Federal Bar Association, which was that the government lawyer “assumes a public trust,” and is “responsible to the people”).

145. Transcripts of the annual Conferences of the Commissioners on Uniform State Laws, Revised Rules of Evidence, for the years 1973 and 1974 reveal that the Commissioners were greatly influenced by the Watergate proceedings, and most were strongly of the view that a broad government attorney-client privilege’s primary function would be to enable government employees to hide the truth from the public. First, the Commissioners made it crisply clear that their intent was to deprive public officers of privilege protection in most instances:

Mr. Eastham: Does [section (6)] mean that if the governor of a state communicates with a lawyer on some matter of concern to him, a court could say the lawyer is required to testify as to what the governor told him? That’s the way I read it. Is that the intention?

Mr. Jestrab: Yes, sir. That was the intent, Commissioner.

National Conference of Commissioners on Uniform State Laws, *Proceedings, Annual Conference in Its 82nd Year, Revised Uniform Rules of Evidence 74-75* (1973). Later, Commissioner Green was more specific, contending that the government privilege was largely used to hide evidence:

Mr. Green: I happen to have a suit pending against the Corps of Engineers right now where I was thoroughly frustrated when the Corps of Engineers ultimately made its decision, in effect, to do nothing, and managed to hide it. They managed to get a letter out of Washington from their house counsel which they claimed authorized the Kansas City District to do nothing, rather than get a letter from a superior officer who is not a lawyer in Washington, and they claimed privilege, and are hiding what they are doing. This is public business. This is the kind of business that the public has a right to know about. And this seems absurd.

Id. at 79.

The following year, when the Committee met for the final time, the issue was discussed once more at length. Again, the Committee defended its decision to deprive government entities of

But the “public trust” argument begs the question; if in fact the privilege enables public officials to obtain sound legal advice—advice that officials could not obtain absent the promise of confidentiality—then the privilege does further the public interest, at least some of the time. Therefore, to determine whether a government entity should hold an attorney-client privilege, it is necessary to determine whether and to what extent the instrumental justification holds in the government context. If, upon examination, the instrumental justification is of dubious validity, then a broad government attorney-client privilege cannot be allowed to stand, because it enables public officials to shield evidence from private citizens for no sound purpose.

The public trust argument aside, the structural differences between government entities and corporations are sufficiently substantial that the instrumental argument becomes even weaker in the government context. As in the analysis of the corporate privilege, the division of legal advice into preconduct and postconduct settings helps clarify the analysis.

B. The Instrumental Justification in the Government Context

1. The Lower- or Middle-Level Executive Branch Employee

a. Preconduct Legal Advice

Most executive branch employees have even greater motivation to speak freely with counsel in the preconduct stage than their corporate counterparts in lower and middle management. Recall that, in the corporate context, the ever-present push to maximize profits can sometimes conflict with the incentive to follow the law. This tension should not be present when executive branch employees seek legal advice. Although employees may face budget considerations, those financial considerations are not on the same order of magnitude as the corporate imperative to make money. The absence of a profit motive influences government employee conduct in a few ways. First, government actors have little incentive to push official conduct to or past

a broad attorney-client privilege by emphasizing the privilege’s potential for abuse:

Mr. Krivosha: It seems to me that the very thing that we have been going through in this country for all of these months has to do with this very privilege. ... It seems to me that at some point we have got to recognize that when the governor or the speaker of the house or the attorney general says, “Well, let’s do it this way. Nobody will know about it,” or “We’ll do it this way, and tell them it’s something else,” that’s the very thing that we’re attempting to put an end to once and for all.

There is no need or requirement for a privilege to public officials. They ought to have the guts to say to their constituents [sic], or they ought not to say it.

National Conference of Commissioners on Uniform State Laws, *Proceedings, Annual Conference in Its 83rd Year, Revised Uniform Rules of Evidence 57-58* (1974).

Finally, on behalf of the Committee, Mr. Jestrab stated: “[I]n our view, the public business should be done in public ... we decided that in a state there were no such things as state secrets. And here again we don’t think there is any purpose in keeping the public business a secret.” *Id.* at 58.

the law's boundaries. It seems reasonable to assume that most government employees have compliance with the law as a paramount concern, and thus need no additional incentive to disclose fully to government counsel. In a sense, then, government actors are analogous to those corporate planners who wish only to comply with, not to stretch or exceed, the law's boundaries. They will be forthcoming with counsel because they need not fear that later revelation of attorney-client communications will compromise or embarrass them.¹⁴⁶ Second, employees should generally be less reluctant to discuss potentially dicey plans with counsel, because eventually revelation of contemplated but rejected courses of conduct cannot hurt the government's "bottom line," and by extension, the employee's job.

Moreover, the disincentives to candor that corporate employees encounter are absent in much of the work that government employees do. The image of an ignorant client who may hesitate to reveal confidential facts unless encouraged by the privilege fails to describe the attorney-client relationship that exists when the "client" is an employee of a government agency who is performing the agency's policymaking, interpretation, or enforcement functions. In those situations, the image of "client" fails because the employee's communications with government attorneys simply do not contain confidential facts about the agency. Extending the attorney-client privilege to protect communications made in these settings serves no compelling purpose.

For example, when agency employees are engaged in rule- and policymaking, they generate many documents that they may later seek to shield by invoking the attorney-client privilege. Yet discussions of the scope and affect of changes in agency policy, and formulations of stock responses to citizen complaints, do not involve confidential "facts" known only to government employees. The agency employees will seek the legal advice necessary to enable them to perform their job descriptions even if they know that their communications will not be protected in subsequent litigation. A number of courts (most notably the D.C. Circuit), have understood this, and have denied the government's claim of attorney-client privilege when government activities at issue could not have involved confidential facts concerning the agency.¹⁴⁷ Other courts, however, apply the privilege to such communications.

Consider *Arizona Rehabilitation Hospital, Inc., v. Shalala*.¹⁴⁸ A health care institution sued the federal government after the Department of Health and Human

146. See *Evans v. Atwood*, 177 F.R.D. 1, 4 (D.D.C. 1997) (realizing that some documents should not be protected by the attorney-client privilege, where government employees consulted with attorneys prior to terminating agency employees and terminated employees later sued the government for age discrimination, because the advice concerned conforming government conduct to the law).

147. See, e.g., *Tax Analysts v. IRS*, 117 F.3d 607, 618-20 (D.C. Cir. 1997) (following precedent to find that Field Service Advice Memos ("FSAs") are generally not protected by the attorney-client privilege because the facts contained within them are known to the taxpayers); *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977) (reversing lower court's ruling that three documents drafted by government attorneys were privileged because the facts that the client had supplied to counsel, and upon which counsel relied in formulating its opinion, were not "confidential" because they were known to third parties).

148. 185 F.R.D. 263 (D. Ariz. 1998).

Services (the "Department") changed its medicare reimbursement policy.¹⁴⁹ During discovery, the plaintiff demanded that the Department produce documents memorializing communications between the Department's employees and the Department's general counsel's office.¹⁵⁰ The documents explained the proposed changes in the regulation and the proposed rule for public comment. The court found that the documents were protected by the attorney-client privilege because they were between attorney and client, made for the purpose of seeking, giving, and receiving legal advice, and were kept confidential.¹⁵¹

Similarly, in *Lacefield v. United States*,¹⁵² the Internal Revenue Service ("IRS") reversed its previous policy when it revoked the tax exempt status of the plaintiff's disability pension payments.¹⁵³ When the plaintiff, Lacefield, made a FOIA request for documents concerning the change, the IRS withheld a large number of documents citing exemption five, which incorporates the attorney-client, attorney work-product, and deliberative process privileges.¹⁵⁴ The court sustained the IRS's claim that a variety of documents between IRS employees and IRS counsel seeking and receiving advice regarding the new policy, as well as an attorney-drafted document suggesting language that agents could use in responding to questions from affected taxpayers, were protected by the attorney-client privilege.¹⁵⁵ As in *Arizona Rehabilitation Hospital*,¹⁵⁶ the characterization of the communications as legal "opinions" sufficed as the basis for the court's holding.¹⁵⁷ Thus, in both cases, and scores of others, the government has been allowed to shield its inner workings from private citizens affected by its decisions for no reason even remotely connected to the rationale for the attorney-client privilege.¹⁵⁸

The same criticism is applicable to attorney-client communications generated as government agencies apply and enforce policy. Although in these instances communications between government employees and attorneys contain factual

149. *Id.* at 265.

150. *Id.* at 265-66, 270-71.

151. *Id.* at 270 (finding specifically that all elements of the attorney-client privilege had been established).

152. No. 92 N 1680, 1993 U.S. Dist. LEXIS 4521 (D. Col. Mar. 10, 1993).

153. *Id.* at *1.

154. *Id.* at *1, *7.

155. *Id.* at *10-12. Specifically, the court protected a memorandum from an attorney in the IRS's National Office to a district counsel attorney responding to a request for "legal advice" regarding the new policy, a memorandum from a district counsel attorney to an IRS employee explaining the new policy, a fax "from a [d]istrict [c]ounsel attorney to the National Office requesting legal advice," and a memorandum from the Acting Chief of the Examination Division requesting legal advice regarding the new policy. *Id.*

156. 185 F.R.D. 263 (D. Ariz. 1998).

157. *Id.* at *11-12.

158. Courts have also protected these types of communications under the deliberative process privilege, a qualified privilege that shields documents that memorialize agency deliberations. Although a critique of the deliberative process privilege is beyond the scope of this Article, the analysis presented herein casts doubt on whether the deliberative process is necessary to encourage agency deliberations. For a thorough critique of the deliberative process privilege, see Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845 (1990).

descriptions, the facts communicated are obtained entirely from the targeted citizen or corporation, and are thus not confidential. As a result, no incentive is necessary to encourage the government employee to transmit those facts to government counsel to receive necessary legal advice.¹⁵⁹

Unfortunately, this point has been lost on many courts. For example, courts have sustained numerous IRS claims of attorney-client privilege in which IRS agents and attorneys exchange written communications regarding taxpayer audits.¹⁶⁰ Typically,

159. For example, in *Lee v. Federal Deposit Insurance Corp.*, 923 F. Supp. 451 (S.D.N.Y. 1996), the court ordered the government to produce several memoranda created by government attorneys prior to the government's approval of a bank merger. According to the court, the documents were not privileged because they contained

standard legal analysis of the law relevant . . . in determining whether an employee of an operating subsidiary of a national bank can serve as an officer of an investment company, whether an operating subsidiary of a national bank can provide administrative services to open-end and closed-end investment companies, including proprietary mutual funds, and whether an operating subsidiary of a national bank can serve as an administrator for limited liability companies.

Id. at 457. Because the documents were "neutral, objective analyses of agency regulations," they were not privileged. *Id.* The privilege was not necessary to induce client disclosure, because the communications did not concern confidential facts with respect to the government. The privilege, therefore, has no role to play in encouraging client communications.

Similarly, in *Schlefer v. United States*, 702 F.2d 233 (D.C. Cir. 1983), the court ordered the United States to produce "CCOs," which were generated when Maritime Administration officials, in response to requests for loans or subsidies and other matters presented to the agency by outsiders, requested advice from the Chief Counsel. *Id.* at 235. In rejecting the government's claim that the CCOs were protected by the attorney-client privilege, the court emphasized that

the factual information contained in the CCOs . . . is not provided by the "client"—the Agency official who solicits the Chief Counsel's advice—but by a third party—the outsider who seeks a ruling from the Agency. The outsider's communications to the official do not contain any confidential information concerning the Agency; when the official transmits the relevant facts to the Chief Counsel, no new or confidential information concerning the Agency is imparted.

Id. at 245 (emphasis omitted).

160. For example, in *Direct Response Consulting Service v. IRS*, No. 94cv1156, 1995 U.S. Dist. LEXIS 12586, at *1-3, *11 (D.D.C. Aug. 21, 1995), the court sustained the government's privilege claim over a memo written by IRS district counsel to the Assistant Chief Counsel that evaluated an individual taxpayer's income and expense claims. The documents discussed the legal issues involved, applicable code sections and cases, and legal analysis. The court found that the memorandum was protected by both work-product (because the citizens being audited might eventually litigate the issues raised in the audit) and attorney-client privileges because "it amounts to a presentation of legal advice to the IRS from its counsel which was clearly meant to be held confidential between the two." *Id.* at *13. See also *Buckner v. IRS*, 25 F. Supp. 2d 893 (N.D. Ind. 1998), in which the plaintiff, who was allegedly harassed by the IRS when the IRS attached his wages and forced him into bankruptcy, sought files of an IRS agent. The court sustained the IRS's claims of attorney-client and work-product privileges over documents that contained communications between government attorneys and between the IRS

agents auditing individuals or corporations request legal advice concerning the application of specific code provisions to the specific taxpayer's return. In some cases, such requests for advice result in a flurry of memos among IRS attorneys in various offices. All of the facts communicated in the requests for legal advice, and in memos providing such advice, have been provided by the taxpayer. There are no confidential facts concerning the agency communicated by the IRS employees to IRS counsel.¹⁶¹

In some cases when agencies are performing an auditing or compliance function, some type of privilege protection might be necessary. For example, once an audited citizen contests the IRS's determination, legal opinions may fairly be said to be made in preparation for litigation. In such a case, the relevant inquiry should be whether some type of work-product protection is necessary—arguably, requiring the government to spell out its legal analysis and strategy would put it at an unfair disadvantage in subsequent litigation with the taxpayer. Part IV contains an analysis of when a privilege justified by that rationale may be warranted.

Similarly, abolition of the government attorney-client privilege should not require government employees to reveal documents generated in the course of ongoing criminal and civil investigations. Such a requirement could compromise ongoing investigations, and force the government to reveal its case in advance of trial. The law enforcement investigatory privilege, which has been adopted by federal courts in at least five circuits, is the proper tool for protecting ongoing criminal and civil investigations.¹⁶²

In sum, the instrumental justification for the attorney-client privilege does not provide a rationale for privileging communications generated as government employees seek legal advice prior to acting. There is no reason to think that an agency employee doing her job needs to be encouraged to reveal nonconfidential facts. When agencies are engaged in policymaking and compliance, confidential facts are not at issue, and allowing the government to claim attorney-client privilege over such

and its attorneys. *See also* *Rollins v. IRS*, No. H-90-3170, 1992 U.S. Dist. LEXIS 10884 (S.D. Tex. June 30, 1992) (rubberstamping IRS claims of work-product, deliberative process, and attorney-client privileges).

161. For example, in *Pully v. IRS*, 939 F. Supp. 429 (E.D. Va. 1996), an IRS agent conducting an audit received an oral answer to inquiries to counsel regarding whether the audited citizen's financial practices violated IRS regulations. The auditor made handwritten notations memorializing counsel's advice. *Id.* at 434. When the taxpayer later made a FOIA request, the court upheld the government's assertion of attorney-client privilege and the government did not produce the notes. *Id.* at 433-34. But the employee would have communicated with counsel even absent the privilege; communicating to counsel the facts learned from the audit would not have opened the agency up to additional liability or harmed the agent in any way. Additional incentive to disclosure was unnecessary.

162. *See, e.g., In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 686-89 (N.D. Ga. 1998) (explaining in depth the doctrinal requirements of the investigatory privilege, noting that at least four other circuits had adopted the privilege, and concluding that "the Eleventh Circuit would recognize the strong policy justifications underlying the privilege"); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *MCCORMICK, ET AL.*, *supra* note 83, § 108 at 167; Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 157-62 (1976).

documents is simply not justifiable.¹⁶³

Of course, the government actor seeking preconduct advice might fervently wish to keep her communications with government counsel secret from a party with whom the government is engaged, such as a corporation with whom it is contracting, or an employee it is contemplating terminating. But the government actor need not worry; because there is no currently pending litigation, and given the attorney's ethical obligation to keep client information confidential, the adverse party would have no way of accessing those communications while negotiations are progressing. And, because the government actor seeks (or should seek) to comply with the law, the potential for postconduct revelation of the communications should not create much of a chilling effect. Whatever need the government actor has for temporary confidentiality is satisfied without the need of a special government attorney-client privilege.

Thus, the court in *Murphy v. Tennessee Valley Authority*,¹⁶⁴ should not have found that documents generated by the Tennessee Valley Authority ("TVA"), a corporation wholly owned by the federal government, in the course of negotiations for the settlement of a contract dispute, were protected by the attorney-client privilege. In *Murphy*, Zurn Industries had contracted to design and construct cooling towers for the TVA.¹⁶⁵ When the TVA decided to defer construction, the TVA and Zurn began a year-long settlement negotiation.¹⁶⁶ After the TVA and Zurn settled, one of Zurn's subcontractors filed a FOIA request in which it sought documents generated during the negotiations.¹⁶⁷

The court held that two documents between TVA employees and the TVA's general counsel were protected by the attorney-client privilege.¹⁶⁸ The documents were communications requesting and giving legal advice with respect to the TVA's position during negotiations.¹⁶⁹ It is difficult to imagine what confidential information was contained in the memos that TVA employees would not have revealed absent the privilege. Presumably, TVA employees were under a duty to make the best possible deal with Zurn within the confines of the law. There was no allegation by the TVA that the facts within the memo were germane to national security or any other special concern. The TVA counsel kept the information confidential until the TVA and Zurn reached a final settlement, so the TVA's position was not compromised.¹⁷⁰ As government agents required to operate within the law's boundaries, it is hard to

163. Professors Allen, Grady, Polsby, and Yashko put it differently; to them, the privilege cannot be justified when the employee-lawyer communication contains facts obtained from third persons because a client would reveal such information without the privilege, and thus the privilege is not necessary in this instance to facilitate the development of contingent claims. See Allen et al., *supra* note 80, at 381. They also suggest that the privilege is not defensible when the client's case will not be affected by unfavorable facts about the client, again because privilege protection would not assist in the development of contingent claims. *Id.* at 367.

164. 571 F. Supp. 502 (D.D.C. 1983).

165. *Id.* at 504.

166. *Id.*

167. *Id.*

168. *Id.* at 506-07.

169. *Id.*

170. *Id.*

believe that TVA employees would have been less forthcoming with counsel had they been told at the time of the communication that the documents might be seen by third parties after the conclusion of settlement negotiations.¹⁷¹ The decision cannot be justified as necessary to facilitate the provision of legal advice.¹⁷²

As further evidence that the privilege's instrumental justification lacks credibility in the preconduct context, consider that government privilege law in many states is inconsistent with the privilege's underlying premise—that government actors will not be forthcoming with counsel unless they are assured of privilege protection. Some states, having adopted Uniform Rule of Evidence 502 in its entirety, do not allow government agents or agencies to claim the privilege unless the communications concern pending litigation and revelation of the communications would seriously compromise the government's ability to prosecute or defend its position.¹⁷³ There is no suggestion that government actors in such states are unable to obtain the legal advice necessary to enable them to conduct government business outside of litigation. Second, consider the "Sunshine Laws" of various states. The Sunshine, or Open Meeting, Laws direct that meetings of public officers must be open to the public, unless the subject of the meeting falls under a specific statutory exception. Several of those state statutes allow no exception for attorney-client communications¹⁷⁴—thus all consultations between municipal agents and attorneys must be open to the public. Other states expressly or implicitly provide for only a limited exception for attorney-client communications concerning pending claims or litigation.¹⁷⁵ Courts that have

171. See also *Alamo Aircraft Supply, Inc. v. Weinberger*, No. 85-1291, 1986 U.S. Dist. LEXIS 29010, at *5 (D.D.C. Feb. 21, 1986) (sustaining government's attorney-client privilege claim in a FOIA action for documents between government employees and counsel because "[w]hen the context of the communication strongly suggests that 'the government is dealing with its attorneys as would any private party seeking advice to protect personal interests,' an expectation of confidentiality may readily be inferred" (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980))).

