

**DIGITAL PILLOW TALK?:  
WAIVING MARITAL PRIVILEGE AT WORK IN  
*UNITED STATES V. HAMILTON***

I. INTRODUCTION

In 1839, the United States Supreme Court first applied the marital communications privilege, calling marriage “the best solace of human existence.”<sup>1</sup> The marital communications privilege presumes communications made between spouses were intended to be confidential and renders those communications inadmissible in court.<sup>2</sup> While the marital communications privilege has officially been part of federal common law since 1839,<sup>3</sup> the privilege is one of the oldest common law privileges; its roots date back to medieval times.<sup>4</sup> The rationale behind the privilege has been explained as fostering the sanctity of the relationship and protecting marital harmony.<sup>5</sup> Today, rapid advancements in technology allow more professionals to work remotely, blurring the lines between work life and personal life and creating a new question for courts: How far will the marital communications privilege extend in a new technological world? In 2012, the United States Court of Appeals for the Fourth Circuit began answering this question when it made clear that spouses should not seek the solace of their marriages via work email on work computers.<sup>6</sup>

Last year in *United States v. Hamilton*,<sup>7</sup> the Fourth Circuit held that Phillip Hamilton’s emails to his wife through his work email account were not subject to the marital privilege and, therefore, were properly admitted at trial.<sup>8</sup> Hamilton, a member of the Virginia House of Delegates, was charged with bribery and extortion under color of official right because he secured state funding for a public university center in exchange for employment by the university center.<sup>9</sup> He was convicted and sentenced to 114 months in prison.<sup>10</sup> Hamilton’s main challenge on appeal<sup>11</sup> was that certain emails admitted at trial

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1. *Stein v. Bowman*, 38 U.S. 209, 223 (1839).

2. *See Wolffe v. United States*, 291 U.S. 7, 14 (1934).

3. *See Bowman*, 38 U.S. at 223; *see also* Katherine O. Eldred, “*Every Spouse’s Evidence*”: *Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials*, 69 U. CHI. L. REV. 1319, 1333 (2002) (citing *Trammel v. United States*, 445 U.S. 40, 44 (1980)) (“The spousal privilege first surfaced in American jurisprudence in 1839.”).

4. *See Trammel*, 445 U.S. at 44.

5. *Id.*

6. *United States v. Hamilton*, 701 F.3d 404, 407, 409 (4th Cir. 2012).

7. 701 F.3d 404.

8. *See id.* at 406, 409.

9. *See id.* at 406–07 (citing 18 U.S.C. § 666(a)(1)(B) (2006); *id.* § 1951).

10. *Id.* at 407.

11. Hamilton also challenged the sufficiency of the evidence, failure to instruct the jury on the distinction between a bribe and a gratuity, and the application of a fourteen-level sentencing enhancement. *See id.* at 409–11 (citations omitted).

written to his wife violated the marital communications privilege.<sup>12</sup> The Fourth Circuit upheld the trial court's decision to admit the emails, affirming his conviction and sentence.<sup>13</sup>

This Comment argues that a lack of precision in this decision regarding the test for privileged communications has created some ambiguity in the law. Further, as daily reliance on digital communications increases, the cost to employees may be less privacy and control over their communications. Here, employees and employers would directly benefit from clear legal implications when navigating how to handle potentially confidential communications at work. However, while the courts may not have yet worked out how to confront technological issues related to privileged communications, this Comment also highlights the important role workplace-use policies play following this decision.

## II. BACKGROUND

Phillip Hamilton spent his career in public education;<sup>14</sup> he was elected to the Virginia House of Delegates in 1988, where he rose through the ranks to key roles in the General Assembly until 2009.<sup>15</sup> In 2006, as financial troubles mounted and a reduction in retirement benefits loomed in the background, Hamilton attended meetings and exchanged emails with officials at Old Dominion University (ODU) regarding securing state funding for a new center designed to train leaders in urban school systems.<sup>16</sup> After an August 2006 meeting, the president of ODU directed the dean of the college of education to hire Hamilton as the director of the new center.<sup>17</sup> In December 2006, Hamilton emailed the president to remind her of his interest in employment and emailed David Blackburn, the director of ODU's Program for Research and Evaluation in Public Schools, informing him that because the governor's budget did not include money for the Center, he would propose a budget amendment to secure the funding.<sup>18</sup> Hamilton also told Blackburn, "'My City retirement is reduced in May 2007.' I will need to supplement my current [public school] income . . . by at least an equal amount . . . ." Director Blackburn replied: "Thanks for passing on budget request and specific salary need[.] I believe GA [General Assembly] will fund and you will be on board[.]"<sup>19</sup>

