THE RIGHT TO REMAIN SILENT: ADDRESSING A GOVERNMENT ATTORNEY CLIENT PRIVILEGE IN THE CONTEXT OF A GRAND JURY SUBPOENA

Matan Shmuel
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By Matan Shmuel

Introduction

There is a brewing conflict in Washington over the use of government attorneys to shield quasi confidential information from the public forum via the privilege of attorney client communications. As governments continue to use the attorney client privilege as a shield to conceal unfavorable public information, the Supreme Court must inevitable decide the appropriate scope of the privilege. Although the Supreme Court has declined to do so in the past, it is becoming more and more likely that a determinative ruling must soon be made, or else the privilege might extend so far beyond the scope of its intended usage that virtually all government communications will be precluded from review by a wary public. This issue is serious, and inevitably will soon receive the attention it deserves by an the Court.

The government’s ability to invoke the attorney client privilege in the context of a grand jury subpoena is a controversial issue that deserves more public discussion than it currently receives. At issue is whether an agency of the federal government may prevent compelled disclosure of testimony by a government attorney before a grand jury. This issue raises questions of corruption, public confidence in government, government accountability, and concerns over separation of powers. This article presents some recent congressional investigations that may

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1 Candidate for Juris Doctor, Rutgers School of Law—Camden, 2013. I would like to thank Hon. Dennis Braithwaite, J.A.D. (N.J.) (Ret.), for his wisdom and guidance throughout the writing process. If there is a test for the quality of a mentor, he sets the standard for a bright line rule.
result in grand jury investigations; provides an up-to-date account of the government attorney client privilege across multiple jurisdictions; analyzes the purpose and scope of the attorney client privilege in multiple contexts; and provides a solution for resolving the conflicting circuit law regarding the government attorney client privilege. Here I propose a comprehensive solution, a balancing-factors-test, which accounts for the many unique alternatives, as well as the consequences of each alternative, when addressing the ultimate issue of whether a government attorney client privilege should exist in the context of a federal grand jury investigation.

Recent Congressional Inquiries into Federal Agencies

Sometimes, a congressional investigation into an agency of the federal government will lead to a subsequent criminal investigation by a grand jury. During such an investigation, the grand jury may request an attorney or representative of the agency being investigated to provide testimony regarding the agency’s alleged wrongdoing. Such testimony may ultimately lead to a grand jury indictment. Through this process, the grand jury has significant oversight of government processes. The cases below represent recent congressional investigations into agencies of the federal government. Some of these cases may become grand jury investigations in the future. The rest have either been closed at the congressional level or have led to a grand jury investigation and subsequent indictment.

Recently, GOP leaders in the House of Representatives promised to subpoena documents related to the Federal government’s loans made to now-defunct Solyndra, LLC.² In November

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2011, the House Energy and Commerce Committee issued a subpoena that called for all "internal
“green energy” companies which received federal loans from the United States Department of
Energy beginning in 2009. Obama Administration Offers $535 Million Loan Guarantee to
Solyndra, Inc., Energy.gov (Mar. 20, 2009), http://energy.gov/articles/obama-administration-
offers-535-million-loan-guarantee-solyndra-inc. The Department of Energy lent $535 million to
the solar panel manufacturer in 2009, and the company received much support from the Obama
administration for its revolutionary green technology and job creation opportunities. Dina
Cappiello, White House Refuses to provide Solyndra Documents, Associated Press (Nov. 5,
However, on September 5, 2011 the company filed for bankruptcy protection. David R. Baker,
Solyndra Files Bankruptcy, Employees Sue, San Francisco Chronicle (Sep. 7, 2011),
http://articles.sfgate.com/2011-09-07/business/30121594_1_solyndra-bankruptcy-papers-
bankruptcy-filing. Details following the bankruptcy petition show that Solyndra laid off 1,100
workers in September, but paid quarterly bonuses of between $44,000 and $60,000 to its top
executives prior to the bankruptcy. Solyndra Execs Reaped Bonuses Before Bankruptcy,
Documents Show, FoxNews.com (Nov. 4, 2011),
http://www.foxnews.com/politics/2011/11/04/solyndra-execs-reaped-bonuses-before-
bankruptcy-documents-show/. This began an investigation into potential misuse of taxpayer
money and fraud, conducted by the Federal Bureau of Investigation as well as the House Energy
and Commerce Committee. Amy Harder, FBI Raids Bankrupt Solar Company Solyndra,
National Journal (Sep. 8, 2011), http://www.nationaljournal.com/energy/fbi-raids-bankrupt-
solar-company-solyndra-20110908.
communications” among top White House staff during the period in 2009 when Solyndra sought a $535-million loan guarantee from the government, through its financial troubles in 2010 and, ultimately, during its move toward bankruptcy protection in October 2011.\(^3\) This sweeping subpoena was met with criticism by the White House, which claimed the subpoena was overly broad and constituted a “vast fishing expedition.”\(^4\) The White House has not yet refused to provide documents and staff testimony. However, this event illustrates a potential circumstance where questions about the government’s use of attorney client privilege might arise. If a grand jury later requests similar information from the executive branch, White House Counsel may desire to invoke the privilege to prevent disclosure.