172. The court also found that a number of the documents reflecting communications between TVA employees were protected by the deliberate process privilege, emphasizing that "TVA's ability to function as an independent corporate entity ... would be seriously undermined if the internal documents reflecting its employees' thought processes were subject to disclosure." *Murphy*, 571 F. Supp. at 506. Of course, a private corporation would have had to produce similar documents in response to a discovery request, and no one has ever suggested that the rules of discovery undermine corporations' ability to do business. Thus, TVA was able to withhold documents that a private party would have had to produce if the request had been made in litigation, for no discernable reason.

173. At least four states, Arkansas, Maine, North Dakota, and Oklahoma, have adopted the narrowed government privilege advocated by Uniform Rule 502(d)(6). See ARK CODE ANN. § 16-41-101, Rule 502(d)(6) (LEXIS 1999 & Supp. 2001); Me. R. Evid. 502(d)(6); N. D. R. EVID., 502(d)(6) (2001); OKLA. STAT. ANN. tit. 12, § 2502(D)(6) (West 1993).

174. See, e.g., *City of College Park v. Cotter*, 525 A.2d 1059 (Md. App. 1987); *McKay v. Bd. of County Comm'rs*, 746 P.2d 124 (Nev. 1987); *District Attorney v. Bd. of Selectmen*, 481 N.E.2d 1128 (Mass. 1985); *Laman v. McCord*, 432 S.W.2d 753 (Ark. 1968).

175. See, e.g., TEX GOV'T CODE ANN. § 551.071 (Vernon 2001) (providing that a governmental body may consult with a government attorney privately only if the communications concern pending or contemplated litigation, a settlement offer, or a disciplinary matter); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*,

created an implied exception for those communications have emphasized that, in the absence of such a limited privilege, the government entity's adversaries could attend strategy sessions and settlement conferences, thus subjecting the government to a distinct disadvantage and undermining its ability to act in the public interest.¹⁷⁶ Yet *none* of these courts has suggested that the purpose of the privilege is to facilitate client candor. Indeed, if these courts were of that view, they would have held that government agents could meet in confidence with government attorneys whenever agents sought legal advice. It is revealing that so many state courts decline to extend the attorney-client privilege beyond the litigation setting, and this fact further undermines the privilege's instrumental justification.

b. Postconduct Advice and the Executive Branch Employee

Now, examine the typical executive branch employee who seeks legal advice postconduct. An employee may seek postconduct legal advice for one of two reasons. First, a government agency or department may itself become a litigation target (for example, in an action for breach of contract, a suit brought under the Federal Tort Claims Act, or an employment discrimination case).¹⁷⁷ Second, a government employee may engage in wrongdoing that does not give rise to government liability but that the government may nonetheless need to address.¹⁷⁸ In either situation, the case for the attorney-client privilege is weaker than in the corporate context.

First, the government may become embroiled in litigation. Here, the government has incentives similar to those of a corporation to direct employees to cooperate with counsel. When the government needs all the facts to present its position adequately,

69 Cal. Rptr. 480, 487-92 (Ct. App. 1968); *Associated Students of the Univ. of Colo. v. Regents of the Univ. of Colo.*, 543 P.2d 59, 61 (Colo. 1975); *Times Publ'g Co., v. Williams*, 222 So. 2d 470, 475-76 (Fla. Dist. Ct. App. 1969); *People ex rel. Hopf*, 332 N.E.2d 649 (Ill. App. Ct. 1975); *Fiscal Court of Jefferson County v. Courier-Journal & Louisville Times, Co.*, 554 S.W.2d 72, 73 (Ky. 1977); *Minneapolis Star & Tribune Co. v. Hous. & Redevelopment Auth.*, 251 N.W.2d 620 (Minn. 1976); *Okla. Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310 (Okla. 1978); *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328 (Tenn. 1984).

176. *See, e.g., Minneapolis Star & Tribune Co.*, 251 N.W.2d at 625 (stating that "[a] basic understanding of the adversary system indicates that certain phases of litigation strategy may be impaired if every discussion is available for the benefit of opposing parties who may have as a purpose a private gain in contravention to the public need as construed by the agency"); *Smith County Educ. Ass'n*, 676 S.W.2d at 334 (stating that a limited attorney-client exception for discussions involving pending and present litigation is necessary to enable the government's attorney to fulfill his ethical duty as an officer of the court).

177. *See, e.g., Smith v. United States*, 193 F.R.D. 201 (D. Del. 2000) (regarding a medical malpractice claim against an Air Force doctor under the Tort Claims Act for care received during pregnancy and childbirth); *Galarza v. United States*, 179 F.R.D. 291 (S.D. Cal. 1998) (regarding a medical malpractice claim against a Navy doctor under the Tort Claims Act for negligence in performing a hysterectomy).

178. *See, e.g., People ex rel Lockyer v. Superior Court of San Diego County (Pfingst)*, 99 Cal. Rptr. 2d 646 (Ct. App. 2000) (discussing a district attorney's office that investigated deputy district attorney for criminal wrongdoing), *partially overruled on other grounds*, *People v. Superior Court of Los Angeles County (Laff)*, No. S063662, 2001 Cal. LEXIS 3245 (May 24, 2001).

it has incentive to instruct government employees down the chain of command to cooperate with government counsel. Again, although the government has a legitimate reluctance to reveal its legal strategy, that reluctance has nothing to do with encouraging employee candor. Moreover, in contrast to a corporation, the government need not worry that any leaking of facts it discovers will damage its bottom line.

Is the privilege necessary to encourage government employees to be candid with counsel? No—whether government employees fully disclose to government counsel has nothing to do with the assurances provided by the attorney-client privilege. Recall that corporate employees may be hesitant to reveal confidential facts to corporate counsel for any of four reasons: fear of career ramifications, fear of loss of reputation, fear of disclosure in court detrimental to the employer, and fear of personal liability. Recall also that the corporate privilege will have little, if any, effect on employees who fear career repercussions or loss of face, but might have some effect on employees whose fear is solely for the well-being of their employer (depending upon the employee's knowledge of the privilege's limits), or employees who fear personal liability (depending upon the employee's position in the hierarchy and his knowledge of privilege law).

The privilege is likely to have even less impact on candor in the government setting. First, as in the corporate context, the government employee who is reluctant to talk for fear of career damage or public embarrassment is unlikely to be swayed by the protection promised by the privilege. The knowledge that other government actors, and in some cases, the press, may learn the information is sufficient to create reluctance, and the privilege cannot protect the employee from that. Moreover, the government employee's fears that his superiors will learn of the attorney-client communication may be well founded; federal law requires executive branch employees to report criminal wrongdoing by other employees to the Attorney General.¹⁷⁹ The statute does not expressly exempt attorneys.¹⁸⁰ Because the statute's requirement is clear, a recalcitrant employee is likely to know about it, and will be less likely than her corporate counterpart to mistakenly believe that the government attorney is acting in her best interest.¹⁸¹ The government employee in serious trouble is unlikely to talk to government counsel, privilege or no privilege, because she knows that if she does, her superiors will shortly learn the truth.

Second, if the employee's real fear is revelation of facts in court, the privilege is unlikely to have a substantial effect on candor. Here, the fact that the privilege is not personal to the employee¹⁸² has more bite than in the corporate context.¹⁸³ Recall that

179. See 28 U.S.C. § 535(b) (1994).

180. Indeed, the Eighth Circuit simply assumed that the statute applies to attorneys. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997) (stating that attorneys are bound by the directive).

181. See also 5 U.S.C. § 2302(b)(8) (1994) (protecting federal employee whistleblowers from adverse employment action as a result of whistleblowing activities).

182. *Edwards v. Mass. Bay Transp. Auth.*, No. 99-0458-F, 2000 Mass. Super. LEXIS 473, at *13 (Dec. 7, 2000) (noting that without the speaker/employee's consent, a government entity may waive the attorney-client privilege and share the employee-attorney communications with others, including law enforcement).

183. See RICE, TREATISE, *supra* note 9, at 140-41 (wondering how a government attorney-client privilege can encourage candor from employees who are not personally protected by it);

corporate executives often believe that their interests are sufficiently aligned with the entity's to preclude a corporate decision to waive the privilege over the employee's objections. Disclosure of the confidential information would hurt the corporation as well as the employee individually; the employee is therefore likely to assume that the corporation will assert the privilege. For example, suppose the employee reveals to counsel that he and other employees accepted bribes in exchange for contracts. The employee might be willing to disclose the fact of the bribe to corporate counsel, because he knows that the corporation is unlikely ever to waive the privilege and reveal the substance of that communication, because disclosure would harm the corporation. In addition, the higher in the hierarchy the employee is, the more likely his fortunes will be tied to the fortunes of the executive. The more important the employee, the more the corporation needs him, and the less likely their interests will diverge.

Government employees, however, are unlikely to rely on an entity privilege when conferring with government counsel. For one thing, often a particular employee's acts will not expose the government to entity liability (for example, where the employee has accepted a bribe). This is usually true in the case of state governments. In such cases, the government might direct counsel to investigate the matter, so that the government may take corrective or disciplinary action.¹⁸⁴ But the employee will have no reason to think that the government attorney is acting in her interest, or that the government would assert the privilege on her behalf.

Even if the government should face liability, the government employee will have less reason to falsely assume that the government would not waive the privilege over the employee's objection; the government is not a profit-generating enterprise and may therefore be less dependent on a particular employee and more willing to cut the employee loose to protect its credibility. To put it differently, the corporate employee knows that he has the power to damage, perhaps destroy, the corporation, and all those who work for it, including his bosses. In such a case, it is in management's best interests to align itself with the employee. The government employee does not have as much leverage: at worst, the government may have to pay a civil judgment, but payment will not threaten the government's health or the job security of all of its employees. Moreover, the law prohibits the government from taking a position contrary to its best interests. If, over the course of litigation, it becomes clear that the government must pin the blame on the employee, it will simply waive the privilege. Or, employees' superiors may seize the opportunity to take credit in the press for weeding out corrupt or ineffective employees.

Third, the marginal role the privilege plays in encouraging the candor of employees who fear personal liability is often absent in the government context. When the

Barsdate, *supra* note 70, at 1739 (noting that "it is unclear how the attorney-client privilege . . . can promote candor from individuals who are unable to prevent the ultimate waiver of the privilege").

184. *See, e.g.,* People *ex rel* Lockyer v. Superior Court of San Diego County (Pfungst), 99 Cal. Rptr. 2d 646 (Ct. App. 2000) (holding that a prosecutor who was the target of a criminal investigation could not assert the attorney-client privilege because the privilege belonged to the District Attorney and not the individual employee of the District Attorney's office), *partially overruled on other grounds*, People v. Superior Court of Los Angeles Co. (Laff), 23 P.3d 563 (Cal. Ct. App. 2001).

federal government is sued, the government employee or employees whose actions provided the basis for the lawsuit are often exempt from personal liability. For example, the Federal Tort Claims Act expressly prohibits direct suit against government employees.¹⁸⁵ In those cases, no disincentive to use candor exists.

In fact, there is evidence that the federal government recognizes the worthlessness of an entity privilege for drawing out facts from a recalcitrant employee. By federal statute, an employee sued in her personal capacity, but represented by government counsel, has a personal attorney-client privilege with such counsel that the employee controls and which cannot be waived by the federal government over the employee's objections.¹⁸⁶ The reason for this provision is obvious. Although the government enjoys sovereign immunity in such cases, it almost always agrees to indemnify the government employee if a judgment is entered against her.¹⁸⁷ Thus, it is in the government's interest to encourage the targeted employee to be fully forthcoming with government counsel. Yet the statute authorizes the government to decline or withdraw representation if representation is not in the United States' best interest.¹⁸⁸ A government employee is therefore unlikely to be forthcoming with government counsel unless that employee is assured that she alone controls the privilege, and that the government will not be able to reveal her confidential communications if their interests later diverge. The statute recognizes this, and therefore clearly prohibits the government from using confidential attorney-employee communications against the employee at any stage of the proceedings.

Consider an example of how courts sustain federal government privilege claims even though the postconduct attorney-client communications would have occurred absent the assurance of privilege protection. In *Galarza v. United States*,¹⁸⁹ a medical malpractice case brought against the Navy,¹⁹⁰ the court held that Navy counsel's *ex parte* interviews of the two allegedly negligent Navy doctors were protected by the attorney-client privilege.¹⁹¹ The court reasoned that the government was analogous

185. 28 U.S.C. § 2679(b) (1994). The statute states in relevant part:

The remedy against the United States ... for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding.... Any other civil action ... against the employee ... is precluded.

Id.

A government employee cannot be sued in her personal capacity unless the plaintiff can allege that the individual government employee violated the plaintiff's constitutional rights. Paragraph (b)(2) states that protection to the employee does not extend when the action "is brought in violation of the Constitution," or "is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." *Id.*

186. See 28 C.F.R. §§ 50.15(a)(2)-(4), (a)(8)(v), (a)(10)-(12) (2001).

187. See, e.g., 28 C.F.R. § 50.15(c)(1) (authorizing the Department of Justice to indemnify employees); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L. J. 65, 76-78 (1999) (stating that "[a]s a practical matter, indemnification is a virtual certainty" in a *Bivens* action).

188. 28 C.F.R. §§ 50.15(a)(2), (a)(8)-(12) (2001).

189. 179 F.R.D. 291 (S.D. Cal. 1998).

190. *Id.* at 292-93.

191. *Id.* at 297.

to a corporate entity, that the government activity in this case was analogous to the internal investigation in *Upjohn*, and that therefore *Upjohn* dictated the result.¹⁹²

The holding cannot be justified, because the privilege simply was not necessary to encourage the Navy doctors to communicate freely with Navy counsel. The doctors faced no personal liability.¹⁹³ Any reluctance to speak freely that either of them might have felt would have to stem from fear for job security or loss to personal reputation. The attorney-client privilege could have done little to assuage those fears in this case, because the doctors must have been aware that Navy attorneys would reveal the substance of their communications to Navy brass. Moreover, because Navy counsel characterized the interviews as *ex parte*, the doctors could not have been under the misimpression that the privilege was personal. Once the facts were out of the bag, the doctors could not control whether and to what extent they would be revealed in court. Finally, the doctors knew that the plaintiff would depose them, and that they would have to tell the truth in those depositions. Thus, the privilege could not help them hide the facts, unless they planned to mislead plaintiff's counsel in an effort to save their jobs or reputation.¹⁹⁴ The protection of the attorney-client privilege was simply not justified.

Of course, there are circumstances in which both the government entity and the individual employee may face liability as a result of the employee's actions. Even here, however, the privilege plays little role in enabling a government entity to defend its legal position. Suppose that a citizen charges that a police officer violated her civil rights by assaulting her with a nightstick during a public demonstration. Pursuant to 42 U.S.C. § 1983,¹⁹⁵ she seeks to hold both the municipality and the officer in his individual capacity liable for the violation.¹⁹⁶ Certainly, the municipality needs to obtain facts from the officer to defend its case. Although the officer faces both incentives and disincentives to speak honestly with government counsel, his decision to be fully forthcoming will not be affected by a government attorney-client privilege. In this typical example of a § 1983 case, two possibilities exist. One, the officer's and

192. *Id.* at 295.

193. *Id.* at 294.

194. The fear that the doctors would distort the truth to avoid jeopardizing their careers and employment positions was what motivated the plaintiff to seek a determination that the privilege would not apply. *Id.* at 294-95.

195. 42 U.S.C. § 1983 (Supp. V 1999). Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. For an excellent analysis of the case law concerning municipal liability under § 1983, see Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000).

196. A municipality may be found liable if the deprivation of the plaintiff's constitutional rights is the result of official policy or custom. See *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978). The individual city employee may escape liability by raising the qualified immunity defense, which enables him to show that he acted in good faith. Gilles, *supra* note 195, at 26-27.

municipality's interests will diverge—the municipality will take the position that the officer acted outside the scope of its employment, and thus is liable only in his personal capacity. In that instance, the officer will take the opposite position, or may argue that the municipality's policies or practices (such as inadequate training of police officers) were a substantial cause of the plaintiff's injury.¹⁹⁷ When interests diverge, the officer will be represented by personal counsel, and he will have no incentive to confide troubling facts to government attorneys, regardless of whether the municipality has an attorney-client privilege, because the municipality can use the facts communicated against him.

The other possibility is that the interests of the municipality and the officer will be consistent—the municipality will admit that the officer acted in an official capacity, but will contest that the officer's actions violated plaintiff's civil rights.¹⁹⁸ In such cases, the municipality ordinarily will have a statutorily imposed duty to indemnify¹⁹⁹ and represent the officer.²⁰⁰ The officer will have much incentive to reveal the facts to the municipal attorney—if he fails to cooperate fully with counsel, the municipality may be able to reverse its decision to indemnify him.²⁰¹ Moreover, because the officer faces no personal liability (because the city will pay any judgment levied against him), he will not be tempted to withhold information or lie to protect his pecuniary interests. On the other hand, the officer may withhold information to protect his career or reputation, or because he fears that the municipality will withdraw indemnification if it knows the truth—in these instances, the promise of a government attorney-client privilege will not affect his reluctance, because it cannot protect him from that which he fears. Thus, a government attorney-client privilege does not

197. *See, e.g., Dunton v. County of Suffolk*, 729 F.2d 903, 907 (2d Cir. 1984) ("If [the employee] can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality. If he is successful in asserting a good faith immunity defense, the municipality may be wholly liable because it cannot assert the good faith immunity of its employees as a defense to a [§] 1983 action." (quoting *Owen v. City of Independence*, 445 U.S. 622 (1980))); *Minneapolis Police Officers Fed'n v. City of Minneapolis*, 488 N.W.2d 817 (Minn. Ct. App. 1992) (noting that "to avoid section 1983 liability, the city must show that a police officer's action is not within the officer's official capacity," but that "a police officer, on the other hand, avoids personal liability by showing that the actions were within the range of official capacity").

198. *See, e.g., Smith v. Daggett County Bd. of Educ.*, 650 F. Supp. 44 (D. Utah 1986); *Smith v. City of New York*, 611 F. Supp. 1080 (S.D.N.Y. 1985); *Sherrod v. Berry*, 589 F. Supp. 433 (N.D. Ill. 1984).

199. States' indemnification provisions differ regarding the scope of coverage, extent of local autonomy over terms and conditions of reimbursement, and limits on amounts of reimbursement. PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 88 (1983).

200. *See, e.g., Smith*, 611 F. Supp. at 1084 (citing section 50-k(2) of the General Municipal Laws of New York State, which requires that a city provide for the defense of any municipal employee sued because of an act or omission that occurred within the scope of employment and not in violation of any agency rule or regulation, and section 50-k(3), which requires the city to indemnify employees on essentially the same criteria).

