

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2003

5 (Argued June 22, 2004 Decided February 22, 2005)

6 Docket No. 04-2287-cv

7 -----x
8 In Re: Grand Jury Investigation
9 -----x

10 UNITED STATES OF AMERICA,

11
12 Movant-Appellee,

13
14 -- v. --

15
16 JOHN DOE,

17
18 Interested-Party-Appellant.

19
20 -----x
21
22 B e f o r e : WALKER, Chief Judge, JACOBS and LEVAL, Circuit
23 Judges.
24

25 Appeal from an order of the United States District Court for
26 the District of Connecticut (Robert N. Chatigny, Chief Judge),
27 compelling the former chief legal counsel to the Office of the
28 Governor of Connecticut to comply with a grand jury subpoena and
29 testify about the contents of confidential conversations she had
30 with former Governor John G. Rowland and members of his staff.

31 **REVERSED.**

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34 Decker, on the brief), Office
35 of the Governor of
36 Connecticut, Hartford, CT, for
Interested-Party-Appellant

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JOHN M. WALKER, JR., Chief Judge:

This opinion follows our expedited order of August 25, 2004, reversing an order of the United States District Court for the District of Connecticut (Robert N. Chatigny, Chief Judge) that would have compelled the former chief legal counsel in the Office of the Governor of Connecticut to reveal to a federal grand jury the contents of private conversations she had with the Governor and various members of his staff for the purpose of providing legal advice. We now explain the reasoning in support of the order.

BACKGROUND

On February 19, 2004, in the course of investigating possible criminal violations by Connecticut public officials and employees, and by private parties with whom the state had done business, a federal grand jury subpoenaed the testimony of Anne C. George, former chief legal counsel to the Office of the Governor of Connecticut. George served in that position from

1 August 2000 to December 2002 and before that as deputy legal
2 counsel. During the period leading up to issuance of the
3 subpoena, the U.S. Attorney's Office ("the Government") had been
4 investigating, in particular, whether Governor Rowland¹ and

¹ The identity of former Governor Rowland was initially protected by the "John Doe" appellation and by various orders sealing the district court proceedings and those in this court. On December 23, 2004, Rowland pleaded guilty to one count of conspiracy to commit honest services mail fraud and tax fraud. Accordingly, no purpose is served by adhering to the sealing orders and those of this court are hereby revoked.

Due to Rowland's guilty plea and the expiration of the grand jury on January 24, 2005, the Government has moved for dismissal of this appeal as moot, implicitly requesting that we vacate our August 25, 2004, order and withhold this opinion from publication. Although the appeal was not moot at the time we issued our order and this opinion merely explains the reasoning behind that order, the Government points out that the mandate has yet to issue and the appeal is thus technically still pending before our panel. This is true, it bears noting, only because on September 9, 2004, we granted the Government's motion for an extension of time to file a petition for rehearing and rehearing in banc until forty-five days after the issuance of our opinion.

We find that the mootness doctrine does not require either that we vacate our prior order or refrain from issuing this opinion. At least in the civil context, vacatur of a previously issued decision of a court of appeals is not constitutionally mandated, and indeed is typically inappropriate, when the appeal is subsequently mooted due to settlement between the parties or the losing party's unilateral actions. See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 23-29 (1994); see also Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993). We generally have discretion, moreover, to leave our order intact where the circumstances leading to mootness occur after we file our decision but before the mandate has issued. See Humphreys v. Drug Enforcement Admin., 105 F.3d 112 (3d Cir. 1996) (refusing to vacate previously issued order where case was mooted following that order but prior to issuance of mandate). If this is true, it follows that we may explain the reasons behind that previously-issued decision, especially where such an explanation was contemplated in the original order. See United States v. Int'l Bhd. of Teamsters, 955 F.2d 171, 174 (2d Cir. 1992) (publishing opinion promised in prior order despite termination of dispute following issuance of the order); see also Bancorp, 513 U.S. at 21 ("[R]eason and authority refute the . . . notion that a federal appellate court may not take any action

1 members of his staff had received gifts from private individuals
2 and entities in return for public favors, including the favorable
3 negotiation and awarding of state contracts. The Government had
4 sought, through direct contact with Governor Rowland, to gain
5 access to specified communications between Rowland, his staff,
6 and legal counsel, all to no avail. The Government had also
7 asked George herself to submit to a voluntary interview. She
8 declined, however, after the Office of the Governor notified her
9 that it believed that the information the Government was seeking
10 was protected by the attorney-client privilege.

