No. 14-5055

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: KELLOGG BROWN & ROOT, INC., ET AL.

On Petition for Writ of Mandamus from the United States District Court for the District of Columbia, the Honorable James S. Gwin (by designation)
Civil Action No. 1:05-cv-1276

PETITION OF HARRY BARKO FOR REHEARING *EN BANC*

Respectfully submitted,

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July 28, 2014

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GLOSSARY

Barko-A-	Barko's Addendum to Combined Response to Motion for Stay and Petition for Writ of Mandamus, USCA Case #14-5055, Document #1484802-2, Filed 03/21/2014
COBC	Code of Business Conduct
KBR	Kellogg Brown & Root, Inc., Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown & Root International, Inc. (a Delaware Corporation), Kellogg Brown & Root International, Inc. (a Panamanian Corporation), and Halliburton Company
KBR-A-	KBR's Appendix to Corrected Petition for Writ of Mandamus, USCA Case #14-5055, Document #1483554, Filed 03/12/2014
NACDL	National Association of Criminal Defense Lawyers
NDA	nondisclosure agreement
N.Y. Bar Op. 650	N.Y. State Bar Association Committee on Professional Ethics Opinion 650
p.	page
Panel Op.	Panel Opinion, *In re Kellogg Brown & Root, Inc.*, No.14-5055, 2014 U.S. App LEXIS 12115, 2014 WL 2895939 (D.C. Cir. June 27, 2014)

INTRODUCTION AND RULE 35 STATEMENT

Thirty years ago, this Court adopted the "primary purpose" test to determine a claim of attorney-client privilege when there is a dispute as to whether communications were made for a business or legal purpose. *In re Sealed Case,* 737 F.2d 94, 98-99 (D.C. Cir. 1984). This Court noted that the "primary purpose" test was summarized by courts as early as 1950. *Id.*

Despite this well-established precedent, a panel of this Court granted extraordinary mandamus relief to Kellogg Brown & Root, Inc. ("KBR"), vacated the district court's interlocutory discovery order, and invented an entirely new legal standard for determining claims of privilege in the corporate setting. Citing to no judicial authority, and relying on only one secondary authority that has not been adopted by any court, the panel jettisoned the 30-year old "primary purpose" test in favor of its newly minted "one of the significant purposes" standard. Panel Op. at 10. This new test departs from the "primary purpose" test followed in this and other circuits for a half century.

By inventing this new legal test, the panel's decision also conflicts with a long line of precedent from this Court and other circuits placing the burden of proof on the party claiming the privilege and requiring that privileges be narrowly construed. Instead of following these established standards, the panel in this case concluded that determining the primary purpose of communications in an internal

corporate investigation setting is an "inherently impossible task," and thus relieved KBR of its burden to prove that the privilege applied. Panel Op. at 9.

In granting KBR's petition for writ of mandamus, the panel further departed from past precedent by ignoring the district court's *in camera* review and factual findings. The panel failed to apply the clearly erroneous standard in reviewing the district court's application of the "primary purpose" standard adopted by this Court and numerous other circuits. The panel's findings also conflict with cases from this and other circuits requiring clear notice or "*Upjohn* warnings" that must clearly inform employees that the purpose of an internal investigation is for the company to seek legal advice. That was not done by KBR in this case.

En banc review should also be granted because the panel failed to follow precedent from this Court and the Supreme Court when it improvidently granted the writ of mandamus. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), *Mohawk Indus. v. Carpenter,* 558 U.S. 100 (2009) ("*Mohawk"*), and this Circuit's precedent in *National Association of Criminal Defense Lawyers v. U.S. Dept. of Justice,* 182 F.3d 981 (D.C. Cir. 1999) ("*NACDL")*, and *Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000).

En banc review is necessary to secure or maintain the uniformity of the court's decisions, and to guard against opening the flood gates of mandamus review each time a party is adversely affected by a district court's privilege ruling.

The panel's decision to grant mandamus upsets the judicial review of privilege rulings, which the Supreme Court unanimously determined in *Mohawk* should ordinarily be reviewed on appeal pursuant to the final judgment rule. Additionally, the panel's invention of an entirely new and novel rule governing the application of the attorney-client privilege in the corporate setting displaces the well-settled "primary purpose" test, shifts the burdens of proof in attorney-client privilege cases, and weakens the traditional district court *in camera* review of documents to decide privilege claims.

