The Search and Seizure of Privileged Attorney-Client Communications

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A customs agent seizes a notepad out of an individual’s briefcase over his objection that its contents are privileged; the notepad is later used to create a “roadmap” for the government’s case against him. An agent conducting electronic surveillance continues listening to a phone call between a suspect and his attorney after it becomes clear that the conversation is privileged; the suspect argues that the agent failed to comply with the minimization provision of the federal wiretap statute. Government agents seize more than a hundred file cabinets and close to a thousand boxes of documents from a suspect’s warehouse and search them for evidence of embezzlement and money laundering; the suspect moves to suppress the fruits of the search on the grounds that privileged documents were illegally searched and seized. A prison warden authorizes monitoring of an inmate’s conversations with his attorney because the attorney general concluded that there was reasonable suspicion that they would use the occasion to further acts of terrorism; the inmate argues that this violates his constitutional rights.

Each of these scenarios presents a question that the federal courts have yet to resolve in a consistent, principled way: what is the relationship between the attorney-client privilege and the Fourth Amendment’s protection against unreasonable searches and seizures?

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1 See United States v Lin Lyn Trading, Ltd, 149 F3d 1112, 1113 (10th Cir 1998).

2 See United States v DePalma, 461 F Supp 800, 817 (SD NY 1978).

3 See United States v Pelullo, 917 F Supp 1065, 1075 (D NJ 1995).

4 See 28 CFR § 501.3(d) (2003) (allowing the attorney general to order the monitoring of communications between an inmate and his attorney where “reasonable suspicion exists to believe that [the] inmate may use communications with attorneys...to further or facilitate acts of terrorism”).

5 See Al-Owhali v Ashcroft, 279 F Supp 2d 13, 16 (D DC 2003).

6 These cases may also present other constitutional questions that are beyond the scope of this Comment, such as whether the government’s interference with the attorney-client relationship violates a defendant’s Sixth Amendment right to counsel, see Weatherford v Bursey, 429 US 545, 554 (1977) (suggesting that government intrusion into the attorney-client relationship can give rise to a Sixth Amendment violation when prejudice to the defendant results), or deprives him of due process of law under the Fifth or Fourteenth Amendment, see United States v Voigt, 89 F3d 1050, 1067 (3d Cir 1996) (setting forth the elements of a due process claim based on a government intrusion into the attorney-client relationship).
This Comment seeks to answer that question in a way that accounts for both the existing case law and the general principles embodied in the attorney-client privilege and the Fourth Amendment.

In particular, this Comment argues that because of the compelling privacy interest embodied in the attorney-client privilege, it is unreasonable for law enforcement agents to search and seize communications that fall within its scope—even if the agents have probable cause and a warrant. This Comment concludes that the Fourth Amendment is violated when the government purposely, knowingly, recklessly, or negligently searches privileged attorney-client communications. In other words, the Fourth Amendment is violated whenever law enforcement officials have reason to believe that a search or seizure is likely to expose them to privileged attorney-client communications and fail to take reasonable steps to minimize their exposure.

This Comment proceeds in four parts. Part I contains a brief overview of the attorney-client privilege and the Fourth Amendment. Part II recites and rebuts several arguments against extending Fourth Amendment protection to privileged attorney-client communications. Part III surveys the case law, noting that courts consistently condemn searches and seizures of privileged attorney-client communications and suggesting that the Fourth Amendment's mandate of reasonableness is a plausible candidate for the authority on which they do so. Part IV discusses when and how the government should implement minimization procedures to screen privileged communications during a search, as well as the remedy for failure to minimize.

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7 As explained below, the ultimate interest the attorney-client privilege serves is the administration of justice. However, because that interest can be realized only by respecting the privacy of attorney-client communications, and because the attorney-client privilege in fact protects the privacy of attorney-client communications, it is appropriate to speak of the attorney-client privilege as embodying a privacy interest.

8 When law enforcement officials accidentally or otherwise nonculpably search or seize privileged attorney-client communications, there is probably no Fourth Amendment violation. See Illinois v Rodriguez, 497 US 177, 185–86 (1990) ("[I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government... is not that they always be correct, but that they always be reasonable."). When this Comment refers to the government's search and seizure of privileged communications, it therefore assumes that the government agents act with some level of culpability.
The attorney-client privilege is a rule of evidence that protects certain attorney-client communications from compelled disclosure. The classic statement of the attorney-client privilege is that:

(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.

The privilege reflects society's judgment that effective legal representation is necessary to the administration of justice in our adversarial system, that effective representation requires "full and frank communication between attorneys and their clients," and that full and frank communication cannot be secured without legal protection against compelled disclosure of the content of attorney-client communications.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourth Amendment is designed to prevent the government from invading the privacy of its citizens without adequate justification, and a search occurs within the meaning of the Fourth Amendment when law enforcement officials engage in conduct that invades a citizen's "reasonable expectations of privacy." Once it has been determined that the conduct of government
agents invaded a reasonable expectation of privacy and therefore consti-
tuted a search, the question becomes whether the search was rea-
sonable. Only unreasonable searches violate the Fourth Amendment.

A search is generally considered reasonable when it is authorized
by a warrant, supported by probable cause, that particularly describes
the things to be searched and seized.\textsuperscript{15} However, there are cases in
which a search and seizure is unreasonable even if supported by prob-
able cause and authorized by a judicial official. For example, in
\textit{Winston v Lee,}\textsuperscript{16} the Supreme Court held that performing a court-
ordered surgery on a suspect in order to remove a bullet from his
chest would violate the suspect's Fourth Amendment rights.\textsuperscript{17} The
Court reasoned that "[a] compelled surgical intrusion into an individ-
ual's body for evidence [...] implicates expectations of privacy and secu-
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ty of such magnitude that the intrusion may be 'unreasonable' even
if likely to produce evidence of a crime."\textsuperscript{18} This Comment argues that
the attorney-client privilege embodies a privacy interest of such mag-
nitude that searches and seizures of privileged attorney-client com-
munications are unreasonable even if likely to produce evidence of a

\section{II. THE INTERSECTION OF THE ATTORNEY-CLIENT PRIVILEGE AND
THE FOURTH AMENDMENT: SOME PRELIMINARY OBSERVATIONS}

How these two pillars of our legal system—the attorney-client
privilege and the Fourth Amendment—interact is not self-evident.
While it may be true that "[t]he attorney-client privilege is an eviden-
tiary privilege, not a constitutional right,"\textsuperscript{19} it is also true that "the gov-
ernment's violation of [the] attorney-client privilege ... may [...] give
rise to constitutional concerns."\textsuperscript{20} In other words, to conclude that the

\textsuperscript{15} See US Const Amend IV ("[N]o Warrants shall issue, but upon probable cause ... and
particularly describing the place to be searched, and the persons or things to be seized.").
\textsuperscript{16} 470 US 753 (1985).
\textsuperscript{17} Id at 755.
\textsuperscript{18} Id at 759. A search and seizure supported by probable cause can also be unreasonable
when the items sought are protected by the First Amendment, as might be the case, for example,
when law enforcement officials seize materials alleged to be obscene. See \textit{Fort Wayne Books, Inc
v Indiana}, 489 US 46, 63 (1989) ("[W]hile the general rule under the Fourth Amendment is that
any and all contraband, instrumentalities, and evidence of crimes may be seized on probable
cause ... it is otherwise when materials presumptively protected by the First Amendment are
involved.").
\textsuperscript{19} \textit{In re Witness Before the Grand Jury}, 631 F Supp 32, 32 (ED Wis 1985). See also \textit{Lange v
Young}, 869 F2d 1008, 1012 n 2 (7th Cir 1989) ("The attorney-client privilege is a creation of the
common law, not the Constitution."); \textit{Clutchette v Rushen}, 770 F2d 1469, 1471 (9th Cir 1985)
("Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been
held a constitutional right.").
\textsuperscript{20} Paul R. Rice, 2 \textit{Attorney-Client Privilege in the United States} § 10:1 at 7 (West 2d ed 1999).
Constitution does not require a jurisdiction to recognize the attorney-client privilege is not to conclude that the government can violate the privilege without violating the Constitution. The fact that the attorney-client privilege is without constitutional grounding does not imply that it is reasonable for the government to search and seize privileged attorney-client communications.

