

# No Clear Legal Answer

THE UNCERTAIN STATE OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

Walter Pincus

SOME 26,000 ATTORNEYS are employed by the federal government.<sup>1</sup> As of now, these attorneys do not operate with the benefit of the same attorney-client privilege that applies to private attorneys working with individual clients. Nor can these government attorneys follow the same privilege rules that govern corporate lawyers who serve corporate clients and their employees. Instead, because of recent decisions by the Eighth Circuit and D.C. Circuit Courts of Appeals, government attorneys are in a legal no-man's land. As a matter of ethics and prudence they must warn every government employee who speaks to them, on official or private business, that the conversation cannot be held in confidence in the face of a grand jury subpoena.

The Supreme Court has denied certiorari in the Eighth Circuit and D.C. Circuit cases

that created this problem.<sup>2</sup> The denial of certiorari by the Court, as Justice Breyer pointed out in his dissent, defers decision on a question that "has no clear legal answer and is open to serious legal debate." The matter will not be settled, Justice Breyer continued, unless some future president or other government official takes the high-risk – and therefore unlikely – step of "disclosing to Government lawyers significant matters that, under the Court of Appeals' decision, are not privileged."<sup>3</sup>

As late as 1997, the climate surrounding the government attorney-client privilege did not seem so uncertain. The Supreme Court's classic statement of the doctrine's underlying policy rationale seemed well settled:

The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client

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<sup>1</sup> Interview with Michael Orenstein, Office of Personnel Management, May 9, 2000. As of September, 1997, there were 25,385 "general attorneys" working for the U.S. government worldwide.

<sup>2</sup> *Office of the President v. Office of Independent Counsel*, 521 U.S. 1105 (1997); *Office of the President v. Office of Independent Counsel*, 525 U.S. 996 (1998).

<sup>3</sup> *Id.* at 997 (Breyer, J., dissenting).

knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures – necessary to obtain informed legal advice – which might not have been made absent the privilege.<sup>4</sup>

In a more recent case, the Court, discussing the role of the corporate attorney, again affirmed the centrality of the privilege, opining that “[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>5</sup>

## THE INDEPENDENT COUNSEL ⌘ THE PRIVILEGE

The above view of matters received a series of sharp jolts at the end of the 1990s, as the Office of the Independent Counsel pursued the endlessly multiplying branches of the Whitewater investigation. The Office launched several attacks on the attorney-client privilege, all of which proceeded more or less contemporaneously. The most frontal of these attacks, *Swidler & Berlin v. United States*,<sup>6</sup> was the occasion for Independent Counsel Kenneth Starr’s most forthcoming account of his own view of the attorney-client privilege.

At issue in *Swidler* were notes taken by a private attorney, James Hamilton, of a professional consultation he had conducted with Deputy White House Counsel Vince Foster

shortly before Foster committed suicide. Starr contended that Hamilton’s privilege to withhold these notes from the grand jury ended with Foster’s death. In making this argument, Starr described the rationale of the attorney-client privilege in terms substantially different from those the Supreme Court had used in prior cases.

Starr labeled as “controversial” the idea that clients would be unwilling to disclose material facts to their lawyers if the lawyers could be required to testify about these facts. Clients who face this dilemma, Starr reasoned, do so when they themselves are potential witnesses. Such clients, like all potential witnesses, have three courses open to them: They can take the Fifth, testify and tell the truth, or perjure themselves. In the first situation, in which a client needs the advice of his or her attorney about whether to invoke the Fifth Amendment privilege, Starr said, the client does not need the attorney-client privilege to protect himself: His communications with his attorney are already protected as a “corollary to the privilege against compelled self-incrimination.” In the second situation, when a client intends to tell the truth, Starr went on, he or she of course has no need of the privilege.<sup>7</sup>

In Starr’s view, that leaves only the potential perjurer to benefit from the attorney-client privilege. If that is so, why does the law nevertheless recognize the privilege? One reason, he said, is the historic assumption that “the attorney’s testimony would be superfluous because the client himself can be freely interrogated.” For the other reason, Starr harkened back to *Hickman v. Taylor*, with its statement by the Court that if both an attorney and his client testify, “the attorney’s testimony can easily generate a

<sup>4</sup> *Fisher v. United States*, 425 U.S. 391, 403 (1976) (citations omitted).