11 On March 3, 2004, prior to George's appearance before the
12 grand jury, the Government moved in the district court to compel
13 George to testify about the contents of confidential
14 communications between George and Governor Rowland and members of
15 his staff. The district court withheld decision pending George's
16 actual appearance and assertion of the privilege before the grand
17 jury.

18 On April 7, 2004, when George appeared before the grand
19 jury, she testified that in her capacity as legal counsel to the
20 Governor she had engaged in numerous conversations with Rowland
21 and other members of his staff on the subject of the receipt of
22 gifts and the meaning of related state ethics laws. George also
23 stated that she had spoken with Rowland's former co-Chief of

with regard to a piece of litigation once it has been determined
that the requirements of Article III no longer are . . . met.").

For the foregoing reasons, the Government's motion is
denied.

1 Staff about a practice of state contracts being sent to the
2 Governor's Office for approval. She testified, however, that
3 because all of these conversations were in confidence and
4 conducted for the purpose of providing legal advice, the Office
5 of the Governor was of the view that they were protected by the
6 attorney-client privilege, which it declined to waive.
7 Accordingly, asserting the privilege on behalf of her client,
8 George refused to answer questions pertaining to the content of
9 the conversations.

10 On April 26, 2004, the district court entered an order
11 compelling George's testimony. After noting that it was
12 "undisputed that the grand jury need[ed] the information it
13 [sought] to obtain from Ms. George," the district court concluded
14 that "[r]eason and experience dictate that, in the grand jury
15 context, any governmental attorney-client privilege must yield
16 because the interests served by the grand jury's fact-finding
17 process clearly outweigh the interest served by the privilege."
18 The district court distinguished the "governmental" attorney-
19 client privilege from the privilege in the context of a private
20 attorney-client relationship, by explaining that "unlike a
21 private lawyer's duty of loyalty to an individual client, a
22 government lawyer's duty does not lie solely with his or her
23 client agency," but also with the public.

24 Both the Office of the Governor and Rowland, as interested
25 parties, appealed the district court's decision. We granted the
26 Government's motion to expedite the appeal.

1 them "in the light of reason and experience." In doing so, while
2 we may draw on the law of privilege as it has developed in state
3 courts, we are not bound by it. In criminal cases, Rule 501
4 plainly requires that we apply the federal law of privilege. See
5 United States v. Gillock, 445 U.S. 360, 368, 100 S. Ct. 1185, 63
6 L. Ed. 2d 454 (1980).

7 Although there is little case law addressing the application
8 of the attorney-client privilege in the specific circumstances
9 presented here, we are nonetheless dealing with a well-
10 established and familiar principle. "The attorney-client
11 privilege is one of the oldest recognized privileges for
12 confidential communications," Swidler & Berlin v. United States,
13 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998); see
14 also United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir.
15 1989), one that for centuries has been a part of the common law,
16 in one form or another. While the privilege has a long history,
17 understandings of its purpose and scope have varied over time.
18 Compare 1 John W. Strong, McCormick on Evidence § 87, at 343-46
19 (5th ed. 1999) (summarizing view that privilege, as it first
20 appeared in Elizabethan England, was linked to barrister's code
21 of honor, but rationale behind it later developed a more
22 utilitarian bent) with 24 Charles Alan Wright & Kenneth W.
23 Graham, Jr., Federal Practice and Procedure § 5472, at 71-77
24 (1986) (characterizing as "highly questionable" the view that a
25 rationale predicated on notions of honor, loyalty, and fairness
26 gradually gave way to a utilitarian rationale for privilege, and

1 arguing that during the modern period both rationales have
2 coexisted). See also United States v. Zolin, 491 U.S. 554, 562,
3 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (noting that “the
4 underlying rationale for the privilege has changed over time”).
5 Today, the generally acknowledged purpose of the privilege is “to
6 encourage ‘full and frank communication between attorneys and
7 their clients and thereby promote broader public interests in the
8 observance of law and the administration of justice.’” Swidler,
9 524 U.S. at 403 (quoting Upjohn Co. v. United States, 449 U.S.
10 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)); see also In
11 re John Doe, Inc., 13 F.3d 633, 635-36 (2d Cir. 1994) (“The
12 purpose of the attorney-client privilege is to promote open
13 communication between attorneys and their clients so that fully
14 informed legal advice may be given.”); Restatement (Third) of the
15 Law Governing Lawyers § 68 cmt. c (2000) (“The rationale for the
16 [attorney-client] privilege is that confidentiality enhances the
17 value of client-lawyer communications and hence the efficacy of
18 legal services.”).

