In Defense of the Government Attorney-Client Privilege

Adam M. Chud

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NOTE

IN DEFENSE OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

Adam M. Chud†

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INTRODUCTION

Within the ranks of attorneys in the United States, government attorneys hold a unique position. Because they have obligations to both the government they serve and the professional rules of legal ethics,1 government attorneys sometimes have to confront conflicts between the interests of government clients and the ethical standards which they as members of the bar vow to uphold.2 The importance of government attorneys has increased as courts and administrative agencies have gained policy-making authority over what was once the traditional domain of the legislature.3 Included among almost 40,000 federal government lawyers4 are lawyers employed by Congress, the federal courts, and the executive branch.5

The unique role of government attorneys in the American legal system has come into a sharp focus by the recent investigation into President and Mrs. Clinton's involvement in a series of Arkansas real estate transactions (collectively known as the "Whitewater" affair).6

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1 See John T. Noonan, Jr. & Richard W. Painter, Professional and Personal Responsibilities of the Lawyer 237 (1997); C. Normand Poirier, The Federal Government Lawyer and Professional Ethics, 60 A.B.A. J. 1541, 1541 (1974); see also Jennifer Wang, Note, Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel, 8 Geo. J. Legal Ethics 115, 131 (1994) (noting that members of the White House Counsel are "subject to the code of ethics of the state bar of which they are members").

2 See generally Noonan & Painter, supra note 1, at 237-43 (discussing the duties, clients, conflicting loyalties, and conflicts of interests of government lawyers).


5 See Noonan & Painter, supra note 1, at 237; Clayton, supra note 3, at 1.

6 For a detailed history of the Whitewater investigation, see United States v. Tucker, 78 F.3d 1313 (8th Cir. 1996). The Whitewater investigation has received wide coverage in the popular press. See Paul Greenberg, Arkansas from Afar and Down Home, Com. Appeal (Memphis), Apr. 5, 1996, at A7 (reporting that Whitewater has received "national press coverage"); cf. Clinton Could Face Reversal of Fortune, Advocate (Baton Rouge), Feb. 10,
From the Whitewater investigation emerged two federal court of appeals decisions that concern issues pertinent to government attorneys. Both the Eighth Circuit's 1997 decision in *In re Grand Jury Subpoena Duces Tecum* and the D.C. Circuit's 1998 decision in *In re Lindsey* confronted the issue of whether an attorney who works for the federal government may invoke the attorney-client privilege as a reason for noncompliance with a federal grand jury subpoena. Both circuits held in two-to-one decisions that federal government attorneys may not invoke the attorney-client privilege against disclosure to a federal grand jury.

Although the lapse of the Independent Counsel Statute eliminates much of the factual predicate for these decisions, the question of the proper scope of the government attorney-client privilege remains. *In re Lindsey* and *In re Grand Jury Subpoena Duces Tecum* are interesting cases for several reasons. First, from the perspective of the government attorney, these cases represent a dispute between two sets of government attorneys—the Office of the Independent Counsel and the White House Counsel's Office. In addition, these cases are important because testimonial privileges have been the subject of recent

1997, at 8B (arguing that the public is not interested in Whitewater "despite considerable press coverage"); Alexander Cockburn & Jeffrey St. Clair, *Is Hillary a Crook?*, NEW STATESMAN & SOC'Y, Apr. 12, 1996, at 20, 20 (arguing that public perception of Whitewater comes from "the consensus of the media").

7 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).


9 See *In re Lindsey*, 148 F.3d at 1102; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915. This issue was one of first impression for both courts. See 112 F.3d at 918 ("Lacking persuasive direction in the case law, we turn to general principles."); *Government Lawyers Aren't Shielded From Grand Juries*, Nat'l L.J., Aug. 17, 1998, at B25 (noting that the D.C. Circuit addressed the question of first impression). The D.C. Circuit's opinion considered only the government attorney-client privilege issue. See 148 F.3d at 1102. The Eighth Circuit's opinion addressed several additional issues as follows: whether the presence of private attorneys at meetings with government attorneys affects the government attorney-client privilege, see 112 F.3d at 921-23; whether a client's reasonable belief that communications are privileged is sufficient to make such communications privileged, see id. at 923-24; whether the work product doctrine is applicable to work prepared in anticipation of congressional hearings, see id. at 924-25; and whether a new legal rule applies to the parties in a case of first impression, see id. at 925. These issues are beyond the scope of this Note.

10 See *In re Lindsey*, 148 F.3d at 1102; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915; see also Harvey Berkman, *Lindsey Ruling Impact: Outsourcing*, Nat'l L.J., Aug. 10, 1998, at A25 (reporting that the D.C. Circuit opinion was the second ruling by a court of appeals rejecting the government attorney-client privilege in the context of federal grand jury subpoenas); Joan Biskupic, *Court Lets Stand Rulings on Secret Service, Lawyers' Testimony*, Wash. Post, Nov. 10, 1998, at A4 (reporting the Supreme Court decision not to hear "a pair of lower court decisions that said . . . the president's talks with White House lawyers are not bound by the traditional attorney-client secrecy").

11 This situation where two different entities of the federal government are on opposing sides of a suit in federal court is not surprising given the sheer number of government attorneys and the number of interests the federal government represents. See Michael
debate. Finally, the decision to limit the availability of the government attorney-client privilege in the context of federal grand jury proceedings represents a radical departure from the previously unqualified rule that the attorney-client privilege absolutely protects communications between government employees and government attorneys.

It may appear easy to dismiss these two decisions as dependent on the Independent Counsel Statute, but the decisions concern an area of privilege law that lacks precedent. Because they were cases of first impression for both the Eighth and D.C. Circuits, any critical analysis of the decisions must examine situations and principles of law analogous to those discussed in these cases. One must, for instance, consider the practical consequence that limiting the government attorney-client privilege has on the work of government attorneys and the interests of government clients.


12 See, e.g., Swidler & Berlin v. United States, 524 U.S. 399, ___, 118 S. Ct. 2081, 2083 (1998) (holding that attorney-client privilege survives the client's death); In re Sealed Case, 148 F.3d 1073, 1079 (D.C. Cir.) (refusing to recognize the "protective function privilege" of Secret Service), cert. denied, 119 S. Ct. 461 (1998); Jonathan Rose, Note, E-Mail Security Risks: Taking Hacks at the Attorney-Client Privilege, 23 RUTGERS COMPUTER & TECH. LJ. 179 (1997) (discussing the attorney-client privilege in the context of the security of on-line communication between lawyers and clients); see also James Toedtman, Successors May Feel Clinton's Pain: Rulings on Oval Office Privileges Seen as Costly to Future Presidents, AUSTIN AM. STATESMAN, Aug. 9, 1998, at G1 ("In the six-month investigation of his relationship with [Monica] Lewinsky, Clinton has waged losing battles in asserting [the] lawyer-client privilege, executive privilege and a special protective privilege covering Secret Service agents.").

13 See infra notes 134-37 and accompanying text; see also Abbe David Lowell, Lawyer-Client Privilege Is Absolute, NAT'L L.J., May 26, 1997, at A21 (noting that the Eighth Circuit "has literally invented an exception to the attorney-client privilege for conversations between government attorneys and officials in response to investigations that might involve criminal law issues").


15 The Eighth Circuit based its decision on general legal principles because it found no binding statutes or case law. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 918; Marcia Coyle, Privilege Ruling Could Touch All Gov't Attorneys: Whitewater Case Withholds Right That Corporate Clients Have Long Enjoyed, NAT'L L.J., May 19, 1997, at A1 (noting in reference to In re Grand Jury Subpoena Duces Tecum that "[t]he [Eighth Circuit] found little case law on whether a government attorney-client privilege can be asserted in federal grand jury proceedings"). The D.C. Circuit similarly had little precedent on which to rely. See In re Lindsey, 148 F.3d at 1108 ("In the instant case, . . . there is no such existing body of caselaw upon which to rely . . . .").
This Note argues that a blanket prohibition on the application of the attorney-client privilege to a government attorney representing a government client—who is or could be served with a federal grand jury subpoena—is unsound. The privilege is important for government clients because, like private clients, they need the candid legal advice that only the attorney-client privilege can guarantee. The prohibition on this privilege is especially unwise when the government client at issue is the President. Part I analyzes the scope of and justifications for the attorney-client privilege. Part II examines the background and the majority and dissenting opinions of both In re Grand Jury Subpoena Duces Tecum and In re Lindsey. Part III argues that the attorney-client privilege is necessary for government attorneys and government clients in the context of grand jury investigations. Part IV considers an alternative to the limitation by the Eighth and D.C. Circuits on the government attorney-client privilege; it proposes two tests to inform any future construction of the privilege. This Part considers the proper scope of the government attorney-client privilege in a post-Independent Counsel legal environment. Finally, this Note concludes that these two decisions place government attorneys in a difficult position by setting an unfortunate precedent for future use of the government attorney-client privilege.

I

THE ATTORNEY-CLIENT PRIVILEGE

This Part is intended as a brief introduction to the attorney-client privilege. It will examine the contours of the attorney-client privilege, analyze the reasons behind courts' recognition of the privilege, and discuss limitations placed on the privilege.

A. Definitions of the Attorney-Client Privilege

Many attempts have been made to craft a precise definition of the attorney-client privilege.\(^\text{16}\) John Henry Wigmore devised the most popular definition,\(^\text{17}\) which states that

\(1\) [w]here legal advice of any kind is sought \(2\) from a professional legal adviser in his capacity as such, \(3\) the communications relevant to that purpose, \(4\) made in confidence \(5\) by the client, \(6\) are at his instance permanently protected \(7\) from disclosure by

\(^{16}\) See Casey Nix, Note, In re Sealed Case: The Attorney-Client Privilege—Till Death Do Us Part?, 43 Vll. L. Rev. 285, 286 (1998) ("The exact scope of the [attorney-client] privilege ... has recently become the focus of heated scholarly debate.").

\(^{17}\) For examples of circuits that use the Wigmore formulation of the attorney-client privilege, see United States v. White, 970 F.2d 328, 334 (7th Cir. 1992); United States v. Rockwell Int'l, 897 F.2d 1255, 1264 (3d Cir. 1990); United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986); United States v. El Paso Co., 682 F.2d 530, 538 n.9 (5th Cir. 1982); United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).
himself or by the legal adviser, (8) except the client waives the protection. 18

Despite numerous attempts at definition, the exact scope of the attorney-client privilege remains debatable. 19 The Federal Rules of Evidence permit the scope of the privilege to be flexibly circumscribed according to evolving common law principles. 20 Rule 501 of the Federal Rules of Evidence 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."21 The language of Rule 501 suggests that the scope of the attorney-client privilege should evolve over time. 22

18 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2292 (1905) (typeface altered). Judge Wyzanski offered another often cited formulation of the attorney-client privilege in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950). He said the privilege applies where the following conditions are met:

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

Id. at 358-59.

19 See 1 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 1.02, at 1-8 to 1-9 (2d ed. 1995).

20 Local professional ethics rules do not alter the federal common law attorney-client privilege as the federal courts apply it. See Reed v. Baxter, 134 F.3d 351, 355 (6th Cir. 1998) ("Questions of privilege are to be determined by federal common law in federal question cases."); United States v. Sindel, 53 F.3d 874, 877 (8th Cir. 1995) ("Congress cannot have intended to allow local rules . . . to carve out fifty different privileged exemptions to the . . . requirements of [a federal law].").

21 FED. R. EVID. 501. Rule 501 applies to federal criminal cases and most civil cases involving nondiverse parties in federal court. See 1 STONE & TAYLOR, supra note 19, § 1.03, at 1-10. Although the Federal Rules of Evidence are generally suspended in grand jury investigations, see Fed. R. Evid. 1101(d)(2), this does not reduce the protection afforded by the attorney-client privilege, since the federal evidence rules governing privileges do apply to grand jury proceedings, see Fed. R. Evid. 1101(c). Despite the grand jury's broad investigatory powers, see, e.g., United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) ("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."). grand juries may not inquire into privileged communications, see 1 STONE & TAYLOR, supra note 19, § 1.75, at 1-204.

The evolution of the attorney-client privilege via case law led to
the drafting of Proposed Federal Rule of Evidence 503 ("Proposed
Rule 503"). Under Proposed Rule 503,

[a] client has a privilege to refuse to disclose and to prevent any
other person from disclosing confidential communications made
for the purpose of facilitating the rendition of professional legal
services to the client, (1) between himself or his representative and
his lawyer or his lawyer's representative, or (2) between his lawyer
and the lawyer's representative, or (3) by him or his lawyer to a
lawyer representing another in a matter of common interest, or (4)
between representatives of the client or between the client and a
representative of the client, or (5) between lawyers representing the
client.23

Although Congress never formally enacted Proposed Rule 503 into
law, federal courts have cited it as an accurate reflection of the federal
common law formulation of the attorney-client privilege.24

B. Justifications for the Attorney-Client Privilege

The attorney-client privilege is the oldest federal testimonial priv-
ilege.25 As the Supreme Court has noted, the law traditionally has
exempted confidential discussions between lawyer and client from dis-
closure "to encourage full and frank communication between attor-
neys and their clients and thereby promote broader public interests in

23 Fed. R. Evid. 503(b) (Proposed Official Draft 1972), reprinted in 56 F.R.D. 183, 236
(U.S. 1972).

24 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir.), cert.
denied, 521 U.S. 1015 (1997); In re Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994); United
States v. Moscony, 927 F.2d 742, 751 (3d Cir. 1991); United States v. Spector, 793 F.2d 932,
938 (8th Cir. 1986) ("[C]ourts have relied upon [Proposed Rule 503] as an accurate defi-
nition of the federal common law of attorney-client privilege . . . ."); 3 Jack B. Weinstein &
Margaret A. Berger, Weinstein's Federal Evidence § 503.02, at 503-10 (Joseph M. Mc-
Laughlin ed., 2d ed. 1999) (noting that although Congress struck down Proposed Rule
503, "it has considerable utility as a guide to the federal common law"). Proposed Rule
503 acknowledges that the protection of the attorney-client privilege may cover govern-
ment attorneys and clients. The Rule defines "client" to mean "a person, public officer, or
corporation, association, or other organization or entity, either public or private." Fed. R.