<sup>5</sup> *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

<sup>6</sup> 524 U.S. 399 (1998).

<sup>7</sup> Brief for the United States at 32, 33, *Swidler*.

sideshow focused on purported discrepancies between the attorney's testimony and the client's testimony."<sup>8</sup>

### THE COURT'S VIEW IN SWIDLER

The Court's opinion in *Swidler*, by Chief Justice Rehnquist, rejected Starr's view and ruled that Hamilton's notes remained protected after Foster's death. "[W]e think there are weighty reasons that counsel in favor of posthumous application," the Chief Justice wrote, because "the privilege serves much broader purposes" than attorney-client consultation regarding criminal liability.<sup>9</sup>

The opinion elaborated on these broader purposes. "Clients consult attorneys for a wide variety of reasons, only one of which involves criminal liability," the Chief Justice said. Many of these matters "may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged."<sup>10</sup>

Two other features of the Chief Justice's opinion are of special interest. First, it denied that criminal investigations by their nature presented a stronger case for narrowing the attorney-client privilege:

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined to criminal cases ... . However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases ... . In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance.<sup>11</sup>

Second, it held that the status of the attorney-client privilege was higher than that of executive privilege:

Finally, the Independent Counsel, relying on cases such as *United States v. Nixon*, 418 U.S. 683, 710 (1974), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of caselaw.<sup>12</sup>

### THE EIGHTH CIRCUIT

Starr's narrow view of the attorney-client privilege in *Swidler* was consistent with the arguments his office had made in the Eighth and D.C. Circuits regarding attorney-client privilege as applied to government attorneys. In these lower courts, however, Starr's position received a more favorable hearing.

On July 11, 1995, White House lawyers and private attorneys to Hillary Rodham Clinton met in the White House to discuss actions taken by the First Lady immediately after her friend Vince Foster's suicide. On January 26, 1996, Mrs. Clinton appeared under subpoena before a federal grand jury to answer questions about certain records of her former law firm; the grand jury had sought the records, which had been in Foster's custody and had more recently appeared in the White House living quarters. White House lawyers and Mrs. Clinton's lawyers held several meetings that day, including one

8 *Id.* at 36 (punctuation omitted) & 37 (citing *Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring)). It should be noted that Justice Jackson's opinion in fact dealt not with testimonial conflict but with the problem of using an attorney's notes to impeach his client.

9 *Swidler*, 524 U.S. at 407.

10 *Id.* at 407, 408.

11 *Id.* at 408-09.

12 *Id.* at 410.

after the conclusion of the First Lady's testimony. At each of these meetings, one of the lawyers present took notes.

On June 21, 1996, the Independent Counsel sent the White House a grand jury subpoena calling for production of "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton" relating to several Whitewater subjects. The White House supplied the Independent Counsel with a privilege list of nine sets of documents that fell within the subpoena but would not be produced by the White House because of executive privilege, attorney-client privilege, and attorney work product doctrine. The Independent Counsel filed a motion with the U.S. District Court for the Eastern District of Arkansas, to compel production of two of those sets of documents, from the July 11, 1995 and January 26, 1996 meetings.<sup>13</sup>

The White House defended, dropping its claim of executive privilege and relying on attorney-client privilege and attorney work product. The Arkansas District Court ruled for the White House, finding that because Mrs. Clinton and the lawyers had a "genuine and reasonable (whether or not mistaken) belief that the conversations at issue were privileged, the attorney-client privilege applied." In addition, the District Court "held that the work product doctrine prevented disclosure of the notes to the grand jury."<sup>14</sup> The Independent Counsel appealed.

The Eighth Circuit accepted, in the area of government attorney-client privilege, the distinction between civil and criminal cases that the Supreme Court was later to reject when considering the posthumous attorney-client privilege. The Eighth Circuit noted the line of cases recognizing the applicability of the government attorney-client privilege to civil cases. It deemed these cases, however, "not particularly persuasive" when applied to a criminal case "in which an entity of the federal government seeks to withhold information from a federal criminal investigation."<sup>15</sup> The court noted the failure of the White House to cite a single case holding that the government attorney-client privilege applied to criminal investigations (a point that was not quite fair, since never before had a government prosecutor attempted to put a government lawyer before a grand jury in such a situation).

