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Attorney-Client Privilege When the Client is a Public Official: Litigating the Opening Act of the Impeachment Drama

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The divided panel decision of the U.S. Court of Appeals for the D.C. Circuit in *In re Lindsey*, 158 F.3d 1263 (D.C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998), represented a dramatic shift in that court's thinking on the question whether the attorney-client privilege protects what a government official says to his agency's counsel in confidence. Although the court of appeals in at least four previous decisions had held that a government agency client holds the same privilege any other client would under like circumstances to communicate with counsel in private, the Lindsey court took a quite different view. Where previously the existence of the attorney-client privilege turned upon the application of a well-understood test (whether the communication was made in confidence by a client, to an attorney acting as such, for the purpose of seeking legal advice, and not for the purpose of perpetrating a crime or fraud), the court of appeals adopted an unusual new formula that differed from the settled common-law privilege in two significant respects. First, the court of appeals expressly held that the scope of the attorney-client privilege may be narrower in criminal cases than in civil cases when the client is a governmental agency. As discussed below, this restriction is substantially at odds both with the Federal Rules of Evidence and the Supreme Court's interpretation of the common-law attorney-client privilege. Second, the court of appeals ruled that, in criminal cases, the existence of the attorney-client privilege depends on the content of the communication the privilege holder wishes to withhold—specifically, on whether the communication contains "information of possible criminal offenses." The court of appeals cited no case, however, to establish that communications containing "information of possible criminal offenses" lay outside the privilege's protection when made in confidence within an otherwise proper attorney-client relationship.

Although both parties petitioned for certiorari, the Supreme Court, with two Justices dissenting, declined to hear the case. The dissenters saw Lindsey as the last best chance to resolve the

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The authors represented the Office of the President ("White House") in the litigation over the White House's assertion of official privileges during the Monica Lewinsky grand jury investigation in 1998. The opinions expressed herein, however, are the authors' own.
question that had divided the court of appeals because of the likelihood that the lower court’s decision would effectively keep the issue from arising again. Because agency counsel could no longer predict in advance that their communication with their client would be privileged after Lindsey, the dissenters perceived, those communications would be less likely to occur in the first place, and thus the question whether their disclosure could be compelled might not readily arise for litigation. The D.C. Circuit would, in other words, have the last word on a subject both parties had recognized was important to the functioning of the national government as a whole.

We believe that the decision of the court of appeals raises troubling questions the majority opinion failed to recognize or address. The Lindsey decision makes government agency lawyers something less than lawyers, for unlike any other attorney, they cannot communicate with their client in confidence. In so doing, the decision creates a perverse incentive for agency officials to retain private counsel to advise them on official government matters-counsel who lack the institutional expertise of agency counsel and who have sworn no oath to the government. The consequences of the panel’s decision will be felt over time, and the risks it may pose cannot now be fully predicted. But the panel’s narrowing of the privilege, its restriction on the privilege in criminal cases, and its novel content-based test, all threaten the unique relationship the law has long recognized to exist between attorney and client, and the decision’s adverse impact on the profession as a whole may well come to reach far beyond the particular factual circumstances in which it originated.

BACKGROUND

It may seem unusual to recapitulate the background of a story that has, despite popular protestations of fatigue, utterly dominated the national media for upwards of a year. To place the Lindsey decision in context, however, we offer this brief summary of the events most salient to the privilege dispute.

At his request, Independent Counsel Kenneth Starr’s jurisdiction was expanded in January 1998 so that he could explore “whether Monica Lewinsky or others”—there was never any doubt that “or others” meant the President—“suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law.” Armed with this expansive jurisdictional grant and the subpoena power of a federal grand jury, Starr’s Office of Independent Counsel (“OIC”) proceeded directly to the White House Counsel’s Office and demanded the disclosure of confidential communications between White House attorneys and their client, the President of the United States. The first attorney to be subpoenaed, who would ultimately lend his name to the decision of the court of appeals, was Bruce Lindsey, Deputy Counsel and Assistant to the President. Lindsey, an attorney licensed to practice in Arkansas, was no doubt selected for questioning because of his long-term friendship with the President. The OIC later questioned other White House attorneys before the grand jury, including Special Counsel Lanny Breuer and Deputy Counsel Cheryl Mills.

