Protecting State Interests: Recognition of the State Government Attorney-Client Privilege

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Even though the attorney-client privilege’s long history dates back to Roman law,1 very few courts have addressed the use of an attorney-client privilege by governments, their agents, or their attorneys.2 In fact, most of the rulings concerning the government attorney-client privilege have occurred in the past ten years. Generally, these courts have concluded that a government agent may claim an evidentiary privilege to protect the communication of confidential information to government lawyers, so long as that communication is made for the purpose of obtaining legal advice.3

One important issue surrounding the government attorney-client privilege remains unsettled: its assertion by a state government agent before a federal grand jury. In 2005, the Second Circuit held in In re: Grand Jury Investigation4 (John Doe) that a state government lawyer may assert her state’s attorney-client privilege before a federal grand jury investigating state corruption.5 The court concluded that “if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context.”6 This Second Circuit decision is in direct conflict with a prior Seventh Circuit decision. In In re: A Witness Before the Special Grand Jury 2000–27 (Witness), the Seventh Circuit held that a state official may not assert a state government attorney-client privilege before a federal grand jury.8 The

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3 See Mueller and Kirkpatrick, Evidence § 5.18 at 487 (cited in note 1). See also Town of Norfolk v United States Army Corps of Engineers, 968 F2d 1438, 1458 (1st Cir 1992) (holding that letters between the United States Attorney and the Corps of Engineers giving legal advice were within the attorney-client privilege); Coastal States Gas Corp v Department of Energy, 617 F2d 854, 863 (DC Cir 1980) (noting that “an agency can be a ‘client’”).
4 399 F3d 527 (2d Cir 2005).
5 Id at 528.
6 Id at 534.
7 288 F3d 289 (7th Cir 2002).
8 Id at 294 (noting that government agencies’ lack of criminal liability and public lawyers’ duty to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context).
court found that the "policy reasons behind the attorney-client privilege do not justify its extension to [state] government attorneys."

The Seventh Circuit derived its approach from decisions made by the Eighth and D.C. circuits. Both the Eighth and the D.C. Circuit courts refused to recognize a federal government attorney-client privilege when one arm of the federal government (the independent counsel) was investigating another arm of the federal government (the president). The Seventh Circuit declined to distinguish these decisions from Witness: "[W]e can see no reason why state government lawyers are so different from federal government lawyers that a different result is justified." The Second Circuit, by contrast, rejected this reasoning and concluded that governments need an attorney-client privilege as much as other entities or persons.

This Comment argues that federal courts should recognize a state government attorney-client privilege as a matter of federal common law. It concludes, like the Second Circuit, that the traditional rationales for the attorney-client privilege apply in the state government context. But unlike the Second Circuit, this Comment recognizes that the assertion of such a privilege during the investigation of state government corruption may undermine public policy and good governance. In response, this Comment argues that the public policy reasons for rejecting the assertion of a federal government attorney-client privilege before a federal grand jury simply do not apply when a state government attorney-client privilege is asserted before a federal grand jury. In the United States' system of federalism, the states "form distinct and independent portions of the supremacy." The states are residual sovereigns and corporate entities, separate from the federal government. Since the states serve and represent distinct sets of the public, this Comment argues that state governments should own and control the exercise of their attorney-client privilege. Recognition of the state government attorney-client privilege would promote and protect state interests.

9 Id at 295 (declining to distinguish between state and federal attorneys in the context of criminal investigations for "ill-defined" reasons of federalism).
10 See In re Lindsey, 158 F3d 1263, 1283 (DC Cir 1998) (holding that "the overarching duties of Lindsey in his role as a government attorney prevent him from withholding information about possible criminal misconduct [by the president] from the grand jury"); In re Grand Jury Subpoena Duces Tecum, 112 F3d 910, 925-26 (8th Cir 1997) (holding that "neither the attorney-client privilege nor the attorney work product doctrine is available to the White House when the president is being investigated by the Office of the Independent Counsel).
11 288 F3d at 295.
12 John Doe, 399 F3d at 534.
Part I explores the history, policy justifications, and development of the attorney-client privilege. Part II describes the development of the attorney-client privilege in the government context by the various circuit courts of appeal, the unique problems the privilege poses for the investigation of government corruption, and the problematic "missing" history of the state government attorney-client privilege.

Part III urges recognition of the state government attorney-client privilege. It compares the state government attorney-client privilege to the corporate privilege, concluding that the justifications for the attorney-client privilege in the corporate context carry over to the state government context. Next, the Comment distinguishes the federal and state governments, concluding that the states, as distinct entities and residual sovereigns, represent different sets of the "public." Given the distinct-entity status of the states, the Comment concludes that policy reasons for declining to recognize the federal government attorney-client privilege do not apply to the state government attorney-client privilege. The Comment also argues that recognition of the state government attorney-client privilege would "fit" within the United States' system of federalism better than nonrecognition or abrogation of the privilege. The Comment concludes by discussing the potential operation of a recognized state government attorney-client privilege.

I. GENERAL HISTORY OF AND JUSTIFICATIONS FOR THE ATTORNEY-CLIENT PRIVILEGE

A. The Attorney-Client Privilege Promotes Full Disclosure and Sound Legal Advice

The attorney-client privilege recognizes that sound legal advice serves public ends and that good advice depends on lawyers being fully informed by their clients. The privilege encourages clients to make full disclosure to their attorneys. "Uninhibited confidence in the inviolability of the relationship is viewed as essential to the protection of a client's legal rights, and to the proper functioning of the adversary process." Although critics argue that the privilege hides valuable evidence from the public, the Supreme Court has justified the loss of that evi-

16 Coastal States Gas Corp v Department of Energy, 617 F2d 854, 862 (DC Cir 1980) (holding that certain Department of Energy memoranda did not fall within the attorney-client privilege).
The extent to which the privilege impedes the factfinding process may also be exaggerated, since the attorney-client privilege shields only communications, not underlying facts. In addition, the privilege "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." Some commentators have argued that the privilege promotes discovery of the truth—in the absence of an attorney-client privilege, parties would have greater incentive to commit perjury. So despite academic criticism, the Supreme Court has repeatedly affirmed the institutional importance of the attorney-client privilege and has generally expanded the reach of evidentiary privileges.

In criminal cases involving individuals, the privilege has constitutional roots: the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination. No rational defendant would disclose damning evidence protected by the Fifth Amendment to her lawyer if the lawyer could then be compelled to testify at trial or before a grand jury. Therefore in criminal cases the attorney-client privilege may block key facts (known by the defendant and communicated to her attorney) from being revealed, since neither

17 Swidler & Berlin v United States, 524 US 399, 408 (1998) (holding that the attorney-client privilege survives the client’s death, even where the privileged information is sought for use in a criminal investigation). See also Jaffee v Redmond, 518 US 1, 12 (1996) (recognizing a psychotherapist-patient privilege under the Federal Rules of Evidence); Fisher, 425 US at 403 (noting that reluctance to confide would make it difficult to obtain fully informed legal advice).

18 Mueller and Kirkpatrick, Evidence § 5.1 at 402 (cited in note 1) (noting that the privilege does not prohibit the adverse party in a civil case from using discovery or calling the client as a trial witness as methods to fully explore the client's knowledge of relevant information).

19 Fisher, 425 US at 403 (reasoning that the privilege thus does not protect preexisting documents that could have been obtained by court process when they were in the client’s original possession).

20 See David W. Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tulane L Rev 101, 109–10 (1956) (noting that “European legal thought seems to regard at least certain privileges as consistent with the goal of accurate fact-finding because they help avoid perjury”).

21 See, for example, Daniel R. Fischel, Lawyers and Confidentiality, 65 U Chi L Rev 1 (1998) (urging abrogation of the attorney-client privilege as the privilege harms the innocent and only benefits lawyers). See also Jeremy Bentham, 5 Rationale of Judicial Evidence 304 (Garland 1978) (arguing that abrogation of the privilege would lead to a social good in that a guilty client would be forced to withhold information from her attorney; receive low-quality legal advice as a result, and most likely be convicted).

22 See, for example, Jaffee, 518 US at 9–10 (extending the federal common law to include a psychotherapist-patient privilege); Upjohn, 449 US at 389–90 (reaffirming the importance of the attorney-client privilege).