Solyndra is only the most recent investigation by Congress into an agency of the federal government. For example, Congress recently subpoenaed Attorney General Eric Holder to determine his participation in the “Fast and Furious” gun-smuggling operation along the Mexican-American border.\(^5\) Similarly, in prior administrations, Congress has subpoenaed

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\(^5\) Samuel Knight, Issa Subpoenas Top DOJ Officials on Fast and Furious, Main Justice.com (Oct. 12, 2011), http://www.mainjustice.com/2011/10/12/issa-subpoenas-top-doj-officials-for-fast-and-furious-communications. “Project Gunrunner” was the name of an operation conducted by the Bureau of Alcohol, Tobacco, and Firearms to prevent the flow of weapons from the
President Bush for firing federal prosecutors\(^6\) and President Clinton for alleged corrupt land development dealings while governor of Arkansas.\(^7\)

United States to Mexican crime gangs. Sharyl Attkisson, *Gunrunning Scandal Uncovered at the ATF*, CBSNews.com (Feb. 23, 2011), http://www.cbsnews.com/stories/2011/02/23/eveningnews/main20035609.shtml. However, the operation had the precise opposite effect: in an effort to gather intelligence, the ATF pressured gun shops to sell military-type semiautomatic weapons for cash to questionable buyers. Agents were then required to let the guns “walk,” where thousands of guns resurfaced across the Mexican border and were used in multiple murders, including the killing of an American Border Patrol Agent. *Id.* Sources estimate that over 2,500 weapons were allowed to cross into criminal hands through this project. *Id.* After the story made headlines, Representative Darrell Issa (R-Cal.), chairman of the House Oversight and Government Reform Committee, sent a subpoena Wednesday to Attorney General Eric Holder as part of his investigation into the gun trafficking operation known as "Fast and Furious.” William Lajeunesse & Mike Levine, *Issa Issues Subpoena to Holder in Fast and Furious Investigation*, FoxNews.com (Oct. 12, 2011), http://www.foxnews.com/politics/2011/10/12/issa-issues-subpoena-to-holder-in-fast-and-furious-investigation. The subpoena seeks, among other things, all communications regarding the operation from 16 top Justice officials. *Id.*

\(^6\) Lawyer: Bush Told ex-Staff to Ignore Subpoena, Associated Press, MSNBC.com (July 8, 2007), http://www.msnbc.msn.com/id/19662270/ns/politics/t/lawyer-bush-told-ex-staff-ignore-subpoena/#.TqxlHKj9EM.
Of these congressional investigations, Solyndra and Fast and Furious are still ongoing. President Bush’s dismissal of federal prosecutors did not rise to the level of a criminal investigation. However, President Clinton’s “Whitewater” controversy did result in a grand jury investigation and indictment for the Clintons’ partners in the land deal, but not for the President himself.

As grand juries continue to subpoena testimony from government lawyers, federal agencies might feel the need to invoke the attorney client privilege to protect confidential communications. Whether such a privilege exists is the subject of this article. The question is ultimately one of scope, and balance. Does the privilege exist in the context of a federal grand jury investigation? Is there a balance of factors to consider when determining if and how the privilege should apply? This article seeks to address these questions.

Present Status of the Attorney Client Privilege

The government’s ability to invoke an attorney client privilege in a criminal grand jury investigation varies greatly across the federal and State jurisdictions. In some circuits, the privilege is absolute. In others, it is non-existent. Others have not specifically addressed the issue. Presented below is an introduction of the scope and purpose of the attorney client privilege, as well as a multi-jurisdictional analysis of the status and direction of the privilege in the grand jury context.

Rationale of the Attorney Client Privilege

The attorney client privilege is one of the oldest recognized privileges for confidential communications. The attorney client privilege protects from disclosure confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client. The scope of the privilege should not exceed what is necessary to effect the policy consideration underlying the privilege, namely, to encourage clients to make full disclosure to their attorneys.

A question arises when a government entity seeks to invoke the attorney client privilege. The attorney client privilege is governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. A proposed rule of evidence, approved by the Supreme Court but never enacted by congress, defines a client as “a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.” This rule incorporates government entities as clients afforded the privilege, and its non-enactment is at the heart of the debate over whether a government agency can invoke an attorney client privilege in a criminal context.

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9 In re Doe, 886 F.2d 135, 137 (6th Cir. 1989) (“Detroit”).

10 Id. The purpose of the attorney client privilege is to promote open communication between attorneys and their clients so that fully informed legal advice may be given. Restatement Third of the Law Governing Lawyers §68 cmt. C (2000).

11 Fed. R. Evid. 501

Generally, in order to invoke the attorney client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. The substance of the communication is important. The heart of the privilege requires the communication to have the purpose of providing or obtaining legal advice. What matters is the specific nature of the communication and not the broader context within which the communication occurs. The privilege applies only when legal advice is sought from a professional legal advisor in his capacity as such.

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15 Id. For instance, whether the communication contains advice in anticipation of litigation does not determine if the privilege should apply. Id. Instead, the privilege will apply if the substance of the communication deals with a legal issue the client requires counsel’s advice on. Id. The privilege will not serve as a blanket to protect communications made solely in preparation for litigation, or for the purposes of an investigation. Id.