After the OIC subpoenaed him on January 30, 1998, Lindsey testified twice in February 1998, and again in March 1998, before the grand jury. On several occasions, prosecutors attempted to elicit from him the substance of confidential communications he had had with the President. As to those questions involving communications between Lindsey and the President in the course of his official duties as Deputy White House Counsel, Lindsey asserted the attorney-client privilege (and, in some instances, the attorney work product doctrine) and declined to answer. The OIC moved to compel Lindsey to disclose his confidential communications with the President, and the White House, as holder of the privilege at issue, opposed.
THE PRIVILEGE ISSUE IN THE DISTRICT COURT

Before the district court, the parties disagreed over whether the court could make a blanket ruling declaring the privileges at issue applicable or inapplicable, or whether it had to make an individual ruling on each question and answer over which the witness asserted a privilege. The White House argued for an individualized determination, noting that the court of appeals in a previous case involving the presidential communications privilege had ordered the district court to assess each communication individually to ensure that no greater disclosure of privileged material than the law strictly required occurred. This would, no doubt, have involved greater effort on the district court’s part, possibly including an in camera session in which the witness answered the questions propounded by the OIC, but it would have ensured that any breach of settled evidentiary privileges held by the executive branch of government was no broader than necessary. The district court refused, however, to deal with the questions individually. It refused even to disclose to counsel for the White House what questions Lindsey had asserted privilege over, essentially requiring the White House to guess what information the OIC claimed to want, and preventing the White House from establishing the factual predicates for the privilege in any but the broadest terms. The district court also entertained two in camera and ex parte submissions proffered by the OIC as establishing the OIC’s need for the testimony it sought to compel. The district court refused the White House’s request to be allowed to review and respond to these submissions. Thus, the district court’s ruling, when it came, was based on a record the district court itself had kept at a high level of generality and which had been developed and seen by (and presumably slanted to favor) only one side to the case.

The district court rejected the absolutist position, advanced by the OIC and apparently adopted by the Court of Appeals for the Eighth Circuit in a case not involving communications by the President with White House Counsel, that a governmental client held no attorney-client privilege before a federal grand jury. See In re Grand Jury Proceedings, 5 F. Supp. 2d 21, 30-32 (D.D.C. 1998). It also rejected the White House’s position, however, that the attorney-client privilege, which in all other contexts is absolute, should remain so when the party claiming the privilege is the President of the United States. Instead, the district court took a middle course substantially similar to one charted in the amicus curiae brief of the Department of Justice. It ruled that, although the attorney-client privilege did attach to communications between the President and White House Counsel,

[i]n the context of a federal grand jury investigation where one government agency needs information from another to determine if a crime has been committed, the Court finds that the governmental attorney-client privilege must be qualified in order to balance the needs of the criminal justice system against the government agency’s need for confidential legal advice.


In the balancing test it constructed, the district court effectively placed the thumb of the federal judiciary firmly on the side of what it called the “needs of the criminal justice system.” First, by refusing to consider on an individualized basis the questions and answers the OIC claimed to want, the district court prevented the White House from establishing “the government agency’s need for confidential legal advice” in any but the broadest terms. Second, by refusing to require the OIC to specify to opposing counsel what information it purportedly needed, but instead allowing the OIC to proffer showings of need to the district court ex parte and in camera, the district court made it all but impossible for the White House to challenge whether “the needs of the criminal justice system” truly
required disclosure of the President's attorney-client confidences. The combined effect of these aspects of the district court's decision was and is one we found quite troubling: instead of requiring the President's attorneys to answer only the questions previously put to them by the OIC, the district court's opinion gave the OIC broad license to question opposing counsel within any of a large number of categories described broadly by the district court, with no mechanism to ensure that the OIC's questioning stayed within the bounds of its ex parte proffer of need. Within the categories of information its opinion described, the district court appeared to leave only the very low relevancy threshold of United States v. R. Enterprises, 498 U.S. 292 (1991), as the standard for challenging any question asked by the OIC. See Grand Jury Proceedings, 5 F. Supp. 2d at 37-38.