201. *See, e.g., N.Y. GEN. MUN. LAW* § 50-k(4) (Consol. Supp. 1984) (providing that the city's duty to indemnify is dependent upon the employee's full cooperation in the defense of the action).

materially assist the government in defending its case.

In some number of situations, a state or federal government entity may need legal advice when an employee is being sued, even if the entity is itself technically immune. A prosecutor may exercise questionable judgment, or engage in an illegal act. An official may accept a bribe. An FBI agent may be the target of a *Bivens* claim, and the government may have to indemnify him in the event of an adverse judgment.²⁰² In these situations, there is even less need for the privilege. Because the government, unlike a corporation, cannot be hurt by the act of its agent, there is even less need to suppose that it needs an incentive to investigate. Of course, public officials may be reluctant to expose wrongdoing that reflects negatively upon them. But it would be ludicrous to allow the government a privilege to hide problematic behavior. Public pressure will provide the incentive to investigate.

2. Highly Placed Executive Branch Employees: Agency Heads and the President

a. The Need for Confidentiality

Although agency heads and the President do not face the tension between concern for profit maximization and legal compliance often confronted by corporate management, they obviously have other compelling reasons for desiring confidentiality in their communications with counsel. Chief among these concerns is apprehension about the potential political difficulties that might result if discussions about potential courses of action are later revealed. The political fallout from revelation of such discussions could result even if highly placed agency employees ultimately chose a wholly legitimate course of action. This concern is even more pressing when an agency head or the President seeks postconduct legal advice. If there were no promise of confidentiality, fear of political fallout if sensitive facts were revealed could muzzle the client.

The President or an agency head might seek legal advice for one of two reasons. First, he or she may need legal guidance in performing official functions—for example, evaluating legislation, formulating foreign and domestic policy, or handling foreign affairs. Second, the President or agency head might seek advice regarding past or prospective conduct that threatens to expose the government, or the actor personally, to liability. Sometimes the conduct occurred as the executive pursued his official functions; other times, it may be questionable whether the conduct can fairly be said to be within the executive's scope of employment (for example, Monica Lewinsky).

In all cases, the promise of confidentiality is probably necessary to encourage the President, or agency head, to confide freely with counsel. Like in the corporate setting, the need for the assurance of confidentiality becomes more pressing the higher up the hierarchy one looks. The chance that government actors might be tempted to skirt or stretch the law for political gain is similarly present in government

202. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that the violation of specific constitutional rights by federal employees gives rise to a cause of action for damages against those federal employees).

hierarchies. One might think, then, that the need for a government attorney-client privilege is strong, at least at the upper levels of the executive branch.

But even here, it is unclear to what extent the promise of an attorney-client privilege will have the desired effect for most government actors. First, consider the predicament of an agency head who is in possession of troubling facts that are relevant to protecting the government's legal or political interests. If those facts put the agency head in a bad light, or threaten her political future, the promise of a government attorney-client privilege will not encourage her to disclose those facts to government counsel, because she cannot be sure that the President will allow her to assert the privilege to protect herself. The privilege will provide an incentive to use candor only if the agency head is certain that the President's interests are, and will remain, aligned with hers.

The promise of privilege protection might be more likely to have the desired effect (increased candor) when the "client" is the Office of the President. The President handpicks his closest advisors, including White House counsel, and he presumably has ultimate decisionmaking authority concerning whether to waive or assert the attorney-client privilege. Given all this, the argument that a privilege might be effective at the very highest levels of the executive branch seems persuasive.

The attorney-client privilege, however, is the wrong mechanism for responding to the confidentiality needs of both agency heads and the Office of the President. The appropriate mechanism for encouraging disclosure already exists—the executive privilege. Combined with the attorney work-product doctrine and the President's (or agency head's) attorney-client privilege when he consults private counsel, existing incentives to act with candor render a government attorney-client privilege largely superfluous, and certainly not worth the costs it generates. The following section explains the executive privilege,²⁰³ and argues that judicial application of that privilege has resulted in a doctrine that is uniquely suited to addressing government actors' concerns for confidentiality.

b. The Scope of the Executive Privilege

The executive privilege assures the President and agency heads that consultations with top-level advisors will be protected from disclosure.²⁰⁴ Courts have determined that the privilege necessarily flows from constitutionally based separation-of-powers

203. Courts and commentators often confuse and conflate the executive privilege, which applies to the President, agency heads, and their closest advisors, with the deliberative process privilege, which allows government agencies to shield from discovery and FOIA requests predecisional documents. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 Reporter's Note, cmt. c (2000) (stating that "governmental agencies may have an executive privilege against disclosing internal deliberations of agency officials and advisory opinions and recommendations"). Because the two privileges have different requirements and serve different interests, it is important that they be kept separate for analytical purposes. For a thorough explanation and attack on the validity of the deliberative process privilege, see Wetlauffer, *supra* note 158.

204. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 705, 708 (1974); *Stiftung v. Zeiss*, 40 F.R.D. 318 (D.D.C. 1966) (sustaining the Attorney General's claim of executive privilege in response to a discovery request in litigation in which the government was not a party).

doctrine.²⁰⁵ As the Supreme Court has recognized, the privilege is also justified on instrumental grounds: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."²⁰⁶ Because the executive privilege facilitates government decisionmaking, it serves the public interest.

Of course, when a private citizen or another branch of government seeks information, the government's ability to shield information by invoking the executive privilege may cause some public harm. Accordingly, courts have not construed the executive privilege as conferring absolute protection.²⁰⁷ Rather, the government's need for confidentiality in a particular instance must be weighed against the claimant's need for the information.²⁰⁸ Thus, courts generally agree that military or state secrets must receive absolute protection.²⁰⁹ And it is the exceptionally rare case when a private litigant's need for the information will justify piercing the privilege. On the other hand, the Court has held that the privilege must give way when the criminal justice system's need for the protected communications is specific and compelling but the President's need for confidentiality with respect to the specific communications is only "general."²¹⁰ In *United States v. Nixon*, the Court emphasized that the President's need for confidentiality was so important that conversations with his advisors are "presumptively privileged."²¹¹ The Court viewed the assurance of confidentiality as so important that the executive privilege should give way only when mandated by the public interest.²¹² In the Court's view, the creation of a presumptive privilege with a very narrow exception would not have too great a chilling effect on presidential deliberations: "[W]e cannot conclude that advisors will be moved to

205. See *Nixon*, 418 U.S. at 705 (stating that the executive privilege flows from "the supremacy of each branch within its own assigned area of constitutional duties").

206. *Id.*

207. See *id.* at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.").

208. See *id.* at 708-09. According to the Court, the privilege

must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that . . . "guilt shall not escape or innocence suffer." [citations omitted] To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id.

209. See *id.* at 710 (stating that, as to military and diplomatic secrets, "the courts have traditionally shown the utmost deference to Presidential responsibilities").

210. *Id.* at 712-13.

211. *Id.* at 708.

212. See *id.* at 712-13 (holding that the public interest in the administration of justice in a criminal case outweighed the general need for confidentiality. The Court remarked, "[W]e must weigh the importance of the general privilege of confidentiality . . . against the inroads of such a privilege on the fair administration of criminal justice."); see also *id.* at 712 n. 19 (narrowing the holding by applying it only to the generalized privilege of confidentiality weighed against the need for evidence in a criminal proceeding).

temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."²¹³

The executive privilege is expressly designed to encourage executive candor in a way that is consistent with the public interest. In fashioning the doctrine, courts have taken due account of the special circumstances in which the President and other top government executives operate, their positions of public trust, and their strong need for confidentiality. The executive privilege extends to executive conversations with all advisors, including counsel. The question then becomes, why should a separate attorney-client privilege be necessary?

c. Given that the Executive Privilege Exists, Can a Separate Attorney-Client Privilege Be Justified?

Executive privilege doctrine is specifically tuned to the unique role of government executives. It affords confidentiality to the extent that confidentiality furthers the public interest, and withholds protection when protection would undermine the public interest. To argue in favor of a separate, absolute government attorney-client privilege is to argue that the public's concern about the obstructionist effects of government privilege should cease to matter just because the advisor with whom the executive confers happens to be an attorney. This argument ignores government executives' unique role in public life. They are not private citizens or corporate actors. Their duty is to the public. It is not clear why the executive's duty to the public should matter less because he consulted a government attorney as opposed to another trusted advisor.

To make the case for an absolute government attorney-client privilege, one must argue that the government's interests will be uniquely harmed in the privilege's absence. One must argue that the minimal chilling effect created by the qualified executive privilege generally cannot be tolerated when the President or another executive seeks legal advice. In the case of the President, the only time that conversation will be chilled is when the President is in possession of facts that may become relevant in a criminal case, or that may be antithetical to the public interest. If the President fears that later revelation of those facts will cause harm, he should consult a private attorney.²¹⁴

When the President seeks legal advice to protect his personal interests, the promise of confidentiality may indeed encourage him to be candid with counsel. Moreover, he may fear that the protection afforded by the executive privilege might not extend to protect the communications at issue. If the President is truly concerned that facts within his knowledge might become relevant in a criminal case, he can consult

213. *Id.* at 712.

214. *Cf.* *The People ex rel. Lockyer v. Superior Court of San Diego County* (Pfungst), 99 Cal. Rptr. 2d 646, 655 (Ct. App. 2000) (holding that a deputy district attorney targeted in a criminal investigation could not assert the attorney-client privilege with respect to conversations made in the course of his duties, but that he could assert the privilege with respect to conversations with his personal attorney), *partially overruled on other grounds by People v. Superior Court of Los Angeles County* (Laff), 23 P.3d 563 (Cal. Ct. App. 2001).

personal counsel. The government, as an entity, will not be hurt by the President's lack of disclosure to government counsel, because the government itself cannot be exposed to criminal liability.

Professor Stephen Gillers has argued that requiring the President to turn to private attorneys when his individual interests are implicated is undesirable because those lawyers will not act in the public interest.²¹⁵ Furthermore, he worries about the effect of allowing lawyers outside of the government to learn sensitive government information, and fears that government lawyers will be deprived of that information to the government's detriment.²¹⁶

Explore each point in turn. First, Gillers's assumption about the role of government lawyers echoes the popular view that those lawyers should behave differently than their private counterparts.²¹⁷ While a private attorney's duty runs solely to her client, the argument goes, the government attorney has a duty to the public at large, which enables, indeed *requires*, her to be less than zealous in defense of the government employee or agency for whom she works if she believes the employee's or agency's actions violate the public interest.²¹⁸ But that view has been soundly rejected by most scholars who have seriously considered the issue.²¹⁹ It is likely that most government lawyers will zealously protect the position of the agency for whom they work, for many reasons. First, self-interest often motivates government attorneys to behave in ways that further their careers.²²⁰ Second, the ethics rules do not expressly require the

215. Stephen Gillers, *A Highly Strategic Legal Chess Game*, L.A. TIMES, June 7, 1988, Part M (Opinion), at 1.

216. *Id.*

217. See, e.g., Steven K. Berensen, *Public Lawyers, Private Values: Can, Should and Will Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) (arguing that government lawyers can, should, and will serve the public interest); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 SO. CAL. L. REV. 951, 955-57, 980 (1991) (discussing the numerous bar associations, judges, government attorneys, scholars, and commentators who believe that "government counsel should temper their advocacy in the interests of 'justice'").

218. See, e.g., *Caleshu v. United States*, 570 F.2d 711 (8th Cir. 1978) (stating that government attorneys should not engage in forum shopping); Alan B. Morrison, *Defending the Government: How Vigorous Is Too Vigorous?*, in VERDICTS ON LAWYERS 242, 251-52 (Ralph Nader & Mark J. Green eds., 1976); Berensen, *supra* note 217, at 789; Eric Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B.N.Y. 649, 655 (1977); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Lawyers and Clients*, 1 TOURO L. REV. 1, 9 (1985) (asserting that "a government attorney should exercise discretion to achieve fairness, and, if necessary, stand up to the client").

219. See Josephson & Pearce, *supra* note 144, at 563-65; Lanctot, *supra* note 217, at 951; Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1119-20 (1995); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991).

220. Jonathan Macey and Geoffrey Miller argue that government attorneys will favor their personal interests over the public good because 1) in the absence of the market forces that private attorneys face, government attorneys will engage in inefficient activities, such as being overly litigious, to build their careers, 2) young government lawyers have incentive to litigate

government attorneys to treat their clients differently than private attorneys are required to treat their clients.²²¹ Most important, attorneys who zealously represent their government "clients" may in fact be operating in the public interest, even if a particular government position is problematic, because zealous advocacy protects the principles of representative democracy,²²² strengthens the adversary system,²²³ and facilitates efficient government operation.²²⁴ In fact, the pluralistic structure of the government, with its system of checks and balances, may even require zealous advocacy by the government attorney.²²⁵ Finally, even if some government attorneys actively seek to further the public interest, the question of exactly what constitutes "the public interest" in any particular circumstance is often impossible to answer, and leaves the determination to the judgment of individual attorneys.²²⁶ Allowing a government attorney to override her agency's position based on her own ideas of "the public interest" is simply unworkable; when the voters' interests conflict, why should the government attorney make the call about which view should prevail?²²⁷ If

to gain experience, even when litigation is not in the public interest, 3) agency attorneys may be "captured" by the private market if they hope to one day enter private practice, and 4) agency attorneys will be influenced by the desire to expand their agency's power, and to enhance their own power within the agency. See Macey & Miller, *supra* note 219, at 1115-1119.

221. Lanctot, *supra* note 217, at 957-74, 993 (making and developing this point).

222. *Id.* at 986 (arguing that "in the American political system, the responsibility to decide which government policy will serve the public good ordinarily rests with elected officials, not with government lawyers. Ultimately, the agency's decision . . . is a matter of government policy, not legal ethics."); *id.* at 1015 (stating that ultimately the decision about the public's best interest lies with elected officials, and once that policy decision has been made a government lawyer may ethically defend it); see also Miller, *supra* note 219, at 1295 (arguing that "the idea that government attorneys serve some higher purpose fails to place the attorney within a structure of democratic government"); Josephson & Pearce, *supra* note 144, at 565 (arguing that the final decisionmaking authority regarding government matters should belong to elected government officials, not to lawyers).

223. Lanctot, *supra* note 217, at 980-81.

224. Miller, *supra* note 219, at 1295 (arguing that "[i]f attorneys could freely sabotage the actions of their agencies out of a subjective sense of public interest, the result would be a disorganized, inefficient bureaucracy, and public distrust of its own government"); Josephson & Pearce, *supra* note 144, at 565 (arguing that "[a]dequate legal representation will not be provided under the public interest approach").

225. Miller, *supra* note 219, at 1296 (developing the argument that the government lawyer who acts according to his own independent judgment instead of for the benefit of the agency's position is acting without constitutional authority); see also Josephson & Pearce, *supra* note 144, at 567-68 (emphasizing that because of the pluralistic nature of our government, when agencies are at cross purposes, the attorney who acts in the best interest of the agency strengthens democracy).

226. See Lanctot, *supra* note 217, at 984-85; see also Miller, *supra* note 219 at 1294-95 (noting that "[i]t is common place that there are as many ideas of the 'public interest' as there are people who think about the subject"); Zacharias, *supra* note 78, at 48 (arguing that the "public interest" concept "leaves prosecutors with only their individual sense of morality to determine just conduct").

227. As two scholars put it:

The government lawyer who uses the public interest approach when policy

government attorneys share these views, and it seems likely that many do,²²⁸ then it is unlikely that they will undermine their agency's position out of some larger concern for the general public good.

The above points have particular resonance when the attorneys are White House counsel. The President handpicks his attorneys, who are often people with whom he enjoys long-standing relationships of trust, and who share his political sympathies. When a President faces potential trouble as a result of his personal acts, White House counsel are likely to view vigorous assistance to and defense of the Office of the President as their ethical obligation, both out of loyalty and out of concern for their own careers. Moreover, that route would not necessarily be inconsistent with the public interest; perhaps the President's attackers are politically motivated, and a vigorous defense of the President is justifiable to protect the will of the electorate. Experience has shown that it is extremely unlikely that White House counsel will urge the President to adopt a course of action that is against the President's personal interests because the attorneys believe that the course of action is in the public's best interests. There is little reason to think that the public will lose if the President turns to private counsel when his actions may expose him to criminal liability.²²⁹

Putting the President on notice that he will have to engage private counsel if he has committed acts that threaten to expose him to criminal or civil liability may, in fact, *serve* the public interest, because it will motivate him to obtain legal advice before, rather than after, he commits questionable acts. Again, the President who seeks to conform conduct to the law will find sufficient assurance in confidentiality in the executive privilege, and will be fully forthcoming with counsel. Only the President who intends to defy legal advice will be muzzled.

Gillers's other points are not entirely persuasive either. The fact that the President reveals incriminating personal details to private counsel would seem to pose little danger to the country's interests; private attorneys have every reason to take their ethical responsibilities of confidentiality seriously. And the fact that government

colleagues are in conflict usurps the function of the client to provide her with instructions. Inevitably, the lawyer who decides for herself which conflicting point of view to represent decides what the public interest is. Such a lawyer is not a lawyer representing a client but a lawyer representing herself.

Josephson & Pearce, *supra* note 144, at 563; *see also* Lanctot, *supra* note 217, at 983-84 (using concrete examples to show how there is no way for a lawyer to confidently determine what course of action is in the public interest in most cases).

228. Lanctot, *supra* note 217, at 955 (arguing, from her experience as a government lawyer, that "[g]overnment lawyers, for the most part, perceive their role as that of zealous advocates for their agency clients, just like any other lawyers representing private clients").

229. Some commentators argue that an absolute government privilege is necessary because government actors may not know in advance whether they need private counsel. *See, e.g.*, Pincus, *No Clear Legal Answer*, *supra* note 7 (quoting a "critic" who argues that "it is only after consultation with an attorney that a client should be expected to distinguish liability from non-liability and civil liability from criminal liability"). This Article has shown that most government employees will not confess conduct that they fear puts them at risk even if there is a government attorney-client privilege. *See supra* text accompanying notes 153-209. As for the President, the suggestion that the President may have little idea whether certain of his actions skirt the criminal law borders on the laughable.

attorneys will be deprived of learning about the troubling facts is not fatal either. In most instances, the government will not be hurt by this, because the government is not exposed to liability. Of course, it is remotely possible that troubling facts within the President's knowledge would be relevant to both the President's personal interests and the government's interests. Consider the most difficult case: suppose the President has committed acts that might expose him to criminal liability and the government to civil liability, or expose him to criminal liability and impeachment. In either case, the President could speak freely with his personal attorney, and those communications would be protected by the privilege. But arguably, he might be reluctant to reveal damaging facts to government attorneys if he knew that his communications would not be protected by a government attorney-client privilege. In that event, government attorneys could not obtain the facts necessary to defend the government, or to represent the President in impeachment proceedings.