23 See United States v Melvin, 650 F2d 641, 645 (5th Cir 1981).

the defendant (by way of the Fifth Amendment) nor the attorney (by way of the privilege) may be compelled to disclose.\textsuperscript{25}

The attorney-client privilege also dovetails neatly with the traditional understanding of the lawyer as a professional. Compelling disclosure of client secrets would force "an act of betrayal," violate the lawyer's duty of loyalty, and cast lawyers as potential adversaries of their clients.\textsuperscript{26} In sum, the attorney-client privilege furthers public policy by encouraging client disclosure, which in turn promotes a professional attorney-client relationship and the giving of sound legal advice.


Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be 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."\textsuperscript{27} The rule applies to the limitation of current privileges and the creation of new ones.\textsuperscript{28} Rule 501 does not freeze the law governing privileges, but directs federal courts to continue the development of testimonial privileges.\textsuperscript{29} However, the Supreme Court no longer has rulemaking power with respect to evidentiary privileges—Congress has reserved that power for itself.\textsuperscript{30} As discussed in Part II, common law development of government privileges by the federal courts has proven especially difficult, given the federal and state governments' responsibilities to the citizens they represent and the citizens' need to monitor their political representatives.

\textsuperscript{25} See Mueller and Kirkpatrick, \textit{Evidence} § 5.1 at 403 (cited in note 1).
\textsuperscript{26} Id § 5.8 at 431 (claiming that the privilege thus manifests societal respect for the importance of confidentiality and trust in the attorney-client relationship). Recent critics of the privilege, however, find these professional justifications to be lacking. Daniel Fischel, for example, concludes that the privilege harms the innocent, while increasing lawyers' paychecks. See Fischel, 65 U Chi L Rev at 33 (cited in note 21) (noting that the attorney-client privilege "benefit[s] lawyers but [is] of dubious value to clients and society as a whole"). Compare Fischel with Francis Bacon: "The greatest trust between man and man is the trust of giving counsel." Francis Bacon, \textit{Of Counsel}, in F.G. Selby, ed, \textit{Bacon's Essays} 51 (MacMillan 1892).
\textsuperscript{27} FRE 501.
\textsuperscript{28} See Jaffee, 518 US at 8 (instructing courts to recognize new privileges on a case-by-case basis).
\textsuperscript{29} Id at 9.
\textsuperscript{30} See Rules Enabling Act, Pub L No 100-702, 102 Stat 4649 (1988), codified at 28 USC § 2074(b) (2000) ("Any ... rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). See also Christopher B. Mueller and Laird C. Kirkpatrick, \textit{Evidence Under the Rules: Text, Cases, and Problems} 872 (Aspen 4th ed 2000) (discussing the implementation of the Federal Rules of Evidence concerning privileges and congressional removal of the power to promulgate additional rules from the Supreme Court).
II. THE PROBLEMATIC NATURE OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

By protecting against the disclosure of information, government attorney-client privileges may conflict with citizens' needs to monitor and police their political representatives. As a representative democracy, our government is ultimately responsible to its citizens. Public service is a public trust—government officials are elected caretakers of the land and of its people. Accordingly, when public servants betray the citizens they represent and abuse their power, courts have often limited evidentiary privileges that may interfere with uncovering corruption. For example, in *Nixon v United States*, the Supreme Court refused to allow President Nixon to assert an "executive privilege" that would have prevented evidence from reaching a federal grand jury during Watergate. Similarly, the Eighth and D.C. circuits refused to allow President Clinton to assert a government attorney-client privilege during the Whitewater and Lewinsky investigations. In both the Nixon and Clinton corruption investigations, the federal government attorney-client privilege was asserted by one branch of the federal government against another.

In *Witness*, the Seventh Circuit extended this reasoning by limiting the assertion of a state government attorney-client privilege by the governor of Illinois against a federal grand jury. The Second Circuit, by contrast, recently declined to apply *Nixon*’s rationale to the state government attorney-client privilege. In *John Doe*, the Second Circuit rejected the presumption that in the context of state government privilege, the public interest lies with disclosure. Instead, the court

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32 See George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 Tulane L Rev 747, 754 (2000) (arguing that "[a]nother theme that frequently forms part of the post-Watergate consensus is the aspirational view of public service as a public trust").
34 Id at 713 (denying a generalized executive privilege against turning over tape recordings and documents demonstrably and specifically needed by a special prosecutor).
35 See *In re Lindsey*, 158 F3d 1263, 1278 (DC Cir 1998) (holding that "[w]hen 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"); *In re Grand Jury Subpoena Duces Tecum (Duces Tecum)*, 112 F3d 910, 915 (8th Cir 1997) (holding that the White House could not invoke any form of governmental attorney-client privilege to withhold potentially relevant information from a grand jury).
36 288 F3d at 294 (citing *Duces Tecum, Lindsey*, and *Nixon* to support the proposition that reason and experience dictate nonrecognition of a government attorney-client privilege in criminal investigations).
37 399 F3d at 534 (asserting that the public interest is not obvious).
found that determination of the public interest is complex: "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." As this Part illustrates, the tension between these competing conceptions of the public interest is unresolved; the courts of appeals disagree about the scope and application of the government attorney-client privilege in both the federal and state contexts.

A. The Scope of the Federal Government Attorney-Client Privilege

In two cases concerning the Whitewater investigation, President Clinton attempted to protect documents and testimony from revelation before a federal grand jury by claiming the protection of a federal government attorney-client privilege for communications made to the White House Counsel. Both the D.C. Circuit and the Eighth Circuit concluded that the federal government attorney-client privilege did not protect communications between a federal government official and a federal government counsel testifying before a grand jury in a federal criminal investigation.

Both courts found that federal government lawyers stand in a different position than members of the private bar. According to the D.C. Circuit in In re Lindsey, federal government lawyers must "take Care that the Laws be faithfully executed," and must not protect wrongdoers from public exposure. "[T]he loyalties of a [federal] government lawyer therefore cannot and must not lie solely with his or her client," but must instead look to the public interest. The Eighth

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38 Id.
39 See Lindsey, 158 F3d at 1267-68 (summarizing an argument that the president's communications should fall within the privilege because "the President, like any private person, needs to communicate fully and frankly with his legal advisors, and because the ... grand jury investigation may lead to impeachment proceedings, which would require a defense ... presumably with the assistance of White House Counsel"); Duces Tecum, 112 F3d at 913-14 (ruled on an attorney-client-privilege-based refusal by the White House to produce nine sets of notes subpoenaed by the Office of the Independent Counsel for a grand jury proceeding).
40 See Lindsey, 158 F3d at 1283; Duces Tecum, 112 F3d at 924.
41 See Lindsey, 158 F3d at 1272 (stating that unlike private lawyers, government attorneys do not have a duty to defend clients against criminal charges or protect wrongdoers from public exposure); Duces Tecum, 112 F3d at 920-21 (noting that the general duty of public service calls for government attorneys to favor disclosure over concealment and that disclosure by a government attorney cannot expose the governmental entity to criminal liability).
42 158 F3d 1263 (DC Cir 1998).
43 Id at 1272, quoting US Const Art II, § 3.
44 Lindsey, 158 F3d at 1273. Note, however, that the public is not the client as the concept of "client" is usually understood. Instead a federal government attorney's employment "requires him to observe ... the public interest sought to be served by the governmental organization of
Circuit in *In re Grand Jury Subpoena Duces Tecum* (Duces Tecum) concluded that the federal government should not use its attorneys as a shield against the production of information relevant to a federal criminal investigation, because it "would represent a gross misuse of public assets." The court derived its approach from *Nixon*, concluding that "the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." In the end, both courts concluded that a federal government attorney-client privilege could not be asserted at all in the wake of a grand jury investigation.

While the Whitewater courts refused to recognize a federal attorney-client privilege in the criminal context, this privilege has a long history of recognition in civil suits. The federal government attorney-client privilege has been invoked and approved repeatedly in civil cases—most involving either public use of the Freedom of Information Act (FOIA) or a private litigant seeking information from the government during the course of a civil lawsuit. Accordingly, the Justice Department's Office of Legal Counsel concluded in 1982:

> Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evi-

which he is a part." Id, quoting Federal Bar Association Professional Ethics Committee, 32 Fed B J at 72 (cited in note 31) (describing the public trust of government employed lawyers).

