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NOTES

IN RE LINDSEY: A NEEDLESS VOID IN THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

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INTRODUCTION

"I did not have sexual relations with that woman—Miss Lewinsky."[1]

When President Clinton looked straight into the camera and spoke these infamous words in January 1998, perhaps the only other person who knew the misleading nature of this statement was Bruce Lindsey, Deputy White House Counsel and Assistant to the President. If President Clinton had not admitted to an "inappropriate" relationship with Monica Lewinsky in August 1998,[2] prior to *In re Lindsey*,[3] the government attorney-client privilege would have protected Bruce Lindsey's knowledge of this relationship, despite the fact that Independent Counsel Kenneth Starr issued a subpoena to Bruce Lindsey in the course of a criminal investigation. However, as this Note will demonstrate, *In re Lindsey* has changed the status of the government attorney-client privilege.

The President, members of Congress, and legal clients have consistently enjoyed protection for their confidential communications via the Executive Privilege,[4] Speech and Debate Clause,[5] and attorney-client

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1. President Clinton denied he had a sexual relationship with Monica Lewinsky on Monday, January 26, 1998. *See 'I Never Told Anybody to Lie,'* OTTAWA SUN, Mar. 29, 1998, at 26.

2. President Clinton admitted he had an "inappropriate" relationship with Monica Lewinsky on Monday, August 17, 1998. *See 'I Misled People, Even My Wife,'* OTTAWA SUN, Aug. 18, 1998, at 4.

3. 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

4. The executive privilege is a "broad, constitutionally derived privilege that protects frank debate between President and advisers." *Id.* at 1285 (Tatel, J., dissenting) (citing United States v. Nixon, 418 U.S. 683, 708 (1974)).

5. The Speech and Debate Clause states that Senators and Representatives shall be privileged for "[a]ny Speech or Debate in either House, [and] they shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

privilege;[6] however, government attorneys and officials have only periodically received protection for their confidential communications.[7] This inequality has primarily derived from the special duty of government attorneys to uphold the public trust reposed in them, and has produced the government attorney-client privilege, a creature of common law that grew out of the traditional attorney-client privilege.[8] Courts have sporadically applied this privilege, and until *In re Lindsey*, many commentators questioned the viability of the government attorney-client privilege in a court of law.[9] *In re Lindsey* acknowledged the privilege's existence; however, it restricted the privilege by dissolving protection for confidential communications between government attorneys and officials in the context of a criminal investigation.[10]

Commentators have mixed reactions to *In re Lindsey*. Some support an absolute government attorney-client privilege that would protect candor and frank communications that the attorney-client privilege embodies in every other context.[11] Others support a qualified government attorney-client privilege that stresses the public's interest in uncovering illegality among its elected and appointed officials. *In re Lindsey* chooses the qualified government attorney-client privilege. Similar to the executive privilege, the government attorney-client privilege evaporates when a criminal investigation ensues. Unlike the executive privilege, absolute protection does not extend when the subject matter sought to be exposed relates to military, diplomatic, or sensitive national security secrets. The court's failure to address the possibility of revealing military, diplomatic, or sensitive national security secrets has left a void in the *In re Lindsey* decision that needs to be filled.

Part I of this Note outlines the attorney-client privilege, distinguishes it from the principle of confidentiality and the executive privilege, and provides the derivation and scope of the government attorney-client privilege. Part II of this Note analyzes *In re Lindsey* and the cases leading up to it, *In re Grand Jury*

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6. *See* FED. R. EVID. 501. "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*

7. *See* News & Observer Publ'g Co. v. Poole, 412 S.E.2d 7, 17 (N.C. 1992) ("So far this Court has not recognized an attorney-client privilege for public entity clients, and it is unclear whether the traditional privilege should be so extended. Most courts that have applied such a privilege have not considered its origin but have merely assumed it exists.") (citation omitted).

8. *See In re Lindsey*, 158 F.3d at 1273.

9. *See Loser: Attorney-Client Privilege*, LEGAL TIMES, Dec. 22/29, 1997, at 15 (quoting former White House Counsel C. Boyden Gray, "I'm not sure there is any such thing as [a] governmental attorney-client privilege now.").

10. *See In re Lindsey*, 158 F.3d at 1278.

11. *See* Ruth Marcus, *Court Rejects Privilege Claim*, WASH. POST, July 28, 1998, at A1.

Subpoena Duces Tecum[12] and *In re Grand Jury Proceedings*.[13] Part III visits the aftermath of *In re Lindsey*, particularly the legal commentary and the alleged repercussions this decision may produce for government attorneys and officials. Part IV addresses a proposed alteration to *In re Lindsey* and offers its own modification to the government attorney-client privilege—extension of absolute protection to confidential communications containing military, diplomatic, or sensitive national security secrets. Finally, this Note concludes with recommendations for government attorneys and officials in light of the restrictions *In re Lindsey* has placed on the government attorney-client privilege.

I. EVOLUTION OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

A. The Attorney-Client Privilege

Federal Rule of Evidence 501, the foundation for the attorney-client privilege,[14] states that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[15] The attorney-client privilege, the oldest privilege for confidential communications at common law, furnishes protection to communications made between client and attorney by forbidding disclosure.[16] By utilizing the attorney-client privilege, a client may refuse to disclose confidential communications and may also prevent his attorney from disclosing confidential communications that were made for the purpose of obtaining legal guidance.[17] The identity of a client, underlying facts, and incidental

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12. 112 F.3d 910 (8th Cir.), *cert. denied*, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

13. 5 F. Supp.2d 21 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re* Lindsey, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

14. The elements of the attorney-client privilege are: (1) The asserted holder is or sought to become a client; (2) the person to whom the communication was made is a member of the bar, or his subordinate, and, in connection with the communication, is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, and for the purpose of securing primarily either a legal opinion, legal services, or assistance in some legal proceeding; (4) the communication was not for the purpose of committing a crime or tort; and (5) the privilege has been claimed and not waived by the client. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

15. FED. R. EVID. 501.

16. *See* Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, *in* CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 1998, at 473, 476 (PLI Litig. & Admin. Practice Course Handbook Series No. 583, 1998).

17. *See* PROPOSED FED. R. EVID. 503(b). Although this rule has not been enacted, it has been recognized as "a powerful and complete summary of black-letter principles of lawyer-client privilege." 3 WEINSTEIN'S FEDERAL EVIDENCE § 503.02, at 503-10 (McLaughlin 2d ed. 1997).

communications are generally not protected by the attorney-client privilege,[18] but an exception applies when the person asserting the privilege can show the possibility that disclosure would implicate the client in the very criminal activity for which the client sought legal advice.[19]

Although privileges generally are in "derogation of the search for truth"[20] and contravene the fundamental maxim that the "public . . . has a right to every man's evidence,"[21] the attorney-client privilege "promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys."[22] As a consequence, the attorney-client privilege promotes the "broader public interests in the observance of law and administration of justice."[23] As a result of the conflicting principles inherent in seeking out the truth *and* protecting confidential communications between attorneys and clients, courts have determined that the attorney-client privilege is not absolute and must be strictly construed. Therefore, the privilege is recognized "only to the very limited extent that permitting a refusal to testify . . . has a *public good transcending* the normally predominant principle of utilizing all rational means for ascertaining truth."[24] This public good must be shown "with a high degree of clarity and certainty" in order to apply the attorney-client privilege.[25]

In addition to the public good requirement, other limitations exist in asserting the attorney-client privilege. The crime-fraud exception exempts from the attorney-client privilege communications made in furtherance of future or ongoing criminal or fraudulent conduct, including other wrongful conduct such as intentional torts.[26] Another example is the at-issue exception, which provides that a party may have effectively waived the attorney-client privilege through an

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18. *See* Chepiga, *supra* note 16, at 479.