Even here, however, a government attorney-client privilege would be unlikely to do the job. If the President fears that revelation of facts communicated to government counsel would hurt his criminal case, a government attorney-client privilege is unlikely to induce him to speak freely to government counsel because there is a strong chance that the President's successor would waive the privilege. Although the question whether a new administration could waive the attorney-client privilege to reveal communications between a former President and government counsel has never been decided, if courts are serious about the corporate analogy, that scenario is a distinct possibility—a government, like a corporation, can act only through its agents, and if the next President believed that waiver of the privilege was in the best interest of the government "client," she should be able to waive the privilege.²³⁰ Given that any criminal proceedings against the President would be brought after he left office, he could be mindful of the possibility that the next President could waive the privilege. Even if one thinks that a government attorney-client privilege might encourage the President to be candid with government counsel, this scenario is unlikely to occur often, and is thus an inadequate ground for justifying a broad government attorney-client privilege for all government employees.

In addition to eliminating the costs created by a government attorney-client

230. In the corporate context, the Supreme Court has held that a corporation's bankruptcy trustee may waive the corporation's privilege over the objection of the corporation's directors. See *Commodity Futures Trading v. Weintraub*, 471 U.S. 343, 356 (1985) (holding that the power to waive the attorney-client privilege "passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors.") In his treatise on attorney-client privilege, Paul Rice takes issue with the suggestion that the same rule should apply in the government context. RICE, *TREATISE*, *supra* note 9 at 136. Although he generally uses the corporate analogy to support the government privilege, on this issue he suggests that the comparison fails because the transfer of power in the government context is involuntary, and a rule transferring control of the privilege is likely to have a greater chilling effect than it would in the corporate context, where the corporate directors give up the privilege voluntarily, as part of the decision to file for bankruptcy. *Id.* This argument seems a little forced; it is a stretch to view the decision to file for bankruptcy as a "voluntary" surrender of the attorney-client privilege. More likely, all corporate directors know that there exists a remote possibility of insolvency, and they rely on the privilege, if at all, despite that remote possibility.

privilege, eliminating the President's ability to assert the attorney-client privilege will offer an additional important benefit—the President (or other top executive) will be forced to assert the executive privilege when he seeks to keep evidence secret. Since *Nixon*, invocations of executive privilege carry some cost. Invocations of executive privilege imply to some segment of the public that the President is trying to hide information. Assertion of the attorney-client privilege, however, is less costly, because the attorney may assert it on the client's behalf.²³¹ To the extent that at least some of the public perceives assertion of the privilege as the act of a lawyer, as opposed to an act of the President, it may seem more palatable. Because executive privilege must be asserted by the President directly, and because the assertion of the privilege in response to a criminal investigation entails greater costs, Presidents might assert that privilege less easily or frequently than they would the attorney-client privilege. This will increase the judicial system's ability to ascertain the truth.

d. *In re Lindsay* and *In re Grand Jury Subpoena Duces Tecum*

The above analysis sheds light on *In re Grand Jury Subpoena Duces Tecum*²³² and *In re Lindsey*.²³³ In these two relatively recent, highly publicized cases, courts found that the government could not invoke the attorney-client privilege with regard to communications between President Clinton and White House counsel,²³⁴ and between Hillary Clinton and White House counsel in response to a grand jury subpoena.²³⁵ Commentators have been nearly uniform in their disapproval of these two decisions.²³⁶ However, the decisions are consistent with this Article's thesis that there is no justification for a government attorney-client privilege that exceeds the limits of the executive privilege.

In *In re Grand Jury Subpoena Duces Tecum*, the independent counsel issued a subpoena that required White House counsel to produce notes taken during meetings

231. For example, in both *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) and *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), the privilege was asserted by a government attorney, as opposed to by the client directly.

232. 112 F.3d 910 (8th Cir. 1997).

233. 148 F.3d 1100 (D.C. Cir. 1998).

234. *Id.*

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

236. See, e.g., Stanley Brand, *A Blow Is Struck Against Attorney-Client Privilege for Government Lawyers in the Whitewater Independent Counsel Case*, 44 FED. LAW. 9 (June 1997) (criticizing the Eighth Circuit's holding); Cole, *supra* note 7 (worrying that the opinion creates uncertainties in privilege law that makes it difficult to determine when privilege protection might apply); Paulsen, *supra* note 7 (arguing that the reasoning in both cases is flawed); Chud, *supra* note 7 (arguing that the government attorney-client privilege is necessary even in criminal investigations); Dickmann, *supra* note 7 (criticizing *In re Lindsey*); Kendall, *supra* note 7 (arguing that *In re Grand Jury Subpoena Duces Tecum* was wrongly decided); Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, *supra* note 7 (arguing that both cases were improperly reasoned to the extent that they suggest a limitation on the government's attorney-client privilege); Toporek, *supra* note 7 (arguing that the Eighth Circuit's opinion will inhibit candor when government employees consult government counsel). *But see* Gowdy, *supra* note 21 (concluding that the government attorney-client privilege is not justified).

that occurred at breaks in Hillary Rodham Clinton's appearance before a criminal grand jury.²³⁷ Present at those meetings were White House counsel, Mrs. Clinton, and Mrs. Clinton's personal attorney.²³⁸ The subjects of the proceedings were the disappearance, and subsequent reappearance in the living quarters of the White House, of certain billing records of the Rose Law Firm, and the First Lady's actions following the suicide of Vincent Foster.²³⁹ The White House responded to the independent counsel's subpoena by asserting that the notes were protected by the executive privilege, the attorney-client privilege, and the attorney work-product doctrine.²⁴⁰ During the proceedings, the White House dropped its executive privilege claim.²⁴¹ The district court sustained the government's attorney-client privilege claim,²⁴² but the Eighth Circuit reversed, holding that, as a matter of policy, the White House could not invoke the privilege in response to a federal grand jury subpoena.²⁴³

In *In re Lindsey*, Deputy White House Counsel and Assistant to the President Bruce Lindsey invoked the attorney-client privilege, the executive privilege, and the attorney work-product doctrine before a federal grand jury, and refused to answer questions concerning his communications with the President.²⁴⁴ The district court rejected all of the privilege claims.²⁴⁵ On appeal, the government contested only the court's denial of the attorney-client privilege claim.²⁴⁶ The D.C. Circuit held that Lindsey could not invoke the attorney-client privilege in response to a federal grand jury investigating possible crimes by government officials and others.²⁴⁷

In both cases, well-accepted privilege doctrine would have required the courts to sustain the government's privilege claims.²⁴⁸ But both courts balked, and instead strained to create a new exception to the privilege doctrine. Whatever criticisms one might level at the courts' reasoning, ultimately the cases are instructive because they expose the weakness of the privilege's instrumental justification.

First, examine *In re Grand Jury Subpoena Duces Tecum*.²⁴⁹ In that case, the Eighth Circuit held that White House counsel could not assert the attorney-client privilege as a justification for failing to turn over White House counsel's notes of the meetings between the First Lady, her lawyer, and White House counsel.²⁵⁰ In reaching that

237. 112 F.3d 910 (8th Cir. 1997).

238. *Id.* at 914.

239. *Id.*

240. *Id.*

241. The White House abandoned the executive privilege claim during the district court proceedings. *Id.* at 914.

242. *Id.*

243. *Id.* at 915, 924.

244. 148 F.3d 1100, 1103 (D.C. Cir. 1998).

245. *Id.*

246. *Id.*

247. *Id.* at 1114.

248. As the D.C. Circuit noted, "We have little doubt that at least one of Lindsey's conversations subject to grand jury questioning 'concerned the seeking of legal advice' and was between President Clinton and Lindsey while Lindsey was 'acting in his professional capacity' as an attorney." *Id.* at 1107 (citations omitted).

249. 112 F.3d 910 (8th Cir. 1997).

250. *Id.* at 924-26.

result, the court first took pains to characterize the larger question of whether a government attorney-client privilege could exist in any context as an open one,²⁵¹ and emphasized that the broader question was not before it.²⁵² Given the small mountain of precedent sustaining government attorney-client privilege claims, the court's characterization of privilege law is startling. After setting the stage, the court turned to the narrower question: whether the White House can assert a claim of attorney-client privilege in response to a subpoena issued by a federal grand jury investigating possible official misconduct. After characterizing the issue as one of first impression,²⁵³ the court determined that, even if a government attorney-client privilege did exist, it must give way in this circumstance, because the logic of *Nixon* dictated that "the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes."²⁵⁴

In finding that the attorney-client privilege was subject to the same limitations as the executive privilege, the court took pains to analyze and reject the White House's argument that *Upjohn* dictated upholding the government's assertion of the privilege.²⁵⁵ The court determined that the government could not properly be analogized to a corporation for privilege purposes for three reasons. First, White House "employees," including the President and the First Lady, could not expose the White House to criminal liability.²⁵⁶ The court reasoned that this fact distinguished the

251. The federal court brushed aside the government's contention that Proposed Rule of Evidence 503, in which the commentary includes "government bodies" in its definition of "client," provided guidance on the question, noting that neither the rule nor advisory committee notes revealed any evidence that the drafters had considered the potential ramifications of the definition in this particular context. The court also noted that language in the RESTATEMENT OF THE LAW GOVERNING LAWYERS and the UNIFORM RULES OF EVIDENCE reveals the drafters' sense that the privilege might justifiably be modified in the government context. *Id.* at 915-16.

252. *Id.* at 915.

253. *See id.* at 917. Specifically, the court determined that *In re Grand Jury Subpoenas Duces Tecum (Farber)*, 574 A.2d 449 (N.J. App. Div. 1989), which sustained a county agency's attorney-client privilege claim, was factually distinguishable because the case "involved the interaction between a county grand jury and a county agency"—and thus did not "bear directly on the relationship of a federal grand jury to a federal entity"—and because the attorney representing the county was a private attorney whom the county had retained, rather than a government attorney. Similarly, it dismissed *In re Grand Jury Subpoena (Doe)*, 886 F.2d 135 (6th Cir. 1989), which found that the city counsel of Detroit could assert the attorney-client privilege, as "unpersuasive legally" and implicating "potentially serious federalism concerns" not present in the instant case. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 917. The court also found that the huge number of cases sustaining attorney-client privilege claims by the federal government were not binding because the cases involved civil litigation between the government and citizens. *Id.* at 917-18.

254. *Id.* at 919. The court also determined that the notes could not be protected as the work product of White House counsel, because the White House was not subject to liability, and therefore the notes were not made in anticipation of litigation. *Id.* at 924-25. The court also considered and rejected the argument that White House counsel's notes were protected under the common-interest doctrine. *Id.* at 921-23.

255. *Id.* at 919-920.

256. *Id.* at 920.

government from a corporation, which has an interest in discovering wrongdoing by employees in order to protect itself.²⁵⁷ Second, executive branch employees (including attorneys) are required by statute to report criminal wrongdoing by other employees.²⁵⁸ Third, the court reasoned, "the general duty of public service calls upon government employees and agencies to favor disclosure over concealment."²⁵⁹ It followed that "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."²⁶⁰ A contrary holding, the court declared, would result in a gross misapplication of public assets.²⁶¹

Finally, the court understood that limiting the privilege would not inhibit the President's ability to obtain legal advice, because the President would be inhibited with counsel only when the President fears he may have violated the criminal law,²⁶² in which case private counsel is appropriate.²⁶³ In this case, the court reasoned, the government would not be harmed by failure to know the facts, because the government would not face criminal liability.²⁶⁴ Finally, the court noted that this narrow limit on the privilege would likely have little effect in the preconduct setting, because "[i]f the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice, which would be unlikely anyway."²⁶⁵

The *Lindsey*²⁶⁶ court took a different route to reach the same result. Bound by precedent from expressly rejecting any government privilege, the court did not suggest that the privilege might never be applicable in the government setting.²⁶⁷ The court did emphasize, however, that, given the special concerns applicable to government entities, the attorney-client privilege could be more narrowly construed in the government context than in the private sector,²⁶⁸ a point the D.C. Circuit has repeatedly made in other contexts.²⁶⁹ The court's ultimate conclusion rested on the specific factual context before it; the court honed in on the fact that the

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 921.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998).

267. *Id.* at 1104 (noting that "[c]ourts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts," and citing, among other cases, *Coastal States Gas Corp. v. United States Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980)).

268. *Id.* at 1107-09 (emphasizing that "competing values arise when the Office of the President resists demands for information from a federal grand jury and the nation's chief law enforcement officer," as government attorneys have duties to the public).

269. *See, e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

communications at issue were made by the President and sought in the context of a criminal grand jury investigation, and realized that there was no justification for giving the attorney-client privilege a broader reading than the executive privilege.²⁷⁰

Both opinions have been roundly criticized by lawyers and scholars, who have deplored this unprecedented “departure” from traditional privilege law.²⁷¹ But because critics assume that the government privilege is justified, they fail to appreciate the strengths of both opinions.

Professor Michael Paulsen has criticized both courts’ reasoning, and delivers a strongly worded rebuke of the Eighth Circuit’s approach to the issue.²⁷² Paulsen is disturbed by the Eighth Circuit’s ambivalence about whether and to what extent the government enjoys an attorney-client privilege in the first instance, and argues vociferously that the government is indistinguishable from a corporation for that purpose.²⁷³ However, he argues, the privilege can be waived in limited instances. In the government context, he argues, the independent counsel, as the equivalent of a corporation’s successors, may waive the privilege.²⁷⁴ In the alternative, the independent counsel’s investigation of criminal behavior by the executive branch is analogous to a shareholder derivative suit, and thus the privilege can be pierced upon a showing of a likely violation of fiduciary duty.²⁷⁵

Paulsen offers a penetrating critique of some of the grounds the Eighth Circuit relied upon to support its conclusion,²⁷⁶ and his analysis of the role of the independent counsel within the executive branch is persuasive.²⁷⁷ Paulsen’s argument ultimately depends, however, on the need for a government attorney-client privilege, and on this point his argument—and therefore his criticism of the Eighth Circuit’s reasoning—is unconvincing.

Paulsen’s major complaint concerns the court’s resolution of the tension between the *Nixon* and *Upjohn* cases.²⁷⁸ *Nixon* held that the executive privilege was qualified, and that the President could not assert it in the face of a criminal investigation. *Upjohn*, on the other hand, put the stamp of approval on a broad, absolute corporate

270. *Lindsey*, 148 F.3d at 1113-14.

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

272. *See Paulsen, supra* note 7, at 494-503.

273. *Id.* at 474 (stating that “[m]y thesis in this article is that the United States government possesses, as a matter of common law, the same attorney-client privilege that exists for a corporation or other organizational entity”); *id.* at 495-98 (arguing that the government has the same need for the privilege as a corporation does).

274. *Id.* at 479.

275. *Id.*

276. Specifically, Paulsen argues at length that the Eighth Circuit’s attempt to distinguish *Upjohn* is wanting on two points. First, he persuasively argues that the statute requiring government employees to report evidence of criminal wrongdoing is itself not a sufficient justification for finding that there is no attorney-client privilege in the government context. *Id.* at 498-501. Second, he notes that the fact that the White House is not subject to criminal liability is not, by itself, enough of a justification for withholding privileged protection. *Id.* at 496-97. However, both points together do combine to undermine the governmental privilege’s instrumental justification.

277. *See id.* at 512-20.

278. *See id.* at 494-97.

attorney-client privilege. The Eighth Circuit held that *Upjohn* was not applicable to the specific government context before it, and that the reasoning in *Nixon* was persuasive with regard to establishing the limits of a government attorney-client privilege.²⁷⁹ Paulsen argues, however, that *Upjohn* creates a broad privilege for all "entities,"²⁸⁰ and thus answers the questions regarding whether and to what extent the government has an attorney-client privilege. To Paulsen, the scope of the executive privilege is irrelevant because the attorney-client privilege and the executive privilege "are simply two different animals."²⁸¹

First, Paulsen insists that a government attorney-client privilege that is coextensive with the corporate privilege not only exists, but is necessary.²⁸² He argues that the court misses this point because it too narrowly defines the relevant government client as "the White House" instead of "the United States government" as a whole.²⁸³ This characterization enables the court to downplay the government's need for legal advice because, in this case, the White House had no compelling need to investigate Hillary Clinton's actions (because Hillary Clinton's actions could not expose the White House to liability). According to Paulsen, the Eighth Circuit's conception is "plainly wrong,"²⁸⁴ and he charges that the court's "sloppiness on this score affects its whole opinion."²⁸⁵ He then argues that because the government needs legal advice, the attorney-client privilege is justified.²⁸⁶

Although Paulsen may be right that, as an ethical matter, the government lawyer's client is the government, this begs the question whether the government would receive adequate legal advice if there were no government attorney-client privilege. Paulsen swallows the instrumental justification for the privilege whole, and assumes that it transfers easily to the government setting. Indeed, it is Paulsen's insistence on a broad definition of the client as "entity" that muddles the analysis and makes the question too easy. Blurring the distinction between government and corporation, Paulsen argues that the privilege is necessary because "entities" have legal interests in the actions of their employees, regardless of whether the entity is likely to be indicted or charged, and that the privilege is necessary to ensure that the entity gathers the facts necessary to obtain legal advice to protect those interests.²⁸⁷ He offers an example:

Suppose that employee malefactors have engaged in a course of reprehensible conduct for which there is no reasonable likelihood that the entity will be asked to bear legal responsibility in any way. Information about the conduct might be relevant to legal advice about whether the employee could be fired by the entity on this ground, without risking suit from the chagrined employee.²⁸⁸

279. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919-21 (8th Cir. 1997).

280. Paulsen argues that "nothing about *Upjohn* on its face seems to limit its reasoning to corporations, as distinct from other organizational clients." Paulsen, *supra* note 7, at 495.

281. *Id.* at 494.

282. *Id.* at 494-98.

283. *Id.* at 486-88.

284. *Id.* at 488.

285. *Id.* at 487.

286. *Id.* at 496-97.

287. *Id.* at 496.

288. *Id.* at 497.

But he stops short of asking the relevant question: Would the entity in that instance fail to ascertain the facts, or fail to obtain legal advice, if there were no attorney-client privilege? Not if the entity were the federal government. If the government faces no liability, it has every incentive to investigate the conduct of a problematic employee and to take appropriate steps in response to the misconduct. This no doubt explains the Eighth Circuit's emphasis on the fact that the government faced no liability in the case before it. But even if potential liability loomed, government actors would have sufficient incentive to investigate. Because failure to seek legal advice might expose the government to liability if it wrongly discharges the employee, it will seek the advice even if there is no privilege. Because the government's aim in seeking legal advice is to conform conduct to the law, government actors need not fear that later revelation of attorney-client communications will cause harm. Finally, for reasons explained earlier in this Article, the privilege will not encourage other government employees who may have knowledge of relevant facts to reveal those facts to government employees conducting the investigation.²⁸⁹

Paulsen also criticizes the court's reliance on 28 U.S.C. § 535(b) as a ground for piercing the privilege.²⁹⁰ Section 535(b), which requires federal employees to report evidence of criminal wrongdoing by other government employees, has also been cited in student notes as grounds for eliminating a government attorney-client privilege.²⁹¹ Paulsen makes a compelling case that, at most, the statute constitutes only a limited exception to the privilege,²⁹² and at the least, the statute is analogous to a corporation's in-house reporting requirement, and does not abrogate the government privilege at all.²⁹³ Yet the statute *is* relevant to the attorney-client privilege debate, *regardless* of whether it abrogates the government's attorney-client privilege, because it undermines the credibility of the privilege's instrumental justification. When possible criminal wrongdoing is involved, the statute chills attorney-employee speech forcefully and directly. The employee with the guilty conscience is on notice that her superiors will quickly be informed of the facts that she reveals to the government attorney. Moreover, the very fact that Congress passed the statute leads one to wonder whether it was convinced that the privilege encourages the candor that is essential to obtaining good legal advice. Were it so, the statute's reporting requirement would seriously

289. See *supra* text accompanying notes 144-197.

290. Paulsen, *supra* note 7, at 497-501.

291. See Barsdate, *supra* note 70, at 1739 n.74.

292. Paulsen, *supra* note 7, at 497-98 (noting that "[o]ne could fairly argue that the crime-reporting mandate constitutes a statutory abrogation" of the government attorney-client privilege, but arguing that one could also conclude that the statute creates only a limited exception for incriminating statements made, and not for *all* attorney-client communications).