If this ruling is not vacated it will result in an explosion of emergency petitions for writs of mandamus seeking immediate interlocutory review of discovery rulings on privilege claims and result in efforts to extend the unprecedented standard adopted by the panel to other jurisdictions. Accordingly, the titanic shift in the evaluation of the attorney-client privilege in the business setting and the nation-wide impact it can predictably bring raises a question of exceptional importance that warrants rehearing *en banc*.

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

The panel granted KBR extraordinary mandamus relief to extend the attorney-client privilege protection to 89 documents prepared under KBR's published Code of Business Conduct ("COBC") program. Below, the district performed *in camera* review of the withheld documents and concluded that "no

legal advice was requested or offered," and that the "*primary purpose* of the investigation was to comply with federal defense contractor regulations, not secure legal advice," and that the finding "*was not a close question*." *United States ex rel. Barko v. Halliburton,* 2014 U.S. Dist. LEXIS 30866, Order at 2 (D.D.C. March 11, 2014)(emphasis added). The district court offered no sweeping legal judgment, followed existing precedent, and rendered a "fact-dependent" decision based on the "discrete issues" and "particular circumstances" of the case. *Id.*

Notably, the district court's findings mirrored other court rulings that had reviewed KBR's COBC program and denied at least in part KBR's privilege claim. For example, KBR, but not the panel, conceded that the decision in *Leamon v. KBR*, No. 10-cv-253, Order (S.D. Tex. Nov. 10, 2011), KBR-A-85, was properly decided. In *Leamon*, the court ordered KBR to produce its COBC reports, reasoning that the COBC did not mandate that attorneys run the investigations, the COBC rules did not mention a legal purpose behind investigations, and that the COBC process contemplates investigation whenever allegation of misconduct comes to light *without* mention of whether . . . deemed likely to result in litigation. The *Leamon* court found that the COBC witness statements were "not communications to a lawyer for the purpose of securing legal advice. They are simply statements of underlying facts known to a particular witness." *Id.*

Critical facts relied upon by the panel are infirm. Where the panel claims

that the COBC was "overseen by the company's Law Department," simply because an attorney asked for the investigation Panel Op. at 2, this claim is not supported by the record, conflicts with KBR's published COBC policy,[1] and ignores prior judicial findings that rejected KBR's argument that the law department managed the COBC program.[2] KBR's published COBC policy actually establishes the mechanism to be followed if a particular COBC investigation would be designated for the purpose of obtaining legal advice, Barko-A-40, COBC, § B.2, and that procedure was neither initiated nor followed here. The record establishes that the only role played by an attorney with respect to the COBC investigations pertaining to this case were purely ministerial, i.e.,

[1] According to the published COBC, a "Policy Committee" as opposed to KBR's Law Department, was responsible for the administration of the COBC. Barko-A-41, COBC, § B. It is the Policy Committee, not the Law Department, that "authorizes" "persons" to "investigate the alleged violations." *Id.*, § B.8. None of the stated goals of the COBC investigation is to obtain legal advice. *Id.* Violations uncovered in COBC investigations are reported to, and acted on, by KBR employees, not the Law Department. *Id.*, § B.7. The documents created by the COBC are for "compliance efforts", not for legal advice or in preparation for litigation. Barko-A-42, COBC, § B.11. The COBC investigations are required to carry out other purely business functions, including the need to take disciplinary action againt any employee found to have violated the COBC. Barko-A-42.

[2] *See Leamon v. KBR,* Order (KBR-A-85, 88)("KBR contends that COBC investigations are conducted by the legal department . . . in anticipation of litigation, *but the CBOC does not mention that purpose"*)(emphasis added). The role of KBR's Law Department in COBC investigations was limited. *See* Barko-A-42, § B.12 ("when in doubt about the propriety of a particular course of action, employees are encouraged to contact . . . the Law Department or any other person identified in the COBC for advice and assistance). In this case, the investigators never sought advice of assistance from anyone when investigating and preparing COBC investigative reports.

transmitting an employee "tip" to the security department for investigation and then depositing the final report prepared by the security department investigator into the COBC record keeping system, with no legal advice sought or given in the process. Barko-A-92-93, 107-108, 124-126.