The court read *United States v. Nixon* to stand for the proposition that a privilege absolute in the civil sphere may not necessarily be absolute in the criminal sphere.<sup>16</sup> If such was true of executive privilege, the court opined, the same was true of government attorney-client privilege.<sup>17</sup>

The Eighth Circuit seemed especially struck by the special role of the government attorney. In general, the court said, everyone has a "duty to give what testimony one is capable of giving, and ... any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general

<sup>13</sup> *In re Grand Jury Subpoena*, 112 F.3d 910, 913, 914 (8th Cir. 1997).

<sup>14</sup> *Id.* at 914 (punctuation omitted).

<sup>15</sup> *Id.* at 917-18.

<sup>16</sup> *Id.* at 918.

<sup>17</sup> *Id.* at 918-921, citing *Nixon*, 418 U.S. at 712 & n.19. The citation from *Nixon* relied on by the Eighth Circuit in fact makes a different point:

We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

rule.”<sup>18</sup> But government attorneys had a higher duty. For this proposition the court cited a special provision of the U.S. Code establishing a statutory duty on the part of government employees to report any possible criminal misconduct to the Attorney General.<sup>19</sup> In light of this duty, the court stated in the most-quoted passage of its opinion, “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.”<sup>20</sup>

The court also was unpersuaded by the attempts of counsel for the White House to draw analogies between government attorneys and attorneys for corporations, who are covered by the attorney-client privilege under *Upjohn*: “[T]he actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability. ... A corporation, in contrast, may be subject to both civil and criminal liability for the actions of its agents.”<sup>21</sup>

The contrast between corporations and government agencies is considerably less sharp than the court suggested. Both may be liable for financial penalties; neither goes to jail. A dissenting judge suggested that the court might at least want to require a balancing test, as the Supreme Court did in *Nixon*;<sup>22</sup> the majority rejected such subtleties.

## BEFORE THE D.C. DISTRICT COURT

On January 16, 1998, Attorney General Janet Reno charged Independent Counsel Starr

with investigating “whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law in connection with the civil lawsuit against the President of the United States filed by Paula Jones.” On January 30, a grand jury issued a subpoena to Bruce Lindsey – Deputy White House Counsel, Assistant to the President, and a close friend of President Clinton. Lindsey appeared before the grand jury, declining to answer certain questions on grounds of government attorney-client privilege, the President’s personal attorney-client privilege, executive privilege, and attorney work product protection. On March 6, the Independent Counsel filed a motion to compel Lindsey’s testimony in the United States District Court for the District of Columbia.<sup>23</sup>

On May 4, 1998, the court granted the Independent Counsel’s motion; but its reasoning was more nuanced than that of the Eighth Circuit. The D.C. District Court found a “compelling need ... of a governmental attorney-client privilege even in the context of a federal grand jury subpoena” and further found “the President’s need for confidential legal advice from the White House Counsel’s Office to be as legitimate as his need for confidential political advice from his top advisers.”<sup>24</sup>

The D.C. District Court therefore opted for a “qualified government attorney-client privilege” with more or less the same boundaries as those of the executive privilege. This parallelism, the court said, “not only respects the needs of the criminal justice system, but also saves courts from having to apply two different privilege standards to conversations commingling political and legal advice to the

18 *Id.* at 918, quoting *United States v. Bryan*, 339 U.S. 232, 331 (1950).

19 *Id.* at 920, citing 28 U.S.C. § 535(b).

20 *Id.* at 921.

21 *Id.* at 920.

22 *Id.* at 935-38 (Kopf, J., dissenting).

23 *In re Lindsey*, 158 F.3d 1263, 1266-67 (D.C. Cir. 1998) (punctuation omitted).

24 *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 32 (D.D.C. 1998).

President.” Thus the Independent Counsel, to overcome the government attorney-client privilege, had to pass a two-prong test: to show that “each discrete group of the subpoenaed materials likely contains important evidence” and that the subpoenaed evidence “is not available with due diligence elsewhere.”<sup>25</sup> This was the same test as the one previously designed by the D.C. Circuit to deal with challenges to executive privilege.<sup>26</sup>

The D.C. District Court’s opinion resembled that of the Eighth Circuit in its reliance on the statutory duty of executive branch employees, including lawyers, to report possible criminal misconduct by other employees to the Attorney General. “Unlike a private attorney representing a corporation,” the D.C. District Court stated, “when a White House attorney learns that a White House employee has engaged in criminal conduct, he must report such conduct.”<sup>27</sup> In contrast to the Eighth Circuit, however, the court took this duty to mean that there should be a qualified privilege, rather than no privilege at all. Once again, however, the court was influenced by the notion that government lawyers have a special, higher duty than their private counterparts.