In early 2007, Hamilton introduced house amendments that did not mention ODU, but rather would have funneled money through the United States

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12. *See id.* at 407.

13. *See id.* at 411.

14. *See* Brief of Appellant at 18–19, *Hamilton*, 701 F.3d 404 (No. 11-4847).

15. *See Hamilton*, 701 F.3d at 406.

16. *See id.*; *see also* Brief of the United States at 9–10, *Hamilton*, 701 F.3d 404 (No. 11-4847) (discussing Hamilton's financial problems).

17. *See Hamilton*, 701 F.3d at 406.

18. *Id.*

19. *Id.*

Department of Education.<sup>20</sup> On the senate side, ODU had another advocate, Senator Blevins, who introduced the amendment which specifically named ODU.<sup>21</sup> A senate legislative aide asked Hamilton if he was okay with the money going through ODU; Hamilton said that was “fine.”<sup>22</sup> The budget passed with \$1,000,000 appropriated for the center, and Hamilton became the director of the center in mid-June 2007.<sup>23</sup> In July 2008, the senate finance committee began an investigation.<sup>24</sup> Hamilton emailed Blackburn and told Blackburn to list himself as director, noting it “looks like they are digging.”<sup>25</sup>

### III. HAMILTON’S EMAILS TO HIS WIFE

At trial, three emails from Hamilton to his wife were admitted over Hamilton’s motion to exclude the emails.<sup>26</sup> In the first email, dated June 5, 2006, Hamilton informed his wife that they only had \$230 remaining in their checking account.<sup>27</sup> They also discussed whether to use the remaining money on books for one of their children or other expenses.<sup>28</sup> In the second email, dated August 16, 2006, Hamilton told his wife that he expected employment to come up at a meeting with ODU officials and he planned to ask for \$6,000 a month.<sup>29</sup> Earlier that day, Hamilton’s wife asked him, “[W]hat are you going to ask for?”<sup>30</sup> The third email was after Hamilton’s meeting at ODU on August 16, 2006; Hamilton informed his wife that the meeting went well and he “reinforced the idea that compensation in the area of \$6,000 per month and time flexibility were important factors.”<sup>31</sup>

On appeal, Hamilton argued that the emails were improperly admitted because they were subject to the marital communications privilege.<sup>32</sup> In particular, Hamilton emphasized that his employer, Newport News Public School System (NNPSS), did not have a computer-usage policy in 2006 when the emails were sent.<sup>33</sup> NNPSS did not enact a use policy regarding computer usage until almost a year after the emails between Hamilton and his wife were

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20. See Brief of Appellant, *supra* note 14, at 13.

21. See *id.* at 15.

22. *Id.* at 14.

23. See *id.* at 21; see also *Hamilton*, 701 F.3d at 406 (stating that two \$500,000 appropriations for the center passed).

24. See Brief of the United States, *supra* note 16, at 21.

25. *Id.*; see also *Hamilton*, 701 F.3d at 407 (describing how Hamilton sought to conceal his position as director).

26. See Brief of Appellant, *supra* note 14, at 16–17.

27. *Id.* at 16.

28. Oral Argument at 1:05, *Hamilton*, 701 F.3d 404 (No. 11-4847), available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/11-4847-20121024.mp3>.

29. See Brief of Appellant, *supra* note 14, at 16.

30. *Id.*

31. *Id.* at 16–17 (internal quotation marks omitted).

