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Should the Federal Government Have an Attorney-Client Privilege?

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NOTE

SHOULD THE FEDERAL GOVERNMENT HAVE AN ATTORNEY-CLIENT PRIVILEGE?

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* I dedicate this Note to my wife, Barbara, for her infinite love, support, and patience through the many months, weeks, and days of separation; and to my parents, David and Valerie, for teaching me so many things.

I. INTRODUCTION

Recent litigation between the Office of Independent Counsel (OIC) and the White House[1] has brought a great deal of public attention to the function of the attorney-client privilege in government.[2] Although this litigation has entailed unique factual circumstances, the White House's assertion of the attorney-client privilege was quite ordinary, as other federal government entities have asserted the privilege in past litigation.[3] These cases raise an important issue of public policy: Should the government be permitted to conceal evidence from a court and opposing litigants by invoking an attorney-client privilege?

The courts and authorities are in near unanimous agreement that the attorney-client privilege should generally be available to government entities.[4] However, the amount of judicial and academic commentary on the governmental attorney-client privilege has been sparse.[5] The purpose

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1. *See generally In re* Lindsey (Grand Jury Testimony) 148 F.3d 1100 (D.C. Cir.) (per curiam) (addressing, inter alia, the question of whether a White House attorney can refuse to provide information about possible criminal conduct to a federal grand jury on the basis of a government attorney-client privilege), *published in full*, 158 F.3d 1263, *cert. denied*, 119 S. Ct. 466 (1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.) (addressing, inter alia, the question of whether a federal government entity can avoid complying with a federal grand jury subpoena on the basis of the attorney-client privilege), *cert. denied*, 117 S. Ct. 2482 (1997).

2. *See generally, e.g.*, *Justices Refuse to Shield Lindsey*, B. GLOBE, Nov. 10, 1998, at A26; Ronald J. Ostrow & Elizabeth Shogren, *Court Denies Bid to Block Lindsey Questioning*, L.A. TIMES, Aug. 4, 1998, at A1; *Privilege: Congress's Turn*, WASH. POST, Nov. 13, 1998, at A22; John Solomon, *No Shield for White House Lawyer: Chief Justice Refuses to Delay Grand Jury Testimony*, PEORIA J. STAR, Aug. 5, 1998, at A2.

3. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Mead Data Cent., Inc. v. Department of Air Force, 566 F.2d 242, 248 (D.C. Cir. 1977); Galarza v. United States, 179 F.R.D. 291, 295 (S.D. Cal. 1998); Ferrell v. Department of Hous. & Urban Dev., 177 F.R.D. 425, 427, 431-32 (N.D. Ill. 1998); Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982).

4. *See, e.g.*, *Lindsey* 148 F.3d at 1104; Town of Norfolk v. Army Corps of Eng'rs, 968 F.2d 1438, 1457 (1st Cir. 1992); *Ferrell*, 177 F.R.D. at 432; FDIC v. Ernst & Whinney, 137 F.R.D. 14, 16 (E.D. Tenn. 1991); Coastal Corp. v. Duncan, 86 F.R.D. 514, 520 (D. Del. 1980); Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138-39 (E.D. Wis. 1972); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.5.6, at 289-91 (1986); Ronald I. Keller, Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal* Government, 62 B.U. L. REV. 1003 (1982); UNIF. R. EVID. 502(a)(1) (1974); FED. R. EVID. 503(a)(1) (Proposed 1973), reprinted in 56 F.R.D. 183, 235 (1972). *But see* Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1725 (1988); *cf.* Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (declining to decide whether governmental attorney-client privilege was generally valid); *Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915 (same).

5. *See* 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475, at 124 n.5, 125 n.12 (1992).

of this Note is to define and analyze the current state of the governmental attorney-client privilege in the federal system. Furthermore, this Note examines whether the underlying rationale of the attorney-client privilege justifies a governmental privilege.[6]

Part II of this Note outlines the scope and rationale of the attorney-client privilege. Additionally, Part II notes certain special issues unique to entity clients and examines how these issues have been resolved for the corporate privilege. Part III discusses the origin of the governmental privilege in the federal system and how the lower federal courts have developed the privilege. Part IV analyzes whether a governmental privilege conforms to the rationale of the attorney-client privilege. This Note concludes that while federal entities may have legitimate purposes for wanting to maintain secrecy and engage in nondisclosure, the attorney-client privilege is not a suitable legal doctrine for achieving those ends.

II. BACKGROUND

A. *Policy and Scope of the Privilege*

Definitions of the attorney-client privilege vary slightly,[7] but Dean Wigmore's description of the concept is the most frequently cited:

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

The privilege is the oldest of its kind for confidential communications, dating back to the reign of Elizabeth I.[9] Originally, its purpose was to protect the oath and honor of the attorney, and the client was powerless to

6. Some courts use the term "governmental privilege" to refer to the deliberative process privilege, which is a distinct and separate privilege from the attorney-client privilege. *See, e.g., Green*, 556 F. Supp at 84. This Note, for the sake of brevity, refers to the governmental attorney-client privilege as the "governmental privilege."

7. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118; UNIF. R. EVID. 502 (b) (1974); Proposed Fed. R. Evid. 503(b) (Proposed 1973); United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 358-59 (1950).

8. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. 1961).

9. *See id.* § 2290, at 542.

prohibit the attorney from waiving the privilege.[10]

Since the late 1700s, the policy of the privilege has been "to promote freedom of consultation" between client and attorney.[11] In the Supreme Court's words, the privilege encourages "full and frank communication between attorneys and their clients."[12] The privilege protects all types of communications including, inter alia, letters, faxes, documents, phone conversations, and e-mails.[13] To accomplish its purpose, the privilege bars any compelled disclosure of confidential attorney-client communications, absent the client's consent.[14]

The rationale for encouraging full disclosure is not to benefit the client; rather, the privilege's objective is to "promote . . . observance of [the] law and [the] administration of justice."[15] For this objective to be achieved, the privilege is founded upon three fundamental assumptions.[16] First, the complexities and uncertainties of the law require a client to consult with an attorney to vindicate her rights and to comply with her obligations.[17] Second, full disclosure by the client enables the attorney to sift through the facts and to give the client sound legal advice.[18] The third, and most controversial, assumption is that clients would not reveal personal, unpleasant or embarrassing facts without the assurance that their attorney could not be compelled to disclose those facts.[19]

Lawyers widely believe the third assumption,[20] despite a scarcity of empirical evidence.[21] Of course, if the third assumption is invalid, then the

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10. *See id.* § 2290, at 543, 545.

11. *Id.* § 2291, at 545.

12. Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

13. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. b. A communication "is any expression through which a . . . person undertakes to convey information to another . . . and any document or other record revealing such an expression." *Id.* § 119.

14. *See* 8 WIGMORE, *supra* note 8, § 2291, at 545.

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

16. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 cmt. c; WOLFRAM, *supra* note 4, § 6.1.3, at 243.

17. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 cmt. c; *see also* WOLFRAM, *supra* note 4, § 6.1.3, at 243. The Supreme Court implicitly agreed with this proposition by noting that corporate clients are required to frequently consult their lawyers because of "the vast and complicated array of regulatory legislation confronting the modern corporation." *Upjohn*, 449 U.S. at 392.

18. *See Upjohn*, 449 U.S. at 391-92; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 cmt. c; *see also* WOLFRAM, *supra* note 4, § 6.1.3, at 243.

19. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 cmt. c; *see also* WOLFRAM, *supra* note 4, § 6.1.3, at 243.

20. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 cmt. c.