45 Id at 910 (8th Cir 1997).
46 Id at 921 (refusing to equate government lawyers' responsibilities with those of a private accountant performing a service with public implications).
47 Id at 919. In adopting *Nixon*'s reasoning over *Upjohn*'s, the Eighth Circuit did not, however, implement a *Nixon*-like balancing test, which would have allowed lower courts to weigh policy reasons for and against assertion of the privilege on a case-by-case basis. Similarly, the D.C. Circuit found that a balancing test would be difficult to apply and unacceptable in light of Supreme Court precedent. See *Lindsey*, 158 F3d at 1278 (noting that although attorney-client privilege is not applicable, the White House Counsel continues to be covered by executive privilege to the same extent as other presidential advisers), citing *Swidler & Berlin v United States*, 524 US 399, 409 (1998).
48 This conclusion evoked vigorous dissents in both Whitewater cases. See *Lindsey*, 158 F3d at 1283–89 (Tatel dissenting) (concluding that the evidentiary record before the court was incomplete and that the majority opinion underestimated the value of the attorney-client privilege to a president); *Duces Tecum*, 112 F3d at 926–38 (Kopf dissenting) (arguing that *Nixon*'s balancing test should have applied to the government attorney-client privilege).
49 See *Lindsey*, 158 F3d at 1271 (recognizing a "government attorney-client privilege that is rather absolute in civil litigation"). See also *Witness*, 288 F3d at 291 (noting that both parties conceded that in the civil and regulatory context, the government is entitled to the same attorney-client privilege as a private client).
50 5 USC § 552 (2000).
51 *Duces Tecum*, 112 F3d at 917 (finding these precedents unpersuasive in the circumstances of the case). See also id at 917 nn 6–7 (listing relevant cases recognizing the government attorney-client privilege).
denced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector.\textsuperscript{52}

Notably, however, both Whitewater courts distinguished a civil federal government attorney-client privilege from a criminal federal government attorney-client privilege—finding that the privilege did not exist when asserted before a federal grand jury in a criminal case.\textsuperscript{53} For example, the D.C. Circuit found “no clear principle that the government attorney-client privilege has as broad a scope as its personal counterpart.”\textsuperscript{54}

Neither of the Whitewater courts found the federal government attorney-client privilege to be as broad as the corporate privilege recognized by the Supreme Court in \textit{Upjohn v United States}.\textsuperscript{55} In \textit{Upjohn}, the Supreme Court recognized a corporate attorney-client privilege as a matter of federal common law.\textsuperscript{56} As defined in \textit{Upjohn}, the corporate attorney-client privilege does not “belong” to the individual corporate agent asserting it; instead, the corporation owns the privilege and the corporation may waive the privilege at its discretion.\textsuperscript{57} \textit{Upjohn} justified this “organizational” privilege by finding that an attorney-client privilege extending to executives and subordinates would encourage full and frank disclosures to corporate attorneys, which, in turn, would help corporations act within the law.\textsuperscript{58} Similarly, a government, like any

\textsuperscript{52} Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op OLC 481, 495 (1982) (memorandum of Theodore B. Olson, Assistant Attorney General) (analyzing the scope of the deliberative process and attorney-client privileges under FOIA, and of the traditional governmental evidentiary privileges).

\textsuperscript{53} See Lindsey, 158 F3d at 1266; Duces Tecum, 112 F3d at 915 (declining to decide whether a governmental attorney-client privilege exists in other contexts as “it is enough to conclude that even if it does, the White House may not use the privilege to withhold potentially relevant information from a federal grand jury”).

\textsuperscript{54} Lindsey, 158 F3d at 1272.

\textsuperscript{55} 449 US 383 (1981).

\textsuperscript{56} Id at 389–90 (noting that “[although] complications in the application of the privilege arise when the client is a corporation … the privilege applies when the client is a corporation”) (internal citation omitted).

\textsuperscript{57} Id at 390-91.

\textsuperscript{58} See, for example, Roe v United States, 144 F3d 653, 658 (10th Cir 1998) (“Any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation’s affairs and the officer’s duties belongs to the corporation and not to the officer.”). See also In re Grand Jury Proceedings, 434 F Supp 648, 650 (ED Mich 1977) (indicating that unless the company lawyer is notified that his advice is not being sought on behalf of the corporation, the corporation, not the corporate officer, is the client under the privilege).

\textsuperscript{59} See Upjohn, 449 US at 391:

[M]iddle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.
other "corporate" organization, may need the privilege so that the government and its agents may obtain legal advice on how best to act within the law.60

The Eighth Circuit found *Upjohn* to be inapplicable to the federal government privilege for two reasons: (1) unlike corporations, the federal government is not subject to criminal liability and does not need the attorney-client privilege as an incentive for information sharing; and (2) as a matter of public policy, the federal government should not be able to assert a privilege against the citizens it represents.61 The D.C. Circuit agreed with the Eighth Circuit's reasoning, and noted that the second objection was derived from corporate privilege law: just as corporations may not assert an attorney-client privilege against their stockholders, the federal government should not assert a federal government privilege against its citizens.62

B. The Circuit Split Concerning the State Government Attorney-Client Privilege

Two circuit courts have considered the status of the state government privilege in the federal common law of evidence. In *John Doe*, the Second Circuit recognized the state government attorney-client privilege as a matter of federal common law, while in *Witness*, the Seventh Circuit declined to recognize the state government privilege.

In *Witness*, the Seventh Circuit held that the federal common law of evidence should not recognize a state government attorney-client privilege within the context of a federal criminal investigation.63 The court found "no reason why state government lawyers are so different from federal government lawyers that a different result is justified."64 In its analysis, the Seventh Circuit balanced practical considerations for the protection of the privilege with the public policy reasons concerning government privileges set forth by the Whitewater courts. Like the Eighth Circuit in *Duces Tecum*, the Seventh Circuit concluded that *Upjohn*’s broad corporate privilege had no relevance for the state government attorney-client privilege: the "lack of criminal liability for government agencies and the duty of public lawyers to uphold the law ... outweigh any need for a privilege in this context."65

60 See Part III.A.
61 See *Duces Tecum*, 112 F3d at 920–21 (concluding that the absence of a government attorney-client privilege in the criminal context would not make the duties of government lawyers significantly more difficult).
62 See *Lindsey*, 158 F3d at 1276.
63 Id at 290.
64 Id at 295.
65 Id at 294.
By contrast, the Second Circuit concluded that the federal common law of evidence should recognize a state government attorney-client privilege when asserted by a state attorney before a federal grand jury. In John Doe, the Second Circuit emphatically rejected the federal government's request to follow the Seventh Circuit, and the Second Circuit declined to balance the functional value of the state government attorney-client privilege against public policy rationales for government disclosure. The court refused to accept the federal government's contention that the public's interest in disclosure to the grand jury was "readily apparent." Instead, the Second Circuit noted that Connecticut had enacted a statute protecting a state attorney's communications in state criminal proceedings. While the court agreed that the state statute did not deserve judicial deference, the court cited the state statute "to point out that the public interest is not nearly as obvious as the Government suggests."

In the end, the Second Circuit concluded that the traditional rationale for the attorney-client privilege applies with "special force" in the government context. The court concluded that abrogating the privilege would impair the public interest: "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."

Prior to both the Seventh and Second Circuit decisions, the Eighth Circuit had cautioned in dicta that abrogation of a state government attorney-client privilege may implicate "potentially serious federalism concerns." The Second Circuit's opinion did not address issues of federalism. The Seventh Circuit, however, explicitly rejected the Eighth Circuit's caution, concluding that federal interests should trump state interests in the context of privileges.

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66 399 F3d at 536 ("We find the assumptions underlying this [balancing] approach to be illusory, and the approach itself potentially dangerous.").

67 Id (rejecting the assumption that a public official's willingness to consult with counsel will be only marginally affected by abrogation of the privilege).

68 Id at 534 ("The people of Connecticut ... acting through their representatives, have concluded that the public interest is advanced by upholding a governmental privilege even in the face of a criminal investigation.").

69 Id (stating that federal courts need not defer to state statutes in determining whether the public welfare weighs in favor of or against the privilege).

70 Id (suggesting that abrogation of the privilege would make internal investigations of applicable law by government officials more difficult).

71 Id (reasoning that the privilege fosters a culture in which consultation with government lawyers "is accepted as a normal, desirable, and even indispensable part of conducting public business").