19 The idea that a robust attorney-client privilege will in
20 fact “promote broader public interests” does not mean that
21 application of the privilege will render justice in every single
22 case. Nevertheless, courts have by reason and experience
23 concluded that a consistent application of the privilege over
24 time is necessary to promote the rule of law by encouraging
25 consultation with lawyers, and ensuring that lawyers, once
26 consulted, are able to render to their clients fully informed

1 legal advice. See id. ("Recognition of the privilege reflects a
2 judgment that [impairment of the search for truth in some
3 instances] is outweighed by the social and moral values of
4 confidential consultations. . . . The law accepts the risks of
5 factual error and injustice in individual cases in deference to
6 the values that the privilege vindicates.").

7 In light of the common-law roots of the attorney-client
8 privilege and the attendant principle (evident in case law
9 stretching back at least a century, see Hunt v. Blackburn, 128
10 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888)) that
11 safeguarding client confidences promotes, rather than undermines,
12 compliance with the law, we believe it best to proceed cautiously
13 when asked to narrow the privilege's protections in a particular
14 category of cases. We are aware, of course, that even existing
15 privileges are not to be "expansively construed," as they "are in
16 derogation of the search for truth," United States v. Nixon, 418
17 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and that
18 the attorney-client privilege, in particular, "applies only where
19 necessary to achieve its purpose," Fisher v. United States, 425
20 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). But this
21 admonishment does not invite a wholesale reassessment of the
22 privilege's utility whenever it is invoked under previously
23 unexplored circumstances. Instead, our application of the
24 privilege in a "new" context remains informed by the longstanding
25 principles and assumptions that underlie its application in more
26 familiar territory.

1 There is no dispute in this case that these principles and
2 assumptions apply to government lawyers and their clients under
3 certain circumstances. The Government concedes, for instance,
4 both that a governmental attorney-client privilege exists
5 generally, and that it may be invoked in the civil context.
6 (Gov't Brief at 33); see also In Re: A Witness Before the Special
7 Grand Jury, 288 F.3d 289, 291 (7th Cir. 2002) (“[B]oth parties
8 here concede that, at least in the civil and regulatory context,
9 the government is entitled to the same attorney-client privilege
10 as any other client.”). Ample authority supports both
11 propositions. In 1972, the Supreme Court promulgated Federal
12 Rules of Evidence setting forth nine specific categories of
13 privileges, including an attorney-client privilege. Proposed
14 Federal Rule 503, defining the privilege, included public
15 officers and public entities within its definition of “client,”
16 see Proposed Fed. R. Evid. 503(a)(1), reprinted in 56 F.R.D. 183,
17 235 (1972); commentary accompanying the proposed rule, moreover,
18 provided that the “definition of ‘client’ includes governmental
19 bodies,” id. at 236. While Proposed Rule 503 was not adopted by
20 Congress, courts and commentators have treated it as a source of
21 general guidance regarding federal common law principles. See,
22 e.g., In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915
23 (8th Cir. 1997) (“[W]e have described [Proposed Rule 503] as ‘a
24 useful starting place’ for an examination of the federal common
25 law of attorney-client privilege.”); United States v. Mackey, 405
26 F. Supp. 854, 858 (E.D.N.Y. 1975) (Weinstein, J.) (“The specific

