
THE WEINTRAUB PRINCIPLE: ATTORNEY-CLIENT PRIVILEGE AND GOVERNMENT ENTITIES

JASON BATTS*

Amidst the backdrop of a federal investigation into the actions of President Donald Trump, a previously unexplored legal question has emerged on a topic that forms the foundation of legal practice: Can a succeeding government official revoke a predecessor's claim of the attorney-client privilege? Although the question is novel, its role within the government context is well established—having been asserted by Presidents Richard Nixon and Bill Clinton in their respective administrations. The context of current events, however, underscores the need to further define the operation of a privilege that is once again being relied upon by a president under investigation.

*In this Article, I argue that a public official should be permitted to revoke a predecessor's claim of the attorney-client privilege if made on behalf of the government entity. I justify this determination by applying the same corporate rationale put forth by the Supreme Court in *Commodity Futures Trading Commission v. Weintraub* to the government context. Termed the "Weintraub Principle," I contend that government agents*

*. Prosecutor, Hickman County, Kentucky; B.A. 2005, Morehead State University; J.D. 2010, Washington University School of Law; Editor-in-Chief, *Washington University Law Review*, Volume 87. Special Victim's Counsel to sexual-assault victims as a Judge Advocate in the United States Army Reserve. Military information does not imply endorsement by the Department of Defense or the Department of the Army. All analysis and opinions are my own. I remain very thankful to Professor Kathleen Clark for her helpful comments and express my sincere gratitude to Professor Brad Areheart and Professor Rebecca Hollander-Blumoff for their respective time, assistance, and encouragement. In addition, I appreciate the staff on the Southern California Law Review, especially Daniel Brovman, for their helpful and professional guidance. I am forever grateful to Judge Hunter B. Whitesell, II and attorneys, Richard Major and Amanda Major, for their unending patience and teaching. I dedicate this Article to my family, without whom this would not be possible.

should have the same authority afforded to their corporate counterparts for three primary reasons: (1) corporate and government entities are restricted to operating through replaceable agents; (2) corporate and government agents are granted authority from others to act on behalf of the entity; and (3) agents in both contexts owe a duty to act in the best interests of the entity—as well as to shareholders in the corporate setting and to the public in the government environment. While acknowledging the likely counterarguments to my proposal, further analysis reveals how each criticism falls short of prohibiting the rule’s application to government entities. In conclusion, I summarize the rationale for my argument and highlight the Weintraub Principle’s real-world application.

INTRODUCTION

“Attorney-client privilege is dead!”¹ This announcement by President Donald Trump declaring the passing of one of the oldest concepts known to law, came as a surprise to many in the legal community and garnered headlines around the world.² Absent from the death certificate was the cause of the privilege’s untimely, alleged demise—the search and seizure by federal agents of files maintained by President Trump’s private attorney, Michael Cohen.³ The taking of Cohen’s documents represented the latest maneuver by federal officials charged with investigating alleged wrongdoings by President Trump and his associates.⁴

1. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 10, 2018, 6:07 AM), <https://twitter.com/realdonaldtrump/status/983662868540346371>.

2. E.g., Andrew Buncombe, *Trump ‘Bouncing Off Walls’ with Rage After FBI Raid on Personal Lawyer’s Offices*, THE INDEPENDENT, Apr. 11, 2018, at 27; Ben Riley-Smith, *Republicans Warn Trump not to Fire Mueller*, DAILY TELEGRAPH, Apr. 11, 2018, at 11; Chidanand Rajghatta, *Trump Goes Ballistic as FBI Closes in, Raids His Personal Lawyer*, TIMES OF INDIA, (Apr. 10, 2018, 9:09 PM), <https://timesofindia.indiatimes.com/world/us/trump-goes-ballistic-as-fbi-closes-in-raids-his-personal-lawyer/articleshow/63700727.cms>; Lawrence Douglas, *The Cohen Raid Is a Game Changer: Trump’s Reaction Tells Us So*, GUARDIAN, (Apr. 10, 2018, 11:03 AM) <https://www.theguardian.com/us-news/2018/apr/10/donald-trump-michael-cohen-raid-comment>. Research of news articles via Google News that included the terms “Trump attorney client privilege”, restricted to the twenty-four hours after the President’s Tweet regarding the privilege’s death, returned about 14,500 results. Similarly, a search of Lexis Advance that I limited to “major non-U.S. newspapers” for the same twenty-four-hour period returned twenty-six results within this more defined pool of news outlets.

3. Matt Apuzzo, *F.B.I. Raids Office of Trump’s Longtime Lawyer Michael Cohen; Trump Calls it ‘Disgraceful’*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html>; Josh Gerstein, *Trump Lawyer Presses for Access to Seized Cohen Files*, POLITICO (Apr. 15, 2018, 10:57 PM), <https://www.politico.com/story/2018/04/15/trump-cohen-files-access-seized-526268>.

4. See Philip Bump & Devlin Barrett, *Investigation of Trump Attorney Cohen Underway for Months, Filing Shows*, WASH. POST, Apr. 14, 2018, at A5; Matt Apuzzo et al., *Trump Sees Inquiry into Cohen as Greater Threat than Mueller*, N.Y. TIMES (Apr. 13, 2018), <https://nyti.ms/2JDyg0h>.