21. *See* WOLFRAM, supra note 4, § 6.1.3, at 243 & n.7; *see generally* Note, *Functional Overlap between the Lawyers and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) (noting that nonlawyers are far less likely to

entire rationale for the privilege is undermined. To put it more plainly, if the privilege does not encourage clients to consult an attorney and to make full disclosures, then attorneys are unable to sift through the pertinent facts to give sound legal advice, and the administration of justice is not benefitted. Furthermore, the privilege only retains its deleterious effect: It excludes relevant evidence from the finder of fact.[22]

To compensate for the speculative nature of the privilege, courts have consistently held that the scope of the privilege should "be strictly confined within the narrowest possible limits."[23] Moreover, the scope of the privilege does not cover all communications between an attorney and the client.[24] For example, the communication must be for the purpose of seeking legal advice.[25] Courts have denied the privilege when a client seeks business advice or other services from an attorney.[26]

Another requirement is that communication be confidential.[27] To satisfy the confidentiality requirement, the client must have a reasonable expectation that only the attorney, and not any third party, will receive the communication.[28] The privilege also protects communications made by a client's agents or an attorney's agents, if they facilitate the rendering of legal advice.[29] For example, the privilege is not destroyed just because the client's secretary types a letter for the client requesting legal advice.[30]

Additionally, the law only mandates that the communication, and not its underlying facts, be confidential.[31] For example, suppose in a private meeting with no other person present, a client tells her attorney, "John and I saw Jack robbing the store." The underlying fact (Jack robbing the store)

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believe the privilege encourages disclosure).

22. *See* WOLFRAM, *supra* note 4, § 6.1.4, at 243-44; *see also* 8 WIGMORE, *supra* note 8, § 2291, at 554.

23. 8 WIGMORE, *supra* note 8, § 2291, at 554 & n.6; WOLFRAM, *supra* note 4, § 6.1.4, at 244 & n.9.

24. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. b (noting that communications through a public mode may not be sufficiently confidential to fall under the privilege's protection).

25. *See* 8 WIGMORE, *supra* note 8, §§ 2292, 2296, at 554, 566-67; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 118, 122.

26. *See* WOLFRAM, *supra* note 4, § 6.3.2, at 251 & nn. 53-59; *see also* 25 WRIGHT & GRAHAM, *supra* note 5, § 5475, at 133 & n.67. However, the legal advice sought may be for either a nonlitigious or litigious purpose. *See* 8 WIGMORE, *supra* note 8, § 2295, at 565.

27. *See* 8 WIGMORE, *supra* note 8, §§ 2292, 2311, at 554, 599; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 118, 121.

28. *See* 8 WIGMORE, *supra* note 8, § 2311, at 601-02; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121.

29. *See* 8 WIGMORE, *supra* note 8, § 2311, at 601-02; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. e.

30. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. g.

31. *See id.* § 121 cmt. b (noting that the "matter communicated need not itself be secret").

is obviously not confidential, because a third party (John) is also aware that Jack robbed the store. Nonetheless, the communication (the client's statement to the attorney) is protected, because no other person was present when the client made the communication, giving the client a reasonable expectation of secrecy.[32]

Although the privilege protects communications, it does not protect the underlying facts.[33] Using the same example, suppose a prosecutor asks the client at Jack's trial, "Did you see Jack rob the store?" The client cannot invoke the privilege, because the question involves a fact she observed. However, if the prosecutor asks, "Did you *tell your attorney* that Jack robbed the store?," then the client may invoke the privilege because the question inquires into a communication she made to her attorney.[34]

Lastly, the traditional justification for the privilege has been to protect communications from the client to the attorney, and not from the attorney to the client.[35] However, due to practicalities, the privilege's scope includes communications from the attorney to the client.[36] Courts have rationalized that disclosing an attorney's legal advice would have a tendency to reveal the client's confidential communications.[37] Nonetheless, the purpose of protecting the attorney's communications is not to secure the attorney's "freedom of expression."[38]

B. *The Privilege for Entity Clients*

1. Issues for Entity Clients

Traditionally, the attorney-client privilege sought to foster an attorney's relation with a private individual.[39] In the last century, though, courts began to apply the privilege to both governmental and corporate entity clients.[40]

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32. *See id.* § 121 cmt. b & c.

33. *See* Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. d.

34. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 cmt. d.

35. *See* Charles A. Miller, *The Challenges to the Attorney-Client Privilege*, 49 VA. L. REV. 262, 268 (1963).

36. *See* 8 WIGMORE, *supra* note 8, § 2320, at 628-29; MCCORMICK ON EVIDENCE § 89, at 125 (John William Strong ed., 4th ed. 1992).

37. *See* 8 WIGMORE, *supra* note 8, § 2320, at 628-29; MCCORMICK, *supra* note 36, § 89, at 125.

38. *See* 8 WIGMORE, *supra* note 8, § 2320, at 629.

39. *See* MCCORMICK, *supra* note 36, § 88, at 124.

40. *See* WOLFRAM, *supra* note 4, § 6.5.2, 6.5.6, at 283 & n. 69, 290-91 & nn.16-18 (collecting cases applying the privilege to corporations and governments). The United States Supreme Court first acknowledged a corporate attorney-client privilege in *United States v. Louisville & Nashville Railroad*, 236 U.S. 318, 336 (1915). The first federal court decision to apply the privilege to a government entity was *United States v. Anderson*, 34 F.R.D. 518, 522-23 (D.

In response, scholars and judges have examined some of the special issues that arise when entities assert the privilege.[41] There are at least three special entity issues that courts need to resolve when assessing the scope and merits of a governmental attorney-client privilege.[42]

The first special issue is determining the identity of the client.[43] Natural persons communicate for themselves, but entities can only communicate through their agents.[44] Therefore, courts must decide which of the entity's agents are authorized to communicate for the entity and to seek legal advice.[45] For example, while most would probably agree that the corporate president communicates for the client, courts must analyze whether lower-level employees also communicate on behalf of the entity.[46] This Note refers to this problem as the "client" issue.

Another aspect of the "client" issue is determining which agents of the entity may invoke or waive the privilege.[47] With private clients, the client both makes the communication and has the power to waive or invoke the privilege.[48] When the client is an entity, it is possible that one agent (i.e., a lower-level employee) could make a privileged communication, but another agent (i.e., a senior manager) could have the authority to invoke or waive the privilege.[49]

A second issue is to what extent an entity may distribute communications without violating the privilege's confidentiality requirement.[50] For example, should an attorney's legal opinion be

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Colo. 1963).

41. *See, e.g.*, Radiant Burners, Inc. v. American Gas Assoc., 207 F. Supp. 771, 772-74 (N.D. Ill. 1962), *reh'g granted*, 209 F. Supp. 321, *reversed* 320 F.2d 314 (7th Cir. 1963) (holding the attorney-client privilege was not available to corporate clients because it was a personal privilege, similar to the right of self-incrimination); James A. Gardner, *A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy*, 40 U. DET. L.J. 299, 305-20, 371-93 (1963); James B. Kobak, *The Uneven Application of Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 363-74 (1972); *see generally* David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

42. *See infra* text accompanying notes 43, 50, 51.

43. *See* Gardner, *supra* note 41, at 384-89; Kobak, *supra* note 41, at 362-71; Simon, *supra* note 41, at 956-63.

44. *See* Kobak, *supra* note 41, at 362; Simon, *supra* note 41, at 956.

45. *See id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. d (Proposed Final Draft No. 1, 1996); Simon, *supra* note 41, at 956-63 (detailing possible agents that could speak for a corporation).