THE PRIVILEGE ISSUE IN THE COURT OF APPEALS

After litigating the OIC's attempt to obtain direct Supreme Court review of the district court's judgment, the parties were given an expedited schedule for briefing and argument in the court of appeals. The White House appealed the district court's order compelling attorney Lindsey to disclose to the grand jury his confidential communications with counsel. On this point, courts and commentators alike have reached a broad consensus that a government agency could be a "client" for purposes of applying the attorney-client privilege. The general rule was sufficiently settled to earn itself a place in the new Restatement of the Law Governing Lawyers, which provides that "the attorney-client privilege normally applies to government agencies as to other organizations as provided in [the corporate setting]" in light of "the generally prevailing rule that governmental agencies and agents enjoy the same privileges as non-governmental counterparts." See Restatement (Third) of the Law Governing Lawyers § 124 cmt. a (1998). As in the context of a corporate client, applying the privilege when the client was a government agency served a public purpose in "aid[ing] government entities and officers in obtaining legal advice founded on a complete and accurate factual picture." Restatement § 124 cmt. b.

The Supreme Court, too, had recognized that government agencies could be "clients" for purposes of applying the attorney-client privilege. In promulgating what later became the Federal Rules of Evidence, the Supreme Court's Proposed Rule 503, dealing with the attorney-client privilege, defined "client" to include a "public officer ... or other organization or entity, either public or private." Although Congress rejected Proposed Rule 503 in favor of Rule 501's general direction to look to the common law in matters of privilege, the proposed rules have nevertheless been generally well regarded as accurate statements of principle. See, e.g., 2 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual 589 (6th ed. 1994) ("[m]ost importantly, the proposed rule covering the attorney-client privilege is still at this point a generally reliable statement of federal common law.").

Even more significantly, at least four previous decisions of the U.S. Court of Appeals for the D.C. Circuit had expressly ruled that a governmental client, like any other client, held a valid privilege to communicate with agency counsel in confidence. The D.C. Circuit's most thorough discussion of the issue came in its opinion in
Mead Data Central v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977). Mead Data Central involved Exemption 5 of the Freedom of Information Act ("FOIA"), which essentially exempts privileged matter from FOIA's disclosure requirements. This exemption, the court of appeals held, protected an agency's attorney-client confidences from compelled disclosure. The court's rationale in part tracked the traditional justification given for the application of the attorney-client privilege when the client is an organizational entity, but added to it the notion that candid intra-agency communications were essential to good government:

Exemption five is intended to protect the quality of agency decision-making by preventing the disclosure requirement of the FOIA from cutting off the flow of information to agency decision-makers. . . . The opinion of even the finest attorney, however, is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. We see no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

Mead Data Central, 566 F.2d at 252.

The White House also took issue with a statute on which the district court relied, 28 U.S.C. § 535(b), to support its holding that the attorney-client privilege is only a qualified privilege when the client is a government agency. That statute requires any federal “department or agency” to report to the Attorney General “[a]ny information, allegation, or complaint” that a government employee may have committed a federal crime. Although the White House routinely complied with this provision as a matter of policy, it noted that, by its terms, the statute did not apply to the White House, which was neither a “department” nor an “agency” of the federal government.11 Even aside from the literal statutory text, however, the White House also noted the longstanding interpretation of the Department of Justice that section 535(b) should be read to conform with, rather than to displace, the common-law attorney-client privilege of a governmental client.12

The White House also attacked the effect of the district court's ruling on the balance of powers among the three branches, noting the incongruity inherent in allowing an Independent Counsel—who was held to be an “inferior officer” of the executive branch in Morrison v. Olson, 487 U.S. 654 (1988)—to compel a higher officer in the Executive Branch hierarchy to disclose his confidential communications with counsel. This was an especially troubling consequence in light of the Independent Counsel's statutory duty to refer to the Congress any evidence of potentially impeachable offenses, a duty the OIC has since exercised and which was plainly in the planning stages at the time of the argument in the court of appeals. The White House argued, and the Attorney General in an amicus brief agreed, that the White House would be absolutely privileged to refuse to disclose its attorney-client confidences to Congress under fundamental separation-of-powers principles. Yet, the Independent Counsel statute set up a mechanism by which Congress could effectively end-run this fundamental separation of powers principle. Under the district court's interpretation, Congress could delegate to an inferior executive officer a power Congress could not itself possess—the power, with the aid of the federal judiciary, to compel a President to divulge his confidential communications with counsel, and then to disclose those communications to Congress in turn. Finally, the White House took issue with the district court's refusal to evaluate each question and answer individually in determining whether the privilege applied, rather than issuing a blanket ruling as to broadly described “categories” of testimony the OIC might wish to seek.