The panel conflates required "*Upjohn* warnings" with a non-disclosure agreement ("NDA") the district court found to have been executed for the purpose of protecting KBR's business as opposed to legal interests.[3] In fact, the NDA "never mentions that the purpose of the investigation is to obtain legal advice," but does identify "possible adverse business impact unauthorized disclosure could have on KBR's work in the Middle East Region." *United States ex rel. Barko,* 2014 U.S. Dist. LEXIS 36490, Order at 6-7 and n. 33 (D.D.C. March 6, 2014). The district court further observed that, "employees *certainly would not have been able to infer the legal nature of the inquiry* by virtue of the interviewer, who was a non-attorney." *Id*. (emphasis added).

ARGUMENT

I. THE PANEL'S DECISION REJECTING "THE PRIMARY PURPOSE" TEST AND CREATING A NEW LEGAL TEST CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER JUDICIAL CIRCUITS

The panel departed from 30 years of "primary purpose" test jurisprudence

[3] The NDA also interferes with statutory rights permitting KBR employees to report wrongdoing to federal authorities.

applied in this Circuit, altered the burden of proof for establishing the existence of the attorney-client privilege as applied to internal corporate misconduct investigations,[4] and eviscerated existing "*Upjohn* warnings" case law. In essence, the panel's grant of a writ of mandamus ushers in an entirely new standard for evaluating the attorney-client privilege in the corporate setting.

Indeed, the 64-year-old the primary purpose standard has never been criticized and was approved by this Court 30 years ago. Significantly, the "primary purpose test" has been adopted, in some form, by nearly every circuit.[5]

Instead of following the well-established law applied by numerous courts

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[4] *In re Sealed Case,* 737 F.2d 94, 98-99 (D.C. Cir. 1984) (noting the origins of the "primary purpose" test), citing *United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357, 358-59 (D. Mass. 1950). *Also see, In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007).

[5] *See Lluberes v. Uncommon Prods.*, 663 F.3d 6, 42-43 (1st Cir. 2011)("The contours of the privilege are reasonably well honed. It protects 'only those communications that are confidential and are made for the purpose of seeking or receiving legal advice."); *Pritchard v. County of Erie*, 473 F.3d 413 (2d Cir. 2006)("the predominant purpose"); *In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir. 1982)("solely for the purpose of the corporation seeking legal advice and its counsel rendering it"); *In re Bevill*, 805 F.2d 120, 123 (3d Cir. 1986)("sole or primary purpose"); *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) (adopting the "classic test," where attorney-client privilege applies if the communication was made for "the purpose of securing primarily" legal services); *U.S. v. Nelson*, 732 F.3d 504, 518 (5th Cir. 2013)("primary purpose"); *Loctite Corp. v. Fel-Pro*, 667 F.2d 577, 582 (7th Cir. 1981)("primarily concerned with legal assistance"); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987)("legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality").

over the past half-century, the panel created an entirely new and unprecedented "one of the significant purposes" standard. Panel Op. at 10. This holding completely changes the meaning of the "primary purpose" test, has no support in Circuit or Supreme Court precedent and was not supported by even *one* federal court opinion. Instead, the panel relied upon a nonbinding Restatement "Reporter's Note." Panel Op. at 10, citing 1 *Restatement (Third) of the Law Governing Lawyers,* §72, Reporter's Note at 554 (2000). That Reporter's Note, in turn, cites to no judicial authority. *Id.* Not one federal case has ever cited to that Reporter's Note to justify a standard even remotely similar to the unprecedented standard created by the panel.[6]

The panel rejected the traditional "primary purpose" test because:

> [A]fter all, trying to find *the* primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can sometimes be an inherently impossible task.

Panel Op. at 9. This reasoning conflicts with all past precedent in this Court and all other circuits.

The task of determining the primary purpose starts with recognition of where the burden of proof lies in privilege cases. Although the panel simply ignored this

[6] The panel also cited another secondary source as grounds for the new legal test -- a *Government Contractor* journal article, dated April 14, 2014, which was more than a month *after* the district court published its March 6, 2014 discovery order that was vacated by the writ of mandamus. Panel Op. at 10.

burden, the actual burden is heavy and is on the party seeking to shield the potentially probative evidence. *See In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) ("the attorney-client privilege must be strictly confined within the narrowest possible limits consistent with the logic of the principle.").[7] In *Lindsey,* this Circuit clarified that the party claiming privilege bears the burden of proof; that communications must be made "primarily" for the purpose of securing "an opinion on law" or "legal services" or "assistance in some legal proceeding;" and that a blanket assertion of the privilege will not suffice. Had the panel applied the established burden of proof to the facts the task of deciding whether KBR met the primary purpose test "*was not a close question*." *United States ex rel. Barko v. Halliburton,* 2014 U.S. Dist. LEXIS 30866, Order at 2 (D.D.C. March 11, 2014).