19. *See id.* (citing *In re* Grand Jury, 631 F.2d 17, 19 (3d. Cir. 1980)).

20. United States v. Nixon, 418 U.S. 683, 710 (1974).

21. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 917-18 (8th Cir.), *cert. denied*, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

22. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d. Cir. 1991).

23. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

24. *In re* Grand Jury Proceedings, 5 F. Supp.2d 21, 30 (D.D.C.) (emphasis added), *aff'd in part, rev'd in part sub nom. In re* Lindsey, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466(1998) (mem.) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)). *See also In re Lindsey*, 158 F.3d at 1268 ("[F]ederal courts do not recognize evidentiary privileges unless doing so 'promotes sufficiently important interests to outweigh the need for probative evidence.'") (citation omitted).

25. *In re* Sealed Case, 148 F.3d 1073, 1076 (D.C. Cir.), *cert. denied*, Rubin v. United States, 119 S. Ct. 461 (1998).

26. *See* Chepiga, *supra* note 16, at 485; *see also* United States v. Zolin, 491 U.S. 554, 561 (1989) (holding that the general policy for the crime-fraud exception is "to assure that the 'seal of secrecy' between lawyer and client does not extend to communications made for [the] purpose of getting advice for [the] commission of a fraud or a crime") (citations omitted).

affirmative act, such as filing suit, that puts protected information at issue by making it relevant to the case.[27] Finally, the self-defense exception allows an attorney to override the client's privilege in order to defend himself against accusations of wrongful conduct.[28] These exceptions ensure that the truth is revealed in situations where a compelling public good outweighs a refusal to testify.

B. The Principle of Confidentiality and the Executive Privilege

The principle of confidentiality is often entangled with the attorney-client privilege.[29] The principle of confidentiality is rooted in professional ethics while the attorney-client privilege is rooted in the law of evidence.[30] As to the principle of confidentiality, Model Rule of Professional Conduct 1.6 states:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . . A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or to establish a claim or defense on behalf of the lawyer . . . .[31]

The critical difference between the attorney-client privilege and the principle of confidentiality is that the attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness while the principle of confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.[32] Furthermore, the principle of confidentiality applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its

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27. *See* Chepiga, *supra* note 16, at 488; *see also* Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (holding that the at-issue exception provides that a party may have waived the privilege when (1) the assertion of the privilege was a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party put protected information at issue by making it relevant to the case; and (3) application of the privilege would deny the opposing party access to information vital to its defense).

28. *See* Chepiga, *supra* note 16, at 490; *see also* Meyerhofer v. Empire Fire & Marine Ins., 497 F.2d 1190, 1194-96 (2d Cir. 1974) (holding that an attorney who had been named as a defendant in a class action brought by the purchasers of the securities who claimed that the prospectus contained misrepresentations had the right to make an appropriate disclosure to counsel representing the stockholders as to his role in the public offering).

29. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1995) ("The principle of confidentiality is given effect in *two related* bodies of law, the attorney client privilege . . . and the rule of confidentiality . . . .") (emphasis added).

30. *See id.*

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).

32. *See id.* at cmt. 5 (1995).

source.[33]

The executive privilege is also confused with the attorney-client privilege. The executive privilege is a "broad, constitutionally derived privilege that protects frank debate between President and advisers"[34] while the attorney-client privilege is a much narrower privilege that emanates from the common law. Although the President may utilize the attorney-client privilege, the executive privilege is exclusive to the President.

The landmark case *United States v. Nixon*[35] carved out the executive privilege from the U.S. Constitution. The Court created the executive privilege in part to equip the President with a comparable protection that members of the House and Senate are afforded under the Speech and Debate Clause[36] in the U.S. Constitution.[37] In creating this privilege, the Court reasoned that the "President's need for complete candor and objectivity from advisers calls for great deference from the courts."[38] However, the Court fashioned an exception to the executive privilege by holding that the executive privilege is not absolute and must ultimately yield to the specific need for evidence in a criminal investigation, unless the investigation encompasses military, diplomatic, or sensitive national security secrets.[39]

C. Derivation and Scope of the Government Attorney-Client Privilege

In addition to the attorney-client privilege, many other privileges have been recognized, such as the psychotherapist-patient privilege,[40] husband-wife privilege,[41] and corporate attorney-client privilege.[42] A more recent addition to this list is the government attorney-client privilege. "Courts, commentators, and government lawyers have long recognized a government attorney-client privilege

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33. *See id.*

34. *In re* Lindsey, 158 F.3d 1263, 1285 (D.C. Cir.) (Tatel, J., dissenting), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.) (citing United States v. Nixon, 418 U.S. 683, 708 (1974)).

35. 418 U.S. 683 (1974).

36. The Speech and Debate Clause states that Senators and Representatives shall be privileged for "[a]ny Speech or Debate in either House, [and] they shall not be questioned in any other Place." U.S. CONST. art. 1, § 6.

37. *See Nixon*, 418 U.S. at 704.

38. *Id.* at 706.

39. *See id.*

40. *See* Jaffee v. Redmond, 518 U.S. 1 (1996) (observing that this privilege would serve the public interest by facilitating the provision of appropriate treatment for individuals who suffer from mental or emotional problems); PROPOSED FED. R. EVID. 504.

41. *See* Trammel v. United States, 445 U.S. 40 (1980) (recognizing two distinct spousal privileges: testimonial and communications); PROPOSED FED. R. EVID. 505.

42. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981) (extending the attorney-client privilege to communications made between corporate counsel and all-level corporate employees, as long as the communications concern matters within the scope of employment).

in several contexts."[43] Although this privilege was not universal and guaranteed prior to *In re Lindsey*,[44] case law, litigation concerning the Freedom of Information Act, and secondary authority did endorse a comprehensive government attorney-client privilege.

Although there are no Federal Rules of Evidence that acknowledge a government attorney-client privilege, precedent on this subject exists in both federal[45] and state[46] case law. An example of a federal case recognizing the government attorney-client privilege is *Green v. Internal Revenue Service*.[47] The district court, reiterating the Seventh Circuit, recognized the privilege on the basis of important underlying policy considerations.[48] The Seventh Circuit had stressed that the government attorney-client privilege promotes frank

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43. *In re* Lindsey, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

44. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475, at 128 (1986) ("Whatever the merits of the arguments for and against the governmental privilege, it seems *likely* that *some* form of privilege for governmental clients will be recognized by federal courts . . . .") (emphasis added).