32. See *United States v. Hamilton*, 701 F.3d 404, 407 (4th Cir. 2012).

33. See *id.* at 408.

sent.<sup>34</sup> When the policy was enacted in June of 2007, the policy informed users that they had no expectation of privacy on their computers and the computers could be inspected or monitored at any time.<sup>35</sup> Hamilton acknowledged and electronically signed this policy on February 1, 2008, and again on October 24, 2008.<sup>36</sup> Additionally, in order to log onto Hamilton's school computer, he was required to press a key to acknowledge that Internet and email access was only for authorized use.<sup>37</sup> Critically, this log on message also stated: "All data stored or transmitted over this system may be monitored."<sup>38</sup>

#### IV. MARITAL COMMUNICATION PRIVILEGE

The marital communication privilege traditionally is evaluated by considering four elements.<sup>39</sup> First, "there must have been a communication, [second,] there must have been a valid marriage at the time of the communication, [third,] the communication must have been made in confidence, and [fourth,] the privilege must not have been waived."<sup>40</sup> In *Hamilton*, the two elements at issue were whether the communication was confidential and whether the privilege was waived.<sup>41</sup>

##### A. Confidentiality

To reach its holding, the Fourth Circuit relied on *Wolfe v. United States*,<sup>42</sup> which established the presumption that communications between spouses are intended to be confidential and are therefore privileged.<sup>43</sup> In *Wolfe*, a husband dictated a letter to his wife using a stenographer who transcribed it.<sup>44</sup> In that case, the Supreme Court held that the privilege did not apply to the letter between the husband and wife because of the voluntary disclosure to the third-

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34. See Brief of Appellant, *supra* note 14, at 40.

35. *Hamilton*, 701 F.3d at 408; see also Brief of the United States, *supra* note 16, at 37 (stating the policy).

36. See *Hamilton*, 701 F.3d at 408; see also Brief of the United States, *supra* note 16, at 38 (stating Hamilton electronically signed the policy).

37. See *Hamilton*, 701 F.3d at 408; see also Brief of the United States, *supra* note 16, at 38 (noting that every time someone logged onto the school's computer system, the user could not bypass pressing a key to acknowledge the policy).

38. Brief of the United States, *supra* note 16, at 38.

39. *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (citing *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992); *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977)). For a discussion of the historical background of the marital communication privilege, see generally Mikah K. Story, *Twenty-first Century Pillow Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C. L. REV. 275, 277–82 (2006).

40. *Id.* (citing *Evans*, 966 F.2d at 401; *Lustig*, 555 F.2d at 747).

41. See *Hamilton*, 701 F.3d at 407 (citing *Wolfe v. United States*, 291 U.S. 7, 13–15 (1934)).

42. 291 U.S. 7.

43. See *Hamilton*, 701 F.3d at 407 (quoting *Wolfe*, 291 U.S. at 14).

44. *Wolfe*, 291 U.S. at 12.

person stenographer.<sup>45</sup> The Court noted that spouses may “conveniently communicate without stenographic aid”<sup>46</sup> and the privilege need not be extended so far as to include confidences voluntarily disclosed to a third person.<sup>47</sup>

Comparing Hamilton’s emails to the stenographer in *Wolfe*, the Fourth Circuit stated that “email has become the modern stenographer.”<sup>48</sup> In *Wolfe*, the Supreme Court held that the privilege never attached because the communication was not made in confidence.<sup>49</sup> Presumably, in analogizing email to the stenographer, the *Hamilton* court was indicating that communications by email are not made in confidence and therefore cannot be privileged communications. Yet, the court acknowledged that people generally have a reasonable expectation of privacy in email—at least where there is no use policy to the contrary—and seemed to suggest that certain communications could be made in confidence over email.<sup>50</sup> Borrowing again from *Wolfe*, the court concluded that spouses can communicate without using work email on an office computer just like the Supreme Court concluded that spouses can communicate without using a stenographer.<sup>51</sup>

Most courts, including the Fourth Circuit, that have examined communications transmitted on or located on company property do so by analyzing the employee’s reasonable expectation of privacy in the communication.<sup>52</sup> Here, the *Hamilton* court implied that Hamilton did have a reasonable expectation of privacy in his email and that email generally is intended to be private.<sup>53</sup> But by comparing Hamilton’s emails to the stenographer in *Wolfe*, and yet acknowledging Hamilton’s reasonable expectation of privacy,<sup>54</sup> the opinion has left the law regarding confidential

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45. *Id.* at 14.