Political scandals are as old as government itself.⁵ While far from a uniquely American phenomenon,⁶ the modern political investigations regarding Presidents Richard Nixon and Bill Clinton captivated a worldwide audience and set a precedent for future actions involving high-ranking government officials.⁷ Although such legal actions can involve defendants who are as concerned about the court of public opinion as the court of legal decision,⁸ the spotlight in such cases can grow as focused on the legal doctrines involved as easily as it can upon the parties to the action.⁹ For example, during the impeachment of President Clinton, an

5. See RAMSAY MACMULLEN, *CORRUPTION AND THE DECLINE OF ROME* (1988); Kyle Swenson, *America's First 'Hush Money' Scandal*, WASH. POST (Mar. 23, 2018), http://wapo.st/2u90MD2?tid=ss_tw-bottom&utm_term=.97f3aaccf148.

6. See, e.g., Choe Hang-Sun, *Park Geun-hye, South Korea's Ousted President, Gets 24 Years in Prison*, N.Y. TIMES (Apr. 6, 2018), <https://nyti.ms/2EmuUec>; *Lula: Former Brazilian President Surrenders to Police*, BBC NEWS (Apr. 8, 2018), <http://www.bbc.com/news/world-latin-america-43686174>.

7. See e.g., Caryn James, *Testing of a President: The Speech; Apology and Defiance Echo a Nixon Address*, N.Y. TIMES, Aug. 18, 1991, at A16; Suzanne Garment, *Nixon's Decisions During Watergate May Help Us Understand the Legal Trouble Trump Is in Now*, NBC NEWS (Apr. 5, 2018, 1:29 AM), <https://www.nbcnews.com/think/opinion/nixon-s-decisions-during-watergate-may-help-us-understand-legal-ncna862821>; *Sex, Lies and Impeachment*, BBC NEWS (Dec. 22, 1998), http://news.bbc.co.uk/2/hi/special_report/1998/12/98/review_of_98/themes/208715.stm.

8. *State of the Union with Jake Tapper*, CNN (Apr. 15, 2018, 9:00 AM to 10:00 AM), https://archive.org/details/CNNW_20180415_160000_State_of_the_Union_With_Jake_Tapper/start/1299/end/1359 (starts at 9:20 AM).

My guess is that his lawyers don't want him to go about it that way. That there's lots of evidence, not necessarily in this Tweet storm, but in other Tweet storms, that will be bad for him if Bob Mueller you know ends up coming around to bringing some kind of case together either in a report or otherwise relating to obstruction. Every single time the President makes clear that he doesn't like an investigation of him or his associates, and wants that investigation to stop, that adds to the narrative that when he takes an action that actually can cause the investigation to stop that that was intentional and was potential obstruction. I'm not saying it is obstruction, but it adds grist for people to find that to be true.

Id. In addition, during investigations concerning President Clinton, the President boldly pronounced that he "did not have sexual relations with that woman." *Bill Clinton: 'I Did Not Have Sexual Relations with that Woman.'*, WASH. POST (January 25, 2018, 4:39 PM EDT), https://www.washingtonpost.com/video/politics/bill-clinton-i-did-not-have-sexual-relations-with-that-woman/2018/01/25/4a953c22-0221-11e8-86b9-8908743c79dd_video.html (affirming this story under oath caused the President to commit perjury); *Mr. Clinton's Last Deal*, N. Y. TIMES (Jan. 20, 2001), <https://www.nytimes.com/2001/01/20/opinion/mr-clinton-s-last-deal.html>. Likewise, President Trump's social media commentary may boost his standing among his political base but could prove detrimental to his legal interests. See Julie Bykovic & Janet Hook, *Trump Weekend Tweetstorm Responds to Mueller Indictment*, WALL ST. J. (Feb. 18, 2018, 11:11 AM), <https://www.wsj.com/articles/trump-weekend-tweetstorm-responds-to-mueller-indictment-1518967910>.

9. The investigations into Presidents Nixon, Clinton, and Trump increased the popular notoriety of the privilege through its repeated appearance in media reporting. See, e.g., Lesley Oelsner, *Ehrlichman Blames Nixon*, N.Y. TIMES, Oct. 16, 1974, at A1; Jacqueline Thomsen, *Trump Lawyers Argue Material Seized in Cohen Raid Is Protected by Attorney-Client Privilege*, THE HILL (Apr. 13, 2018, 11:41 AM), <http://thehill.com/homenews/administration/383019-trump-lawyers-argue-material>.

American public that typically associated privilege with political leaders also became acquainted with a legal form of privilege between an attorney and client.¹⁰ While the Clinton impeachment process played out, the privilege rose in notoriety as Clinton's White House cited it in fighting to keep private certain conversations with in-house counsel.¹¹

In the current tumultuous political environment, fueled by investigations into President Trump and those associated with his administration, the attorney-client privilege is again gaining notoriety as part of the legal toolkit for a president under investigation.¹² Following the seizure of documents from properties being used by the President's attorney, President Trump and Mr. Cohen asked a court to throw out the material collected, arguing it was privileged.¹³ In addition, the President's son, Donald Trump, Jr., cited the attorney-client privilege as justification for refusing to answer questions in a hearing before the House Intelligence Committee.¹⁴ This resurgent notoriety of the attorney-client privilege and discussion of how the privilege operates within the government context will likely grow as the investigations into the Trump administration continue.¹⁵

It would be disingenuous, however, to suggest that the attorney-client privilege was an ignored legal issue outside the realm of modern political events.¹⁶ Presidential sagas—like those of Nixon, Clinton, and Trump—

seized-in-cohen-raid-is-protected-by.