45. *See, e.g.*, Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (assuming the government attorney-client privilege exists, but never explicitly deciding); *In re* Grand Jury Subpoena, 886 F.2d 135 (6th Cir. 1989) (assuming that a governmental entity, such as a municipal corporation, may invoke the attorney-client privilege); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (dicta); *In re* Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 694 (N.D. Ga. 1998) (holding that the attorney-client privilege applies to a governmental entity when it seeks advice to protect personal interests and needs the same assurance of confidentiality so it will not be deterred from full and frank communications); Scott Paper Co. v. United States, 943 F. Supp. 489, 499 (E.D. Pa.), *aff'd*, 943 F. Supp. 501 (E.D. Pa. 1996) ("In claims of attorney-client privilege by an organization, such as a governmental agency or corporation, the privilege extends to those communications between the attorney and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.").

46. *See, e.g.*, People *ex rel.* Dep't of Pub. Works v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303, 310 (Cal. Ct. App. 1964) (holding that the privilege for governmental agencies is determined in the same way as the privilege for private corporations); City of Orlando v. Desjardins, 493 So.2d 1027, 1029 (Fla. 1986) (finding an exception under state open-files statute); District Attorney v. Board of Selectmen, 481 N.E.2d 1128, 1130 (Mass. 1985) (finding an exception to the open-meeting law, but refusing to recognize an implicit exception for non-litigation consultation); Minneapolis Star & Tribune v. Housing & Redevelopment Auth., 251 N.W.2d 620, 624-25 (Minn. 1976) (holding that state open-meeting laws implicitly exempt meetings between agency and lawyer for purposes of discussing pending litigation); Matter of Grand Jury Subpoenas Duces Tecum Served by Sussex County Grand Jury on Farber, 574 A.2d 449, 455 (N.J. Super. Ct. App. Div. 1989) ("[W]e are convinced that many of the considerations which underlie application of the attorney-client privilege to corporations militate strongly in favor of its extension to public entities.").

47. 556 F. Supp. 79 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984).

48. *See id.* at 84.

communications among those who make meaningful decisions regarding governmental functions.[49] The Seventh Circuit had also recognized that the privilege was designed to shield from disclosure the mental processes of executive and administrative personnel.[50]

An example of a state case upholding the government attorney-client privilege is *Markowski v. City of Marlin*.[51] The Texas court extended the privilege to governmental entities because "a governmental body has as much right as an individual to consult with its attorney without risking the disclosure of important confidential information."[52] The Texas court reasoned that because a governing body may consult privately with its attorney, logic prescribes that the information disclosed should be protected.[53] However, the Texas court mandated that a "checking" mechanism be applied to claims of the government attorney-client privilege.[54] In order to justify the privilege, the Texas court required the proponents to submit the alleged privileged documents or communications to an in camera inspection.[55]

Although a great deal of general case law exists, most of the law on the government attorney-client privilege has primarily developed from litigation[56] concerning exemption five of the Freedom of Information Act[57] ("FOIA"). Under this exemption, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"[58] are excused from mandatory disclosure to the public. "Exemption five does not itself create a government attorney-client privilege."[59] Rather, it creates an effective government attorney-client privilege only "when the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors."[60]

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49. *See id.*

50. *See id.*

51. 940 S.W.2d 720 (Tex. App. 1997).

52. *Id.* at 726.

53. *See id.* at 727.

54. *Id.*

55. *See id.*

56. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975); Mead Data Ctr., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252-53 (D.C. Cir. 1977); Porter County Chapter of Izaak Walton League v. United States Atomic Energy Comm'n, 380 F. Supp. 630, 637 (N.D. Ind. 1974).

57. 5 U.S.C. § 552 (1994). The Freedom of Information Act is a "broadly conceived statute which seeks to permit public access to much previously withheld official information." *Izaak Walton League*, 380 F. Supp. at 636.

58. 5 U.S.C. § 552(b)(5).

59. *In re* Lindsey, 158 F.3d 1263, 1269 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

60. *Id.* (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C.

The proposed, but never enacted, Federal Rule of Evidence 503 lends additional support for the government attorney-client privilege, and courts have often turned to it as evidence of the black-letter law.[61] Proposed Federal Rule 503 defines "client" for the purposes of the attorney-client privilege as a "person, public officer, or corporation, association, or other organization or entity, either public or private."[62] The advisory committee's notes to the proposed rule clarify that the attorney-client privilege extends to communications of governmental organizations.[63]

Finally, the Restatement (Third) of the Law Governing Lawyers advocates support for the government attorney-client privilege.[64] However, the commentary emphasizes that the privilege for governmental clients is much narrower than the attorney-client privilege due to statutory formulations, such as open-meeting and open-file statutes, that reflect a public policy against secrecy in many areas of governmental activity.[65]

As the above-mentioned authority reflects, the scope of the government attorney-client privilege was broad prior to *In re Lindsey*. It protected the processes by which a decision was reached, extraneous matters considered, contributing factors, and the role played by the work of others.[66] The government attorney-client privilege also protected "government documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[67] In certain circumstances, the government could even invoke this privilege with regard to state and military secrets.[68]

Although this privilege was broad, no legal precedent existed determining

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Cir. 1980)); *see also* Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. Off. Legal Counsel 481, 495 (1982) ("[T]he privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA.").

61. *See, e.g.*, *In re Lindsey*, 158 F.3d at 1269.

62. PROPOSED FED. R. EVID. 503 (a)(1).

63. *See* PROPOSED FED. R. EVID. 503 advisory committee's note.

64. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996) ("[T]he attorney-client privilege extends to a communication of a governmental organization . . . ."). The American Law Institute has approved the chapter of Proposed Final Draft No. 1 of the Restatement governing the attorney-client privilege. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 916 n.4 (8th Cir.), *cert. denied*, Office of the President v. Office of Indep. Counsel, 521 U.S. 1105 (1997) (citing 64 U.S.L.W. 2739 (1996)).

65. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. b (Proposed Final Draft No. 1, 1996).

66. *See* Green v. IRS, 556 F. Supp. 79, 84 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984) (citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966)).

67. JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION § 58A.34 (1997) (citing Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963)).

68. *See id.* (citing E.W. Bliss Co. v. United States, 203 F. Supp. 175 (N.D. Ohio 1961)).

whether this privilege applied in a criminal investigation.[69] The logical assumption, however, was that the government attorney-client privilege applied in criminal investigations because a court had never carved out an exception to the attorney-client privilege based solely on the type of proceeding in which a party claimed the privilege.[70] *In re Lindsey* marked a fundamental change in this assumption as it created an exception applicable only to government entities: no attorney-client privilege for criminal investigations.

II. *IN RE LINDSEY* AND ITS COMPANION CASES

While the world's focus was on Monica Lewinsky and President Clinton, Independent Counsel Kenneth Starr, in his extended Whitewater investigation, was attempting to pierce the government attorney-client privilege. Although the cases discussed below are from the Eighth and D.C. Circuits, they have borrowed from each other and were ultimately combined to produce the holding in *In re Lindsey*: the government attorney-client privilege evaporates in the face of a federal grand jury subpoena.

