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Dead Men's Lawyers Tell No Tales: The Attorney-Client Privilege Survives Death

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DEAD MEN'S LAWYERS TELL NO TALES: THE ATTORNEY-CLIENT PRIVILEGE SURVIVES DEATH

Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998)

I. INTRODUCTION

In *Swidler & Berlin v. United States*,[1] the United States Supreme Court held that there is no posthumous exception to the attorney-client privilege for communications with substantial impact on criminal proceedings. In reaching its principal holding, the Court explicitly rejected the District of Columbia Circuit's balancing test.[2] The Court of Appeals had recommended that judges balance clients' interests in posthumous confidentiality against the need for evidence in criminal proceedings to determine whether communications between attorneys and clients may be introduced as evidence after clients have died.[3]

The Supreme Court reasoned that preservation of the privilege after death would be consistent with clients' best interests. Survival of the privilege would therefore encourage the kind of open and frank communication between client and counsel which the privilege was intended to achieve.[4] Citing deceased clients' concerns about reputation, civil liability, and potential harm to friends and family,[5] the Court noted that posthumous disclosure of confidential communications even in a limited criminal context might result in less communication between attorneys and clients.[6] Finding that earlier exceptions to the attorney-client privilege did not justify a posthumous exception in

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[1] 118 S. Ct. 2081 (1998).

[2] *Id.* at 2086.

[3] *In re* Sealed Case, 124 F.3d 230, 232 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998).

[4] *Swidler*, 118 S. Ct. at 2085.

[5] *Id.*

[6] *Id.* at 2085-86.

this case, the Supreme Court rejected use of a balancing test to determine application of the privilege because such a test might result in disclosure of information inconsistent with clients' best interests.[7] However, the Court noted that its decision did not reach the question of whether the posthumous attorney-client privilege must be preserved in cases where criminal defendants' constitutional rights might be implicated.[8]

This Note argues that the Supreme Court's decision to preserve the attorney-client privilege in *Swidler & Berlin v. United States* is correct because its focus on clients' interests is consistent with the rationale underlying the development of the privilege. This Note begins by tracing the history of the attorney-client privilege, explaining how and why exceptions to the privilege developed over time. This Note then examines the reasoning of both the majority and minority opinions in the case. Next, this Note argues that the Supreme Court's failure to recognize an exception to the posthumous privilege for testimony having a substantial impact on criminal proceedings is consistent with earlier courts' attention to clients' interests when determining the contours of the privilege. Finally, this Note concludes that the Court's refusal to address the potential conflict between the posthumous attorney-client privilege and defendants' constitutional rights should not be interpreted as a sign of the Court's willingness to recognize an additional exception to the posthumous privilege.

II. BACKGROUND

A. HISTORY OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege dates back to the English Common Law of the late sixteenth century making it the first privilege the law recognized for confidential communication.[9]

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[7] *Id.* at 2087.

[8] *Id.* at 2086 n.3.

[9] 8 JOHN HENRY WIGMORE, EVIDENCE § 2290, at 542 (John T. McNaughton rev. ed., 1961). *See also* Dennis v. Codrington, 21 Eng. Rep. 53 (1580) (finding "A counsellor not to be examined of any matter, wherein he hath been of counsel"); Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577) (holding "solicitor exempted from examination touching the cause").

The Supreme Court of the United States embraced the privilege early in its tenure, finding that "[t]he general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time."[10] Though legal historians have not questioned the early existence of the privilege, the reasons underlying the privilege's development have been the subject of some debate.[11] This controversy is significant since the contours of the attorney-client privilege are largely determined by the importance of the policy goals which underlie it, and the extent to which the privilege is viewed to further those ends.[12]

The original rationale for the privilege concerned the protection of attorneys' honor as gentlemen.[13] The conventions of the time considered disclosure of confidential communications dishonorable.[14] However, this doctrine gradually eroded because "the judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one's pledge under force of law."[15] In its place arose the modern rationale, which reasons that allowing communication without fear of disclosure encourages clients to be honest with their attorneys.[16]

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[10] Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826).

[11] *See* Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) (contending that the legal interests and theories underlying the development of the privilege were not as clear as Dean Wigmore, the noted commentator on the law of evidence, presents). *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.2, at 242-43 (1986) (discussing reasons for development of privilege). Dean Wigmore to some extent acknowledges the early confusion, as he observes, "Probably in no rule of evidence having so early an origin were so many points still unsettled until the middle of the 1800's." 8 WIGMORE, *supra* note 9, § 2290, at 544.

[12] *See infra* Part II. B.

[13] *See* 8 WIGMORE, *supra* note 9, § 2290, at 543 (citing Taylor v. Blacklow, 132 Eng. Rep. 401, 406 (L.J.C.P. 1836) ("The first duty of an attorney . . . is to keep the secrets of his clients.")).

[14] *See id.*

[15] *Id.*

[16] *Id.* at 545. Though Wigmore explains the goal of the privilege as being "freedom of consultation," the English cases he cites for the premise exhibit an evolving rationale for the importance of the freedom. *See, e.g.*, Annesley v. Earl of Anglesea, 17 How. St. Tr. 1139, 1225, 1241 (Ex. 1743) (explaining agency rationale; the increasing complexity of business enterprises made it necessary that there should be people

This view was embraced by the Supreme Court in 1981 in *Upjohn Co. v. United States*, in which the Court found that the privilege was intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[17] Fear of disclosure would discourage clients from communicating openly and honestly with their attorneys.[18] To encourage candor between clients and their counsel, protection of the rights and interests of clients became the guiding principle used to determine the parameters of the attorney-client privilege.[19]

However, courts have recognized the tension resulting from the privilege's tendency to frustrate the fact-finding process.[20] Implicit in courts' recognition of the privilege has been a consensus that the "social good derived from the proper performance of the function of lawyers acting for their clients . . . outweighs[s] the harm that may come from the suppression of evidence."[21] This statement represents a conclusion by the legal

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whose job it was to represent the legal interests of owners). *See also* Anderson v. Bank, 2 Ch. D. 644, 649 (Ch. App. 1876) (explaining fairness rationale; the complexity and difficulty of law itself necessitates the involvement of trained professionals to conduct litigation). It could be argued that this formulation also implies a kind of "legitimacy rationale" as well. The ability of individuals to seek assistance from attorneys versed in the law (without fear of disclosure) acts to promote confidence in and acceptance of a system of justice whose procedures the majority of citizens do not fully comprehend.

[17] 449 U.S. 383, 389 (1981).

[18] *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (legal "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). *See also* Fisher v. United States, 425 U.S. 391, 403 (1976).

[19] *See* Hamilton v. Neel, 7 Watts 517, 521 (Pa. 1838) ("But where it is impossible, that the rights or the interests of the client can be affected by the witness's giving evidence of what came to his knowledge by his having been counsel and acted at the time as attorney or counsel at law, the rule has no application whatever, because the reason of it does not exist.").

[20] *See In re* Grand Jury Investigation, 723 F.2d 447, 451 (6th Cir. 1983) (Because "the attorney client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process."). *See also* Foster v. Hall, 29 Mass. 89, 97 (1831) ("The rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly.").