10. Bob Franken, *White House Says Clinton Needs Attorney-Client Privilege for Impeachment Fight*, CNN (Aug 21, 1998), <http://edition.cnn.com/ALLPOLITICS/1998/08/21/lewinsky>.

11. *Id.*; H.R. Res. 611, 105th Cong., 144 CONG. REC. 11774 (1998) (enacted).

12. See, e.g., Kathleen Parker, *We've Seen This Movie Before. It Ended in Impeachment.*, WASH. POST (Apr. 10, 2018), https://wapo.st/2qkNFJO?tid=ss_tw-bottom&utm_term=.f83b124ba01c; Mike Huckabee (@GovMikeHuckabee), TWITTER (Jun 13, 2017, 1:04 PM), <https://twitter.com/govmikehuckabee/status/874719159585841152?lang=en> (“Dems act like they never heard of atty/client privilege; AG is top atty in Exec branch; serves @POTUS and not stooge of Congress.”).

13. Thomsen, *supra* note 9.

14. Kyle Cheney, *Trump Jr. Cites Attorney-Client Privilege in not Answering Panel's Questions About Discussions with his Father*, POLITICO (December 6, 2017, 7:37 PM), <https://www.politico.com/story/2017/12/06/donald-trump-privilege-questions-284841>.

15. It is worth noting that the current investigations concerning President Trump are occurring amidst the backdrop of a federal government controlled by members within the President's own political party. Congress has immense investigatory powers, which are most practically limited by its willingness to utilize them. Should the Democratic Party take control of Congress, or simply the House of Representatives or Senate, members in the new majority would likely have a far greater willingness to investigate the Trump administration.

16. See, e.g., 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. 1961); John Damin, *Thawing the Chill Between Government Attorneys and Their Clients: The Need for Legislative Intervention in Protecting the Governmental Attorney-Client Privilege*, 111 PENN. ST. L. REV. 1009, 1010 (2007).

merely provide a catalyst for media pundits and legal commentators to discuss a topic that is all too familiar to legal scholars¹⁷ Much has been written about the privilege's history and its application to courts in the United States and abroad.¹⁸ Scholarship has also delved into the intricate theories of the privilege by discussing its potential application to government lawyers.¹⁹ However, one question remains unanswered: Whether the successor to a government official can revoke a predecessor's claim of attorney-client privilege? Faced with this unresolved issue, courts should apply the corporate principle outlined in *Commodity Futures Trading Commission v. Weintraub*²⁰ to government actors and permit a successive government agent to revoke a predecessor's claim of the attorney-client privilege.

I. APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO CORPORATE AND GOVERNMENT ENTITIES

Although courts and scholars have relied upon various enunciations of the rule for attorney-client privilege, one replete with the intricacies of modern practice is found in the often-cited case *United States v. United Shoe Machinery Corporation*.²¹ For entities, that analysis becomes

17. See, e.g., Gregory I. Massing, *The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White-Collar Crime*, 75 VA. L. REV. 1179 (1989); *Clinton's Senate Trial: How It Will Work*, PALM BEACH POST, Dec. 20, 1998, at 22A.

18. See, e.g., PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1:11 (2d ed. 1999); Damin, *supra* note 16, at 1013–15.

19. See, e.g., Damin, *supra* note 16, at 1010–11 (quoting *In re Bruce R. Lindsey*, 158 F.3d 1263, 1271 (D.C. Cir. 1998)); Michael Stokes Paulson, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 475 (1998) ("My topic concerns one of the many important practical consequences that flows from this post-*Morrison* constitutional order: how control over the government's attorney-client privilege works under a regime of divided executive management of USA, Inc.") (providing analysis, in the context of the impeachment of President Clinton, of the privilege's operation within the federal Executive Branch).

20. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

21. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950).

The privilege applies only if (1) the asserted holder of the privilege is or sought to be come [sic] a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. See also John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 445 n.5 (1982) (claiming Dean Wigmore's definition is "the most widely cited formulation of the elements of the attorney-client privilege" before also reciting the definition put forth in *United Shoe*).

complicated because they are restricted to acting through agents.²² To assist with the task of applying the privilege in the entity context, courts have developed various tests that are largely focus on the status of the entity employee.