16 U.S. v. W.R. Grace, 455 F. Supp. 2d at 1145 (D. Mont. 2006). “Therefore, not all communications made to an attorney will be privileged. The communication must be made to an attorney in the context of seeking legal advice. It will not automatically be deemed privileged because the person who the communication is made to has a license to practice law.” Id.
Application of the privilege is not uniform across jurisdictions. In some, the attorney client privilege applies even when the government attorney is a private law firm.\textsuperscript{17} Other jurisdictions recognize the government’s right to an attorney client privilege in accordance with state law.\textsuperscript{18} However, courts generally have the last word when it comes to interpreting state statutes governing privilege.\textsuperscript{19}

\textsuperscript{17} \textit{In re Farber}, 241 N.J. Super. 18 (1989) (\textit{“Farber”}). A New Jersey county retained a private law firm to represent the board of freeholders and bring the Adjuster’s office into compliance with current laws and regulations. A grand jury subsequently subpoenaed the attorneys who represented the freeholder board to determine the attorneys’ activities with respect to their engagement by the county. The attorneys filed a motion to quash the subpoena on the basis that the appearance would intrude upon the attorney client privilege and that much of the proposed testimony was protected as work product. \textit{Id.} at 23.

\textsuperscript{18} \textit{Id.} at 3. A New Jersey statute expressly recognized that public scrutiny of matters traditionally falling within purview of the attorney client privilege is often inimical to the public interest, notwithstanding that a governmental entity is the client. \textit{Id.} at 29. The Open public meetings act N.J.S.A. \textsection{4-12b(7) states that “a public body may exclude the public from that portion of a public meeting involving…any matters falling within the attorney client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.”} \textit{Id.}

\textsuperscript{19} New Jersey tempered its legislative enactment by requiring the privilege to accord the shield of secrecy only with respect to confidential communications made within the context of the strict relation of attorney and client. \textit{Farber} at 30. This method prevents abuse of the privilege by
Consistent application of the privilege is not guaranteed in all states. Some, for example, look to state law to determine if the privilege should apply at the federal level. However, in other jurisdictions, the courts do not recognize a governmental privilege of confidentiality. Sunshine laws in Rhode Island and North Carolina, for example, require that the government disclose all information relative to public decisions and also requires that they hold open public meetings for the transparency benefit of their citizens. In most other jurisdictions, where the legislature is dormant on this issue, the common law governs the privilege.

The Federal Circuit Split

Several circuits have come to a conclusion on whether the government can exercise an attorney client privilege in a criminal context. The D.C. circuit seriously confronted the issue in 1998 after President Clinton’s “Whitewater” controversy became a Federal investigation. In the course of this investigation, witnesses Bruce Lindsey and Sidney Blumenthal refused to answer questions propounded before a grand jury on the basis of government attorney client privilege. Based on the President’s compelling need to explore alternatives in the process of shaping requiring the matter to be substantively related to legal work and prevents a blanket government privilege merely by the presence of an attorney.


22 S. Rep. No. 104-280 (1996). The Senate report discusses in complete detail the Clinton’s involvement in the Whitewater Development Corporation while President Clinton was then-Governor of Arkansas.

policies and making decisions, and the difficulty in obtaining such advice except through private
discussions, the D.C. Circuit affirmed the district court ruling that the governmental attorney
client privilege exists even in the context of a federal grand jury subpoena.\textsuperscript{24} However, the court
hesitated to recognize an absolute privilege in such a context. In the context of a federal grand
jury investigation where one government agency needs information from another to determine if
a crime has been committed, the Court determined that the government attorney client privilege
must be qualified in order to balance the needs of the criminal justice system against the
government agency’s need for confidential legal advice.\textsuperscript{25}

The D.C. Circuit subsequently reframed the issue of government attorney client privilege
as a matter of scope. It contended that a government attorney client privilege existed as a matter
of right, but raised the question of whether the privilege should be expanded to include

\textsuperscript{24} \textit{Whitewater} at 32.

\textsuperscript{25} \textit{Id.} at 32-33. The D.C. Circuit essentially placed the same qualifications on the government
attorney client privilege as it did to the executive privilege. \textit{Id.} at 34. The executive privilege
protects confidential communications between the President and his political advisors. \textit{Id.} These
political advisors are often legal advisors to the president as well. \textit{Id.} Instead of burdening the
court with the application of two standards of privilege for what are often commingled legal and
political conversations, the court determined that judicial efficiency and fairness are benefitted
by application of the same standard to both types of communication. \textit{Id.} An absolute
government attorney client privilege would overly complicate communications to the President
for both White House employees and the federal courts, and would unduly frustrate the work of
federal grand juries. \textit{Id.} The court did not deem such a burden necessary for the continued
provision of candid legal advice to the president. \textit{Id.}
protection from federal grand jury inquiry or contracted to prevent concealment from a federal
grand jury. 26 Ultimately the circuit narrowed the privilege such that “when government attorneys
learn, through communications with their clients, of information related to criminal misconduct,
they may not rely on the government attorney client privilege to shield such information from
disclosure to a grand jury.” 27 This decision, however, expressed the district court’s recognition of
a government attorney client privilege; yet the court refused to broadly construe the extent of the
privilege. The case law leaves unanswered questions of how narrow the privilege is focused in
D.C.—the court certainly recognized a right to the privilege in civil and most criminal contexts. 28
But the court specifically “counsel[ed] against ‘expansion of the privilege to all governmental
entities’ in all cases.” 29 Narrowed to such a scope, the privilege cannot be invoked in a federal
grand jury investigation.