Although widely and erroneously reported in the popular press as evidence of a rift between the Attorney General and the President, the Department of Justice submitted an amicus brief in the court of appeals that strongly supported the White House's position and opposed the position of the OIC. Contrary to the OIC's posi-
tion, the Justice Department took the view that (1) a governmental client holds a valid attorney-client privilege to refuse to divulge its communications with counsel, even in the face of a grand jury subpoena; (2) the statute on which the district court relied, 28 U.S.C. § 535(b), was irrelevant to the Lindsey dispute; (3) the district court's procedures, calling for blanket disclosure of any communications within a number of broadly phrased categories, did not adequately protect the privileged communications at issue and did not suffice to inform the witnesses just what testimony they had been compelled to give; and (4) the district court's judgment should be reversed and remanded for further consideration under appropriate standards. The sole area of principled disagreement between the Justice Department and counsel for the White House was on the question whether the attorney-client privilege both agreed to exist should, in the instant context, be a qualified or an absolute privilege. The Justice Department believed that a governmental client ordinarily should hold only a qualified privilege to communicate with counsel, although it proposed a very stringent standard whereby such communications would be ordered disclosed only if “essential to justice” in a particular case. The Justice Department agreed that the President would retain an absolute privilege vis-à-vis Congress in impeachment proceedings, but took no position on the question whether the prospect of an imminent impeachment referral from the OIC to Congress altered the calculus in favor of an absolute privilege before the grand jury. The White House maintained that the common law knew only one type of attorney-client privilege, and that privilege was absolute, and should remain so irrespective of context.

The court of appeals ruled for the OIC. Indeed, although the OIC did not cross-appeal or otherwise complain about the district court's judgment, the court of appeals significantly expanded the ruling in the OIC's favor. Rejecting the district court's conclusion that even a qualified attorney-client privilege could protect a President's confidential consultations with White House Counsel, the court of appeals instead ruled that no attorney-client privilege could apply in the face of a grand jury subpoena if the communications sought “contain information of possible criminal offenses.” Lindsey, 158 F.3d at 1266.

The court of appeals recognized that previous cases had established that a governmental client could assert an attorney-client privilege that was “rather absolute in civil litigation,” but declared that “those cases do not necessarily control the application of the privilege here.” Lindsey, 158 F.3d at 1271. To support this rationale, it would have been most natural for the court of appeals to cite cases holding that the common-law attorney-client privilege applied differently in criminal cases than in civil cases. But it did not do so, for the eminently practical reason that no such authorities exist. Instead, the court of appeals took a circuitous route from its conclusion through its supporting rationale, ultimately opining that its vision of “the proper allegiance of the government lawyer,” id. at 1273, did not include the lawyer asserting evidentiary privileges against an Independent Counsel.

The court of appeals' conception of the “proper allegiance” of a government attorney was constructed from several unrelated sources. It first extolled “reason and experience, duty, and tradition,” Lindsey, 158 F.3d at 1272, authorities that need not rely for their intellectual force on the occasionally inconvenient duty to cite precedent. The court of appeals noted that each attorney's oath to uphold the constitution included a duty to breach his client's confidences if questioned before a grand jury. id. at 1272-73. The panel majority also cited, with somewhat greater force, the public interest in rooting out wrongdoing within the government, tacitly evoking the Nixonian parallel so forcefully pressed by the OIC. See id. at 1273-74. Next, although acknowledging that 28 U.S.C. § 535(b) “does not clearly apply to the Office of the President,” id. at 1274, the court nevertheless read the statute to “suggest”-a proposition the generality of which makes it scarcely refutable-that government lawyers “are duty-bound not to withhold evi-
The court of appeals also collected a few examples of presidential lawyers, including lawyers for the Clinton Administration, volunteering evidence to various bodies without raising a claim of attorney-client privilege. Id. at 1274-75.