1 Rules on privilege promulgated by the Supreme Court are
2 reflective of 'reason and experience.' They are the culmination
3 of three drafts prepared by an Advisory Committee consisting of
4 judges, practicing lawyers and academicians."); 3 Jack B.
5 Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, §
6 503.02, at 503-10 (2d ed. 1997) ("[Proposed Rule 503] restates,
7 rather than modifies, the common-law lawyer-client privilege.
8 Thus, it has considerable utility as a guide to the federal
9 common law."); see also In re Grand Jury Investigation, 918 F.2d
10 374, 380 (3d Cir. 1990) ("We believe that the proposed rules
11 provide a useful reference point and offer guidance in defining
12 the existence and scope of evidentiary privileges in the federal
13 courts."). Similarly, section 74 of the Restatement (Third) of
14 the Law Governing Lawyers provides that the "attorney-client
15 privilege extends to a communication of a governmental
16 organization" as it would to a private organization. The
17 commentary to that section notes that "[t]he privilege aids
18 government entities and employees in obtaining legal advice
19 founded on a complete and accurate factual picture." Id. cmt.
20 b.² While these authorities are not conclusive as to the
21 existence at common law of a governmental attorney-client
22 privilege, they demonstrate that serious legal thinkers, applying
23 "reason and experience," have considered the privilege's

² The commentary also expresses some hesitation as to the breadth of the governmental privilege, noting, for example, that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another." Id.

1 protections applicable in the government context.

2 The case law, as well, while not extensively addressing the
3 issue, generally assumes the existence of a governmental
4 attorney-client privilege in civil suits between government
5 agencies and private litigants. See, e.g., In re Lindsey, 158
6 F.3d 1263, 1268 (D.C. Cir. 1998) ("Courts, commentators, and
7 government lawyers have long recognized a government attorney-
8 client privilege in several contexts."); Dep't of Econ. Dev. v.
9 Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y. 1991);
10 Detroit Screwmatic Co. v. United States, 49 F.R.D. 77, 78
11 (S.D.N.Y. 1970); Galarza v. United States, 179 F.R.D. 291, 295
12 (S.D. Cal. 1998); United States v. Anderson, 34 F.R.D. 518, 522-
13 23 (D. Colo. 1963). The privilege has arisen in a number of
14 these cases in the context of Exemption 5 of the Freedom of
15 Information Act, 5 U.S.C. § 552(b)(5), which allows a federal
16 government agency to withhold from requests under the Act
17 "inter-agency or intra-agency memorandums or letters which would
18 not be available by law to a party other than an agency in
19 litigation with the agency." Courts have construed Exemption 5
20 as covering materials protected by the attorney-client privilege
21 and, in doing so, have assumed that such a privilege attaches
22 when the attorney is a government lawyer and the client a
23 government entity. See, e.g., Coastal States Gas Corp. v. Dep't
24 of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) ("Exemption 5
25 protects, as a general rule, materials which would be protected
26 under the attorney-client privilege."); Mead Data Cent., Inc. v.

1 U.S. Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

2 There is, then, substantial authority for the view that the
3 rationale supporting the attorney-client privilege applicable to
4 private entities has general relevance to governmental entities
5 as well. The Government argues that while this authority may
6 establish a privilege of some kind, recent case law in other
7 circuits supports its view that the attorney-client privilege in
8 the government context is weaker than in its traditional form.
9 It cites In Re: A Witness Before the Special Grand Jury, 288 F.3d
10 289 (7th Cir. 2002) ("Ryan"); In re Lindsey, 158 F.3d 1263 (D.C.
11 Cir. 1998) ("Lindsey"); and In re Grand Jury Subpoena Duces
12 Tecum, 112 F.3d 910 (8th Cir. 1997) ("Grand Jury"), for the
13 proposition that the "governmental" attorney-client privilege
14 must give way where a federal grand jury seeks access to
15 otherwise privileged statements in order to further a criminal
16 investigation. While Lindsey and Grand Jury involved
17 applications of the privilege to communications by a federal
18 executive, and thus involved statutes and considerations
19 unrelated to this case, all three decisions broadly questioned
20 the relevance of the traditional rationale supporting the
21 privilege to the government context. See Ryan, 288 F.3d at 293;
22 Grand Jury, 112 F.3d at 921; Lindsey, 158 F.3d at 1272-73.