In 1950, a Massachusetts District Court put forth the first such test in a broad holding that permitted an employee to invoke the privilege on a corporation's behalf if the majority of the employee's job activities involved legal work and the communication remained secret from public disclosure.²³ In 1962, a District Court for the Eastern District of Pennsylvania created the "control-group test," which narrowed application of the corporate privilege to include only those communications between corporate counsel and agents who controlled the corporation.²⁴ Under this test, the privilege would apply if the recipient possessed sufficient authority to implement changes within the corporation based upon the advice received.²⁵ Considering the different approaches, in 1970, the Seventh Circuit Court of Appeals created the "subject-matter test."²⁶ This test required an employee to seek legal advice at the direction of a supervisor on a "subject matter" within the employee's realm of work responsibility.²⁷ Finally, in 1981, the United States Supreme Court announced the *Upjohn* Test in an opinion that acknowledged the different tests, but refused invitations to endorse one over the other.²⁸ Instead, the Court used five factors to determine whether a communication is privileged in the corporate context.²⁹

22. See, e.g., *Bellis v. United States*, 417 U.S. 85, 90 (1974) (stating "the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents"); *Braswell v. United States*, 487 U.S. 99, 110 (1988) (citing *Bellis*, 417 U.S. at 90) ("Artificial entities such as corporations may act only through their agents.").

23. *United Shoe*, 89 F. Supp. at 361.

24. *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

25. *Id.* at 485–86.

26. *Harper & Row Publishers v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970).

27. *Id.*

[A]n employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Id.

28. *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

29. *Id.* at 394–95. The Court first considered whether the information was "available from upper-echelon management." *Id.* Second, the Court examined whether the information was "needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas." *Id.* Third, the Court reviewed whether the "communications concerned matters within the scope of the employees' corporate

The boundaries for government application of the attorney-client privilege are not as established as their corporate counterparts.³⁰ This is particularly true in the criminal context, which—as the Second Circuit Court of Appeals wryly noted—is ripe for a Supreme Court decision to resolve the current judicial split.³¹ The public function served by government agents and the potentially high-ranking clients involved in such cases further demonstrates the need for clarity as to how the privilege operates within the government context.³² Often with little underlying analysis, courts have seemingly deferred to a version of the control-group test by assuming that elected officials have authority to assert the privilege.³³

In contrast to the disagreement over how the privilege operates with respect to entities, unanimity exists as to how the entity itself operates. Whether the entity is a business or a government agency, both act through agents.³⁴ The agents, in turn, possess authority and bear responsibility for asserting the attorney-client privilege on behalf of the entity when in its “best interests.”³⁵ This intersection—where the requirement of entity

duties.” *Id.* Fourth, it asked whether “the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.” *Id.* Finally, the Court considered whether “the communications were considered ‘highly confidential’ when made . . . and have been kept confidential by the company.” *Id.* at 395.

30. The evolutionary development of the corporate privilege spans decades and includes several tests developed by courts to determine the operation of the rule. *See supra* notes 22–29 and accompanying text.

31. *United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 536 n.4 (2d Cir. 2005) (“We are in no position, however, to resolve this tension in the law.”).

32. *See supra* note 8 (stating examples of the potential high-ranking clients in government-privilege cases by comparing the investigations of Presidents Nixon and Clinton).

33. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997). Unlike in cases involving corporations and other private entities, when the client is a public entity, courts often include a public-function element within their analysis. *See, e.g., Lindsey*, 158 F.3d at 1273 (“[T]he loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.”); *Duces Tecum*, 112 F.3d at 920 (“[T]he general duty of public service calls upon government employees and agencies to favor disclosure over concealment.”).

34. *Deshaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194 (1989); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985); *Bowen v. Watkins*, 669 F.2d 979, 989 (5th Cir. 1982) (“At some level of authority, there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents.”). *See also* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 404 (“Like a corporation, the government speaks and acts only through its agents.”); Carlos E. Gonzalez, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 132 (2003) (considering the degree to which government entities represent the will of the people).

35. *See Weintraub*, 471 U.S. at 34–49.

agents to invoke the privilege as well as their power to do so collide—highlights the unresolved issue of a succeeding government official’s authority.

This analysis has practical implications because it is not hard to imagine a scenario where a newly elected politician might revoke the privilege of her or his predecessor. For instance, the Obama administration could have sought to revoke the privilege that protected communications made during the Bush administration—a practice which frustrated some in Congress at the time.³⁶ In addition, a future president could seek to revoke any claims of privilege put forth by officials within the Trump administration on behalf of the executive branch.³⁷ Applying the *Weintraub* Principle in the government context permits a court to logically draw upon similarities to corporate entities, while furthering the distinctively public function of public agencies.³⁸

II. DEVELOPMENT OF THE WEINTRAUB PRINCIPLE

In the seminal case *Commodity Futures Trading Commission v. Weintraub*, the Supreme Court set out to resolve a circuit split as to “whether the trustee of a corporation in bankruptcy has the power to waive the debtor corporation’s attorney-client privilege with respect to communications that took place before the filing of the petition in bankruptcy.”³⁹ Although not appearing in the title, the case stemmed from an inquiry into the Chicago Discount Commodity Brokers (“CDCB”) by the Commodity Trading Commission (“the Commission”).⁴⁰ After the CDCB filed bankruptcy, a permanent trustee was appointed to act on its behalf, thus setting the stage for a confrontation to determine which agent was authorized to assert attorney-client privilege on behalf of a corporate entity in bankruptcy.⁴¹

While the trustee moved forward with the corporation’s bankruptcy action, so too did the Commission with its investigation into allegations of

36. See *Cheney, Rice Approved Use of Waterboarding, Other Interrogation Tactics*, FOX NEWS (April 11, 2008), <http://www.foxnews.com/story/0,2933,349948,00.html>.