[21] Commonwealth v. Goldman, 480 N.E.2d 1023, 1029 (Mass. 1985) (quoting United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 358 (D. Mass. 1950)).

system that the systemic benefit which accrues from enhanced attorney-client communications outweighs the loss of evidence protected by the privilege. This understanding has guided the development of the attorney-client privilege, and courts have only recognized exceptions to the privilege when its application would be at odds with its underlying policy goals.[22]

B. NOTABLE EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE

1. Testamentary Exception

The testamentary exception allows suspension of the attorney-client privilege after the death of the client, when necessary to resolve disputes between litigants claiming under the decedent's estate.[23] The rationale underlying the exception was first explained in 1851 in *Russell v. Jackson*.[24] The English court concluded that when all the parties to a dispute "claim under the client," suspending the privilege would prove consistent with a client's interest in the rightful disposition of his estate.[25] In recognizing the testamentary exception, courts have examined the extent to which it furthers the goals the privilege is intended to achieve.[26] By the end of the nineteenth century, the testamentary exception had been embraced by the Supreme Court in *Glover v. Patten*.[27] In *Glover*, the daughters of the decedent dis-

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[22] *See* Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) ("Limitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused. Absent such abuse, or a waiver of the privilege, our legal system jealously protects the confidential status of attorney-client communications.").

[23] MICHAEL A. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, § 503.1, at 522 (4th ed. 1996).

[24] 68 Eng. Rep. 558 (V.C. 1851). A deceased client's next of kin sued the estate after he was excluded from the will. *Id.* The plaintiff demanded that the deceased's attorney be forced to testify. *Id.*

[25] *Id.* at 560. The court was willing to apply an exception to the privilege, reasoning that the client impliedly waives the right in order to fulfill his or her testamentary intent. *Id.*

[26] *See* Blackburn v. Crawfords, 70 U.S. 175, 194 (1865) ("A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it was founded.").

[27] 165 U.S. 394, 406 (1897) ("[W]e are of the opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged.").

agreed on the proper interpretation of their mother's will.[28] The Court found that in a suit between heirs to an estate, communications between the decedent and her attorney would not be privileged since proper disposition of the estate was in the decedent's best interest.[29] It is notable that even as courts began to recognize this exception to the privilege, they seemingly ignored possible cases in which post-death disclosure would not be consistent with clients' intent.[30] Commentators have recognized the potential chilling effect of the exception on communication between attorneys and clients in testamentary matters.[31]

2. *Crime/Fraud Exception*

Attorney-client communications are not privileged if they are intended to assist or promote future or ongoing criminal conduct.[32] This exception is older than the testamentary exception, dating back to English jurisprudence of the eighteenth century.[33] The "exception" designation may be a bit misleading,

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[28] *Id.* at 394-97.

[29] *Id.* at 406.

[30] The example of an illegitimate child discussed in *Blackburn* suggests an instance in which a testator may prefer that his communications remain confidential even if his attorney's silence would frustrate his testamentary intent. *Blackburn*, 70 U.S. at 193. This point is raised by the dissent in Swidler & Berlin v. United States, 118 S. Ct. 2081, 2089 (1998) (O'Connor, J., dissenting).

[31] *See In re* Sealed Case, 124 F.3d 230, 234 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.4, at 256 (1986) (Attorney-client testamentary discussions are "the one occasion above all others when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosure can be made after the client's death."); Simon J. Frankel, *The Attorney-Client Privilege after the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 77 (1992); George W. Overton, *Ruling on Attorney-Client Privilege a Fascinating Exercise*, CHICAGO DAILY LAW BULLETIN, June 29, 1998, at 2 (discussing situations in which clients may not want heirs to have access to privileged communications).

[32] *See In re* Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986) ("All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud."). *See also* Clark v. United States, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.").

[33] *See* 8 WIGMORE, *supra* note 9, § 2298, at 575-76 (quoting Annesley v. Earl of Anglesea, 17 How. St. Tr. 1129, 1229, 1232, 1241-42 (Ex. 1743) ("If he is employed as an

as there really is no presumption of privilege for this type of communication. The rationale for the "exception" is that attorney-client communications which further criminal or tortious activity do not fit within the scope of the proper attorney-client relationship, and therefore merit no privilege.[34] However, Dean Wigmore has observed the ironic nature of the exception's rationale, since attorney-client discussion of past criminal activity may also serve to further such behavior.[35]

3. Breach of Duty by Attorney or Client

The law also recognizes an exception to the attorney-client privilege in cases which involve alleged breeches of duty by clients or attorneys.[36] Issues of breach of duty by attorneys or clients might arise in cases where the attorney is suing to collect a fee,[37] the client is suing the attorney for legal malpractice,[38] or third parties are suing an attorney for his or her involvement in allegedly tortious behavior.[39] Given that clients may themselves waive the privilege at will,[40] the apparent rationale for exceptions in these types of cases is to protect the interests of attorneys.[41]

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attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it.")).

[34] *See id.*, at 572. *See also* Erick S. Ottoson, *Dead Man Talking: A New Approach to Evidence: The Crime Fraud Exception to Attorney-Client Privilege*-United States v. Zolin, *109 S. Ct. 2619 (interim ed. 1989)*, 15 U. DAYTON L. REV. 365, 371 (1990).

[35] 8 WIGMORE, *supra* note 9, § 2298, at 572.

[36] *See* GRAHAM, *supra* note 23, § 503.7, at 551, 552. *See also* Laughner v. United States, 373 F.2d 326, 327 n.1 (5th Cir. 1967) ("The rule that a client waives his privilege by attacking the attorney's performance of his duties seems to have been adopted unanimously by those courts which have dealt with the question.").

[37] *See, e.g.*, Nakasian v. Incontrade, Inc., 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976); Mitchell v. Bromberger, 2 Nev. 855 (1866).

[38] *See, e.g.*, 8 WIGMORE, *supra* note 9, §2327, at 638 (citing Olmstead v. Webb, 5 App. D.C. 38, 51 (1894) (noting that "the object of the rule ceases, and the attorney is no longer bound by its obligation, when the client or his representatives charge him . . . with a fraud, or other improper or unprofessional conduct")).

[39] *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins., 497 F.2d 1190, 1194-96 (2d. Cir. 1974) (Attorney for issuer of securities being sued for fraud by purchasers of securities had a right to testify to content of attorney-client communications).

[40] *See* GRAHAM, *supra* note 23, § 503.7, at 554.

[41] For a critique of these rules, *see* Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 786-801 (1977).

C. HISTORY OF THE POST-MORTEM ATTORNEY-CLIENT PRIVILEGE

Since its beginnings, the presumption has been that the attorney-client privilege continues after death.[42] While the Supreme Court affirmed the testamentary exception in *Glover v. Patten*, it implied that the privilege generally survives the death of the client.[43] Dean Wigmore explained the continuation of the privilege by noting that "there is no limit of time beyond which the disclosures might not be used to the detriment of the client or his estate."[44]

While preservation of the privilege after clients' death has been the norm in the majority of jurisdictions,[45] this rule has by no means been unanimous. California, in drafting its code of evidence, made a conscious decision to depart from the common-law tradition, and allow suspension of the privilege after a client's estate has been closed.[46] Rejecting Wigmore's premise that disclosure will always be detrimental to clients' interests, California sought to safeguard the financial interests of the client by extending the privilege for as long as the deceased client's civil liability persists.[47]

One Pennsylvania appellate court in *Cohen v. Jenkintown Cab Co.* took a different approach to application of the posthumous privilege.[48] The *Cohen* court, while acknowledging the presumption of survival for the privilege post-mortem, suggested application of a balancing test when there is substantial need for an

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[42] Hart v. Thompson's Ex'r, 15 La. 88, 93 (1840) (stating that attorney cannot be compelled to disclose communications of deceased client). *See also* Chirac v. Reinicker, 24 U.S. 280, 294 (1826). *See also* 8 WIGMORE, *supra* note 9, § 2323, at 630.