The court of appeals rejected the notion that its rule would unduly chill communications between government agencies and their counsel, finding that the clients need only fear disclosure if their “communications reveal information relating to possible criminal wrongdoing,” Lindsey, 158 F.3d at 1276, and suggesting that the President’s circumstance was not so different from that of a corporate officer trying to conceal an attorney-client communication from a shareholder of the corporation. Id. It then declared that government officials who felt themselves “chilled” could always exercise the option of retaining and consulting private lawyers. Id.

The court of appeals similarly found unpersuasive the notion that the prospect of impending impeachment proceedings in Congress supported a stronger privilege for the President’s consultations with counsel. It found the duties of White House Counsel in such a then-unusual context to be “far from settled,” id. at 1277, and found this uncertainty to weigh against the claim of privilege. The majority similarly brushed aside the separation of powers argument, essentially declaring that it was for Congress to choose whether it wished to recognize a President’s assertion of privilege in impeachment proceedings. See id. at 1277-78.

The court of appeals closed by noting that a President had only a qualified executive privilege to confer with non-attorney advisors. Again citing no precedent, the majority opined that “we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency that the advice coming from all other quarters.” Id. at 1278. Because the President could rely only on a qualified privilege to shield his communications with a junior policy advisor, the panel majority reasoned, he could not expect any privilege to attach to his confidential communications with White House Counsel.

Judge Tatel, dissenting, would have applied the common-law attorney-client privilege to the case essentially as that privilege had long been understood: to bar absolutely the compelled disclosure of what the client told his lawyer in confidence. He would have remanded the case for additional fact-finding on the question whether Lindsey was in fact supplying legal advice at the time of the relevant communications, a question rendered difficult to answer on appeal by the district court’s refusal to perform an individualized analysis of each question to which the OIC sought to compel an answer. See Lindsey, 158 F.3d at 1288-89.

Assessing the Court of Appeals’ Decision

With the Supreme Court’s denials of certiorari, the decision of the Court of Appeals in Lindsey stands as the most recent authoritative pronouncement on the expectation of confidentiality a government officer enjoys when conferring with governmen
tal counsel on official matters. As the justices who dissented from the denial of certiorari saw it, the court of appeals’ decision could itself chill the very attorney-client communications that could again bring the case to the Supreme Court for review, requiring in essence that the Court act now or not at all. See Office of the President v. Office of Independent Counsel, 119 S. Ct. 466, 466 (1998) (Breyer, J., dissenting from denial of certiorari). Given this legitimate concern, it is pertinent to assess the import of the Lindsey decision on the attorney-client privilege for government clients and others. We believe the decision portends serious potential trouble for future Presidents of any party, whose ability to perform the many duties reposed in them by the Constitution and federal statutes may be seriously hampered by the inability to obtain the candid and informed legal advice that would be available to any other citizen or corporation. The panel majority’s decision leaves a number of
troubling questions unanswered, and pays scant notice to the role and function of the President in our system of shared and divided powers.

The difficulties with the court of appeals’ opinion can broadly be grouped into “common-law” and “constitutional” categories. On the first front, there is ample reason to doubt that the court of appeals’ decision represents a correct interpretation of the common-law authorities supporting the attorney-client privilege. These flaws in the court of appeals’ analysis should concern all practitioners alike and are not confined to the special case of communications between the President of the United States and White House Counsel. The second category consists of more fundamental, although arguably more ephemeral, effects the panel majority’s decision may portend for the constitutional separation of powers. These separation-of-powers concerns can hardly be dismissed as speculative, although the court of appeals gave them short shrift.

Turning first to the question whether the court of appeals correctly applied the common-law of attorney-client privilege, the panel majority’s decision raises a number of troubling issues that may confront future counsel in the course of privilege disputes. First, the court of appeals breathed new life into a doctrine the Supreme Court had taken pains to extinguish only a month before Lindsey: specifically, the notion that the scope of the attorney-client privilege expands and contracts depending on whether the client claims it in a civil or criminal proceeding. The year before, in In re Sealed Case, 124 F.3d 230 (D.C. Cir. 1997), a different panel of the court of appeals (again over the dissent of Judge Tatel) had ruled that the common-law rule providing for the survival of the attorney-client privilege after the client’s death should not apply in criminal cases.