46. *Cf.* Simon, *supra* note 41, at 956.

47. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. j.

48. *See* 8 WIGMORE, *supra* note 8, §§ 2321, 2327, at 629, 634-35.

49. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. j.

50. *See* Gardner, *supra* note 41, at 386; Kobak, *supra* note 41, at 371-73; Simon, *supra* note 41, at 982-85.

considered confidential if it is circulated to five hundred employees? If an agent communicates facts that are widely known within the entity, should the communication be protected? What if the facts are known outside the entity? This Note refers to these problems as the "confidentiality" issue.

Lastly, and most importantly, courts ought to address whether an attorney-client privilege actually encourages entities to make full disclosures to counsel.[51] As noted previously, one of the privilege's three assumptions is that clients would not otherwise disclose personal, unpleasant or embarrassing facts without the protection provided by the privilege.[52] This assumption, although lacking empirical support,[53] is rooted in the history of the common law.[54] However, the common law privilege was based upon a natural person client, not an entity client.[55] Just because the assumption may have been valid for natural person clients does not necessarily establish its validity for entity clients. Furthermore, if the assumption is invalid, the privilege cannot accomplish its objective of promoting the "observance of [the] law and [the] administration of justice."[56] This Note refers to this issue as the "encouragement" issue.

2. Federal Corporate Attorney-Client Privilege

Since both corporations and governments are entities, courts have relied upon the law of the corporate privilege when construing the governmental privilege.[57] Prior to 1981, the lower federal courts had developed two primary tests for the corporate privilege.[58] The first test, known as the "control group" test, limits the privilege to communications between the lawyer and persons who have a managerial responsibility to respond and take actions based upon the lawyer's advice.[59] Therefore, the "control group" could be different persons within the corporation for different legal problems.[60] Additionally, for a communication to meet the confidentiality requirement, its distribution must be limited to members of the control

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51. *See* Gardner, *supra* note 41, at 328-338.

52. *See supra* text accompanying note 19.

53. *See supra* note 21.

54. *See* 8 WIGMORE, *supra* note 8, § 2291, at 545 ("The policy of the privilege has been plainly grounded since the latter part of the 1700's on subjective considerations . . . to promote freedom of consultation by legal advisers.").

55. *See* MCCORMICK, *supra* note 36, § 88, at 124.

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

57. *See, e.g.*, Galarza v. United States, 179 F.R.D. 291, 295 (S.D. Ca. 1998); SEC v. World-Wide Coin Inv., Ltd., 92 F.R.D. 65, 66 (N.D. Ga. 1981).

58. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.16, at 391 (1995); WOLFRAM, *supra* note 4, § 6.5.4, at 284.

59. *See In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979); MUELLER & KIRKPATRICK, *supra* note 58, § 5.16, at 391; WOLFRAM, *supra* note 4, § 6.5.4, at 284.

60. *See* WOLFRAM, *supra* note 4, § 6.5.4, at 284-85.

group.[61] Lastly, senior management maintains the power to invoke or waive the privilege.[62]

The second test developed by the courts is known as the "subject matter" test.[63] Under this test, any communication made by any employee to the corporation's lawyer is protected, so long as it relates to the performance of employment duties and was made for the purpose of assisting the lawyer in rendering legal services to the corporation.[64] Some courts adopted a modified subject matter test, which requires that the request for legal services originate with a superior officer and that further dissemination of the communication be limited to those with a need for such information.[65] This test also grants senior management the right to invoke or waive the privilege.[66]

After years of debate about the merits of the two tests, the Supreme Court reviewed *Upjohn Co. v. United States*.[67] Upjohn had discovered through an independent audit that one of its foreign subsidiaries had possibly made illegal payments to foreign officials.[68] In response, Upjohn's general counsel conducted an internal investigation.[69] As part of the investigation, corporate attorneys interviewed various employees and sent questionnaires to some of them.[70] The chairman of the board directed employees to cooperate with the attorneys, to fully disclose all information, and to keep the communications confidential.[71] During a subsequent government investigation, the IRS issued a summons demanding that Upjohn produce all files relating to the attorneys' internal investigation.[72] Upjohn declined and eventually petitioned the Supreme Court for review.[73]

The Court rejected the control group test, although it did not expressly adopt the subject matter test.[74] The Court rested its holding upon the strong need of corporate counsel to obtain all the facts before rendering a sound

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61. *See* Kobak, *supra* note 41, at 372.

62. *See* WOLFRAM, *supra* note 4, § 6.5.4, at 286.

63. *See* MUELLER & KIRKPATRICK, *supra* note 58, § 5.16, at 391; WOLFRAM, *supra* note 4, § 6.5.4, at 284.

64. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd by equally divided court*, 400 U.S. 348 (1971); MUELLER & KIRKPATRICK, *supra* note 58, § 5.16, at 391-92.

65. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977)(en banc); WOLFRAM, *supra* note 4, § 6.5.4, at 284.

66. *See* WOLFRAM, *supra* note 4, § 6.5.4, at 286.

67. 449 U.S. 383 (1981); *see* WOLFRAM, *supra* note 4, § 6.5.4, at 285.

68. *See Upjohn*, 449 U.S. at 386.

69. *See id.*

70. *See id.* at 386-87.

71. *See id.* at 387.

72. *See id.*

73. *See id.* at 388.

74. *See id.* at 392-93.

legal opinion to a corporation.[75] In particular, the Court stressed that Upjohn's superior officers directed the investigation in order to obtain legal advice and that Upjohn's lower-level employees possessed all the relevant information relating to the attorneys' legal advice.[76] Without disclosures by lower-level employees, management could not unearth the pertinent facts and obtain a sound legal opinion for the corporate client.[77] Conversely, if only disclosures by senior management were privileged, then corporate counsel would be hampered in gathering legally relevant facts from non-managerial employees.[78] Furthermore, attorneys would be unable to give full and frank legal advice to lower-level employees who implement corporate policy.[79] Such encumbrances would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[80]

In regards to the "confidentiality" issue, the Court was unclear and failed to explain to what extent communications must be kept confidential within the corporation to qualify for the privilege. However, the Court did emphasize the fact that Upjohn's senior management had ordered all employees to keep confidential the contents of their interviews with corporate counsel.[81] Therefore, if a corporation treats a communication as confidential, it can expect to receive the protection of the privilege.[82]

On the "client" issue, *Upjohn* permits any corporate employee to speak for the client, but the opinion appears to require that senior management direct the lower-level employee to communicate with the lawyer.[83] Nevertheless, the Court did not alter the role of senior management as the holder of the privilege.[84] Thus, a lower-level employee's communications may be protected, but senior management may choose to waive the privilege and disclose the communication without the consent of the employee.[85] Additionally, when faced with a subpoena for an employee's communications, senior management, not the employee, decides whether to assert the privilege.[86]

On the "encouragement" issue, the *Upjohn* model is possibly

75. *See id.* at 392.
76. *See id.* at 394-95.
77. *See id.*
78. *See id.* at 392.
79. *See id.*
80. *Id.*
81. *See id.* at 395 & n.5.
82. *See* MCCORMICK, *supra* note 36, § 87.1, at 123.
83. *See Upjohn*, 449 U.S. at 394
84. *See* WOLFRAM, *supra* note 4, § 6.5.4, at 287.
85. *See id.*
86. *See id.*

defective.[87] Because senior management may waive the privilege without the employee's permission, the employee has no reason to believe that his communication is confidential.[88] Therefore, the law does not provide an incentive to the employee to make a full disclosure.[89] More likely, pressure from upper management, as occurred in *Upjohn*, will encourage full disclosure by lower-level employees rather than any incentive provided by the attorney-client privilege.[90]