[43] 165 U.S. 394, 407 (1897).

[44] 8 WIGMORE, *supra* note 9, § 2323, at 630.

[45] *See* Frankel, *supra* note 31, at 78-79.

[46] CAL. CODE EVID. ANN. § 954 Cmt. (West 1998) ("Hence the privilege ceases to exist when the client's estate is finally distributed and his personal representative is discharged. This is apparently a change in California law.").

[47] *Id.* ("Although there is good reason for maintaining the privilege while the estate is being administered–particularly if the estate is involved in litigation–there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative discharged.").

[48] 357 A.2d 689 (Pa. Super. Ct. 1976). In this case, a cab company was being sued by the victim of a hit-and-run accident. *Id.* The deceased driver of the cab was a defendant in the case. *Id.* Leaving no estate, the driver could not be financially damaged by disclosure of his admission of guilt to his attorney. *Id.*

attorney's testimony.[49] In making its decision to compel the attorney's testimony, the court weighed the significance of the evidence against the "rights, interests, estates, or memory" of the deceased,[50] further noting that when the administration of justice can only be frustrated by application of the privilege, trial judges may compel disclosure.[51] However, while advocating use of a balancing test, the court noted that if there is doubt as to possible injury to a client's interest, the issue is to be resolved in favor of non-disclosure.[52]

Some commentators have argued for the widespread use of a more liberal balancing test than that applied in *Cohen*. The American Law Institute has proposed the creation of a tribunal which would "balance [the] interest of confidentiality against any exceptional need for the communication."[53] Still other commentators have argued for the wholesale abandonment of the privilege after death of the client, contending that there would be little, if any, effect on client candor.[54]

III. FACTS AND PROCEDURAL HISTORY

On May 19, 1993, close to four months after Bill Clinton took office as President of the United States, David Watkins, Assistant to the President for Management and Administration,

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[49] *Id.* at 692-93.

[50] *Id.*

[51] *Id.* at 694.

[52] *Id.* This qualification appears to contradict the court's earlier reference to "injury to the client's memory" as a factor to be considered in the balancing test. *Id.* at 693. In allowing the deceased client's attorney to testify in this case, the court acknowledged that his testimony would confirm the client's earlier statement as perjury, but dismissed the implications for the client's memory by noting that an earlier witness' deposition also contradicted the client's testimony. *Id.*

[53] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, Comt. d (Proposed Final Draft No. 1, 1996). *See also* 2 CHRISTOPHER B. MEULLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 199, at 380 (2d ed. 1994) ("[A] rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege.").

[54] CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 94, at 350 (John William Strong ed., 4th ed. 1992) ("To hold that in all cases death terminates the privilege . . . could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege."). *See also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5498, at 484-85 (1986).

dismissed seven career employees from their positions with the White House Travel Office.[55] The employees were told that they were being dismissed for mismanaging travel office funds.[56] Two days earlier, accountants from KPMG Peat Marwick had discovered problems in the Travel Office, noting a shortage of $18,200 in the petty cash account.[57] The Travel Office employees were subsequently replaced with political appointees, including a distant cousin of President Clinton.[58] In conjunction with the dismissal, the White House announced that it had asked the Federal Bureau of Investigation (FBI) to investigate the former employees' activities.[59]

This announcement provoked questions regarding the White House's reasons for discharging the employees and requesting an FBI investigation.[60] On July 2, 1993, the White House announced the results of its own internal investigation into the Travel Office firings, subsequently reprimanding four employees for their involvement in the dismissals.[61] Although Deputy White House Counsel Vincent Foster was not reprimanded, he was mentioned as being involved in the firings.[62] Controversy concerning the firings persisted, and the President ordered the General Accounting Office to conduct its own review of the matter.[63] On Sunday, July 11, Vincent Foster visited attorney James Hamilton of the Washington D.C. law firm Swidler & Berlin, to discuss the possibility of Hamilton representing Foster and the White House in future investigations of the Travel Office firings.[64] During the meeting, Hamilton took three pages of notes.[65] Nine days after his consultation with

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[55] Brief for the United States at 3, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192).

[56] Toni Locy, *For White House Travel Office, a Two-Year Trip of Trouble*, WASH. POST, Feb. 27, 1995, at A4.

[57] *Id.*

[58] Joan Biskupic, *Do Legal Secrets Outlive Clients?*, WASH. POST, June 8, 1998, at A2.

[59] Brief for the United States at 3, *Swidler* (No. 97-1192).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 3-4.

[65] Brief for Petitioners at 2, *Swidler*, (No. 97-1192).

Hamilton, on July 20, Vincent Foster was found dead.[66] Police concluded that the cause of death was suicide.[67]

On January 3, 1996, the White House announced the discovery of a memorandum which suggested that First Lady Hillary Clinton may have been involved in the Travel Office firings.[68] The discovery of the memorandum raised doubts as to the veracity of Mr. Watkins' (and others') earlier testimony concerning the First Lady's involvement in the firings.[69] In March of 1996, in response to the discovery of the memorandum, Attorney General Janet Reno requested that the Office of Independent Counsel Kenneth Starr expand the scope of its ongoing investigation of the President to include investigating whether individuals connected with the White House "made false statements, committed perjury, obstructed justice, or committed other crimes during investigations of the Travel Office matter."[70]

The Office of Independent Counsel then commenced its own investigation of the Travel Office firings and subsequent White House behavior.[71] In December of 1995, James Hamilton and Swidler & Berlin received federal grand jury subpoenas for the notes Hamilton took during his consultation with Vincent Foster.[72] Swidler & Berlin moved to quash the subpoenas, contending that both the attorney-client privilege and work product doctrine prevented them from surrendering the notes.[73] The District Court for the District of Columbia, after reviewing the document *in camera*, granted the motion to quash, finding that the notes were protected by both the attorney-client privilege and the work product doctrine, but declined to discuss the reasoning for its decision.[74]

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[66] Brief for the United States at 3, *Swidler* (No. 97-1192).
[67] *Id.*
[68] *Id.*
[69] *Id.* at 5.
[70] *Id.*
[71] *Id.* at 6.
[72] *Id.* at 7.
[73] *Id.*
[74] *Id.*

The Office of Independent Counsel appealed the decision to the Court of Appeals for the District of Columbia Circuit, which reversed and remanded for further proceedings consistent with the holding.[75] The Court of Appeals' decision qualified the posthumous privilege, recognizing an exception to the privilege when the substance of communications bears on a significant aspect of criminal proceedings.[76] To determine when evidence protected by the attorney-client privilege could be admitted, the court held that a balancing test should be used to weigh the evidence's impact on pending criminal proceedings against the deceased client's interest in continued confidentiality.[77]

James Hamilton and Swidler & Berlin petitioned the Supreme Court for certiorari.[78] They argued that the Court of Appeals' decision would significantly discourage clients from confiding in their attorneys, thereby defeating the basic purpose of the attorney-client privilege.[79] Hamilton and Swidler & Berlin further contended that the court erred in its denial of heightened work product protection for Hamilton's notes, because attorneys exercise professional judgment when deciding which portions of attorney-client communications should be written down.[80] The Supreme Court granted Hamilton and Swidler & Berlin's petition for certiorari.[81] The Supreme Court subsequently granted the motion of Independent Counsel to expedite the briefing and argument.[82]

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[75] *In re* Sealed Case, 124 F.3d 230 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998).