A. In re Grand Jury Subpoena Duces Tecum

In re Grand Jury Subpoena Duces Tecum,[71] decided by the Eighth Circuit on February 13, 1997, paved the way for *In re Lindsey*. In this case, the Special Division of the United States Court of Appeals for the District of Columbia, pursuant to the Independent Counsel statute,[72] ordered Kenneth Starr to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc."[73] The Special Division also assigned Kenneth Starr to pursue evidence of "other violations of the law developed during and connected with or arising out of his primary investigation, known generally as 'Whitewater.'"[74] Pursuant to its investigation,

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69. *See* Lisa E. Toporek, *"Bad Politics Makes Bad Law:" A Comment on the Eighth Circuit's Approach to the Governmental Attorney-Client Privilege*, 86 GEO. L.J. 2421, 2433 (1998).

70. *See id.*

71. 112 F.3d 910 (8th Cir.), *cert. denied*, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

72. 28 U.S.C. § 592 (1994). An investigation pursuant to this statute shall be made of such matters as the "Attorney General considers appropriate in order to make a determination . . . on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law." *Id.* § 592 (a)(1). The Independent Counsel statute expired on June 30, 1999. *See Independent Counsel Law Expires Today: Statute Started During Watergate*, FLA. TIMES UNION, June 30, 1999, at A4 (reporting the reasons for enacting the Independent Counsel statute as well as the reasons for letting it lapse).

73. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913 (quoting *In re* Madison Guar. Sav. & Loan Ass'n, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994)).

74. *Id.*

the Office of Independent Counsel delivered a grand jury subpoena duces tecum to the White House that required production of "all documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton."[75] The White House identified nine sets of notes in response to this subpoena, but ultimately refused to produce them, claiming, among other things, the attorney-client privilege.[76]

The district court addressed the White House's refusal, but found it unnecessary to decide the broad question presented by the Office of Independent Counsel of whether a federal governmental entity may assert the attorney-client privilege in response to a subpoena by a federal grand jury.[77] Rather, the court concluded that because Mrs. Clinton and the White House had a genuine and reasonable, albeit mistaken, belief that the conversations at issue were privileged, the attorney-client privilege indeed applied.[78] The Office of Independent Counsel appealed, and the Eighth Circuit granted an expedited review.[79]

On appeal, the Eighth Circuit refused to decide whether the government attorney-client privilege applies in civil litigation pitting the federal government against private parties.[80] Furthermore, the Eighth Circuit rejected the dissent's approach of recognizing a qualified government attorney-client privilege that would be subject to the *Nixon*[81] test for the executive privilege which balances the grand jury's need for the subpoenaed material against the White House's need for confidentiality.[82] The Eighth Circuit ultimately held that "the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue"[83] and found that the government attorney-client privilege indeed evaporates during a criminal investigation.[84] *In re Grand Jury Subpoena Duces Tecum* was the first federal court of appeals case that actually decided whether a government attorney-client privilege exists in a federal grand jury setting.[85]

In holding that the attorney-client privilege does not apply, the court relied primarily on the nature of public service, stating that "the general duty of public service calls upon government employees and agencies to favor *disclosure* over concealment."[86] Additionally, the court found significant the fact that executive

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75. *Id.* (citation omitted).

76. *See id.*

77. *See id.* at 914.

78. *See id.*

79. *See id.*

80. *See id.* at 917-19.

81. United States v. Nixon, 418 U.S. 683, 712-13 (1974).

82. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 917-19.

83. *Id.* at 917-18.

84. *See id.*

85. *See In re* Grand Jury Proceedings, 5 F. Supp.2d 21, 31 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re* Lindsey, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

86. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920 (emphasis added).

branch employees, including attorneys, are under a statutory duty[87] to report criminal wrongdoing by other employees to the Attorney General.[88] Although the court acknowledged the White House's concern that "[a]n uncertain privilege . . . is little better than no privilege at all,"[89] the court pointed out that confidentiality will suffer *only* in those situations that involve criminal violations.[90] The court's practical advice concerning this possibility was that, "an official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney."[91]

B. In re Grand Jury Proceedings

The D.C. District Court decided *In re Grand Jury Proceedings*[92] on May 27, 1998, just prior to *In re Lindsey*. Before *In re Grand Jury Proceedings*, the Special Division of the United States Court of Appeals for the District of Columbia expanded Kenneth Starr's prosecutorial jurisdiction and ordered him to conduct investigations concerning "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law."[93] The Office of Independent Counsel then moved to compel the testimony of Bruce Lindsey, Deputy White House Counsel and Assistant to the President.[94] Lindsey refused to answer certain questions, citing the government attorney-client privilege.[95] In seeking to compel Lindsey to testify, the Office of Independent Counsel urged the court to follow *In re Grand Jury Subpoena Duces Tecum* from the Eighth Circuit, by holding that the government attorney-client privilege disintegrates in a criminal context. The White House insisted that the majority's reasoning in *In re Grand Jury Subpoena Duces Tecum* was flawed and that the D.C. Circuit clearly recognizes an absolute government attorney-client privilege that applies equally to civil *and* criminal matters.[96]

The D.C. District Court partially agreed with the White House's view and confirmed the existence of an absolute government attorney-client privilege that

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87. *See* 28 U.S.C. § 535(b) (1994).

88. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920.

89. *Id.* at 921.

90. *See id.*

91. *Id.*

92. 5 F. Supp.2d 21 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re* Lindsey, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

93. *In re Lindsey*, 158 F.3d at 1267 (citation omitted).

94. *See In re Grand Jury Proceedings*, 5 F. Supp.2d at 24.

95. *See id.*

96. *See id.* at 31-32. The Attorney General filed an amicus brief in which she asked the court to recognize a qualified government attorney-client privilege that would "balance the demands of criminal law enforcement against the asserted need for confidentiality." *Id.* at 32 (quoting Brief Amicus Curiae for the United States, Acting Through the Attorney General at 7-8).

applies to Freedom of Information Act cases and other civil cases in which government attorneys represent government agencies or employees against private litigants in matters encompassing official government conduct.[97] The court reasoned that the "President's need for confidential legal advice from the White House Counsel's Office . . . [is] as legitimate as his need for confidential political advice from his top advisers."[98] The court then held that this "compelling need supports recognition of a governmental attorney-client privilege even in the context of a federal grand jury subpoena."[99]

Although this initial holding clearly contradicts the decision of the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, the court illustrated its unwillingness to recognize an absolute government attorney-client privilege.[100] The court agreed with the Eighth Circuit that the criminal/civil distinction is significant and that "[m]ore particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another."[101] Finally, the court held that in the context of a grand jury investigation, where one government agency requires information from another to determine whether a crime has been committed, the government attorney-client privilege must be qualified "in order to balance the needs of the criminal justice system against the government agency's need for confidential legal advice."[102] This is essentially the same test proposed by the dissent in *In re Grand Jury Subpoena Duces Tecum*.[103]

To accomplish this balancing test, the court established that the government attorney-client privilege dissipates if the subpoena proponent can show "first, that each discrete group of the subpoenaed materials (or testimony) likely contains important evidence; and second that this evidence is not available with due diligence elsewhere."[104] Upon application of this test, the court found that the Office of Independent Counsel's submissions[105] detailing its need for the conversations between Lindsey and President Clinton were likely to elicit evidence that was important and relevant to the grand jury's investigation and

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97. *See id.* at 32.