### THE D.C. CIRCUIT AFFIRMS

Both the White House and President Clinton in his personal capacity appealed the District Court’s order. The two sides made their arguments in the D.C. Circuit on June 29, 1998, four days after the Supreme Court delivered its opinion in *Swidler*. Yet the D.C. Circuit’s opinion in the *Lindsey* case, issued on July 27, 1998, contained only three

references to *Swidler*. This near-absence of mentions is perhaps not surprising in light of the inconsistencies between the Supreme Court’s views on attorney-client privilege and the D.C. Circuit’s.

The D.C. Circuit, early in its opinion, distinguished *Lindsey*’s situation from *Hamilton*’s in *Swidler*. “[T]he government attorney-client privilege,” the opinion stated, “is not recognized in the same way as the personal attorney-client privilege addressed in *Swidler*.”<sup>28</sup> The D.C. Circuit, like the Supreme Court in *Swidler*, distinguished between common-law privileges and more recently “created” privileges, but the D.C. Circuit then set off in the same direction as the Eighth Circuit, basing its analysis on the idea that government lawyers have special duties unlike those of their private counterparts. Beginning with the Constitution itself, and its admonition that the President “take Care that the laws be faithfully executed,”<sup>29</sup> the court drew its lesson: “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.” Again echoing the Eighth Circuit, it relied on 28 U.S.C. § 535(b) for the “conclusion that a government attorney, even one holding the title Deputy White House Counsel, may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations.”<sup>30</sup>

Unlike the Supreme Court in *Swidler*, the D.C. Circuit in *Lindsey* did not put common-law attorney-client privilege on a higher plane

<sup>25</sup> *Id.* at 33, 34, 37 (punctuation omitted).

<sup>26</sup> See *id.* at 36-37, citing *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

<sup>27</sup> 5 F. Supp 2d at 35.

<sup>28</sup> *In re Lindsey*, 158 F.3d at 1272.

<sup>29</sup> *Id.*, quoting U.S. Const. art. II § 3.

<sup>30</sup> *Id.* at 1273, 1274.

than newer, more political privileges like executive privilege. Quite the opposite: The advice a President gets from his political and policy advisers is “of vital importance to the security and prosperity of the nation, and to the President’s discharge of his constitutional duties. Yet upon a proper showing, such conversations must be revealed in federal criminal proceedings.”<sup>31</sup>

By contrast, said the court,

Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President’s conversation with the most junior lawyer in the White House Counsel’s Office is deserving of more protection from disclosure in a grand jury investigation than a President’s discussions with his Vice President or a Cabinet Secretary.<sup>32</sup>

Like the Eighth Circuit, the D.C. Circuit concluded that there can be no government attorney-client privilege in the face of a grand jury subpoena. Like the Eighth Circuit and unlike the D.C. District Court, the D.C. Circuit avoided the complexities of a balancing test for government attorney-client privilege by allowing no privilege at all. But the D.C. Circuit had some comfort to dispense to Lindsey, noting that while he was not covered by the government attorney-client privilege, he “continues to be covered by the executive privilege to the same extent as the President’s other advisers.”<sup>33</sup>

The dissenter on the D.C. Circuit panel, Judge Tatel, noted that the majority’s dismissal of the pretensions of attorneys was quite beside the point. The unique protection given to a President’s communications with his lawyers, Tatel said, “rests not, as my colleagues

put it, on some ‘conceit’ that ‘lawyers are more important to the operations of government than all other officials’ but on the special nature of legal advice, and its special need for confidentiality, as recognized by centuries of common law.”<sup>34</sup>

### GROUND OF DECISION: THE DUTY TO REPORT UNDER 28 U.S.C. § 535(B)

One of the foundations of these opinions was 28 U.S.C. § 535(b). The D.C. Circuit tempered its reliance on the statute somewhat by saying that it “does not clearly apply to the Office of the President.”<sup>35</sup> Both appellate courts, however, used the statute in support of their holdings that no government attorney-client privilege can exist in the face of a grand jury subpoena because government attorneys are under a duty, created by this statute, to report to the Attorney General any allegations they hear about possible crimes.