23 Drawing on these decisions, the Government contends that the
24 reasons for the traditional attorney-client privilege do not
25 apply with the same force in the circumstances presented by this
26 case: a federal grand jury investigation into potentially

1 criminal government conduct. It argues, first, that George, as a
2 government attorney, has a fundamentally different relationship
3 with her client, the Office of the Governor, than does a private
4 attorney representing a private individual. George's client is a
5 public entity, accountable to the general citizenry. As the
6 Office of the Governor serves the public, the Government argues,
7 so too must George as counsel to that office. Her loyalty to the
8 Governor, the Government contends, must yield to her loyalty to
9 the public, to whom she owes ultimate allegiance when violations
10 of the criminal law are at stake. Accordingly, the Government
11 argues that the privilege should not be used as a shield to
12 permit George, as a government attorney, to withhold client
13 confidences, when revealing them would be in the public interest.
14 Implicit in the Government's argument is the presumption that the
15 public interest in the present circumstances lies with disclosure
16 and the furtherance of the "truth-seeking" function of the grand
17 jury. "[T]o allow the Governor's Office to interpose a
18 testimonial privilege 'as a shield against the production of
19 information relevant to a federal criminal investigation,'" the
20 Government concludes, "'would represent a gross misuse of public
21 assets.'" (Gov't Brief at 23 (quoting Grand Jury, 112 F.3d at
22 921)).

23 We cannot accept the Government's unequivocal assumption as
24 to where the public interest lies. To be sure, it is in the
25 public interest for the grand jury to collect all the relevant
26 evidence it can. However, it is also in the public interest for

1 high state officials to receive and act upon the best possible
2 legal advice. Indeed, the people of Connecticut have deemed the
3 latter interest more important than the former: if state
4 prosecutors had sought to compel George to reveal the
5 conversations at issue, there is little doubt that the
6 conversations would be protected. The Connecticut legislature
7 has enacted a statute specifically providing that

8 [i]n any civil or criminal case or proceeding or in any
9 legislative or administrative proceeding, all confidential
10 communications shall be privileged and a government attorney
11 shall not disclose any such communications unless an
12 authorized representative of the public agency consents to
13 waive the privilege and allow such disclosure.
14

15 Conn. Gen. Stat. § 52-146r(b). The people of Connecticut, then,
16 acting through their representatives, have concluded that the
17 public interest is advanced by upholding a governmental privilege
18 even in the face of a criminal investigation. We do not suggest,
19 of course, that federal courts, charged with formulating federal
20 common law, must necessarily defer to state statutes in
21 determining whether the public welfare weighs in favor of
22 recognizing or dissolving the attorney-client privilege. But we
23 cite the Connecticut statute to point out that the public
24 interest is not nearly as obvious as the Government suggests.
25 One could as easily conclude, with the Connecticut legislature,
26 that the protections afforded by the privilege ultimately promote
27 the public interest, even when they might impede the search for
28 truth in a particular criminal investigation.

29 We believe that, if anything, the traditional rationale for
30 the privilege applies with special force in the government

1 context. It is crucial that government officials, who are
2 expected to uphold and execute the law and who may face criminal
3 prosecution for failing to do so, be encouraged to seek out and
4 receive fully informed legal advice. Upholding the privilege
5 furthers a culture in which consultation with government lawyers
6 is accepted as a normal, desirable, and even indispensable part
7 of conducting public business. Abrogating the privilege
8 undermines that culture and thereby impairs the public interest.
9 See 1 Paul R. Rice, Attorney-Client Privilege in the United
10 States § 4:28, at 4 (2d ed. 1999) ("If the government attorney is
11 required to disclose [internal communications with counsel] upon
12 grand jury request, it is sheer fantasy to suggest that it will
13 not make internal governmental investigations more difficult, to
14 the point of being impossible. . . . To the extent that the
15 protection of the privilege is justified in any corporate
16 context, the need within the government is equal, if not
17 greater.").

18 We are aware, of course, that the relationship between a
19 government attorney and a government official or employee is not
20 the same as that between a private attorney and his client. For
21 one, in the government context, the individual consulting with
22 his official attorney may not control waiver of the privilege.
23 Even if he does control waiver during his time in government, the
24 possibility remains that a subsequent administration might
25 purport to waive the privilege exercised by a predecessor.³

³ We express no view of the effectiveness of such a waiver.

1 Thus, some commentators (and presumably the Government, here)
2 question whether application of the attorney-client privilege in
3 the government context will in fact encourage public officials
4 and employees to confide in counsel. See, e.g., Melanie B.
5 Leslie, Government Officials as Attorneys and Clients: Why
6 Privilege the Privileged?, 77 Ind. L.J. 469, 507 (2002). While
7 encouraging little in the way of legal consultation and
8 disclosure, their argument goes, the privilege engenders
9 significant costs by frustrating the "search for truth."