Despite this flaw, *Upjohn*'s result can be defended, because it does provide a legal incentive to senior managers and corporate counsel to conduct internal investigations into corporate wrongdoing.[91] If internal investigations were likely to be discoverable by government investigators or opposing parties, senior managers might be inclined to ignore possible wrongdoing rather than investigating and correcting illegal activity.[92] The Court's rationale for granting a broad privilege to corporate entities was to encourage corporate managers to seek counsel for the purpose of ensuring the corporation's compliance with the law.[93]

Some commentators have criticized the Court's rationale as unrealistic.[94] Nevertheless, lower federal courts must accept *Upjohn*, and this Note does not aim to dispute *Upjohn*'s rationale. Rather, this Note attempts to explain the justification for a governmental privilege based upon the Court's reasoning in *Upjohn*. Because the government is an entity, similar to a corporation, *Upjohn* could be, and often is, construed as controlling law for any government assertion of the privilege. A critical question, therefore, is whether the attorney-client privilege provides a similar incentive to government officials to seek counsel in order to ensure that their government entity is complying with the law.

III. HISTORY AND SCOPE OF THE GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE

Today, nearly all federal courts agree that government entities, like natural persons and corporations, are entitled to an attorney-client privilege.[95] Despite agreement on the existence of a governmental

87. *See* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 466-67 (1982).

88. *See id.*

89. *Cf. id.* at 467.

90. *Cf. id.*

91. *Cf. generally id.* at 466-68.

92. *Cf. id.*

93. *See Upjohn*, 449 U.S. at 392-93.

94. *See* MUELLER & KIRKPATRICK, *supra* note 58, § 5.16, at 396 n. 26 (collecting scholarly criticism).

95. *See supra* note 4.

privilege, no uniform rule as to its application exists in the federal system.[96] Currently, there is no *Upjohn* equivalent in which the Supreme Court has delineated its view. Therefore, to determine the scope and merits of the governmental privilege, one must examine lower court opinions.

A. *Origins of the Governmental Attorney-Client Privilege*

1. Freedom of Information Act

The governmental attorney-client privilege is not deeply rooted in the common law.[97] Most of the federal case law concerning the privilege has arisen out of the Freedom of Information Act (FOIA),[98] although there is some scant evidence of a federal governmental privilege prior to FOIA's enactment in 1967.[99] FOIA enables any citizen to request and to obtain information from the government;[100] however, FOIA was not enacted as a rule of discovery or evidence.[101] In spite of this, courts have looked to FOIA for guidance as to the scope of the governmental privilege, even in non-FOIA litigation.[102]

Until rather recently, government officials had little need for an attorney-client privilege.[103] Under the Federal Housekeeping Act, officials were empowered to adopt organizational regulations for government agencies.[104] With this authority, agency heads created regulations prohibiting subordinate officials from disclosing government documents

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96. *See* WOLFRAM, *supra* note 4, § 6.5.6, at 290-91.

97. *See* 25 WRIGHT & GRAHAM, *supra* note 5, § 5475, at 124 & n.4.

98. *See In re* Lindsey (Grand Jury Testimony), 148 F.3d 1100, 1104 (D.C. Cir.), *published in full*, 158 F.3d 1263, *cert. denied*, 119 S. Ct. 466 (1998). The Eight Circuit considered FOIA attorney-client privilege law to be sui generis. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 917 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

99. *See, e.g.*, United States v. Anderson, 34 F.R.D. 518, 523 (D. Colo. 1963). The court applied a standard for a corporate privilege, as set out in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950), without discussion as to any distinction between corporate and government entities. *See id.*

100. *See* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 655 (1984). The author has served as Circuit Judge, United States Court of Appeals for the District of Columbia Circuit and has authored several FOIA opinions. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (1980).

101. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).

102. *See, e.g.*, Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 597 (E.D. Pa. 1980).

103. *See* MCCORMICK, *supra* note 36, § 108, at 152.

104. *See* MCCORMICK, *supra* note 36, § 108, at 152 (citing 5 U.S.C. § 822, R.S. § 161 (1875)); Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges Without a Bureaucratic Privilege*, 16 HARV. C.R.-C.L. L. REV. 495, 498 (1981).

and from testifying, even when served with a court subpoena.[105] The Supreme Court twice upheld the validity of such regulations.[106]

In response, Congress amended the housekeeping statute in 1958 to expressly state that officials were not authorized to withhold information from the public.[107] Congressional policy moved towards even greater governmental openness with the passage of FOIA in 1967.[108] The purpose of the bill was to establish a policy favoring full agency disclosure of information.[109] Congress intended FOIA to make almost every document generated by a government agency available to the public in one form or another.[110] As the Supreme Court elaborated, "[FOIA sought] to permit access to official information long shielded unnecessarily from public view and attempt[ed] to create a judicially enforceable public right to secure such information from possibly unwilling official hands."[111]

During the committee hearings for FOIA, many government witnesses expressed concern that unlimited public access to government documents would inhibit a "full and frank exchange of opinions" among officials.[112] As a result, Congress created Exemption 5,[113] one of nine specific exemptions that permitted government officials to shield documents from the public.[114] The text of Exemption 5 protects against disclosure of "inter-

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105. *See* Lively, *supra* note 105, at 498.

106. *See* United States *ex. rel.* Touhy v. Ragen, 340 U.S. 462, 467-68 (1951); Boske v. Comingore, 177 U.S. 459, 467-70 (1900).

107. *See* Pub. L. No. 85-619, 72 Stat. 547 (1958) (codified as amended at 5 U.S.C. § 301 (1994)).

108. *See* MCCORMICK, *supra* note 36, § 108, at 152.

109. *See* S. REP. NO. 89-813, at 3 (1965).

110. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

111. EPA v. Mink, 410 U.S. 73, 80 (1973).

112. *See* H.R. REP. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427.

113. *See* 5 U.S.C. § 552(b)(5).

114. Section 552(b) provides in relevant part:

> (b) This section does not apply to matters that are—
> (1) (A) specifically authorized under . . . an Executive order to be kept secret in the interest of national defense or foreign policy . . . ;
> (2) related solely to the internal personnel rules and practices of any agency;
> (3) specifically exempted from disclosure by statute . . . ;
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
> (6) personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or

agency or intra-agency memorandums or letters which would not be available by law to a party."[115]

Two particular provisions in the congressional reports have lent credence to the argument that Congress intended to grant government agencies an attorney-client privilege.[116] First, the Senate noted that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties."[117] Second, the House stated Exemption 5 would apply, unless the information "would routinely be disclosed to a private party through the discovery process in litigation with the agency."[118] Neither the Senate nor the House detailed the proper scope of a governmental privilege, although the Senate did state that it intended "to delimit [Exemption 5] as narrowly as consistent with efficient Government operation."[119]

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information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of an individual;

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

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

5 U.S.C. § 552(b)(1994)

115. *Id.* § 552(b)(5).

116. The District of Columbia Circuit has stated in dicta that Congress did not intend to "create" a governmental attorney-client privilege, but merely that Congress intended that the "agencies should not lose the protection traditionally afforded through the evidentiary privileges." *In re* Lindsey (Grand Jury Testimony), 148 F.3d 1100, 1104-05 (D.C. Cir.) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980)), *published in full*, 158 F.3d 1263, *cert. denied*, 119 S. Ct. 466 (1998). The *Coastal States* court cites no precedent for the existence of a pre-FOIA governmental attorney-client privilege. *See Coastal States Gas Corp.*, 617 F.2d at 862.