The seventh circuit followed a slightly different tack. Instead of refusing to extend an
evidentiary privilege, 30 the court determined that the government attorney client privilege does

26 In re Lindsey, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (“Lindsey”). The court emphasized, “to
argue about an ‘exception’ presupposed that the privilege otherwise applies in the grand jury
context; to argue about an ‘extension’ presupposed the opposite.” Id.

27 Id. at 1278.

28 Id. at 1271.

29 Id. at 1272, quoting 24 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and
Procedure § 5475, at 125 (1986).

30 The court struggled with the semantics of qualifying its decision as an exception to the broad-
based attorney client privilege or an extension of the government attorney client privilege to an
area of law it had not been invoked in previously. Lindsey at 1272.
not have deep historical roots in the common law and rejected the contention that Swidler\(^{31}\) compelled the court to find an absolute privilege in the criminal context because the court acknowledged a government attorney client privilege in the civil context.\(^{32}\) The Seventh circuit was persuaded by policies of candor and loyalty, and declined to extend the privilege to federal grand jury investigations.\(^{33}\)

\(^{31}\) Swidler, 524 U.S. 399 (1998). In Swidler, the Supreme Court determined that attorney client privilege survives the death of a client. This determination was based on deep historical roots of a centuries old privilege. Swidler’s circumstances of a private attorney representing White House officials in the White House Travel Office are similar to other situations where jurisdictions have raised the question of attorney client privilege and government agencies.\(^{32}\) *In re Witness before Special Grand Jury 2000-2, 288 F.3d 289, 292 (7th Cir. 2002) (“Ryan”). In Swidler, the court emphasized that the attorney client privilege extended beyond death uniformly in the civil and criminal contexts. 524 U.S. 399, 404 (1998). The court also recognized that there is no case authority for the proposition that the privilege applies differently in criminal and civil cases. *Id.* at 408-09.

\(^{33}\) Serious arguments against extending the attorney client privilege to protect communications between government lawyers and the public officials they serve include: (1) government lawyers have different responsibilities and obligations than private lawyers. Government lawyers have a higher, competing duty to act in the public interest, as opposed to private lawyers whose primary concern is with protecting their clients. *Ryan* at 293. (2) Government lawyers take an oath, separate from their bar oath, to uphold the constitution of the united states and the laws of this nation; (3) government lawyers are compensated not by their client but by the public fisc. *Id.* at 293. It would be a misuse of public funds to allow a government lawyer to conceal from
The Eight circuit rule is similar: a government entity cannot use the attorney client privilege to withhold potentially relevant information from a federal grand jury.\(^{34}\) The court relied on the fundamental maxim that the public has a right to every man’s evidence.\(^{35}\) This principle is particularly applicable to grand jury proceedings.\(^{36}\) The court was unconvinced that application of the privilege would protect individuals in government.\(^{37}\) It was further concerned that such a privilege would discourage honest and transparent government, which is in the public interest.\(^{38}\) The court also said that the duties of government attorneys will not increase taxpayers otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power. *Id.* at 293.

\(^{34}\) *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997) (“*Starr*”). The holding in *Starr* refuses to invade the attorney client relationships held between individuals and their attorneys. *Id.* at 915. It focuses instead on the government entities that are real parties in interest. *Id.* The holding also does not contest or even investigate whether a government attorney client privilege exists in other contexts besides the federal grand jury investigation. *Id.*

\(^{35}\) *Starr* at 918.

\(^{36}\) *Id.*

\(^{37}\) The actions of white house personnel, whatever their capacity, cannot expose the white house as an entity to criminal liability. *Starr* at 920. While private corporations have a compelling interest in ferreting out misconduct by employees, and thus a need for the privilege, the White House has no such interest. *Id.*

\(^{38}\) “We believe the strong public interest in honest government and in exposing wrong doing 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.” *Starr* at 921.
significantly because government entities are not subject to criminal liability.\footnote{39} Since the entity is immune from criminal sanctions, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation.\footnote{40} For these reasons, the eighth circuit refused to allow a government attorney client privilege to prevent disclosure to a grand jury.

In the First circuit, a district court also recently refused to recognize a government privilege in the context of a federal criminal investigation.\footnote{41} The district court of Puerto Rico

\begin{quote}
“We also believe that to allow any part of the federal government to use its in house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.” \textit{Id.} at 921.
\end{quote}

\footnote{39} “Our holding in this case does not make the duties of government attorneys significantly more difficult. Assuming arguendo that there is a governmental attorney client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate. \textit{Starr} at 921.