[76] *Id.* at 231.

[77] *Id.* The appellate court also found that an attorney's notes from a client interview would not be shielded by the work-product privilege if they included only factual material. *Id.* at 230.

[78] Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084 (1998).

[79] Brief for Petitioners at 7, *Swidler* (No. 97-1192).

[80] *Id.* at 9.

[81] Swidler & Berlin v. United States, 118 S. Ct. 1358, 1359 (1998).

[82] Swidler & Berlin v. United States, 118 S. Ct. 1406, 1407 (1998).

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

The Supreme Court reversed the decision of the Court of Appeals for the District of Columbia Circuit, holding that the attorney-client privilege survives a client's death even when the evidence is of substantial importance to a criminal proceeding.[83]

The Court concluded that use of a balancing test, which weighed a deceased client's interest in confidentiality against the need for evidence in a criminal trial, would introduce substantial uncertainty into the protection afforded by the privilege.[84] Hence, use of such a balancing test would be inconsistent with the privilege's purpose of encouraging candor between attorneys and their clients.[85]

Chief Justice Rehnquist, writing for the majority,[86] began his analysis by acknowledging the long history of the attorney-client privilege, as well as its goal of encouraging "full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and the administration of justice."[87]

The Court then observed that all but two cases[88] have held either expressly or implicitly that the attorney-client privilege survives the death of the client.[89] Chief Justice Rehnquist noted that even where courts have suspended the privilege post-mortem, these decisions consistently assume the privilege generally survives.[90] This acknowledgment represented a clear rejection of the Independent Counsel's contention that the

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[83] *Swidler*, 118 S. Ct. at 2082.

[84] *Id.* at 2083.

[85] *Id.* at 2082.

[86] Chief Justice Rehnquist was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.

[87] *Swidler*, 118 S. Ct. at 2084 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

[88] *Id.* (citing Cohen v. Jenkintown Cab Co., 357 A.2d 693, 694 (Pa. Super. Ct. 1976); *In re* Sealed Case, 124 F.3d 230, 236-37 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998)).

[89] *Swidler*, 118 S. Ct. at 2084.

[90] *Id.* at 2085. *See, e.g.*, Glover v. Patten, 165 U.S. 394, 406-08 (1897) (assumed that privilege persisted after client's death).

majority of courts have refused to apply the privilege posthumously.[91] Turning to the testamentary exception, the Court expressly rejected the Independent Counsel's argument that it represented a policy decision by courts that the interest in proper settlement of estates outweighed clients' posthumous confidentiality concerns.[92] Chief Justice Rehnquist found that there was no balancing of policy goals inherent in the application of the testamentary exception since the rationale for the exception is that it furthers the interests of the deceased client.[93]

Noting that disclosure in the testamentary context was deemed consistent with clients' interests,[94] the majority observed that earlier courts found that an implied waiver existed on the part of the client to disclose the content of the communication post-mortem, when the information was necessary for the proper settlement of the client's estate.[95] The Court proceeded to observe that the Independent Counsel's policy-based argument for suspending the privilege fails because there is no reason to believe that the disclosure of evidence in posthumous criminal proceedings would in any way further clients' interests or intent.[96]

Next, the majority addressed commentators' arguments that the posthumous privilege should be suspended when extreme injustice would result from its application, and disclosure would not seriously discourage client communication.[97] The Court observed that even those calling for the privilege's abolishment post-mortem recognized that such a move would be a departure from previous caselaw.[98] The Court then reviewed reasons for

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[91] *Swidler*, 118 S. Ct. at 2082 (Chief Justice Rehnquist noted that although many cases dealing with the posthumous privilege apply the testamentary exception, survival of the privilege is the prevailing view). *Id.*

[92] *Id.* at 2082, 2085.

[93] *Id.* at 2085 (citing United States v. Osburn, 561 F.2d 1334, 1340 n.11 (9th Cir. 1977)).

[94] *See supra* notes 23-31 and accompanying text.

[95] *Swidler*, 118 S. Ct. at 2085.

[96] *Id.* at 2086.

[97] *Id.* (citing 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 199, at 380-81 (2d ed. 1994); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, Comt. D (PROPOSED FINAL DRAFT NO. 1, 1996)).

[98] *Id.*

maintaining the privilege in the face of such criticism.[99] Even though the fear of posthumous disclosure might be reduced by limiting an exception to criminal cases, Chief Justice Rehnquist noted that legitimate reasons remained as to why clients may not want confidences disclosed after death.[100] Listing concerns for reputation, civil liability, or possible injury to friends and family, the Court found that even in the absence of criminal liability, attorneys' clients had legitimate reasons to fear disclosure of their confidences after death.[101]

The Court then considered the Independent Counsel's contention that his proposed exception would only discourage attorney-client communication by those who intend to perjure themselves on the witness stand.[102] Chief Justice Rehnquist refused to accept the Independent Counsel's view[103] that the right to confidential communication with an attorney was analogous to one's Fifth Amendment protection against self-incrimination, and could be suspended if the client were freed from criminal liability.[104] The majority observed that people consult attorneys for various reasons, many of which do not concern criminal liability, and the many discussions would be chilled even if criminal liability were not a consideration.[105]

After rejecting the Independent Counsel's argument, the Court went on to reason that even if some evidence is lost by application of the posthumous privilege, such a "loss" is justified because absent the privilege, the conversation may not have taken place at all.[106]

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[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* The Independent Counsel argued that information obtained from a deceased's attorney could have been accessed had the client lived by calling the client to testify. *See* Brief for the United States at 20, *Swidler* (No. 97-1192). The Independent Counsel noted that prosecutors can grant a living client immunity to circumvent his Fifth Amendment right of protection against self-incrimination. *Id.* at 20 n.16.

[103] *Id.*

[104] *Swidler*, 118 S. Ct. at 2086.

[105] *Id.* (observing that people often consult their attorneys about personal, family, and business matters).

[106] *Id.* (citing Jaffee v. Redmond, 518 U.S. 1, 12 (1996); Fisher v. United States, 425 U.S. 391, 403 (1976)).