117. S. REP. NO. 89-813, at 2. This comment was in response to an amendment to the bill. The bill's previous language had only exempted material "'dealing solely with matters of law or policy.'" *Id.* at 1.

118. H.R. REP. 89-1497, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428.

119. S. REP. NO. 89-813, at 9.

2. Supreme Court FOIA Cases

FOIA encouraged citizens, advocacy groups, businesses, and other organizations to flood government agencies with voluminous requests for public disclosure of information.[120] In response, government agencies often refused disclosure by claiming one of the nine exemptions.[121] *EPA v. Mink*[122] was the Supreme Court's first opportunity to review a FOIA request and an agency's Exemption 5 claim. In *Mink*, a group of House members sued to obtain disclosure of documents relating to nuclear weapon tests, and the government resisted by invoking Exemption 5.[123] In evaluating an Exemption 5 claim, the Court stated that the rules of discovery should serve as "rough analogies."[124] However, the Court did not address the attorney-client privilege directly.

FOIA's passage also prompted a new litigation tactic: Parties who were adverse to the government in judicial or administrative proceedings would attempt to obtain evidence through FOIA requests, rather than through the normal rules of discovery.[125] *NLRB v. Sears, Roebuck & Co.*[126] involved such a tactic, and it is the only opinion in which the Court comments on the relation between the governmental attorney-client privilege and Exemption 5.[127]

The case began as an administrative dispute between Sears and the NLRB.[128] Sears had filed a "charge" with the NLRB's Regional Counsel, requesting a "complaint" be filed with the Board concerning an alleged unfair labor practice.[129] The Regional Counsel denied Sears' request, prompting Sears to make an administrative appeal to the General Counsel.[130] While preparing the appeal, Sears filed a FOIA request with the NLRB for all "Advice and Appeals Memoranda issued within the previous five years."[131] The memoranda were internal documents used by the General and Regional Counsel staff in deciding whether to file complaints.[132] The NLRB denied Sears' FOIA request, and Sears sought an injunction in federal court.[133]

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120. *See* Wald, *supra* note 100, at 659-63.
121. *See generally id.*
122. 410 U.S. 73 (1973).
123. *See id.* at 75.
124. *Id.* at 86.
125. *See* Wald, *supra* note 100, at 666-67 & n.76.
126. 421 U.S. 132 (1975).
127. *See id.* at 148-49.
128. *See id.* at 143 n.10.
129. *Id.*
130. *See id.*
131. *Id.* at 142-43.
132. *See id.* at 139-42.
133. *See id.* at 143 n.10.

The NLRB argued that, as a government agency, Exemption 5 granted three separate privileges: the attorney-client, work product, and deliberative process privileges.[134] The Court held that when enacting Exemption 5, Congress had the deliberative process privilege and the work product privilege "specifically in mind."[135] In regards to the work product privilege, the Court justified its holding by emphasizing the language in the Senate report referring to the attorney-client privilege.[136] However, the Court's disposition of the case rested upon the deliberative process and work product privileges, not on the attorney-client privilege.[137]

The *Sears* Court never expressly stated that Exemption 5 incorporated a governmental attorney-client privilege; nevertheless, such a reading of the *Sears* opinion is plausible.[138] Subsequently, many lower courts have cited *Sears* as precedent for the proposition that the government is entitled to an attorney-client privilege,[139] even in cases not involving FOIA requests.[140] Since *Sears*, the Court has not returned to the issue of a governmental attorney-client privilege, leaving the lower courts to develop the law.

B. *Lower Court Development of the Governmental Attorney-Client Privilege*

Prior to *Upjohn*, the lower courts had thoroughly analyzed the corporate privilege and fully developed two main theories.[141] In contrast, the lower courts' discussion of a government attorney-client privilege has been limited. No cohesive doctrines have been developed for a governmental privilege.

1. The Client Issue

The amount of case law discussing which agents speak for the government is scarce. In one pre-*Upjohn* case, the District of Columbia Circuit, in dicta, supported a governmental privilege akin to the corporate control group test.[142] However, since *Upjohn*, the courts seem to simply assume, without discussion, that any employee of a government agency speaks for the agency, and therefore, those communications are protected

134. *See id.* at 149. The Court referred to the "deliberative process privilege" as the "executive privilege." *See infra* notes 229-230 and accompanying text.

135. *Sears, Roebuck & Co.*, 421 U.S. at 150, 154.

136. *See id.* at 154.

137. *See id.* at 155-60.

138. *See* WOLFRAM, *supra* note 4, § 6.5.6, at 290.

139. *See* Mead Data Cent. v. Department of Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977).

140. *See* Coastal Corp. v. Duncan, 86 F.R.D. 514, 520 (D. Del. 1980).

141. *See supra* text accompanying notes 58-67.

142. *See Mead Data Cent.*, 566 F. 2d at 253 n.24.

by the privilege.[143] Conversely, it is also assumed that only the government entity, and not its individual employees, has the power to invoke or waive the privilege.[144]

One court has discussed which government employees speak for the client.[145] *Galarza v. United States* involved a suit brought under the Federal Torts Claim Act (FTCA).[146] The plaintiff had undergone surgery at a Navy hospital and alleged that two Navy physicians had been negligent in removing her uterus.[147] Under the FTCA, the United States, and not the physicians, was the named defendant.[148] In preparation for the suit, the U.S. Attorney's Office conducted ex parte communications with the physicians, and the plaintiff sought disclosure of those communications.[149] The United States refused, invoking the attorney-client privilege.[150]

The district court ruled that *Upjohn* was on point.[151] The government was no different than a corporation being sued for the tortious acts of its employees.[152] Moreover, the government could only function through its employees.[153] In the court's view, government attorneys, like corporate attorneys, needed "full and frank disclosure" from government employees in order to give sound legal advice to the client, the United States.[154] The court made no distinction between government service and corporate employment.[155] A survey of cases indicates that most courts implicitly agree with *Galarza* and permit nearly any government employee to speak for the client.[156]

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143. *See, e.g.*, Town of Norfolk v. Army Corps of Engineers, 968 F.2d 1438, 1457 (holding that the Corps of Engineer was a "client" of the U.S. Attorney's Office without analyzing which officers on the Corps could speak for the government); Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (stating "privilege . . . unquestionably is applicable to the relationship between Government attorneys and administrative personnel").

144. *Cf.* Clavir v. United States, 84 F.R.D. 612, 614 (S.D.N.Y. 1979) (holding that FBI agents, being personally sued, could not invoke the work product privilege to conceal interviews with Justice Department attorneys because the government held the privilege). The Restatement's view is that the "responsible public official" has the power to assert the privilege. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. e (Proposed Final Draft No. 1, 1996).

145. *See* 179 F.R.D. 291, 294-96 (S.D. Cal. 1998).

146. *See id.* at 292.

147. *See id.* at 292-93.

148. *See id.* at 293.

149. *See id.*

150. *See id.*

151. *See id.* at 295.