Swidler & Berlin v. United States, 118 S. Ct. 2081, 2087 (1998). The Court reasoned as follows:

[A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance. Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected the use of a balancing test in defining the contours of the privilege.

_id._. The Supreme Court’s decision in Swidler & Berlin stands for the proposition that uniform application of the attorney-client privilege in civil and criminal cases alike is necessary to provide the client with the ex ante assurance of confidentiality necessary to encourage candor.

The court of appeals in Lindsey, however, returned to exactly the same ground as the In re Sealed Case panel of the year before. Although it recognized the body of precedents “recogniz[ing] a government attorney-client privilege that is rather absolute in civil litigation,” Lindsey, 158 F.3d at 1271, it held that “those cases do not necessarily control the application of the privilege here.” _id._. It then proceeded to hold that no privilege attached in criminal cases to communications containing “information of possible criminal offenses.”

It seems clear, however, that the court of appeals’ reinvigorated distinction between criminal and civil cases can only have the adverse consequences that led the Supreme Court to reject such a distinction in Swidler & Berlin. Like any other client, a government officer lacks the gift of prescience that would be necessary to “know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter,” Swidler & Berlin, 118 S. Ct.
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at 2087. Nor, given the wide-ranging and ever-expanding scope of a potential independent counsel inquiry, can it be predicted with any certainty in advance whether a future prosecutor might believe that any given communication might “contain information of possible criminal offenses,” as would suffice to overcome the protection of the privilege under the Lindsey rule. Because it cannot be known in advance whether any individual attorney-client communication might later be sought in civil or criminal proceedings, the wisest course for a client concerned about possible disclosure will be not to communicate with counsel. The court of appeals dismissed this potential chilling effect, we believe unwisely. Government attorneys, like all attorneys, serve their clients best when possessed of all the relevant facts, and any rule that motivates clients to withhold potentially crucial information from counsel is one the courts should hesitate to condone. 13

The court of appeals’ repeated statements that whether the attorney-client privilege applies at all turns on the content of the privileged communications is also troubling.14 We know of no authority, and the court of appeals cited none, that communications containing certain content fall outside the attorney-client privilege. Rather, so long as the crime-fraud exception is not implicated, the attorney-client privilege is, and should be, content-neutral.

The court of appeals’ explicit content-based test raises a number of practical concerns. First, it is difficult to understand how the content-based analysis would apply in practice. Suppose a witness invokes the attorney-client privilege before a grand jury and the prosecution moves to compel the witness to testify. Who determines whether the witness’ answer to the question “contains information of possible criminal offenses” and is therefore unprivileged? If the prosecutor’s mere say-so suffices to meet the court of appeals’ content-based test, then the privilege itself becomes a sham, voidable at will by any prosecutor at any time.

Or would the court need to concern itself with the witness’ answer at all? The court of appeals in Lindsey ordered Lindsey to testify even though there was no indication in the record that any of the communications over which he asserted privilege “contain[ed] information of possible criminal offenses.” Because the district court did not conduct an individualized question-by-question inquiry into the claim of privilege, and did not require Lindsey to answer any of the OIC’s questions in camera, what answers he might have given but for the claim of privilege were nowhere to be found in the record, and the court of appeals could only have been speculating if it nevertheless believed that his testimony would have met its content-based test. May a court simply declare that a witness possesses “information of possible criminal offenses” absent any testimonial support for such a conclusion? The court of appeals’ disposition of Lindsey, although perhaps not its opinion, appears to leave that prospect very much open.

Judge Tatel’s thoughtful dissent touched on another serious concern, which was also mentioned by the opinion dissenting from the denial of certiorari. The court of appeals observed that, although the President may not have confidential communications with White House Counsel, he is always free to hire a private lawyer. Lindsey, 158 F.3d at 1276. This ruling can only create a perverse incentive for public officials to rely on private counsel for advice on official, but sensitive, matters. Private attorneys, however, may make poor civil servants. They would necessarily lack the institutional familiarity with the mission and operations of the client agency that agency counsel would provide. Indeed, in sensitive cases (which occur routinely for counsel representing the White House), officials of the client agency may be severely restricted by federal law or other considerations of the public interest from disclosing all material facts to a private attorney. More fundamentally, retained private counsel have no ethical obligation to serve any interests beyond those of their individual client. They are not necessarily well suited to advise an official on what course of action is best for the agency, branch, or Nation as a whole. Given that agency counsel exist specifically for the purpose
of providing legal advice to the agency in the fulfillment of its official functions, a rule discouraging the very communications that agency counsel need to do their jobs effectively seems poorly attuned to the public interest.