10 Whatever merit there is to this reasoning, we think it
11 insufficient to jettison a principle as entrenched in our legal
12 tradition as that underlying the attorney-client privilege. Such
13 reasoning amounts to little more than speculation over the way in
14 which the privilege functions in the government context. Cf.
15 Swidler, 524 U.S. at 410 ("A 'no harm in one more exception'
16 rationale could contribute to the general erosion of the
17 privilege, without reference to common-law principles or 'reason
18 and experience.'""). We also reject the idea that because
19 government employees can confer with private counsel to represent
20 their own, individual interests, the privilege is somehow less
21 important when applied to government counsel. The privilege
22 serves to promote the free flow of information to the attorney
23 (and thereby to the client entity) as well as to the individual
24 with whom he communicates. See Upjohn, 449 U.S. at 390. The
25 government attorney requires candid, unvarnished information from
26 those employed by the office he serves so that he may better

1 discharge his duty to that office. See Grand Jury, 112 F.3d at
2 931-32 (Kopf, J., dissenting).

3 Having determined that the attorney-client privilege applies
4 to the communications at issue in this case, we decline to
5 fashion a balancing test, or otherwise establish a rule whereby a
6 "generalized assertion of privilege must yield to the
7 demonstrated, specific need for evidence" Nixon, 418
8 U.S. at 713 (establishing balancing test with regard to executive
9 privilege). The Supreme Court has instructed that, where the
10 attorney-client privilege applies, its protections must be
11 reliably enforced in order to effectuate its goal of promoting
12 compliance with the law. See Swidler, 524 U.S. at 409
13 ("Balancing ex post the importance of the information against
14 client interests, even limited to criminal cases, introduces
15 substantial uncertainty into the privilege's application. For
16 just that reason, we have rejected use of a balancing test in
17 defining the contours of the privilege."); see also Upjohn, 449
18 U.S. at 393 ("An uncertain privilege, or one which purports to be
19 certain but results in widely varying applications by the courts,
20 is little better than no privilege at all."). We see no
21 persuasive reason to abandon that logic here. Of course, nothing
22 we hold today derogates from traditional doctrines, such as the
23 crime-fraud exception, that apply to the private attorney-client
24 relationship and that courts have developed, through reason and
25 experience, to limit egregious abuses of the protections that the
26 privilege affords. See John Doe, Inc., 13 F.3d at 636 ("The

1 crime-fraud exception strips the privilege from attorney-client
2 communications that relate to client communications in
3 furtherance of contemplated or ongoing criminal or fraudulent
4 conduct.”) (internal quotation marks and citation omitted).

5 In arguing that we ought not “extend” the attorney-client
6 privilege to the present situation, the Government asks us, in
7 essence, to assign a precise functional value to its protections
8 and then determine whether, and under what circumstances, the
9 costs of these protections become too great to justify. We find
10 the assumptions underlying this approach to be illusory, and the
11 approach itself potentially dangerous. The Government assumes
12 that “the public interest” in disclosure is readily apparent, and
13 that a public official’s willingness to consult with counsel will
14 be only “marginally” affected by the abrogation of the privilege
15 in the face of a grand jury subpoena. Because we cannot accept
16 either of these assumptions, we decline to abandon the attorney-
17 client privilege in a context in which its protections arguably
18 are needed most.⁴ In the end, we do not view the question before
19 us as whether to “extend” the privilege to the government

⁴ Our decision is in conflict with the Seventh Circuit’s decision in Ryan, and is in sharp tension with the decisions of the Eighth (Grand Jury) and the D.C. Circuits (Lindsey). We are mindful that uniformity among the circuits fosters predictability in the invocation of the privilege and suppresses forum shopping. See also Boren v. Sable, 887 F.2d 1032, 1038 (10th Cir. 1989) (“[T]he Federal Rules of Evidence are intended to have uniform nationwide application”); Matincheck v. John Alden Life Ins. Co., 93 F.3d 96, 101 (3d Cir. 1996) (“[W]e must attempt, to the extent possible, to harmonize our own federal common law rules with those of other federal courts of appeals.”). We are in no position, however, to resolve this tension in the law.

1 context, and our decision today does no such thing. Rather, we
2 have simply refused to countenance its abrogation in
3 circumstances to which its venerable and worthy purposes fully
4 pertain.

5

6

CONCLUSION

7

For the foregoing reasons, we **REVERSE** the order of the
8 district court.