98. *Id*.

99. *Id.*

100. *See id.*

101. *Id.* (quoting *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 916 (8th Cir. 1997)).

102. *In re Grand Jury Proceedings*, 5 F. Supp.2d at 32-33.

103. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 935 (Kopf, J., dissenting), ("A careful balancing of the interests of the White House and the IC [is required] to preserve and protect the public interest that both governmental entities seek to promote.").

104. *In re Grand Jury Proceedings*, 5 F. Supp.2d at 37-38 (quoting *In re* Sealed Case, 121 F.3d 729, 754 (D.C. Cir. 1997)).

105. The details of the submissions cannot be revealed because the submissions were viewed in camera and involve matters subject to Federal Rule of Criminal Procedure 6(e)(2). *See In re Grand Jury Proceedings*, 5 F. Supp.2d at 38.

were not available with due diligence elsewhere.[106] Therefore, the District Court granted the Office of Independent Counsel's motion to compel the testimony of Bruce Lindsey.[107]

C. In re Lindsey

In re Lindsey, decided by the D.C. Circuit on July 27, 1998, commenced when the Office of President appealed the D.C. District Court's compulsion of Bruce Lindsey's testimony.[108] In response, the Office of Independent Counsel immediately petitioned the Supreme Court for review of the district court's decision, hoping to prevent a future delay resulting from a possible appeal from the D.C. Circuit Court. The Supreme Court, however, denied certiorari from the district court and indicated its expectation that the D.C. Circuit Court would proceed expeditiously to decide this case.[109]

After exploring the foundation for the attorney-client privilege and tracking the evolution of the government attorney-client privilege, the D.C. Circuit Court concluded that the "issue whether the government attorney-client privilege could be invoked [in response to a grand jury subpoena] is therefore ripe for decision."[110] In deciding this issue of first impression for the D.C. Circuit, the court held that "[w]hen government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury."[111]

In route to its holding, the court discussed numerous policy considerations. The court relied heavily on the basic duties of government attorneys and officials when defining the contours of the government attorney-client privilege in the context of a criminal investigation:

> When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their *duty* is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure.[112]

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106. *See id.*

107. *See id.* at 39.

108. *See in re* Lindsey, 158 F.3d 1263, 1267 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

109. *See Office of President*, 119 S. Ct. at 466.

110. *In re Lindsey*, 158 F.3d at 1271.

111. *Id.* at 1278.

112. *Id.* at 1272 (emphasis added).

Furthermore, borrowing from Judge Weinstein,[113] the court stated, "If there is wrongdoing in the government, it must be exposed . . . . [The government attorney's] *duty* to the people, the law and his own conscience requires disclosure and prosecution."[114] The court then complimented these governmental duties with the public's interest in exposing illegality among its elected and appointed officials.[115] "Openness in government has always been thought crucial to ensuring that the people remain in control of their government."[116]

As a supplement to these rudimentary duties, the court looked to several provisions in the U.S. Constitution involving oaths in order to formulate the confines of the government attorney-client privilege. First, the President and all members of the executive branch have a constitutional responsibility to "take Care that the Laws be faithfully executed."[117] Furthermore, the President swears that he "will faithfully execute the Office of President of the United States, and will to the best of [his] [a]bility, preserve, protect and defend the Constitution of the United States."[118] Lastly, each officer of the executive branch is bound by oath or affirmation to uphold the U.S. Constitution.[119] Although Judge Tatel pointed out in his dissent that every attorney must take an oath to uphold the U.S. Constitution in order to enter the bar of any court, the majority responded that a government attorney must take an additional oath to enter into government service and stated, "[T]hat in itself shows the separate meaning of the government attorney's oath."[120]

Additionally, the court noted that the executive branch adheres to the precepts of 28 U.S.C. section 535(b), which provides that "[a]ny information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 [the federal criminal code] involving Government officers and employees shall be expeditiously reported to the Attorney General."[121] The court concluded that this provision suggests that government attorneys and officials have a duty to reveal evidence of possible commissions of federal crimes.[122]

After evaluating these policy concerns, the majority concluded that the government attorney-client privilege dissolves in the context of a criminal investigation and is therefore qualified. The dissent proposed some problems

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113. The Hon. Jack B. Weinstein is a Senior Judge for the United States District Court for the Eastern District of New York.

114. *In re Lindsey*, 158 F.3d at 1273 (emphasis added) (quoting Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966)).

115. *See id.* at 1266.

116. *Id.* at 1274 (quoting *In re* Sealed Case, 121 F.3d 729, 749 (D.C. Cir 1997)).

117. U.S. CONST. art. II, § 1, cl. 8.

118. *Id.*

119. *See id.* art. VI, cl. 3.

120. *In re Lindsey*, 158 F.3d at 1273 n.3.

121. *Id.* at 1274 (quoting 28 U.S.C. § 535(b) (1994)).

122. *See id.*

with this holding, particularly that government officials will avoid confiding in government attorneys because they will never know at the time of disclosure whether the information they share, no matter how innocent it appears, may some day become pertinent to possible criminal violations.[123] Therefore, the dissent predicted that government officials will shift their trust on all but the most routine legal matters from White House counsel to private counsel.[124] The majority conceded that this qualified application of the government attorney-client privilege may indeed "chill some communications between government officials and government lawyers."[125] However, the majority ultimately concluded that government attorneys and officials will still enjoy the benefit of fully confidential communications between them unless the communications reveal information about possible criminal wrongdoing.[126] Moreover, the majority pointed out that nothing prevents government officials who seek totally confidential communications from seeking a private attorney.[127]

In response to the D.C. Circuit Court's holding, the Office of President filed a petition for certiorari; however, the Supreme Court denied certiorari.[128] Justice Stevens, while respecting the denial of certiorari, stated, "I believe that this Court, not the Court of Appeals, should establish controlling legal principle in this disputed matter of law, of importance to our Nation's governance."[129]

III. THE AFTERMATH OF *IN RE LINDSEY*

Commentators have mixed reactions to *In re Lindsey*. Proponents of *In re Lindsey* have hailed the outcome because they believe that government attorneys and officials should answer directly to the American public.[130] The opponents of *In re Lindsey* have criticized it, citing detrimental consequences, such as "chilling effects," outsourcing of governmental legal work, revelation of military, diplomatic, or sensitive national security secrets, and slippery slope concerns.[131] Some critics have been more extreme with their remarks, stating that "this is a

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123. *See id.* at 1284 (Tatel, J., dissenting) (citation omitted).

124. *See id.* (Tatel, J., dissenting).

125. *Id.* at 1276.

126. *See id.*

127. *See id.*

128. Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

129. *Id.* (Stevens, J., respecting denial of certiorari).

130. *See, e.g.*, Bob Barr, *Barr Hails Clinton Attorney-Client Decision "Government Assets Not for Private Use"* (visited Nov. 1, 1998) <http://www.house.gov/barr/p_starr3.htm>.