It seems clear, for example, that citizens have an expectation of privacy in their privileged communications with attorneys; the privilege attaches only to communications made in confidence. It also seems clear, given the universal acceptance of the attorney-client privilege, that that expectation is reasonable. Thus, when government agents access privileged attorney-client communications, they conduct a search within the meaning of the Fourth Amendment.

What is arguably less clear—and what this Comment seeks to elucidate—is whether the Fourth Amendment allows law enforcement officials to search and seize privileged communications when they have probable cause, as they often will, to believe that those communications contain evidence of crime, or whether instead the search and seizure of privileged attorney-client communications, even when based on probable cause and conducted pursuant to a valid warrant,

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21 See DeMassa v Nunez, 770 F2d 1505, 1506 (9th Cir 1985) (“It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney.”) (emphasis omitted).

22 It may seem odd to say that there can be probable cause with respect to privileged communications, but the fact that probable cause exists with respect to an item does not necessarily mean that its seizure is constitutional. See notes 16–18 and accompanying text. Probable cause exists when the item is likely to be the fruit, instrumentality, or evidence of crime, and privileged communications will often contain highly probative evidence of crime. Thus, whether probable cause exists with respect to a communication and whether the communication is privileged are distinct inquiries. See United States v Friedemann, 210 F3d 227, 229 (4th Cir 2000) (“[T]he question whether a document is privileged has nothing at all to do with the separate question whether there existed probable cause.”).

23 Attorney-client communications, especially in criminal cases, will often contain evidence of past crime. These communications are generally covered by the privilege. See, for example, Sound Video Unlimited, Inc v Video Shack, Inc, 661 F Supp 1482, 1486 (ND Ill 1987) (“[T]he attorney-client privilege remains intact when a person consults an attorney in an effort to defend against past misconduct.”). If attorney-client communications are used to facilitate future crime, they fall within the crime-fraud exception and are not privileged. See, for example, United States v Edwards, 303 F3d 606, 618 (5th Cir 2002) (“Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome where communication . . . is intended to further continuing or future criminal or fraudulent activity.”) (internal quotation marks omitted). When the government has reason to believe that an attorney-client communication falls within the crime-fraud exception, a court may require the client to submit the communication for an in camera adjudication of its status. See United States v Zolin, 491 US 554, 572 (1989) (“Before engaging in in camera review . . . the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”) (internal quotation marks and citation omitted).
should be considered unreasonable in violation of the Fourth Amendment. The case law has not squarely confronted this question. Though courts have consistently condemned the search and seizure of privileged attorney-client communications, they have generally done so without explicitly relying on the Fourth Amendment, and the basis for such holdings remains unclear. Before turning to the case law, however, it is worth considering some of the arguments that the government might advance in support of the proposition that the search and seizure of privileged attorney-client communications does not violate the Fourth Amendment.

A. The Attorney-Client Privilege: Merely a Creature of State Law?

One can imagine the government arguing that the attorney-client privilege is merely a creature of state law and that the Fourth Amendment does not require law enforcement officials to respect every privilege recognized by the states. For example, if a state created a teacher-student privilege, it probably would not violate the Fourth Amendment for law enforcement officials with probable cause and a warrant to search and seize a letter from a student to a teacher. More to the point, federal courts have suggested that the search and seizure of communications covered by other evidentiary privileges—including the therapist-patient privilege and the spousal privileges—does not trigger the full protection of the Fourth Amendment.

The attorney-client privilege, however, is not just any privilege. It is, as the Supreme Court has emphasized, "the oldest of the privileges for confidential communications known to the common law." The privilege has been recognized in some form in the English common law since the sixteenth century and was recognized in American law during the founding era. Today, the attorney-client privilege is not

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24 See Part III.
25 See, for example, United States v Squillacote, 221 F3d 542, 560 (4th Cir 2000) (holding that the psychotherapist-patient privilege "is a testimonial or evidentiary one, and not constitutionally-based," and that evidence derived from an electronic interception of therapist-patient conversations did not therefore have to be suppressed); United States v Lefkowitz, 618 F2d 1313, 1318 n 8 (9th Cir 1980) ("Because we reject [the] argument that the marital privileges are somehow constitutionally grounded in ... the Fourth Amendment, we doubt that a secondary source of information obtained through information protected by the confidential marital communications privilege would in any way be 'tainted.'").
27 See Paul R. Rice, 1 Attorney-Client Privilege in the United States § 1:2 at 7-11 (West 2d ed 1999).
28 See id § 1:12 at 38–39 ("In twenty reported cases prior to 1820, six states and two federal circuits recognized the privilege.").
only well established in every state, it is also a long-standing fixture of the federal common law.\textsuperscript{29}

Moreover, the attorney-client privilege differs from other privileges in important respects, many of which suggest that the privacy interest protected by the attorney-client privilege is of surpassing importance.\textsuperscript{30} For example, unlike the doctor-patient privilege, which often does not apply in criminal cases\textsuperscript{31} or in certain types of civil proceedings such as workman’s compensation suits,\textsuperscript{32} the attorney-client privilege applies in all proceedings. Similarly, unlike the spousal privilege for confidential communications, which carries with it no general obligation on the part of either spouse not to disclose the content of husband-wife conversations, the attorney-client privilege is buttressed by professional rules that impose a general obligation on attorneys not to disclose the content of their communications with their clients.\textsuperscript{33} Finally, whereas the policy basis for other privileges is the subject of considerable dispute,\textsuperscript{34} there appears to be a reasonably broad consensus that some protection of the privacy of attorney-client communications is necessary to the administration of justice in our legal system.\textsuperscript{35}

\textsuperscript{29} See note 9. See also \textit{In re Bieter Co}, 16 F3d 929, 935 (8th Cir 1994) (noting that courts have relied upon the Proposed Federal Rule of Evidence 503 “as an accurate definition of the federal common law of attorney-client privilege”), quoting \textit{United States v Spector}, 793 F2d 932, 938 (8th Cir 1986).

\textsuperscript{30} The Supreme Court recently reaffirmed the extraordinary strength of the attorney-client privilege by holding that its protections survive the death of the client. \textit{Swidler & Berlin v United States}, 524 US 399, 410 (1998).

\textsuperscript{31} See \textit{United States v Harper}, 450 F2d 1032, 1035 (5th Cir 1971). Unlike the attorney-client privilege, the doctor-patient privilege did not exist at common law, and so it cannot be asserted to suppress evidence in federal criminal trials.

\textsuperscript{32} See Graham C. Lilly, \textit{An Introduction to the Law of Evidence} 483 (West 3d ed 1996).

\textsuperscript{33} See ABA Model Rules of Professional Conduct Rule 1.6(a) (2003) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [Rule 1.6(b)]”).

\textsuperscript{34} For example, many question the necessity of the doctor-patient privilege because individuals already have a strong incentive to communicate openly with their doctors in order to ensure that they receive competent health care. See Wigmore, \textit{Evidence in Trials at Common Law} § 2380a at 829-30 (cited in note 10) (opposing the doctor-patient privilege because its costs to the judicial system outweigh the incremental benefit it produces in doctor-patient candor). Similarly, there is skepticism that the spousal privilege for confidential communications—of which most spouses are ignorant—actually facilitates open communication between spouses. See Lilly, \textit{An Introduction to the Law of Evidence} at 442 (cited in note 32) (“Serious doubt can be raised as to whether the [spousal privilege] produces the desired effect. To begin with... many marital partners are unaware of the existence of the privilege.”).