\footnote{40} \textit{Id.}

\footnote{41} \textit{U.S. v. Bravo-Fernandez}, 756 F. Supp. 2d 184, 198 (D. P.R. 2010). A government official who is acting in an official capacity when communicating with a state attorney in his official capacity as a state government lawyer cannot invoke the attorney client privilege to prevent disclosure of communications during a federal criminal investigation. \textit{Id.} at 198.
based its decision on the analysis used in the seventh and D.C. circuits. This is the most recent case to question the extent of the government attorney client privilege in a criminal context.

The sixth circuit has not specifically addressed the criminal context of a government attorney client privilege, but it did lay a foundation relied on by other circuits when it upheld a privilege in a civil context. In the only case of its kind published by the sixth circuit, the court did not specifically find that a government body could exercise an evidentiary privilege, but instead vacated a judgment on grounds that the trial court erred in concluding that attorney client privilege did not prevent disclosure of city council meeting minutes because the attorneys hired were representing another branch of the city government. This decision is complicated because it doesn’t address much in the way of federal investigations and government privilege. However, it does shed light on the court’s consideration of applicable state law in determining whether an

42 Id. at 197. See also Ryan, 288 F.3d 289, 294 (7th Cir. 2002) (“interpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinated to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public disclosure”)

43 Detroit, 886 F.2d 135 (6th Cir. 1989).

44 Detroit, 886 F.2d 135, 136. The issue arose out of a subpoena duces tecum for the Detroit city council to produce minutes from four closed sessions. Id. The City of Detroit has a legislative and executive branch. Id. at 138. The court determined that outside counsel retained by one branch on behalf of the city government represented the entire city government in the condemnation proceeding at the heart of this question, pursuant to Detroit Code §4-120. Id. at 138. Therefore, the communications made between the unretained branch of government still is considered a lawyer-client communication and thus within the scope of the privilege. Id.
evidentiary privilege should apply.\textsuperscript{45} It also addresses the attorney client privilege in the context of private attorneys retained to represent government agencies.\textsuperscript{46} And it develops the roots of a government attorney client privilege in civil litigation, so long as the privilege is in concert with the common law.\textsuperscript{47} Based on the court’s reasoning, it appears that the sixth circuit would support a government attorney client privilege in the face of a grand jury subpoena.

In the Fourth Circuit, the government attorney client privilege is addressed only in the civil context. \textit{In re Allen}\textsuperscript{48} affirms, in depth, the use of government attorney client privilege in a civil context.\textsuperscript{49} The decision also supports the sixth circuit application of the privilege to private

\textsuperscript{45} \textit{Detroit} at 138.

\textsuperscript{46} \textit{Id.} This court implicitly accepts that communications made between agencies and private attorneys are privileged in a civil context based on Detroit Code § 4-120. \textit{Id.} at 138.

\textsuperscript{47} \textit{Detroit} at 138-139. The common law in the sixth circuit recognizes a government privilege in a civil context with a private law firm retained to represent the municipal entity. \textit{Id.} at 138.

\textsuperscript{48} 106 F.3d 582 (4\textsuperscript{th} Cir. 1997).

\textsuperscript{49} In this case, a consumer watchdog group filed suit against the West Virginia Attorney General’s office after a political dispute wherein the Attorney general registered the name Better Government Bureau in order to prevent the Better Government Bureau West Virginia from incorporating in its state. The move was likely a political one used to suppress the BGB’s presence in the state after BGB made several media attacks directed at the Attorney General and the Assistant Attorney General. \textit{In re Allen}, 106 F.3d 582, 588 (4\textsuperscript{th} Cir. 1997). The Attorney general retained outside, Barbara Allen, Esq. to investigate possible document mismanagement and confidentiality breaches related to the BGB lawsuit. \textit{Id.} at 589. BGB attempted to depose Attorney Allen, who asserted the attorney client privilege and refused to answer certain questions.
attorneys hired to represent government agencies. However, the fourth circuit has not yet addressed the federal grand jury issues that the D.C. and seventh circuits have ruled on. Again, it appears likely, based on the court’s robust application of the privilege in a civil context, this circuit would apply some form of the government attorney client privilege in a grand jury context as well.

Defying its sister circuits, the second circuit both identified the question of the privilege’s applicability and, in doing so, created the famed circuit split. In 2005, the Second Circuit determined that the government may invoke the attorney client privilege in the federal grand jury context. The court determined that the benefits of the attorney client privilege are more important to the public interest than the costs. The court came to this conclusion by comparing the privilege under a Connecticut statute, which would have prevented disclosure of

and reveal certain documents. Id. at 590. The Appellate Court determined that special counsel retained to conduct an investigation using her legal expertise qualifies for the protections of attorney client privilege. Id. at 603. The court further concluded that this privilege applies to communications made with current as well as former employees of the government agency. Id. at 608-09. The court applies, without hesitance, a government attorney client privilege in the civil context presented here.

In re Grand Jury Investigation, 399 F.3d 527 (2nd Cir. 2005) (“Rowland”).