293. *Id.* at 498-500. Here, Paulsen notes that if a corporation had a similar in-house reporting rule, the corporation would not be found to have waived the privilege if an employee obeyed the rule and reported wrongdoing to corporate counsel. *Id.* at 498-99. He also points out that a court would not likely find that the statute constituted a waiver if the claim were made in the context of litigation brought by a private party against the government. *Id.* at 500. Rather, he argues, the better reading of the statute is that it imposes an "intra-executive" duty that does not abrogate the attorney-client privilege "possessed by the executive branch as an entity." *Id.*

compromise the executive branch's ability to function in the gravest cases. Thus, while § 535(b) may not eliminate the executive branch's attorney-client privilege in the criminal context, it is important because it reveals the inherent weakness in the instrumental argument.

In sum, Paulsen does not make the case that the government attorney-client privilege is needed to enable government actors to obtain appropriate legal advice. As this Article has established, the instrumental justification is unpersuasive in most government contexts. It works, if at all, only in the case of the President and other agency heads, who already enjoy the protection of the executive privilege. Thus, the strength of the Eighth Circuit's opinion is its implicit realization that a broad government attorney-client privilege is not justified. In refusing to accept uncritically a broad government privilege, and in characterizing "the client" as "the White House," the court limited its analysis of the scope of the privilege to the situation where the instrumental justification has some persuasive force. By focusing exclusively on the question of the President and his closest staff, the court implicitly frames the issue as follows: Does the President need the promise of the protection afforded by the attorney-client privilege to speak candidly with counsel? Thus framed, the answer is simple. Given that the President and his closest advisors already have the protection of the executive privilege, which exists to encourage candid communications between all of the President's advisors, including lawyers, there is no need for an attorney-client privilege in this case. Although the court's three reasons for distinguishing *Upjohn* fall short of the mark, the court was correct in concluding that *Upjohn* is not applicable here.

Paulsen's other major criticism of the Eighth Circuit's reasoning is that it wrongly conflates the executive and attorney-client privileges by finding that the attorney-client privilege should be similarly qualified.²⁹⁴ He criticizes the *Lindsey* court's analysis on the same grounds.²⁹⁵ To make this case, Paulsen must persuade us that the President's consultations with White House counsel would be stifled only if the executive privilege were in effect. He does not make that case.

Both the Eighth Circuit and the *Lindsey* court found no justification for an attorney-client privilege broader in scope than the executive privilege. The *Lindsey* court is especially clear on this point:

A President often has private conversations with his Vice President or his Cabinet Secretaries or other members of the Administration who are not lawyers or who are lawyers, but are not providing legal services. The advice these officials give the President is of vital importance to the security and prosperity of the nation, and to the President's discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings. Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In

294. *Id.* at 494-95.

295. *Id.* at 505-08.

short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.²⁹⁶

Paulsen's attempt to rebut this reasoning amounts to a handful of conclusory statements: Not only are the privileges "simply two different animals,"²⁹⁷ but the attorney-client privilege "is a distinct claim, having rather little to do with the fact that the particular institution in question is the United States government."²⁹⁸ Finally, he argues that the lawyer's advice is simply "different" than the advice provided the President by his other advisors.²⁹⁹

Because persons seeking legal advice often have very real legal problems, resulting from their own questionable conduct, the occasions that call for such advice are perhaps less likely than most other situations (maybe even including Cabinet meetings) to produce complete candor by the person needing advice and the person giving it, if confidentiality should not be assured.³⁰⁰

He falls back on the conclusion that if the attorney-client privilege is interpreted as broader than the executive privilege, "the law has endured worse anomalies."³⁰¹

Given his ultimate conclusion—that the independent counsel controls the privilege in some circumstances—his argument is especially puzzling. His conclusion undermines his premise; in determining that the independent counsel should control the privilege, he creates a privilege that is qualified. Even he admits, then, that the instrumental justification for the privilege is weak. Moreover, if he approves of a qualified attorney-client privilege in the case of a criminal investigation by a special prosecutor, why does he insist that there must be two privileges? The incentive provided by the executive privilege is sufficient. Because he lumps all government agencies and offices together with corporate entities, this point is obscured.

IV. GOVERNMENT PRIVILEGE AND THE LEVEL PLAYING FIELD

The preceding Parts have established that federal government employees would continue to consult candidly with government attorneys even in the absence of an attorney-client privilege. Does it follow that all communications between government employees and attorneys should be discoverable? Not necessarily. Privileging government employee-attorney communications can be justified in limited instances, not necessarily to encourage open communication between lawyer and client, but to ensure a level playing field in litigation. Therefore, in addition to the investigatory and executive privileges this Article has previously explored, government should be

296. *In re Lindsey*, 148 F.3d 1100, 1114 (D.C. Cir. 1998) (internal citations omitted).

297. Paulsen, *supra* note 7, at 494.

298. *Id.* at 495.

299. *Id.* at 507.

300. *Id.*

301. *Id.*

entitled to the same qualified work-product immunity that other litigants enjoy. As the following paragraphs explain, extending work-product protection to the government is justified on fairness grounds; a government attorney should have the same ability to develop her case as her private adversary. The need to provide a level playing field in litigation also justifies extending work-product-like protection to oral statements made by government employees (both legal and nonlegal) in preparation of litigation.

Federal Rule of Civil Procedure 26(b)(3) protects “documents and tangible things” generated by a party, its attorney, the party’s agent, or the attorney’s agent in anticipation of litigation.³⁰² As interpreted by the federal courts, the rule confers virtual immunity³⁰³ from discovery on attorney-generated documents that reveal the attorney’s legal analysis, opinions, and case strategy.³⁰⁴ The doctrine also provides qualified immunity³⁰⁵ to all other work-product, but, at least in theory, requires that actual facts discovered by a party be revealed to its adversary if the discovered facts are responsive to discovery requests (so long as revelation of all or part of documents containing those facts would not also reveal that party’s strategy or legal theories). Work-product immunity extends to all documents prepared in anticipation of litigation, whether generated by the client, the client’s attorney, or the agent of the client or the attorney.³⁰⁶ Although Rule 26 does not protect oral statements made in anticipation of litigation, most courts agree that the common law confers similar, if not greater,³⁰⁷ protection to oral statements made in furtherance of trial preparation.³⁰⁸

302. FED. R. CIV. P. 26(b)(3).

303. See Jeff A. Anderson et al., *Special Project: The Work Product Doctrine*, 68 CORNELL L. REV. 760, 789-830 (1983) (stating that facts are not protected as work-product, that “ordinary work product” has qualified protection that will give way upon a showing of substantial need and unavailability, and that attorneys’ opinions, strategies, and legal analyses are almost always protected).

304. See, e.g., *First Heights Bank v. United States*, 46 Fed. Cl. 827, 829 (Fed. Cl. 2000) (stating that work-product material that can be described as an attorney’s mental impressions, conclusions, opinions, or legal theories “can be discovered only in very rare and extraordinary circumstances” (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977))).

305. The party seeking to overcome the presumption of work-product immunity must make a showing of substantial need and an inability to obtain the same materials without undue hardship. See generally WRIGHT ET AL., *supra* note 115 § 2025 (2d ed. 1994); *First Heights Bank*, 46 Fed. Cl. at 829.

306. See, e.g., *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (recognizing that the work-product of the attorney’s agent is protected); *Otto v. Box U.S.A. Group, Inc.*, 177 F.R.D. 698, 699 (N.D. Ga. 1997) (“[A] plaintiff who creates work-product material before hiring an attorney is still permitted to take advantage of the work-product doctrine.”); *Mahoney v. Sisters of Charity Hosp.*, 165 F.R.D. 26, 30 (W.D.N.Y. 1995) (holding statistical reports made by a hospital human resources director at the suggestion of an attorney were made in anticipation of litigation and were thus protected); *Ward v. Maritz, Inc.*, 156 F.R.D. 592, 595 (D.N.J. 1994) (tape recordings made by a client are normally protected).

307. In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court suggested that oral statements might be given greater protection than tangible work-product because requiring counsel to reveal oral statements made to him would present “grave dangers of inaccuracy and untrustworthiness,” and would transform the lawyer from “an officer of the court” to an ordinary witness. *Id.* at 513. One article argues that intangible work-product deserves greater protection because revelation of nontangible work-product will expose more of the attorney’s

The two most common justifications for the work-product doctrine are: 1) that work-product protection is necessary to ensure that attorneys adequately prepare for litigation,³⁰⁹ and 2) that it is a necessary corollary to the adversarial system.³¹⁰ Courts and many scholars believe that work-product immunity creates at least a marginal increase in attorney preparation, and that it facilitates efficient case preparation by allowing attorneys to freely memorialize their analysis, strategy, and organizational efforts.³¹¹ This increase in effort and efficiency in turn benefits the client, who receives relatively better legal representation than she would have absent the doctrine. Because the doctrine extends to all attorneys, it strengthens the adversarial system by allowing each party to present its best possible case without revealing its hand prior to trial.

The arguments in favor of the doctrine are controversial, and many scholars have questioned their strength.³¹² But it is not necessary to judge the merits of the work-

strategy and thought process than revelation of tangible work-product, and because juries might give undue weight to an attorney's oral statements. See Anderson et al., *supra* note 303, at 839-40.

308. See, e.g., *United States v. 266 Tonawanda Trail*, 95 F.3d 422, 428 n.10 (6th Cir. 1996) (stating that "[w]hen applying the work product privilege to such nontangible information, the principles enunciated in *Hickman* apply, as opposed to Rule 26(b)(3) . . . which applies only to 'documents and tangible things'"); *Alexander v. FBI*, 192 F.R.D. 12, 19 (D.D.C. 2000) (holding that President Clinton's private investigator did not have to answer a question regarding whether he had investigated Linda Tripp, because it would reveal the attorney's thought processes); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995) (holding that the defendant's expert witness need not answer a deposition question regarding whether the defendant's attorney had expressed dissatisfaction with a previous expert's opinion because the answer would reveal nontangible work product, that is, the defense attorney's opinions, and nontangible work product is protected under *Hickman*).

309. See James A. Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery* (pt. 2), 42 U. DET. L.J. 253, 270 (1965); Allen et al., *supra* note 80, at 385-87 (arguing that work-product protection benefits the system by encouraging attorneys to uncover both favorable and unfavorable facts about the case); Anderson et al., *supra* note 303, at 786 (stating that "[t]he zone of privacy also removes serious disincentives to thorough preparation").

310. See, e.g., Robert F. Kane, *The Work-Product Doctrine—Cornerstone of the Adversary System*, 31 INS. COUNS. J. 130 (1964) (arguing that work-product protection is an essential part of the adversary system); Anderson et al., *supra* note 303, at 784-85 (arguing that "[t]he central justification for the work-product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role"); Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 334 (1978) (same). But see Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1524-30 (1991) [hereinafter Thornburg, *Work Product*] (setting out the various arguments that have been made in furtherance of the general proposition that work-product is a necessary aspect of the adversarial system, but concluding that all of those arguments are unpersuasive).

311. See Allen et al., *supra* note 80, at 386-87 (arguing that forced disclosure of attorneys' investigative work would decrease the incentive to discover all relevant facts); Anderson et al., *supra* note 303, at 786.

312. For a thorough argument that none of the justifications for the work-product doctrine are compelling, see Thornburg, *Work Product*, *supra* note 310. See also Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*,

product debate to determine whether the government should benefit from the doctrine. If work-product is not defensible (as perhaps it is not), then it should be abolished with respect to all attorneys. But if private attorneys are entitled to the doctrine's benefits, then a serious inequality would result if the doctrine were not extended to government attorneys as well. During discovery, government attorneys would be forced to reveal strategy, legal analysis, and all of their case-preparation work. But they could not require their adversaries to produce comparable information. The resulting imbalance would undermine the objectives of the adversary system to the government's disadvantage. There is no clear reason to allow this to occur.

The absence of work-product protection for government attorneys might create imbalance in another way; government attorneys might be less willing than their private counterparts to commit trial preparation to writing, which would impede efficient case preparation.³¹³ There is no readily apparent justification for denying government attorneys the ease of preparation that private attorneys enjoy.

Consequently, if private attorneys can assert work-product immunity, then extension of the work-product doctrine to government attorneys is justifiable to ensure that the government can operate on a level playing field throughout the litigation. But if the aim in extending work-product immunity to government attorneys is to create a level playing field, it would be important that all nonlegal government employees' communications to government counsel, both *oral* and written, made in anticipation of litigation, be protected by the doctrine. Due to the government's unique structure, revelation of many employee-attorney communications would reveal the government's litigation strategy and legal analysis. For instance, suppose an agency recommends that the Department of Justice pursue litigation against a corporation. To enable the litigation attorneys to do their jobs, agency employees (both legal and nonlegal) must communicate all relevant information concerning the case. Nonlegal employees may communicate to counsel factual summaries of events leading to the decision to recommend litigation, analysis of applicable legal regulations, and opinions regarding the strengths and weaknesses of the case. Even if the communicant is not an attorney, the specialized nature of her job makes it likely that she possesses some knowledge of applicable law, and the facts that she chooses to emphasize will reveal her analysis of the case. This is likely to be true whenever government employees (both lawyers and nonlawyers) consult with government litigation attorneys. Currently, courts often protect communications between nonlawyer government employees and government lawyers made in preparation for litigation by invoking the attorney-client privilege. In the absence of a government attorney-client privilege, protecting those communications would be necessary to promote a level playing field, because similar statements made by the government's adversary would be protected by the attorney-client privilege, if not the work-product doctrine.

1981 SUP. CT. REV. 309, 362 (arguing that the doctrine does create an incentive for attorney preparation, but that it may encourage overinvestment in preparation); Fischel, *supra* note 79, at 1 (arguing that all rules governing attorney confidentiality, including the work-product doctrine, benefit the attorney at the client's expense).

313. See Anderson et al., *supra* note 303, at 786. I do not mean to suggest that the communications will not occur, or that the employee will omit relevant facts from her communication, only that the efficiency of trial preparation may be slightly impeded as the employee takes pains to transmit some matters verbally instead of in writing.

This view is consistent with Uniform Rule of Evidence 502. Although the drafters of the Uniform Rules did not fully articulate this justification for their approach,³¹⁴ their final decision to limit the government attorney-client privilege to the litigation and investigation settings is sound and considerably more satisfying than Proposed Federal Rule 503's treatment of the issue. Indeed, a number of state legislatures have implicitly recognized that the "level playing field" justification is the only solid basis for a government attorney-client privilege, and have adopted the Uniform Rule's limitation.³¹⁵ There is no indication that government entities in those states have been frustrated in their ability to seek and receive necessary legal advice.

In sum, to ensure that the government can operate on a level playing field in litigation, it is justifiable to allow the government to withhold from discovery communications, both written and oral, between government litigation counsel and other government employees, both legal and nonlegal. The analysis presented in this Article is equally applicable to state and municipal governments, although with some modifications, depending upon particular state statutes or constitutional provisions.

V. LOOKING BACKWARD: MAKING SENSE OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

Preceding Parts have shown that the attorney-client privilege is not necessary to encourage government employees to speak freely with government lawyers. Yet, if the thesis of this Article is correct, why have so many courts sustained the federal government's attorney-client privilege claims? The sheer numbers seem to cast doubt on this Article's thesis—surely, so many able federal judges could not be wrong.

The answer lies in a close analysis of the early cases. Before litigation over federal government attorney-client privilege claims became commonplace, courts crafted a narrow government privilege that is at odds with the attorney-client privilege's justification but consistent with the adversary system's demand for a level playing field. Despite broad dicta that seemed to sanction a broad privilege coextensive with the corporate one, courts implicitly, if not expressly, recognized the dissonance between the privilege's objectives and the workings of government, and tailored privilege protection accordingly. In situations where granting the government privilege protection ensured that the government would not be disadvantaged in litigation preparation, courts have sustained the government's privilege claim.³¹⁶ In other situations, courts refused to sustain government claims of privilege, even where the communications at issue met the privilege's doctrinal requirements.³¹⁷ Taken together, these early opinions reveal courts' understanding that privilege protection was not necessary to encourage speech between government actors and government attorneys, but that some type of protection was necessary to assure that the government would

314. See *supra* note 145 and accompanying text.

315. At least four states, including Arkansas, Maine, North Dakota, and Oklahoma, have adopted the narrowed government privilege advocated by Uniform Rule 502(d)(6). See, e.g., ARK. CODE ANN. § 16-41-101 (Michie 1987); ME. R. EVID. 502(d)(6); N.D. R. EVID., 502(d)(6); OKLA. STAT. ANN. tit. 12, § 2502(D)(6) (West 1993).

316. See *supra* Part IV.

317. See *supra* Part III.B.2.d.

not be unfairly disadvantaged in litigation.

This raises a question: If courts were primarily concerned with providing government litigators with a level playing field, why did they not simply hold that the communications at issue were protected by the work-product doctrine? First, the work-product doctrine was not codified until 1970.³¹⁸ The first federal appellate cases adjudicating government attorney-client privilege claims were issued in the 1960s. During that time, it was not clear whether work-product protection extended to communications made by clients and others to attorneys, or whether the immunity was limited to documents generated by the attorney alone. Moreover, because the attorney-client privilege granted absolute protection to client communications, courts usually did not consider whether work-product protection was necessary in those instances. Typically, courts assumed that the attorney-client privilege covered client-attorney communications, and work-product covered documents prepared by attorneys. But because nonlawyer government employees often assisted in case preparation (out of necessity), some kind of protection was necessary to keep the playing field level. So courts simply slapped on the attorney-client privilege label to afford the government that protection.

Those courts that did view work-product as covering client communications contributed to the confusion. In many such cases, courts, in broad strokes, held that the communications were protected by both the attorney-client and work-product privileges, without stopping to think of the possible ramifications of setting a precedent for a government attorney-client privilege. Thus, attorney-client privilege got its foot in the door in the 1960s and never left.

As the 1980s progressed, it became common for the government to assert numerous FOIA exemptions in a single case, and the attorney-client privilege got lost in the commotion; courts began to read earlier cases at face value, and the broad, freewheeling government attorney-client privilege was born.