46. *Id.* at 16.

47. *See id.* at 16–17.

48. *Hamilton*, 701 F.3d at 408.

49. *See Wolfe*, 291 U.S. at 13–14.

50. *See Hamilton*, 701 F.3d at 408. In doing so, the Court referenced an ABA Formal Opinion. *Id.* (quoting ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 413 (1999)) (“[E]mail ‘pose[s] no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy’ and so there is generally ‘a reasonable expectation of privacy in its use.’”).

51. *See id.*; *see also Wolfe*, 291 U.S. at 16–17 (stating that the spouses could communicate without a stenographer).

52. *See, e.g., In re Royce Homes, LP*, 449 B.R. 709, 733 (Bankr. S.D. Tex. 2011) (citing *United States v. Etkin*, No. 07-CR-913 (KMK), 2008 WL 482281, at \*3 (S.D.N.Y. Feb. 20, 2008); *Long v. Marubeni Am. Corp.*, No. 05Civ.639(GEL)(KNF), 2006 WL 2998671, at \*3 (S.D.N.Y. Oct. 19, 2006); *Curto v. Med. World Commc’ns Inc.*, 99 Fair Empl. Prac. Cas. (BNA) 298, 302–05 (E.D.N.Y. 2006); *Kaufman v. Sungard Inv. Sys.*, No. 05-cv-1236 (JLL), 2006 WL 1307882, at \*4 (D.N.J. May 10, 2006); *In re Asia Global Crossing, LTD.*, 322 B.R. 247, 255–56 (Bankr. S.D.N.Y. 2005); *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 664 (N.J. 2010); *Nat’l Econ. Research Assocs., Inc. v. Evans*, 21 Mass. L. Rptr. 337, 338 (Super. Ct. 2006)) (noting that most courts consider an “employee’s reasonable expectation of privacy”).

53. *See Hamilton*, 701 F.3d at 408.

54. *See id.*

communications unclear. Going forward, the opinion seems to suggest that work email sent from an office computer that is subject to a use policy will not be considered confidential in the Fourth Circuit.<sup>55</sup> Nevertheless, the question remains, to what extent will other types of email be considered confidential, if communications involving workplace property will be considered confidential at all.<sup>56</sup>

*B. Waiver*

Turning to the waiver issue, Hamilton insisted that because there was no use policy in place at the time the emails were written and sent, he could not retroactively waive the privilege.<sup>57</sup> The court noted, “In an era in which email plays a ubiquitous role in daily communications, these arguments caution against lightly finding waiver of marital privilege by email usage.”<sup>58</sup> However, the court placed importance on the fact that Hamilton did not take “any steps to protect the emails in question” after the policy was in place.<sup>59</sup>

In essence, once the use policy went into place, the court held Hamilton waived the privilege (assuming one existed at the time he wrote the emails) by not going back and attempting to delete or protect the emails.<sup>60</sup> The court concluded that this result was consistent “with the principle that one who is on notice that the allegedly privileged material is subject to search may waive the privilege when he makes no effort to protect it.”<sup>61</sup> The court noted that two other circuits “have also made clear that a party waives the marital communications privilege when he ‘fails to take adequate precautions to maintain . . . confidentiality.’”<sup>62</sup> One of the cases the court cited was *SEC v. Lavin*,<sup>63</sup> in which the Court of Appeals for the District of Columbia Circuit described privileged communications as “crown jewels” which must be zealously protected in order

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55. *See id.*

56. The reasonable expectation of privacy analysis is also used in other employee privacy claims. *See, e.g.,* *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (discussing the “reasonable expectation of privacy” in the Fourth Amendment context); *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (rejecting the contention that in the Fourth Amendment context “public employees can never have a reasonable expectation of privacy in their place of work”). Therefore, while this Comment focuses on the spousal privilege at issue in this case, this analysis could also impact other common law privileges like the attorney–client privilege. *See generally* Adam C. Losey, Note, *Clicking Away Confidentiality: Workplace Waiver of Attorney–Client Privilege*, 60 FLA. L. REV. 1179, 1190 (2008) (discussing that whether an employee waived attorney–client privilege centers “around whether the employee–client had an objectively reasonable expectation of privacy when communicating with an attorney”).