25 See Swidler & Berlin v. United States, 524 U.S. 399, ___, 118 S. Ct. 2081, 2084
(1998) ("The attorney-client privilege is one of the oldest recognized privileges for confi-
dential communications." (citations omitted)); United States v. Schwimmer, 892 F.2d 237,
243 (2d Cir. 1989) ("[T]he rule affording confidentiality to communications between at-
torney and client endures as the oldest privilege known to the common law."); 4 Wigmore, supra note 18, § 2290, at 3193-94 (noting that the attorney-client privilege is the
oldest privilege at common law); Stephen A. Saltzburg, Privileges and Professionals: Lawyers
and Psychiatrists, 66 Va. L. Rev. 597, 603 (1980) ("[T]he attorney-client privilege is the
oldest and most widely recognized privilege."). For a detailed history of the attorney-client
privilege, see David Drysdale, History of the Attorney-Client Privilege, in Paul R. Rice, Atto-
the observance of law and administration of justice.” Proponents of
the attorney-client privilege believe that it improves the quality of the
communications between lawyer and client and therefore improves
the quality of the legal advice clients receive. If clients hesitate to
speak openly with their attorneys, lawyers cannot accurately inform
clients of their legal obligations and advise them of the best way to
meet those obligations. This law compliance function, the Supreme
Court has said, serves the public’s interest.

Although one generally assumes that the attorney-client privilege
reduces the amount of information available to a court, there is support
for the contrary proposition that the attorney-client privilege ac-
tually preserves some information that would be lost absent the

26 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also Swidler & Berlin, 524
U.S. at ___, 118 S. Ct. at 2086 (“The loss of evidence admittedly caused by the privilege
is justified in part by the fact that without the privilege, the client may not have made such
communications in the first place.”); Commodity Futures Trading Comm’n v. Weintraub,
471 U.S. 343, 348 (1985) (“The attorney-client privilege serves the function of promoting
full and frank communications between attorneys and their clients. It thereby encourages
observance of the law and aids in the administration of justice.”); Coastal States Gas Corp.
society’s judgment that promotion of trust and honesty... is more important than the
burden placed on the discovery of truth.”); MODEL CODE OF PROFESSIONAL
RESPONSIBILITY EC 4-1 (1981) (“A client must feel free to discuss whatever he wishes with his lawyer and a
lawyer must be equally free to obtain information beyond that volunteered by his client.”);
Nancy Horton Burke, The Price of Cooperating with the Government: Possible Waiver of Attorney-
privilege is designed to promote full and complete disclosure between counsel and the
client.”); Saltzburg, supra note 25, at 603 n.14 (“If... counsel assists a defendant and also
discloses confidential communications to a court... clients would seek advice but would be
reluctant to open up fully with counsel.”).

27 See Stephen A. Saltzburg, Communications Falling Within the Attorney-Client Privilege,
66 IOWA L. REV. 811, 817 (1981); cf. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE
AND THE WORK-PRODUCT DOCTRINE 2 (3d ed. 1997) (noting that “the American Bar Associa-
tion’s Task Force on Legal Ethics has suggested that the name of the privilege should be
changed to the ‘client-lawyer’ privilege to reflect more accurately the primacy of roles”).

28 See Epstein, supra note 27, at 6 (“A... policy rationale for the privilege is that by
promoting a client’s freedom of consultation with a lawyer, the privilege is said to foster voluntary compliance with regulatory laws and thereby facilitate the effective administration
of the laws.” (emphasis added)). The Model Code of Professional Conduct also supports
this position: “Almost without exception, clients come to lawyers... to determine what
their rights are and what is, in the maze of laws and regulations, deemed to be legal and
correct... Based upon experience, lawyers know that almost all clients follow the advice
given, and the law is upheld.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 3
(1998); see also Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968) (noting that the attor-
ney-client privilege promotes the administration of justice by encouraging communications
between lawyers and clients).

29 See Upjohn, 449 U.S. at 389 (“The privilege recognizes that sound legal advice or
advocacy serves public ends... .”).

30 See 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 87, at 314 (John Wil-
liam Strong ed., 4th ed. 1999) (noting “[t]he consequent loss to justice of the power to
bring all pertinent facts before the court”).
The privilege encourages discussion between an attorney and a client and thereby prevents the loss of information due to the client's fading memory as the time gap between the relevant event and trial increases. This preservation of information aids the court in its search for truth. Additionally, after a lawyer informs a client that conversations are privileged, the client will not refrain from discussing sensitive and potentially damaging subjects with her attorney for the fear that the discussion will be used against her in court. In sum, the attorney-client privilege allows a lawyer to give high quality legal advice while depriving a court of little information; the client would not necessarily have divulged the information to the court absent the protection offered by the attorney-client privilege.

C. Limitations on the Attorney-Client Privilege

Despite the values protected by the attorney-client privilege, the privilege is limited in scope. Because the privilege permits attorneys to exclude information which may help a court in its inquiry, the privilege functions as an exception to the general right of the public to people's evidence. Even when the elements that give rise to a testi-

31 See Petitioner's Reply Brief at 4, Swidler & Berlin (No. 97-1192). Petitioners in Swidler & Berlin argued:
Once the client has freely confided in the lawyer, the lawyer can ... prod the client into testing personal recollections against available documents and the statements of others. After that process, the lawyer will have an accurate basis for giving advice, and the client will be better equipped to present a cogent, truthful account, if testimony is required.

32 See Saltzburg, supra note 25, at 610-11; cf., e.g., Houghton v. State, 207 N.W.2d 63, 64 (Minn. 1973) (per curiam) (noting that a more expeditious grant of new trials in criminal cases is warranted "so that a second trial ... can be had before memories fade" (internal quotation marks omitted)).

33 Cf. Ronald I. Keller, Note, The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government, 62 B.U. L. Rev. 1003, 1007 (1982) ("The truth-seeking apparatus of the adversarial process is impaired by granting litigants [the attorney-client] privilege. Yet because the privilege serves to improve the quality of legal representation, there is a greater chance that a court will reach a just decision." (footnote omitted)).

34 See Saltzburg, supra note 25, at 606-07; see also Vela v. Superior Court, 255 Cal. Rptr. 921, 924 (Ct. App. 1989) (noting that the objective of the privilege is to encourage disclosure of information by client to attorney by removing any fear of later disclosure of that information by the attorney).

35 See Saltzburg, supra note 27, at 817; see also David S. Rudolf & Thomas K. Maher, Behind Closed Doors, CHAMPION, Aug. 1997, at 40, 41 ("A client unprotected by the privilege simply will not share the information with counsel, and there will be no greater disclosure that [sic] there would have been absent the privilege.").

36 See, e.g., University of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (noting that "[i]nasmuch as ... privileges contravene the fundamental principle that the public ... has a right to every man's evidence, ... any such privilege must be strictly construed" (citation omitted) (internal quotation marks omitted)); Trammel v. United States, 445 U.S. 40, 50 (1980) (same); In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973) (arguing for the strict construction of the attorney-client privilege and quoting 8 WIGMORE, EVIDENCE §§ 2192, 2291
monial privilege exist, courts nonetheless strictly construe the scope of that privilege.\textsuperscript{37} Courts recognize privileges only because they serve specific purposes which courts believe outweigh the value of the testimony that would be introduced absent the privilege.\textsuperscript{38}

Proposed Federal Rule of Evidence 503(d) details only five exceptions to the attorney-client privilege. No privilege exists when (1) discussions between attorney and client are intended to help a client to commit a crime or fraud,\textsuperscript{39} (2) multiple parties have claims through a common deceased client,\textsuperscript{40} (3) the attorney-client communications at

\textsuperscript{37} See United States v. Wilson, 960 F.2d 48, 50 (7th Cir. 1992) ("Because evidentiary privileges impede the fact-finding function by excluding relevant evidence, federal courts generally disfavor privileges and construe them narrowly."); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) ("[T]he adverse effect of the application [of the attorney-client privilege] on the disclosure of truth may be such that the privilege is strictly construed."); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 116 F.R.D. 46, 49 (M.D.N.C. 1987) ("[T]he privilege must be strictly construed to ensure that it does not unduly impinge on the more general, overriding duty of insisting that investigations and decisions be based on truth and reality as opposed to fiction or fabrication."); 4 WIGMORE, supra note 18, § 2291, at 3204 (arguing that the attorney-client privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."); cf. United States v. Morris, 65 F.3d 758, 761 (9th Cir. 1995) ("We recognize a marital communications privilege, but construe it narrowly because it obstructs the truth-finding process.").

\textsuperscript{38} See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); see also United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976) (listing four factors to determine whether to recognize a testimonial privilege: (1) the “federal government’s need for information being sought in enforcing its substantive and procedural policies,” (2) the value of the relationship furthered by the privilege and “the probability that the privilege will advance that relationship,” (3) any special need for the information at issue, and (4) the impact on local policies if the privilege is not recognized); cf. Timothy V. Ramis, Comment, Executive Privileges: What Are the Limits?, 54 Or. L. Rev. 81, 82 (1975) ("The exact scope of a privilege can be defined by identifying the specific obligation which the privilege excuses.").

\textsuperscript{39} See FED. R. EVID. 503(d) (1) (Proposed Official Draft 1972), reprinted in 56 F.R.D. 183, 236 (U.S. 1972); United States v. Zolin, 491 U.S. 554, 563 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege 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 crime." (citations omitted)); Clark v. United States, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused. A client who consults an attorney for advance that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."); In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986) ("[W]hen applying the crime-fraud exception, the government must make a \textit{prima facie} showing that a sufficiently serious crime or fraud occurred to defeat the privilege; second, the government must establish some relationship between the communication at issue and the \textit{prima facie} violation."). For a discussion of the crime-fraud exception in the context of environmental audits, see Mia Anna Mazza, \textit{The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation}, 23 Ecology L.Q. 79, 123 (1996).

\textsuperscript{40} See FED. R. EVID. 503(d) (2) (Proposed Official Draft 1972), reprinted in 56 F.R.D. at 236; see also WEISSENBERGER, supra note 22, § 501.5 at 214.
issue relate to a breach of duty between the lawyer and the client, the attorney-client communications at issue relate to "an attested document to which the lawyer is an attesting witness," or (5) multiple clients share a joint interest, and one of them communicates with a lawyer retained to represent that common interest.

Proposed Rule 503 does not contemplate the creation of additional exceptions to the attorney-client privilege nor does it distinguish between criminal and civil cases. The opening phrase of Rule 501 in the Federal Rules of Evidence contains the only hint at the creation of additional restrictions on the attorney-client privilege: "[e]xcept as otherwise required by the Constitution ... or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority." Nonetheless, this language implies a legislatively created restriction on the privilege, not a court-created exception.

II
CASE BACKGROUND

This Part will discuss two recent court of appeals decisions that restrict the scope of the attorney-client privilege as it is applied to gov-

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41 See Fed. R. Evid. 503(d) (3) (Proposed Official Draft 1972), reprinted in 56 F.R.D. at 236; see also Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 570 (E.D.N.Y. 1986) (citing Proposed Rule 503(d)(3) in a lawyer-client fee dispute). See generally United States v. Ballard, 779 F.2d 558, 570 (9th Cir. 1986) ("A lawyer may reveal otherwise privileged communications from his clients in order to recover a fee due him, to defend himself against charges of improper conduct, without violating the ethical rules of confidentiality or the attorney-client privilege." (footnote omitted)); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) ("Surely a client is not free to make various allegations of misconduct and incompetence while the attorney's lips are sealed by invocation of the attorney-client privilege.... When a client calls into public question the competence of his attorney, the privilege is waived.").


43 See Fed. R. Evid. 503(d)(5) (Proposed Official Draft 1972), reprinted in 56 F.R.D. at 237; see, e.g., Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129, 132 & n.3 (E.D. Pa. 1975) (applying Proposed Rule 503(d)(5) to a fee dispute concerning a trucking contract). See generally Grand Trunk W.R. Co. v. H.W. Nelson Co., 116 F.2d 823, 835 (6th Cir. 1941) ("[W]hen two persons employ a lawyer as their common agent, their communications to him as to strangers will be privileged, but as to themselves, ... either can compel him to testify against the other as to their negotiations in any litigation between them . . .").

44 Fed. R. Evid. 501.

45 The Restatement of the Law Governing Lawyers supports this assumption in Proposed Rule 503; it introduces the section on the government attorney-client privilege with the language, "unless applicable law otherwise provides." Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996) [hereinafter Restatement Governing Lawyers]. This language allows "a legislative determination of a need for less confidentiality" to "prevail over the common-law rule." Id. § 124 cmt. b.
ernment lawyers. These decisions will be discussed in the order in which they were decided.

A. The Eighth Circuit Decision: In re Grand Jury Subpoena Duces Tecum

1. Factual and Procedural History

At the request of the Attorney General Janet Reno, the Division for the Purpose of Appointing Independent Counsels of the D.C. Circuit ("Special Division") appointed Kenneth W. Starr as Independent Counsel on August 5, 1994. The Special Division asked Starr to investigate matters concerning the relationship between President Clinton, First Lady Hillary Rodham Clinton, and James B. McDougal in their dealings with Whitewater Development Corporation, Capital Management Services, Inc., and Madison Guaranty Savings & Loan Association. The Special Division also permitted Starr to investigate other illegal activities that he might uncover during his Whitewater investigation. On June 21, 1996, the Office of Independent Counsel (OIC), led by Starr, issued a federal grand jury subpoena to the White House requiring "production of [a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton" pertaining to several Whitewater-related subjects. The White House refused to produce these documents.

On August 19, 1996, the OIC filed a motion with the United States District Court for the Eastern District of Arkansas to compel the

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46 See United States v. Tucker, 78 F.3d 1313, 1315 (8th Cir. 1996). See generally Naftali Bendavid, Another Place in History at Stake: Starr's, AUSTIN AM.-STATESMAN, Sept. 13, 1998, at H7 (discussing Starr's place in history as the Independent Counsel for the Clinton investigation).

47 See In re Madison Guar. Sav. & Loan Ass'n, No. 94-1, 1994 WL 913274, at *1 (D.C. Cir. Aug. 5, 1994); see also Tucker, 78 F.3d at 1315 (describing the full range of tasks assigned to Independent Counsel Starr).

48 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 913 (8th Cir.), cert. denied, 521 U.S. 1105 (1997); Roberto Suro, Jordan Was Justification To Wen Starr Probe, WASH. POST, Jan. 28, 1998, at A22 (noting that Starr has the power to investigate any matter "related" to the ongoing Whitewater investigation). The investigation of other illegal matters led Starr down paths that were only tangentially related to the Whitewater investigation. The targets of Starr's probe included the White House Travel Office, the suicide of Deputy White House Counsel Vincent Foster, potentially improper White House use of confidential FBI files, and potentially illegal activities arising from the relationship between President Clinton and former White House intern Monica Lewinsky. See Peter S. Canellos, Starr's Expanding Probe Puts Focus on Counsel Law, BOSTON GLOBE, Jan. 22, 1998, at A1; Chris Mondics, Independent Counsel Expands To Cover a Lot, HOUSTON CHRON., Jan. 24, 1998, at A7. In addition, Starr's original jurisdiction formally expanded several times. See Stephen Labaton, Independent Counsel Cites Deceit Pattern, N.Y. TIMES, Jan. 22, 1998, at A24.