A. 1963-69: A Limited Litigation Preparation Privilege

Examine the early cases in which courts sustained federal government attorney-client privilege claims. These cases are inconsistent with the attorney-client privilege's instrumental justification; it seems likely that the communications at issue would have occurred even absent the promise of privilege protection. On the other hand, requiring the government to reveal the communications might have put it at an unfair disadvantage against its litigation adversary, which could shield comparable materials from discovery by invoking the work-product doctrine and attorney-client privilege.

First, recall *United States v. Anderson*,³¹⁹ the first reported decision sustaining an attorney-client privilege claim by the federal government.³²⁰ In *Anderson*, the Small

318. See Thornburg, *Work Product*, *supra* note 310, at 1520.

319. 34 F.R.D. 518 (D. Colo. 1963).

320. Prior to *Anderson*, two courts had held that communications between state or municipal government employees and government attorneys could be protected by the attorney-client privilege. See *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955); *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio App. 1942). Both opinions are conclusory and simply assume that the privilege applies to governmental entities. In *Connecticut Mutual Life*, the court rejected the plaintiff's argument that the privilege did not attach to communications between

Business Administration ("SBA") was a secured creditor in the Durox bankruptcy proceedings.³²¹ After Durox's plan was confirmed, the government sued the guarantors of the note seeking recovery of the loan amount.³²² The guarantors argued that actions that the SBA had taken during Durox's reorganization proceedings relieved the guarantors of liability on the note.³²³ The SBA admitted taking those actions, which were a matter of public record,³²⁴ but denied that the actions relieved the guarantors of liability.

The guarantors demanded that the SBA produce documents that SBA employees, SBA counsel, and Justice Department attorneys had generated during the reorganization proceedings. These documents memorialized the discussions and conflicts between SBA attorneys regarding how the SBA should protect its secured claim in the Durox reorganization proceedings.³²⁵ The SBA alleged, and the court agreed, that all documents *between* government attorneys were protected by the work-product doctrine, because they contained opinion, strategy, and legal analysis, and because the guarantors had no need for the documents.³²⁶ The government also alleged that documents drafted by government counsel to the SBA Regional Director, and vice versa, were protected by the attorney-client privilege.³²⁷ The documents contained either requests for information to enable counsel to formulate a strategy with regard to the reorganization, or attorneys' legal opinions on the same subject.³²⁸ In a quick paragraph, the court held that the documents were protected by the attorney-client privilege.³²⁹

In holding that the government did not have to produce those documents, the court reached the right result for the wrong reason. Application of the attorney-client privilege here cannot be justified. The two documents drafted by nonlawyer government employees to government counsel requested advice or suggested taking action to preserve the SBA's position in the reorganization. The attorney-client privilege simply was not necessary to encourage SBA employees to reveal confidential facts, because the SBA's legal interest in collecting its debt simply did

government employees and attorneys, stating that "plaintiffs state no cases in support of this proposition," and reasoning that "the policy of the privilege seems ... to provide no ground for the distinction which plaintiffs suggest." 18 F.R.D. at 450. Similarly, in *Rowley v. Ferguson*, the case upon which *Connecticut Mutual Life* relied, the court flatly concluded in two sentences that the documents "were confidential communications between attorney and client," and that "the fact that both attorney and client were public officials should make no difference." 48 N.E.2d at 248.

321. *Anderson*, 34 F.R.D. at 520.

322. *Id.*

323. *Id.*

324. *Id.* at 522.

325. *See id.* at 521-22.

326. *Id.*

327. *Id.* at 522-24.

328. *Id.* at 523-24.

329. The court held that the documents met "the criteria" of privilege doctrine, and thus were privileged "insofar as they do not comment or report on information coming from persons outside the government or from public documents, or are summaries of conferences held with or in the presence of outsiders, and were produced with the idea of obtaining or receiving legal advice." *Id.* at 523.

not concern confidential facts known only to the SBA.³³⁰

The court's determination that the documents were privileged is better understood as consistent with the level-playing-field theory. The documents would have revealed the back-and-forth process of formulating litigation strategy. The Durox bankruptcy proceedings and the SBA's claim against the guarantors were inextricably intertwined. The documents showed that government attorneys were aware that the government would have to proceed against the guarantors after the debt was discharged. No doubt the government formulated its position in the bankruptcy with the guarantors in mind. Had the guarantors been involved in multiple litigation, the combination of attorney work-product and attorney-client privilege would have allowed them to keep their legal strategy to themselves. Leaving aside the question whether work-product protection is justified as a general matter, given that it exists, it would have been patently unfair to allow the guarantors to claim the protection of the doctrine, but at the same time to force the government to reveal its strategy and legal analysis. The court's failure to use a work-product analysis instead of an attorney-client privilege theory to protect the documents can probably be attributed to the government's failure to argue that the documents were work-product and the then-prevailing view that work-product covered only documents generated by attorneys.³³¹

Anderson, then, could easily have been read as ensuring that the government is on a level playing field with its adversaries, and not more broadly to privilege all confidential communications between government employees and government counsel. And indeed, in the eighteen years following *Anderson*, courts granted privilege protection only when necessary to afford the government a level playing field in litigation and to facilitate efficient case preparation.³³² During the same time

330. The SBA did not argue, and the court did not consider, whether this set of documents could be protected as attorney work-product. At the time of the litigation, the work-product rule had not yet been codified, and case law was inconsistent regarding whether and to what extent opinion work-product was protected. *See, e.g.,* *United States v. Certain Parcels of Land*, 15 F.D.R. 224, 235-36 (S.D. Cal. 1953); *Carpenter-Trant Drilling Co. v. Magnolica Petroleum Corp.*, 23 F.R.D. 257, 261-62 (D. Neb. 1959). The government seems to have assumed that work-product would not apply to the communications involving nonlawyers, and so the court did not address that issue. *See Anderson*, 34 F.R.D. at 518.

331. *See, e.g.,* *S. Ry. Co. v. Campbell*, 309 F.2d 569, 572 (5th Cir. 1962) (holding that "statements taken by a claim agent are not generally considered to be the 'work product of a lawyer in preparation for the defense'"); *De Bruce v. Pa. R.R. Co.*, 6 F.R.D. 403, 404 (E.D. Pa. 1947) (noting that in *Hickman v. Taylor*, "[t]hroughout the opinion at every point at which occasion arose the Court explicitly stated that what was under review was discovery . . . of statements obtained by an attorney for his client in preparation for trial"). *But see Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (holding that material prepared by client's agent was protected by the work-product doctrine).

332. First, in *Detroit Screwmatic v. United States*, 49 F.R.D. 77 (S.D.N.Y. 1970), the government successfully argued that a "Chief Counsel's defense letter" to the government "client," written after commencement of the litigation at issue and detailing the United States's position in the litigation, should be protected by both the attorney-client privilege and work-product doctrine. *Id.* at 78. Forcing disclosure of the document would have forced the government to lay out its theory of the case. Similar evidence generated by the government's opponent, however, would have been protected, thus giving the government's adversary an unfair advantage in the litigation. Then, in 1972, in a patent infringement case brought by

General Electric against the United States, the Justice Department asserted the privilege to protect factual summaries and legal analysis provided to it by attorneys for various branches of the armed forces to enable Justice to defend the case. *Gen. Elec. Co. v. United States*, No. 81-70, 1972 U.S. Ct. Cl. LEXIS 442, at *1-4 (Sept. 19, 1972). The attorneys had made the communications to the Justice Department when General Electric instigated the lawsuit, pursuant to a statutory directive that required government agents to provide the Justice Department with all information necessary to litigate the government's case. *Id.* at *6 (stating that all government agencies are required to provide the Justice Department with "all facts, circumstances, and evidence concerning the claim in . . . [their] possession or knowledge" (quoting 28 U.S.C. § 520 (1994))). General Electric argued that the documents should not be privileged, because protecting them was not necessary to further the privilege's objectives. *Id.* at *11. Because government agents were required to make the communications, General Electric argued, the incentive provided by the attorney-client privilege was not necessary. *Id.* The court did not address General Electric's argument directly, but merely responded that it found the argument "unpersuasive," because "under such reasoning nothing transmitted to the Justice Department pursuant to this statutory provision would be exempt from discovery." *Id.*

Although the court understood that its decision could not be justified by the rationale for attorney-client privilege, it intuitively knew that the information had to be protected. The court stressed that "since most Government agencies employ their own attorneys, it is common for in-house counsel to obtain or prepare the required information. In this case, it appears that all post-suit documents . . . were prepared by [the] attorneys employed by the involved agencies." *Id.* at *8. Obviously, setting a precedent that failed to protect information communicated by government agencies to the Justice Department would significantly undermine the Justice Department's ability to prosecute the case. The decision would have been better justified on a work-product rationale.

In the decade following *General Electric*, government privilege claims were sustained in a dozen poorly explained cases. The language used in the opinions, if taken at face value, seems uncritically to validate a government privilege. But in fact, those that are detailed enough to be analyzed can be justified as providing the government with a level playing field in litigation. *See, e.g., SEC v. World-Wide Coin Invs.*, 92 F.R.D. 65 (N.D. Ga. 1981) (applying attorney-client privilege to avoid revealing government attorneys' strategy), *modified on other grounds* by 567 F. Supp. 724 (N.D. Ga. 1983); *Moody v. IRS*, No. 77-1825, 1980 U.S. Dist. LEXIS 10461 (D.D.C. Feb. 28, 1980) (sustaining a government attorney-client privilege claim regarding a letter from an IRS worker to IRS counsel, because counsel used it to formulate strategy); *Grolier v. FTC*, No. 79-1215, 1980 U.S. Dist. LEXIS 10388 (D.D.C. Feb. 21, 1980) (holding that a letter from an FTC employee to a Justice Department attorney regarding an antitrust investigation is privileged), *vacated in part on other grounds*, 671 F.2d 553 (D.C. Cir. 1982), *rev'd on other grounds*, *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983); *Dema v. IRS*, No. 78 C 3992, 1979 U.S. Dist. LEXIS 9025 (N.D. Ill. Oct. 22, 1979) (sustaining work-product and government privilege claims over documents prepared by a government attorney in assisting the IRS in litigation); *Eisenberg v. IRS*, No. 77 C 339, 340, 1979 U. S. Dist. LEXIS 14184 (N.D. Ill. Feb. 26, 1979) (holding that the government does not have to produce documents protected by the attorney-client privilege in response to a FOIA request because the documents would reveal the government's strategy against the plaintiff in pending tax court litigation); *Firestone Tire & Rubber v. Coleman*, 432 F. Supp. 1359 (N.D. Ohio 1976) (holding that the government did not have to produce documents in response to a FOIA request because the documents were prepared by the government and its attorneys "in anticipation of litigation"); *Thill Secs. v. N.Y. Stock Exch.*, 57 F.R.D. 133 (E.D. Wis. 1972) (protecting communications between the SEC and attorneys for the Justice Department).

Other cases sustaining government privilege claims are too vague to analyze. *See Sterling*

period, courts rejected attorney-client privilege claims that would have been sustained if the "client" had been an individual or corporation.³³³ In each of these eleven cases, the communications at issue involved a government employee conferring confidentially with government counsel, for the purpose of obtaining legal advice. Nonetheless, courts rejected the government's contention that the communications should be protected by the attorney-client privilege. In some cases, privilege protection was properly denied because the communications arose in settings that involved no confidential facts known only to the government. But in other cases, courts contradicted well-established privilege doctrine to permit disclosure of communications between government employees and their lawyers while personally acknowledging the established "rule" that the attorney-client privilege applies in the government context.³³⁴

First, whenever the government claimed the privilege over documents that were generated in the course of making or enforcing policy, courts rejected this argument on the theory that the privilege was not necessary to encourage government employees to reveal facts to counsel. In the most notable case, *Coastal States Gas Corp. v. Department of Energy*,³³⁵ the court expressly stated that the absence of confidential facts rendered the privilege inapplicable.³³⁶ In that case, the government claimed that communications between employees of the Department of Energy ("DOE") and its counsel were protected by the attorney-client privilege, and thus exempt from disclosure under FOIA.³³⁷ The communications at issue were memoranda generated by counsel in response to requests by DOE employees conducting compliance audits of oil companies.³³⁸ Specifically, during the course of the audit, questions would arise concerning the application of specific discovered facts to the law, and the auditor would write to counsel requesting advice. DOE counsel would respond with a detailed memo analyzing the applicable regulations in light of the specific facts raised.³³⁹ In rejecting the government's privilege claim, the court emphasized that "[w]e have difficulty in perceiving any purpose which would be served by applying the attorney-client privilege in this case. . . . It is hard to imagine the 'confidential information'

Drug Inc. v. Harris, 488 F. Supp. 1019 (S.D.N.Y. 1980) (sustaining government attorney-client privilege claim over communications involving issues relevant to a certain litigation); *Hearnes v. IRS*, No. 77-225 C (3), 1979 U.S. Dist. LEXIS 11281 (E.D. Mo. July 2, 1979).

333. See, e.g., *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977); *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979); *Bank of Am. v. United States*, No. C-76-1757, 1978 U.S. Dist. LEXIS 17554 (N.D. Cal. May 24, 1978); *United States v. Bd. of Trade*, No. 71 C 2875, 1973 U.S. Dist. LEXIS 11307 (N.D. Ill. Oct. 30, 1973).

334. In contrast, only three courts rejected government privilege claims because the government failed to meet the burden of proving that the traditional doctrinal requirements of the privilege were met. See *Canadian Javelin v. SEC*, 501 F. Supp. 898 (D.D.C. 1980); *King v. IRS*, 1981 U.S. Dist. LEXIS 16256 (N.D. Ill. 1981); *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969 (3d Cir. 1980).

335. 617 F.2d 854.

336. *Id.* at 863.

337. *Id.* at 858 n.2.

338. *Id.* at 858.

339. *Id.* at 858-59.

which an auditor might have communicated to regional counsel."³⁴⁰

Courts also rejected government privilege claims when the communications at issue had been generated as the government acted in the same capacity as a private party, and it was therefore conceivable that the government employees would wish to discuss confidential facts with counsel. In *Mead Data Central, Inc. v. Department of the Air Force*,³⁴¹ the court reversed the lower court's ruling that three documents drafted by government attorneys and sent to government employees during the course of the Air Force's contract negotiations with West Publishing Company ("West") were protected by the attorney-client privilege. The documents gave legal advice regarding whether the Air Force needed to obtain a license from West, whether copyrighted material used by the Air Force would be subject to FOIA requests, and how the Air Force should proceed in its negotiations with West.³⁴² After negotiations terminated, Mead Data Central made a FOIA request, demanding that the Air Force produce all documents generated during the Air Force's contract negotiations with West. The government claimed that three of the documents were protected by the attorney-client privilege, and thus fell under exemption five of the FOIA.³⁴³

340. *Id.* at 863. Similarly, in *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979), the court found that Field Service Advice Memoranda issued by the Office of Chief Counsel for the IRS in response to requests from field personnel for legal guidance were not privileged, and thus not exempt from disclosure under FOIA. *Id.* at 990. In addition, the court found that statements of agency policy and interpretations adopted by the agency were not privileged communications. *See id.* In so holding, the court confused the elements of attorney-client privilege and work product immunity, stating that the government could not claim the attorney-client privilege over documents that were "not prepared in anticipation of litigation," and that the privilege would have been available in that setting because "it is essential that the agency be able to prepare its case with some privacy." *Id.* The opinion, though muddled, reveals the court's understanding that privilege protection could be justified only under a work-product theory. *See also* *Bank of Am. v. United States*, No. C-76-1757, 1978 U.S. Dist. LEXIS 17554, at *2 (N.D. Cal. May 24, 1978) (determining that attorney-client communications which were "primarily factual or explanatory and which reflect the history and development of the relevant treasury regulations" were not privileged).

In *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977), the court rejected the government's claim that a memorandum written by counsel to the Watergate Special Prosecutor recommending that President Nixon not be indicted was protected by the attorney-client and deliberative privileges. Even though the attorney's communication to the Special Prosecutor was confidential and based on facts provided by his "client," the Special Prosecutor, the court found that the memo was not protected by the attorney-client or work-product privileges because it was not prepared "in anticipation of litigation." Though inadequately explained, the decision is sound for all of the reasons examined in Parts III & IV of this Article. Simply put, the privilege was not necessary to encourage the Special Prosecutor to confer freely with his counsel. The Special Prosecutor does not fit the attorney-client privilege conception of the client who is reluctant to reveal confidential facts that might be relevant to her case. To do his job, the Special Prosecutor had to reveal the facts to counsel. He faced no personal embarrassment, liability, or exposure as a consequence of revealing the facts necessary to gain legal advice.

341. 566 F.2d 242 (D.C. Cir. 1977).

342. *Id.* at 249.

343. *Id.* at 248.

In rejecting the government's claim, the court emphasized the importance of the attorney-client privilege, and reasoned that the government had as much need for it as any other "client," because "the opinion of even the finest attorney . . . is no better than the information which his client provides."³⁴⁴ Yet after determining that the communications at issue were between attorney and client for the purpose of securing legal advice, the court took a startling turn: it determined that the privilege did not apply because the facts that the client had supplied to counsel, and upon which counsel relied in formulating their opinion, were not "confidential" because they were known to third parties.³⁴⁵ This was a radical take on the confidentiality requirement; most courts at that time (and to this day) required only that the attorney communication be based on facts supplied by the client *in confidence*;³⁴⁶ there was no requirement that the facts that the client communicated in confidence be unknown to any third party.³⁴⁷ The court remanded to the district court for a determination as to whether the communications contained any facts unknown to third parties.³⁴⁸ In doing

344. *Id.* at 252.

345. Specifically, the court stated that "[i]t must also be demonstrated that the *information* is confidential. If the information has been or is later shared with third parties, the privilege does not apply." *Id.* at 253 (emphasis added).

346. See Bryan S. Gewdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 713 (1999); see also *Mead*, 566 F.2d at 263-64 (McGowan, J. dissenting).

347. The *Mead* court cited four cases as supporting its view of the confidentiality requirement. 566 F.2d at 253-54 nn.23 & 26 (citing *United States v. McDonald*, 313 F.2d 832 (2d Cir. 1963); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975); *Doe v. A Corp.*, 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971), *aff'd sub nom.* 453 F.2d 1375 (2d Cir. 1972); *Cnty. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 68 F.R.D. 378, 382 (E.D. Wis. 1975)). Of those four cases, only one, *Community Savings and Loan Ass'n*, actually held that the facts communicated must be confidential for the privilege to apply. In that case, several savings and loan associations sought judicial review of the Federal Home Loan Bank Board's decision to allow First Federal Savings and Loan Association of Wisconsin to open a new branch office in an area already crowded with banks. The decision was a change in position on the board's part. During discovery, the board declined to produce a memo written by its Office of General Counsel which presumably contained legal advice regarding First Federal's application. In a short, terse paragraph, the court held that the memo was not protected by the attorney-client privilege because the information that the board had provided to counsel, and upon which counsel had based its legal opinion, was "almost entirely . . . material which was in the public record." *Cnty. Sav. & Loan Ass'n*, 68 F.R.D. at 382. Whether the court intentionally made this historic and dramatic change in the government attorney-client privilege is unclear.