\textsuperscript{35} See \textit{Swidler & Berlin}, 524 US at 412 (O’Connor dissenting) (“The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence.”) (internal citation omitted).
Furthermore, the attorney-client privilege, unlike other privileges, is essential to the effectuation of constitutional rights, including a criminal defendant's rights to the effective assistance of counsel and a fair trial. Courts have also recognized that government invasions of the attorney-client privilege can deprive an individual of due process under the Fifth and Fourteenth Amendments. In short, if any evidentiary privilege is to be afforded the protection of the Fourth Amendment, none presents a more compelling case than the attorney-client privilege.

One possible objection to affording privileged attorney-client communications Fourth Amendment protection is that, because jurisdictions vary in how they define the scope of the privilege, the scope of the Fourth Amendment would also vary by jurisdiction. There are at least two responses to this assertion. First, it is not necessarily true. Courts could limit Fourth Amendment protection to communications that lie at the core of the privilege—communications that are protected even in jurisdictions that define the privilege most narrowly.

Second, even if the scope of the Fourth Amendment's protection did vary by jurisdiction, such variation would not be unprecedented in constitutional jurisprudence. For instance, what constitutes a protected property interest under the Due Process Clause turns on state law. Just as state law creates and defines property interests that are entitled to constitutional protection, state law could be thought to create and define privacy interests that are entitled to constitutional protection, especially where, as with the attorney-client privilege, the core privacy interest has long been recognized by every jurisdiction and the variance is merely in the details. In the end, it may simply be a question of which is the greater evil—allowing the scope of Fourth Amendment protection to turn in some respects on state law or leaving an important and universally recognized privacy interest unprotected.

36 See United States v Neill, 952 F Supp 834, 839 (D DC 1997) (“The attorney-client privilege, while it has not been elevated to the level of a constitutional right, is key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial.”) (internal citation omitted).
37 See United States v Voigt, 89 F3d 1050, 1066 (3d Cir 1996) (noting that a due process violation “premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice”).
38 See Board of Regents of State Colleges v Roth, 408 US 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”); Goldberg v Kelly, 397 US 254, 262–63 (1970) (holding that statutorily created welfare benefits are protected property).
B. The Attorney-Client Privilege: Merely an Evidentiary Privilege?

One can also imagine the government arguing and courts agreeing that the attorney-client privilege is merely an evidentiary privilege shielding communications from introduction at trial. Thus, even if law enforcement agents search and seize privileged communications, the privilege will prevent their introduction into evidence, and that is the only protection the privilege is designed to afford. It has nothing to say about what happens to privileged communications during the investigatory stage preceding trial, and neither should the Fourth Amendment. On this account, the government is allowed to search and seize privileged communications as to which there is probable cause and use the information thus obtained in preparing its case, so long as the privileged communications, and possibly their fruits, are not introduced at trial.

There are at least two problems with this theory. First, it misconceives the nature of the privilege. It is simply not the case that the attorney-client privilege applies only to the introduction of evidence at trial. For example, privileged communications are not subject to discovery, and this rule is absolute in the sense that it applies even when the party seeking access to the privileged communications can show substantial need. Similarly, a grand jury cannot compel an individual to produce privileged communications, even when there is probable cause to believe that the communications contain evidence of crime.

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39 See United States v Segal, 313 F Supp 2d 774, 776 (ND Ill 2004) (reciting the government's argument, made in response to a defense motion for the return of privileged documents, that "the attorney-client privilege is an evidentiary privilege that only "prohibits the introduction of privileged communications at trial or in the grand jury over the objection of the privilege holder").

40 See United States v White, 970 F2d 328, 336 (7th Cir 1992) ("There is a fundamental difference between the use of privileged information at trial, and its use during the investigatory period.").

41 See United States v Rogers, 751 F2d 1074, 1079 (9th Cir 1985).

42 It is not clear whether violations of the attorney-client privilege, standing alone (that is, without any corresponding constitutional violation), require the suppression of derivative evidence. See note 106.

43 See, for example, Martin v Valley National Bank of Arizona, 140 FRD 291, 306 (SD NY 1991) ("Unlike the deliberative privilege or the work-product rule, the attorney-client privilege . . . cannot be overcome simply by a showing of need.").

44 Courts have recognized an exception to this rule when an investigation involves the possible commission of criminal offenses within the government and the subpoena is directed to a government attorney. See, for example, In re Lindsey, 158 F3d 1263, 1274 (DC Cir 1998) (holding that "a government attorney . . . may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations"). This exception rests on government attorneys' distinctive duty to the public. See id ("[T]o allow . . . 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 gross misuse of public assets.").
It would be anomalous if the government, prohibited from gaining access to privileged attorney-client communications by way of discovery or subpoena, could make an end run around these procedures by searching and seizing the communications.

Second, to refuse to extend the protections of the attorney-client privilege to the investigatory stage preceding trial would be profoundly at odds with the policies behind the privilege. If the government could search and seize privileged communications, attorney-client communications would be severely chilled and lawyers' ability to represent their clients effectively would be undermined. Conscientious attorneys would advise their clients that the government could lawfully intercept their communications. Faced with such a possibility, few clients would feel free to communicate openly with their attorneys.

This chilling effect is unlikely to be eliminated by explaining to clients that their intercepted communications cannot be introduced into evidence at trial. One suspects that such a distinction would be lost on many clients, whose candor is likely to be undermined by the bare threat of government intrusion into the attorney-client relationship and is unlikely to be rehabilitated by a lecture on the permissible uses of intercepted communications. In any event, any such lecture would also include the fact that evidence derived from intercepted communications—as opposed to the communications themselves—may well be admissible, a fact that can only be expected to confirm to clients that they communicate openly at their peril.

Attorney-client communications would be chilled by the search and seizure of privileged communications even if the use of derivative evidence were prohibited. If the government could access privileged information, it would be difficult for anyone, least of all the client, to be confident that no derivative evidence would be introduced at trial. Prosecutors and investigators would almost certainly be able to use privileged information in ways that neither the client nor the judge could detect. That possibility would cause individuals to think twice before disclosing potentially damaging information to their attorneys.

Moreover, attorney-client communications would be chilled even if courts were somehow able to detect and suppress all the fruits of the breach of the privilege. This is because the privilege extends not only to clients' disclosures of factual information about the case that would be damaging if introduced at trial or that would lead investigators to additional evidence, but also to other communications, including, for

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1997). It does not reflect a general notion that the interests of criminal law enforcement trump the attorney-client privilege.

44 See note 106.
example, discussions of trial strategy. A party whose trial strategy had been disclosed would be at a substantial disadvantage and an exclusionary remedy would not be responsive.

Courts have recognized these concerns when a private party searches and seizes her opponent's privileged communications. For example, in a sex discrimination case in which a plaintiff stole privileged documents from her employer's lawyer, the New York Court of Appeals dismissed her complaint, crediting the defendant's argument that its ability to present a defense had been irreparably injured. The court acknowledged that "neither suppression of the documents nor suppression of the information" would have been an adequate remedy.45

The situation is no different when the party that searches and seizes the privileged communications is the government. Prosecutors and other government attorneys who intercept confidential attorney-client communications would have a substantial advantage that would not always depend on the introduction of privileged material or its fruits at trial. The prospect of such an unfair advantage would chill attorney-client communications. In short, if clients are to feel free to communicate openly with their attorneys, they must be free from the apprehension that they will be penalized for doing so. That apprehension can be eliminated only by closing off adversaries, including the government, from all access to privileged communications.