72 Duces Tecum, 112 F3d at 917.

73 See Witness, 288 F3d at 295 (noting the lack of a precise holding on the federalism issue). The Seventh Circuit also rejected the Sixth Circuit case In re Grand Jury Subpoena, 886 F2d 135,
found that the Supreme Court in *United States v Gillock*\(^\text{74}\) had rejected the idea that separation of powers or comity required the judiciary to create a state government attorney-client privilege.\(^\text{75}\) "Instead, 'where important federal issues are at stake, as in the enforcement of federal criminal statutes, comity yields.'\(^\text{76}\)

C. **Rule 501 and the Uncertain History of the State Government Attorney-Client Privilege**

The Supreme Court has instructed courts developing the federal common law of privileges pursuant to Rule 501 "to avoid either derogating existing privileges or extending privileges to new, uncharted waters absent compelling considerations."\(^\text{77}\) In other words, courts interpreting the principles of the common law in light of "reason and experience"\(^\text{78}\) must ask whether recognizing the state government attorney-client privilege would be an expansion of the current scope of the attorney-client privilege, or if refusing to recognize the privilege would amount to a contraction of an existing privilege.\(^\text{79}\)

Only four courts have seriously considered the status of a government attorney-client privilege when asserted during a federal criminal investigation: the Second Circuit in *John Doe*, the Seventh Circuit in *Witness*, and the Eighth and D.C. Circuits in the Whitewater cases.\(^\text{80}\) Thus, as the Seventh Circuit admitted in *Witness*: "[O]ne could

\(^{74}\) 445 US 360, 370–73 (1980) (refusing to acknowledge a privilege in a criminal proceeding for statements made by a state senator, even though similar statements would have been privileged under the Constitution’s Speech and Debate Clause if made by a member of Congress).

\(^{75}\) *Witness*, 288 F3d at 295 (interpreting the Court’s holding in *Gillock* to mean that “a state privilege should not be recognized if it will impair legitimate federal interests and provide ‘only speculative benefit’ to the state official”), quoting *Gillock*, 445 US at 370–73.

\(^{76}\) *Witness*, 288 F3d at 295.

\(^{77}\) Id at 292.

\(^{78}\) See Part I.B.

\(^{79}\) See *Witness*, 288 F3d at 292. See also *Lindsey*, 158 F3d at 1272 (“To argue about an 'exception' presupposes that the privilege otherwise applies in the federal grand jury context; to argue about an 'extension' presupposes the opposite.”).

\(^{80}\) There may be good reasons for the opaque history of the government attorney-client privilege. For example, many privileges were not recognized until rules of procedure and evidence had developed: "It is quite understandable why rules of privilege did not begin to develop until the duty of citizens to testify had become general and the rules that made interested parties incompetent as witnesses had been abolished." Charles Alan Wright and Kenneth W. Graham, Jr., *23 Federal Practice and Procedure: Federal Rules of Evidence* § 5422 at 668 (West 1980). Note also that government privileges may not have become important or controversial until citizens gained the ability to sue governments through civil suits authorized by statute (for example, § 1983 actions), or until the federal government started seriously investigating government corruption (for example, Watergate).

\(^{81}\) See Parts II.A–B.
argue either that, since historically the privilege has never been claimed [in the criminal context], recognizing it would be an extension, or that, since no court has ever recognized a civil-criminal distinction to the privilege, creating one here would constitute an exception.\textsuperscript{34}

The Seventh Circuit found that it was being asked to "extend" the attorney-client privilege to a new context: "Our decision here . . . must rest on whether the policy reasons for recognizing an attorney-client privilege in other contexts apply equally when the United States seeks information from a government lawyer."\textsuperscript{35} Given the state government attorney-client privilege's "missing history,"\textsuperscript{36} the Seventh Circuit found that courts should compare the state government attorney-client privilege to other manifestations of the privilege and determine whether the policy reasons for recognizing the attorney-client privilege apply to the state government attorney-client privilege specifically. In the end, the Seventh Circuit concluded that the general policy reasons for recognizing the attorney-client privilege did not hold for the state government attorney-client privilege.\textsuperscript{37}

By contrast, the Second Circuit in \textit{John Doe} did not view its decision as "extending" the attorney-client privilege to the government context. The court "refused to countenance its abrogation in circumstances to which its venerable and worthy purposes fully pertain."\textsuperscript{38} The Second Circuit refused to reassess the attorney-client privilege's utility in the government context.\textsuperscript{39} Instead, the court concluded that "the traditional rationale for the privilege applies with special force in

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\item[82] 288 F3d at 292.
\item[83] Id at 292–93.
\item[84] Even though government attorney-client privileges lack a "history," they are not without support from treatises and commentators. For example, the proposed Restatement of the Law (Third) Governing Lawyers recognized that the attorney-client privilege "extends to a communication of a governmental organization." Restatement (Third) Governing Lawyers § 124 (Proposed Final Draft no 1 1996). The section "states the generally prevailing rule that governmental agencies and agents enjoy the same privilege as non-governmental counterparts." Id § 124 cmt b. Proposed Federal Rule of Evidence 503 also recognized government privileges: "A ‘client’ is a person, public officer, or corporation, association or other organization or entity, either public or private, who . . . consults a lawyer with a view to obtaining professional legal services from him." Rules of Evidence for United States Courts and Magistrates, 56 FRD 183, 235 (1972) ("Proposed FRE 503").
\item[85] See \textit{Witness}, 288 F3d at 293 ("While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue.").
\item[86] 399 F3d at 536.
\item[87] See id at 531–32. Referring to the attorney-client privilege's common law roots, the court stated that a wholesale reassessment of the privilege's utility is not required "whenever it is invoked under previously unexplored circumstances." Id at 531.
\end{itemize}
\end{footnotesize}
the government context. In the end, the Second Circuit discounted the state government attorney-client privilege's "missing history" in the criminal context, choosing instead to emphasize the government attorney-client privilege's history in the civil context. The court ultimately concluded that the state government attorney-client privilege deserved recognition and should not be abrogated.

III. THE STATE AS A DISTINCT, "CORPORATE" ENTITY: WHY FEDERAL COURTS SHOULD RECOGNIZE A STATE'S ATTORNEY-CLIENT PRIVILEGE

This Comment argues that the state government attorney-client privilege meets the standards for common law recognition set forth by either of the two courts of appeals. The policy reasons for recognizing an attorney-client privilege in other contexts apply equally when the United States seeks information from a state government lawyer. Longstanding principles undergirding the attorney-client privilege suggest that state governments retain the need for an organizational attorney-client privilege. Indeed, the rationale for recognizing the attorney-client privilege has special force when the federal government is investigating a state government agent. In short, this Comment proposes that the state government attorney-client privilege should be recognized as a matter of common law by the federal judiciary and given a broad scope comparable to the corporate privilege, as construed by the Supreme Court in *Upjohn*.

"Reason and experience" should lead the federal courts to recognize the state government attorney-client privilege as part of the federal common law of evidence. In all contexts, the attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." States, no less than individuals or corporations, need legal advice to navigate the complexities of state and federal law that apply to them and to their agents.

Recently, however, some federal courts of appeals have raised three objections to the recognition of government attorney-client privileges generally and state government attorney-client privileges particularly. First, these objecting courts have concluded that state and federal governments do not need the attorney-client privilege, since

88 Id at 534 (observing that government lawyers must be encouraged to seek and receive fully informed legal advice).
89 See id at 534-35 (reviewing the assertion of government privileges in the civil context).
90 *Upjohn*, 449 US at 389 (asserting that the lawyer cannot carry out his professional mission without knowing "all that relates to the client's reasons for seeking representation").
neither are subject to criminal liability. Second, these circuit courts have determined that, as a matter of public policy, governments should not be able to keep information from the citizens they represent when a government agent is being investigated by a federal grand jury. Third, the Seventh Circuit, considering the state government attorney-client privilege specifically, has held that the federal interest in the disclosure of information for law enforcement purposes will always trump a state's interest in confidentiality.91

By contrast, the Second Circuit recently concluded that "reason and experience" should lead to recognition of a state government attorney-client privilege when it is asserted before a federal grand jury.92 In John Doe, the Second Circuit challenged the objecting circuit courts' first contention and concluded that state governments retain a need for the state government attorney-client privilege.93 The Second Circuit declined to address the objecting circuit courts' second contention, determining that, despite the public's interest in the confidential information, "the traditional rationale for the privilege applies with special force in the government context."94 The Second Circuit did not reach the Seventh Circuit's third objection.