The other cases the court cites do not support its position. In *United States v. McDonald*, the court required an attorney to produce copies of real estate contracts and closing documents that the attorney's client had produced to its adversary at the closing. This interpretation of the attorney-client privilege fits within the standard interpretation of the confidentiality requirement; courts have never allowed clients to use the privilege to avoid producing otherwise relevant documents simply by funneling them through their attorneys. In the remaining two cases the court cites, the opinions merely restate the boilerplate language of the confidentiality requirement.

348. The court directed that:

On remand, the court should order disclosure of these documents unless the Air

so, it strongly suggested that the communications at issue should not be protected because the facts supplied by the client were known to West.³⁴⁹ In dicta, the court also suggested that communications from the client to the attorney were privileged only to the extent that they contained facts unknown to a third party.³⁵⁰

Whether the court intentionally made this radical departure from privilege law is unclear. In a strong dissent, Judge McGowan argued that the majority's new standard would "go a long way toward eliminating the attorney-client privilege altogether."³⁵¹ In remanding the case for further determinations, the court took pains to note that, to the extent that the information communicated by the client was a summary of the Air Force's negotiations with West, the lower court could not find the communication privileged because West was aware of the information.³⁵²

Although the *Mead* court affirmed the government privilege in the abstract, when faced with a concrete application of the doctrine it struggled with the lack of fit between the doctrine's instrumental justification and the reality of the government enterprise.

While the stricter standard pioneered by the D.C. Circuit is logically consistent with the privilege's objectives, it is ultimately not a satisfactory method for dealing with the problems created by the government attorney-client privilege. First, it increases the cost of adjudicating privilege issues by virtually requiring an *in camera* inspection of

Force demonstrates either that the attorney-client privilege does apply to these documents because the information on which they are based was supplied by the Air Force with the expectation of secrecy and was not known by or disclosed to any third party, or that they fall within exemption five for some other reason.

Mead, 566 F.2d at 254.

349. *Id.* at 254 n.27.

350. *Id.* at 255 n.32 (discussing a fourth document, drafted by an Air Force employee, which summarizes the Air Force's negotiations with West to that date, and requests legal advice). The court states that even though the Air Force did not claim that the document was protected by the privilege, "[The document] is just the kind of communication which the privilege is designed to protect." *Id.* However, the communication would still have to meet the confidentiality requirement, as the court defined it, to be privileged. *Id.*

351. *Id.* at 264. Professor Rice, for one, agrees, and has strongly criticized the line of precedent flowing from *Mead*. See Rice, *Continuing Confusion*, *supra* note 9, at 983-88. Rice argues that "[t]he nature of the information contained in the communications from the client to the attorney is irrelevant to the communications' privileged status. Regardless of where the client acquired the *information*, or the information's confidential or public nature, the *content* of the client's communication with his attorney is privileged." *Id.* at 985 (emphasis in original). Rice warns that the D.C. Circuit's restrictive standard, if universally followed, "would, at the very minimum, jeopardize the privileged status of the legal advice obtained by all governmental regulatory bodies." *Id.* at 988. He declines to consider, however, whether that result would have any deleterious effect on the ability of government actors to obtain legal advice. Rice acknowledges, in a footnote, that the government's case for asserting the privilege is weaker than a corporation's, since "citizens have a pressing need to know the standards by which the government's enormous powers are being employed against them." *Id.* at 988 n.88. If so, he argues, such a need argues in favor of abolishing the privilege altogether. One might infer from this statement that Rice intuitively understands that the privilege is not necessary to ensure that government actors obtain competent legal advice.

352. *Mead*, 566 F.2d at 255.

every document in every case. Moreover, because the opinion failed to realize that communications containing confidential facts would have occurred even if there were no privilege, it did not go far enough. Concerns for case preparation and judicial economy suggest that the better course would be to abolish the privilege entirely, and create instead a limited government litigation privilege.

Nonetheless, the precedent set in *Mead* gave courts a tool for rejecting a large number of government attorney-client privilege claims. Several cases within the early eighteen-year period followed *Mead*'s lead, applied the sharply restricted confidentiality standard, and rejected government privilege claims.³⁵³

In sum, at the end of the 1970s, the government simply did not enjoy an attorney-client privilege analogous to the one applied to corporations. The cases taken together show that courts rejected the utilitarian underpinnings of the privilege in the government setting. Cases that sustained the privilege did so not on instrumental grounds, but to ensure that the government was not at a disadvantage against its litigation adversaries. In cases where privilege protection was not necessary to ensure a level playing field, courts rebuffed the government's privilege claims. This suggests that the 1974 version of Uniform Rule of Evidence 502, which validated government attorney-client privilege claims only if the communication concerned a pending claim or action,³⁵⁴ more accurately captured the existing law than did the Federal Rules' much broader protection for all attorney-client communications. But because courts did not carefully articulate that the government privilege was confined to work-product, and instead used broad language that seemed to validate the attorney-client privilege, an expanded government attorney-client privilege was cemented into law.

B. The Government Attorney-Client Privilege from 1980 to Today: FOIA and Broader Protection

In the late 1970s and early 1980s, the federal courts faced a surge in attorney-client privilege claims by government agencies.³⁵⁵ The surge was attributable, in large

353. See, e.g., *Slack v. FTC*, No. 79-973-S, 79-959-S, 1980 U.S. Dist. LEXIS 14996, at *4-5 (D. Mass. Nov. 18, 1980) (following *Mead* to deny government's privilege claims where documents summarize negotiation proceedings with government adversary); *Bast v. IRS*, No. 77-0829, 1978 U.S. Dist. LEXIS 18060 (D.D.C. Apr. 28, 1978) (holding that memos prepared by attorneys in the Disclosure Division of the IRS's Office of Chief Counsel containing advice with respect to plaintiff's appeal of the agency's decision on a previous FOIA request are not privileged because the legal communications are not based on confidential facts, but that they are protected by the government privilege, so nonfactual information may be withheld).

354. See UNIF. R. EVID. 502(d)(6)(1974), 13 U.L.A. 257 (1986) ("There is no privilege under this rule . . . [a]s to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.").

355. See *Schlefer v. United States*, 702 F.2d 233 (D.C. Cir. 1983); *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969 (3d Cir. 1981); *Brinton v. Dep't of State*, 636 F.2d 600 (D.C. Cir. 1980); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980); *United States v. Crocker*, 629 F.2d 1341 (Temp. Emer. Ct. App. 1980); *Murphy v. Tenn. Valley Auth.*,

measure, to the increased volume of FOIA litigation, and to Section (b)(5), which permits the government to assert certain evidentiary privileges, including attorney-client, as grounds for withholding government documents in response to FOIA requests.³⁵⁶ For the most part,³⁵⁷ courts in the early 1980s sustained privilege claims

571 F. Supp. 502 (D.D.C. 1983); *Norwood v. FAA*, 580 F. Supp. 994 (W.D. Tenn. 1983); *Mobil Oil Corp. v. Dep't of Energy*, 102 F.R.D. 1 (N.D.N.Y. 1983); *Rachel v. Dep't of Justice*, No. 83C0434, 83C1420, 1983 U.S. Dist. LEXIS 15000 (N.D. Ill. Aug. 1, 1983); *Dames & Moore v. Dep't of the Treasury*, 544 F. Supp. 94 (C.D. Cal. 1982); *LSB Indus. v. Comm'r*, 556 F. Supp. 40 (W.D. Okla. 1982); *Green v. IRS*, 556 F. Supp. 79 (N.D. Ind. 1982); *Savoie v. IRS*, 544 F. Supp. 662 (W.D. La. 1982); *King v. IRS*, No. 80C3006, 1981 U.S. Dist. LEXIS 16256 (N.D. Ill. July 2, 1981); *FDIC v. United States*, 527 F. Supp. 942 (S.D. W. Va. 1981); *SEC v. World-Wide Coin Invs.*, 92 F.R.D. 65 (N.D. Ga. 1981); *United States v. Kin-Buc*, No. 79-514, 1981 U.S. Dist. LEXIS 18414 (D. N.J. May 21, 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980); *United States v. Exxon Corp.*, 87 F.R.D. 624 (D.D.C. 1980); *Jupiter Painting Contracting Co., Inc. v. United States*, 87 F.R.D. 593 (E.D. Pa. 1980); *Canadian Javelin, Ltd. v. SEC*, 501 F. Supp. 898 (D.D.C. 1980); *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019 (S.D.N.Y. 1980); *Slack v. FTC*, No. 79-973-S, 79-959-S, 1980 U.S. Dist. LEXIS 14996 (D. Mass. Nov. 18, 1980); *Moody v. IRS*, No. 77-1825, 1980 U.S. Dist. LEXIS 10461 (D.D.C. Feb. 28, 1980); *Grolier, Inc. v. FTC*, No. 79-1215, 1980 U.S. Dist. LEXIS 10388 (D.D.C. Feb. 21, 1980), *rev'd in part, aff'd in part*, 671 F.2d 553 (D.C. Cir. 1982), *rev'd on other grounds*, 462 U.S. 19 (1983); *Dema v. IRS*, No. 78C3992, 1979 U.S. Dist. LEXIS 9025 (N.D. Ill. Oct. 22, 1979); *Eisenberg v. IRS*, No. 77C339, No. 77C340, 1979 U.S. Dist. LEXIS 14184 (N.D. Ill. Feb. 26, 1979); *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979); *Hearnes v. IRS*, No. 77-225C(3), 1979 U.S. Dist. LEXIS 11281 (E.D. Mo. July 2, 1979); *Kanter v. IRS*, 478 F. Supp. 552 (N.D. Ill. 1979); *Gregory v. FDIC*, 470 F. Supp. 1329 (D.D.C. 1979); *Bast v. IRS*, No. 77-0829, 1978 U.S. Dist. LEXIS 18060 (D.D.C. Apr. 28, 1978).

356. Between 1978 and 1983, the vast majority of cases involving federal government claims of attorney-client privilege arose in response to citizens' FOIA requests. See *Schlefer v. United States*, 702 F.2d 233 (D.C. Cir. 1983); *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969 (3d Cir. 1981); *Brinton v. Dep't of State*, 636 F.2d 600 (D.C. Cir. 1980); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980); *Murphy v. Tenn. Valley Auth.*, 571 F. Supp. 502 (D.D.C. 1983); *Norwood v. FAA* 580 F. Supp. 994 (W.D. Tenn. 1983); *Rachel v. Dep't of Justice*, No. 83C0434, 83C1420, 1983 U.S. Dist. LEXIS 15000 (N.D. Ill. Aug. 1, 1983); *Dames & Moore v. Dep't of the Treasury*, 544 F. Supp. 94 (C.D. Cal. 1982); *LSB Indus. v. Comm'r*, 556 F. Supp. 40 (W.D. Okla. 1982); *Green v. IRS*, 556 F. Supp. 79 (N.D. Ind. 1982); *Savoie v. IRS*, 544 F. Supp. 662 (W.D. La. 1982); *King v. IRS*, No. 80C3006, 1981 U.S. Dist. LEXIS 16256 (N.D. Ill. July 2, 1981); *Canadian Javelin, Ltd. v. SEC*, 501 F. Supp. 898 (D.D.C. 1980); *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019 (S.D.N.Y. 1980); *Moody v. IRS*, No. 77-1825, 1980 U.S. Dist. LEXIS 10461 (D.D.C. Feb. 28, 1980); *Grolier, Inc. v. FTC*, No. 79-1215, 1980 U.S. Dist. LEXIS 10388 (D.D.C. Feb. 21, 1980), *rev'd in part, aff'd in part*, 671 F.2d 553 (D.C. Cir. 1982), *rev'd on other grounds*, 462 U.S. 19 (1983); *Slack v. FTC*, No. 79-973-S, 1980 U.S. Dist. LEXIS 14996 (D. Mass. Nov. 18, 1980); *Dema v. IRS*, 78C3992, 1979 U.S. Dist. LEXIS 9025 (N.D. Ill. Oct. 22, 1979); *Hearnes v. IRS*, No. 77-225C(3), 1979 U.S. Dist. LEXIS 11281 (E.D. Mo. July 2, 1979); *Eisenberg v. IRS*, No. 77C339, 77C340, 1979 U.S. Dist. LEXIS 14184 (N.D. Ill. Feb. 26, 1979); *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979); *Kanter v. IRS*, 478 F. Supp. 552 (N.D. Ill. 1979); *Gregory v. FDIC*, 470 F. Supp. 1329 (D.D.C. 1979); *Bast v. IRS*, No. 77-0829, 1978 U.S. Dist. LEXIS 18060 (D.D.C. Apr. 28, 1978).

357. Some opinions are not susceptible to categorization or analysis because they include

only when the documents involved were prepared to assist in litigation.³⁵⁸ Moreover,

too sparse a description of the facts underlying the privilege claim. *See* *FDIC v. United States*, 527 F. Supp. 942 (S.D. W. Va. 1981) (lacking detailed description of contested documents); *Gregory v. FDIC*, 470 F. Supp. 1329 (D.D.C. 1979) (protecting one document because it concerned the government's strategy with respect to an administrative hearing, but failing to describe the other documents); *Hearnes v. IRS*, No. 77-225C(3), 1979 U.S. Dist. LEXIS 11281 (E.D. Mo. July 2, 1979) (listing relevant documents in unpublished appendix).

358. *See* *Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983) (overruling government's attorney-client privilege claim because the factual information that formed the basis of the government counsel's opinions came from third parties, and was not confidential information concerning the agency); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (holding that the attorney-client privilege could not apply to communications that contained facts known to third parties); *United States v. Crocker*, 629 F.2d 1341, 1344-45 (Temp. Emer. Ct. App. 1980) (remanding to require lower court to conduct *in camera* inspection of documents claimed privileged); *Rachel v. Dep't of Justice*, No. 83C0434, 83C1420, 1983 U.S. Dist. LEXIS 15000, at *7 (N.D. Ill. Aug. 1, 1983) (upholding privilege claim where memoranda contained factual and legal analysis of future litigation); *Mobil Oil Corp. v. Dep't of Energy*, 102 F.R.D. 1, 10 (N.D.N.Y. 1983) (sustaining privilege where documents were drafted in contemplation of pending litigation); *LSB Indus. v. Comm'r*, 556 F. Supp. 40, 42-43 (W.D. Okla. 1982) (sustaining privilege claim over documents prepared to assist in litigation); *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (holding that letter from IRS to Chief Counsel recommending prosecution of taxpayer was protected by government and attorney-client privileges); *King v. IRS*, No. 80C3006, 1981 U.S. Dist. LEXIS 16256, at *7-8 (N.D. Ill. July 2, 1981) (denying government's privilege claim because government did not prove that documents were kept confidential or that the communications within the documents were based on confidential facts); *SEC v. World Wide Coin Invs.*, 92 F.R.D. 65, 66-67 (N.D. Ga. 1981) (sustaining privilege claim over documents prepared in anticipation of litigation); *Slack v. FTC*, No. 79-973-S, 79-959-S, 1980 U.S. Dist. LEXIS 14996, at *4-5 (D. Mass. Nov. 18, 1980) (rejecting the government's attorney-client privilege because the communications were based on facts known to third parties); *Moody v. IRS*, No. 77-1825, 1980 U.S. Dist. LEXIS 10461, at *18-19 (D.D.C. Feb. 28, 1980) (holding that government could withhold document written by IRS employee to IRS regional counsel because counsel used the document to formulate litigation strategy); *Grolier, Inc. v. FTC*, No. 79-1215, 1980 U.S. Dist. LEXIS 10388, at *5 (D.D.C. Feb. 21, 1980), *rev'd in part, aff'd in part*, 671 F.2d 553 (D.C. Cir. 1982), *rev'd on other grounds*, 462 U.S. 19 (1983) (holding that letter from the Secretary of the FTC to the Acting Chief, Consumer Affairs Section of the Antitrust Division of the Justice Department is privileged because the letter addresses the FTC's determination regarding litigation strategy); *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019, 1025 (S.D.N.Y. 1980) (sustaining government's attorney-client privilege claim where attorney-client communications were made in anticipation of litigation); *Eisenberg v. IRS*, No. 77C339, 77C340, 1979 U. S. Dist. LEXIS 14184, at *3 (N.D. Ill. Feb. 26, 1979) (holding that government did not have to produce documents in response to FOIA request because the documents would have revealed the government's strategy in pending litigation against citizen in tax court); *Falcone v. IRS*, 479 F. Supp. 985, 988 (E.D. Mich. 1979) (holding that IRS counsel's communications containing statements of agency policy and interpretations of regulations were not protected from disclosure by attorney-client privilege because they were not prepared in anticipation of litigation, and emphasizing the importance of not allowing government to develop a body of "secret law"); *Bast v. IRS*, No. 77-0829, 1978 U.S. Dist. LEXIS 18060, at *4 (D.D.C. Apr. 28, 1978) (holding that memos prepared by IRS attorneys were not protected by the attorney-client privilege because the plaintiff/taxpayer was aware of

courts were careful to require the government to establish each and every element of the privilege claim with respect to each document for which the government claimed privilege.³⁵⁹

The intervening two decades, however, have brought a gradual but noticeable change in judicial treatment of the governmental attorney-client privilege. Courts have more often sustained attorney-client privilege claims with respect to all communications between government employees and attorneys.³⁶⁰ They have done so

the facts upon which the communications were based). *But see* *Murphy v. Tenn. Valley Auth.*, 571 F. Supp. 502, 607 (D.D.C. 1983) (sustaining government privilege claim to protect communications generated during Tennessee Valley Authority's settlement negotiations with third party).

359. *See, e.g.,* *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (reversing district court determination that lawyer's communications to client were protected by attorney-client privilege because government did not prove that the lawyer's communications were based on confidential facts supplied by the client, but holding that the deliberative process privilege did apply); *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 984-85 (3d Cir. 1981) (remanding and requiring government to create a more detailed *Vaughn* index to support its privilege claim); *Norwood v. FAA* 580 F. Supp. 994, 1004 (W.D. Tenn. 1983) (holding that the privilege did not apply because the government had failed to prove that the documents were kept in confidence); *Mobil Oil Corp. v. Dep't of Energy*, 102 F.R.D. 1, 9 (N.D.N.Y. 1983) (holding that privilege did not apply to attorney communications where it was not clear that attorney was acting in capacity as attorney); *King v. IRS*, No. 80C3006, 1981 U.S. Dist. LEXIS 16256, at *7-8 (N.D. Ill. July 2, 1981) (denying government's privilege claim in part because government does not prove that documents were kept confidential); *United States v. Kin-Buc*, No. 79-514, 1981 U.S. Dist LEXIS 18414, at *4 (D.N.J. May 21, 1981) (remanding and requiring government to substantiate privilege claim document by document); *Canadian Javelin, Ltd. v. SEC*, 501 F. Supp. 898, 902 (D.D.C. 1980) (rejecting privilege claim because the SEC did not take pains to prove that the documents were kept confidential); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (emphasizing that "in a government top heavy with lawyers" it is important "to construe the [attorney-client] privilege narrowly to conform to its purposes," and holding that attorney's notes summarizing interviews with nonparties are not protected by privilege); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 521-22 (D. Del. 1980) (holding that the government had failed to establish with sufficient particularity that the privilege applied to each communication for which it was claimed, rejecting government's offer to further substantiate privilege claim, and ordering that government produce allegedly privileged documents).