C. The Attorney-Client Privilege: In Derogation of the Search for Truth?

One can also expect the government to argue that because the attorney-client privilege operates in derogation of the search for truth, it should be narrowly construed.47 Courts should therefore not extend the protections associated with it by immunizing privileged communications from search and seizure. There are two problems with this argument. First, it is not accurate to say that the privilege operates in derogation of the search for truth, because without the privilege, many of the statements that it shields would not be made in the first place.48

45 See Lipin v Bender, 84 NY2d 562, 644 NE2d 1300, 1304 (1994) (noting that "the information would yield significant litigation advantage" to the plaintiff, and that the injury was irretrievable because the plaintiff's knowledge could never be purged).
46 Id.
47 See, for example, United States v White, 950 F2d 426, 430 (7th Cir 1991) ("[T]he scope of the [attorney-client] privilege is narrow, because it is in derogation of the search for truth.") (internal quotation marks omitted); United States v Noriega, 917 F2d 1543, 1551 (11th Cir 1990) ("The attorney-client privilege...serves to obscure the truth [and] should be construed as narrowly as is consistent with its purpose.") (internal quotation marks omitted).
48 See Swidler & Berlin, 524 US at 408 ("[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made
On this view, the attorney-client privilege simply serves to restore the status quo ante and is therefore truth-neutral.

The second problem with this argument is that it misses the point. The question is not how we should define the scope of the privilege. Even if courts construe the privilege narrowly so that it covers few communications, that tells us nothing about what should happen to communications that fall within the scope of the privilege once it is defined. When an attorney-client communication is determined to be privileged, it is considered to be absolutely protected from compelled disclosure. It should also be protected from search and seizure.


Despite having heard a large number of cases in which the issue is implicated, the federal judiciary has not yet explained the relationship between the Fourth Amendment and the attorney-client privilege. One searches the case law in vain for a straightforward statement that the Fourth Amendment prohibits government agents from searching and seizing privileged attorney-client communications. However, two lines of cases suggest that federal judges operate on that background assumption. Perhaps the strongest evidence that federal judges assume that privileged attorney-client communications cannot be searched and seized comes from electronic surveillance cases, where the courts have consistently held that agents must minimize the interception of privileged attorney-client communications despite the absence of an explicit statutory directive to that effect.

such communications in the first place.

49 See Chore-Time Equipment, Inc v Big Dutchman, Inc, 255 F Supp 1020, 1021 (WD Mich 1966) ("[I]t generally is acknowledged that the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously.").

50 There is also evidence that law enforcement agencies themselves operate on the assumption that they cannot search and seize privileged attorney-client communications. For example, Justice Department guidelines require agents to follow specified procedures in order to minimize their exposure to privileged material. See U.S. Department of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations II(B)(7)(b) (2002), online at http://www.usdoj.gov/criminal/cybercrime/s&manual2002.pdf (visited Feb 24, 2005) ("Agents contemplating a search that may result in the seizure of legally privileged computer files should devise a post-seizure strategy for screening out the privileged files and should describe that strategy in the affidavit.").
Similarly, judges have required government agents conducting searches of law offices to take extra precautions to minimize their exposure to privileged documents and have consistently ordered the return of documents determined to be privileged. These outcomes make sense if one assumes that the Fourth Amendment prohibits the government from searching and seizing privileged attorney-client communications.

A. Electronic Interception of Privileged Conversations

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 allows federal judges to issue orders authorizing government agents to conduct electronic surveillance. Before an order may issue, a number of requirements must be fulfilled, two of which warrant mention here. First, the order must furnish "a particular description of the type of communication sought to be intercepted." Thus, an order may not authorize the blanket interception of all of a suspect's conversations, but must instead specify which ones are subject to interception (for example, by specifying that only conversations related to an illegal drug trafficking scheme are subject to interception). Second, each order must contain a provision stipulating that the surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." Pursuant to this minimization provision, agents must stop monitoring a conversation once they determine that it does not relate to any of the topics covered by the order.

Federal judges have consistently held that Title III requires agents to minimize the interception of privileged attorney-client conversations, with no apparent exception for conversations that fall within the terms of the surveillance order. However, the conclusion

52 18 USC § 2518(4)(c).
53 See United States v Tortorello, 480 F2d 764, 780 (2d Cir 1973).
54 18 USC § 2518(5).
55 See United States v Bynum, 360 F Supp 400, 409 (SD NY 1973):

[The minimization requirement of § 2518(5) must be read as requiring the authorization to intercept to be conducted in such a way as to minimize the monitoring or the hearing of communications not subject to interception under the Act. The "evil" to be limited by this requirement is the listening to innocent calls.

(emphasis and internal citations omitted), revd on other grounds, Bynum v United States, 417 US 903 (1974).
56 See, for example, United States v Harrelson, 754 F2d 1153, 1169 (5th Cir 1985) ("Section 2518(5) requires the government to minimize the interception of privileged communications."); United States v Chagra, 754 F2d 1181, 1182 (5th Cir 1985) ("[Section 2518(5)] requires the interception of privileged communications to be minimized."); United States v Gotti, 771 F Supp 535, 544 (ED NY 1991) ("[T]he statutes authorizing electronic surveillance which were enacted with a sensitive concern for constitutional rights make no special provision for privileged communica-
that the interception of all privileged attorney-client conversations must be minimized follows only if pertinent but privileged communications are "not otherwise subject to interception," and nothing in Title III itself restricts the interception of privileged communications. In fact, one provision seems to contemplate that some privileged conversations will be intercepted.

Thus, when judges hold that agents must minimize the interception of privileged communications, they must be invoking something besides Title III. It seems reasonable to conclude that the suppressed premise—that privileged communications are "not otherwise subject to interception"—is provided by the Fourth Amendment's mandate of reasonableness, which prohibits government agents from searching and seizing privileged communications.

B. Law Office Searches

Law enforcement officials sometimes have probable cause to believe that evidence of crime will be found in a law office, where the risk that executing agents will encounter privileged documents is high. Despite this risk, courts have consistently held that searches of law offices are not per se unreasonable. They have, however, required that executing agents take care to minimize their exposure to privileged documents. They also require the return of any privileged documents that are seized.

In one frequently cited case, a lawyer was under investigation for fraudulently inflating his clients' medical bills. An initial warrant authorized the seizure of all of the firm's closed or nonactive personal injury files, and a supplemental warrant authorized the seizure of some open personal injury files. Agents spent a full day searching the office and took away two thousand files and many other financial

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57 18 USC § 2518(5).
58 The provision provides that "[n]o otherwise privileged ... communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." 18 USC § 2517(4) (emphasis added).
59 See, for example, Klitzman, Klitzman and Gallagher v Krut, 744 F2d 955, 959 (3d Cir 1984).
60 Id ("[T]he correct approach to this issue ... is not to immunize law offices from searches, but to scrutinize carefully the particularity and breadth of the warrant authorizing the search, the nature and scope of the search, and any resulting seizure.").
61 See id at 962 (affirming the issuance of a preliminary injunction ordering the government to return documents seized from a law office).
62 Id at 957.
documents. The Third Circuit invalidated the entire search, conclud-
ing that "this government rampage potentially or actually invaded the
privacy of every client of the [ ] firm." The court emphasized that 
"[t]he government well knew, prior to the search, that the client files
contained privileged communications, yet the government took not
one step to minimize the extent of the search or to prevent the inva-
sion of the clients’ privacy guaranteed by the attorney-client privi-
lege."

After scolding the government for its disregard of the privilege,
the court ordered that all the documents be returned to the firm and
outlined the procedures that the government should follow in any
subsequent attempt to seize the evidence it sought: (1) it should re-
quest specific materials and give the firm an opportunity to comply
voluntarily; and (2) if the firm declined to cooperate, the district court
should devise and oversee a procedure to balance the privacy interests
embodied in the privilege against the government’s investigatory
needs. The court suggested that a special master should be appointed
to examine in camera any material that the law firm objected to pro-
ducing.