This Comment expands on the Second Circuit's reasoning and addresses each of the objecting circuits' arguments in turn, concluding that federal courts should recognize a state government attorney-client privilege as a matter of federal common law. First, the state government privilege, if recognized, would be an organizational or "corporate" privilege. States, while immune from criminal prosecution, need the attorney-client privilege to comply with federal and state law—just like any other corporate organization. Second, even if governments usually should not be able to "hide" information from the citizens they represent, the circuit courts' public policy objection does not apply when one government is investigating the agent of another government. The Constitution and our system of federalism establish the states as residually sovereign entities distinct from the federal government, and this distinction between state and federal governments should not be blurred. Third, in our system of federalism, federal interests do not always trump state interests. Recognition of the

91 See Witness, 288 F3d at 295. Note that the third objection to the state attorney-client privilege is unique to the Seventh Circuit.
92 See John Doe, 399 F3d at 535 (declining to adopt a case-by-case balancing test).
93 See id at 533–35 (suggesting as an example that a state government attorney-client privilege could help spur internal investigations).
94 Id at 534 (arguing that government officials are responsible for upholding and executing the law and thus must be encouraged to seek out and receive fully informed legal advice).
state government attorney-client privilege by a federal court would fit with the United States' system of federalism.

Finally, if the state government attorney-client privilege were to be recognized by the federal common law, each state would own and control its privilege. The last Part of this Comment discusses the operational mechanics of the state government attorney-client privilege.

A. State Governments Need an “Organizational” or “Corporate” Attorney-Client Privilege

The state government attorney-client privilege, if recognized, would be an “organizational” privilege. Currently, however, the only organizational privilege consistently recognized by the federal courts is the corporate privilege. In *Upjohn*, the Supreme Court held that corporations, like any other client, need the privilege to encourage “full and frank” communication between attorneys and their clients and to “promote broader public interests in the observance of law and administration of justice.” Thus, the privilege is needed even though corporations are “artificial creature[s] of the law” and application of the privilege to fictional entities may create “complications.”

The states, as sovereign entities, cannot be subject to criminal prosecution. As a result, some federal courts have found that there is “no need to offer the attorney-client privilege as an incentive to increase [a state’s] compliance with the laws.” Indeed, both the White-water courts and the Seventh Circuit concluded that the attorney-client privilege was unnecessary in the government context.

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95 The Rules of Evidence promulgated by the Supreme Court in 1972 explicitly included government privileges in its list of organizational privileges: Rule 503 extends the privilege to “organization[s] or entity[ies], either public or private.” Proposed FRE 503(a)(1), 56 FRD at 235 (emphasis added). Proposed Rule 503 was proposed by the Supreme Court, but it was not approved by Congress. Congress rejected the codification of federal privileges and instead enacted Rule 501, which directs courts to develop the common law of privileges in light of “reason and experience.” FRE 501. The failure of Congress to approve Rule 503 does not mean that Congress disapproved of government privileges:

Standard 503 is a restatement of the traditional common law attorney-client privilege which had been applied in the federal courts prior to the adoption of the federal rules. Consequently, despite the failure of Congress to enact a detailed article on privileges, Standard 503 should be referred to by the courts.


96 449 US at 389.

97 Id at 389–90.

98 Id (noting that the Court has long “assumed that the privilege applies when the client is a corporation”).

99 Only a state’s agents can be subject to federal criminal prosecution. See *Witness*, 288 F3d at 294 (noting that state agencies may not be held criminally liable).

100 Id. See also text accompanying note 65.
This conclusion, however, rests on the assumption that a state agent's individual criminal liability will never have any bearing on a state's interests or on a state's civil liability; this assumption in turn ignores the organizational nature of the state government attorney-client privilege.\textsuperscript{101} States are no different from corporations in their need for an organizational or "corporate" privilege:

The organizational attorney-client privilege, be it asserted by [the government] or [by] Upjohn [a corporation], is intended to encourage officials, who may be fearful of losing their jobs, their reputations, their privacy, or their liberty, to tell the organization the raw truth so it can comply with the law. The privilege is ... premised upon the reasonable belief that no-nonsense legal advice generally depends upon confidentiality.\textsuperscript{102}

Indeed, as the Second Circuit argued in John Doe, "the traditional rationale for the [attorney-client] privilege applies with special force in the government context."\textsuperscript{103} Upholding the privilege would further a culture in which consultation with government lawyers is accepted "as a normal, desirable, and even indispensable part of conducting public business."\textsuperscript{104} By contrast, abrogating the privilege would undermine such a culture and impair the public interest.\textsuperscript{105} Government attorneys, no less than other attorneys, require candid information so that they may better discharge their duties to their government and its citizens.\textsuperscript{106}

Even the federal government has previously recognized the need for a corporate organizational government privilege: "According to [the Office of Legal Counsel], the President, no less than the Upjohn corporation, required the attorney-client privilege so he could comply with the law by insuring that subordinates talked candidly with counsel."\textsuperscript{107} Similarly, a state official, whether she is the governor or another state official, would need the privilege to help her comply with state and federal law.

\textsuperscript{101} See Part III.B.

\textsuperscript{102} Duces Tecum, 112 F3d at 931–32 (Kopf dissenting) (arguing that the White House and Upjohn are no different in this regard).

\textsuperscript{103} 399 F3d at 534.

\textsuperscript{104} Id (suggesting that abrogation of the privilege could discourage internal government investigations of applicable law).

\textsuperscript{105} See id.

\textsuperscript{106} See id at 535 (rejecting the idea that officials' ability to consult with private counsel regarding their own personal interests makes the government attorney-client privilege less important), citing Duces Tecum, 112 F3d at 931–32 (Kopf dissenting).

\textsuperscript{107} Duces Tecum, 112 F3d at 931 (Kopf dissenting) (approving of this longstanding Department of Justice policy), citing Confidentiality of the Attorney General's Communications, 6 Op OLC at 495–96 (cited in note 52).
Additionally, governments and corporations are frequently sued for actions of their officers and employees. Since the violation of a criminal law by an individual may trigger civil liability for the state or its agents, without an attorney-client privilege in criminal investigations, a state may be denied valuable information related to the individual agent's criminal activity that it could use in civil cases. Similarly, a state may be denied valuable information if state officials choose to rely on outside counsel for routine legal advice, a likely move should the state government attorney-client privilege prove to be nonexistent. If state officials lack the incentive to discuss legal matters with state counsel, it is doubtful that they will do so. Private attorneys do not serve the public interest—they serve their clients, and advice provided by those attorneys may be contrary to the best interest of the state. Advice by agency attorneys to state government agents is more likely to consider state interests, individual interests, and the public interest. Put simply, absent a state government attorney-client privilege, a state official confused about a legal issue is less likely to turn to the government attorneys for confidential legal advice and, as a result, state interests will suffer.

In sum, states need an attorney-client privilege, even absent criminal liability. The state government privilege would operate in this context as it does with other organizations—it would provide a state's


109 Justice Breyer, dissenting to the denial of certiorari for Lindsey, feared that federal employees would take a "cautious course" and hire outside lawyers, denying the Court a chance to review the law in the future. See Office of the President v Office of the Independent Counsel, 525 US 996, 997 (1998) (Breyer dissenting). Justice Breyer also argued that "this Court, not the Court of Appeals, should establish controlling legal principle in this disputed matter of law, of importance to our Nation's governance." Id.

110 See Fischel, 65 U Chi L Rev at 5–7 (cited in note 21) (arguing that without confidentiality, demand for lawyers would decrease as the legal services provided would be less valuable to the client).

111 According to United States v Fawell, 2002 US Dist LEXIS 10415 (ND Ill), the private attorneys litigating Witness for former Secretary of State George Ryan (who was under investigation while he was the governor of Illinois for taking bribes as secretary of state) did so without the knowledge or authorization of the Illinois Solicitor General. See id at *18 (granting the government's motion to disqualify defense counsel). Ryan was subsequently indicted as a result of these investigations. Matt O'Connor, Judge Limits Questioning as Ryan Jury Selection Lags, Chi Trib sec 2, 5 (Sept 21, 2005).

Of course, this Comment takes the position that the Witness litigation was in the best interest of the State of Illinois, because it sought to preserve the exercise of the state government privilege. If the Witness court had recognized the state government attorney-client privilege, there is no guarantee that then-Governor Ryan would have been permitted to assert it. His assertion may have been subject to waiver by the state. See Part III.D.

112 See, for example, Duces Tecum, 112 F3d at 931–32 (Kopf dissenting) (noting the need of corporate or government attorneys to hear the "raw truth so [they] can [instruct the organization how to] comply with the law").
agents with the incentive to disclose information to state counsel, thus allowing the state to better comply with both federal and state law.