152. *See id.*

153. *See id.*

154. *Id.*

155. *See id.*

156. *See, e.g., supra* note 144; SEC v. World-Wide Coin Invest., 92 F.R.D. 65, 66 (N.D. Ga. 1981) (citing *Upjohn* as support for protecting staff memoranda); United States v. Anderson, 34 F.R.D. 518, 522-23 (D. Colo. 1963) (assuming, without discussion, that "administrative personnel"

2. The Confidentiality Issue

As noted previously, the common law only required that the communication, and not its underlying facts, be confidential.[157] Therefore, even though third parties may be fully aware of a communication's factual content, the communication may still be confidential, so long as there was a reasonable expectation of secrecy.[158] In contrast, the District of Columbia Circuit has held that, for the governmental attorney-client privilege, (1) the communication must be confidential and (2) "the communication [must be] based on confidential information."[159] The court's use of the word "information" is equivalent to requiring the underlying fact to be confidential.[160]

In *Mead Data Central v. Department of Air Force,* the Air Force had negotiated a licensing agreement for a computerized legal research system with West Publishing, a business rival of the plaintiff.[161] The plaintiff filed a FOIA request for all documents relating to the computer system.[162] The Air Force complied with part of the request, but claimed the attorney-client privilege for three documents because they were legal opinions from Air Force attorneys to superior officials.[163] Two of the documents advised the Air Force about copyright and licensing issues.[164] One of the documents set forth a legal opinion and the background facts for the negotiations.[165]

The circuit court rejected the Air Force's claims.[166] While acknowledging the Air Force's right to an attorney-client privilege, the court held that the Air Force had not met its burden of showing the documents to be confidential.[167] To invoke a governmental attorney-client privilege, the information upon which a communication was based had to

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in SBA can communicate for the client); *see also* Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138-39 (E.D. Wis. 1972) (assuming attorney-client relationship between two agencies).

157. *See supra* note 31 and accompanying text.

158. *See supra* notes 27-30 and accompanying text.

159. Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); *see also* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); Mead Data Cent. v. Department of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977).

160. *See Coastal Gas States Corp.*, 617 F.2d at 863; *Mead Data Cent.*, 566 F.2d at 263-64 (McGowan, J. dissenting).

161. *See Mead Data Cent.*, 566 F.2d at 248.

162. *See id.*

163. *See id.* The Air Force claimed that four other documents were protected by the deliberative process privilege. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 253-54, 255.

167. *See id.*

be confidential.[168] Because the Air Force had possibly revealed information contained in the legal opinions to West during the negotiations, the opinions were not necessarily confidential.[169] On remand, the Air Force had to show that the legal opinions were free of information known to West or any other third party.[170]

Judge McGowan, in dissent, recognized that by requiring the underlying "information" to be confidential, the majority was actually requiring the communication's facts to be confidential.[171] In a subsequent FOIA case, another panel of the court agreed by stating the privilege was "limited to protection of confidential facts."[172] Judge McGowan viewed the majority's opinion as a significant alteration of the traditional attorney-client privilege.[173] He argued: "In the vast majority of cases, attorney-client discussions concern the client's dealings or relationship with one or more third parties. The mere fact that those third parties are aware of the factual details of their interaction with the client cannot automatically defeat a claim of confidentiality."[174] Judge McGowan was correct. The majority's confidentiality requirement was clearly contrary to, and more narrowly defined than, the common law attorney-client privilege as developed by Wigmore and others.[175]

Although the *Mead Data* majority departed from the common law, most federal courts have followed its reasoning, even in non-FOIA cases.[176] A key factual issue to the courts is whether the communication "comment[s] or report[s] on information coming from persons outside the government or from public documents."[177] For example, in *Jupiter Painting Contracting Co. v. United States*, a taxpayer sued the IRS for a refund and abatement of federal employment withholding taxes.[178] The taxpayer moved to compel discovery of IRS legal memoranda that

168. *See id.* at 254.

169. *See id.* at 255.

170. *See id.* at 254.

171. *See id.* at 263-64 (McGowan, J. dissenting).

172. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980).

173. *See Mead Data Cent.*, 566 F.2d at 263-64 (McGowan, J. dissenting).

174. *Id.* at 264 (McGowan, J. dissenting).

175. *See supra* notes 27-32 and accompanying text.

176. *See, e.g.*, Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980); Community Sav. & Loan Assoc. v. Federal Home Loan Bank Bd., 68 F.R.D. 378, 382 (E.D. Wis. 1975); United States v. Anderson, 34 F.R.D. 518, 522-23 (D. Colo. 1963). *But see* FDIC v. Ernst & Whinney, 137 F.R.D. 14 (E.D. Tenn. 1991); FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 595 (M.D. Fla. 1990). In these two cases, the courts permitted the FDIC to invoke the attorney-client privilege for criminal investigative reports, which undoubtedly were based upon information from outside the agency.

177. *Anderson*, 34 F.R.D. at 523.

178. *See Jupiter Painting*, 87 F.R.D. at 595.

discussed an agency decision not to prosecute the taxpayer.[179] The district court rejected the IRS's assertion of attorney-client privilege, because the memoranda were based upon factual information gained from witnesses outside of the government.[180]

Besides examining whether a communication's underlying information is confidential, courts also inquire into whether the communication itself was confidential.[181] In *Coastal States Gas Corp. v. Department of Energy*, the plaintiff made a FOIA request for legal memoranda sent from the Energy Department's regional counsel to field auditors.[182] The Energy Department admitted that the memoranda had been widely circulated to employees within the department, but argued that the attorney-client privilege should apply because the memoranda had been kept within the department.[183] The circuit court rejected this argument and held that the Energy Department had no basis for a claim of confidentiality, because the memoranda had been "made known to persons other than those who need[ed] to know."[184] By limiting access to those officials with a need to know, the court essentially adopted part of the modified subject matter test.[185] Other federal courts have also required that the distribution be limited to select officials in order to satisfy the confidentiality requirement.[186]

3. The Encouragement Issue

Courts rarely address whether the attorney-client privilege actually encourages government entities to make full disclosures, thereby enabling government counsel to sift through the facts and give sound legal advice to the government entity. Rather, courts simply accept the assumption, without analysis, that the privilege will encourage "full and frank discussion" between the government attorney and client.[187]

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179. *See id.* at 595-96.

180. *See id.* at 598. In a factually similar case, another court reached the opposite conclusion and permitted the attorney-client privilege. *See* Green v. IRS, 556 F. Supp. 79, 85-86 (N.D. Ind. 1982) (holding that the IRS did not have to disclose an interattorney letter requesting that a taxpayer be subject to legal proceedings).

181. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863-64 (D.C. Cir. 1980); Coastal Corp. v. Duncan, 86 F.R.D. 514, 521 (D. Del. 1980).

182. *See Coastal States Gas Corp.*, 617 F.2d at 857-58.

183. *See id.* at 863.

184. *Id.*

185. *See supra* note 65 and accompanying text.

186. *See, e.g.*, Scott Paper Co. v. United States, 943 F. Supp. 489, 499 (E.D. Pa. 1996); Covington & Burling v. Food & Nutrition Serv., 744 F. Supp 314, 323 (D.D.C 1990); *Coastal Corp.*, 86 F.R.D. at 521. *But see* Badran v. United States, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) (permitting privilege claim just because document had been kept within the agency).