49 In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 913.

50 See id. at 913-14.
production of two sets of the documents. The first set included
notes taken by Miriam Nemetz, an Associate Counsel to the
President, on July 11, 1995, which documented a meeting between
Hillary Rodham Clinton, her personal lawyer David Kendall, and
Special Counsel to the President Jane Sherburne concerning
Mrs. Clinton’s activities following the death of President
Clinton’s Deputy Counsel Vincent W. Foster, Jr. The second set
included notes taken by Sherburne on January 26, 1996, which
documented a meeting between Mrs. Clinton, Kendall, one of his
partners, and Counsel to the President John Quinn.

The White House claimed that because the attorney-client
privilege protected these documents, it did not need to forward the
documents to the grand jury. The District Court agreed with the
White House; it held that Mrs. Clinton’s reasonable belief that the
conversations at issue were privileged sufficed to exempt the notes
documenting those conversations from disclosure. The OIC
appealed the decision to the Eighth Circuit. A divided panel of the
Eighth Circuit reversed, and held that the attorney-client privilege
does not protect conversations between government attorneys and
government clients from disclosure to a grand jury. The United States
Supreme Court denied a petition for certiorari.

2. The Majority Opinion

Before the Eighth Circuit, Mrs. Clinton asserted that the attorney-
client privilege should protect her conversations with White House
Counsel. She asked the court to extend the Supreme Court’s hold-
ing in *Upjohn Co. v. United States* to government attorneys and their

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51 See id. at 914.
52 See id.
53 See id. Ironically, these two sets of notes very likely provided little useful informa-
54 See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 914.
55 See id. The District Court also held that “the work product doctrine prevented
disclosure of the [documents] to the grand jury.” Id.
56 See id. at 913.
57 See id. at 915.
59 One contention that neither the majority nor the dissent challenged was that one
could consider First Lady Hillary Rodham Clinton a “client” of the White House
Counsel under Proposed Rule 503. For the text of Proposed Rule 503, see *supra* text
accompanying note 23. If Mrs. Clinton was not a client of the White House Counsel, then
the attorney-client privilege clearly would not protect conversations she may have had
with White House lawyers. Because the assumption that Mrs. Clinton was a client is
not central to this Note’s argument, the Note will not further examine it.
60 449 U.S. 383 (1981). The majority in *Upjohn* limited the applicability of its ruling to
the facts of that case. See id. at 396 ("We decline to lay down a broad rule or series of rules
to govern all conceivable future questions in this area, even were we able to do so.").
government clients. Upjohn held that the attorney-client privilege applies not only to communications between corporate executives and corporate counsel, but also to communications between corporate employees and corporate counsel.

The OIC, however, argued that the Eighth Circuit should apply the standards established by the Supreme Court in United States v. Nixon, a case that concerned the executive privilege. The OIC asked the court to recognize Nixon's limitation on government privileges and to hold that the government's need for information related to a criminal investigation outweighs the general need for confidentiality of White House communications.

The Eighth Circuit's majority sided with the Independent Counsel and held that the White House Counsel could not invoke the attorney-client privilege as justification for its refusal to comply with a federal grand jury subpoena. The majority justified this decision with two basic arguments. First, the court distinguished the long line of decisions that extend the attorney-client privilege to government entities on the ground that none of those cases involve the invocation of the privilege in the criminal context. While the majority acknowledged the deep roots of the attorney-client privilege in American legal history, it did not identify which elements of Proposed Rule 503 were missing in the context of federal grand jury subpoenas directed to White House lawyers.

Second, the court adopted the principle that government officials should disclose incriminating information within their possession; the court noted that to privilege information which is relevant to a

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61 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 919-20.
62 449 U.S. at 390-97.
64 See id. at 703-16; infra notes 227-38 and accompanying text.
65 See 418 U.S. at 707.
66 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 919.
67 See id. at 919-21.
68 See id. at 925-26.
69 See id. at 917-18. The court's analysis was rather cursory on this important point. The court simply cited Nixon for the proposition that the executive privilege does not apply equally in criminal and civil matters. See id. It also cited two circuit court decisions that limited the reporter's privilege in criminal cases. See id. at 918. However, the court gave no explanation as to why these analogies apply to the instant case, or why the reasoning used in those cases overwhelms the justification for the attorney-client privilege the court had previously acknowledged in civil cases.
70 See id. at 915 ("The White House is correct, of course, in its assertion that the attorney-client privilege is the oldest known to the common law.").
71 For the text of Proposed Rule 503, see supra text accompanying note 23.
72 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 918, 920-21. But cf. Rudolf & Maher, supra note 35, at 41 (arguing that the Eighth Circuit, in its unqualified support of openness in government, "ignores the value of the attorney-client privilege").
federal grand jury investigation would constitute a misuse of government resources.\textsuperscript{73}

3. The Dissent

The dissenting opinion applied a more literal interpretation of Proposed Rule 503. Judge Richard G. Kopf\textsuperscript{74} concluded that the White House Counsel could invoke the attorney-client privilege during federal grand jury investigations, because each element of Rule 503 is satisfied in that context.\textsuperscript{75} Judge Kopf also argued that the standards established for the evaluation of the executive privilege in United States v. Nixon\textsuperscript{76} should be applied in this case involving the attorney-client privilege.\textsuperscript{77}

Judge Kopf started with a discussion of Proposed Rule 503. He agreed with the majority that the Rule is an accurate reflection of the federal common law definition of the attorney-client privilege.\textsuperscript{78} Unlike the majority, however, Judge Kopf not only examined the general principles concerning the application of the privilege to this case, but also considered the individual elements of Proposed Rule 503. Based on this examination, he drew two conclusions: First, he observed that Proposed Rule 503 does not distinguish between civil and criminal cases.\textsuperscript{79} Judge Kopf rationalized the lack of precedent in this area\textsuperscript{80} by noting that "intragovernmental disputes in the federal criminal arena seldom arise."\textsuperscript{81} Second, citing a string of cases that apply the attorney-client privilege to government communications, Judge Kopf concluded that invocation of the privilege in this case would serve the public interest.\textsuperscript{82} He felt the Upjohn rule,\textsuperscript{83} recognizing a limited attorney-client privilege for intracorporate communications, should be extended to government entities because the privilege "is intended to

\textsuperscript{73} See In re Grand Jury Subpoena Ducas Tecum, 112 F.3d at 921.

\textsuperscript{74} Judge Kopf is a United States District Court judge for the District of Nebraska. He sat on the Eighth Circuit panel by designation. See id. at 913 n.1.

\textsuperscript{75} See id. at 933-35 (Kopf, J., dissenting).

\textsuperscript{76} 418 U.S. 683 (1974).

\textsuperscript{77} See In re Grand Jury Subpoena Ducas Tecum, 112 F.3d at 935 (Kopf, J., dissenting) ("Once we decide that the White House has a privilege that the [Independent Counsel] seeks to overcome, the only precedent that matters is United States v. Nixon." (citation omitted)).

\textsuperscript{78} See id. at 929 (Kopf, J., dissenting).

\textsuperscript{79} See id. (Kopf, J., dissenting).

\textsuperscript{80} The majority examined cases which involve the application of the attorney-client privilege to government attorneys in civil cases and its application to private attorneys before grand juries. The majority was not persuaded that these decisions constitute adequate precedent for a ruling in favor of the application of the attorney-client privilege to government attorneys whom federal grand juries subpoena. See id. at 916-18.

\textsuperscript{81} Id. at 929 (Kopf, J., dissenting). Kopf further argued that there is no precedent denying the existence of the privilege in these cases. See id. (Kopf, J., dissenting).

\textsuperscript{82} See id. at 929-32 (Kopf, J., dissenting).

encourage officials, who may be fearful of losing their jobs, their reputations, their privacy, or their liberty, to tell the organization the raw truth so it can comply with the law."  

Nevertheless, Judge Kopf's support for the government attorney-client privilege was not unconditional. He proposed that the court balance the need for the privilege against the need for the information sought by the grand jury. Judge Kopf posed the following question: "Is the White House's attorney-client privilege generally more important than a grand jury's criminal investigation of the White House?" He answered the question by interpreting *Nixon* as favoring "a grand jury's need for evidence of the truth" over "the President's general need for confidentiality." Although *Nixon* involved the executive privilege and not the attorney-client privilege, Kopf viewed *Nixon*’s balancing as an appropriate method for the evaluation of any asserted governmental privilege. In applying the balancing to the instant case, Judge Kopf would have required "a preliminary showing [by the OIC] of specific need, relevance, and admissibility to a district judge" before the safe haven of the attorney-client privilege could be invaded.

The Eighth Circuit was the first circuit to limit the coverage of the government attorney-client privilege during grand jury proceedings. In 1998, the D.C. Circuit became the second to consider this issue.

B. The District of Columbia Circuit Decision: *In re Lindsey*

1. Factual and Procedural History

The *Lindsey* decision was a product of the expanded jurisdiction of the Starr investigation. On January 16, 1998, following a request by Attorney General Janet Reno, the Special Division authorized Independent Counsel Starr to investigate alleged violations of federal law committed by former White House intern Monica Lewinsky and others during the litigation of the sexual harassment lawsuit filed by Paula Corbin Jones against President Clinton. As the grand jury investigation of those allegations began, Starr’s office issued a subpoena

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84 *In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 931-32 (Kopf, J., dissenting).*
85 For further discussion of Judge Kopf’s proposed disposition of this case, see infra notes 264-71 and accompanying text.
86 *Id.*
87 *Id.*
88 Judge Kopf argued that "as the *Nixon* court made clear, the appropriate approach is to balance the governmental privilege asserted by the White House (whether it be the attorney-client privilege or some other privilege) against the competing governmental interest asserted by the [Independent Counsel]." *Id.* at 929 (Kopf, J., dissenting).
89 *Id.* at 937 (Kopf, J., dissenting).
90 See supra note 48 and accompanying text.
91 *See In re Motions of Dow Jones & Co., Inc., 142 F.3d 496, 497-98 (D.C. Cir.), cert. denied, 119 S. Ct. 60 (1998).*
to Bruce R. Lindsey, a Deputy White House Counsel and an Assistant to the President, to testify before the grand jury. Although Lindsey appeared before the grand jury, he refused to answer a number of questions by asserting that the attorney-client and executive privileges protected the requested information from disclosure.

Independent Counsel Starr challenged these privilege claims before the United States District Court for the District of Columbia. The District Court granted Starr’s motion to compel Lindsey’s testimony and ruled that although the President’s discussions with White House Counsel are protected by the attorney-client privilege, this privilege is limited by the grand jury’s need for the subpoenaed information.

The Office of the President appealed this decision to the D.C. Circuit. However, before the case could be heard by the D.C. Circuit, Starr petitioned the Supreme Court to hear the case on an expedited basis. Although the Supreme Court denied the request, it admonished the D.C. Circuit to “proceed expeditiously to decide [the] case.”

2. The Majority Opinion

Lindsey’s invocation of the government attorney-client privilege in his refusal to answer questions posed by the federal grand jury presented the D.C. Circuit with the same issue previously considered by the Eighth Circuit. The D.C. Circuit phrased the issue as follows: “Whether an attorney in the Office of the President, having been called before a federal grand jury, may refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others.” The court, in a two-to-one decision, held that White House attorneys may not

92 See In re Lindsey, 148 F.3d 1100, 1103 (D.C. Cir.) (per curiam), aff’d in part and rev’d in part, 158 F.3d 1263 (D.C. Cir.) (per curiam), cert. denied, 119 S. Ct. 466 (1998).
93 See Id. The executive privilege issue was not raised before the D.C. Circuit. See id. (“Neither the Office of the President nor the President in his personal capacity has appealed the district court’s ruling on executive privilege.”); see also David Willman & Ronald J. Ostrow, Clinton Abandons Executive Privilege Claim in Inquiry, L.A. Times, June 2, 1998, at A1 (reporting that the White House abandoned the executive-privilege defense before the D.C. Circuit).
95 See id. at 39-40.
96 See id. at 33-36.
97 See In re Lindsey, 148 F.3d at 1103.
98 See id.
99 See id.
101 In re Lindsey, 148 F.3d at 1102.
refuse to answer those questions on the basis of the attorney-client privilege.\textsuperscript{102}

The majority justified its decision by asserting that the public demand for honesty in government necessitates the exposure of government wrongdoing.\textsuperscript{103} They argued for limiting the scope of the government attorney-client privilege.\textsuperscript{104} Additionally, the court emphasized the need for government lawyers in particular to expose wrongdoing by government employees and officials. The majority argued that government attorneys are obligated by "reason and experience, duty, and tradition" to disclose evidence of government improprieties.\textsuperscript{105} The court felt that this exposure of government wrongdoing by government attorneys fosters democratic principles, as "'openness in government has always been thought crucial to ensuring that the people remain in control of their government.'"\textsuperscript{106}

The D.C. Circuit also rejected arguments made by the President's counsel that the government attorney-client privilege in the grand jury context serves the public interest.\textsuperscript{107} The court believed that communications between government clients and their government counsel will remain honest and complete, even under a narrow con-

\textsuperscript{102} See id. ("To state the question is to suggest the answer . . . .")
\textsuperscript{103} See id.
\textsuperscript{104} See id. at 1107 ("'More particularized [privilege] rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.'" (quoting \textsc{Restatement Governing Lawyers}, supra note 45, § 124 cmt. b)). The court added that the lack of existing case law on the issue of government attorneys who refuse to comply with grand jury subpoenas is evidence that the government attorney-client privilege is generally more limited than the ordinary common law attorney-client privilege. See \textit{In re Lindsey}, 148 F.3d at 1108. See generally Brett M. Kavanaugh, \textit{The President and the Independent Counsel}, 86 Geo L.J. 2133, 2173 (1998) (criticizing the government attorney-client privilege in criminal cases because of the lack of precedent in support thereof). The logic of Kavanaugh's criticism is somewhat puzzling because the court found no opinions either affirming or rejecting the privilege in this context. \textit{But cf In re Sealed Case}, 148 F.3d 1073, 1076 (D.C. Cir. 1998) (noting in the context of a proposed protective function privilege on behalf of the Secret Service that "we do not regard the absence of precedent as weighing heavily against recognition of the privilege").
\textsuperscript{105} In \textit{In re Lindsey}, 148 F.3d at 1108.
\textsuperscript{106} \textit{Id.} at 1109-10 (quoting \textit{In re Sealed Case}, 121 F.3d 729, 749 (D.C. Cir. 1997)); cf. \textit{We the People Are Lindsey's Bosses}, TENNESSEAN, Aug. 7, 1998, at 18A ("The broad and until now the unchallenged assumption is that [government] attorneys are hired for the public good—not to render personal, legal advice to specific office-holders."). The court supported this argument by referring to the following provision in the United States Code: "Any information . . . received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General." 28 U.S.C. § 535(b) (1994). The court elected not to answer the question of whether this provision alone compels the testimony of government attorneys before federal grand juries. See \textit{In re Lindsey}, 148 F.3d at 1110. However, it did argue that § 535(b) shows a congressional policy preference for disclosure of information by governmental employees. See \textit{id}.
\textsuperscript{107} See \textit{In re Lindsey}, 148 F.3d at 1111-14.
struction of the attorney-client privilege, because the limited exception created in this case applies only to discussions that concern criminal activities.  