Similar procedures have been followed in other cases, with some
courts suggesting that the most desirable approach is for agents to seal
any documents seized from a law office and refrain from searching
them until they receive leave of the court. When it turns out that
privileged documents have in fact been seized, courts have ordered
that they be “returned forthwith.”

In these cases, courts have required that the search and seizure of
all privileged documents be minimized and that all privileged docu-
ments inadvertently seized be returned. Insofar as the privileged

63 Id.
64 Id. at 961.
65 Id.
66 Id. at 962.
67 Id.
68 See, for example, In re Grand Jury Subpoenas Dated December 10, 1987, 926 F2d 847,
858 (9th Cir 1991) (approving as “a model of government sensitivity to the special privacy inter-
ests that are implicated when a law firm’s files must be searched” a procedure whereby executing
agents allowed the firm to produce the documents, after which they were sealed and turned over
to the district court); In re Impounded Case (Law Firm), 840 F2d 196, 202 (3d Cir 1988) (“[T]he
attorney-client privilege is sufficiently protected by the procedure established by the magistrate
requiring that the government obtain leave of the court before examining any seized items.”).
69 United States v Abbell, 914 F Supp 519, 522 (SD Fla 1995). See also National City Trading
Corp v United States, 635 F2d 1020, 1026 (2d Cir 1980) (“To the extent that the files obtained
here were privileged, the remedy is suppression and return of the documents in question.”) (internal
citation omitted); In re Search Warrant for Law Offices Executed on March 19, 1992, 153
FRD 55, 58 (SD NY 1994) (“[P]rivileged documents . . . should remain privileged, and . . . should
be restored to their owner or owners.”).
documents are not within the scope of the warrant, this is unexceptional. However, insofar as the privileged documents do fall within the scope of the warrant—and would therefore be subject to search and seizure but for their privileged status—the courts plainly assume that something immunizes them from search and seizure. Again, it is not implausible to conclude that this "something" is the Fourth Amendment. In fact, one court has come close to holding as much. The Eighth Circuit has held that "an attorney's obligation to safeguard the privilege of his files and papers, from any attempted invasion of such protected confidences as they contain, entitles him to set up ... the violation of privilege ... as an element of unreasonable search and seizure." 70

C. The Unreasonableness of Searching and Seizing Privileged Attorney-Client Communications

It is possible to rationalize the electronic surveillance and law office search cases without invoking the Fourth Amendment. The courts may have simply assumed that the privilege itself, rather than the Fourth Amendment, immunizes privileged communications from search and seizure. 71 On this account, the courts that decided the law office cases were simply invoking a common law rule that privileged documents are not subject to search and seizure, and the courts that decided the electronic surveillance cases were interpreting Title III in accordance with a presumption that it did not abrogate this common law rule.

Even if the immunity of privileged communications from search and seizure has its immediate roots in an unarticulated common law principle, the existence of such a common law principle would only strengthen the argument that searching and seizing privileged attorney-client communications violates the Fourth Amendment. This principle would underscore the unreasonableness of permitting government officials—who cannot gain access to privileged communications through discovery or subpoena, and whose access to the communications would chill, if not freeze, attorney-client communications—to search and seize privileged attorney-client communications. Judges must recognize that without some protection against search and seizure, there would be a gaping loophole in an otherwise rock-solid wall of protection surrounding privileged attorney-client communications.

70 Schwimmer v United States, 232 F2d 855, 866 (8th Cir 1956).
71 For example, one court, reversing a magistrate's holding that "attorney-client communications are not immune from search and seizure" because the privilege "operates in the realm of discovery and trial procedure," concluded that "the attorney-client privilege is clearly applicable in the search warrant context." In the Matter of the Search of 636 South 66th Terrace, Kansas City, Kansas, 835 F Supp 1304, 1306 (D Kan 1993).
Ultimately, the question posed by this Comment is simply whether it is reasonable for the government to search and seize privileged attorney-client communications—a question that seems almost to answer itself. The Supreme Court has held that “the Fourth Amendment’s command that searches be ‘reasonable’ requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification [than probable cause] is required to make the search ‘reasonable.’” Our society clearly recognizes that the attorney-client privilege embodies a significantly heightened privacy interest. A number of factors—including the long-standing and universal existence of the privilege; the immunity of privileged communications from discovery and subpoena; attorneys’ ethical obligation not to disclose privileged information; the close relationship between the privilege and the constitutional rights to counsel, due process, and a fair trial; the guidelines of federal law enforcement agencies; and the federal courts’ conclusion that privileged communications cannot be searched—illustrate the high premium that society places on the privacy of privileged attorney-client communications. Given this societal consensus, it is difficult to see how the government’s search and seizure of privileged communications could, in the majority of cases, be anything but unreasonable.

One can, of course, imagine extreme cases in which it might be reasonable for government agents to search and seize privileged communications—for example, those in which the search and seizure

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72 Winston, 470 US at 767.

73 This Comment is concerned primarily with the unreasonableness of allowing the government to search privileged communications. In some situations the seizure of unsearched privileged communications may be reasonable. This might be the case, for example, when an agent seizes a file cabinet or a computer that contains both privileged documents and other documents subject to seizure. If there is no reasonable way to sort the documents on-site, the seizure may be lawful. See United States v Hargus, 128 F3d 1358, 1363 (10th Cir 1997) (“Although we are given pause by the wholesale seizure of file cabinets . . . the officers’ conduct did not grossly exceed the scope of the warrant. Their conduct was motivated by the impracticality of on-site sorting.”). The only question would be whether the government implemented adequate minimization procedures during the subsequent off-site search of the files.

Similarly, an agent sometimes should be permitted to seize documents that he has reason to believe are privileged (perhaps because the suspect tells him so or because a label so indicates). Otherwise, criminals could protect incriminating documents from seizure simply by claiming that they are privileged or marking them as such. It has been famously observed that “few people keep documents of their criminal transactions in a folder marked ‘drug records.’” United States v Riley, 906 F2d 841, 845 (2d Cir 1990). If government agents were forbidden from seizing any documents that they had reason to believe might be privileged, it would not be long before criminals began keeping their drug records in folders marked “privileged.” The most that should be required of agents in these circumstances is that they seal the documents that might be privileged and refrain from searching them until their status has been adjudicated.
would avert catastrophic loss of life. A recent Department of Justice regulation allows the monitoring of inmates’ conversations with their attorneys when the attorney general has determined that there is reasonable suspicion that the conversations will be used to further terrorist acts. Yet even in this situation—one involving both a compelling government interest and inmates’ reduced expectations of privacy—some scholars have argued that the invasion of the attorney-client relationship is unreasonable and runs afoul of the Fourth Amendment.

A fortiori, then, one might conclude, as this Comment does, that the government’s everyday interest in criminal law enforcement is plainly insufficient to overcome the privacy interests protected by the attorney-client privilege. Courts should recognize this by holding that, in the absence of some justification greater than probable cause, the Fourth Amendment prohibits the search and seizure of privileged attorney-client communications. Doing so would not only vindicate the weighty privacy interest embodied in the attorney-client privilege; it would also bring clarity and consistency to an area of the law that judges have heretofore muddled through on a largely ad hoc basis.

IV. RECKLESS AND NEGLIGENT SEARCHES OF PRIVILEGED COMMUNICATIONS

Cases in which government agents know that a particular communication is covered by the attorney-client privilege and proceed to search it anyway are relatively rare. However, as the foregoing discussion of law office searches suggests, the Fourth Amendment’s protection of privileged communications extends not only to purposeful and knowing searches but also to situations in which agents have reason to believe that a search will expose them to privileged communications.