B. As Distinct Entities, States Should Be Allowed to Assert the Attorney-Client Privilege Before a Federal Grand Jury

In Witness, the Seventh Circuit held that "the duty of public lawyers to uphold the law and foster an open and accountable government outweigh[s] any need for a privilege in [the state government] context."\(^{113}\) The Second Circuit in *John Doe* refused to balance the state government's need for an attorney-client privilege against the need for "open and accountable" governance: the court rejected the assumption that "the public interest in disclosure is readily apparent.\(^{114}\)

The Second Circuit, however, did not need to reject *Nixon*'s call for an open and accountable government in order to recognize the state government attorney-client privilege as a matter of federal common law.\(^{115}\) Indeed, both the Second Circuit and the Seventh Circuit failed to note an important fact that distinguished their cases from both the Whitewater cases and *Nixon*: in both *Witness* and *John Doe*, a state government attorney asserted a state government attorney-client privilege against a federal grand jury. Both courts missed an essential point: the states are residual sovereigns distinct from the federal government, and any call for "open and accountable" governments should recognize the distinctions between state and federal governments.

1. The *Garner* doctrine and our representative system of government.

Both the Whitewater courts and the Seventh Circuit used a corporate law doctrine borrowed from *Garner v Wolfinbarger*\(^{116}\) to illustrate their objection to the use of the government attorney-client privilege in criminal cases investigating public corruption. In *Garner*, the Fifth Circuit refused to consider the corporation as an entity sepa-

\(^{113}\) 288 F3d at 294 (suggesting that, in the absence of a public lawyer privilege, an officeholder wary of becoming enmeshed in illegal acts could consult with a private attorney so that the privilege would apply).

\(^{114}\) 399 F3d at 536 (referring to a state statute granting a government attorney-client privilege in the criminal context as an indication of some debate).

\(^{115}\) See *Witness*, 288 F3d at 294. In most circumstances "it would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power." Id at 293, citing *Nixon*, 418 US at 713.

\(^{116}\) 430 F2d 1093 (5th Cir 1970). Note that *Upjohn*'s broad construction of the corporate attorney-client privilege did not disturb the venerable *Garner* doctrine. See *Ward v Succession of Freeman*, 854 F2d 780, 785 (5th Cir 1988) ("*Upjohn* does not undermine our holding in *Garner*.").
rate from its stockholders: "[M]anagement has duties which run to the benefit ultimately of the stockholders." Thus, "where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests ... require[s] that the ... privilege be subject to the right of the stockholders to show why it should not be invoked." Applying the Garner analogy, the Seventh Circuit concluded: "Just as a corporate attorney has no right or obligation to keep otherwise confidential information from shareholders ... a government attorney should have no privilege to shield relevant information from the public citizens."

The Garner analogy tracks our representative system of government. Both federal and state governments are limited by their citizens, just as corporations are limited by their shareholders. The state and federal governments are sovereign within a sphere of power delegated by their citizens. State and federal sovereignty does not reside in a king or in Parliament. Instead indivisible, final, and unlimited authority rests in the citizens—the "People"—themselves; federal and state government officials are representatives, agents, and servants of the "People." This, as Akhil Amar has argued, is in essence a corporate structure.

Thus, use of the Garner doctrine seems appropriate when a government is put in opposition to itself—a government should not be able to thwart the interests of the people that it represents by hiding information from them in an attempt to avoid a criminal conviction for violating the public trust. For this reason, both the Whitewater courts and the Seventh Circuit explicitly analogized corporate shareholders to the general public and determined that the federal government could not assert the federal government privilege in a corruption investigation—the federal government owes a general duty to

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117 430 F2d at 1101 (asserting that describing the corporation as an entity distinct from its shareholders is not useful).
118 Id at 1103-04 (listing indicia of good cause including the number of shareholders and percentage of stock they represent, the nature and colorability of the shareholders' claim, the necessity or desirability of disclosure to the shareholders, and whether the communication pertains to the litigation itself).
119 Witness, 288 F3d at 294 (stating that government attorneys owe ultimate allegiance to the public citizens, represented by the grand jury).
120 See Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L J 1425, 1437 (1987) (arguing that the Framers intended government to be powerless beyond its sphere of delegated power).
121 See id at 1435–36 ("Americans ... decisively repudiated British notions of 'sovereign' governmental omnipotence.").
122 See id at 1432–33. It is not a coincidence that many of the "foundational political instruments constituting and limiting governmental power"—that is, state constitutions—were originally corporate charters. Id at 1433.
Applying a similar logic, a state should be unable to assert the privilege against its own independent counsel or attorney general during a corruption investigation in state court.

2. The distinct-entity status of the states precludes application of the Garner doctrine to the state government attorney-client privilege.

Application of the Garner doctrine should not, however, necessarily extend to the investigation of one entity (or that entity's agents) by another entity. For example, the shareholders of one company do not have the right to waive or challenge the attorney-client privilege of another company. Similarly, it would be inappropriate to apply the Garner doctrine to the state government attorney-client privilege when it is asserted before a federal grand jury. Indeed, application of the Garner doctrine to the state government attorney-client privilege would blur the division between the state and federal governments and would ignore the distinct-entity status of the states preserved by the Constitution.

In The Federalist, James Madison, Alexander Hamilton, and John Jay described the Constitution to their fellow citizens as the states prepared to approve or reject the proposed federal government. In his analysis of the proposed federal structure, Madison defined the federal and state governments as distinct entities: "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different pur-

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123 See Lindsey, 158 F3d at 1276 (intimating that the Garner rule is widely followed despite its potential to chill corporate attorney-client communication and that "[a]ny chill on candid communications with government counsel flowing from our decision not to extend an absolute attorney-client privilege to the grand jury context is both comparable and similarly acceptable"); Duces Tecum, 112 F3d at 913–14. Note that Garner-type logic is the only rational explanation for any civil/criminal distinction. In a criminal prosecution of a government agent, the government is effectively investigating itself. In a civil trial, another entity is opposed to the government, and the privilege would hold. This distinction would not extend to the federal criminal investigation of a state agent, however, since two distinct entities are still involved. See Part III.B.

124 The extent of the privilege in the state court setting, however, would not implicate federal common law—it would be a matter of state common law as modified by the state legislature and interpreted by state courts. For example, Connecticut has already determined that the state government attorney-client privilege may be asserted before a state grand jury. See John Doe, 399 F3d at 534 (discussing the state statute); Conn Gen Stat Ann § 52-146r(b) (West 2004).

125 Similarly, the Seventh Circuit's application of the Garner doctrine in Witness inappropriately credited corporations with a greater degree of sovereign autonomy than the individual states. Corporate agents retain the ability to assert a corporate attorney-client privilege before a federal grand jury investigation; state agents, who represent the governments responsible for the legal creation of such corporations, may not assert a state government attorney-client privilege in the Seventh Circuit's scheme.
poses."\textsuperscript{126} According to the plan of the Constitution, the two sets of governments share "common constituents,"\textsuperscript{127} but the constituents of each state are subsets of "We the People" as a whole. Thus, the state as a corporation should act in the interest of its people, its constituents—that is, the citizens of the state. The United States as a corporation should act in the interest of its people: all of the citizens of the United States. As Madison articulated in \textit{The Federalist}, state and federal interests often will coincide, but the states and the federal government will not always agree—the interests of one state will not necessarily parallel the interests of the nation at large.\textsuperscript{128} It is this tension between the two governments that protects our liberty:

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.\textsuperscript{129}

Of course, the Supremacy Clause dictates that a state may not enact a general law inconsistent with the federal Constitution or constitutional federal laws.\textsuperscript{130} The Supremacy Clause does not, however, deprive the states of a limited form of sovereignty: the Constitution preserves the states as entities separate from the whole.\textsuperscript{131} The states are "not rele-

\textsuperscript{126} \textit{Federalist} 46 (Madison), \textit{The Federalist} 315, 315 (cited in note 13).

\textsuperscript{127} Id at 316 ("Truth, no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of [the state and federal governments'] common constituents.").

\textsuperscript{128} See id at 315–20 (finding that both the government and the states may attempt to overreach their power).

\textsuperscript{129} \textit{U.S. Term Limits, Inc v Thornton}, 514 US 779, 838 (1995) (Kennedy concurring) (agreeing that a state enactment imposing congressional term limits impermissibly intrudes upon the federal domain).

\textsuperscript{130} See US Const Art VI, § 2.