Finally, the court rejected an argument made by the President’s counsel that the need for confidential communication between the President and government lawyers is even greater when the President’s counsel is in the midst of preparing him for impeachment proceedings.  

The majority held that because the impeachment process is a political, and not a legal, process, and because the procedures used by the House of Representatives in an impeachment proceeding or by the Senate in a trial of the President are not traditional “legal” proceedings, the typical protections afforded by the attorney-client privilege do not apply in the impeachment context.

3. The Dissent

Judge David S. Tatel dissented in part from the D.C. Circuit’s decision. He argued for an expansive attorney-client privilege for government lawyers, especially for White House Counsel. Judge Tatel would have remanded the case back to the district court with instructions to develop a more complete record to determine the exact content of Bruce Lindsey’s conversations with President Clinton. Judge Tatel perceived this information as necessary to assess whether the elements of the attorney-client privilege were satisfied during those discussions.

The essence of Judge Tatel’s disagreement with the majority stemmed from the value he placed on confidential legal advice given by White House Counsel to the President. He argued that the protections offered by the government attorney-client privilege should not be lost during grand jury proceedings. Rather, Judge Tatel

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108 See id. at 1112. The majority supported this argument with reference to similar limitations placed upon the executive privilege. See id. The executive privilege protects information which is of “vital importance to the security and prosperity of the nation,” yet is not an absolute privilege; therefore, the court’s argument goes, the government attorney-client privilege, which protects far less valuable information, similarly need not be absolute. Id. at 1114.

109 See id. at 1112-13. Although the formal impeachment proceedings against President Clinton had not yet begun at the time of the D.C. Circuit’s decision, the impeachment risk emerged because the Independent Counsel statute, which was the foundation of Starr’s authority, authorized him to “advise the House of Representatives of any substantial and credible information ... that may constitute grounds for an impeachment.” 28 U.S.C. § 595(c) (1994).

110 See In re Lindsey, 148 F.3d at 1113.

111 See id. at 1118 (Tatel, J., dissenting).

112 See id. (Tatel, J., dissenting).

113 See id. (Tatel, J., dissenting).

114 See id. (Tatel, J., dissenting).

115 See id. (Tatel, J., dissenting).
noted that an expansive government attorney-client privilege can promote the values that are advanced by the private attorney-client privilege, including fostering complete and honest discussion with legal advisors.\textsuperscript{116} He feared that a limitation on the government attorney-client privilege would reduce the confidence of government clients, including the President, when conversing about legal matters with government counsel, because they could never be certain that even seemingly innocuous information would not become relevant evidence in a federal criminal investigation.\textsuperscript{117}

Judge Tatel challenged the majority’s comparison of the executive and attorney-client privileges. He distinguished the constitutionally based executive privilege\textsuperscript{118} from the attorney-client privilege, which is a product of the common law,\textsuperscript{119} by arguing that the executive privilege extends to policy or political advice, while the attorney-client privilege protects only legal advice.\textsuperscript{120} Judge Tatel found this to be a critical distinction, because legal advice by its unique nature requires confidentiality, “as recognized by centuries of common law.”\textsuperscript{121}

The bulk of Judge Tatel’s opinion concerned the special demands of the Presidency, and the need for an expansive government attorney-client privilege for White House Counsel.\textsuperscript{122} He argued that because federal executive powers are concentrated in one President, who serves as “head of the Executive Branch, Commander-in-Chief, head of State, and [is] removable only by impeachment,” decisions about the types of advice that should be given to the President, and the limits which should be placed on the advice, must be undertaken with great care.\textsuperscript{123} Judge Tatel further argued that because the Office of the Presidency and the President himself are inextricably bound, “official matters . . . often have personal implications for a President.”\textsuperscript{124} For Judge Tatel, this blurring of personal and official mat-

\begin{itemize}
\item \textsuperscript{116} See id. at 1122 (Tatel, J., dissenting).
\item \textsuperscript{117} See id. at 1119 (Tatel, J., dissenting).
\item \textsuperscript{118} See Wolfe v. Department of Health & Human Servs., 839 F.2d 768, 773 n.5 (D.C. Cir. 1988); In re Irving, 600 F.2d 1027, 1036 (2d Cir. 1979); Nixon v. Sirica, 487 F.2d 700, 781 (D.C. Cir. 1973).
\item \textsuperscript{120} See In re Lindsey, 148 F.3d at 1120 (Tatel, J., dissenting). This is a point of disagreement between Judge Tatel’s dissenting opinion in In re Lindsey and Judge Kopf’s dissenting opinion before the Eighth Circuit. Judge Kopf would have held that the restrictions devised in United States v. Nixon for the executive privilege also should be applied to the government attorney-client privilege. See infra notes 264-71 and accompanying text.
\item \textsuperscript{121} In re Lindsey, 148 F.3d at 1120 (Tatel, J., dissenting).
\item \textsuperscript{122} See id. at 1121-22 (Tatel, J., dissenting).
\item \textsuperscript{123} Id. at 1121 (Tatel, J., dissenting).
\item \textsuperscript{124} Id. (Tatel, J., dissenting); see also Naftali Bendavid, Thin Line Separates Personal, Presidential Lawyering, Chi. Trib., June 30, 1998, at 1 (“The question of how to separate Clinton’s personal legal problems from his public ones has not been easy.”); Ruth Marcus, White House Lawyer Role Faces Test, Wash. Post, June 29, 1998, at A1 (“I don’t believe
ters meant that discussions of official business easily could be intermingled with "sensitive, embarrassing, or even potentially criminal topics." Judge Tatel concluded that the court should have remanded the case to the district court to determine whether Bruce Lindsey's supposedly privileged discussions satisfied all the elements of the attorney-client privilege. This conclusion reflects Judge Tatel's concern that because Lindsey served as both legal counsel and Special Assistant to President Clinton, some of his advice to the President may have been political, rather than legal, advice. Political advice is not protected by the attorney-client privilege.

III
THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE IS NECESSARY IN CRIMINAL INVESTIGATIONS

These two decisions by the Eighth and D.C. Circuits limit the availability of the government attorney-client privilege in grand jury proceedings. This Part will consider the government attorney-client privilege from the perspective of government attorneys, government employees, and the Office of the President. Although the facts of both the Eighth and D.C. Circuit cases involved the Office of the President and federal grand juries, the rationale of both courts is applicable to government attorneys at any level of government in any

there's any way for White House counsel to differentiate personal from official." (quoting former White House special counsel Lanny J. Davis)). Judge Tatel also challenged the majority's invocation of 28 U.S.C. § 535(b) and noted that the section is inapplicable to the Office of the President. See In re Lindsey, 148 F.3d at 1120 (Tatel, J., dissenting).

125 In re Lindsey, 148 F.3d at 1121 (Tatel, J., dissenting).
126 See id. at 1123 (Tatel, J., dissenting).
127 See id. (Tatel, J., dissenting).
128 See id. (Tatel, J., dissenting).
129 See United States v. White, 970 F.2d 328, 335 (7th Cir. 1992) ("The attorney-client privilege does not protect all communications between an attorney and his client. Rather, it shields from disclosure only communications made for the purpose of obtaining legal advice."). The requirement of legal advice appears in various definitions of the attorney-client privilege. See supra note 18 and accompanying text; supra text accompanying note 23. For example, in Wigmore's definition, protected conversations must concern "legal advice" and the advice must come "from a professional legal adviser in his capacity as such." 4 WIGMORE, supra note 18, § 2292, at 3204.
A. A Brief History of the Government Attorney-Client Privilege

Because the federal government is frequently a party to litigation, questions about the application of the attorney-client privilege to the federal government arise often. But the scope of this privilege has not been limited to the federal government. Courts have applied the attorney-client privilege not only to communications at the federal level but to communications involving attorneys represent-

131 See infra notes 291-95 and accompanying text.
133 See Keller, supra note 35, at 1024-25. Keller notes:

The federal government must seek legal advice more often than corporations or individuals, for the government must not only obey the law, it must formulate and enforce it. It is therefore important that courts avoid applying an overly constricted attorney-client privilege to the government because such a privilege might deter agencies from seeking essential legal advice.

Id.
ing states and municipalities as well. The case law is consistent with the Restatement of the Law Governing Lawyers and the Model Code of Professional Conduct, which recognize that the protections offered by the attorney-client privilege apply to communications involving government attorneys.

Nonetheless, several gaps remain in the approaches of the Restatement, the Model Code, and the common law with respect to the application of the attorney-client privilege to government attorneys. Commentators have paid scant attention to the standards applicable

F.2d 854, 863 (D.C. Cir. 1980) ("[A]n agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege . . . ."); Department of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y. 1991) ("Clearly, a government agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the [attorney-client] privilege."); Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (noting that the attorney-client privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 598, 598 (E.D. Pa. 1980) ("Courts generally have accepted that attorney-client privilege applies in the governmental context . . . ."); United States v. AT&T, 86 F.R.D. 603, 621 (D.D.C. 1979) (noting that the government attorney-client privilege should be held to the same standard as the privilege applied to corporations); 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5662, at 469 (1992) ("[G]overnmental entities can sometimes claim the . . . attorney-client privilege.").

See, e.g., Boyer v. Board of County Comm'rs, 162 F.R.D. 687, 690 (D. Kan. 1995) (citing Uphoff for the proposition that the attorney-client privilege protects communications between a county employee and a county attorney); Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385, 389 (M.D. La. 1992) (holding that the attorney-client privilege is an exception to the state public records law); Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471, 476 (D. Colo. 1992) (holding that attorney-client privilege protects an agreement between city attorneys and a sewage processor); Buford v. Holladay, 133 F.R.D. 487, 492 (S.D. Miss. 1990) (holding that confidential consultations between the State Department of Economic Development and the State Attorney General are covered by the privilege); Bruce v. Christian, 115 F.R.D. 554, 560 (S.D.N.Y. 1986) (holding that the attorney-client privilege applies to memoranda based on interviews of New York City Housing Authority managers by Housing Authority attorneys); State v. Today's Bookstore, Inc., 621 N.E.2d 1283, 1288 (Ohio Ct. App. 1993) (holding that a memorandum from a city prosecutor to a city manager is protected by the attorney-client privilege); cf. Chiles v. State Employees Attorneys Guild, 714 So. 2d 502, 506 (Fla. Dist. Ct. App. 1998) ("The fact that a lawyer is hired by a state agency rather than by individual clients does not negate a lawyer's basic ethical obligations." (quoting the lower court opinion)). See generally Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975) ("Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state." (citations omitted)).

According to the Restatement, "[u]nless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization . . . and of an individual officer, employee, or other agent of a governmental organization as a client with respect to his or her personal interest." RESTATEMENT GOVERNING LAWYERS, supra note 45, § 124.

According to the Model Code, "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 6 (1983).
to the privilege for government attorneys, probably because courts never before have questioned the application of the attorney-client privilege to government attorneys. Consequently, there is no discussion in either the case law or the legal literature distinguishing the privilege for government employees from the privilege for private citizens. Additionally, there exist few published decisions concerning the invocation of the attorney-client privilege by government counsel served with grand jury subpoena. One may attribute these gaps to the fairly specific context under which the issue arises: it is rare for two government entities to oppose each other in court in criminal cases.

Despite the dearth of precedent in this area, the Eighth Circuit majority found two cases in which courts applied the government attorney-client privilege to grand jury investigations. The first case was an intermediate appellate court decision in New Jersey. In that case a grand jury investigated two allegations: The first allegation set forth that the County Adjuster's Office improperly disclosed medical records during a political campaign. The second allegation set forth that the Adjuster did not properly perform her assigned tasks. Outside counsel represented the Adjuster's Office. When asked to appear before the grand jury to disclose the information received during the investigation, the counsel refused to do so on the grounds of the attorney-client privilege. The New Jersey court held that despite the need for a grand jury to have a complete picture of the events under investigation, it is necessary to protect discussions between government clients and government counsel from disclosure to the grand jury. The New Jersey court reasoned that the govern-

138 See Keller, supra note 33, at 1005 ("No test for applying the privilege to the executive branch of the federal government has been succinctly articulated or widely adopted . . . .").
139 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 929 (8th Cir.) (Kopf, J., dissenting) ("[I]ntragovernmental disputes in the federal criminal arena seldom arise, regardless of whether the attorney-client privilege is involved."), cert. denied, 521 U.S. 1105 (1997). But see In re Lindsey, 148 F.3d 1100, 1108 (D.C. Cir.) (per curiam) (interpreting the lack of existing caselaw in this area to mean that the government attorney-client privilege has never been construed as broadly as the ordinary common-law attorney-client privilege), aff'd in part and rev'd in part, 158 F.3d 1263 (D.C. Cir.) (per curiam), cert. denied, 119 S. Ct. 466 (1998).
140 Even though persuasive and on point, neither of these cases bound the Eighth or D.C. Circuits. Nonetheless, the arguments made in these cases for the recognition of the government attorney-client privilege in the grand jury context should at a minimum inform any consideration of this issue.
142 See id. at 451.
143 See id. at 451-52 & n.1.
144 See id. at 452.
145 See id. at 453-55.
ment attorney-client privilege in the grand jury context helps the government client to receive quality legal advice and thereby serves the public interest. 146

The Eighth Circuit distinguished the New Jersey case from the facts of the case before it on three grounds: First, the Eighth Circuit argued that the New Jersey court did not actually apply the government attorney-client privilege because the court remanded the case to a lower court to determine whether the facts justified application of the privilege. 147 Second, the Eighth Circuit distinguished the county officials involved in the New Jersey case from the federal officials involved in the Whitewater case it considered. 148 Third, the Eighth Circuit felt that the New Jersey case involved private lawyers who were hired to assist the county and therefore could not be compelled to testify before a grand jury. 149 By contrast, the government lawyers in the Eighth and D.C. Circuit cases were permanent government counsel, not private counsel temporarily hired to handle a particular matter facing government officials. 150