37. See *supra* note 11 and accompanying text.

38. See *infra* note 73 and accompanying text.

39. *Weintraub*, 471 U.S. at 345.

40. *Id.* The Commission sought to determine whether the Chicago Discount Commodity Brokers (“CDCB”) had “violated the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*” *Id.*

41. *Id.* at 345–46. The bankruptcy court named Mr. John K. Notz, Jr. as the permanent trustee for CDCB, granting him authority to proceed with the bankruptcy action on behalf of the company, which occurred on the same day the Commodity Trading Commission (“the Commission”) filed a complaint against CDCB. *Id.*

misconduct by CDCB agents. As part of its inquiry, the Commission subpoenaed Mr. Gary Weintraub—the former counsel for the CDCB.⁴² Although Weintraub provided sworn answers to the Commission, he “refused to answer 23 questions, asserting CDCB’s attorney-client privilege.”⁴³ In response, the Commission filed a motion requiring Mr. Weintraub to answer the remaining questions, while taking the unorthodox approach of communicating directly with the bankruptcy trustee to request the trustee use his authority to waive CDCB’s privilege. The trustee agreed to abandon any right to the privilege owned by the CDCB up to the date he was appointed. Although the district court found the trustee could waive the privilege, thus requiring Mr. Weintraub to testify, the Seventh Circuit overturned this decision, placing the power to waive privilege back in the hands of Mr. Weintraub.⁴⁴ Subsequently, the Supreme Court accepted the case to resolve the issue and the circuit split that had developed.⁴⁵

As respondents, Mr. Weintraub and his counsel put forth five primary arguments for why the Court should permit management of a corporation in bankruptcy to retain the authority to assert attorney-client privilege. First, they argued that the allegiances of a trustee would be to the creditors that selected her or him, as opposed to the shareholders of the debtor corporation.⁴⁶ The Court dismissed this argument by noting that the fiduciary duties of a trustee are to “shareholders as well as to creditors.”⁴⁷ Furthermore, were there to be no trustee appointed, the managers of the insolvent corporation would share the same dual fiduciary duty as a trustee.⁴⁸ The Court also shrewdly observed that “out of all management powers” lost to a trustee during bankruptcy, the respondents had offered no justification as to why the attorney-client privilege should be the sole power treated differently.⁴⁹

Second, the respondents argued that the Court’s decision “would also apply to *individuals* in bankruptcy.”⁵⁰ However, the Court rejected this

42. *Id.* at 346.

43. *Id.*

44. *Id.* at 346–47.

45. *Id.* at 347.

46. *Id.* at 354–55.

47. *Id.* at 355–56.

48. *Id.* at 355 (“Respondents also ignore that if a debtor remains in possession—that is, if a trustee is not appointed—the debtor’s directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession.”) (citing *Wolf v. Weinstein*, 372 U.S. 633, 649–52 (1963)).

49. *Id.*

50. *Id.* at 356 (emphasis in original).

notion by drawing upon the distinction between human and entity clients to convey that any such result would be an overly broad application of their ruling. As the Court noted, whereas a person makes his or her own decisions, “a corporation, as an inanimate entity, must act through agents.”⁵¹ Therefore, the decision held that any subsequent ruling involving a person in the same context would require different legal reasoning than employed in *Weintraub*.⁵²

Third, the respondents claimed that granting a bankruptcy trustee power over the privilege would “have an undesirable chilling effect on attorney-client communications.”⁵³ Corporate executives, the theory went, would be far less willing to communicate openly with entity attorneys if the conversations were discoverable in an ensuing bankruptcy matter. However, the Court dispelled this argument by noting that any hesitancy would be no greater than the amount already existing for corporations operating outside of bankruptcy. Future managers of corporations that are not going through bankruptcy could always “waive the corporation’s attorney-client privilege with respect to prior management’s communications with counsel.”⁵⁴

Fourth, the respondents claimed that vesting authority to control an insolvent entity’s attorney-client privilege in a trustee is tantamount to “economic discrimination.”⁵⁵ The Court acknowledged that solvent and insolvent corporations were treated differently, but noted that this was by legislative design. Bankruptcy laws grant courts the ability to “change radically and materially [the] rights and obligations” of an insolvent debtor, and the respondents failed to provide the Court with an explanation as to why the disparity in treatment was unwarranted.⁵⁶

Finally, the respondents claimed that permitting a trustee to waive a corporate successor’s privilege would deter individuals and entities from pursuing the shelter of bankruptcy.⁵⁷ Ruling in favor of the Commission, according to the respondents, would “provide an incentive for creditors to file for involuntary bankruptcy.”⁵⁸ However, the Court disagreed, noting that there are a number of factors that might motivate a party to pursue or

51. *Id.*

52. *Id.* at 356–57.

53. *Id.* at 357.

54. *Id.*

55. *Id.*

56. *Id.* (quoting *McDonald v. Williams*, 174 U.S. 397, 404 (1899)).