What the panel dubs an "inherently impossible task" was regularly and without controversy tackled by district courts throughout the country over the last half century on a document-by-document basis, *in camera,* based on the principles

[7] The holding in *Lindsey* is consistent with *Fisher v. United States*, 425 U.S. 391 (1976) ("[S]ince the privilege has the effect of withholding relevant information from the fact finder it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege."). *Accord*, *In re Horowitz*, 482 F.2d 72, 81-82 (2d Cir. 1973) ("the privilege stands in derogation of the public's 'right to every man's evidence'" and thus must be "strictly confined within the narrowest possible limits"), *quoting from* 8 Wigmore, Evidence § 2291 (Cleary ed. 1972).

and burdens of proof outlined in *Lindsey*[8] (and numerous other circuit precedents that are consistent with *Lindsey*).[9] The panel's decision conflicts with this long line of precedent.

The important public policies behind the innumerable line of cases applying the primary purpose test and requiring district courts to apply it through *in camera* review is explained by one district court as follows:

> [V]irtually everything a member of industry does carries potential legal problems vis-à-vis government regulators, and granting the privilege to all matters sent to the legal department, or in which the legal department is involved would effectively immunize most of the industry's internal communications because everything leaving the company has to go through the legal department for review, comment and approval.

Phillips v. C.R. Bard, 290 F.R.D. 615, 630-31 (D. Nev. 2013) (internal citations and quotations omitted).

The panel's decision found that "employees knew that the company's legal department was conducting an investigation." Panel Op. p. 7. Nothing on the

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[8] *Landry v. F.D.I.C.*, 204 F.3d 1125, 1134-35 (D.C. Cir. 2000). There are literally scores of district court opinions that use the in camera review process to evaluate the primary purpose test.

[9] *See In re Grand Jury*, 123 F.3d 695, 700 (1st Cir. 1997)(chastising District Court for not conducting in camera); *U.S. v. Smith*, 123 F.3d 140, 151 (3d Cir. 1997)("*in camera* is a common method used by courts"); *N.L.R.B. v. Interbake*, 637 F.3d 492, 495 (4th Cir. 2011)(abuse of discretion not to conduct in camera review); *U.S. v. Johnson*, 465 F.2d 793, 796 (5th Cir. 1972)("the documents themselves may well be the best evidence of their confidential and privileged nature"); *Clarke v. American Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992)(in camera review permitted as "blanket assertions of the privilege are extremely disfavored").

record indicates that a single employee understood this to be the case. No affidavit or document was produced to support this finding, nor was one witness who could support this claim identified. The only cited evidence on this issue was the NDA, which did not state that the legal department had any role in conducting the investigation.

The fact that the NDA did not constitute proper "*Upjohn* warnings" is evident. Not one judicial opinion in over 30 years since *Upjohn* found statements similar to the NDA to satisfy the warnings requirement,[10] including cases in this circuit.[11] The reason for this is obvious. Lawyers who provide *Upjohn* warnings as flimsy as those in the NDA risk bar disciplinary charges. *See e.g.* New York Ethics Op. 650.[12]

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[10] *See U.S. v. Int'l Broth. Of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997) ("attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest"); *Admiral Ins. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1492 (9th Cir. 1989)("An *Upjohn* warning is given to advise the employee that he is not communicating with his personal lawyer, no attorney-client relationship exists, and any communication may be revealed to third parties if disclosure is in the best interest of the corporation."). Accord., *In re Grand Jury*, 415 F.3d 333, 336 (4th Cir. 2005); *Sandra v. S. Berwyn*, 600 F.3d 612, 620 (7th Cir. 2009).

[11] As Judge Howell held in *United States v. ISS Marine Services, Inc.*, "[f]or the results of an internal investigation to enjoy the attorney-client privilege, the company must clearly structure the investigation as one seeking legal advice . . . [and] must make clear to the communicating employees that the information they provide will be transmitted to attorneys for the purpose of obtaining legal advice." 905 F. Supp. 2d 121, 131 (D.C.D.C. 2012).