These distinctions do not fully appreciate the arguments made by the New Jersey court in its discussion of the attorney-client privilege as applied to government attorneys in the context of grand jury investigations. The New Jersey Superior Court considered the values that the attorney-client privilege protects and found that the privilege is fully applicable in the grand jury context. 151 Additionally, the New Jersey court gave substantial attention to the federal common law of the attorney-client privilege. 152 Although the Eighth Circuit was correct in asserting that the New Jersey court failed to discuss the differences between the privilege as it is applied at the county and federal levels, 153 the Eighth Circuit itself failed to appreciate the increased importance of the attorney-client privilege when applied at the federal level. Indeed, the values supported by the privilege are enhanced when White House Counsel are involved, because the issues they consider and the advice they give to the President are likely to be of national importance. 154

146 See id. at 454.
148 See id.
149 See id.
150 Although the facts which the Eighth Circuit considered involved both Mrs. Clinton's private counsel and White House counsel, Starr sought notes from only the White House Counsel. See id. at 913.
151 See In re Grand Jury Subpoenas Duces Tecum, 574 A.2d at 454-55.
152 See id. at 454.
153 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 917.
154 See infra Part III.C.
The Eighth Circuit also discussed a Sixth Circuit decision, *In re Grand Jury Subpoena.*\(^{155}\) That decision involved a government attorney's claim that he did not have to comply with a federal grand jury subpoena on the grounds of the attorney-client privilege. In the Sixth Circuit decision, the City of Detroit sought to quash a federal grand jury subpoena that sought the production of minutes from certain Detroit City Council meetings.\(^{156}\) The city argued that these notes fell within the scope of the attorney-client privilege.\(^{157}\) The Sixth Circuit did not deny the applicability of the privilege in the federal grand jury context, but remanded the case to consider whether the discussions at issue were, in fact, confidential.\(^{158}\)

The Eighth Circuit distinguished this case from the facts of its case on three grounds: First, the court again reasoned that the Sixth Circuit remanded the case and did not actually apply the privilege to a particular set of facts.\(^{159}\) Second, because the Sixth Circuit case involved a standoff between a federal grand jury and a city government, the Eighth Circuit felt the case involved federalism issues not present in the facts before it.\(^{160}\) Third, the Eighth Circuit was not persuaded by the Sixth Circuit's rather brief legal analysis; the Sixth Circuit did not examine the application of the privilege to government attorneys in depth.\(^{161}\)

These reasons reduce, but do not eliminate, the precedential value of the Sixth Circuit's decision. The court remanded the case to consider whether the privilege applied to the particular facts before the court, not whether it is applicable in the ideal situation.\(^{162}\) The Sixth Circuit did not even entertain the possibility that an exception...
to the common law attorney-client privilege might exist in the federal
grand jury context.

B. The Justifications for the Government Attorney-Client
Privilege Apply in Criminal Investigations

Despite the limited history of the application of the government
attorney-client privilege in grand jury proceedings, the justifications
for the attorney-client privilege nonetheless apply in the grand jury
context. This section will examine the justifying purposes of the gov-
ernment attorney-client privilege as they apply to criminal
investigations.

1. Preliminary Considerations

Prior to the Eighth and D.C. Circuit opinions, no court chal-
lenged the notion that the justifications for the government attorney-
client privilege in fact apply in criminal investigations. Additionally, neither Rule 501 of the Federal Rules of Evidence nor Proposed
Rule 503 forbids the application of the privilege in criminal cases or
distinguish between criminal and civil cases. The Eighth Circuit's
decision, followed by the D.C. Circuit, effectively carved out a new ex-
ception to the government attorney-client privilege in the context of
federal grand jury subpoenas issued to government counsel.

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163 See supra notes 25-35 and accompanying text.
164 See Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 2087
(1998) ("[T]here is no case authority for the proposition that the privilege applies differ-
ently in criminal and civil cases . . ."); Lowell, supra note 13, at A21 ("For more than 200
years, American law recognized that the privilege was necessary to encourage people to
seek out legal advice and to ensure that lawyers could properly protect their clients' confi-
dences. The privilege did not depend on whether the issues being discussed had civil or
criminal aspects . . ."). Obviously one can view this lack of discussion in two ways: the lack
of precedent either provides an opportunity to carve out an exception to the privilege, or
demonstrates that this exception has never been contemplated before. The latter ap-
proach seems to be consistent with the purposes of privileges generally. Although courts
exceptions to the demand for every man's evidence are not lightly created nor expansively
construed, for they are in derogation of the search for truth."); In re Lindsey, 148 F.3d 1100, 1119 (D.C. Cir.) (Tatel, J., dissenting) ("[T]his case
involves . . . as in Swidler, the carving out of an exception to an already well-established
466 (1998). The Restatement contains the only contemplation of an exception to the
government attorney-client privilege that supplements the exceptions to the private attor-
ney-client privilege; it excepts from the coverage of the government attorney-client privile-
ge those communications specifically excluded by a statute. See Restatement Governing
Lawyers, supra note 45, § 124. Nonetheless, the Eighth and D.C. Circuits did not refer to
any statutorily created exception to the privilege in their opinions.

165 See supra notes 21-23 and accompanying text.
GOVERNMENT PRIVILEGE

Two factors helped the Eighth and D.C. Circuits justify the new exception: First, neither court found case law on point. Second, both courts placed a virtually absolute value on the disclosure of information by government employees. The Eighth Circuit noted that "to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets." The Eighth Circuit did not temper this statement with any discussion of the need for confidentiality in government communications. The D.C. Circuit echoed this justification and argued that "[t]he obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government." 168

2. Attorney-Client Privilege Justifications Reexamined

There are justifications for applying the attorney-client privilege when a government attorney consults with a government client who is, or could be, the subject of a federal grand jury investigation. This section will discuss three ways in which the justifications for the privilege apply in the context of criminal investigations of government employees.

First, invocation of the privilege by government clients encourages open and honest discussion between lawyer and client. 170

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166 See In re Lindsey, 148 F.3d at 1108; In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 917-18 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).

167 For the proposition that an overly broad attorney-client privilege in the context of government attorneys would be dangerous, the Eighth Circuit's majority cited Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980). In Jupiter Painting, a taxpayer sued the federal government "for refund and abatement of federal employment withholding taxes." Id. at 545. During discovery, the government disclosed many documents, but refused to produce some documents on the ground that the government attorney-client privilege exempted them from disclosure. See id. The court in Jupiter Painting noted the general "apprehension at [the] pernicious potential [of the attorney-client privilege] in a government top-heavy with lawyers." Id. at 598. But it refused to limit the attorney-client privilege in the context of government attorneys. The Jupiter Painting court said that its "concern [about an overly expansive attorney-client privilege did] not justify application of a different privilege to governmental attorney-client relationships." Id. Jupiter Painting merely limited the type of privileged communications; for instance, the attorney-client privilege would not cover communications from third-party nongovernmental witnesses. See id. This was not an issue before either the Eighth or D.C. Circuits.

168 In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 921.

169 In re Lindsey, 148 F.3d at 1109.

170 See Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977) (noting that the privilege in the context of government attorneys helps guarantee quality legal advice to clients "based on a full and frank discussion with [the] attorney"). In Mead Data the court warned that disclosure of the conversations between
law should not expect any client, including government employees or officials, to fully understand the scope of a testimonial privilege before seeking the advice of counsel.171 Although government officials frequently have legal backgrounds,172 the decision to consult with counsel indicates some need for legal assistance. Therefore, the attorney-client privilege in the grand jury context encourages clients to divulge information they might otherwise not disclose absent the privilege.173 In fact, the privilege may be more important in criminal cases than in civil cases because of the possibility that an adverse verdict may lead to incarceration.174

Second, and perhaps most importantly, the privilege in the grand jury context is consistent with the public interest.175 As the Supreme Court noted in Upjohn, "[t]he privilege recognizes that sound legal advice or advocacy serves public ends."176 Any citizen’s ability to tailor attorney and government client to the public would affect government decision-making. See id. at 256.

171 Cf. Saltzburg, supra note 25, at 608 ("A client is more likely to share information openly if she knows that a slip of the tongue will not be used against her in court.").
172 See generally Miller, supra note 3, at 81 ("American lawyers have long dominated many political offices."). Twenty-five of the 41 United States Presidents, including President Clinton, earned law degrees. See id. Mrs. Clinton is also an attorney. See Greg Pierce, Inside Politics: Hillary’s Next, WASH. TIMES, Sept. 16, 1998, at A9.
173 See Rudolf & Maher, supra note 35, at 41.
174 See Coyle, supra note 15, at A1 (arguing that the privilege is more important in criminal cases than in civil cases); see also Earl C. Dudley, Jr., Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law, 82 GEO. L.J. 1781, 1832-33 (1994) (arguing that "protection for attorney-client communications in criminal cases is almost certainly implicit in the Sixth Amendment guarantee of effective assistance of counsel"); cf. United States v. Alu, 246 F.2d 29, 33-34 (2d Cir. 1957). The Second Circuit in Alu noted:

[Lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided. . . . This prohibition is applicable to the United States Government and its attorneys as well as to private litigants and their attorneys. . . . Especially in criminal litigation, where so much is at stake for the defendant, must the Bench and Bar demand adherence to a principle that is designed to ensure objectivity in the presentation of evidence.

Id.
175 The Eighth and D.C. Circuits placed an absolute value on a government attorney’s need to work in the public interest when they denied the recognition of the government attorney-client privilege in the grand jury context. See In re Lindsey, 148 F.3d 1100, 1109 (D.C. Cir.) ("The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government."); aff’d in part and rev’d in part, 158 F.3d 1263 (D.C. Cir.), cert. denied, 119 S. Ct. 466 (1998); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir.), cert. denied, 521 U.S. 1105 (1997). One problem attendant to a decision about what is and is not in the public interest is the inherent imprecision of the term. See, e.g., Wang, supra note 1, at 122 (recognizing “the unavoidable difficulties of taking on the nebulous public interest as a client”).
176 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). But see In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 921 ("[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a
his or her behavior to comply with the law benefits the public.\textsuperscript{177} This justification becomes even stronger when that citizen is a government employee seeking advice about work-related matters. Because one of the purposes of the attorney-client privilege is to encourage compliance with the law,\textsuperscript{178} one cannot argue that privileging government communications automatically leads to a wrongful government action.\textsuperscript{179}

The view of the public interest held by the Eighth and D.C. Circuits ignores the outcome of government decisions and focuses instead on the process of disclosure. This is only one possible method to evaluate how a government official can act in the public interest. One alternative to this view is that if a government employee or official is unable to fulfill his or her official duties, the interests of the public are hurt.\textsuperscript{180} If one cannot trust that government attorneys will unflinchingly assist government employees and officials with their duties, the public interest is not adequately served.\textsuperscript{181} This public interest problem is only magnified when the government official in question is the President.

Finally, the Eighth and D.C. Circuit opinions misinterpret the process in which individuals make the decision to consult with counsel.\textsuperscript{182} Government clients must seek the advice of counsel to determine whether their official actions might bring adverse legal consequences, be they civil or criminal.\textsuperscript{183} This process takes place governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.

\textsuperscript{177} See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 932 (Kopf, J., dissenting).

\textsuperscript{178} See supra notes 26-29 and accompanying text.

\textsuperscript{179} The Eighth Circuit mistakenly assumed that government attorneys and clients will use the privilege only as a "shield" against disclosure, In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 921, and did not consider the possibility that the privilege might encourage discussion and disclosure of information among government entities. Because government clients always have the option to employ private counsel, they can keep damaging information from a tribunal even under the court's rule.

\textsuperscript{180} See Bruce E. Fein, Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney, 30 FED. B. NEWS & J. 406, 406 (1983). This rationale is limited to elected or appointed officials, and not permanent government employees. For a discussion of a similar perspective on the public interest which uses the Secretary of Education as an example, see Geoffrey P. Miller, Government Lawyers' Ethics in a System of Checks and Balances, 54 U. CHI. L. REV. 1293, 1294-95 (1987).

\textsuperscript{181} See Fein, supra note 180, at 406.

\textsuperscript{182} See Cole, supra note 14, at 27 ("In the real world . . . a government official may not know that he or she has violated the criminal law and, therefore, needs private counsel until he or she has spoken with an attorney.").

\textsuperscript{183} Even where a dispute seems to portend only civil liability, the possibility of criminal proceedings may remain. See Major Richard P. Laverdure, The Threat of Criminal Sanctions in Civil Matters: An Ethical Morass, ARMY LAW., Jan. 1989, at 16, 17. This concern is magnified in the context of activities by government officials. See Lowell, supra note 13, at A21 ("[P]olicy disagreements easily become criminal investigations."); cf. Hunt v. Blackburn,
regardless of whether a government employee works diligently to avoid improper conduct, or whether he previously has sought the advice of counsel to avoid illegal conduct. This type of assistance is exactly the task government attorneys perform, especially when facing the issue of disclosure of government information. It is only after consultation with an attorney that a client should be expected to distinguish liability from nonliability and civil liability from criminal liability.

If the attorney-client privilege is intended to ensure that clients receive full and effective assistance of counsel, then forcing a client to anticipate all potential legal consequences of his or her actions before consulting with counsel makes such assistance impossible. Forcing a government client to seek the advice of private counsel on all threshold questions regarding the legal consequence of his or her actions significantly reduces the effectiveness of the assistance of government counsel. Furthermore, a government client now risks having...

...
her government attorney called to testify against her merely because she received an incorrect prediction from private counsel.\textsuperscript{189} Consider the following situation: A government employee consults with private counsel, who advises her that some official course of conduct risks only civil liability. Relying on that advice and the Eighth and D.C. Circuit holdings, the government client then consults with government counsel on that matter. Subsequently, a grand jury issues a subpoena seeking to uncover the contents of that conversation. The client has followed the Eighth and D.C. Circuits’ advice to seek private counsel, but still would be denied the protection of the attorney-client privilege.

A government employee or official might attempt to solve this problem by simply seeking the advice of private counsel in regard to all actions that carry the risk of criminal liability. This resolution becomes complicated where issues of criminal and civil liabilities are difficult to separate. The next section will discuss this issue.