The majority then returned to the Independent Counsel's argument that a limited exception in criminal cases would not significantly affect the level of communication between attorneys and their clients.[107] The Court noted the Independent Counsel's failure to cite cases which support the proposition that the privilege should apply differently in civil and criminal proceedings.[108] The majority found that clients' inability to determine whether information might be significant to later criminal proceedings would introduce "substantial uncertainty into the privilege's application," thereby discouraging full and frank communication between clients and attorneys.[109]

Having rejected a balancing test which would compel testimony with a substantial impact on criminal cases,[110] the majority then limited the scope of its holding by forbidding extension of its decision to cases in which criminal defendants' constitutional rights might justify suspending the privilege.[111] The Court refrained from elaborating on how or which constitutional rights might warrant suspension of the attorney-client privilege, but did acknowledge Swidler & Berlin's admission that such a right might exist.[112] In its third footnote,[113] the Court appeared to embrace Swidler & Berlin's contention that it could rule on the posthumous attorney-client privilege generally without touching the issue of whether a defendant's "constitutional right to obtain and use as evidence otherwise privileged exonerating statements" might be sufficient to justify suspension of the privilege.[114]

The Court then considered whether an additional exception would affect clients' willingness to confide information in their attorneys in light of existing exceptions to the privilege.[115] The majority responded first by observing that unlike the Inde-

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[107] *Id.* at 2087.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 2086 n.3.
[112] *Id.*
[113] *Id.*
[114] Brief for Petitioners at 29, *Swidler* (No. 97-1192).
[115] *Swidler*, 118 S. Ct. at 2087.

pendent Counsel's proposed exception, existing exceptions to the privilege were consistent with the purpose of the privilege.[116] Chief Justice Rehnquist then noted the Independent Counsel's inability to present empirical evidence to support his assertion that an additional exception would not significantly affect attorney-client candor.[117]

Finally, the Court examined the line of cases which urge that evidentiary privileges be interpreted narrowly because of their inconsistency with "the paramount judicial goal of truth seeking."[118] The majority differentiated these holdings from *Swidler*, finding that they dealt with newly created privileges, not well-established ones like that between attorneys and clients.[119] The Court concluded its analysis by finding that the Independent Counsel was unable to show that reason and experience justified a departure from the common law rule that the attorney-client privilege survives clients' death.[120]

B. JUSTICE O'CONNOR'S DISSENT

Justice O'Connor, writing for the dissent,[121] did not dispute the general presumption that the attorney-client privilege survives the death of the client, but found instead that preservation of the privilege post-mortem was by no means inevitable.[122] The dissent would have compelled the testimony of attorneys of deceased clients when defendants claimed a right to exculpatory evidence or law enforcement officers demonstrated a compelling need for such information.[123]

The dissent began its analysis by citing the principle that evaluation of evidentiary rules must be based on their ability to

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[116] *Id.* Existing exceptions were found to be consistent with the goal of protecting clients' interest.

[117] *Id.*

[118] *Id.* (citing United States v. Nixon, 418 U.S. 683, 710 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972)).

[119] *Id.* at 2087-88.

[120] *Id.* at 2088.

[121] Joining Justice O'Connor's opinion were Justices Scalia and Thomas.

[122] *Swidler*, 118 S. Ct. at 2088 (O'Connor, J., dissenting).

[123] *Id.* (O'Connor, J., dissenting).

contribute to discovery of the truth.[124] The dissent then asserted that evidentiary privileges in litigation should be construed narrowly since they hamper the fact-finding process.[125] Justice O'Connor contended that even existing privileges should be interpreted narrowly unless they further a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining [the] truth."[126]

Justice O'Connor next observed that although deceased clients' personal, reputational, or economic concerns might evidence a continued interest in confidentiality, deceased clients' criminal liability has disappeared entirely and the potential for harm to other interests has greatly diminished.[127] She then asserted that preservation of the privilege post-mortem would inevitably reduce the evidence available in criminal proceedings, since a client's death prevents prosecutors from accessing the information by immunizing the witness from prosecution.[128]

Justice O'Connor then considered the alleged high cost of maintaining an absolute post-mortem privilege.[129] Citing cases in which deceased clients had confessed crimes for which living defendants were being tried,[130] the dissent argued that the paramount importance the justice system puts on avoiding the prosecution of innocent defendants[131] should outweigh the diminished interest deceased clients have in maintaining confidentiality.[132] Acknowledging that Swidler & Berlin did not dispute the potential need for an exception for exculpatory evidence, Justice O'Connor proceeded to argue that if an excep-

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[124] *Id.* (O'Connor, J., dissenting) (citing Funk v. United States, 290 U.S. 371, 381 (1933)).

[125] *Id.* (O'Connor, J., dissenting) (citing Jaffee v. Redmond, 518 U.S. 1, 19 (1996)).

[126] *Id.* (O'Connor, J., dissenting) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

[127] *Id.* at 2088-89 (O'Connor, J., dissenting).

[128] *Id.* at 2089 (O'Connor, J., dissenting).

[129] *Id.* (O'Connor, J., dissenting).

[130] *Id.* (O'Connor, J., dissenting) (citing *In re* John Doe Grand Jury Investigation, 562 N.E.2d 69, 72 (Mass. 1990); State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976)).

[131] *Id.* (O'Connor, J., dissenting) (citing Schlup v. Delo, 513 U.S. 298, 324-25 (1995); *In re* Winship, 397 U.S. 358, 371 (1970)).

[132] *Id.* (O'Connor, J., dissenting).

tion was warranted to protect the innocent, then it was also justified to prosecute the guilty, since these are the twin goals of the criminal justice system.[133] The dissent agreed with the lower court's recommendation of a balancing test which would allow courts to suspend the privilege where "interests in fairness and accuracy outweigh the justifications for the privilege."[134]

The dissent next considered other exceptions to the attorney-client privilege, concluding that existing exceptions to the privilege prevent clients from being certain that privileged conversations will always remain confidential.[135] Addressing the testamentary exception, Justice O'Connor reasoned that some deceased clients might prefer to have confidences preserved, even at the cost of misallocation of the client's estate.[136] Therefore, application of the exception might not always be in the client's best interest.[137] Justice O'Connor then took issue with the contention that exceptions for crime or fraud and claims concerning breach of duty by attorney or client are consistent with either clients' best interests or the justice system's interest in promoting candor between clients and their attorneys.[138] She contended that these exceptions to the privilege represent a recognition that in some instances the attorney-client privilege ceases to protect the legitimate interests of the criminal justice system, and therefore should not be preserved.[139]

Finally, the dissent surveyed the common law authority for maintaining the posthumous privilege. It found that most courts merely presume the privilege persists, but fail to address the question directly or provide much reasoning for their conclusions.[140] Justice O'Connor found that existing authority sup-

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[133] *Id.* (O'Connor, J., dissenting).

[134] *Id.* (O'Connor, J., dissenting).

[135] *Id.* (O' Connor, J., dissenting) (citing *In Re* Sealed Case, 124 F.3d 230, 235 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998)).

[136] *Id.* (O'Connor, J., dissenting).

[137] *Id.* (O'Connor, J., dissenting) (discussing example in which testator may prefer confidentiality to disclosure of his desire to provide for an illegitimate child and citing *In Re* Sealed Case, 124 F.3d at 234).

[138] *Id.* at 2090 (O'Connor, J., dissenting).

[139] *Id.* (O'Connor, J., dissenting).

[140] *Id.* (O'Connor, J., dissenting).

ported the proposition that the attorney-client privilege might be abrogated after the death of clients. She embraced the reasoning of California's Evidence Code, finding "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged."[141]

The dissent concluded by citing the work of legal commentators who agree that the posthumous privilege should not be preserved when such evidence would be instrumental in exonerating the innocent or convicting the guilty.[142]

V. ANALYSIS

In *Swidler & Berlin v. United States*,[143] the Supreme Court rejected use of a balancing test to determine the contours of the posthumous attorney-client privilege, because it would be inconsistent with the interests of clients and therefore discourage full and frank communication between attorneys and clients.[144] This Note argues that even though the Majority did not adequately reconcile its decision with other common law exceptions to the privilege, the Court was correct in adhering to the common law and striking down use of a balancing test. This Note further argues that by failing to rule on whether criminal defendants' constitutional rights might warrant breaching the attorney-client privilege,[145] the Court essentially avoided the Independent Counsel's most compelling argument,[146] and missed an opportunity to clarify defendants' rights under the Sixth Amendment Compulsory Process Clause.[147] However, the

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[141] *Id.* (O'Connor, J., dissenting) (quoting CAL. CODE EVID. ANN. § 952, 954 (West 1995)).