[12] A paper, published by the ABA Section of Litigation Corporate Counsel, explained the consequences for not giving proper *Upjohn* warnings: "What is clear

II. THE PANEL DECISION CONFLICTS WITH SUPREME COURT AND CIRCUIT PRECEDENT ON THE STANDARD FOR GRANTING A WRIT OF MANDAMUS

This court should grant reconsideration or en banc review in order to ensure that its interpretation of mandamus authority is consistent with the Supreme Court's rulings and this Circuit's precedent. *Cheney, supra.; Mohawk, supra.; NACDL, supra.; In re Executive Office of the President, supra.* In *Cheney,* the Supreme Court held that "three conditions must be satisfied before" a writ of mandamus "may issue." *Cheney,* 542 U.S. at 380. The first mandatory condition is that there is "no other adequate means to attain the relief" through the "regular appeals process." *Id*. at 380-81. This extremely high standard is essential for our system of justice, as it vindicates the essential rule (and law) requiring finality of judgment prior to an appeal. The panel simply ignored *Cheney*.

Based on *Mohawk*, KBR cannot meet the first *Cheney* condition. In *Mohawk,* a unanimous Supreme Court explained that interlocutory review must be denied in nearly every attorney-client privilege case. The Supreme Court reviewed the three

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that counsel who fail to give the warnings . . . expose themselves to criticism by the courts, professional discipline and even civil liability. Given these realities, it is imperative that all counsel – internal and external – scrupulously inform employees at all levels of the organization of the potential conflicts of interest and do so in a way where the warnings cannot be contested. Warnings are a time for plain language." English, et al., "Avoiding the Perils and Pitfalls of Internal Corporate Investigations: Proper Use of *Upjohn* Warnings," ABA Section of Litigation (Feb. 11-14, 2010), *available at* http://goo.gl/ULUIo5. The panel's acceptance of the wording of the NDA to satisify *Uphohn* warnings completely contradicted this advice, and ignores the precedents relied upon in the paper.

most common methods used to appeal an attorney-client ruling without resorting to interlocutory appeals, and found that all of these procedures were sufficient, as a matter of law, to mandate that no interlocutory review be permitted. The Court's holding at *Mohawk*, 558 U.S. at 109-111, speaks for itself:

> Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.
>
> * * *
>
> [S]anctions allow a party to obtain post judgment review without having to reveal its privileged information.
>
> * * *
>
> When the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment.

The Court in *Mohawk* also rejected the usual "cat is out of the bag" harm asserted in privilege cases by holding that simply because a privilege holding may be "imperfectly reparable" on appeal did not justify immediate interlocutory review. 558 U.S. at 107. KBR did not present any facts whatsoever that any of the three procedures set forth in *Mohawk* were not fully available to them, and the panel's decision conflicts with *Mohawk* and *Cheney* and undermines the rule of law that requires the appeal be heard only after a final judgment.

The panel decision relies solely on language in *Mohawk* that points to a

potential mandamus remedy only in extraordinary cases. But reliance on this narrow exception completely misreads the core holding of *Mohawk*. If a party can use any one of the three *Mohawk* methods to appeal the privilege ruling, then the exception would not apply; it only becomes relevant if all three of the appeal avenues prove ineffective and the failure for the court to approve an interlocutory appeal would result in irreparable harm. This can occur in a truly remarkable case, such as an order to produce the name of a confidential informant. or documents compromising national security or an ongoing undercover operation. No such exceptional circumstances exist in this case, nor were they even argued by KBR.

The panel fundamentally misunderstood the extremely narrow class of cases for which mandamus is available and that the mandamus standard was far narrower and much harder to meet, than the "collateral order" doctrine at issue in *Mohawk*. The Supreme Court in *Mohawk* did not intend to expand mandamus jurisdiction to cover attorney-client issues foreclosed under the collateral order doctrine. The holding in *Mohawk* was designed to accomplish the exact opposite result. The panel's decision directly conflicts with these Supreme Court holdings.

Additionally, the panel's decision conflicts with Circuit precedent, which the panel ignored. *See In re Executive Office of the President,* 215 F.3d at 23; *NACDL,* 182 F.3d at 987. The panel did not even attempt to address three of the five factors required under these precedents. The panel did not weigh whether there was an

adequate means to appeal (which under *Mohawk* had to be answered affirmatively as a matter of law), whether the decision was correctable on appeal (which also was addressed affirmatively by *Mohawk*) and whether the alleged error was "oft repeated" (for which there was no allegation by KBR that it was).