187. Mead Data Cent. v. Department of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977); *see*

While not addressing this assumption directly, the Eighth Circuit made forceful arguments for disputing its rationale.[188] In *In re Grand Jury Subpoena Duces Tecum*, the OIC, as part of its Whitewater investigation, issued a subpoena for notes generated by White House counsel during an interview with the First Lady.[189] The White House resisted the subpoena, invoking the attorney-client privilege.[190] One of the White House's central arguments was that the court should adopt *Upjohn* as the model for a broad governmental attorney-client privilege.[191] According to the White House, *Upjohn* emphasized "the importance of the attorney-client privilege in encouraging full and frank . . . legal advice" to corporate clients, and government clients should have at least the same benefits as corporate clients.[192] However, the Eighth Circuit refused to adopt an *Upjohn* model, citing two key distinctions between government and corporate clients.[193]

First, the court stated that the White House could not be subject to any criminal liability, unlike corporations which may suffer both criminal and civil liability due the actions of their agents.[194] Second, the court emphasized that government employees have a "general duty of public service," which "favor[s] disclosure over concealment."[195] The court noted that all executive branch employees have a statutory duty to report criminal wrongdoing.[196] Furthermore, the court found the difference between the private interest of a corporation and the public interest of a government agency to be so substantial that it was reason enough not to apply *Upjohn* to a government client.[197] Nevertheless, the court declined to decide whether the attorney-client privilege is generally available to government clients and narrowed its ruling to denying the existence of a governmental

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also, e.g., Galarza v. United States, 179 F.R.D. 291, 295 (S.D. Cal. 1998); *Coastal Corp.*, 86 F.R.D. at 520.

188. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

189. *See id.* at 913.

190. *See id.* at 913-14. The White House also claimed executive and work product privileges, but it abandoned the executive privilege on appeal. *See id.* The First Lady intervened in her personal capacity, arguing that the notes should be privileged under the common-interest doctrine. *See id.* at 914. The court rejected the work product and common-interest doctrine arguments. *See id.* at 922, 923, 924.

191. *See id.* at 919-20.

192. *Id.* at 920.

193. *See id.*

194. *See id.*

195. *Id.*

196. *See id.* The relevant statute is 28 U.S.C. § 535(b) (1994), which provides that "[a]ny information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General."

197. *See id.*

privilege in criminal grand jury proceedings.[198]

The District of Columbia Circuit also recognized substantial differences between public service and corporate employment.[199] In *In re Lindsey (Grand Jury Testimony)*, the Deputy White House Counsel refused to answer grand jury questions on grounds that his communications with the President were protected under the attorney-client privilege.[200] While acknowledging the existence of a governmental attorney-client privilege, the court's holding abrogated the privilege in a criminal grand jury proceeding.[201]

Unlike the Eighth Circuit, the court's opinion focused on the duties that distinguish a government *lawyer*, not a government *client*.[202] Nevertheless, many of the public duties mentioned by the court are equally applicable to government agencies and their senior officials.[203] For example, the court noted that all members of the executive branch take a constitutional oath to "take [c]are that the [l]aws be faithfully executed."[204] Additionally, the court emphasized that public officials must be attentive to the importance of "having transparent and accountable government."[205] The court stressed Madison's concept of open government and noted "openness in government has always been thought crucial to ensuring that the people remain in control of their government."[206]

Neither of the cases involving the White House and OIC directly examine the "encouragement" issue.[207] However, these cases do show that government entities are quite distinguishable from private and corporate entities.[208] The primary difference is that officials within a government entity have public duties unlike their counterparts in the corporate world.[209] The courts found these distinctions to be sufficient enough to warrant abrogation of the attorney-client privilege in a criminal context.[210]

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198. *See id.* at 915, 921.

199. *See In re* Lindsey (Grand Jury Testimony), 148 F.3d 1100, 1108-11 (D.C. Cir.), *published in full*, 158 F.3d 1263, *cert. denied*, 119 S. Ct. 466 (1998).

200. *See id.* at 1103.

201. *See id.* at 1102, 1105.

202. *See generally id.* at 1108-1111.

203. *See infra* notes 205-07 and accompanying text.

204. *In re* Lindsey (Grand Jury Testimony), 148 F.3d at 1108 (quoting U.S. CONST. art. II, § 3).

205. *Id.* at 1109.

206. *Id.* at 1109-10 (quoting *In re* Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997)).

207. *See supra* text accompanying notes 189-207.

208. *See supra* text accompanying notes 195-97, 205-07.

209. *See supra* text accompanying notes 195-97, 200, 205-07.

210. *See supra* notes 199, 202 and accompanying text.

4. Summary

Generally, federal government entities may refuse to disclose evidence by invoking the common law attorney-client privilege except in the context of a criminal proceeding.[211] For most courts, the communication need not originate from the agency's senior officials.[212] Rather, communications of all government employees are protected along the same lines as *Upjohn* protected communications of lower-level corporate employees.[213] Nonetheless, the agency still retains the right to invoke or assert the privilege.[214] To meet the confidentiality requirement, the communication's underlying facts must be unknown to third parties,[215] and the communication itself must have a limited distribution to those officials with a "need to know."[216] Lastly, most courts have failed to analyze the "encouragement" issue, but two courts of appeals have noted pertinent distinctions between private and government clients.[217]

C. *Other Privileges*

Before examining whether public policy supports a governmental attorney-client privilege, it is important to note that the attorney-client privilege is just one of many privileges available to a government litigant.[218] Some of the privileges currently available to the government are the work product privilege,[219] the deliberative process privilege,[220] the

211. *See supra* note 202 and accompanying text.
212. *See supra* note 144 and accompanying text.
213. *See supra* notes 146-57 and accompanying text.
214. *See supra* note 145 and accompanying text.
215. *See supra* note 177 and accompanying text.
216. *See supra* note 187 and accompanying text.
217. *See supra* notes 188-95 and accompanying text.
218. *See infra* notes 220-25 and accompanying text.
219. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 858 & n.2 (D.C. Cir. 1980); Griffith v. Davis, 161 F.R.D. 687, 698 (C.D. Cal. 1995); Coastal Corp. v. Duncan, 86 F.R.D. 514, 519-21 (D. Del. 1980).
220. *See, e.g.*, Mead Data Cent., Inc. v. Department of Air Force, 566 F. 2d 242, 248 (D.C. Cir. 1977); Ferrell v. Department of Hous. & Urban Dev., 177 F.R.D. 425, 431 (N.D. Ill. 1998); Scott Paper Co. v. United States, 943 F. Supp. 489, 496-500 (E.D. Pa. 1996). The deliberative process privilege encourages agency officials to provide decision-makers with frank and honest opinions without the fear of subsequent public disclosure and ridicule. *See generally* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989). The privilege protects "predecisional" and "deliberative" communications, but is subject to a balancing test. *Id.* at 290-98.

presidential privilege,[221] the state secrets privilege,[222] the investigative file privilege,[223] and the bank examination privilege.[224] Except for the work product privilege, all of these privileges have been tailored to meet special needs for government secrecy, while balancing other interests such as open government.[225] In contrast, the historical development of the attorney-client privilege has no roots in the government's need for secrecy.[226]

Furthermore, many legal opinions and documents are protected under either the work product privilege or the deliberative process privilege.[227] The purpose of the deliberative process privilege is to encourage agency officials to provide decision-makers with frank and honest opinions without the fear of subsequent public disclosure and ridicule.[228] Subject to a balancing test, the deliberative process privilege protects communications that are part of "the give-and-take of the consultative process," including legal opinions.[229] The work product privilege protects a lawyer's materials prepared in anticipation of trial, unless the opposing party can demonstrate a "substantial need" and an "undue burden."[230] Additionally, the work product privilege provides a high-level of protection against disclosure of a lawyer's mental impressions or legal strategy.[231]

IV. ARGUMENTS AGAINST A GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege should not be applied to government entities for two policy reasons. First, the possibility that the privilege encourages public officials to consult with counsel is too speculative. Second, the privilege is an inappropriate means for balancing the

221. *See* United States v. Nixon, 418 U.S. 683, 705-13 (1974); *In re* Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997).

222. *See* MCCORMICK, *supra* note 36, § 107, at 150-51.