57. *Id.* at 357–58.

58. *Id.* at 357.

avoid bankruptcy.⁵⁹ The Court felt that any impact of its decision upon the calculus of a party weighing the possibility of bankruptcy, would be in accord with “congressional intent.”⁶⁰

Having considered and refuted the arguments put forth by Mr. Weintraub, the Court overruled the Seventh Circuit and implemented the *Weintraub* Principle—that a corporate successor in interest can revoke a predecessor’s assertion of attorney-client privilege.⁶¹

III. APPLYING THE *WEINTRAUB* PRINCIPLE TO GOVERNMENT ENTITIES

With the well-articulated, point-by-point approach taken in *Weintraub*, the Court laid the groundwork for applying the rationale to similar scenarios. The characteristics of corporate entities described by the Court are also applicable to government agencies. Further analysis of each shared trait establishes strong evidence for employing the *Weintraub* Principle in both contexts.

A. THE AGENT REQUIREMENT

The Court in *Weintraub* held that, “[a]s an inanimate entity, a corporation must act through agents [and] cannot directly waive the attorney-client privilege when disclosure is in [the entity’s] best interest.”⁶² Likewise, a government agency is an inanimate entity that must act through its agents.⁶³ It cannot speak for itself, and similarly, it cannot directly waive the privilege when disclosure is in its best interest.⁶⁴ Furthermore, the agents operating within each type of entity are replaceable.⁶⁵ Whether the

59. *Id.* at 358.

60. *Id.*

61. *Id.* (noting that a corporate bankruptcy trustee “has the power to waive the corporation’s attorney-client privilege with respect to prebankruptcy communications”).

62. *Id.* at 348.

63. RICE, *supra* note 18, at § 4:28.

64. *Id.*

65. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of

chief executive officer of a company or the president of the country, the end of their tenure does not result in the expiration of the entity.⁶⁶ By operating via agents who are replaceable, entities can carry on in perpetuity, with varying individuals speaking on its behalf throughout its lifespan.⁶⁷ Since both government and corporate entities are restricted to operating through interchangeable agents, courts should apply the *Weintraub* Principle to successive government agents.

B. THE SOURCES OF AUTHORITY

The Court in *Weintraub* also justified its decision to allow corporate successors-in-interest the power to revoke a predecessor's claim of privilege by recognizing that the power wielded by entity agents stems from other authorities.⁶⁸ Corporate officers are empowered to act on behalf of the entity by the board of directors, who in turn are vested with authority by the shareholders.⁶⁹ Similarly, government agents are endowed by the people to act on their behalf.⁷⁰ Actors within a government entity may be elected by the people, appointed by the elected official, or hired by a subordinate to the officeholder.⁷¹ The existence of empowering authorities, who select agents to act on their behalf, illustrates another similarity

individuals are capable of acting for the promotion of the particular object, like one immortal being.

Id. Practically speaking, a potential counterargument could be the small, family-run corporation that may cease to exist beyond the original proprietors. This potential result, however, does not negate the well-stated case herein, nor the excellent article authored by Professor Schwartz. *See* Schwartz, *infra* note 66.

66. Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012) (“Natural persons can get sick and die, and similarly, other forms of business organization, such as the partnership or sole proprietorship, have only limited lifespans. But one of the defining legal characteristics of the corporation is its capacity to live forever.”).

67. *Woodward*, 17 U.S. at 636.

68. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 349 n.4 (1985) (citing Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375 (1975)).

69. *Id.*; *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 127 (3d Cir. 1998) (citing 2 WILLIAM M. FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 434, at 339 (perm. rev. ed. 1992)).

70. *See, e.g., Perry v. United States*, 294 U.S. 330, 353 (1935) (“The congress cannot revoke the sovereign power of the people”); THE FEDERALIST NO. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The Fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.”); THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) (stating that “the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which THE several branches of government hold their power, is derived.”).

71. *See, e.g., U.S. CONST. art. I, § 2* (stating “the People of the several States” are to elect House of Representatives members).

between the two entity types that justifies application of the *Weintraub* Principal in both contexts.⁷²

C. THE DUTY OWED TO OTHERS

Finally, operating as an agent carries certain obligations to act in the interests of the principle.⁷³ Private entities, for example, rely on senior officers to assert the privilege “in a manner consistent with their fiduciary duty to act in the best interests of the corporation.”⁷⁴ Likewise, government entities often act through high-ranking elected officials⁷⁵ who must take care to assert the privilege in accord with the official’s duty to the public in honest and open government.⁷⁶ Breach of duty in either context can result in judicial action against the agent.⁷⁷ Permitting a government official to revoke a predecessor’s assertion of the privilege is in furtherance of the official’s duty to “open government” since it would reveal government information.⁷⁸ Furthermore, a government agent’s decision to waive a

72. Although differences between public and private entities can emerge when examining how a senior agent may be terminated in either context, similarities between the two continue when discussing employees operating at other levels. Employment contracts can result in countless different scenarios; however, in the context of an at-will-employment relationship, public and private entities enjoy broad latitude in deciding whether to terminate an employment relationship. *Engquist v. Dep’t of Agric.*, 553 U.S. 591, 599 (2008) (“In light of these basic principles, we have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.”); *Hugley v. Art Inst.*, 3 F. Supp. 2d 900, 908 (N.D. Ill. 1998) (quoting *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995)). Yet differences can emerge with respect to elected officials because their employment in a particular office is restricted to certain timespans as well as limits on the number of terms the official can serve. *See, e.g.*, U.S. Const. amend. XIV, § 2; Haw. Const. art. V, § 1. This variance for elected officials does not dilute the number of similarities between public and private entities enough, however, to warrant a result other than applying the *Weintraub* Principle to public entities.

73. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

74. *Weintraub*, 471 U.S. at 348–49. *See also* *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 171 (Del. Ch. 2014).

75. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (involving a president); *United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527 (2d Cir. 2005) (involving a governor).

76. *Subpoena Duces Tecum*, 112 F.3d at 918 (finding that restricting communications involving the first family would be “in derogation of the search of the truth”) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

77. *Bailey v. Mayor of New York*, 3 Hill 531, 538 (N.Y. Sup. Ct. 1842) (“If a public officer authorizes the doing of an act not within the scope of his authority, . . . he will be held responsible.”); *Vertin*, 102 A.3d at 171–72.

78. *Subpoena Duces Tecum*, 112 F.3d at 918 (quoting *Nixon*, 418 U.S. at 710). A succeeding administration could also determine that revoking the prior claim of privilege under such circumstances

predecessor's claim of privilege would be a direct implementation of the people's will since the people elected the new public official.⁷⁹

IV. COUNTERARGUMENTS TO APPLYING THE *WEINTRAUB* PRINCIPLE TO GOVERNMENT ENTITIES

Applying the *Weintraub* Principle to the government context will not be without critics. The attorney-client privilege is central to the practice of law, and any proposed hindrance to its operation might understandably inspire well-intentioned counterarguments. Ultimately, just as with corporate employees, an elected official can retain a private attorney to deliver independent advice that would be exempt from future revocation by a successor in interest.⁸⁰ After all, the Court in *Weintraub* acknowledged that its ruling applied solely to entities, given their unique structure, and that any similar conclusion reached by a court in the context of individuals would require different reasoning.⁸¹ While the option of hiring private counsel remains available to an agent of either entity, it is not the only rebuttal available to courts responding to criticisms of applying the *Weintraub* Principle to government entities.

A. APPLYING THE *WEINTRAUB* PRINCIPLE TO GOVERNMENT ENTITIES WOULD HAVE A CHILLING EFFECT

Opponents may argue that applying this corporate standard to government entities would produce a chilling effect on government communications.⁸² As the respondents in *Weintraub* argued, permitting discovery of attorney-client communications could deter agents from having candid conversations with entity attorneys.⁸³ This point is significant as it cuts to the very purpose of the privilege—to induce open communications between attorneys and clients.⁸⁴ Ultimately, this argument

would be contrary to a duty to maintain a truthful, open government that instills confidence in the people. *See* *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (“The Act is an attempt to meet the demand for open government.”).

79. HASTINGS CTR., *THE ETHICS OF LEGISLATIVE LIFE* 29 (1985). One theory of political representation describes an elected official's duty as “carrying out [the] set of express or tacit instructions” expressed by her or his constituents. *Id.*

80. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 356 (1985) (“An individual, in contrast, can act for himself; there is no ‘management’ that controls a solvent individual's attorney-client privilege.”).

81. *Id.*

82. *See, e.g., id.* at 357.

83. *Id.*

84. *Mitchell v. Superior Court*, 691 P.2d 642, 646 (Cal. 1984) (citing *People v. Flores*, 139 Cal. Rptr. 546, 547–48 (1977) (“Clearly, the fundamental purpose behind the privilege is to safeguard the

is unpersuasive because the attorney-client privilege is not absolute and other opportunities exist to seek legal advice that are exempt from public inspection.

For example, the privilege does not protect communications pertaining to ongoing criminal or fraudulent activity.⁸⁵ Clients continue to successfully seek competent legal advice in spite of this exemption. In addition, “[e]xisting protections, including exemptions to the [Freedom of Information Act], special governmental privileges, and the attorney work product doctrine, offer sufficient protection for the government’s legitimate interests in confidentiality.”⁸⁶

Considering the privilege exceptions already in operation, as well as the additional safeguards available for certain communications, revoking a predecessor’s claim of privilege would not “have an undesirable chilling effect on client-attorney communications.”⁸⁷ Furthermore, the lack of any cognizable chilling impact brought to light in the corporate context since *Weintraub* provides strong circumstantial evidence supporting the Court’s decision as well as my thesis.⁸⁸ In fact, some express skepticism as to whether or not the privilege actually promotes candor at all.⁸⁹

B. APPLYING THE WEINTRAUB PRINCIPLE TO GOVERNMENT ENTITIES WILL NOT REFLECT THE WILL OF THE PEOPLE

Critics may also argue that applying the *Weintraub* Principle to government entities is not in furtherance of the public duty owed by government officials.⁹⁰ Those opposed to the government’s application of the rule could note that it is impossible to know if the revocation would be representative of the people’s will because it is unlikely a candidate would run on the platform of “promising to revoke my predecessor’s claim of privilege on day one.” Although a candidate may face a variety of issues in a

confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.”).