As explained by this Court in *NACDL*, even if the litigation "qualifies as 'really extraordinary,' we open no door for indiscriminate use of the remedy to avoid the strictures of the final judgment rule." 182 F.3d at 986. Accord, *In re Executive Office of the President*, 215 F.3d at 23 *(*"Even assuming arguendo that the District Court's holding . . . is clear error, mandamus relief is not warranted" because the harm "could be corrected on appeal"). The panel's decision conflicts with the rule in *NACDL*: "In no event could clear error alone support the issuance of a writ of mandamus. Any error, even clear error, can be corrected on appeal without irreparable harm." *NACDL,* 182 F.3d at 987.

CONCLUSION

For the foregoing reasons, rehearing *en banc* should be granted.

Respectfully submitted,

/s/ Stephen M. Kohn
Stephen M. Kohn

/s/ Michael D. Kohn
Michael D. Kohn

/s/ David K. Colapinto
David K. Colapinto

Attorneys for Harry Barko

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 35(c), Petitioner Harry Barko, respondent-relator before the Panel, by and through counsel, attaches a copy of the opinion of the panel from which rehearing is being sought and hereby certifies in accordance with Circuit Rule 28(a)(1)(A):

I. PARTIES AND *AMICI CURIAE*

Harry Barko, plaintiff-relator below and respondent-relator before the panel in this Court, petitions for rehearing *en banc*. The United States of America is a real party in interest on the claims filed below by Mr. Barko. Kellogg Brown & Root, Inc., Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown & Root International, Inc. (a Delaware Corporation), Kellogg Brown & Root International, Inc. (a Panamanian Corporation), and Halliburton Company were the defendants before and petitioners before this Court.

Appearing in the U.S. Court of Appeals for the District of Columbia Circuit as *amici curiae* before the panel were the Chamber of Commerce of the United States of America, National Association of Manufacturers, Coalition for Government Procurement, American Forest & Paper Association, and Association of Corporate Counsel.

II. RULING UNDER REVIEW

The ruling under review on this petition for rehearing *en banc* is the June 27, 2014 panel decision and order granting KBR's petition for writ of mandamus in *In re Kellogg Brown & Root, Inc.*, No. 14-5055, Opinion reported at 2014 U.S. App. LEXIS 12115, and Order reported at 2014 U.S. App. LEXIS 12447 (D.C. Cir. June 27, 2014). In the ruling under review, the panel, the Honorable Brett M. Kavanaugh, the Honorable Thomas B. Griffith, and the Honorable Padmanabhan S. Srinivasan, granted KBR's emergency motion for stay and petition for a writ of mandamus, vacating the District Court's March 6, 2014 discovery order to produce documents. The panel's Order is appended to this petition at Addendum 1a and the panel's Opinion is appended to this petition at Addendum 2a.

The underlying decision from which KBR requested emergency mandamus relief is *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 U.S. Dist. LEXIS 36490, 2014 WL 1016784, Order (D.D.C. Mar. 6, 2014), in which the District Court, the Honorable James S. Gwin, held that KBR produce documents as from an internal investigation because they are not covered by the attorney-client privilege or work product doctrine.

III. RELATED CASES

The underlying case from which KBR petitioned for a writ of mandamus is still pending in the U.S. District Court for the District of Columbia before the

Honorable James S. Gwin. *United States ex rel. Barko v. Halliburton Co.*, No. 1:05-cv-1276 (D.D.C.).

By: /s/ David K. Colapinto
David K. Colapinto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing *En Banc*, together with the accompanying Addenda and Certificates, was served on this 28th day of July, 2014, by U.S. Mail, postage prepaid, upon:

Beverly M. Russell
Assisstant U.S. Attorney
U.S. Attorney's Office
Civil Division
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The Honorable James S. Gwin
U.S. District Judge
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ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5055 **September Term, 2013**

1:05-CV-1276-JSG

Filed On: June 27, 2014

In re: Kellogg Brown & Root, Inc., et al.,

Petitioners

BEFORE: Griffith, Kavanaugh, and Srinivasan, Circuit Judges

ORDER

Upon consideration of petitioners' corrected petition for writ of mandamus, the corrected response and supplement thereto, and the reply; the supplemental briefs of the parties; and argument by counsel, it is

ORDERED that the petition be granted, and the District Court's March 6 document production order be vacated for the reasons stated in the opinion issued herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 7, 2014 Decided June 27, 2014

No. 14-5055

IN RE: KELLOGG BROWN & ROOT, INC., ET AL.,
PETITIONERS

On Petition for Writ of Mandamus
(No. 1:05-cv-1276)

John P. Elwood argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were *John M. Faust*, *Craig D. Margolis*, *Jeremy C. Marwell*, and *Joshua S. Johnson*.