3. Blending of Criminal and Civil Law

The American legal system traditionally has compartmentalized legal actions into the categories of criminal law and civil law.\textsuperscript{190} This distinction encompasses the notion that the goal of civil law is to compensate those harmed by the acts of others, while the goal of criminal law is to punish those who commit acts which society condemns.\textsuperscript{191}

This division is intrinsic to the Eighth and D.C. Circuits’ choice to distinguish civil matters from criminal matters for the purpose of invoking the government attorney-client privilege. If separate privilege rules exist for criminal and civil matters, there must be a neat dividing

\textsuperscript{189} Of course the dilemma for the government employee is even greater than this. The Eighth and D.C. Circuit opinions are not limited to the disclosure of information by individuals under investigation by federal grand juries. The rulings involve access to relevant information for a grand jury proceeding by people who may have that information, whether they are under investigation themselves or not. Therefore even innocent communications with counsel by people whom no one suspects of acting improperly are not covered by the Eighth and D.C. Circuit versions of the government attorney-client privilege.

\textsuperscript{190} See generally Hicks \textit{ex rel.} Feiock v. Feiock, 485 U.S. 624, 636-37 (1988) ("The States have long been able to plan their own procedures around the traditional distinction between civil and criminal remedies.").

\textsuperscript{191} See Kenneth Mann, \textit{Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law}, 101 \textit{Yale L.J.} 1795, 1796 (1992). Mann argues that this distinction is present in procedural rules, legislative enactments, and legal writings. \textit{See id.} at 1796-97. The different consequences of a violation of a criminal law and a civil law manifest this distinction. The consequence of a violation of a criminal statute is punishment and that of a civil statute is compensation. \textit{See} Joshua Dressler, \textit{Understanding Criminal Law} 1 (1987); \textit{cf.} Pacific Mut. Life Ins. Co. \textit{v.} Haslip, 499 U.S. 1, 47 (1991) (O'Connor, J., dissenting) ("Here . . . the civil/criminal distinction is blurry. Unlike compensatory damages, which are purely civil in character, punitive damages are, by definition, punishment."); United States \textit{v.} Barnette, 129 F.3d 1179, 1182 n.7 (11th Cir. 1997) ("A civil contempt order is compensatory and coercive. A criminal contempt order is punitive." (citation omitted)).
line between criminal and civil law. Otherwise, a government attorney could never be comfortable giving advice to clients because she could never be certain whether such conversations would be privileged. The Eighth Circuit majority dismissed this practical concern: "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." Similarly, the D.C. Circuit majority argued that "nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel."

A clear distinction between criminal and civil law is necessary to justify both the theoretical and practical distinctions between the attorney-client privilege for civil matters and for criminal matters. Theoretically, courts considering the attorney-client privilege under either a criminal or civil law rule should provide protection to the litigants commensurate with the label. Practically, court choice to provide either civil or criminal law protection should be based on principle, not on happenstance.

Increasingly, the neat distinction between criminal law and civil law has blurred. This can occur in two ways: First, a single act may risk either civil or criminal sanction. For example, "[m]atters con-

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194 This is not to argue that all constitutional protections afforded to criminal defendants must be given to civil defendants. Nonetheless, if the law mixes civil and criminal remedies, it should provide adequate protections to civil defendants. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L.J. 1325, 1328 (1991) ("[E]fforts to mix and match criminal and civil sanctions . . . undoubtedly will require procedural and jurisdictional reforms."). Professor Cheh goes on to argue that "certain proceedings, even though statutorily or judicially labeled 'civil,' in reality exact punishments at least as severe as those authorized by the criminal law." Id. at 1350; see also Mann, supra note 191, at 1798 ("As civil law becomes more punitive, serious doubt arises about whether conventional civil procedure is suited for an unconventional civil law.").
195 See Cheh, supra note 194, at 1325 ("[T]he distinction between criminal and civil law seems to be collapsing across a broad front."); Mann, supra note 191, at 1798 ("[P]unitive civil sanctions are rapidly expanding, affecting an increasingly large sector of society in cases brought by private parties as well as by the government . . . . With more punishment meted out in civil proceedings, the features distinguishing civil from criminal law become less clear." (footnotes omitted)); Lowell, supra note 13, at A21 ("[T]he line between the civil and criminal aspects of a modern government dispute . . . is nearly invisible . . . "). Mann further notes that "[t]he paradigmatic co-option of attributes [of criminal and civil law] stems from historical conventions that are now eclipsed." Mann, supra note 191, at 1804.
196 See Cheh, supra note 194, at 1333-34.
cerning securities, tax, antitrust, fraud or RICO laws all could involve either civil or criminal liability. Second, a court may impose civil sanctions following a criminal conviction. Examples of these sanctions include punitive civil penalties for the filing of false claims and civil forfeiture of a person's home after drug seizure on his property. The first of these two situations is probably the most worrisome for a government client facing a legal arena that does not privilege discussions with government counsel which relate to criminal matters, but protects discussions concerning civil matters. When a single case contains both criminal and civil elements, one no longer maintains the clean division of privilege rules in civil and criminal cases.

While this legal evolution does not mean that the traditional conceptualization of a division of criminal and civil law and the concomitant protections given to criminal and civil litigants will soon disappear, it does have several implications for the individual who must predict whether her actions risk criminal or civil liability. The seemingly simple answer to this dilemma is that government employees always should assume their actions risk both; therefore, they sim-


199 Petitioner's Reply Brief at 9, Swidler & Berlin (No. 97-1192) (footnotes added).

200 Cheh identifies forfeiture and restitution as examples of punitive civil sanctions. See Cheh, supra note 194, at 1334-35; cf. Hudson v. United States, 522 U.S. 93, 99 (1997) (noting that, for double jeopardy purposes, a punitive purpose may "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)) (alteration in original)); Mann, supra note 191, at 1804 ("Punitive sanctions ... are paradigmatically associated with the criminal law, but now characterize so much of the civil law that punishment no longer seems a distinctive attribute of the criminal law.").

201 See Mann, supra note 191, at 1797-98. Cheh uses the example of a legislature choosing punishment as an objective of civil proceedings. See Cheh, supra note 194, at 1356. She also identifies racial harassment and spousal abuse as matters which might be classified as criminal, but which are more effectively dealt by civil law processes. See id. at 1326. Kenneth Mann has noted: "Punitive civil sanctions ... are sometimes more severely punitive than the parallel criminal sanctions for the same conduct. ... As a result, the jurisprudence of sanctions is experiencing a dramatic shift." Mann, supra note 191, at 1798 (footnote omitted); see also Cheh, supra note 194, at 1356 ("Punishment is a common objective of many civil proceedings."). Cheh also argues that the government tries to effectuate the goals of criminal law with civil sanctions "such as injunctions, forfeitures, restitution, and civil fines." Id. at 1325.

Imposition of punishment also may occur in any civil proceeding if a court holds a party in contempt. If a party refuses to comply with a court order, they may be held in contempt of court. The punishment for contempt can range from a fine to imprisonment. See id. at 1364-65. Cheh notes that enforcement of the contempt order is conditional, and that a party can avoid the punishment by complying with the court order. See id. at 1365.

ply should consult with private counsel for all legal advice. If this safer assumption is the default, then the argument made by the Eighth and D.C. Circuit majorities—that a nonprivilege rule in criminal investigations will not disrupt the flow of legal advice to government employees and officials—is incorrect. The elimination of the attorney-client privilege in the criminal context will either disrupt the work of government attorneys or alter the type of advice an official such as the President will receive.

C. The Attorney-Client Privilege and the President

Thus far, this Note has concentrated on the application of the attorney-client privilege to all government attorneys in the context of grand jury inquiries. This section will narrow the focus of this discussion to one particular government official: the President. This section will examine the precise nature of the attorney-client relationship between the President and White House Counsel and the relevance of United States v. Nixon. This section will then consider the practical benefits of the government attorney-client privilege for the President.

1. The President and Confidentiality

The President is the sole head of the Executive Branch of the federal government. Article II of the Constitution provides members of the executive branch with some level of secrecy in their communications. This secrecy "ensure[s] that advice to presidents is

205 See U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. One aspect of this secrecy is the ability of the President to consult privately with the advisors of his choice. See Association of Am. Physicians and Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993). The scope and value of this privacy is subject to fierce debate. Presidential secrecy may hinder Congress's ability to investigate allegations of wrongdoing. See Morton H. Halperin & Daniel N. Hoffman, Top Secret: National Security and the Right to Know 31 (1977); David Wise, The Politics of Lying: Government Deception, Secrecy, and Power 64 (1973) ("Boiled down, 'executive privilege,' for all of its constitutional trappings, simply means that if a President does not wish to provide information, he can tell Congress: 'You can't have it.' There is not much Congress can do about it."). For a sharp criticism of executive branch secrecy, see Raoul Berger, Executive Privilege: A Constitutional Myth (1974). For an explanation of the arguments for and against execu-
candid and [safeguards] military, diplomatic, and law enforcement endeavors which premature disclosure would compromise." Courts should presume that those presidential communications which are necessary to ensure that the President receives quality legal advice are protected.

One should undertake with great care any analysis that attempts to consider the appropriate circumstances in which to limit presidential confidentiality and secrecy. The Eighth and D.C. Circuits restricted the government attorney-client privilege after only a cursory consideration of general legal principles. Principles that should be considered in great detail include the practical needs of the President and the presidency. Given the President’s unique constitutional position, any restriction on his ability to perform his multiple tasks demands a close examination.

The Eighth and D.C. Circuit majorities gave this issue little attention. Although each court acknowledged the importance of the functions performed by the White House, they placed absolute values on fostering “honest government” and on preventing the “gross misuse of public assets.” Nonetheless, both courts addressed the argumentative secrecy in the context of the executive privilege, see Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability 8-61 (1994).

Randall K. Miller, Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege, 81 Minn. L. Rev. 631, 692 (1997); see also Wang, supra note 1, at 128 (“[T]he White House Counsel’s legal advice . . . enables the President to successfully safeguard the country’s vital interest in national security.”). Presidential secrecy, though, is not absolute. For example, the President is not immune from judicial process while in office for activities he may have undertaken in a private capacity. See Clinton v. Jones, 520 U.S. 681, 693-95 (1997). In addition, the President’s personal documents do not receive absolute protection from disclosure. See Nixon, 418 U.S. at 711-13.

See Nixon, 418 U.S. at 706, 708. See supra note 15 and accompanying text.

Cf Mark Miller, Note, A Privileged Character? The President and Joint Defense, 85 Geo. L.J. 1979, 2002 (1997) (noting that the Supreme Court in United States v. Nixon used nonlegal factors including “political exigencies” in its balancing test to determine whether the executive privilege was applicable); Michael Martin, Attorney-Client Privilege for Deceased Client, N.Y. L.J., Aug. 14, 1998, at 3 (noting that the Supreme Court in Swidler & Berlin v. United States, 524 U.S. 399 (1998), applied the instrumentalist approach to the application of the attorney-client privilege to deceased clients and examined the privilege “only in terms of its potential to encourage communication between clients and counsel and at the proposed exceptions or qualifications only in terms of their tendency to discourage such communication”).

Cf Clinton, 520 U.S. at 707 (noting in the context of a potential civil suit against the President while still in office that “[t]he high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery”).


In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 921; see also In re Lindsey, 148 F.3d at 1109-10.
ment that elimination of the attorney-client privilege in the grand jury context effectively eliminates the government attorney-client privilege in all contexts. The Eighth Circuit responded by arguing that the loss of the privilege would only occur in those situations which a grand jury chose to investigate.\footnote{See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 921.} The court further countered that government officials who are concerned that they may have committed a crime should discuss those matters exclusively with private counsel.\footnote{See id.}\footnote{See In re Lindsey, 148 F.3d at 1114.} Additionally, the D.C. Circuit believed that a reduction of government employee reliance on government counsel because of the restriction on the attorney-client privilege is appropriate given the similar limitation on the executive privilege, which protects important matters of national security.\footnote{Beth Nolan, Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act, 79 Geo. L.J. 1, 39 (1990). See generally Roger C. Cramton, The Lawyer as Whistleblower: Confidentiality and the Government Lawyer, 5 Geo. J. LEGAL ETHICS 291, 296 (1991) (noting that the question of who the client of the government lawyer is "has vexed decision-makers and commentators for many years").} These arguments by the Eighth and D.C. Circuits ignore the actual functioning of the White House in both the legal and non-legal contexts. Only the dissenting opinion of Judge Tatel on the D.C. Circuit panel recognized the President’s unique need for legal advice on a variety of subjects. The following sections will discuss the President’s need for complete legal advice, beginning with a consideration of whether the President is the White House Counsel’s “client.”

2. Who Is the White House Counsel’s Client?

An initial question is whether White House attorneys represent the individual President or the Office of the President. If White House lawyers represent the Office of the President rather than the President himself, the case for privileging the President’s communications concerning potentially criminal subject matter becomes substantially weaker. This question is difficult to answer because of "the amorphous quality of the government."\footnote{See Nolan, supra note 217, at 39-43. This Note will consider this issue assuming a post-Independent Counsel legal environment. Because of the language of the former Independent Counsel Statute, the nature of the relationship between the President, the Independent Counsel, and the White House Counsel may have altered the answer to the question of whether President or the Independent Counsel himself was the holder of the privilege. See Michael Stokes Paulsen, Who "Owns" the Government’s Attorney-Client Privilege?, 83 Minn. L. Rev. 473, 508 (1998).} The government lawyer’s potential clients could include the public generally, the government as a whole, or the agency that employs the attorney.\footnote{See Nolan, supra note 217, at 39-43. This Note will consider this issue assuming a post-Independent Counsel legal environment. Because of the language of the former Independent Counsel Statute, the nature of the relationship between the President, the Independent Counsel, and the White House Counsel may have altered the answer to the question of whether President or the Independent Counsel himself was the holder of the privilege. See Michael Stokes Paulsen, Who "Owns" the Government’s Attorney-Client Privilege?, 83 Minn. L. Rev. 473, 508 (1998).}
The answer to the initial question that most clearly protects the President's interests is that the President himself is the "client" of the White House Counsel's Office.\textsuperscript{219} If the White House Counsel is not the functional equivalent of the President's private counsel, the President cannot claim that the White House Counsel has any obligations to him concerning unofficial matters. But if the White House Counsel's obligations run directly to the President, counsel is "relieve[d] . . . of the duty to assess the public interest, or to resolve competing claims between government agencies, on her own."\textsuperscript{220} It would be unwise to allow White House lawyers to screen each request made by the President to determine whether the request is consistent with the greater public interest.\textsuperscript{221}

This undesirable screening process also would be necessary if a distinction is drawn between the White House Counsel's obligations to the President and their obligations to the Office of the President. For example, the President may encounter a conflict between his issue agenda and congressional actions that seek to limit presidential power. If the President chooses to forgo some of his institutional power for the sake of legislative advances, the White House Counsel cannot be authorized to oppose such a choice.\textsuperscript{222} This position is supported by the Model Rules of Professional Conduct, which note that government attorneys must maintain the confidences of their clients

\textsuperscript{219} See \textit{In re} Lindsey, 148 F.3d at 1104 ("In Lindsey's case, his client . . . would be the Office of the President."); see also Nolan, supra note 217, at 40 ("If a lawyer is to function effectively as counselor and adviser to elected and appointed officials, those officials must not view the lawyer as some independent actor, liable at any time to arrive at some individualistic perception of the 'public interest' and act accordingly." (quoting Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct, 3 WASH. LAW. 53, 54 (Sept.-Oct. 1998)) (internal quotation marks omitted)); \textit{cf.} Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) ("In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer."); Miller, supra note 180, at 1295 ("Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.").