To be sure, it is in the public interest for the grand jury to collect all the relevant evidence it can. However, it is also in the public interest for high state officials to receive and act upon the best possible legal advice. Rowland at 534.
communications to state prosecutors.\(^{52}\) The court also noted that “it is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.”\(^{53}\) While the court expressed some concern that the privilege is only secure so long as no government official authorizes a waiver, nevertheless it refused to “jettison a principal as entrenched in our legal tradition as that underlying the attorney client privilege.”\(^{54}\) Further, the court declined to “fashion a balancing test, or otherwise establish a rule whereby a ‘generalized assertion of privilege must yield to the demonstrated, specific need for evidence.’”\(^{55}\) By refusing to circumscribe the privilege with a balancing test, the court essentially posed a direct challenge to the Supreme Court to determine, once and for all, what the status of the government attorney client privilege in a federal grand jury investigation context ought to be.

\(^{52}\) In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure. Conn. Gen. Stat. § 52-146r(b).

\(^{53}\) Rowland at 534. The court further explained, “Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensible part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.” Id.

\(^{54}\) Rowland at 535.

In sum, the circuits have been split on this issue only relatively recently. The issue hadn’t really aroused suspicion until 1997, when President Clinton was investigated for corruption related to a real estate development project. For almost ten years afterwards, the circuits had quietly accepted the rulings of the DC, Eighth, and Seventh circuits, holding that government communications with attorneys do not have an expectation of privacy in federal grand jury investigations. However, the 2005 Second circuit ruling challenged the holdings of the D.C., seventh, and eighth circuits and pushed the issue to the forefront. Should the Supreme Court choose to review this issue, this article provides a guideline for the court to apply below.

**Resolving the Conflict at Law**

Resolving the circuit split involves fashioning a balancing test which weighs the competing interests of the government, the public, and the grand jury. The government’s primary interest in the attorney client privilege is to prevent disclosure of private communications made between insiders, which could potentially embarrass or thwart government efforts if made public. The public’s interest is in complete disclosure; generally, the public benefits from transparency. And the grand jury’s interest lies in retrieving information that might not be available through other sources. These three competing interests form the crux of the balancing test, although the test should also include a review of state law to determine the legislative interest of the people in those jurisdictions. While a bright-line rule is not recommended, a rule which places the balance in favor of disclosure, rebuttable by a significant evidentiary showing from the party invoking the privilege, can satisfy each of the competing needs in these cases.

*Protecting Government Employees*
An important factor in jurisdictions that extend the attorney client privilege to government agencies is protection of the public interest. On the one hand, nondisclosure impinges on open and accessible government.\(^{56}\) On the other hand, public officials are duty bound to understand and respect constitutional, judicial, and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest.\(^{57}\) Sometimes, the protections afforded by the privilege ultimately promote the public interest, even when they might impede the search for truth in a particular criminal investigation.\(^{58}\) If the government attorney is required to disclose internal communications with counsel upon grand jury request, it is sheer fantasy to suggest that it will not make internal government investigations more difficult, to the point of being impossible.\(^{59}\) Remember, the privilege serves to promote the free flow of information to the attorney as well as to the individual with whom he communicates.\(^{60}\) The government attorney requires candid, unvarnished information from those employed by the office he serves so that he may better discharge his duty to that office.\(^{61}\) These are legitimate concerns that need to be taken into account when determining whether to abrogate or extend the privilege.

*Protecting the Public*

\(^{56}\) *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

\(^{57}\) *Id.*

\(^{58}\) *Rowland*, 339 F.3d at 534.


\(^{60}\) *Rowland*, 399 F.3d 527, 535 (2005).

\(^{61}\) *Id.*
Conversely, Courts and commentators have cautioned against broadly applying the privilege to governmental entities. The recognition of a governmental attorney client privilege imposes the same costs that are imposed in the application of the corporate privilege, but with an added disadvantage. The governmental privilege stands squarely in conflict with the strong public interest in open and honest government. With respect to investigations of federal criminal offenses committed by government officials, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. For more than two hundred years, each officer of the executive branch has been bound by an oath or affirmation to preserve, protect, and defend the constitution of the United States. This oath commands a higher duty to the American public than to the individual office. Unlike a private practitioner, the loyalties of a government lawyer cannot and must not lie solely with his or her client agency.

The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the

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63 Id.

64 Id.

65 Lindsey, 158 F.3d 1263, 1272 (1998).

66 Id.

67 Id. at 1272-73.

68 Id. at 1273.
government.\textsuperscript{69} The proper allegiance of the government lawyer is complemented by the public’s interest in uncovering illegality among its elected and appointed officials.\textsuperscript{70} The public interest is protected by having a transparent and accountable government.\textsuperscript{71} Therefore, allowing the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.\textsuperscript{72} For these reasons, the public interest is generally better protected by curtailing the government attorney client privilege.

\textit{Preserving the Functions of the Grand Jury}

The role of the grand jury is an important element of our criminal justice system. “The grand jury, a constitutional body established in the Bill of Rights, ‘belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.’” \textsuperscript{73} The Grand Jury has broad investigatory powers, which entitles it, as a representation of the public, to “every man’s evidence.”\textsuperscript{74} An investigation without access to specific facts in a criminal prosecution may be totally frustrated.\textsuperscript{75} Taken in balance with the respect for privileged communications, confidentiality will only suffer in those situations where a grand jury sees fit to

\textsuperscript{69} Lindsey at 1273

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Whitewater, 112 F.3d 910, 921 (1997).


\textsuperscript{74} Starr, 112 F.3d 910, 919 (1997).