131. *See* Harvey Berkman, *Lindsey Ruling Impact: Outsourcing*, NAT'L L.J., Aug. 10, 1998, at A12; Marcia Coyle, *In the 8th Circuit–Privilege Ruling Could Touch All Government Attorneys–Whitewater Case Withholds Right That Corporate Clients Have Long Enjoyed*, NAT'L L.J., May 19, 1997, at A1; Marcus, *supra* note 11, at A1; Walter Pincus, *Past Attorney-Client Issue Resonates White House Lawyers Invoked Privilege in Iran-Contra Investigation*, WASH. POST, June 7, 1997, at A3.

mess that needs fixing."[132] Although the Supreme Court denied certiorari, the potential repercussions this decision may have on government attorneys and officials is still unsettled. Therefore, these consequences would benefit from further analysis.

Supporters of a qualified government attorney-client privilege rely mostly on the nature of government employment as their arsenal. Congressman and former U.S. Attorney Bob Barr commented, "Taxpayer-funded government attorneys do not work for individuals under investigation for private conduct. They work for, and serve, the taxpaying citizens of this country."[133] Furthermore, recognizing an absolute privilege for attorney-client communications in the government context would "compromise[] . . . the important public policy of openness in government affairs."[134] While the majority of the judicial community appears to agree with the basic rationale that the public policy of open government outweighs the public policy of confidential communications involving a possible criminal violation by a government official, vehement opposition exists in the legal community. This opposition falls into these basic categories: "chilling effects" on communications between government attorneys and officials, outsourcing burdens, omission of protection for military, diplomatic, or sensitive national security secrets, and slippery slope concerns.

A. "Chilling Effects"

Opponents of the qualified government attorney-client privilege are primarily concerned with the "chilling effects" this ruling may have on communications between government attorneys and officials. Commentators, expanding upon Judge Tatel's dissent in *In re Lindsey*,[135] have responded that the "chilling effects" this holding may induce are in direct conflict with the primary purpose of the attorney-client privilege: promoting full and frank communications.[136] White House counsel Charles F.C. Ruff, in response to the Supreme Court's denial of certiorari in *In re Lindsey*, pronounced that "[w]e continue to believe that the attorney-client privilege should protect conversations between Government officials and Government attorneys. The American people benefit

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132. *Fix-up Time*, NAT'L L.J., Aug. 10, 1998, at A20.

133. Barr, *supra* note 130; *see also Appendix to the Hearings of the Select Committee on Presidential Campaign Activities*, *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 105 (6th ed. 1995) ("It is the people who not only pay the Government lawyer's salary but who are supposed to be the beneficiaries of his legal work and his true client.").

134. Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1744 (1988).

135. Judge Tatel forecasted that the ruling essentially would deter government clients from confiding in government attorneys. *See In re* Lindsey, 158 F.3d 1263, 1284 (D.C. Cir.) (Tatel, J., dissenting), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.).

136. *See* Marcus, *supra* note 11, at A1.

from decisions made by Government officials . . . on the basis of full and frank information and discussion."[137]

"Chilling effects" on full and frank communications will inevitably occur because potential criminal wrongdoing is not always conspicuous at the time of disclosure; "[f]ear of a future investigation, even a meritless one, will make government officials practice a better-safe-than-sorry approach"[138] and err on the side of nondisclosure. The *In re Lindsey* majority's rebuttal states that government officials will still enjoy the benefit of fully confidential communications with their attorneys, *unless* the communications expose information relating to possible criminal wrongdoing.[139] While this lessens the concern about "chilling effects," the practical effect is that government officials will more likely seek private counsel if they even remotely suspect that a criminal investigation may ensue.

B. Outsourcing of Governmental Legal Work

The practice of government officials seeking private counsel, known as outsourcing,[140] is an additional concern of those opposed to the qualified government attorney-client privilege. However, attorneys have already been advising government attorneys and officials to retain a private attorney. For example, G. Jerry Shaw, a partner in a D.C. law firm that represents federal employees, has confirmed that "[a]ttorneys who work for the government have *always* known, and it has *always* been taught to them, that their client is the government or agency and not the individual."[141] However, even when government officials heed this advice and hire a private attorney, they incur a tremendous monetary burden.[142] Furthermore, it essentially deprives the government of critical information because government officials will be less likely to give information freely to government attorneys based on the advice of their private attorneys.[143]

In an effort to abate this burden on government officials, an insurance policy, which has been "selling like hotcakes," has recently been made available and provides $1 million in liability coverage for suits arising out of government officials' jobs and pays up to $100,000 for legal services.[144] Furthermore, Congress has proposed a bill that reimburses government supervisors and management officials for up to fifty percent of the costs incurred by such

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137. Stephen Labaton, *Administration Loses Two Legal Battles Against Starr*, N.Y. TIMES, Nov. 10, 1998, at A19.

138. Toporek, *supra* note 69, at 2436-37.

139. *See In re Lindsey*, 158 F.3d at 1276.

140. *See generally* Patricia M. Wald, *Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 TEMP. L. REV. 1085, 1096 (1997).

141. Berkman, *supra* note 131, at A12 (emphasis added).

142. *See* Toporek, *supra* note 69, at 2438.

143. *See id.*

144. *See* Berkman, *supra* note 131, at A12.

employees for this professional liability insurance.[145] Although the availability of liability insurance and the reimbursement of premiums will not prevent outsourcing of legal work to the private sector, it does curb the monetary burden for government officials, and therefore weakens the opposition's argument.

C. Omission of Protection for Military, Diplomatic, or Sensitive National Security Secrets

Seeking a private attorney may involve a more potent and clandestine concern than mere "chilling effects" and outsourcing burdens: the possibility of revealing military, diplomatic, or sensitive national security secrets. This is the third concern opponents of the qualified government attorney-client privilege raise. This possibility is particularly worrisome in a situation involving a high-ranking government official, such as the President, Vice President, or a cabinet member, because the communications exchanged often involve matters that are of vital importance to the security and prosperity of the nation.[146] Even supporters of a qualified government attorney-client privilege shun its applicability to national security matters. For example, C. Boyden Gray, White House counsel during the Bush administration, believes that an absolute government attorney-client privilege should extend to communications involving national security matters, such as Iran-Contra,[147] that may involve possible violations of law.[148] C. Boyden Gray's rationale for this absolute protection is that government officials will not have to acquire two sets of attorneys, one government and one private, in order to clear a top secret.[149] Second, C. Boyden Gray believes that absolute protection will eliminate the inherent riskiness in relying on outside attorneys because of the sensitivity, and consequent exposition to a non-government attorney, of the top-secret information involved.[150] Although Gray supports this view, he does not believe that government attorneys should be representing government officials who face possible involvement in

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145. *See* H.R. 4278, 104th Cong. § 636 (1996). This liability insurance covers any tortious act, error, or omission while in the performance of such individual's official duties, as well as the ensuing litigation and settlement expenses. *See id.*

146. *See United States: Government Lawyers Can't Invoke Privilege when Called to Testify Before Grand Jury*, 1998 U.S.L.W.D. (BNA), Aug. 3, 1998, at D3; *see also* Stanley Brand, *A Blow Is Struck Against Attorney-Client Privilege for Government Lawyers in the Whitewater Independent Counsel Case,* 44-JUN FED. LAW. 9 (1997) ("[Outsourcing] may spark more government officials to seek advice from private lawyers in *sensitive ethics cases* or *internal agency investigations* that have the potential to turn into criminal probes.") (emphasis added).