74 See 28 CFR § 501.3(d). Note that the Justice Department regulation is not aimed at privileged communications. The targeted conversations are those used to facilitate acts of terror, and such conversations fall within the crime-fraud exception to the privilege. Analytically, the problem presented by the regulation is the problem discussed in Part IV, namely, what the Fourth Amendment requires when an otherwise legitimate search poses a high probability of exposing law enforcement agents to privileged communications. In such cases, the issue is whether the agents have implemented adequate minimization procedures to sort the privileged from the nonprivileged material. Compare id § 501.3(d)(3) (requiring the use of a “privilege team” “to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials ... are not retained during the course of the monitoring”), with Akhil Reed Amar and Vikram David Amar, The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values, 34 Conn L Rev 1163, 1167 (2002) (arguing that videotaping the attorney-client conferences, and then submitting the tapes for in camera review by an independent judge, would be superior to using a privilege team composed of executive branch agents).

75 See Amar and Amar, 34 Conn L Rev at 1164–65 (cited in note 74).
In such situations, the Fourth Amendment’s mandate of reasonableness requires that agents take measures to minimize their exposure to privileged material. In other words, the Fourth Amendment prohibits reckless and negligent, as well as purposeful and knowing, searches of privileged communications.

A. When Is Minimization Required?

It is one thing to assert that minimization is required whenever government agents have reason to believe that a given course of action is likely to expose them to privileged communications; it is another to determine what that means in practice. When agents conduct a search of a law office, the need for minimization is obvious, and courts have been quick to require it. Law office searches, however, are not the only scenario in which the risk of exposure to privileged communications is high.

Take, for example, the situation in which agents conducting electronic surveillance realize that the conversation they are monitoring involves an attorney. Arguably, this scenario involves precisely the same heightened risk of exposure to privileged material that exists in law office searches, yet courts have allowed agents to continue listening until it becomes clear that the conversation is privileged. The Fifth Circuit, for example, has observed that “[i]t would be unreasonable to expect agents to ignore completely any call to an attorney” as “lawyers have been known to commit crimes.”

While it may be unreasonable to require monitoring agents to ignore all calls involving attorneys, it is also unreasonable to allow agents to continue listening to a conversation when the risk of invading the attorney-client privilege is so high. Few would allow executing agents to read every document in a lawyer’s file cabinet until its privileged status becomes apparent, even though lawyers’ file cabinets have been known to contain nonprivileged evidence of crime. Fortunately, the choice is not that stark. Just as agents executing a search warrant can seal documents seized from a law office and submit them to a judicial official for a privilege determination before reading them, so agents can stop listening to attorney-client conversations and submit a recording of the conversations to a judicial official for a privilege determination before listening to them.

76 This conclusion flows readily from the fact that the touchstone of the Fourth Amendment is reasonableness, and reckless and negligent conduct is ipso facto unreasonable.

77 United States v Hyde, 574 F2d 856, 870 (5th Cir 1978). See also United States v Gotti, 771 F Supp 535, 543-44 (ED NY 1991) (rejecting the argument that Title III prohibits the interception of all attorney-client conversations unless there is probable cause to believe that the conversations will not be privileged).
Minimization should also be required when law enforcement officials must search through a large number of documents or computer files in order to find those subject to seizure—and not only when the documents or computers are located in a law office. The need for minimization in this context rests not only on the likelihood that privileged documents will be viewed, but also on the more general invasion of privacy associated with allowing law enforcement officials to rifle through an individual’s papers. The Supreme Court has compared the invasion of privacy associated with document searches to the invasion of privacy associated with electronic surveillance and has concluded that in both situations judicial and law enforcement officials “must take care to assure that [the searches and seizures] are conducted in a manner that minimizes unwarranted intrusions upon privacy.”

With respect to electronic surveillance, this minimization requirement has been codified in Title III. With respect to the search and seizure of documents, however, there has been no such standardization; and while some courts require minimization, it is still all too common for courts to authorize (or approve after the fact) the search of computers or massive quantities of documents without requiring the government affirmatively to engage in (or to demonstrate the use of) minimization procedures. Usually, courts rely on a vague notion of practicality as a justification for the general search.

One recent case is both illustrative and disturbing. In United States v Pelullo, government agents seized “approximately 904 boxes, 114 file cabinets and ten file cabinet drawers” from the defendant’s

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78 See Andresen v Maryland, 427 US 463, 482 n 11 (1976) (“[T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person’s papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable.”).

79 Id.

80 See, for example, Black v United States, 172 FRD 511, 516–17 (SD Fla 1997) (requiring that a neutral party, in this case a judge, review a seized computer for privileged documents before allowing the government to proceed with its search); United States v Gawrysiak, 972 F Supp 853, 866 (D NJ 1997) (approving the seizure and subsequent search of documents and computer files “so long as a review procedure promptly after seizure safeguards against the government’s retention and use of [ ] documents known to lie beyond a reasonable interpretation of the warrant’s scope”).

81 See, for example, United States v Campos, 221 F3d 1143, 1148 (10th Cir 2000) (recognizing that minimization procedures should be followed when searching a computer, but nonetheless upholding the seizure and subsequent search of the defendant’s computer because the defendant “offered no evidence as to the methods used by the officers in searching through his computer files”).

82 See, for example, United States v Upham, 168 F3d 532, 535 (1st Cir 1999) (“As a practical matter, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure.”).

83 917 F Supp 1065 (D NJ 1995).
warehouse and searched them, apparently without undertaking any minimization procedures. Responding to the defendant's objection that privileged documents had been seized and searched, the court chided him for keeping his business records "in a disorganized state and often mislabeled," even suggesting that "the carelessness with which Pelullo treated supposedly privilege[d] documents constituted a waiver of his privilege." The court approved the agents' conduct because they "pursued the only practical course available to them" when they "took [the documents] to a central location and sought to separate what was pertinent to their investigation from what was not." The court noted that "there was no way the agents searching the warehouse could possibly have known that Pelullo claimed privilege with respect to" any of the documents in the seized files.

This reasoning seems clearly wrong. Individuals should not be expected to order their papers in such a way as to facilitate their search and seizure by the government. Instead, when the government must search or seize large volumes of documents or a computer, it should bear the burden of implementing search methodologies that will minimize the intrusion on privacy. So the Supreme Court has concluded. Courts should enforce this requirement in cases involving document searches in the same way they enforce it in electronic surveillance cases.

B. What Constitutes Adequate Minimization?

The minimization procedure used in electronic surveillance is generally straightforward: the agents simply stop listening to nonpertinent and privileged conversations. However, even in this context, parties disagree about whether agents adequately minimized, disputing, for example, over how long it is appropriate for agents to listen to

84 Id at 1077.
85 Id at 1077–78. Failure to mark privately stored documents as privileged hardly constitutes a waiver. See Gabbert v Conn, 131 F3d 793, 804 n 6 (9th Cir 1997) (concluding that a magistrate's decision that the "files contained no privileged material because the documents were not stamped or marked 'privileged' is contrary to even the most basic understanding of the attorney-client privilege").
86 Pelullo, 917 F Supp at 1078.
87 Id at 1077–78.
88 In electronic surveillance cases, courts have consistently held that the government has the initial burden of showing that agents made reasonable efforts to minimize. See, for example, United States v Rizzo, 491 F2d 215, 217 n 7 (2d Cir 1974) ("The burden of proof on the minimization issue ... necessarily rests, in the first instance, on the Government."). Once the government meets its burden, the burden shifts to the defendant to show that a substantial number of nonpertinent or privileged calls were unreasonably intercepted.
89 See Andresen, 427 US at 482 n 11 (requiring that agents conducting electronic surveillance and document searches minimize unnecessary intrusions on privacy).
a particular conversation before minimizing, a how often they may spot-check conversations to ensure they remain innocent, and whether a pattern of innocence has been established with respect to certain calls that warrants their immunity from further interception. This inquiry is fact intensive, and courts have identified many factors relevant to the adequacy of the minimization effort. These factors include the nature and scope of the criminal enterprise under investigation, the thoroughness of the government’s efforts (the number and percentage of impermissibly intercepted calls are highly relevant), and the degree of judicial supervision during the monitoring.