\textsuperscript{131} See \textit{Alden v Maine}, 527 US 706, 714 (1999) ("The federal system established by our Constitution . . . reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."). Note that Akhil Amar takes issue with the Supreme Court's recent decisions regarding state sovereignty. Amar concludes that because sovereignty rests in the people, the idea of state sovereign immunity is nonsensical. See Amar, 96 Yale L J at 1475–84 (cited in note 120). The issue of state sovereign immunity is beyond the scope of this Comment, but note that the distinct-entity status of the states compared to the federal government is common ground for both sides of the sovereign immunity debate.
gated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."

Federal attorneys are thus very different from state attorneys, contrary to the assertion of the Seventh Circuit. State and federal attorneys do not represent the same clients: state attorneys serve the people of their state by representing the state government and its agents, while federal attorneys serve the people of the United States by representing the federal government. Both state and federal attorneys serve a “public” and as “corporate” attorneys they should not be able to assert attorney-client privilege against that “public.” But state and federal attorneys simply do not serve the same “public,” nor do they necessarily share the same interests.

To the extent that state and the federal governments can be considered distinct entities, the Garner analogy should not apply to the assertion of the state government attorney-client privilege before a federal grand jury. When a state government official asserts the state government attorney-client privilege against the federal government, she is not asserting the privilege against the citizens she represents, the citizens of her state. Instead, she is asserting the privilege against the federal government—a distinct entity from her state which represents a unique set of the citizenry and respects a broader set of interests. Absent application of the Garner analogy to the state government attorney-client privilege, policy objections hinging on the representative nature of government fall away. Recognition of a broad “corporate” state government attorney-client privilege may keep information from the federal government, but it will not keep information from the state government.

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132 Alden, 527 US at 715. Note that this distinguishes our federal system from the parent/subsidiary corporate system. The states are not subsidiaries of the federal government—they simply share subsets of the citizenry (they share stockholders) with the federal government. U.S. citizens wear two hats: (1) as state citizens they “own” stock in the state they live in, and (2) as U.S. citizens they “own” stock in the United States as a whole. So while all citizens of the states are citizens of the United States, the converse is not true: all citizens of the United States are not citizens of every state.

133 See Witness, 288 F3d at 295 (seeing “no reason why state government lawyers are so different from federal government lawyers that a different result is justified”).

134 Whether by the federal courts or by Congress, the abrogation of a state’s attorney-client privilege seems to be analogous to the federal government mandating state policy or commandeering state officials. See Part III.C.

135 Assertion of the state government attorney-client privilege in state courts would be a matter of state evidence law, but if the corporate analogy is applied consistently, states should not be able to assert the privilege against themselves.
C. Recognition of the State Government Attorney-Client Privilege
Would Fit Well with the United States’ System of Federalism

The states’ residual sovereignty is derived from the text and structure of the Constitution. “The Constitution specifically recognizes the States as sovereign entities,”136 and “[a]ny doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment.”137 In short, the structure of the Constitution and the text of the Tenth Amendment preserve for the states all powers inherent in sovereign entities, as long as those powers have not been enumerated and/or assigned by the Constitution to the federal government or to the people. Although the state government attorney-client privilege may not be a power inherent to a state’s residual sovereignty,138 recognition of the privilege by a federal court as a matter of federal common law would fit well with the United States’ system of federalism and with the individual states’ status as residual sovereigns. Nonrecognition of the privilege elevates federal interests over state interests without due consideration of constitutional structure.

The Seventh Circuit in Witness found that the federal judiciary could dismiss concerns of federalism when considering the fate of the state government attorney-client privilege. Relying on Gillock, the court found that “where important federal interests are at stake, as in

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137 Alden, 527 US at 713. The Tenth Amendment mandates that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” US Const Amend X.

138 For example, the Supreme Court has held that state sovereign immunity was “central to sovereign dignity” and deserved absolute constitutional protection as an inherent power belonging to a residual sovereign. Alden, 527 US at 715–16. The state government attorney-client privilege, unlike state sovereign immunity, does not enjoy explicit constitutional preservation. The attorney-client privilege’s strongest constitutional roots may be found in the Fifth and Sixth Amendments, both of which only apply to criminal trials. A criminally “accused” person has a right to the assistance of counsel. See US Const Amend VI. This accused “person” also has a right against self-incrimination. See US Const Amend V. The combination of these two rights provides a constitutional basis for the attorney-client privilege in criminal trials involving individuals. See text accompanying notes 23–25. States, however, cannot be subject to criminal prosecution, either in state or federal court—due, in part, to the states’ sovereign natures. See Price, 383 US at 810 (Appendix to Opinion of the Court). Only a state’s agents can be subject to federal criminal prosecution. See Witness, 288 F3d at 294 (noting that many individual state employees “had[ ] been found guilty of crimes in the investigation”). So even though a state agent may have a constitutionally protected personal attorney-client privilege, the “corporate” state government attorney-client privilege does not fall under the literal language of the Fifth or Sixth Amendments: a state can never be an “accused” and thus a state does not have a Sixth Amendment right to counsel.
the enforcement of federal criminal statutes, comity yields.\textsuperscript{139} The privilege at issue in \textit{Gillock}, however, is distinguishable from the state government attorney-client privilege discussed here and in \textit{Witness}.

In \textit{Gillock}, the Supreme Court refused to recognize a state speech and debate privilege asserted by a state senator in a federal criminal proceeding.\textsuperscript{140} The speech and debate privilege is not an organizational privilege like the state government attorney-client privilege, which, if recognized, would be owned and controlled by the state. Instead, the speech and debate privilege is a political privilege, which is owned and controlled by an individual state senator.\textsuperscript{141}

This distinction is important. Since the state government attorney-client privilege, if recognized, would properly belong to an individual state, nonrecognition of the privilege would impact a state as an organization, as a distinct entity, and as a residual sovereign. By contrast, nonrecognition of the speech and debate privilege at the federal level will only impact individual state senators and possibly state issues, but nonrecognition of that privilege will not impact the state as an organization or impact state interests.\textsuperscript{142} The speech and debate privilege, by its nature, protects the interests of one individual subject to federal criminal law (the state senator), while the state government attorney-client privilege, if recognized, would protect the interests of an organization immune from the reach of federal criminal law (the state itself).

The state speech and debate privilege also serves different interests from the state government attorney-client privilege. The speech and debate privilege is primarily a check against intrusion by the executive or the judiciary into the affairs of a coequal branch—it is a separation of powers privilege, and its recognition outside that context would expand the reach of the privilege.\textsuperscript{143} By contrast, the state government attorney-client privilege, even when asserted before a federal grand jury, retains its character and function. The privilege furthers

\begin{itemize}
\item \textsuperscript{139} \textit{Witness}, 288 F3d at 295 (interpreting this to mean that a state privilege should not be recognized if it will impair legitimate federal interests and provide only speculative benefits to the state official), quoting \textit{Gillock}, 445 US at 373.
\item \textsuperscript{140} See 445 US at 374 (finding that a state speech and debate clause may limit only the prosecutorial powers of that state).
\item \textsuperscript{141} See id at 362 (recounting \textit{Gillock}'s motion to suppress all evidence of his legislative activities).
\item \textsuperscript{142} See id at 373 (finding a state speech and debate privilege to be of only speculative benefit to the state legislative process).
\item \textsuperscript{143} See id at 369–70 (finding that the history of the speech and debate privilege shows that the privilege evolved as a check against the other coequal branches, never as a check against another government in a system of federalism).
\end{itemize}
sound legal advice and state compliance with federal and state laws by preserving confidentiality between state agents and state counsel.\textsuperscript{144}

Thus, \textit{Gillock}'s sweeping elevation of federal power over state power is inapposite to the recognition or nonrecognition of the state attorney-client privilege as a matter of federal common law. In fact, most of Supreme Court precedent in the past twenty years has rejected \textit{Gillock}'s idea that comity always yields to "important" federal interests. Instead, the Court has reminded the federal government repeatedly that the states are residual sovereigns distinct from the federal government and that federal interests do not always trump state interests.