360. For example, in *Buckner v. IRS*, 25 F. Supp. 2d 893 (N.D. Ind. 1998), taxpayer Buckner sought, via a FOIA request, to obtain files of IRS employees and attorneys in his attempt to determine why the IRS had labeled him an "Illegal Tax Protester/Extremist" and had garnished his wages and filed several liens against his property, causing him to file for bankruptcy. *Id.* at 809, 895-96 & n.2. The IRS withheld seventy-one pages of documents and eleven partial pages, citing numerous FOIA exemptions, including the attorney-client privilege and work product doctrine. *Id.* at 895, 899. After reviewing affidavits supplied by various IRS employees and attorneys, the court sustained all of the IRS's work product and attorney-client privilege claims. *Id.* at 899-900. Some of the documents were protected because the IRS prepared them in anticipation of its involvement in litigation in plaintiff's bankruptcy proceedings. *Id.* at 900. The court then, however, held that the attorney-client privilege protected all documents "that are communications among attorneys or between IRS personnel and agency attorneys," no matter when the communications occurred. *Id.* at 899. *See also* *Jernigan v. Dep't of the Air*

by divorcing the earlier cases from their factual contexts, and relying on broad dicta in earlier opinions. Indeed, two cases courts most frequently cite as support for the government privilege are *Coastal States Corp.*³⁶¹ and *Mead*³⁶²—two cases in which courts *rejected* government privilege claims.³⁶³

The nature of FOIA litigation has contributed to this trend. First, in FOIA cases, government defendants often assert numerous statutory exemptions to resist a single FOIA request. As a result, courts sometimes focus inadequate attention on each of the individual justifications the government offers to support its position.³⁶⁴ Second, in

Force, No. 97-35930, 1998 U.S. App. LEXIS 22708, at *6-8 (9th Cir. Sept. 17, 1998) (holding that an Air Force attorney's report, which contained a "legal review" of a Navy investigation, "falls squarely within the traditional attorney-client privilege"); *Ariz. Rehab. Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 270 (D. Ariz. 1998) (holding that documents exchanged between government employees and attorneys that explained the proposed changes in agency regulations and the proposed rule for public comment were protected by attorney-client privilege); *FTC v. Digital Interactive Assocs.*, No. 95-Z-754, 1997 U.S. Dist. LEXIS 3520, at *10 (D. Colo. Mar. 17, 1997) (holding that the attorney-client privilege shielded draft documents that contained attorney notes regarding the relationship between the FTC and the FCC, and thus the government did not have to produce the documents in response to defendant's discovery request); *Lacefield v. United States*, No. 92N1680, 1993 U.S. Dist. LEXIS 4521, at *8 (D. Colo. Mar. 10, 1993) (stating that "[i]t is important to note that the privilege applies in all situations in which a client seeks an attorney's legal advice, not only when there is ongoing litigation or a specific dispute") (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980); *CIT Group/Equip. Fin., Inc. v. United States*, 24 Cl. Ct. 540, 543 (Cl. Ct. 1991) (holding that "Takings Impact Analysis" drafted by the Army Corps of Engineers, and which resulted in the government's denial of plaintiff's permit to develop his property, was confidential legal advice rendered by government attorney to his client, the government).

361. 617 F.2d 854 (D.C. Cir. 1980).

362. 566 F.2d 242 (D.C. Cir. 1977).

363. *See, e.g., Better Gov't Bureau, Inc. v. McGraw (In re Allen)*, 106 F.3d 582, 600 n.8 (4th Cir. 1997) ("[I]t is clear that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege." (quoting *Coastal States Gas Corp.*, 617 F.2d at 863) (alteration in original)); *Ariz. Rehab. Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 269 (D. Ariz. 1998) (citing *Coastal States Gas Corp.* for the proposition that "[c]ourts have applied [the attorney-client] privilege to communications between government agencies and their counsel"); *Buckner v. IRS*, 25 F. Supp. 2d 893, 899 (N.D. Ind. 1998) (citing *Mead* for the proposition that "attorney-client privileged material is exempt from FOIA"); *Lacefield v. United States*, No. 92 N 1680, 1993 U.S. Dist. LEXIS 4521, at *7 (D. Colo. Mar. 10, 1993) (stating that the privilege is necessary "to assure that a client's confidences to his or her attorney will be protected and therefore encourage[s] clients to be as open and honest as possible with attorneys" (quoting *Coastal States Gas Corp.*, 617 F.2d at 862) (alteration in original)); *Starkey v. IRS*, No. C-91-20040 JW, 1991 U.S. Dist. LEXIS 18374, at *10-11 (N.D. Cal. Dec. 6, 1991) (citing *Mead* for the same proposition).

364. *See, e.g., Buckner v. IRS*, 25 F. Supp. 2d 893, 899-900 (N.D. Ind. 1998); *Starkey v. IRS*, No. C-91-20040 JW, 1991 U.S. Dist. LEXIS 18374, at *3-11 (N.D. Cal. Dec. 6, 1991) (government asserting FOIA exemptions (b)(3) (taxpayer information), (h)(7)(A) (records compiled for law enforcement purposes), (h)(5) (claiming deliberative process privilege, work-product protection, and attorney-client privilege), and (b)(2) (information related solely to the internal personnel rules and practices of an agency); in addressing government's attorney-client

FOIA cases, the court's focus is on the request for information, not on the underlying purpose or claim that has generated the request for information. As a consequence, a court evaluating a FOIA request is less likely to appreciate that sustaining a broad claim of government privilege may ultimately result in inaccurate fact finding and potential injustice—the very concerns that have traditionally led courts to be cautious in sustaining privilege claims. Moreover, once courts use a broad brush in FOIA cases, other courts apply the same broad statements in non-FOIA cases, resulting in a more general expansion in the scope of the government attorney-client privilege.

Another possible contributing factor to the privilege's expansion is attorney self-interest. Lawyers have consistently pushed for expansive privilege protection.³⁶⁵ For example, the recently published third edition of *The Restatement of the Law Governing Lawyers*³⁶⁶ puts the stamp of approval on the broadest possible government attorney-client privilege.³⁶⁷ The authors seem to recognize that the only compelling justification for a government attorney-client privilege is the level-playing-field theory, because it is the only theory that they offer in its defense.³⁶⁸ But the level-playing-field justification supports only a limited litigation-preparation privilege; one might think, then, that the drafters would cart out other justifications to support a more

privilege claim, the court, after considering government's Vaughn index, simply concludes that IRS documents "contain information which qualifies for protection under the deliberative process privilege, the attorney-client privilege, and include work product"); *Wilder v. Comm'r*, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985) (government asserted FOIA exemptions (b)(7)(e) and (b)(2), (b)(3), and (b)(5) (attorney-client privilege); the court sustained attorney-client privilege claim after *in camera* review with a one-sentence explanation).

365. More than one commentator has pointed out that confidentiality rules give lawyers a market advantage over other professionals and that the advantage to lawyers might *not* confer a benefit on clients. *See, e.g., Zacharias, supra* note 78, at 360 (noting that "the presence of confidentiality may explain why clients are willing to pay high fees to lawyers when nonlawyers might be able to provide similar services more cheaply"); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 256, 259 (1985) (stating that "confidentiality rules . . . benefit the profession," and that "with few exceptions, the Rules embrace the client's interests when it is painless, even beneficial, for lawyers to do so").

366. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000).

367. Section 74 states that "the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72." *Id.*

368. The comments suggest that

the legal system has recognized the strategic concerns of a public agency or officer in establishing and asserting public legal rights. . . . The public acting through its public agencies is entitled to resist claims and contentions that the agency considers legally or factually unwarranted. To that end, a public agency or employee is entitled to engage in confidential communications with counsel to establish and maintain legal positions. . . . Otherwise governments would be at an unfair disadvantage in litigation, in handling claims and in negotiations A privilege that would cover only litigation, including claims or investigations, would be a plausible alternative.

Id. cmt. b.

expansive privilege. Instead, they are content to support what they see as “the generally prevailing view,”³⁶⁹ and they politely reject out of hand cases that attempt to limit the privilege to the litigation context.³⁷⁰

Although a number of courts have resisted this expansion of the privilege, the general trend is troubling for the reasons highlighted throughout this Article: extending a privilege to communications between government officials and their lawyers keeps relevant evidence away from the fact finder without any commensurate gain. Because the privilege plays no real role in encouraging most communications between government officials and their lawyers, the usual justification for attorney-client privilege is simply inapplicable.

A recent case makes this point clearly. In *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*,³⁷¹ the plaintiffs, who sued drug manufacturers, alleged that certain weight loss drugs (popularly known as “phen-fen”) that they had ingested had caused heart valvulopathy.³⁷² One of the defendants relied heavily on the “FDA defense,” claiming that it had acted reasonably in distributing the drug because neither the FDA nor the medical community at large knew of any potential adverse effects of phen-fen at the time the FDA approved the drug.³⁷³ In support of the FDA defense, one of the defendants relied on an article written by six FDA officials and published in the *Journal of the American Medical Association*.³⁷⁴ The article substantiated the defendants’ claim about the state of medical knowledge when the FDA approved the drug.³⁷⁵ The plaintiffs’ counsel wrote to the FDA, alleging that medical evidence of adverse drug effects had indeed been available to the defendants prior to the approval date, and suggested that the defendants had withheld this troublesome evidence from the FDA.³⁷⁶ The FDA responded with a letter denying that the FDA was in possession of this evidence at the time the article was published.³⁷⁷ In a startling about-face, the defendants’ counsel then wrote to the FDA, stating that the defendants had in fact provided this information to the FDA before the article was published.³⁷⁸ After taking a few months to search its records, the FDA informed the plaintiffs that it had been in possession of the information at the time the article was published.³⁷⁹

369. After asserting that the privilege is justified when the government is preparing for litigation, the authors simply conclude that, “[t]his Section, however, states the generally prevailing rule that governmental agencies and employees enjoy the same privilege as nongovernmental counterparts.” *Id.*

370. The authors note that some decisions have suggested that a “contemplation of litigation” limitation . . . should be imposed on the governmental-client privilege. . . . That suggestion is not followed in the Section or Comment.” *Id.* at note on governmental privilege in the context of democratic government.

371. No. 1203, 2000 U.S. Dist. LEXIS 15170 (E.D. Pa. Oct. 12, 2000).

372. *Id.* at *2.

373. *See id.*

374. *Id.*

375. *Id.*

376. *Id.* at *3.

377. *Id.*

378. *Id.* at *3-4.

379. *Id.* at *4.

In response, the plaintiffs directed various questions to the FDA to determine, among other things, why the authors of the article and other key FDA employees appeared not to have been aware of the negative medical research.³⁸⁰ The plaintiffs suspected that the defendants had “buried” the information in their FDA submission, which had caused FDA employees to overlook it.³⁸¹ As a result, the plaintiffs also requested that the government produce all internal documents that the FDA generated in the course of the FDA’s internal search for the medical evidence.³⁸² The government, asserting both the deliberative process privilege and the attorney-client privilege, declined to produce 132 documents.³⁸³

The court rejected the government’s deliberative process privilege claim, holding that the communications did not concern discussions regarding agency policy, but rather concerned “whether the FDA possessed certain documents, what those documents were[,] and who they were being sent to within the agency.”³⁸⁴ However, the court sustained the attorney-client privilege claim over all the documents for which it was asserted, on the grounds that the documents were “between FDA officials and FDA attorneys,” were generated in the course of responding to subpoenas and to letters from the plaintiffs’ and defendants’ counsel, were marked “Sensitivity: Confidential,” and were “apparently” accessible only to agency employees.³⁸⁵

Because the court sustained the government’s attorney-client privilege claim, it is not possible to determine the contents of the communications with certainty. It seems likely, however, that the privileged documents can be divided into two categories. First, some of the privileged documents concerned the actual search for the missing scientific evidence. Presumably, attorney-client communications in this category were simply reports concerning the ongoing search and suggestions regarding how the search should proceed. Second, other documents memorialized attorney-client communications generated as the FDA determined whether and how to respond to the letters from the defendants’ counsel (which charged that the FDA already possessed the relevant scientific evidence) and the plaintiffs’ counsel (which asked the FDA to explain how it missed the documents and whether, in light of the evidence, it had altered its position regarding the drug’s safety). Taken together, the privileged documents might have shown that the documents were in fact found buried in other documents that the defendants had produced to the FDA. Or, the privileged communications might have revealed that the FDA’s own negligence (or worse) contributed to the agency’s failure to inform its own scientists of the potentially troubling scientific evidence. Determination of this issue was relevant to key issues in the case—whether the defendants acted reasonably in distributing the product, and whether and to what extent punitive damages were warranted. Knowledge of these facts would also have influenced settlement negotiations.

More importantly, while the privilege clearly obstructed the search for the truth, it provided no countervailing benefit—the promise of confidentiality was not necessary

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at *4-5.

384. *Id.* at *12-13.

385. *Id.* at *15-16.

to ensure that the FDA received necessary legal advice. With regard to the first category of documents, those generated as part of the search for the scientific evidence, it strains credulity to argue that the FDA would not have searched for and found the missing scientific evidence absent the assurance of confidentiality provided by the attorney-client privilege. No specialized legal advice was necessary to enable the FDA to search its own files. Most importantly, the FDA had no legal position to protect; it was not a party in the lawsuit, and, in fact, was immune from suit concerning its decision to approve the diet drugs. Thus, employee discussions with attorneys could not have concerned the FDA's legal position. More likely, the employee-attorney discussions concerned either how to minimize the FDA's embarrassment (if in fact the FDA was negligent in failing to consider the documents) or whether to publicly accuse the defendants of burying the evidence. Because neither of these possibilities implicated the FDA's legal interests, the privilege played no role in assuring that the agency received necessary legal advice. The attorney-client privilege obstructed fact finding for no compelling reason.

The gradual expansion of government privilege law has created great disparities from circuit to circuit, from court to court. Some courts practically "rubber stamp" government claims of privilege over all communications between agency employees and government attorneys. A few have gone so far as to relieve the government of the burden of proving the confidentiality requirement.³⁸⁶ Other courts, however, continue to view claims of government privilege suspiciously, requiring particularized proof that each document meets the privilege's elements³⁸⁷ or rejecting privilege claims when the communications do not contain confidential facts.³⁸⁸ Some courts have gone

386. See *Hollar v. IRS*, No. 95-1882, 1997 U.S. Dist. LEXIS 12846, at *16 (D.D.C. Aug. 7, 1997) (holding that "because the IRS engaged in communications with DOJ attorneys as would a private person soliciting advice to protect his or her legal interests[,] [i]t is reasonable . . . to infer the confidentiality of the [documents]"); *Alamo Aircraft Supply v. Weinberger*, No. 85-1291, 1986 U.S. Dist. LEXIS 29010, at *5 (D.D.C. Feb. 21, 1986) (sustaining government attorney-client privilege claim even though government's affidavit did not state that the attorney-client communications were "initiated with the expectation of confidentiality" because "an expectation of confidentiality may readily be inferred").

387. See, e.g., *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa. 1996) (holding that the government's proof of confidentiality was insufficient); *Rattner v. Netburn*, No. 88 Civ. 2080, 1989 U.S. Dist. LEXIS 6876, at *13-14 (S.D.N.Y. June 20, 1989) (attorney-employee communications held not privileged because attorney was acting as press agent, not giving legal advice); *Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680, 680-89 (E.D. Pa. 1986) (rejecting government's privilege claim because government offered insufficient evidence that elements of privilege were met).

388. See *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997). In *Tax Analysts*, the court followed D.C. Circuit precedent, finding that communications that did not contain confidential facts that concerned the agency could not be privileged. The D.C. Circuit rejected a claim by the IRS that Field Service Advice Memos ("FSAs") are protected by the attorney-client privilege. FSAs are documents issued by the office of IRS chief counsel in response to requests from IRS field personnel for legal guidance, usually with regard to the audit of a specific taxpayer. *Id.* at 609. In requesting legal guidance, the IRS field worker transmits all necessary facts regarding the particular taxpayer to counsel, who uses those facts to formulate legal advice. *Id.* The purpose of the FSA is to ensure that IRS employees correctly and consistently apply the law. *Id.* *Tax Analysts*, a nonprofit corporation, made a FOIA request for certain

further, manipulating doctrine³⁸⁹ or creating new exceptions³⁹⁰ to defeat government privilege claims. As a result, the doctrine of government attorney-client privilege is radically uneven. That these inconsistencies exist further undermines the instrumental justification; what government employee would rely on a privilege when she cannot know, at the time of the communication, whether a court will later determine whether the privilege attached?

CONCLUSION

The reflexive assumption that a government attorney-client privilege is necessary to ensure that government actors communicate openly with government counsel is a

FSAs. *Id.* at 608. The government refused to make the documents available on a number of grounds, among them that the documents were protected by the attorney-client and work-product privileges. *Id.* at 618-20. The IRS also argued that FSAs fell under FOIA exemption 3, because the information within them was "return information" as defined by § 6103(b)(2)(a), *id.* at 611, and that FSAs were protected by the deliberative process privilege, *id.* at 616-18. The court rejected both claims.

Under traditional privilege doctrine, FSAs should have been privileged; they were confidential communications between government employees and government counsel, made for the purpose of obtaining legal advice. But the court applied the more restrictive test formulated by the *Coastal States* court and consistently applied in the D.C. Circuit, holding that the privilege could apply only if the information contained in the documents were confidential facts *concerning the agency* and unknown to third parties. *Id.* at 618-19. The only portion of the FSAs that could be withheld were those that would reveal "the scope, direction, or emphasis of audit activity." *Id.* at 619-20. The court also denied work-product immunity, except to the extent an FSA was prepared in anticipation of litigation. *Id.* at 620.

The result in *Tax Analysts* makes sense. IRS field workers had sufficient motivation to communicate with counsel—the need to perform their jobs correctly. Moreover, they faced no disincentives to act with candor because their communications to counsel did not concern confidential facts that they would be hesitant to reveal absent some promise of confidentiality. The only material that the IRS could justifiably withhold was that which would compromise its ability to conduct the audit or pursue litigation. These are the justifications that underlie the investigatory privilege and work-product immunity.

389. *See, e.g., Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998). In *Reed*, the court held that two city council members were not "clients" of the city attorney, and thus the city waived the attorney-client privilege when two employees shared confidential attorney-client communications with them. In a previous case, *United States v. Doe (In re Grand Jury Subpoena)*, 886 F.2d 135, 138 (6th Cir. 1989), the same court had held that the Detroit City Council was a client of the city's attorney, when council members met with the attorney in condemnation hearings. Reading the two opinions together, it appears that whether a particular government employee can be termed a "client" of the entity's lawyer depends on the subject matter of the conversation. If the privilege were necessary to encourage employees to consult with counsel, the Sixth Circuit's approach would be highly problematic, because employees could not predict whether their interests might later be viewed as "divergent" from other employees with whom they shared the privileged information. The Sixth Circuit's willingness to reject the city's privilege claim in the face of precedent indicates that the court might have doubts about the privilege's instrumental justification.

390. *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

fiction. At most, government entities should be able to claim a limited litigation privilege that enables them to shield communications made in furtherance of trial preparation. This approach would be consistent with early case law. In addition, it would make government entities more accountable to the citizens they serve, at no cost to government's ability to function effectively.