Rachel L. Brand, *Steven P. Lehotsky*, *Quentin Riegel*, *Carl Nichols*, *Elisebeth C. Cook*, *Adam I. Klein*, *Amar Sarwal*, and *Wendy E. Ackerman* were on the brief for amicus curiae Chamber of Commerce of the United States of America, et al. in support of petitioners.

Stephen M. Kohn argued the cause for respondent. With him on the response to the petition for writ of mandamus were *David K. Colapinto* and *Michael Kohn*.

Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

I

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that

the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents *in camera*, the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3.

KBR vehemently opposed the ruling. The company asked the District Court to certify the privilege question to this Court for interlocutory appeal and to stay its order pending a petition for mandamus in this Court. The District Court denied those requests and ordered KBR to produce the disputed documents to Barko within a matter of days. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430 (D.D.C. Mar. 11, 2014). KBR promptly filed a petition for a writ of mandamus in this Court. A number of business organizations and trade associations also objected to the District Court's decision and filed an amicus brief in support of KBR. We stayed the District Court's document production order and held oral argument on the mandamus petition.

The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course inappropriate. If the District Court's ruling was erroneous, the remaining question is whether that error is the kind that justifies mandamus. *See Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004). We address those questions in turn.

II

We first consider whether the District Court's privilege ruling was legally erroneous. We conclude that it was.

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law – as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000); *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

In *Upjohn*, the Supreme Court held that the attorney-client privilege applies to corporations. The Court explained that the attorney-client privilege for business organizations

was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (internal quotation marks and citation omitted). The Court stated, moreover, that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. That is so, the Court said, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. In *Upjohn*, the communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's "compliance with the law." *Id.* at 392; *see id.* at 394. The Court ruled that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

First, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case*, 737 F.2d at 99. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. c, at 551.

Second, the District Court noted that in *Upjohn* the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn*.

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn*, 449 U.S. at 387 (Upjohn's managers were "instructed to treat the investigation as 'highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *3 n.33 (D.D.C. Mar. 6, 2014).

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice

was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See id.* at *2; *see also In re Sealed Case*, 737 F.2d at 98-99. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. 2014 WL 1016784, at *2. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3; *see id.* at *3 n.28 (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under

the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392. We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a

given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation – "one of the significant purposes" – as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation – although required by law – does not transform quintessentially legal advice into business advice.").

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal

advice, the District Court applied the wrong legal test and clearly erred.

III

Having concluded that the District Court's privilege ruling constituted error, we still must decide whether that error justifies a writ of mandamus. *See* 28 U.S.C. § 1651. Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). In keeping with that high standard, the Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (quoting and citing *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976)). We conclude that all three conditions are satisfied in this case.

A

First, a mandamus petitioner must have "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380. That initial requirement will often be met in cases where a petitioner claims that a district court erroneously ordered disclosure of attorney-client privileged documents. That is because (i) an interlocutory appeal is not available in attorney-client privilege cases (absent district court certification) and (ii) appeal after final judgment will

come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

The Supreme Court has ruled that an interlocutory appeal under the collateral order doctrine is not available in attorney-client privilege cases. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106-13 (2009); *see also* 28 U.S.C. § 1291. To be sure, a party in KBR's position may ask the district court to certify the privilege question for interlocutory appeal. *See* 28 U.S.C. § 1292(b). But that avenue is available only at the discretion of the district court. And here, the District Court denied KBR's request for certification. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *1-3 (D.D.C. Mar. 11, 2014). It is also true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an "adequate" means of relief in these circumstances. *See In re Sealed Case*, 151 F.3d 1059, 1064-65 (D.C. Cir. 1998); *see also In re City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (same).

On the other hand, appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, "the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). As this Court and others have explained, post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. *See id.*; *see also In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) ("a remedy after final judgment cannot unsay the confidential

information that has been revealed") (quoting *In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987)).