[142] *Id.* (O'Connor, J., dissenting) (citing 2 CHRISTOPHER B. MEULLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 199, at 380-81 (2d ed. 1994); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, Comt. d (Proposed Final Draft No. 1, 1996)).

[143] 118 S. Ct. 2081 (1998).

[144] *Id.* at 2086.

[145] *Id.* at 2087 n.3. The possibility that defendants' constitutional rights might warrant breaching the privilege in the post-mortem context is granted by Swidler & Berlin. *See* Brief for Petitioners at 28-29, *Swidler* (No. 97-1192).

[146] *See* Brief for the United States, at 22-26, *Swidler* (No. 97-1192).

[147] U.S. CONST. amend. VI. The amendment states:

Court's refusal to address this question should not be interpreted as willingness to recognize an additional exception to the privilege. To recognize an exception to the privilege for criminal defendants' evidentiary needs would be inconsistent with previous courts' treatment of both the attorney-client privilege and the right to compulsory process.

A. PROTECTION OF CLIENTS' BEST INTERESTS AS RATIONALE FOR THE PRIVILEGE

In reaching its decision, the *Swidler* Court noted that existing exceptions to the attorney-client privilege are consistent with the goals of promoting full and frank communication and safeguarding clients' best interests.[148] The dissent in *Swidler* disagreed, noting that the testamentary exception might be applied even when a deceased client would have preferred that confidentiality be maintained.[149] Even though efforts may be made to prevent disclosure of potentially embarrassing details, the possibility remains that information that clients would have wished to remain confidential will be disclosed.

While the dissent is correct that application of the testamentary exception will not always be consistent with the preferences of individual clients, the existence of the testamentary exception does not represent a "settled policy judgment that the interest in accurately settling estates overrides any interest in posthumous confidentiality of attorney-client communications."[150] Rather than a policy decision weighing settlement of estates against confidentiality, the testamentary exception represents a recognition by courts that, overall, clients prefer that their estates be settled consistently with their wishes, even if it means

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[148] *Swidler*, 118 S. Ct. at 2086.

[149] *Id.* at 2089 (O'Connor, J., dissenting).

[150] Brief for the United States at 20, *Swidler* (No. 97-1192).

that unwanted details are disclosed.[151] In applying the testamentary exception, courts are not so much making a decision against the best interests of clients, as they are determining what the majority of attorneys' deceased clients would prefer if they could still speak. Furthermore, to the extent that clients are notified of the testamentary exception when making out their wills, the exception serves as an incentive to make their preferences clear. In this manner, testators exercise a degree of control over when the testamentary exception will be applied.

The dissent cites the crime/fraud exception and exceptions for claims relating to breach of duty by attorney or client as further proof that courts have already limited the privilege in cases where its application would not further justice.[152] Here the dissent offers a cursory analysis of a complicated issue. As noted earlier,[153] the "crime-fraud exception" to the attorney-client privilege is not an exception at all, but a recognition that some communications are outside the scope of the proper attorney-client relationship. Regarding the exception for breach of duty by attorney or client, while in individual instances the exception's application may not be in the best interest of the client, its overall impact assists clients by making counsel available to them.[154] It would have been difficult and in poor taste for the Independent Counsel to argue that disclosure of Hamilton's notes would be consistent with Vincent Foster's best interests, given the presumption that the problems which prompted Foster to consult with Hamilton also contributed to his decision to commit suicide.[155] Moreover, these exceptions do not present the same problem of uncertainty for clients, since clients con-

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[151] *See* Glover v. Patten, 165 U.S. 394, 407-08 (1897) (citing Blackburn v. Crawfords, 3 Wall. 175, 194 (1865) ("It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related.")).

[152] *Swidler*, 118 S. Ct. at 2090 (O'Connor, J., dissenting).

[153] *See supra* notes 32-35 and accompanying text.

[154] If the attorney-client privilege could not be suspended in actions for malpractice and collection of fees, attorneys would be left entirely at the mercy of their clients, which would likely make obtaining legal assistance either impossible, or at the very least, considerably more expensive.

[155] *See generally* Brief for the United States, *Swidler* (No. 97-1192).

trol the circumstances under which the privilege might cease.[156] The Independent Counsel's proposed exception makes posthumous disclosure subject to an ex-post balancing test to be applied by courts on a case-by-case basis. This would make it almost impossible for clients to determine with certainty whether or not their communications might be used as evidence in a later criminal proceeding.

The Supreme Court's decision in *Swidler* strengthened protection of client interest as a guiding principle in determining the contours of the attorney-client privilege.[157] Oddly, the case which the Independent Counsel cited as the only one setting forth analysis concerning the privilege's survival in the face of compelling evidentiary need[158] concludes by observing that when doubt exists as to possible impact on clients' interests, the presumption should be in favor of nondisclosure.[159] Rather than advocating the balancing of needs for evidence against client interests, *Cohen v. Jenkintown Cab* holds that the posthumous privilege should only be curtailed when clients' rights or interests can not be harmed in any way.[160]

Moreover, the *Cohen* court's analysis of client interest appears flawed. It finds that there was nothing in the attorney's testimony which would "blacken the memory" of the client, while acknowledging that the testimony would confirm that the client committed perjury before he died.[161] To reconcile these two contentions, clients would have to care little about their

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[156] Whether or not these exceptions will be applied to privileged communications is more or less within the control of the client. If a client limits his communication to non-testamentary matters, avoids discussing future criminal activity, pays the attorney's fees, and does not sue his attorney for malpractice, the privilege will survive.

[157] *Swidler*, 118 S. Ct. at 2086.

[158] Brief for the United States at 21, *Swidler* (No. 97-1192) (citing Cohen v. Jenkintown Cab Co., 357 A.2d 689, 692-94 (Pa. Super. Ct. 1976)).

[159] Cohen v. Jenkintown Cab Co., 357 A.2d 689, 694 (Pa. Super. Ct. 1976) ("[T]he trial court should resolve all doubt in favor of nondisclosure, so that a client should not be chagrined to learn that the confidences that he conveyed to his attorney have been revealed to his detriment.").

[160] *Id.* at 692.

[161] *Id.* at 693. The *Cohen* court's analysis of perjury makes the Independent Counsel's citation to the case appear somewhat ironic in light of subsequent events. *See generally* Jill Abramson & Jeff Gerth, *Perjury is the Foundation of 5 of 11 Grounds Cited for Impeachment by Starr's Report*, N.Y. TIMES, Sept. 13, 1998 at A30.

posthumous reputations; a contention the *Swidler* Court correctly rejects.[162] Given the importance of client interest in determining the boundaries of the privilege, as well as the all-too-apparent weakness in the reasoning of the Independent Counsel's lead case, the Supreme Court was correct to refuse to recognize an additional exception to the posthumous attorney-client privilege.