\textsuperscript{220} Nolan, supra note 217, at 42. This does not mean that the government attorney has no responsibility to the public. Because the agency that employs a government lawyer itself works for the public, a government lawyer's choice to follow the instructions of agency officials represents an action in the public interest. See id. at 42-43.

\textsuperscript{221} See Miller, supra note 180, at 1294-95; see also Michael Stokes Paulsen, \textit{Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits}, LAW & CONTEMP. PROBS., Winter 1998, at 83, 85 ("The ethics rules of the legal profession . . . plainly require an executive branch attorney to abide by . . . the policy choices of the legitimately elected administration in which he or she serves, no matter how strongly the attorney disagree with those policy choices . . . . ").

\textsuperscript{222} See Nelson Lund, Lawyers and the Defense of the Presidency, 1995 BYU L. REV. 17, 28. This does not mean that government counsel cannot advise the President to resolve the dilemma differently. But, if the President chooses to denigrate the office, counsel cannot forgo assistance to an individual President based on a perceived need to safeguard the institution of the presidency. See id.
even if they disagree with the policy positions held by their superiors.\footnote{\textit{See Model Rules of Professional Conduct Rule 1.6 cmt. 6 (1998).}}

This connection between the White House Counsel and the individual President is buttressed by the fact that the White House Counsel is not statutorily authorized or confirmed by the Senate, and is relatively isolated from outside inquiry.\footnote{\textit{See Jeremy Rabkin, At the President's Side: The Role of the White House Counsel in Constitutional Policy, Law & Contemp. Probs., Autumn 1993, at 63, 63-64. The President's ability to shape the Counsel's Office to his particular needs evidences this connection. \textit{See id.} at 64. The tailoring of the Office by the President has created an institutional atmosphere whereby the White House counsel feels close to the President and "dependent on the president's favor." \textit{Id.}}} Government counsel is still only counsel; they provide advice. Government attorneys do not have the final authority to make policy decisions.\footnote{\textit{See supra Part III.B.3.}} Therefore, whether their advice is directed to the President or to the presidency, the White House Counsel's ability to influence government decisions is limited by the willingness of policy actors to heed any given advice.

If the President as an individual is considered the client of the White House Counsel, those lawyers should be able to give privileged advice to the President about a wide range of issues. This is particularly true when it is difficult to separate privileged actions from non-privileged actions in light of the Eighth and D.C. Circuit rulings.\footnote{\textit{See supra} Part III.B.3.} The next section will consider one key Supreme Court decision in the area of presidential privileges, \textit{United States v. Nixon},\footnote{418 U.S. 683 (1974).} and discuss its relevance to the government attorney-client privilege.


In \textit{United States v. Nixon}, the Supreme Court considered the protections to be given to presidential communications.\footnote{\textit{See supra} Part III.B.3.} In \textit{Nixon}, a subpoena was directed to President Richard Nixon that sought the production of tape recordings and documents generated during discussions between Nixon and his advisors.\footnote{\textit{See id.} at 703.} Nixon asserted that production of the tapes could not be compelled because of the protection provided by the executive privilege.\footnote{\textit{See id.} at 686.} Although the Supreme Court recognized the value of secrecy in presidential communications,\footnote{\textit{See id.} at 705-06.} the Court was unwilling to allow an unqualified privilege encompassing these communications. Instead, the Court...
balanced the need for government secrecy with the duty of the judiciary "to do justice in criminal prosecutions."\textsuperscript{232} It concluded that a "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."\textsuperscript{233}

The central issue in \textit{Nixon} was the scope of the executive privilege. The executive privilege permits "a presidential administration . . . to conduct the duties of government in secret."\textsuperscript{234} This shielding of information from the public is distinguishable from the attorney-client privilege, which protects communications from disclosure to a court.

Despite the fact that President Nixon never asserted the attorney-client privilege, the Eighth and D.C. Circuits discussed the \textit{Nixon} decision.\textsuperscript{235} Both courts felt that \textit{Nixon} stood for the proposition that government confidentiality could be "subordinated to the needs of the government's own criminal justice processes."\textsuperscript{236}

\textit{Nixon} seems to be at odds with an outright rejection of the government attorney-client privilege in criminal cases. First, the court in \textit{Nixon} resolved the case by applying a balancing test to determine whether, in any particular case, the executive privilege outweighs the needs of the criminal justice process.\textsuperscript{237} This balancing presumes that a privilege (in \textit{Nixon}, the executive privilege) exists in the first place. To apply any balancing process, it is necessary to have two or more relevant factors to balance. This process will not always result in the complete rejection of one factor in favor of the other, as the Eighth and D.C. Circuits concluded.\textsuperscript{238} Second, one should interpret \textit{Nixon} to support the application of the attorney-client privilege to government attorneys. \textit{Nixon} recognized that privileges should not be created or construed whimsically, and that common law privileges, such as those involving attorneys, "are designed to protect weighty and legitimate competing interests."\textsuperscript{239} Although \textit{Nixon} would not recognize an absolute attorney-client privilege, \textit{Nixon} would favor a

\begin{enumerate}
\item \textit{Id.} at 707.
\item \textit{Id.} at 713.
\item ROZELL, \textit{supra} note 206, at 1; see also \textit{BLACK'S LAW DICTIONARY} 569-70 (6th ed. 1990) (defining executive privilege by its secrecy functions).
\item \textit{In re Grand Jury Subpoena Duces Tecum}, 112 F.3d at 919; see \textit{In re Lindsey}, 148 F.3d at 1114.
\item See \textit{Nixon}, 418 U.S. at 711-12 ("[W]e must weigh the importance of the general privilege of confidentiality . . . against the inroads of such a privilege on the fair administration of criminal justice.").
\item \textit{Nixon} also resolved this balance through the use of in camera inspection of documents. See \textit{id.} at 713-16; see also \textit{infra} note 268 and accompanying text.
\item \textit{Id.} at 709.
\end{enumerate}
balancing of the need for the privilege versus the need for the information sought.

4. Impact on Advice to the President

The chilling effects of a limitation on the ability of the President to keep information secret are obvious.\textsuperscript{240} At its base, the unfettered dissemination of information and advice to the President is vital to his decision-making ability.\textsuperscript{241} As Judge Tatel argued in his dissenting opinion, “[n]o President can navigate the treacherous waters of post-Watergate government, make controversial official legal decisions, decide whether to invoke official privileges, or even know when he might need private counsel, without confidential legal advice.”\textsuperscript{242}

Because the distinction between the President as an individual and the Office of the President is often blurred,\textsuperscript{243} a simple distinction between the President’s official and unofficial activities is impossible.\textsuperscript{244} As a practical matter, White House employees often defend the private actions of the President.\textsuperscript{245} Examples of such defenses in-

\begin{footnotesize}
\begin{enumerate}
\item See Rudolf & Maher, supra note 35, at 41 (“White House officials who believe that their discussions with White House counsel are subject to subpoena cannot help but be chilled in their discussions . . . .”); see also Stanley Brand, A Blow Is Struck Against Attorney-Client Privilege for Government Lawyers in the Whitewater Independent Counsel Case, Fed. Law., June 1997, at 9, 9 (“Given the breadth of the [Eighth Circuit] decision, application of its holding . . . could lead to wholesale disclosure of confidential attorneys’ work because so much of what occurs in the government is or becomes subject to criminal or quasi-criminal investigations . . . .”); Coyle, supra note 15, at A1 (“If government officials were forced to turn to private counsel at even the hint of criminal implications for certain actions . . . they’d not only be foregoing the special expertise of government attorneys, the expense may mean they’d get no advice at all.” (quoting Stephen Saltzburg)).
\item See Miller, supra note 207, at 640.
\item In re Lindsey, 148 F.3d 1100, 1122 (D.C. Cir.) (Tatel, J., dissenting), aff’d in part and rev’d in part, 158 F.3d 1283 (D.C. Cir.), cert. denid, 119 S. Ct. 466 (1998). Judge Tatel also argued that the use of government counsel, as opposed to private counsel, is in the public’s interest because an uncertain government attorney-client privilege may lead “Presidents to shift their trust from White House lawyers who have undertaken to serve the Presidency, to private lawyers who have not.” Id.
\item See supra notes 217-19 and accompanying text.
\item See Ruth Marcus & Susan Schmidt, Legal Experts Uncertain on Prospects of Clinton Privilege Claim, Wash. Post, Dec. 14, 1995, at A14 (“[F]or the president, private and public are not distinct categories . . . .” quoting New York University law professor Stephen Gillers)).
\item The Restatement of the Law Governing Lawyers uses the example of an allegation of excessive force by a police officer to demonstrate where the individual government employee and the government organization are each interested in a single case. Restatement Governing Lawyers, supra note 45, § 124 cmt. d. According to the Restatement, the officer may choose between private counsel and government counsel because the interests of the government are intertwined with the personal difficulties the officer may face. See id. The Eighth and D.C. Circuits rule denies a privilege in such situations which mix official and personal interests. If the President faced a criminal investigation for his activities while in office, then the Eighth and D.C. Circuit rule would contradict the Restatement rule. This situation was likely in the political environment where special investigations of official presidential activities proliferated. Five independent counsel investigations were ongoing as of February 1999. See Editorial, Death Knell Sounds Again for Independent Counsels,\end{enumerate}
\end{footnotesize}
clude the White House press office's answering questions related to the President's personal life and consideration of the political ramifications of policy actions by the President's advisors.246

This information process may rise to constitutional dimensions, as "the President requires accurate, frank, and robust advice and information from his subordinates . . . to perform his constitutional functions."247 The Framers felt that presidential secrecy and deliberative privileges would enable the President to act quickly and decisively.248 Without such confidentiality in presidential communications, performance of the President's constitutional duties would be far more difficult.249 As the Court noted in Nixon, presidential privacy is in the public interest.250

If the President cannot rely on White House Counsel for advice on all matters, their value as advisors decreases dramatically.251 If the President constantly fears potential violation of the attorney-client

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246 See Rabkin, supra note 185, at 108.
247 Miller, supra note 207, at 640.
248 See Association of Am. Physicians and Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993) ("If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly."); The Federalist No. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number . . . .").
249 The President's constitutional duties include compliance with the law. See In re Lindsey, 148 F.3d 1100, 1122 (D.C. Cir.) (Tatel, J., dissenting) (arguing that by allowing the President to be "candid" with his lawyer, "the attorney-client privilege promotes compliance with the law"), aff'd in part and rev'd in part, 158 F.3d 1263 (D.C. Cir.), cert. denied, 119 S. Ct. 466 (1998).
250 See United States v. Nixon, 418 U.S. 683, 708 (1974); see also Rabkin, supra note 224, at 98 ("If the President wants to play an effective role in the evolution of constitutional law, he will need to have a sizable and capable White House Counsel's Office.").
251 See Rabkin, supra note 185, at 128 ("[T]he counsel's ability to influence conduct in the White House depends on his being a trusted presidential loyalist.").
privilege, he will be less likely to seek advice from White House attorneys on borderline issues. This limits the President's ability to effectively shape policy because legal advisors will not feel free to give potentially unpopular opinions. In addition, the President will not always have the time to seek the advice of different counsel for different subjects. The President confronts unfamiliar issues daily which demand his immediate attention and action.

Even if the President seeks the advice of private counsel on issues that he senses risk criminal liability, and he is advised that no such risk exists, there remains no guarantee that future conversations with White House lawyers about that subject will be privileged. The information, though not obviously relevant to criminal activity, may nonetheless be relevant to a grand jury inquiry of some other government official. The complexity of the legal system demands that the President be able to consult government counsel to seek advice on how to comply with the law. Although the President is a "creature[ ] of the law, and [is] bound to obey it," the President's ability to obey the law depends upon quality legal advice.

Critics argue that if conversations between the President and government lawyers concerning potentially criminal activity are privileged, the President always will have counsel by his side in an attempt to privilege all conversations. This criticism represents a misunderstanding of the attorney-client privilege. For a communication to be privileged, it must be made for the purpose of obtaining legal ad

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252 See, e.g., id. ("An overly fastidious counsel . . . risks having White House aids bypass the counsel's office entirely when they fear that the counsel will raise legal or ethical objections . . . ."). But see Nixon, 418 U.S. at 712 ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."). Perhaps if Nixon were decided after the proliferation of Independent Counsel investigations, this conclusion would have been different. See supra note 245.

253 See Wang, supra note 1, at 134-35.

254 See Bruce Buchanan, Constrained Diversity: The Organizational Demands of the Presidency, 20 PRESIDENTIAL STUD. Q. 791, 791 (1990). Examples include foreign policy crises, see id. at 791-92, and intra-staff conflicts, see id. at 792.


257 Government attorneys may be better qualified to help the President avoid criminal activities than private counsels. Cf. Rabkin, supra note 185, at 133 (arguing that for the President, seeking advice from outside counsel means seeking advice from someone less familiar with the problems of the White House). The expertise of the White House counsel may even help the President avoid legal difficulties. Professor Rabkin notes that the White House counsel's office has developed expertise which may help him avoid "the intricate ethical traps established in recent decades." Id.

vice.259 If a government attorney stands by the President's side as a personal assistant or a full-time stenographer, those communications will not be privileged because they were not made for the purpose of obtaining legal advice. In addition, the rule devised by the Eighth and D.C. Circuits does not restrict the privilege in the context of conversations between the President and private counsel. Therefore, the ability to hide behind counsel is allowed even within the confines of the Eighth and D.C. Circuit holdings.