223. *See id.* § 108, at 153.

224. *See* Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 220-21 (D.C. Cir. 1993).

225. *See* MCCORMICK, *supra* note 36, §§ 107, 108, at 151-53 (discussing policies and interests for various governmental privileges).

226. *See generally* 8 WIGMORE, *supra* note 8, § 2290, at 542-45 (failing to mention any governmental attorney-client privilege).

227. *See* Mead Data Cent. v. Department of Air Force, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (discussing overlap of attorney-client and deliberative process privileges); MUELLER & KIRKPATRICK, *supra* note 58, § 5.31, at 460-61 (discussing overlap of attorney-client and work product privileges); *see also* Barsdate, Note, *supra* note 4, at 1742-43.

228. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

229. *Id.*

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

231. *See id.*; MUELLER & KIRKPATRICK, *supra* note 58, § 5.31, at 460-61

competing policies of open government and government secrecy. Additionally, the legislative history of FOIA and Exemption 5 does not mandate a governmental attorney-client privilege.[232]

A. *The Encouragement Issue*

Dean Wigmore, an advocate of the privilege, recognized that the benefits of the privilege were "speculative," even when the client was a natural person.[233] The *Upjohn* model for a corporate privilege is even more speculative. As noted previously, there is no incentive for a lower-level employee to confide in counsel when senior officers hold the privilege.[234] This flaw in *Upjohn*'s reasoning is equally germane to government clients. However, *Upjohn* had some merit because it provided an incentive to senior corporate management to consult counsel in order to correct wrongdoing and comply with the law.[235] Without a similar incentive to senior government officials, the *Upjohn* model cannot be justified.

Because of the differences between public service and corporate employment, any possible incentive that the privilege would provide to government officials is far too speculative. Public service requires a commitment to honesty, open government, and doing justice;[236] conversely, corporate employment requires a commitment to perform in the best interests of a corporation and its shareholders.[237] This key distinction is exemplified by the fact that government officials, unlike their corporate counterparts, have a constitutional duty to faithfully execute the laws.[238] Of course, one could argue that corporate officers are also under a duty to correct wrongdoing, because of the duty of care that they owe shareholders, and thus do not need any incentive to comply with the law. Whatever the merits of this argument may be, a constitutional duty is obviously greater than any fiduciary duty created by state law. Furthermore, government officials, but not corporate officers, are also under a statutory duty to report wrongdoing.[239]

Therefore, if a public officer is unsure about the complexities and

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232. *See infra* text accompanying notes 250-52.

233. 8 WIGMORE, *supra* note 8, §2291, at 554.

234. *See supra* note 87 and accompanying text.

235. *See supra* notes 91-93 and accompanying text.

236. *See In re* Lindsey (Grand Jury Testimony), 148 F.3d 1100, 1104-08 (D.C. Cir.) (per curiam), *published in full*, 158 F.3d 1263, *cert. denied*, 119 S. Ct. 466 (1998); Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920-21 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

237. *See* ALI, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(a).

238. *See Lindsey*, 148 F.3d at 1108.

239. *See Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920.

uncertainties of the law, she will probably consult a lawyer, not because of the attorney-client privilege, but because an essential part of her job is to comply with the law.[240] The District of Columbia Circuit chose to draw a distinction between criminal and non-criminal cases. However, public servants are charged with complying with all laws, criminal and civil.[241] Common sense dictates that even if no attorney-client privilege existed, government officials would still consult attorneys to ensure that their agencies were following the law.[242]

B. *Open Government*

Unlike corporations, federal agencies must comply with a policy of open government.[243] This policy has been expressed in many writings of the Framers and in the legislative history of FOIA.[244] Privileges are in direct conflict with open government.[245]

Despite a policy of openness, the government undoubtedly requires a degree of secrecy in order to govern efficiently.[246] Even the Founding Fathers recognized the importance of secrecy by conducting closed meetings during the Constitutional Convention.[247] As a result, the law has created a series of privileges that recognize the government's special needs for secrecy.[248] For example, the deliberative process privilege allows government officials to make frank recommendations on policy.[249] Many legal opinions would be protected under this privilege.[250] Of course, the government does more than govern; it also litigates. Government lawyers need confidentiality when preparing strategies for upcoming litigation. The work product privilege serves this need by protecting an attorney's mental impressions.[251]

Using the attorney-client privilege to serve the government's needs for secrecy is like hammering a square peg into a round hole. The attorney-client privilege just does not fit a government client. A prime example is

240. *Cf. Lindsey*, 148 F.3d at 1104-08; *Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920-21.

241. *Cf. Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920-21; *Reed*, 134 F.3d at 356.

242. This observation comes in part from the author's own experience in government, which was not as a lawyer.

243. *Cf., e.g.*, EPA v. Mink, 410 U.S. 73 (1973).

244. *See* Wald, *supra* note 100, at 650-54.

245. *See Reed*, 134 F.3d at 356; *see also* In re *Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920.

246. *See* Nixon v. United States, 418 U.S. 683, 705 n.15 (1974).

247. *See id.*

248. *See supra* notes 220-25.

249. *See supra* note 221.

250. *See supra* note 221.

251. *See* MUELLER & KIRKPATRICK, *supra* note 58, § 5.32, at 468.

the *Mead Data* decision, which narrowed the scope of the common law privilege by requiring that, when the government is the client, a communication's underlying facts must be confidential in order for the communication to be protected.[252] *Mead Data* and other decisions are understandable, for judges probably intuitively fear that applying the common law confidentiality requirement would permit government agencies to shield too much information from the public, especially when every agency is inundated with lawyers. However, tinkering with the attorney-client privilege is the wrong method for combating this problem. Courts do need to balance the government's need for secrecy with the policy of open government, but developing other privileges, rather than distorting the common law attorney-client privilege, is a more suitable means for balancing these competing policies.

C. *Legislative History*

For a court to abrogate the governmental attorney-client privilege, it must explain the rather explicit legislative history of FOIA. The Senate report accompanying FOIA stated Exemption 5 "would include . . . documents which would come within the attorney-client privilege if applied to private parties."[253] The language appears to mandate a governmental attorney-client privilege.

However, when FOIA was passed in 1967, there was only one case in which a court discussed a governmental attorney-client privilege.[254] Because of a lack of developed case law and the obvious differences between entity and individual clients, Congress would have provided specific guidelines if it intended to extend all the rights of the attorney-client privilege to government. Additionally, the Senate FOIA report also stated that Exemption 5 should be construed as narrowly as possible to allow the government to conduct "efficient [g]overnment operation[s]."[255] Lastly, the federal rules of evidence direct that courts formulate privilege rules "in light of reason and experience."[256] Based on all of the foregoing, FOIA's legislative history does not mandate that courts adopt a governmental attorney-client privilege.

V. CONCLUSION

The federal government should not be permitted to conceal evidence by invoking an attorney-client privilege, because the privilege's rationale fails

252. *See supra* text accompanying notes 169, 172-76.
253. S. REP. NO. 89-813, at 2.
254. *See* United States v. Anderson, 34 F.R.D. 518, 523 (D. Colo. 1963).
255. S. REP. NO. 89-813, at 9.
256. FED. R. EVID. 501.

when the client is the government. Applying the privilege to an entity is difficult, but possible, when the entity is a corporate client. However, the government is not a corporation, and the differences between public service and corporate employment warrant abrogating the governmental attorney-client privilege. While the government may have legitimate needs for confidentiality and secrecy, the rationale of the attorney-client privilege is not an appropriate method for achieving those needs.