B. PROTECTION OF DEFENDANTS' SIXTH AMENDMENT RIGHTS AS JUSTIFICATION FOR SUSPENSION OF THE POSTHUMOUS ATTORNEY-CLIENT PRIVILEGE

In addition to strengthening the posthumous attorney-client privilege against claims that it should be suspended for reasons other than clients' best interests, the decision in *Swidler* was significant for its refusal to reach the issue of survival of the posthumous attorney-client privilege in circumstances implicating criminal defendants' constitutional right to present exculpatory evidence.[163] The Court avoided considering what may be the strongest argument for suspending the posthumous attorney-client privilege: criminal defendants' right to present evidence which would exonerate them.[164] The Court's refusal to hold that defendants' right to present exculpatory evidence must yield to the posthumous attorney-client privilege provided hope for those who contend that clients' posthumous reputational concerns should not prevent presentation of evidence which would exonerate defendants.[165] While the Court's third footnote[166] makes it possible that the Court might recognize an exception to the posthumous privilege to allow the presentation of excul-

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[162] *Swidler*, 118 S. Ct. at 2086.

[163] *Id.* at 2087 n.3.

[164] *See* Brian R. Hood, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure after the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741 (1994) (arguing for a revision in American Bar Association's Model Rules of Professional Conduct to permit disclosure of a deceased client's communications when they might exonerate an innocent defendant). *See also* Julia Thomas-Fishburn, *Attorney-Client Confidences: Punishing the Innocent*, 61 U. COLO. L. REV. 185 (1990).

[165] *See, e.g.*, Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 161 (1974) ("No interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence.").

[166] *Swidler*, 118 S. Ct. at 2087 n.3.

patory evidence, such a ruling is improbable as it would be inconsistent with courts' previous decisions regarding the relationship between evidentiary privileges and defendants' Sixth Amendment rights.

Historically, the rights protected by the Compulsory Process Clause of the Sixth Amendment[167] have not received as much attention as those guaranteed by the Due Process Clause.[168] The Supreme Court has held that the Compulsory Process Clause was intended to ensure that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[169]

Previous Supreme Court decisions make it unlikely that the Court will recognize an exception to the posthumous privilege to allow the presentation of exculpatory evidence. Although the Supreme Court has struck down evidentiary rules which infringe on a defendant's right to compulsory process, it has hesitated to suspend recognized privileges on similar grounds.[170] In 1967, the Court decided *Washington v. Texas,* in which a petitioner convicted of murder challenged a state rule which prevented accomplices or coindictees from testifying for one another.[171] If allowed to testify, the man's accomplice would have claimed sole responsibility for the crime.[172] In striking down the evidentiary rule, the Court held that it violated the defendant's right to compulsory process because it denied him the opportunity to present a witness who was capable of testifying to events which were material or relevant to the petitioner's defense.[173] While

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[167] U.S. CONST. amend. VI. *See supra* note 147 for the text of the Sixth Amendment.

[168] The Due Process Clause of the Fifth Amendment provides that no one shall be "deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987) ("This Court has had little occasion to discuss the contours of the Compulsory Process Clause.").

[169] Taylor v. Illinois, 484 U.S. 400, 408 (1988) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987)).

[170] *See id.* at 410 ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

[171] Washington v. Texas, 388 U.S. 14 (1967).

[172] *Id.* at 16.

[173] *Id.* at 14.

similar reasoning might be asserted for allowing the testimony of attorneys for the deceased, the Court sought to foreclose this type of argument by noting that its analysis should not be extended to consideration of the attorney-client privilege.[174] The Court explained that the protection afforded privileged communications was based on "entirely different considerations" from those underlying Texas' attempt to disqualify evidence in *Washington*.[175]

In *Chambers v. Mississippi*, the Supreme Court struck down a lower court's decision to exclude testimony on grounds of hearsay, since the proffered testimony "bore persuasive assurance of trustworthiness."[176] The petitioner sought to overturn a conviction of murder by presenting evidence that a third party had orally confessed to the crime.[177] The Supreme Court held that the testimony should be allowed, noting that when "constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice."[178] The Court's willingness to admit hearsay evidence to exculpate a defendant appears particularly significant given its observation that "no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay."[179] However, any attempt to construe *Chambers* as advocating suspension of the attorney-client privilege in similar circumstances encounters two main obstacles. First, the Court in *Chambers* noted that the exercise of the right to compulsory process must be limited by "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[180] Established rules of procedure and evidence would presumably include the well-recognized attorney-client

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[174] *Id.* at 23 n.21 ("nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges.").

[175] *Id.*

[176] Chambers v. Mississippi, 410 U.S. 284, 302 (1972).

[177] *Id.* at 284.

[178] *Id.* at 302.

[179] *Id.*

[180] *Id.*

privilege. Second, any attempt to use the decision in *Chambers* to justify suspension of the attorney-client privilege is further frustrated by the Tenth Circuit's finding in *Valdez v. Winans,* that "*Chambers* does not support the notion that the right to compulsory process overrides the attorney-client privilege."[181] The *Valdez* court correctly noted that the hearsay rule and the attorney-client privilege serve two entirely different purposes.[182] While the hearsay rule acts to exclude potentially unreliable evidence, privileges are intended to promote extrajudicial interests which are held to outweigh the unfettered search for truth.[183]

In 1987, the Supreme Court decided *Rock v. Arkansas,* holding that Arkansas' rule excluding all hypnotically refreshed testimony violated criminal defendants' right to present relevant evidence.[184] The petitioner sought to have her conviction for manslaughter overturned because she was denied the opportunity to testify about events which she only remembered after having her memory refreshed through hypnosis.[185] The Court held that when drafting an evidentiary rule, states had to evaluate whether the interests protected by the evidentiary rule justified limiting defendants' constitutional right to testify under the Compulsory Process Clause.[186] The decision appears to support use of a balancing test, noting that "restrictions on a defendant's right to testify may not be arbitrary and disproportionate to the purposes they are designed to serve."[187] However, the significance of this decision to questions of attorney-client privilege and the right to compulsory process is limited by the Court's reference to its earlier footnote in *Washington,* stating that the holding should not be interpreted as affecting testimonial privileges.[188]

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[181] Valdez v. Winans, 738 F.2d 1087, 1090 (10th Cir. 1984).

[182] *Id.*

[183] *Id.* (quoting Peter Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 161 (1974)).

[184] Rock v. Arkansas, 483 U.S. 44, 55 (1987).

[185] *Id.* at 47.

[186] *Id.* at 56.

[187] *Id.* at 55-56.

[188] *Id.* at 55-56 n.11 (citing Washington v. Texas, 388 U.S. 14, 23 n.21 (1967)).

The most recent Supreme Court opinion construing defendants' Sixth Amendment rights is *U.S. v. Scheffer*.[189] In *Scheffer*, the Court sustained a rule preventing presentation of polygraph evidence in court martial proceedings against a challenge that it violated a defendant's right to present a defense.[190] The petitioner sought to present the results of a polygraph test which indicated that he had not lied about his alleged use of drugs.[191] In reaching its decision, the Supreme Court noted that exclusionary rules do not violate a defendant's right to present a defense, unless they "are arbitrary and disproportionate to the purposes they are designed to serve."[192] The Court further explained that rules are arbitrary or disproportionate to the extent that they threaten an important interest of the accused.[193] In seeking to distinguish the facts in *Scheffer* from those in *Washington*,[194] *Chambers*,[195] and *Rock*[196] the Court noted that the exclusions of evidence found unconstitutional in those cases "significantly undermined fundamental elements of the accused's defense."[197] *Scheffer's* holding is significant because it clarifies the type of rules the Court considers arbitrary and disproportionate. Applying this understanding, the exclusion of exculpatory evidence, particularly one's confession to a crime for which another is being prosecuted, would appear to significantly undermine a "fundamental element of the accused's defense." However, the holding in *Scheffer* does not extend to the tension between defendants' right to compulsory process and the attorney-client privilege since the case addresses an evidentiary rule, rather than a privilege.