Yet the language and legislative history of the provision provide a very different picture of the statute from the one that the courts presented.

The statute was passed in 1954. It grew out of a disagreement among various federal agencies over which one had primary power to investigate when information, allegations or complaints came to any agency or department alleging a criminal violation by some government employee or official. The Department of Justice won out as the primary investigator, but the statute reserved a place for both the military services and the Post Office to handle their own investigations.

In short, the statute was intended to allocate

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<sup>31</sup> *Id.* at 1278.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1285 (Tatel, J., dissenting in part and concurring in part).

<sup>35</sup> *Id.* at 1274.

power within the government, not to impose special duties on government employees. The report by the House of Representatives on the legislation speaks of it as imposing a reporting requirement “by the departments and agencies of the executive branch to the Attorney General of information coming to *their* attention concerning any alleged irregularities on the part of officers and employees of the Government.”<sup>36</sup>

The language of the statute makes this intent fairly clear. The provision reads,

*Any information, allegation, or complaint 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 by the head of the department or agency ...*<sup>37</sup>

Note the italicized portions. The phrase “information, allegation, or complaint” makes clear that the statute is meant to cover all types of data, significant and trivial, that the ocean of politics heaves up on shore. The phrase “by the head of the department or agency” indicates that it is not individual employees who are to report to the Attorney General; instead, these individual employees are to send their information up the official chain so that others can review and filter it. In short, Congress never intended that there be a direct connection between the government employee who sees or hears news of wrongdoing and officials of the law enforcement agencies.

Now compare the D.C. Circuit’s citation of the statute:

[a]ny 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.<sup>38</sup>

The phrase “allegation or complaint” is gone, leaving “information” standing alone and enhanced in importance. The phrase “by the head of the department or agency” is gone, so that the statute could plausibly be said to order individuals to testify directly to the Attorney General.<sup>39</sup>

*Lindsey* did not mark the first occasion on which a bowdlerized version of § 535(b) played a significant role in proceedings before the D.C. Circuit. In 1998, the Independent Counsel sought to enforce a subpoena to have Secret Service agents testify to a grand jury regarding things they had seen and heard while guarding the President. The Treasury Department responded by claiming a new protective function privilege for the agents.

The court turned Treasury down, relying in part on a truncated version of § 535(b). That section, the court’s opinion stated,

... provides that any “information, allegation, or complaint 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, unless the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of the law.”<sup>40</sup>

As in the later *Lindsey* case, the court’s version of the statute omitted (without elision) the language indicating that it was the head of the

36 *Id.*, quoting H.R. Rep. No. 83-2622, at 1 (1954) (emphasis added).

37 28 U.S.C. § 535(b) (emphasis added).

38 158 F.3d at 1274.

39 The D.C. Circuit itself seemed to recognize a weakness in its interpretation of the statute, saying that the text “suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes.” *Id.* (emphasis added).

40 *In re Sealed Case*, 148 F.3d 1073, 1078 (D.C. Cir. 1998).



department or agency who was to review the “information, allegation, or complaint” and report to the Attorney General.

The Independent Counsel, in his brief to the D.C. Circuit in the Treasury case, had quoted § 535(b) correctly, but had then gone on to assert that the section imposes a disclosure obligation on executive branch employees.<sup>41</sup> The D.C. Circuit appeared to accept this assertion.

In the Treasury case the Independent Counsel made an additional argument that the D.C. Circuit did not explicitly accept. “The OIC contends,” the court’s opinion noted, “that the Independent Counsel stands in the shoes of the Attorney General for purposes of § 535(b)(1).”<sup>42</sup> Independent Counsel Starr maintained this position throughout his investigation. It is not hard to discern why. We have seen that bowdlerizing § 535(b) creates the impression that it is the Attorney General to whom a government employee must directly provide allegations of wrongdoing. If the Independent Counsel stands in the Attorney General’s shoes, it is the Independent Counsel who becomes directly entitled to the “information” possessed by any executive branch employee, including government lawyers. Thus did a statute designed as a sensible piece of logrolling turn into a justification for upending traditional and constitutional privileges.

## THE REACTION BY THE COURTS OF APPEALS

Neither the Eighth Circuit nor the D.C. Circuit opinion included any mention of the impact that its view of § 535(b), and of government attorney-client privilege in general,

could have on lawyers in government. Indeed, such views could have a similar impact not only on government attorneys but also on holders of other previously recognized privileges who work for government – on doctors, chaplains in the military, social workers, even husbands and wives.