57. *See Hamilton*, 701 F.3d at 408.

58. *Id.*

59. *Id.*

60. *See id.* at 408, 409 (quoting *Wolfle v. United States*, 291 U.S. 7, 17 (1934)).

61. *Id.* at 409.

62. *Id.* (quoting *SEC v. Lavin*, 111 F.3d 921, 930 (D.C. Cir. 1997)).

63. 111 F.3d 921.

to maintain the privilege.<sup>64</sup> The test regarding waiver both the D.C. Circuit in *Lavin* and the Ninth Circuit adopted is “[w]hen the disclosure of privileged material is involuntary, we will find the privilege preserved if the privilege holder has made efforts ‘reasonably designed’ to protect and preserve the privilege.”<sup>65</sup>

The *Lavin* case, which the *Hamilton* court referenced,<sup>66</sup> dealt with marital communications over the phone while the husband was at work.<sup>67</sup> The Securities and Exchange Commission (SEC) issued a subpoena to Mr. Lavin regarding an ongoing investigation of fraudulent sales practices at the bank where Lavin worked.<sup>68</sup> Lavin was not aware that telephone conversations in his office were taped and seven conversations between him and his wife were recorded.<sup>69</sup> The district court ruled that the marital communications privilege did not protect the conversations because the privilege had been waived.<sup>70</sup> The D.C. Circuit reversed that ruling and remanded, holding that the Lavins had done all they could reasonably be expected to do to protect the privilege.<sup>71</sup>

The court noted that even though Mr. Lavin had learned of his line being recorded five to seven months prior, he was not obligated to recollect every conversation he had with his wife during that time and “assert the privilege . . . anticipating production requests by third parties.”<sup>72</sup> Moreover, the court reasoned that even if Lavin could have reasonably foreseen an investigation, there is no case which requires a privilege holder to preemptively “strike” without a “concrete threat of disclosure.”<sup>73</sup> Finally, “The inadvisability of adopting an affirmative duty is clear given the difficulties that arise in determining what would constitute sufficient preemptive measures . . . . Rules of privilege are designed to afford its holder the right to protect himself or herself against the use of privileged materials in legal proceedings . . . .”<sup>74</sup> Put simply, the court determined the Lavins had asserted the privilege as soon as there was known potential disclosure to a third party and this assertion was adequate protection to maintain the privilege.<sup>75</sup>

In the present case, before the use policy was instituted, Hamilton stored his personal emails in folders labeled “personal” and later organized them by month

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64. *Id.* at 929 (quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)) (internal quotation marks omitted).

65. *Id.* at 930 (quoting *United States v. De La Jara*, 973 F.2d 746, 750 (9th Cir. 1992)).

66. *See Hamilton*, 701 F.3d at 409.

67. *See Lavin*, 111 F.3d at 923.

68. *Id.*

69. *See id.* at 923–24.

70. *See id.* at 929 (citing *SEC v. Lavin*, 937 F. Supp. 23, 30 (D.D.C. 1996), *rev'd*, 111 F.3d 921).

71. *Id.* at 930, 933.

72. *Id.* at 931.

73. *Id.*

74. *Id.*

75. *See id.* at 930.

and year after the use policy was instituted.<sup>76</sup> According to the court, Hamilton did not do *anything* after he was on notice of the use policy to protect his emails from being disclosed.<sup>77</sup> Thus, *Hamilton* arguably establishes an affirmative duty on privilege holders to take action to protect privileged communications. In particular, the court, at oral argument, was interested in why Hamilton did not delete the emails once the use policy went into effect.<sup>78</sup> Ultimately, the court emphasized the fact that he had not tried to delete the emails and determined this fact meant he had not done enough to protect his privileged communications.<sup>79</sup> As the *Lavin* court cautioned,<sup>80</sup> the question now is: What will be sufficient to protect a privileged communication once it already exists in written or digital form? The *Hamilton* court seemed to suggest that at least attempting to delete the emails would have made a difference;<sup>81</sup> here, this would have required Hamilton to either spend time going through each email written prior to the policy, or recalling, finding, and deleting specific emails that he intended to be confidential.