If and when courts regularly assess the adequacy of minimization efforts in document searches, one would expect the inquiry to be equally fact-bound. Accordingly, it would be difficult to announce that certain procedures should be used in every case. Perhaps the most reasonable approach to minimization in document searches is the one suggested by the American Law Institute (ALI) and endorsed by the Ninth Circuit, which requires agents who seize a large number of documents to refrain from searching them until after an adversarial hearing is held at which both parties have an opportunity to suggest the minimization procedures appropriate to the case.

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90 See, for example, United States v Homick, 964 F2d 899, 903 (9th Cir 1992) (finding that, under the circumstances, it was appropriate for agents to listen to all conversations for at least two minutes).

91 See, for example, United States v Cleveland, 964 F Supp 1073, 1097 (ED La 1997) (rejecting defendant’s claim that “attorney-client conversations were inappropriately ‘spot-checked’ on the wall-mike” because the spot checks were few, periodic, and short and were therefore “reasonable”).

92 See, for example, United States v Hoffman, 832 F2d 1299, 1309 (1st Cir 1987) (holding that conversations constituting a pattern of innocent calls must be excluded from government eavesdropping, but finding that the defendant’s intercepted conversations did not fall into such a pattern).

93 See, for example, Cleveland, 964 F Supp at 1093 (discussing the “variety of factors to consider in deciding the reasonableness of minimization efforts”).

94 See American Law Institute, A Model Code of Pre-Arraignment Procedure §§ SS 220.2(4), SS 220.5 (1975).

95 United States v Tamura, 694 F2d 591, 595-96 (9th Cir 1982) (endorsing the ALI procedures for situations “where documents are so intermingled that they cannot feasibly be sorted on site”).

96 The ALI, in a note to § SS 220.5, suggests the kinds of minimization procedures that might be appropriate:

[T]he moving party might request that the search be conducted in the presence of counsel; might show that certain files or other discrete portions of the intermingled documents could not possibly contain the particular documents or entries sought under the warrant; might request that the search be carried out by a special master or other qualified and judicially-designated examiner rather than by the police; or might suggest other safeguards against unnecessary scrutiny or disclosure of the contents of the documents.

American Law Institute, Model Code § SS 220.5. It should also be noted that there may be minimization procedures available for computer searches that are not available when searching paper documents. Such procedures include, for example, searching by filename or directory,
When the government knows or has reason to believe that privileged documents are among those to be searched, personnel should be designated to act as a filter to shield privileged documents from the prosecution. One live issue is whether those personnel can be law enforcement agents (the so-called “taint team” or “Chinese wall,” composed of agents and attorneys not assigned to the defendant’s case), or whether instead the filtering task should be assigned to a judicial official, such as a special master or magistrate judge. Courts and commentators have typically favored the involvement of neutral judicial officials, but have stopped short of holding that it is constitutionally required. Judicial review, however, can be time-consuming and expensive. While a full treatment of this issue is beyond the scope of this Comment, one possible way to streamline the sorting using keyword searches to identify relevant documents, and limiting the types of files that may be opened (for example, by requiring that only picture files be opened in a search for child pornography).

97 The Department of Justice, for example, requires that some sort of filter be used when the search of a computer is likely to expose agents to privileged files. See U.S. Department of Justice, Searching and Seizing Computers at II(B)(7)(b) (cited in note 50) (“When agents seize a computer that contains legally privileged files, a trustworthy third party must comb through the files to separate those files within the scope of the warrant from files that contain privileged material.”). See also Black, 172 FRD at 516 (stating that the judge acts as a neutral filter in order to “safeguard and protect the vitally important constitutional guarantees of confidentiality flowing from . . . [the] attorney-client privilege”).

98 See, for example, United States v Stewart, 2002 US Dist LEXIS 10530, *24–29 (SD NY) (reviewing the merits and demerits of each approach and favoring the appointment of a special master); United States v Hunter, 13 F Supp 2d 574, 583 n 2 (D VT 1998) (“It may be preferable for the screening of potentially privileged records to be left not to a prosecutor behind a ‘Chinese Wall,’ but to a special master or the magistrate judge.”); United States v Neill, 952 F Supp 834, 840 n 13 (D DC 1997) (noting that, “for obvious reasons,” “the more traditional approach is to submit contested materials for in camera review by a neutral and detached magistrate”); In re Search Warrant for Law Offices Executed on March 19, 1992, 153 FRD 55, 59 (SD NY 1994) (“[R]eliance on the implementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable, and should be discouraged. . . . It is a great leap of faith to expect that members of the general public would believe any such Chinese wall would be impenetrable.”).

99 See, for example, Amar and Amar, 34 Conn L Rev at 1167 (cited in note 74) (favoring judicial review over monitoring by a taint team); Steven J. Enwright, Note, The Department of Justice Guidelines to Law Office Searches: The Need to Replace the “Trojan Horse” Privilege Team with Neutral Judicial Review, 43 Wayne L Rev 1855, 1858 (1997).

100 See, for example, Stewart, 2002 US Dist LEXIS 10530 at *11 (“[T]he Court has the authority and discretion to decide whether to appoint a Special Master to conduct an initial review of the seized materials for privilege and responsiveness or whether to allow the government’s privilege team to conduct this review.”); United States v Skeddle, 989 F Supp 890, 896–98 (ND Ohio 1997) (holding that the Fourth Amendment is not violated when a judge allows a government taint team to sort documents).

101 See, for example, Black, 172 FRD at 514 (“The Government strongly opposes the special master procedure urged by the Plaintiffs, on the ground that a two and one-half year delay in resolving the issue, coupled with the high cost of fees and expenses incurred by the special master, demonstrate that this procedure is both unworkable and unpractical.”).
process would be to give the defendant supervised access to the seized documents or copies of them and require him to present a privilege log within a reasonable period of time.

C. What Is the Remedy for Failure to Minimize?

What are the remedies available to those who claim that the government has failed adequately to minimize during a wiretap or document search? The clearest answer to this question is found in the electronic surveillance cases. Courts almost invariably hold that the proper remedy for the impermissible interception of nonpertinent or privileged conversations is simply the suppression of those conversations. Some courts have suggested that blanket suppression of all the seized conversations may be warranted if the government either did not minimize at all or made grossly inadequate efforts to do so and a substantial number of conversations were intercepted that should not have been. Courts have also suggested that blanket suppression may be appropriate where agents in bad faith attempted to intercept privileged conversations. Courts should reach similar conclusions in cases where the government fails to implement adequate minimization procedures during a document search.

It is clear that blanket suppression will rarely be available. When blanket suppression is not warranted, however, the usual Fourth Amendment remedy—suppression of the illegally seized evidence—may be largely superfluous if the illegally seized evidence is privileged, as the privilege already bars the introduction into evidence of communications that come within its scope.

The exclusionary rule may not, however, be entirely redundant because it requires the suppression not only of illegally seized evidence, but also of any evidence that is deemed the fruit of the government's illegal conduct. It is not clear whether government viola-
tions of the attorney-client privilege, standing alone, require the suppression of derivative evidence. If they do not, it plainly matters whether the protection against searches and seizures of privileged communications stems from the Fourth Amendment or from the privilege itself. If it stems only from the latter, and if privilege violations do not require suppression of derivative evidence, then law enforcement officials would have a perverse incentive to search and seize privileged communications. Such conduct would yield a clear benefit (the use of the privileged communications to discover and introduce additional evidence) at no cost (the remedy—suppression of the privileged communications—would leave the government in precisely the same position it would have been in had it not searched and seized the communications: unable to introduce them into evidence).