147. In 1986, two secret U.S. Government operations were publicly exposed in which the United States sold arms to Iran in exchange for American hostages in contravention of stated U.S. policy and in possible violation of arms-export controls. *See* 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 1-2 (1993).

148. *See* Pincus, *supra* note 131, at A3.

149. *See id.*

150. *See* Coyle, *supra* note 131, at A1.

criminal matters, even if the information involves issues of national security.[151]

D. Slippery Slope Concerns

Less worrisome than the revelation of national security matters is the slippery slope problem. Even before the D.C. Circuit decided *In re Lindsey*, commentators cautioned to "[b]e prepared to see [the Eighth Circuit's ruling in *In re Grand Jury Subpoena Duces Tecum*] flower because of the number and breadth of government investigations that become criminal. And be prepared for the extension of this decision . . . from criminal to civil proceedings."[152] Furthermore, the increasing number of investigations conducted by the Office of Independent Counsel also causes concern for an over-inclusive extension of this ruling.[153] Although *In re Lindsey* will clearly place restrictions on the relationship between government attorneys and officials, the effects of these restrictions are yet to be known.

In re Lindsey will indeed have repercussions for government attorneys and officials. However, the nature of public service validates most of the effects this decision will create. While the "chilling effects," outsourcing burdens, and slippery slope concerns can be minimized, the possibility of revealing military, diplomatic, or sensitive national security secrets based on this qualified government attorney-client privilege must be thwarted.

IV. PROPOSED ALTERATIONS TO *IN RE LINDSEY*

Many suggestions have been made to lessen the impact that *In re Lindsey* may have on government attorneys and officials. Most of these proposed solutions incorporate balancing the need for confidentiality against the need for evidence in criminal cases. However, the Supreme Court has explicitly rejected this concept of applying balancing tests to the attorney-client privilege.[154] Furthermore, using a balancing test will likely compromise the public's interest in unmasking illegality among its elected and appointed officials. In light of this concern, there still remains a void in the *In re Lindsey* decision that must be addressed before hindsight regrets its omission from the government attorney-client privilege. This void can be filled by establishing an exception to the government attorney-client privilege that applies when the information disclosed deals with military, diplomatic, or sensitive national security secrets. This can be accomplished by using an in camera inspection.

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151. *See* Pincus, *supra* note 131, at A3.

152. Coyle, *supra* note 131, at A1; *see also* Brand, *supra* note 146, at 9 ("The court of appeals decision will certainly encourage litigants to seek to expand the rationale to civil cases.").

153. *See* Coyle, *supra* note 131, at A1 ("Given the proliferation of independent counsel . . . similar requests by other independent counsel for attorney-client materials will be made against numerous government agencies.").

154. *See* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2087 (1998).

A. Balancing Test

One example of a balancing test, borrowed from Judge Kopf's dissent[155] in *In re Grand Jury Subpoena Duces Tecum*, is to require a showing of need and an in camera inspection by a federal judge of the subpoenaed materials in order to determine relevance and admissibility.[156] The benefit of using this approach is that every privileged communication subpoenaed in a criminal investigation will not be automatically disclosed.[157] Instead, the "judge would carefully weigh the importance of the communication to the criminal investigation against the importance of confidentiality to encourage full and frank communications with government attorneys."[158]

Although this balancing test appears "fair," it must ultimately fail. The first reason is the context in which the government attorney-client privilege initially will be claimed—the grand jury. The grand jury, a constitutional body established in the Bill of Rights,[159] "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."[160] Allowing a government attorney to withhold relevant criminal evidence in some instances would essentially disparage the grand jury's function as a buffer between the government and the people. Furthermore, not only does a grand jury have broad investigatory powers,[161] but government attorneys also have a duty to provide testimony to the grand jury.[162]

Second, the Supreme Court has criticized the practice of applying a balancing test to the attorney-client privilege.[163] This criticism has resulted because of the

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155. Judge Kopf would require the special prosecutor to make an initial threshold showing before the district court that the documents are specifically needed, relevant, and admissible. Furthermore, assuming the prosecutor met this showing, Judge Kopf would require the documents to be examined in chambers in order to determine whether in fact the documents are relevant and admissible. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 926-27 (8th Cir.) (Kopf, J., dissenting), *cert. denied*, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997); *see also In re* Grand Jury Proceedings, 5 F. Supp.2d 21, 32 (D.D.C.), *aff'd in part, rev'd in part sub nom. In re* Lindsey, 158 F.3d 1263 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.) (stating that the government attorney-client privilege must be qualified "in order to balance the needs of the criminal justice system against the government agency's need for confidential legal advice").

156. *See* Toporek, *supra* note 69, at 2439.

157. *See id.* at 2440.

158. *Id.*

159. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

160. *In re Lindsey*, 158 F.3d at 1271.

161. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 918. Furthermore, "[t]he principle that the public is entitled to 'every man's evidence' is 'particularly applicable to grand jury proceedings.'" *Id.* at 919 (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

162. *See* Marcus, *supra* note 11, at A1.

163. *See In re Lindsey*, 158 F.3d at 1268.

uncertainty a client may have at the time of disclosure as to whether the information will later become relevant to a civil or criminal matter, let alone whether it will be of substantial importance.[164] Balancing the importance of the information against client interests introduces substantial uncertainty into the privilege's application; therefore, the use of a balancing test is not applicable when defining the contours of the attorney-client privilege.[165]

B. In Camera Inspection

Although good grounds exist for not employing a balancing test, the issue of disclosing military, diplomatic, or sensitive national security secrets, which *In re Lindsey* left open, is still not resolved. The possibility of disclosure, which Part III of this Note addresses, is a realistic concern that the Supreme Court addressed *United States v. Nixon*.[166]

In determining whether President Nixon must disclose audiotapes concerning the break-in at Watergate, the Court held that the assertion of the executive privilege must ultimately yield to the specific need for evidence in a criminal investigation, unless the investigation encompasses military, diplomatic, or sensitive national security secrets.[167] The basis of this sensitive information exception is rooted in the nature of the President's work. "The President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."[168] Furthermore, "[i]t may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[169]

Although the government attorney-client privilege does not necessarily involve information exchanged between the President and his advisors, it does involve information exchanged between government officials and government attorneys. High-ranking government officials, such as the Secretary of Defense,

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164. *See* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2087 (1998).

165. *See id.*; *see also* Jaffee v. Redmond, 518 U.S. 1 (1996). The Court in *Jaffee* stated

> if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected" because "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.

Id. at 17-18. *See also* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("[T]he attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.").

166. 418 U.S. 683 (1974).

167. *See id.* at 706.

168. *Id.* at 710 (quoting Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

169. *Id.* at 711 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).