The panel majority's decision in Lindsey also raises lingering separation-of-powers concerns. For one, the court of appeals did not seriously address the argument that Congress could not use the Independent Counsel to do something Congress itself could not—to compel the head of a coordinate branch of government to disclose his confidential communications with counsel in the precursor to impeachment proceedings in Congress. Impeachment is one of the few formal proceedings expressly provided for in the Constitution as a core function of government. Impeachment of a President, or the threat of impeachment, necessarily involves the single most direct and cataclysmic confrontation between the executive and legislative branches of government known to our constitutional system. The defense against impeachment, as witnessed by the participation of White House Counsel in the current proceedings in the House and Senate, represents more than a defense of the individual occupying the office of President, but rather a defense of the institution of the Presidency against the subordination to the legislative branch that would necessarily be entailed if Presidents could be easily or frequently removed at the whim of Congress. White House Counsel have an official duty to their institutional client in such circumstances, a duty that depends, among other things, on their ability to confer with the client in confidence.

If Congress ordered a White House lawyer to divulge his or her communications with the President in the course of impeachment proceedings and the lawyer refused, it seems probable that the resulting dispute between the executive and legislative branches would be ruled nonjusticiable, and the President's lawyer's refusal to breach the President's confidences would prevail by default. The court of appeals' decision, however, effectively establishes an end-run around this constitutional stalemate, for it allows Congress to order the Independent Counsel to obtain the President's attorney-client communications and then disclose them to Congress. Whether this is an inappropriate or undue incursion by the legislative branch on the confidences of the executive is a subject for another day; the point for present purposes is that this is a very real alteration in the balance of powers between the branches that went almost entirely unremarked upon by the court of appeals.

The panel majority decision in Lindsey also raises the question whether the Independent Counsel is still, as the Supreme Court held him to be in Morrison v. Olson, 487 U.S. 654 (1988), an "inferior officer" of the executive branch. The independent counsel statute essentially grants the Independent Counsel the powers of the Attorney General over matters within his jurisdictional grant. Yet, the decision in Lindsey empowers the Independent Counsel to do something even the Attorney General may not do: to require a superior constitutional officer to disclose his confidential communications with counsel. This is a dramatic and sweeping power and necessarily raises the question whether the Independent Counsel remains "inferior" to the President in the Morrison v. Olson constitutional sense. Indeed, given the comparatively limited functions ascribed to inferior officers under the Supreme Court's more recent ruling in Edmond v. United States, 117 S. Ct. 1573 (1997), Lindsey appears to raise even more questions about the constitutionality of the independent counsel statute than did Morrison itself. These, too, are questions for another day, but the Lindsey majority's failure even to recognize them bespeaks a worrisome case of tunnel vision.

Although the conventional wisdom now holds that the independent counsel statute will not be renewed upon its expiration later this year, the conventional wisdom has scored remarkably few successes during the Lewinsky investigation to date. The constitutional tension between the executive and legislative branches that lurks beneath the surface of the majority's decision in Lindsey may have ample future opportunities to recur and be brought to light.
ENDNOTES

1. A redacted version of the opinion was originally reported at 148 F.3d 1100. The opinion was subsequently released in unredacted form on motion of the President.


3. The Independent Counsel sought in June 1998 to bypass the court of appeals and instead appeal the district court’s decision, granting its motion to compel, directly to the Supreme Court. In the process, the Independent Counsel no doubt wished to score a public-relations point and invoke the memory of the Nixon tapes case by giving its cert petition the ominous caption of United States v. Clinton. The White House opposed the expedited basis for the petition, although conceding that the issue presented was important and could be ripe for review following a decision by the court of appeals. The Supreme Court denied the petition for certiorari before judgment in the court of appeals, granting its motion to compel, directly to the Supreme Court. See Lindsey, 158 F.3d at 1277 (attorney’s “information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege”).