In addition, neither Circuit Court opinion bore any signs of self-awareness about its assumptions concerning why individuals go to government lawyers for advice. The Eighth Circuit, for instance, simply adopted the Independent Counsel’s view that the only reason government officials go to government lawyers is to discuss their possible involvement in crimes. Yet, as critic Lance Cole has pointed out,

Government officials may need confidential advice about the legality of past actions before deciding on a future course of conduct. The Eighth Circuit’s solution to this problem is simple: “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.”<sup>43</sup>

Another critic has put it,

Government clients must seek the advice of counsel to determine whether their official actions might bring adverse legal consequences, be they civil or criminal. This process takes place 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

41 Brief of Appellee United States at 23-32, *In re Sealed Case*; see also Brief of Appellee United States at 18-28, *In re Lindsey*.

42 *In re Sealed Case*, 148 F. 3d at 1078 (emphasis added).

43 Lance Cole, *The Government-Client Privilege After Office of the President v. Office of the Independent Counsel*, 22 J. Legal Prof. 15, 27 (1997-98).

liability from nonliability and civil liability from criminal liability.<sup>44</sup>

## RETRIEVING THE PRIVILEGE

Government lawyers now face a substantial problem. The law on government attorney-client privilege has been seriously muddled, primarily because of political battles taking place at the highest levels. These political wars spilled into the legal arena; their implications, in this as in many other areas, could resonate far beyond the White House.

Nearly all the case law concerning the attorney-client privilege for entity clients involves corporate clients. The White House has claimed an absolute government attorney-client privilege similar to the one that applies when a corporate attorney represents both the corporation and individual employees. But the relationship between the two remains unclear.

Also unclear is the question of whether the privilege varies in degree or kind depending on whether the underlying matter is private or public. Current case law, involving as it does a President's conduct and its overlapping effect on his public duties, has substantially confused the matter. One commentator has attempted to make the crucial distinction by arguing that "the government attorney-client privilege should apply to protect the communications of a public official who seeks advice from a government attorney only if those communications concern conduct that can reasonably be considered to be in furtherance of the official's public duties."<sup>45</sup> The formulation is appealing, but it is hard to imagine many easy places to draw the line.

But the recent mistakes about government attorney-client privilege may be capable of

amelioration. There will arise cases in which lawyers are reasonably suspected of having used their privilege to cover up criminal activity. In *United States v. Nixon*, the Court proposed a balancing test to deal with such situations. In his dissent from the Eighth Circuit's decision on government attorney-client privilege, Judge Kopf proposed a version of a balancing test to be used for government attorney-client privilege cases: First, the prosecutor must make a threshold showing that the materials in question are specifically needed, relevant, and admissible. If such a showing is made, the materials should be delivered to the judge, who will examine them in chambers to decide whether they are in fact specifically needed, relevant, and admissible. Those that are not should be returned under seal to the agency from which they came.<sup>46</sup>

If it does happen that a question concerning abuse of the government attorney-client privilege arises again, Kopf's pre-screening procedure appears to be the best compromise.

In more practical terms, the fact is that the Independent Counsel Act is dead. There may never come another time when a federal government prosecutor puts a federal government attorney before a federal grand jury to force him to tell what he was told by a federal government official in what would normally be considered a privileged conversation. Without an Independent Counsel, it is the Attorney General who decides when defense attorneys will be subpoenaed by federal grand juries.

With the Independent Counsel gone, the battles that produced the opinions by the Eighth and the D.C. Circuits may be of only historic interest. By contrast, what remains is the opinion of Chief Justice Rehnquist in *Swidler*, expressing a view of the attorney-client

44 Adam M. Chud, *In Defense of the Government Attorney-Client Privilege*, 84 Cornell L. Rev. 1682, 1711-12 (1999) (citations omitted).

45 Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 Harv. L. Rev. 1995, 2005 (1999).

46 *In re Grand Jury Subpoena*, 112 F.3d at 927, citing *Nixon*, 418 U.S. at 700-02, 713-16.

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privilege that gives weight to the complicated realities of attorney-client communications. If that view prevails, then not just the attorney-client privilege but the government attorney-client privilege has survived the recent attacks. ~~§~~