\textsuperscript{75} Id.
investigate.\textsuperscript{76} Because of its unique role and importance in our legal system, the grand jury must be seriously considered in determining the government’s ability to invoke a privilege and prevent testimony before the grand jury.

\textit{Addressing the Federal Circuit Split}

One possible solution to the circuit split is to eliminate the government attorney client privilege in the criminal context. This solution would apply the judgment of the D.C, seventh, and eighth circuits across all jurisdictions. This results in a uniform circuit-wide application, eliminating a government attorney client privilege across the board. This solution will require government actors to use private attorneys for potential personal criminal investigations. And it will still allow government agencies to receive candid political advice by their advisors, who will be protected by the executive privilege.\textsuperscript{77} However, issues may eventually arise if government lawyers begin to provide legal advice disguised as political advice.

But a better solution requires the court to utilize a balancing test to determine whether the government attorney client privilege ought to apply. The court already employs a balancing test

\textsuperscript{76} \textit{Id.} at 921.

\textsuperscript{77} “Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.” \textit{United States v. Nixon}, 418 U.S. 683, 705-06 (1974)
for the executive privilege. This balancing test “resolves the competing interests” in a manner that preserves the essential functions of each branch. The test considers the importance of shaping policy and exploring alternatives that sometimes must be done in a way that many would be unwilling to express except privately. The test also recognizes that private communications are presumptively privileged and fundamental to the operation of government, as well as rooted in the separation of powers under the constitution. However, the court acknowledges the importance of the rule of law, and the necessity in the adversarial system of developing all relevant facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts. In light of these weighty factors, the court fashioned a

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78 See U.S. v. Nixon, 418 U.S. 683 (1974) (“neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances”).

79 The competing interests in questions of revealing confidential presidential communications to an investigation are the need for protection of communications between high end government officials and their advisors, as well as the need for the courts to function in accordance with their constitutional duties by doing justice in criminal proceedings. Id. at 705-07.

80 Id. at 707.

81 Id. at 708.

82 U.S. v Nixon at 708

83 Id. at 709.

84 Id.
test whereby “the generalized assertion of privilege must yield to demonstrated, specific need for evidence in a pending criminal trial.”  

A similar balancing test can be applied in the present context—a general governmental entity privilege of attorney-client communications. The balancing test should be comprised of three components: (1) determining the public interest in disclosure; (2) weighing the government’s interest in confidentiality balanced against disclosure’s negative impact on the public; and (3) determining the grand jury’s ability to acquire relevant information from other sources. These three factors should be weighed against each other to determine whether the government’s desire for secrecy should be upheld. In each case, the court can weigh the benefits of each factor and determine the most appropriate outcome for the unique circumstances at bar.

Determining the public’s interest is the most challenging prong of the test. In states where a government privilege is specifically provided by statute, confidentiality might prevail. But confidentiality will only prevail when the need for secrecy outweighs the public benefit in disclosure and the grand jury’s ability to get the information elsewhere. State statutes like Connecticut’s 86 assist in weighing the public-benefit prong of the test, but are not dispositive on

85 Id. at 713. When the grounds for asserting the privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. Id.

86 “In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileges and a government attorney shall not disclose
their own. Statutes merely reflect “that the protections afforded by the privilege ultimately promote the public interest, even when they might impede the search for truth in a particular criminal investigation.”

It is important to note that Connecticut is the only state that statutorily preserves a government attorney client privilege in the criminal context. Certainly, many states have enacted evidentiary statutes which classify a “government entity” as a client for the purposes of attorney client privilege. But other states have tempered the government’s attorney client privilege when any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure. Conn. Gen. Stat. §52-146r(b).

87 Rowland at 534.

it contradicts with the public benefit in disclosure. And some have purposefully omitted government entities from their privilege statutes. Because each state treats the government attorney client privilege differently, statutes should not dictate, but merely guide courts, in determining the public’s desire for confidentiality or disclosure.

After determining whether the public favors disclosure or confidentiality, the court should balance the other factors against the public benefit factor to determine whether a grand jury may subpoena the testimony of the government attorney. In cases where the government’s need for confidence outweighs the public interest in disclosure, the privilege will remain intact. In instances where the grand jury requires the testimony to reach a determination, the privilege will collapse. There is no better way to protect both the public and the government, than by

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forcing both sides to provide merit for their need for the information. Courts are the appropriate forum for determining the balance, since courts have often applied balancing tests in their deliberations.  

Determining where the balance lies is the tricky part. In criminal cases, it is surely in the public interest for the grand jury to collect all the evidence it can. But public interest is not a zero-sum game. Often times, the public loses when confidential government information becomes public knowledge. In these cases, the balance must favor confidentiality. The decision

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91 See United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) (applying a balancing test to determine if government employees could receive honoraria for speeches); see also United States v. Loud Hawk, 474 U.S. 302 (1986) (applying a balancing test to compare the need for speedy trial versus the quality of appellate review); New Jersey v. T.L.O., 469 U.S. 325 (1985) (applying balancing test to determine if search of a student’s purse violated fourth amendment).