#### V. PROTECTING THE “CROWN JEWELS” AT WORK: WHAT *UNITED STATES V. HAMILTON* MEANS FOR EMPLOYEES AND EMPLOYERS

*Hamilton* may serve as a cautionary tale for both employees and employers.<sup>82</sup> First, this case highlights what commentators have noted is a tremendous knowledge gap between employees and employers.<sup>83</sup> Despite use policies and acknowledgement of these policies, many employees continue to commingle personal and business matters from their work emails and computers.<sup>84</sup> When a policy disclaims any expectation of privacy for the employee, the employee should acknowledge this disclaimer, and the information should be provided to the employee in multiple ways as the school system did in this case.<sup>85</sup> Employers should also consider ways to mitigate the knowledge gap by adopting clear, easy to understand use policies and holding training sessions that outline the practical implications of such policies.

Second, the *Hamilton* decision may comfort employers that have not instituted a use policy because, according to this opinion, creating or updating a

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76. Oral Argument at 21:30, *United States v. Hamilton*, 701 F.3d 404 (2012) (No. 11-4847), available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/11-4847-20121024.mp3>.

77. See *Hamilton*, 701 F.3d at 408.

78. See Oral Argument at 32:10, *Hamilton*, 701 F.3d 404 (No. 11-4847), available at <http://coop.ca4.uscourts.gov/OAarchive/mp3/11-4847-20121024.mp3>.

79. See *Hamilton*, 701 F.3d at 408.

80. See *Lavin*, 111 F.3d at 931.

81. See *Hamilton*, 701 F.3d at 408.

82. It also serves as a warning that legislators should avoid taking bribes, or at least the appearance of impropriety, lest they also potentially face a similar nine-year prison sentence.

83. See Losey, *supra* note 56, at 1201.

84. See *id.*

85. See *Hamilton*, 701 F.3d at 408.



use policy in the future may protect employees' actions taken in the past.<sup>86</sup> While the old axiom still rings true that "retroactivity is not favored in the law,"<sup>87</sup> companies enjoy the flexibility to alter their use policies and provide some protection in the future for communications that may have taken place in the past. The school system's policy explicitly notified employees that data *stored* on the computer was subject to monitoring.<sup>88</sup> Without such notice, it is possible that the outcome here would have been different. On the other hand, employees should be cautioned that an expectation of privacy may still be forfeited if they do not do enough to protect those communications, and changes in workplace use policies could have real effects on previous communications.

Finally, the *Hamilton* court noted that the surest way to avoid privileged communication problems of the sort highlighted in the appeal is to refrain from communicating with one's spouse via work email.<sup>89</sup> However, the court also seemed to recognize that work demands in our technology-driven world are moving closer to twenty-four-hour-a-day, seven-day-a-week accessibility to work.<sup>90</sup> Employees, especially those who are unaware of what they are risking, put too much at stake when they try to have confidential communication at work.<sup>91</sup> However, whether this wall of separation between work and personal confidential communications will withstand further scrutiny remains to be seen. There are legitimate questions to be asked about whether this separation is realistic given today's technology and work demands.<sup>92</sup> Until the law and the workplace provide clearer boundaries on how to successfully integrate personal life with work life without putting privilege at risk, pillow talk between spouses is best left for the pillow.

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86. *See id.*

87. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)) (internal quotation marks omitted).

88. *See* Brief of the United States, *supra* note 16, at 38.

89. *See Hamilton*, 701 F.3d at 408.

90. *See id.* ("In an era in which email plays a ubiquitous role in daily communications, these arguments caution against lightly finding waiver of marital privilege by email usage.")

91. *See, e.g.,* Michael Z. Green, *Against Employer Dumpster-Diving for Email*, 64 S.C. L. REV. 323, 365 (2012) (discussing the how attorney–client communication via email is changing attorney–client privilege implications with regard to reasonable expectations of privacy).

92. *See, e.g.,* *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (noting that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties . . . This approach is ill suited to the digital age . . .").