IV
AN ALTERNATIVE TO THE "NO PRIVILEGE" RULE

In Part III, this Note challenged the conclusion drawn by the Eighth and D.C. Circuits that the attorney-client privilege should not protect conversations between government employees and government counsel when those discussions become the subject of a federal grand jury subpoena. This Part will propose an alternative to the Eighth and D.C. Circuit rule. Because the nuances of the Independent Counsel Statute no longer influence the proper construction of the government attorney-client privilege, this section will attempt to fashion a privilege rule that best fosters effective government performance while minimizing opportunities for abuse.

Before proceeding to this proposal, though, it is necessary to highlight the other alternatives suggested by the dissenting opinions in the Eighth and D.C. Circuit decisions.260 Judge Tatel, dissenting

259 Proposed Rule 503 contains this requirement, see supra note 23 and accompanying text, as do both the Wigmore and Wyzanski definitions of the attorney-client privilege, see supra note 18 and accompanying text.

260 Five law review articles dedicated exclusively to this topic have been published to date. The first recommends that the government attorney-client privilege be applied in an unqualified manner in both civil and criminal proceedings. See Michael K. Forde, The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications, 16 Yale L. & Pol'y Rev. 109, 166-67 (1997). Another favors the balancing approach recommended by Judge Kopf. See Toporek, supra note 184, at 2439-40. The third recommends that government lawyers advise their clients that conversations may be disclosed if subject to a federal grand jury subpoena. See Katherine L. Kendall, Note, In re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Government Realm?, 1998 Utah L. Rev. 421, 440. A fourth advocates simply applying the government attorney-client privilege to official government business, but not to personal matters involving government officials. See Note, Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel, 112 Harv. L. Rev. 1995, 2004-05 (1999). Finally, the most interesting article written to date on the government attorney-client privilege suggests that because of the peculiarities of the Independent Counsel statute, the Independent Counsel is the holder of the privilege and "has full authority to contest the President's (or any other officer's) claim of testimonial or evidentiary privilege." Paulsen, supra note 218, at 508. Therefore the White House may not refuse to disclose the attorney-client communications because it does not control the use of the government privilege. See id. Paulsen's conclusions depend on the provisions of the former Independent Counsel Statute, not on any broader theory about the proper scope of the government attorney-client privilege.
from the D.C. Circuit opinion, did not outline a solution to the question, but suggested that a complete factual record must be established before any legal rule could be fashioned. On the other hand, Judge Kopf, dissenting from the Eighth Circuit opinion, believed that the balancing test devised in United States v. Nixon for the executive privilege should be extended to the government attorney-client privilege. Although such balancing does not adequately protect the values upheld by the attorney-client privilege, it is a useful starting point for the discussion of an alternative to the Eighth and D.C. Circuit rule.

A. Judge Kopf's Balance

In his dissent from the Eighth Circuit's decision, Judge Kopf cited Nixon for the proposition that "presidential confidentiality [should] be afforded the greatest possible protection." He argued that Nixon's balancing test—weighing executive confidentiality against the public interest—should apply to the government attorney-client privilege. This process would include (1) a preliminary showing of the need, relevance, and admissibility of the subpoenaed information by the government, (2) in camera inspection of documents, and (3) the court's balancing of the need for confidentiality against the public interest in the disclosure of the information.

Judge Kopf acknowledged that a balance of interests creates uncertainty because government officials can only find out which conversations are privileged after a court has undertaken this balancing process. Nevertheless, he was unwilling to conclusively elevate the White House's interest in confidentiality over the court's interest in developing a complete factual record.

263 See infra notes 275-77 and accompanying text.
264 In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 935 (Kopf, J., dissenting).
265 See id. at 936 (Kopf, J., dissenting). Judge Kopf did not discuss the analogy between the executive privilege claim in Nixon and the attorney-client privilege claim in In re Grand Jury Subpoena Duces Tecum. See id. Rather, by characterizing Nixon as addressing "the President's general need for confidentiality," Judge Kopf concluded that the attorney-client privilege falls within its holding "at this elevated level of abstraction." Id.
267 See id. at 700-02.
268 See id. at 713-16.
269 See id. at 711-12.
270 See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 936 (Kopf, J., dissenting).
271 See id. (Kopf, J., dissenting).
B. The Merits and Demerits of Balancing Privileges

The use of balancing to determine whether a privilege should protect particular communications is quite common. To overcome the presumption that evidence must be disclosed to a court, courts often undertake a balancing of interests approach. Balancing allows a court to examine whether the need to keep information confidential outweighs the value of the disclosure of that information.

But balancing privileges is problematic. Privileges should be categorical. They should apply when certain threshold conditions are met, regardless of the other side's need for the information sought. A client should know when she speaks with counsel whether the conversation is privileged. A court's later need for that information should not trigger a restriction on the privilege. Additionally, balancing creates uncertainty. If a court balances the need of the judicial process with the need of the client after the client already has disclosed the information to her attorney, the attorney-client privilege is of little benefit.

C. An Alternative: Threshold Questions for Courts

The question remains: how can courts craft a predictable rule for the government attorney-client privilege that minimizes abuse by government clients? The optimal privilege rule is one which lawyers and clients can discern at the time they wish to communicate, but is not so expansive as to protect information to which the government or court legitimately should have access.

272 See supra note 36 and accompanying text.
273 See, e.g., Epstein, supra note 27, at 14 ("Implicit in many of the cases is a balancing of social goals."). This balancing involves "the need for full disclosure" on the one hand and "the desirability of protecting confidentiality and encouraging attorney-client communications" on the other. Id.
274 See Rosenfeld, supra note 186, at 496 (noting that the attorney-client privilege embodies "the tension between the rights of the individual and the good of society"). Rosenfeld adds that "[t]he adversary system of justice is committed to individual rights and fair procedures, on the one hand, and to discovery of the truth, on the other." Id.
275 Most courts have adopted this view. See 1 Stone & Taylor, supra note 19, § 1.01, at 1-6 & n.10. When a court seeks to determine whether the attorney-client privilege applies in an individual case, no attempt is made to balance interests. See Jonathan P. Rich, Note, The Attorney-Client Privilege in Congressional Investigations, 88 Colum. L. Rev. 145, 161 n.113 (1988).
276 See Swidler & Berlin v. United States, 524 U.S. 399, 2081, 118 S. Ct. 2081, 2087 (1998) ("Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application."); 1 Stone & Taylor, supra note 19, § 1.01, at 1-5 to 1-6.
277 See Toporek, supra note 184, at 2434 (noting that, as a result of the Eighth Circuit's decision, "[f]or the first time, whether or not the privilege stands depends on the type of subsequent inquiry being made into the conversation not the conditions present at the time of the conversation").
This section will identify the only two situations in which courts should refuse to recognize the government attorney-client privilege. The basic test that these situations represent is the following: the government attorney-client privilege should not protect discussions between government counsel and government clients concerning the clients' purely private conduct. Furthermore, even when the discussions concern official government business, the privilege should not apply if the substance of the discussion relates to an ongoing criminal investigation or to a matter which the client should reasonably anticipate may be the subject of a future criminal investigation. The following sections will discuss these two prongs—the public-versus-private prong and the present-versus-future prong—separately.

1. Public Matters Versus Private Matters

The first issue courts should consider is whether the conduct at issue constitutes official or private conduct. If a conversation between the government attorney and government client involves the private behavior of the client, then the government attorney-client privilege should not protect the discussion for disclosure. This rule is predictable. To comply with the rule, government employees would merely have to seek private counsel for private matters, and could choose between government counsel or private counsel for official matters. The rule also minimizes abuse by government employees who, under the rule of absolute privilege, may seek the (free) advice of government attorneys about private matters.

This distinction between the public and private activities of government employees follows the logic of the Eighth and D.C. Circuit majorities, but does little violence to the government attorney-client privilege itself. These courts had two central concerns about the rec-
ognition of the government attorney-client privilege in the grand jury setting: (1) abuse of public assets and public trust, and (2) the government attorney's obligation to expose government wrongdoing. The public-versus-private distinction satisfies both concerns. A government employee has no obligation to expose wrongdoing when the problem for which he or she seeks legal advice concerns private, not public, behavior. It is, though, a misuse of public finances for government employees to use government counsel for private legal matters.

2. Foreseeability of Criminal Ramifications

Even if the conduct at issue is official government business, the government attorney-client privilege should not protect conversations between government employees and government counsel when those discussions are reasonably related to (1) an ongoing criminal investigation (whether the client is the focus of the investigation or merely has information reasonably related to an ongoing investigation), or (2) criminal activities that are not currently under investigation. Exempted from this rule are cases where no investigation is ongoing and the government client cannot reasonably anticipate that the conversation would be linked to any future criminal investigation. This rule differs from the positions of the Eighth and D.C. Circuit majorities by requiring either an ongoing investigation or a reasonable belief by the client that the discussion is related to criminal activity.


283 See In re Lindsey, 148 F.3d at 1102.


285 Courts apply the reasonable belief standard in many other areas of the law. See, e.g., United States v. Gray, 137 F.3d 765, 776 (4th Cir. 1998) (applying probable cause inquiry to the question of whether sufficient evidence exists to form a reasonable belief that a crime has been committed); United States v. Two Parcels of Real Property Located in Russell County, Ala., 92 F.3d 1123, 1126-27 (11th Cir. 1996) (applying reasonable belief standard in a drug forfeiture proceeding); Austin v. Healey, 5 F.3d 598, 605 (2d Cir. 1993) (applying reasonable belief standard to an extradition proceeding).
Nonetheless, this rule is consistent with the logic of the Eighth and D.C. Circuit majorities, and at the same time maintains the beneficial protections that the government attorney-client privilege offers. Both circuits feared that an absolute privilege would allow government attorneys to shield criminal behavior and damage the public interest. But a rule that prohibits government employees from discussion with government counsel about ongoing investigations, or about subjects reasonably related to criminal activity, adequately protects the public interest. It also prevents government clients from being broadsided by grand jury subpoenas. Additionally, this rule will not stifle communications between government employees and government counsel if the employees have no reason to believe that the matters for which they seek legal advice carry criminal implications. Finally, this rule accounts for the difficulties individuals face in anticipating the difference between criminal and civil liability.

This present-versus-future prong is objective and easy to follow. If a criminal investigation is ongoing and a government employee has evidence related to that investigation, he may not discuss the matter with government counsel. Similarly, the focus on the reasonable anticipation of a future criminal investigation also provides an objective test. It not only gives predictability to the privilege, but also fosters the exposure of wrongdoing by the government. This reasonableness standard is consistent with the Civil Service Reform Act of 1978, which permits government employees to disclose certain information if they reasonably believe that it demonstrates wrongdoing by government employees or officials. If a court is able to determine whether the shielding of the information by a government employee was reasonable, then concerns about widespread nondisclosure of information critical to criminal investigations would be diminished. This en-

286 See In re Lindsey, 148 F.3d at 1109-10; In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 921.
287 See supra Part III.B.3.
288 See, e.g., Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (identifying as an objective test a reasonable belief standard under the Fourth Amendment); United States v. Han, 74 F.3d 537, 541 (4th Cir. 1996) (noting that a reasonable belief standard for probable cause is an objective test); Eastway Constr. Corp. v. City of New York, 762 F.2d 245, 254 (2d Cir. 1985) (using a reasonable belief of competent attorney as an objective standard in investigating viability of a pleading). See generally Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 635 (3d Cir. 1996) (noting that Congress’s use of words “reasonable belief” in a statute shows an intent to create an objective standard).
289 See Cramton, supra note 217, at 307-09. It is unclear whether this statute permits disclosure by government attorneys of presumptively privileged information. Nonetheless, no government lawyer has yet disclosed information under the Act, presumably out of an obligation to keep the confidences of their clients. See id. at 315.
ensures the predictive value of the attorney-client privilege while satisfying the Eighth and D.C. Circuit concerns about misuse of public assets.

**Conclusion**

Two federal appeals courts recently held that the government attorney-client privilege does not protect communications between government employees and government attorneys once those conversations become the subject of a federal grand jury subpoena. Although the decisions establish a roadmap for government employees who wish to speak to government counsel about potentially criminal matters, the holdings force government attorneys to work in a conversational minefield, where any discussion potentially may be subject to disclosure to a grand jury.

The decisions also muddy the waters for the government attorney-client privilege outside the criminal context. Commentators have already begun to fear the future erosion of the government attorney-client privilege. Some feel these decisions might cause "Congress, criminal defendants, state prosecutors and civil litigants [to] demand the right to seek [formerly privileged] materials in the face of such a weak privilege." If, as both circuits held, conversations between

including in camera inspection of documents, would help to prevent abuse of the disclosure process).

291 See Cole, supra note 14, at 26 ("[G]overnment lawyers should establish a procedure for identifying and reporting to senior attorneys any legal matters that involve a grand jury investigation or other criminal inquiry.").

292 See Toporek, supra note 184, at 2496 ("Instead of trying to guess whether a particular conversation will be successfully subpoenaed in a current or future criminal investigation, government officials will follow a better-safe-than-sorry approach and act as if there is no governmental attorney-client privilege at all."); Berkman, supra note 10, at A12 ("We tell [government employees] that they cannot rely on the confidentiality of most of their discussions [with lawyers] within their agencies.")."

293 See Cole, supra note 14, at 15 ("[T]he unexpected denial of certiorari has left many government attorneys questioning whether and to what extent the Eighth Circuit opinion may affect them and their governmental clients."). Cole argues that some of the scenarios which justify the restriction of the government attorney-client privilege at the federal level may not apply to state and local governments. The White House lawyers' enhanced duty to disclose may not be equally applicable to state or local governments. In addition, he argues that the government attorney-client privilege should be available to the state or local government that is the subject of a federal investigation. See id. at 19-20. However, state courts may adopt the Eighth or D.C. Circuits' reasoning when faced with state or local governments subject to a state grand jury subpoena. See id. at 26.

294 Coyle, supra note 15, at A1 (stating the contentions of White House Counsel Charles F.C. Ruff and a special counsel to President Clinton, Andrew L. Frey); see id. ("Be prepared to see [the 8th Circuit's ruling] flower because of the number and breadth of government investigations that become criminal.") (quoting Washington lawyer Stanley
government attorneys and government clients about potentially improper conduct constitute wrongful government conduct, then this equation exists regardless of whether the improprieties are of a civil or a criminal nature.\(^{295}\)

A more reasonable government attorney-client privilege rule would recognize and resolve the practical problems facing government attorneys and clients under a limited and uncertain privilege. The rule proposed by this Note would exclude from the government attorney-client privilege only those conversations related to personal issues, ongoing criminal investigations, or clearly criminal activity.

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295 Brand, supra note 240, at 10 ("Is it any less a 'misuse of public assets' to allow the government to use its in-house attorneys to shield relevant discovery in a civil suit involving a plaintiff’s suit for breach of contract or civil rights violations?").