In \textit{Printz v United States},\textsuperscript{145} for example, the Supreme Court held that Congress may not "commandeer" state officials and require them to implement a congressional program.\textsuperscript{146} The Court found that the Supremacy Clause did not require state officials to implement congressional programs,\textsuperscript{147} and that the states' status as residual sovereigns gave them exclusive authority over their agents' administration of programs. Recognition of the state government attorney-client privilege would fit well with the spirit of \textit{Printz}: the privilege respects the entity differences between state and federal governments,\textsuperscript{148} and the privilege's assertion is closely related to a state's internal governance.\textsuperscript{149} By contrast, nonrecognition of the privilege would not fit \textit{Printz}'s reasoning. The justifications for nonrecognition blur the important distinctions between federal and state agents,\textsuperscript{150} nonrecognition of the privilege would discourage state agents from consulting with state government attorneys on issues vital to state interests,\textsuperscript{151} and if the privilege is not recognized, all "confidential communications" between state officials would be subject to "waiver" by a federal grand jury, not the state.\textsuperscript{152}

\textsuperscript{144} See Part III.A.
\textsuperscript{145} 521 US 898 (1997).
\textsuperscript{146} Id at 935 (holding that Congress may not "conscript[] the States' officers directly" to implement parts of the Brady Bill).
\textsuperscript{147} Id at 928–29 (finding that the state courts' duty to apply federal law was irrelevant to the analysis).
\textsuperscript{148} See Part III.B.
\textsuperscript{149} See Part III.A.
\textsuperscript{150} See notes 133–135 and accompanying text.
\textsuperscript{151} See notes 103–106 and accompanying text.
\textsuperscript{152} \textit{Printz} does not command the recognition of the attorney-client privilege—Congress most likely has the power to statutorily deny recognition of the privilege. Compare note 120 and accompanying text, with US Const Art I, § 8, cl 9 (granting Congress power to "constitute Tribunals inferior to the supreme Court" and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").
Of course, the assertion of the state attorney-client privilege before a federal grand jury is also closely related to the substantive law at issue: federal criminal law. In the past, the Supreme Court has carefully pondered matters of federalism when evaluating issues related to federal criminal law, construing narrowly statutes that intrude upon state criminal law. For example, Justice Thurgood Marshall counseled caution in the judicial interpretation of federal criminal statutes, demanding a clear congressional mandate before expanding the federal criminal law: "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

Thus, recognition of the state government attorney-client privilege would fit well with the Supreme Court's caution in the area of federal criminal law. Recognition of the privilege would check the potential for the over-expansion of federal criminal law by limiting the power of U.S. Attorneys. By contrast, nonrecognition of the privilege would assume, without waiting for a clear mandate, that by implementing Rule 501, Congress chose not to recognize a state's attorney-client privilege. Furthermore, nonrecognition of the privilege would give the federal government complete control over a state's "confidential" communications between its agents and its attorneys.

In sum, the balance of federalism struck by the Constitution does not always elevate federal interests over the states' interests. The "corporate" nature of the state government attorney-client privilege, the distinct-entity status of the states, the states' ability to exercise exclusive executive authority within their territorial boundaries, and the Supreme Court's caution concerning the reach of federal common

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153 See United States v Bass, 404 US 336, 349–51 (1971) (finding that principles of federalism caution against a broad construal of a federal criminal statute, when the broad interpretation would alter sensitive federal-state relationships).

154 Id at 349 (stating that Congress must clearly convey an intent to make a significant change in the federal-state balance), citing Rewis v United States, 401 US 808, 812 (1971). As the Court explained in Gregory v Ashcroft, 501 US 452, 460 (1991) (emphasis added):

"The Federal Government holds a decided advantage in this delicate balance [of federalism]: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."

155 For example, Justice Thomas has noted that "[t]he potential for abuse . . . is particularly grave in the inherently political context of public corruption prosecutions." Evans v United States, 504 US 255, 296–97 (1992) (Thomas dissenting). Even Congress has recognized problems associated with prosecutorial abuse by U.S. Attorneys: a 1997 congressional action cabining the power of federal prosecutors was initiated in response to the overzealous prosecution of Representative Joseph McDade. See Hyde Amendment, Pub L No 105-119, § 617, 111 Stat 2440, 2519 (1997), codified at 18 USC § 3006A (2000) (allowing any individual to recover her attorney's fees when the government's position was "vexatious, frivolous, or in bad faith"). See also 143 Cong Rec H 7791 (Sept 24, 1997) (statement of Rep Hyde).
law all counsel for the recognition of the state government attorney-client privilege by federal courts as a matter of common law.

D. The Proper Role of the State Government Attorney-Client Privilege

A state's retention of the power to assert and waive its attorney-client privilege will allow the state to protect its interests, without compromising the federal and state governments' ability to enforce their laws. Recognition of the state government attorney-client privilege will not undermine the public's trust in its government representatives, as long as the privilege is understood and used properly.

Consider application of the state government attorney-client privilege in Illinois. If Illinois chose to exercise its broad "corporate" state government attorney-client privilege, the state government would be the "client" for purposes of the privilege. Illinois, like a corporation, would "own" the attorney-client privilege. Similarly, the Illinois state government, like a corporation, would be able to waive its privilege when waiver would further the state's interests.

According to the state constitution, "The Governor shall have the supreme executive power." 156 Presumably then, the governor should have the power to waive Illinois's attorney-client privilege when it is challenged by a federal grand jury. 157 Illinois may choose to cooperate with the federal prosecutor and waive its privilege when waiver would be congruent with its interests. Alternatively, the state may refuse to waive the privilege if it finds the federal prosecution to be abusive or if waiver would reveal confidential information relating to possible state civil liability.

Thus applied, a state government attorney-client privilege most likely would not prevent the prosecution of corrupt state officials. Federal prosecution of state officeholders may decline, but that decline may simply be offset by a return to self-policing by the states. In light of expansive federal prosecutor power and its potential for abuse, the return of prosecutorial control to the states may make corruption investigations less political and more focused on individuals who harm state interests. In some cases, however, it may be in a state's best interest to cooperate with a federal investigation.

Admittedly, the facts faced by the Seventh Circuit in Witness are troublesome: the Illinois governor, George Ryan, was attempting to

156 Ill Const Art V, § 8.
157 See Part III.B. The power to assert the privilege would be a matter of Illinois constitutional law, and it is possible that the power would be vested in the head of each state agency, since the citizens of Illinois elect the head of each agency separately. See Ill Const Art V. For a discussion of the potential for corruption in the governor's office and the proper response, see text accompanying note 158-160 and accompanying text.
assert the state privilege to protect communications made when he
was secretary of state. Most likely, Governor Ryan would not have
waived the state's attorney-client privilege—he was the state office-
holder being investigated. Ryan's refusal to waive, however, would
only foreclose assertion of the privilege in the federal setting; the
privilege may not exist as a matter of state common law when asserted
against a state grand jury. Additionally, the privilege only protects
communications made to obtain legal advice; it does not protect un-
derlying facts and is subject to the crime-fraud exception. Illinois
could provide for this exceptional case by vesting control of the privi-
lege in another member of the executive branch under certain circum-
stances.

Recognition of a state government attorney-client privilege cer-
tainly would reduce uncertainty for state officeholders. Each conver-
sation seeking legal advice with a state lawyer would be presumptively
privileged, as it had been prior to Witness. The officeholder or em-
ployee would not need to worry about distinguishing between advice
regarding criminal and civil liability. Nor would the officeholder have
to request an individual attorney or seek outside counsel every time a
policy decision implicated criminal liability. Of course, the privilege
would be subject to potential waiver by the governor, but this waiver
would most likely be exercised sparingly and would serve the inter-
ests of the entity owning the privilege (the state), not the interests of a
federal prosecutor or of a federal judge.

CONCLUSION

"Reason and experience" should lead the federal courts to rec-
ognize a state government attorney-client privilege. The state govern-
ment attorney-client privilege is, at heart, an organizational privilege,
and, despite the circuit courts' objections, it should be accorded a
broad common law status similar to the corporate privilege. The policy
reasons for recognizing the attorney-client privilege retain their force
in the state government context—the state government needs the
privilege to help its agents comply with the law. In addition, the fed-
eral common law should respect the distinct-entity status of the states.

158 See Witness, 288 F3d at 290 (stating that prosecutors were investigating "licenses for bribes" under "Operation Safe Road").
159 See Part III.B. Note also that six months after Witness was decided, a new governor was elected in Illinois. Presumably the new governor would have waived the privilege.
160 See text accompanying notes 18-22.
161 The extent to which waiver is exercised would be a matter of empirical study. Waiver may be used even more rarely if state corruption prosecutions shift from the U.S. Attorney's office to the Office of the State Attorney General.
Structural federalism counsels the judiciary to recognize the state government attorney-client privilege: the privilege fits well with recent Supreme Court precedent and recognizes the states as residual sovereigns. In the end, recognition of the privilege would reduce uncertainty for state officeholders and agents, preserve the distinct-entity status of the states, better enable states to comply with federal and state law, and protect the interests of those most invested in the state—the citizens of the state.