4. See In re Sealed Case, 121 F.3d 729, 740 (D.C. Cir. 1997) (criticizing district court for issuing “a blanket ruling, with no individualized discussion of the documents”).

5. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997). See, e.g., Paul R. Rice, The Attorney-Client Privilege in the United States § 2:2 (1993) (“assuming a limited number of exceptions are not applicable, this protection [of the attorney-client privilege] is absolute”; “[a]bsent a waiver of the protection, therefore, the privilege precludes the disclosure of the communications regardless of the need that might be demonstrated for the information in them.”). The new Restatement takes a similar view. See Restatement (Third) of the Law Governing Lawyers § 118, cmt. c, and reporter’s note (1998) (“the privilege is absolute” and is not “subject to ad hoc exceptions”; “[o]n the whole, the law of the privilege does not provide for a case-by-case balancing in which applying the privilege would depend upon the advantages and disadvantages of upholding the privilege in a particular case.”). See also Admiral Insurance Co. v. U.S. District Court, 881 F.2d 1486, 1488 (“there is no availability exception to the attorney-client privilege”), 1493-95 (9th Cir. 1989); In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 601 (8th Cir. 1978) (en banc).
Many state codes of evidence have, in essence, adopted some variant of Proposed Rule 503 and have expressly provided that the attorney-client privilege extends to the communications between a governmental agency and its counsel. See, e.g., Ala. R. Evid. 502(a)(1); Alaska R. Evid. 503(a)(1); Ark. R. Evid. 502(a)(1); Cal. Evid. Code § 951 & cmt.; Del. R. Evid. 502(a)(1); Fla. Stat. Ann. § 90.502(1)(b); Idaho R. Evid. 502(a)(1); Ky. R. Evid. 503(a)(1); Miss. R. Evid. 502(a)(1); Neb. Rev. Stat. § 27-503(1)(a); N.H. R. Evid. 502(a)(1); N.M. R. Evid. 11-503(A)(1); N.D. R. Evid. 502(a)(1); 12 Okla. Stat. § 2502(A)(2); Tex. R. Evid. 503(a)(1); Utah R. Evid. 504(a)(1); Vt. R. Evid. 502(a)(1); Wis. Stat. § 905.03(1)(a).

10 See supra note 2 and authorities cited.


12 See Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, Duty of Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee, at 4 (Mar. 29, 1985); Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 483 (attorney-client privilege covers “communications of a legal advisory nature which were prepared [by the Attorney General] for the Office of the President”), 495-96 (Aug. 2, 1982); Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice Representation of Federal Employees Who Have Been Indicted, at 4-5 (Apr. 3, 1979); Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, The Attorney-Client Relationship in Department of Justice Representation of Individual Employees and Release of Information Obtained During that Representation Under the Freedom of Information Act, at 10 (Aug. 30, 1978); Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee at 2 (Nov. 30, 1976).

13 The court of appeals also did not attempt to square its civil/criminal case distinction with the Federal Rules of Evidence. The advisory committee note to Fed. R. Evid. 501 instructs “that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.” Fed. R. Evid. 501 adv. comm. note (emphasis added). Similarly, Rule 1101(c) provides (with emphasis added) that the “rule with respect to privileges applies at all stages of all actions, cases, and proceedings,” making no textual distinction between civil and criminal matters.

14 See Lindsey, 158 F.3d at 1266 (“[t]he extent to which the communications . . . are privileged . . . depends, therefore, on whether the communications contain information of possible criminal offenses”) (emphasis added), 1274 (“a government attorney . . . may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations”) (emphasis added). See also id. at 1272 (no privilege attaches to communications “about alleged crimes within the executive branch”), 1273 (attorney must “prov[ide] evidence of the possible commission of criminal offenses within the government”), 1274 (no privilege if communications contain “evidence of crimes committed by government officials”), 1275 (distinguishing situation involved in Iran/Contra investigation; privilege may have remained applicable there because there was “no indication that the information sought from [White House Counsel] constituted evidence of any criminal offense”), 1276 (no attorney-client privilege if “the communications reveal information relating to possible criminal wrongdoing”), 1278 (attorney may not assert privilege “if he possesses information relating to possible criminal violations”; no privilege if “government attorneys learn, through communications with their clients, of information related to criminal misconduct”).