For those reasons, the first condition for mandamus – no other adequate means to obtain relief – will often be satisfied in attorney-client privilege cases. Barko responds that the Supreme Court in *Mohawk*, although addressing only the availability of interlocutory appeal under the collateral order doctrine, in effect also barred the use of mandamus in attorney-client privilege cases. According to Barko, *Mohawk* means that the first prong of the mandamus test cannot be met in attorney-client privilege cases because of the availability of post-judgment appeal. That is incorrect. It is true that *Mohawk* held that attorney-client privilege rulings are not appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109. But at the same time, the Court repeatedly and expressly reaffirmed that *mandamus* – as opposed to the collateral order doctrine – remains a "useful safety valve" in some cases of clear error to correct "some of the more consequential attorney-client privilege rulings." *Id.* at 110-12 (internal quotation marks and alteration omitted). It would make little sense to read *Mohawk* to implicitly preclude mandamus review in all cases given that *Mohawk* explicitly preserved mandamus review in some cases. Other appellate courts that have considered this question have agreed. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010); *In re Whirlpool Corp.*, 597 F.3d 858, 860 (7th Cir. 2010); *see also In re Perez*, 749 F.3d 849 (9th Cir. 2014) (granting mandamus after *Mohawk* on informants privilege ruling); *City of New York*, 607 F.3d at 933 (same on law enforcement privilege ruling).

B

Second, a mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters. In this case, for the reasons explained at length in Part II, we conclude that the District Court's privilege ruling constitutes a clear legal error. The second prong of the mandamus test is therefore satisfied in this case.

C

Third, before granting mandamus, we must be "satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. As its phrasing suggests, that is a relatively broad and amorphous totality of the circumstances consideration. The upshot of the third factor is this: Even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify mandamus.

In this case, considering all of the circumstances, we are convinced that mandamus is appropriate. The District Court's privilege ruling would have potentially far-reaching consequences. In distinguishing *Upjohn*, the District Court relied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most importantly, the District Court's distinction of *Upjohn*

on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices. Because defense contractors are subject to regulatory requirements of the sort cited by the District Court, the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory compliance program. *See* 48 C.F.R. § 52.203-13 (2010). And because a variety of other federal laws require similar internal controls or compliance programs, many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations. *See, e.g.*, 15 U.S.C. §§ 78m(b)(2), 7262; 41 U.S.C. § 8703. As KBR explained, the District Court's decision "would disable *most public companies* from undertaking confidential internal investigations." KBR Pet. 19. As amici added, the District Court's novel approach has the potential to "work a sea change in the well-settled rules governing internal corporate investigations." Br. of Chamber of Commerce et al. as Amici Curaie 1; *see* KBR Reply Br. 1 n.1 (citing commentary to same effect); Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) (assessing broad impact of ruling on government contractors).

To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge. But prudent counsel monitor court decisions closely and adapt their practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the

privilege context, for the Supreme Court has told us that an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). More generally, this Court has long recognized that mandamus can be appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). Other courts have granted mandamus based on similar considerations. *See In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) (granting mandamus where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege") (quotation omitted); *In re Seagate Technology, LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (same). The novelty of the District Court's privilege ruling, combined with its potentially broad and destabilizing effects in an important area of law, convinces us that granting the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In saying that, we do not mean to imply that all of the circumstances present in this case are necessary to meet the third prong of the mandamus test. But they are sufficient to do so here. We therefore grant KBR's petition for a writ of mandamus.

IV

We have one final matter to address. At oral argument, KBR requested that if we grant mandamus, we also reassign this case to a different district court judge. *See* Tr. of Oral Arg. at 17-19; 28 U.S.C. § 2106. KBR grounds its request on the District Court's erroneous decisions on the privilege claim, as well as on a letter sent by the District Court to the Clerk of this Court in which the District Court arranged to transfer the record in the case and identified certain

documents as particularly important for this Court's review. *See* KBR Reply Br. App. 142. KBR claims that the letter violated Federal Rule of Appellate Procedure 21(b)(4), which provides that in a mandamus proceeding the "trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."

In its mandamus petition, KBR did not request reassignment. Nor did KBR do so in its reply brief, even though the company knew by that time of the District Court letter that it complains about. Ordinarily, we do not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. *See Ligon v. City of New York*, 736 F.3d 118, 129 & n.31 (2d Cir. 2013) (collecting cases), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is "so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (en banc). Nothing in the District Court's decisions or subsequent letter reaches that very high standard. Based on the record before us, we have no reason to doubt that the District Court will render fair judgment in further proceedings. We will not reassign the case.

* * *

In reaching our decision here, we stress, as the Supreme Court did in *Upjohn*, that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United*

States, 449 U.S. 383, 395 (1981). Barko was able to pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files. As the *Upjohn* Court stated, quoting Justice Jackson, "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 396 (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege "is 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.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn*, 449 U.S. at 389).

We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments.

So ordered.