Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SWIDLER & BERLIN ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97–1192. Argued June 8, 1998– Decided June 25, 1998

When various investigations of the 1993 dismissal of White House Travel Office employees were beginning, Deputy White House Counsel Vincent W. Foster, Jr., met with petitioner Hamilton, an attorney at petitioner law firm, to seek legal representation. Hamilton took handwritten notes at their meeting. Nine days later, Foster committed suicide. Subsequently, a federal grand jury, at the Independent Counsel's request, issued subpoenas for, *inter alia*, the handwritten notes as part of an investigation into whether crimes were committed during the prior investigations into the firings. Petitioners moved to quash, arguing, among other things, that the notes were protected by the attorney-client privilege. The District Court agreed and denied enforcement of the subpoenas. In reversing, the Court of Appeals recognized that most courts assume the privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client's heirs. The court declared that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. Concluding that the privilege is not absolute in such circumstances, and that instead, a balancing test should apply, the court held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial.

Held: Petitioner's notes are protected by the attorney-client privilege. This Court's inquiry must be guided by "the principles of the common law . . . as interpreted by the courts . . . in light of reason and experience." Fed. Rule Evid. 501. The relevant case law demonstrates that

Syllabus

it has been overwhelmingly, if not universally, accepted, for well over a century, that the privilege survives the client's death in a case such as this. While the Independent Counsel's arguments against the privilege's posthumous survival are not frivolous, he has simply not satisfied his burden of showing that "reason and experience" require a departure from the common-law rule. His interpretation– that the testamentary exception supports the privilege's posthumous termination because in practice most cases have refused to apply the privilege posthumously; that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality; and that, by analogy, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the estate's financial interests are not at stake– does not square with the case law's implicit acceptance of the privilege's survival and with its treatment of testamentary disclosure as an "exception" or an implied "waiver." And his analogy's premise is incorrect, since cases have consistently recognized that the testamentary exception furthers the client's intent, whereas there is no reason to suppose the same is true with respect to grand jury testimony about confidential communications. Knowing that communications will remain confidential even after death serves a weighty interest in encouraging a client to communicate fully and frankly with counsel; posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. The Independent Counsel's suggestion that a posthumous disclosure rule will chill only clients intent on perjury, not truthful clients or those asserting the Fifth Amendment, incorrectly equates the privilege against self-incrimination with the privilege here at issue, which serves much broader purposes. Clients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crime, but nonetheless are matters the clients would not wish divulged. The suggestion that the proposed exception would have minimal impact if confined to criminal cases, or to information of substantial importance in particular criminal cases, is unavailing because there is no case law holding that the privilege applies differently in criminal and civil cases, and because a client may not know when he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application and therefore must be rejected. The argument that the existence of, *e.g.*, the crime-fraud and testamentary exceptions to the privilege makes the impact of one more exception marginal fails because there is little

Syllabus

empirical evidence to support it, and because the established exceptions, unlike the proposed exception, are consistent with the privilege's purposes. Indications in *United States* v. *Nixon*, 418 U. S. 683, 710, and *Branzburg* v. *Hayes*, 408 U. S. 665, that privileges must be strictly construed as inconsistent with truth seeking are inapposite here, since those cases dealt with the creation of privileges not recognized by the common law, whereas here, the Independent Counsel seeks to narrow a well-established privilege. Pp. 3–11.

124 F. 3d 230, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.