This perverse incentive would, of course, be largely eliminated by suppressing all evidence derived from breaches of the privilege. But even the suppression of derivative evidence along with the privileged communications may not adequately deter illegal searches and seizures of privileged communications or provide corrective justice to the defendant. The government might still make nonevidentiary uses of the illicitly obtained privileged information—for example, by changing or fine-tuning its trial strategy. This fine-tuning would be especially likely when a privileged communication has shed light on the defendant's trial strategy. The government's ability to make tactical decisions in light of this information could work to the defendant's substantial disadvantage, a disadvantage that the suppression of evidence would not remedy.

The question whether the government can make nonevidentiary use of privileged information has been presented most squarely in cases where individuals have been compelled to give self-incriminating tes-

leading statement on the burden of proof on derivative evidence issues comes from Alderman v United States, 394 US 165 (1969), where the Court held:

[When an illegal search has come to light, [the government] has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time [the defendant] must go forward with specific evidence demonstrating taint. The trial judge must give opportunity . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree.

Id at 183 (internal quotation marks omitted).

Compare United States v Squillacote, 221 F3d 542, 560 n 8 (4th Cir 2000) (suggesting that the violation of evidentiary privileges does not generally call for the suppression of derivative evidence, but recognizing the possibility that “suppression of derivative evidence may, under extraordinary circumstances, be required in cases involving the attorney-client privilege”); Nickel v Hannigan, 97 F3d 403, 409 (10th Cir 1996) (declining “to apply the ‘fruit of the poisonous tree’ doctrine to the possible breach of attorney-client privilege in this case”); with United States v White, 970 F2d 328, 336 (7th Cir 1992) (suggesting that at least some violations of the attorney-client privilege require the suppression of derivative evidence).
timony (testimony privileged under the Fifth Amendment)\(^{107}\) with the guarantee that no information directly or indirectly derived from their testimony will be used against them in a subsequent prosecution.\(^{108}\) However, no clear answer has emerged, as both courts\(^{109}\) and commentators\(^{110}\) have divided sharply on the issue.

Whether or not immunized testimony can properly be used for nonevidentiary purposes in a subsequent prosecution, the use of improperly searched attorney-client communications for these purposes should be condemned. In cases involving testimonial immunity, the initial disclosure of the privileged information is lawful. Not so in cases where the government searches and seizes privileged communications. In these cases, the government has engaged in illegal conduct and should not be allowed to profit, even in small and subtle ways, from its wrongdoing.

Moreover, the policies behind the Fifth Amendment’s privilege against self-incrimination are different from those served by the attorney-client privilege. Whereas the Fifth Amendment privilege is rooted in the notion that it is improper to secure evidence of guilt from the defendant’s own mouth, the attorney-client privilege is de-

\(^{107}\) There is a congruence between immunized testimony and illegally seized privileged information. In the former case, the government has obtained privileged information protected by the Fifth Amendment. In the latter case, the government has obtained privileged information protected by the Fourth Amendment. Whether this congruence is a sufficient reason to afford victims of illegal searches of privileged communications the full protections associated with immunized testimony, including a so-called *Kastigar* hearing at which the prosecutor bears the burden of demonstrating that the evidence to be presented is untainted, see *Kastigar v United States*, 406 US 441 (1972), is a question I do not undertake to answer here. For a case holding that privilege violations do not call for a *Kastigar* hearing, see *Squillacote*, 221 F3d at 560 (holding that “because the government’s right to compel testimony in the face of a claim of privilege is the issue at the heart of *Kastigar*, its protections do not apply in cases where there is privileged evidence, but no compelled testimony”).

\(^{108}\) See 18 USC § 6002 (2000) (providing that “no testimony or other information compelled under the [statute] (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order”).

\(^{109}\) Compare *United States v Semkiw*, 712 F2d 891, 893–95 (3d Cir 1983); *United States v Pantone*, 634 F2d 716, 721 (3d Cir 1980); *United States v McDaniel*, 482 F2d 305, 310–11 (8th Cir 1973) (all holding or suggesting that nonevidentiary uses of compelled testimony are prohibited), with *United States v Mariani*, 851 F2d 595, 600–01 (2d Cir 1988); *United States v Crowson*, 828 F2d 1427, 1431–32 (9th Cir 1987); *United States v Byrd*, 765 F2d 1524, 1530–31 (11th Cir 1985) (all holding or suggesting that nonevidentiary uses of compelled testimony are permissible).

\(^{110}\) Compare Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 Tex L Rev 791, 820 (1978) (“[U]nless an immunized defendant is accorded a firm right to discovery and a comprehensive pretrial hearing on the issues of evidentiary and nonevidentiary use, the defendant is left totally dependent on the good faith of the prosecutors for the preservation of his constitutional rights.”), with Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 Tex L Rev 351, 355–56 (1987) (“[N]either the immunity statute nor the fifth amendment requires the government to prove that it made no nonevidentiary uses of the defendant’s compelled testimony.”).
signed to ensure that individuals freely disclose all relevant information to their lawyers. Reasonable people may disagree about whether the use of compelled testimony for nonevidentiary purposes violates the policy of not proving a defendant’s guilt out of his own mouth, but there can be little question that the threat of the government using privileged information to prepare its case would chill attorney-client communications.

One problem with prohibiting the government from making nonevidentiary use of illegally searched privileged communications is that it might be exceedingly difficult to establish what counts as a nonevidentiary use.\textsuperscript{111} Furthermore, in cases where the prosecution has been exposed to the information, the prohibition against nonevidentiary use may amount to a de facto prohibition on prosecution, as it may be impossible to determine which prosecutorial decisions have been impacted by the illicit knowledge.

This is obviously a complicated issue and one not resolved here. One possibility, however, would be for courts to minimize the probability that privileged information will be used for nonevidentiary purposes (and for hard-to-detect evidentiary purposes) by ordering “tainted” personnel removed from the case and quarantined from the rest of the investigatory and prosecutorial team.\textsuperscript{112} At very least, courts should require the prosecutorial team to disclose the privileged information to which it has been exposed so that the court can determine whether the prosecutor’s knowledge of privileged material has prejudiced the defendant.

**CONCLUSION**

The attorney-client privilege represents the time-honored judgment that the justice system’s search for truth must sometimes give way to the need to ensure open communication between attorneys and their clients. Without protection against the search and seizure of privileged attorney-client communications, individuals would not feel free to disclose all the relevant circumstances of their cases to their attorneys, and the policies behind the privilege would be undermined.

\textsuperscript{111} If the government’s trial strategy is shaped by improperly obtained knowledge, the evidence it presents is likely to be shaped by that knowledge as well. It would be difficult to say with any confidence that the evidence introduced would have been the same absent the violation. It may thus be that truly nonevidentiary uses will be rare.

\textsuperscript{112} The Tenth Circuit, for example, used such a remedy in a case where government agents illegally seized a privileged notepad and used it to formulate specific counts of an indictment. See United States v Lin Lyn Trading, Ltd., 149 F3d 1112, 1118 (10th Cir 1998) (requiring that any new investigation of the defendant be “conducted by personnel—both investigatory and prosecutorial—untouched by the taint of the [ ] notepad”).
This intuition has led judges to the conclusion that privileged attorney-client communications cannot be searched and seized. That conclusion both reflects and contributes to a broader societal consensus that the privacy interest embodied by the attorney-client privilege is extraordinarily strong, trumping even the government's substantial interest in criminal law enforcement. Courts should make explicit what this consensus implies: the Fourth Amendment prohibits the search and seizure of privileged attorney-client communications.