Joint Chiefs of Staff, Secretary of State, or National Security Advisor, often have unrestricted access to top-secret information concerning the military, foreign affairs, or national security. Therefore, it is reasonable that if such officials are called upon to testify in a criminal investigation, they should also be extended the protection that the President is afforded under the executive privilege.[170]

Furthermore, the *In re Lindsey* court affirmatively borrowed the concept of evaporating the attorney-client privilege in a criminal context from the Supreme Court's formulation of the executive privilege in *United States v. Nixon*,[171] but neglected, without apparent explanation, to adopt the other important facet of the executive privilege—absolute protection for military, diplomatic, and sensitive national security secrets. The *In re Lindsey* court gave no reason why it only adopted one-half of the executive privilege formula. Whether by oversight or intent, divulgence of secret matters is a realistic possibility that the court in *In re Lindsey* should have discussed.

This concept of extending absolute protection to communications involving secret matters is not distinctive to the executive privilege. "In certain circumstances, the Government may invoke its governmental privilege with regard to the discovery of informants and state and military secrets."[172] Other courts have also acknowledged that disclosing secrecy matters could be harmful to the government and consequently have devised methods to prevent this from occurring.[173]

In order to extend this needed protection to matters concerning military, diplomatic, or sensitive national security secrets, a method should be utilized which will not compromise the public's right to unveil wrongdoing among government officials. Several courts have held that, given the strong competing interests to be balanced, the government attorney-client privilege should require examination of the subpoenaed documents in camera.[174] "The court must give . . . consideration to an appropriate method by that which is legitimately privileged, such as . . . intragovernmental policy discussions, [which] may be shielded while the relevant factual data is disclosed. In this connection, the court may want to use the in camera examination device."[175] Therefore, whenever information

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170. C. Boyden Gray, White House counsel during the Bush administration, believes that an absolute government attorney-client privilege should be extended to communications that involve national security matters. *See* Pincus, *supra* note 131, at A3.

171. *See In re Lindsey*, 158 F.3d at 1266.

172. MERTENS, *supra* note 67, at § 58A.34 (citing E.W. Bliss Co. v. United States, 203 F. Supp. 175 (N.D. Ohio 1961)).

173. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 6-7 (1953) (holding that there is a governmental privilege for state and military secrets); People *ex rel.* Dep't of Pub. Works v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303 (Cal. Ct. App. 1964) (applying an in camera inspection to state secrets and official communications).

174. *See, e.g.*, Scott Paper v. United States, 943 F. Supp. 489, 498 n.8 (E.D. Pa.), *aff'd*, 943 F. Supp. 501 (E.D. Pa. 1996).

175. *Id.* (quoting United States v. O'Neill, 619 F.2d 222, 230 (3d. Cir. 1980)); *see also In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 582 (E.D.N.Y. 1980) ("Given the clash of strong

potentially contains military, diplomatic, or sensitive national security secrets, the judge would determine what exactly should be disclosed, such as basic facts, without compromising the sensitivity of the information, but nevertheless satiating the public's right to unveil illegality among government officials.

Using a balancing test to eradicate the negative effects of *In re Lindsey* may not be a viable alternative for two primary reasons: the specialized function of the grand jury and the criticism by the Supreme Court concerning application of balancing tests to the attorney-client privilege. However, by holding that the government attorney-client privilege evaporates in the context of a criminal investigation, the *In re Lindsey* court left open a possibility that has been criticized before—revelation of diplomatic, military, or sensitive national security secrets.[176] The possibility of revealing such information needs to be addressed before hindsight regrets its omission from the government attorney-client privilege. In order to accomplish this, whenever the government attorney-client privilege is claimed in a response to a criminal investigation involving diplomatic, military, or sensitive national security secrets, the courts should create an exception to the government attorney-client privilege that requires judges to conduct an in camera review. An in camera review will ensure that the sensitivity of the information is not compromised because judges will censor what should be disclosed.

CONCLUSION

Regardless of the proposed alterations to the government attorney-client privilege, there will be consequences to the relationship between government attorneys and officials. In order to alleviate these ensuing changes, a few simple procedures should be followed. First, government attorneys should establish a plan for identifying and reporting to senior attorneys any legal matters that involve a criminal inquiry.[177] Those matters, and the work of government attorneys in connection with them, can then be monitored with the understanding that the government attorney-client privilege may not be available.[178] Second, government attorneys should warn government officials from the outset that they represent the governmental entity, not the individual official; therefore, government attorneys can steer individuals toward private counsel if needed.[179] If government attorneys follow this approach, it may sometimes make it more difficult to obtain information from government officials; however, it should then minimize the risk that a government attorney could be criticized for not putting an official on notice that his discussion with the government attorney was not

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competing interests, the official information privileged usually requires examination of the documents in camera.").

176. *See supra* text accompanying notes 168-75.

177. *See* Lance Cole, *The Government-Client Privilege After* Office of the President v. Office of the Independent Counsel, 22 J. LEGAL PROF. 15, 26 (1998).

178. *See id.*

179. *See id.* at 28.

privileged.[180] As far as government officials are concerned, they should heed the advice of the Eighth Circuit, "An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney."[181] Following these simple recommendations will not entirely eradicate the proposed effects of the qualified government attorney-client privilege, but it will ease the transition to limited protection for communications between government attorneys and officials that encompass criminal wrongdoing.

In conclusion, although the government attorney-client privilege contains an exception, dissolution of the privilege in the face of a criminal investigation, that the attorney-client privilege does not contain, the differences between the two privileges are ultimately dispositive. The bottom line is that taxpayer-funded government attorneys and officials work for, and serve, the taxpaying citizens of this country. Therefore, a qualified government attorney-client privilege in a criminal context, which *In re Lindsey* establishes, is warranted because of the public's right to uncover illegality among its elected and appointed government officials.

Although there has been much opposition to *In re Lindsey*, much of the criticism, such as "chilling effects" and outsourcing burdens, can be tempered. The major solutions proposed to eradicate these potential effects, such as balancing tests that weigh the grand jury's need for the evidence against the need to protect full communications between government attorneys and officials, are equally problematic. However, this does not resolve the issue. The *In re Lindsey* court notably left out an important possibility in its construction of the qualified government attorney-client privilege—revelation of military, diplomatic, or sensitive national security secrets. This oversight has a left a void in the *In re Lindsey* decision that needs to be filled. To fill this void, courts should create an exception to the government attorney-client privilege that will protect military, diplomatic, and sensitive national security secrets by requiring judges to employ an in camera inspection. An in camera inspection will safeguard the sensitivity of such information because judges can censor it before disclosure. Unfortunately, because Monica Lewinsky is not a military, diplomatic, or sensitive national security secret, even this formulation of the government attorney-client privilege would not have prevented Bruce Lindsey from testifying about the "inappropriate" relationship between President Clinton and Monica Lewinsky had President Clinton not admitted to it.

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180. *See id.* at 28-29.

181. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir.), *cert. denied*, Office of President v. Office of Indep. Counsel, 521 U.S. 1105 (1997). *See also In re* Lindsey, 158 F.3d 1263, 1276 (D.C. Cir.) (per curiam), *cert. denied*, Office of President v. Office of Indep. Counsel, 119 S. Ct. 466 (1998) (mem.) ("[N]othing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel.").