92 Rowland, 399 F.3d at 534.

93 Robert Booth et al, WikiLeaks Cables: Bradley Manning Faces 52 Years in Jail, The Guardian (Nov. 30, 2010), http://www.guardian.co.uk/world/2010/nov/30/wikileaks-cables-bradley-manning. Bradley Manning gave away private state department communications to an internet website. Hillary Clinton, the secretary of state, said it "tore at the fabric of government" and pledged "aggressive steps to hold responsible those who stole this information". Republicans branded it terrorism. Id.
should be based on a “clear and convincing” evidence standard.\textsuperscript{94} A clear and convincing standard requires a trier of fact to “believe it is highly probably that an allegation is true.”\textsuperscript{95} This is a higher burden of proof than the preponderance of the evidence test, which only requires a trier of fact to “believe it is more probable than not that an allegation is true.”\textsuperscript{96} But clear and convincing proof is a lower standard than “beyond a reasonable doubt,” which requires one to be “almost certain that an allegation is true.”\textsuperscript{97}

Under a “clear and convincing” standard, the government entity attempting to protect its communications must prove it is highly probable that revealing the communications would harm the public. This high burden of proof will ensure that most communications will face disclosure. But those of an extremely sensitive nature will be kept confidential.

A “clear and convincing” burden connected with the balancing test will ensure that most communications result in disclosure. Only extremely sensitive matters of national security, or those matters that are ongoing and which could result in serious physical injury or death to government actors, will remain protected from a grand jury investigation. These matters might include government communications which have foreign policy consequences, or cases where

\textsuperscript{94} See Clark v. Arizona, 584 U.S. 785, 797 (2006) (explaining that “clear and convincing” is a lower standard of proof than “beyond a reasonable doubt”); see also Addington v. Texas, 441 U.S. 418, 422 (1979) (explaining that “clear and convincing” is a higher burden than “a preponderance of the evidence”)


\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.}
clandestine government actors might be revealed through disclosure. However, the government’s concerns over disclosure may be tempered by the privacy requirements of grand jury proceedings. Unless a grand jury returns an indictment, the grand jury’s investigation into any government communications will remain confidential.98

Applying the balancing tests to the cases mentioned above supports the validity of the test. If a grand jury requests communications made by the executive branch regarding its Solyndra loan, those communications will probably be disclosed. This is because the government will have a difficult time showing clearly and convincingly that the Solyndra due diligence had foreign policy implications. After all, it was a loan made to an American company manufacturing on U.S. soil. While multinational trade may have been impacted, it is a stretch to assume sovereign relationships were affected by the government’s loan.

However, “Fast and Furious” may have a different outcome. The government will have to prove by clear and convincing evidence that disclosure will cause serious damage to an ongoing investigation. In this case, it is highly likely that the outcome will result in protection of communications. Multiple federal agents are currently on the line in a violent drug and gun trafficking investigation, and revealing their participation may be extremely harmful to both the Agency’s interest in continuing the operation, as well as the lives of the agents themselves.

If a grand jury decided to investigate the politically motivated firing of federal prosecutors by the Bush administration, the balance would probably require government disclosure. Again, the burden of proof would have been too high for the President to withhold his

98 Fed. R. Crim. P. 6(e)(2).
reasons for firing the prosecutors. And the public would likely have benefitted from disclosing the President’s reasons for his decision. Also, the grand jury would likely not be able to obtain the information from the fired attorneys. The balance favors disclosure in this case.

Finally, looking at the Whitewater investigation with the benefit of hindsight, it also would have resulted in disclosure under this test; the government would have had to prove serious injuries to the government would have occurred by disclosure, which simply was not the case. President Clinton’s reputation was muddied a bit, but Whitewater did not impact his ability to lead the nation. It did, however, lead to the indictment and conviction of the President’s business partners.

In the end, the weight of the balance favors disclosure, with exceptions made in the case of highly sensitive official communications. The public interest more strongly favors disclosure, so long as lives are not at risk in ongoing federal investigations. The weighted factors—public interest in disclosure, government interest in protection, and the constitutional purpose of the grand jury—all combine to favor disclosure as a general rule. Judges will be the ultimate decision makers, basing their decisions on the arguments of both the government entity-defendant and the federal prosecutors who requested the subpoena.

**Conclusion**

The government’s ability to invoke the attorney client privilege in the face of grand jury investigations is a controversial issue that deserves serious deliberation. The circuits have taken opposing positions on whether the federal government can invoke such a privilege in the grand jury context. The D.C., seventh, and eighth circuits have determined the public interest requires a government attorney to testify against the wishes of his government client. But the second circuit
determined that the public benefit is better preserved through maintenance of government confidentiality. In order to resolve the conflict at law, this article proposes a comprehensive balancing test for the courts to apply on an individual basis. When the public is better served by disclosure of the testimony, the privilege should be abrogated. However, when the government’s need for confidentiality outweighs the benefits of disclosure, the privilege should be sustained. This is ultimately an issue for courts to determine, as there is no bright line rule that can resolve the inherent conflicts that arise out of a need for confidentiality and trust that attorney and client require from one another. The balancing test proposed, which weighs the competing interests of the government, the public, and the grand jury, is the best solution for resolving the conflict and creating a uniform government attorney client privilege.