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[189] 118 S. Ct. 1261 (1998).

[190] *Id.* at 1268-69.

[191] *Id.* at 1262.

[192] *Id.* at 1265.

[193] *Id.*

[194] Washington v. Davis, 388 U.S. 14 (1967). *See supra* notes 171-75 and accompanying text.

[195] Chambers v. Mississippi, 410 U.S. 284 (1972). *See supra* notes 176-83 and accompanying text.

[196] Rock v. Arkansas, 483 U.S. 44 (1987). *See supra* notes 184-88 and accompanying text.

[197] *Scheffer*, 118 S. Ct. at 1267-68.

Existing lower court decisions further reduce the likelihood that the Supreme Court will recognize an exception to the posthumous privilege to allow the presentation of exculpatory evidence. Two circuit courts have already ruled on the question of whether defendants' Sixth Amendment right to compulsory process justifies suspending the privilege when clients are still alive.[198] Both courts held that the right to compulsory process must yield when the attorney-client privilege is asserted.

In *Myers v. Frye*, the petitioner had been convicted of murder and sentenced to death.[199] During his trial, he sought to prove insanity by presenting letters he had written to his teenage accomplice.[200] At the time, the letters were being held by the accomplice's attorney, who withheld them on a claim of privilege.[201] The court held that the attorney's refusal to produce the letters did not violate the defendant's right to compulsory process, noting that the right is violated only when "broad arbitrary rules" exclude whole categories of witness testimony on the ground that it is "unworthy of belief."[202] The Court's finding that assertion of the privilege was neither broad nor arbitrary frustrates future compulsory process claims aimed at assertions of attorney-client privilege.

In *Valdez v. Winans*, the petitioner sought to introduce evidence that another prisoner had confessed to the crime for which the petitioner had been convicted.[203] The case was a particularly interesting one since the prisoner had confessed to the petitioner's public defender, and then subsequently recanted his confession.[204] The court refused to admit testimony of the confession, finding that it was protected by the attorney-client privilege.[205] The court based its decision on the fact that the prisoner was being represented by another public defender

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[198] *See* Valdez v. Winans, 738 F.2d 1087 (10th Cir. 1984); Myers v. Frye, 401 F.2d 18 (7th Cir. 1968).

[199] 401 F.2d at 19.

[200] *Id.* at 20.

[201] *Id.*

[202] *Id.* at 21.

[203] *Valdez*, 738 F.2d at 1088.

[204] *Id.*

[205] *Id.* at 1089.

from the same office as petitioner's counsel.[206] Though the evidence the defendant sought to present might have exculpated him, the court refused to admit it, noting that "the Sixth Amendment usually has been forced to yield when a testimonial privilege is asserted."[207] The holding in this case is particularly forceful since the excluded evidence bore directly on the defendant's guilt.

Three state courts have already considered whether defendants' Sixth Amendment rights justify suspending the attorney-client privilege after a client's death.[208] All three courts sustained the posthumous privilege against challenges based on the Sixth Amendment.

In *Arizona v. Macumber*, a client's need for exculpatory evidence directly conflicted with the posthumous attorney-client privilege.[209] The defendant sought to introduce the testimony of two attorneys that their deceased client had confessed to the crime for which the defendant had been charged.[210] The ruling was a significant one since the evidence sought to be presented was clearly relevant to the question of petitioner's guilt. The court reasoned that since the privilege was statutory in Arizona, the legislature's failure to provide for an express exception meant there was none available for presentation of exculpatory evidence.[211] Though the value of this decision as precedent may be weakened by the court's reliance on Arizona statutory law, the decision is representative of courts' unwillingness to suspend the posthumous attorney-client privilege.

In *Cooper v. State*, the petitioner had been convicted of murder even though one of the state's key witnesses had died before the trial.[212] The deceased witness' prior testimony was read at trial, and the defendant appealed when he was denied the opportunity to question the deceased witness' attorney concerning

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[206] *Id.*

[207] *Id.*

[208] Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976); People v. Pena, 198 Cal. Rptr. 819 (Cal. Ct. App. 1984); Cooper v. State, 661 P.2d 905 (Okla. Crim. App. 1983).

[209] 544 P.2d 1084 (Ariz. 1976).

[210] *Id.* at 1086.

[211] *Id.*

[212] Cooper v. State, 661 P. 2d 906, 907 (Okla. Crim. App. 1983).

the written testimony.[213] The defendant argued that his right to confront a witness under the Sixth Amendment justified suspending the deceased witness' attorney-client privilege.[214] The court rejected this argument, finding that the right to confront a witness did not include the right to examine that witness' attorney.[215] The court held that "the right to compulsory process does not negate traditional privileges such as the attorney-client privilege."[216]

In *People v. Pena*, the petitioner had been convicted of murder, and argued that he had been wrongfully denied the opportunity to question the victim's attorney.[217] The petitioner hoped to strengthen his claim of self defense by presenting testimony of a privileged conversation regarding the victim's earlier indictment for assault with a deadly weapon.[218] The court found that the defendant had no right to compel the testimony of the victim's attorney.[219] However, the significance of this decision is tempered by the fact that the evidence the defendant sought to compel was deemed irrelevant by the court.[220] While explicitly rejecting the claim that defendants' Sixth Amendment rights justify suspending the posthumous attorney-client privilege, the decisions in *Cooper* and *Pena* serve as weak precedent to the extent that their holdings address instances where evidence bore minimal significance to defendants' innocence.

A cursory examination of the Supreme Court's evolving Compulsory Process Clause jurisprudence might give hope to those who believe that the posthumous attorney-client privilege should be suspended to allow presentation of exculpatory evidence. However, the Court's previous reluctance to apply its Compulsory Process Clause analysis to well-established privileges makes it unlikely that the Court will recognize an additional exception to the posthumous attorney-client privilege. A quick re-

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[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] People v. Pena, 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984).
[218] *Id.* at 828-29.
[219] *Id.*
[220] *Id.* at 829.

view of lower court rulings concerning the relationship between the attorney-client privilege and the Sixth Amendment makes it appear even less likely that the Court will make such a finding. Furthermore, allowing the privilege to be suspended for presentation of exculpatory evidence would be inconsistent with the Court's guiding principle in construing the privilege: safeguarding clients' best interests.

VI. CONCLUSION

In *Swidler & Berlin v. United States*, the Supreme Court sent a clear message that the contours of the posthumous attorney-client privilege were not to be determined by balancing clients' interests in confidentiality against other judicial policy goals. The decision reaffirmed clients' best interests as the guiding principle when preservation of the attorney-client privilege is questioned. However, in failing to address cases implicating defendants' constitutional rights, the Court left open the question whether defendants' right to present exculpatory evidence under the Compulsory Process Clause warrants suspension of the posthumous privilege. However, the *Swidler* Court's emphasis on client interests in construing the privilege, as well as previous courts' unwillingness to limit common law privileges when confronted with Compulsory Process Clause challenges, makes it unlikely that the Supreme Court will recognize an additional exception to the posthumous attorney-client privilege for exculpatory evidence.

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