85. *United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (quoting 8 J. WIGMORE, EVIDENCE § 2298)).

86. Lory A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1742 (1988).

87. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 357 (1985).

88. Although I agree with the insufficiency of a “lack-of-evidence-to-the-contrary,” it is difficult to believe that the dire “chilling effect” warned of by the respondents in *Weintraub* has come to fruition in the more than thirty years since the Supreme Court’s decision, given the silence on the matter since. However, this question is primed for further research to shed light on this possibility.

89. See, e.g., Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 482–84 (2002).

90. See *supra* notes 70–71 and accompanying text.

campaign, an elected official faces a myriad of issues that are not thoroughly expounded on during a campaign—either because there were more important topics that occupied the limited time of the election or because it was not an issue yet.⁹¹ Thus, government officials should be permitted to revoke a predecessor’s claim of privilege because the decision to do so may be one of many issues not discussed during the campaign.

C. APPLYING THE *WEINTRAUB* PRINCIPLE TO GOVERNMENT ENTITIES
WOULD ENDANGER NATIONAL SECURITY

Even conceding the application of *Weintraub* to government officials, opponents may argue against allowing government successors the power to revoke claims of privilege by their predecessors because government lawyers have access to confidential material that should not be divulged to the public.⁹²

While “the government entity has a unique public function”⁹³ involving access to “military secrets [and] sensitive negotiations with foreign governments,” it must also adhere to the strict regulations barring distribution of such information that would prevent the disclosure of national security secrets or other highly confidential matters.⁹⁴ For example, the Freedom of Information Act contains provisions that prevent the general public from accessing secretive information.⁹⁵ Such protections would adequately safeguard critical communications from being disclosed by a succeeding government official.

91. If a predecessor invoked privilege in between the successor’s election and successor’s swearing-in ceremony, there is arguably less incentive for the successor to have spoken about the issue during the previous campaign. This likelihood stems from the fact that neither political party currently recognizes the operation of attorney-client privilege as a campaign issue. *See, e.g., Our Platform*, DEMOCRATS, <https://www.democrats.org/party-platform> (last visited Aug. 21, 2018); RNC Communications, *The 2016 Republican Party Platform*, GOP: BLOG (July 28, 2016), <https://www.gop.com/the-2016-republican-party-platform>. As party platforms are updated in response to issues of significance to the electorate, the platforms could include the issue of privilege revocation if it became significant.

92. *See* Barsdate, *supra* note 86, at 1742–44 (noting and then refuting the existence of concerns surrounding the “sensitive communications” government attorneys have access to).

93. *Id.* at 1738.

94. Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 294–95 (1991) (citing 26 U.S.C. §§ 6103, 6104, 6108, 6110 (1988); 5 U.S.C. §§ 552, 552(a) (1988); 18 U.S.C. § 1905 (1988)).

95. 5 U.S.C. § 552(b)(1)–(9) (2007).

CONCLUSION

In summary, considering the inherent conflict between the public's right to open government and an individual's interest in having private communications with an attorney, it seems inevitable that a court will confront the question considered by this paper. In the context of current events, President Trump could invoke the privilege yet again—this time in his position as president—to defend against the federal inquiry that is ongoing at the time of this writing.⁹⁶ While it is impossible to predict the course of an investigation—especially one occurring within the political setting—the President's assertion of the privilege already demonstrates its value to his defense strategy. If the investigations continue with the same scope and public intensity as have been exhibited thus far, the likelihood only grows that President Trump will invoke the privilege in the same manner as former Presidents Nixon and Clinton. If that occurs, the next president would face the question of whether revocation of Trump's assertion serves the public interest.

Even absent further assertion of the privilege by President Trump, the surging popularity of the rule during his tenure highlights the need for an answer to the question posed in this paper.⁹⁷ Confronted with a case on this issue, a court should draw upon the parallels between private corporations and government agencies and apply the corporate *Weintraub* Principle to the government context. Both types of entities are restricted to acting through agents who acquire authority from others and must assert the privilege in keeping with their duty to shareholders or the public. Such an application applies sound legal principles to further the public interest, while also proving that the attorney-client privilege is not only alive and well, but healthy enough to survive the transition of government power in a democracy.⁹⁸

96. Prior invocation of the attorney-client privilege by Presidents Richard Nixon and Bill Clinton—as well as the current assertions by President Donald Trump and others associated with his administration—signal the possibility that the test case may involve a president. However, application of my thesis is by no means limited to members of the White House, as the rationale and logic put forth herein apply to local- and state-government agencies, as well.

97. Analysis of the news articles regarding the privilege and President Trump's references to the long-standing rule have resulted in a public-relations campaign that has promoted the privilege. With so much scholarship devoted to attorney-client privilege in recent years, such publicized talk of the privilege's application to the President prove the need to resolve this unexplored question. Yet the test case may not end up involving a president or even federal officials; however, no matter the level of government agent involved, the current discussions stemming from President Trump illustrate the importance of the privilege in a government official's day-to-day operations.

98. See *supra* note 1 and accompanying text (discussing President Trump declaring the privilege dead).