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THE PROFESSIONAL RESPONSIBILITIES OF THE PUBLIC OFFICIAL'S LAWYER: A CASE STUDY FROM THE CLINTON ERA

William H. Simon*

No one has sought more persistently to focus our attention on the relation of professional duty and personal integrity than Thomas Shaffer. Shaffer's work is the most powerful defense of integrity in the legal ethics literature, and it offers the most useful set of strategies for vindicating integrity in law practice. This Essay was conceived in the spirit of Shaffer's distinctive preoccupations and commitments, and it is a pleasure to present it in an issue dedicated to him.

When Bernard Nussbaum was forced to resign as White House Counsel in March 1994, he described himself as a martyr to professional ethics.¹ He blamed the pressure for his resignation on people "who do not understand, nor wish to understand the role and obligations of a lawyer."² According to Nussbaum, the point that eluded his critics was that the duties of lawyers for public officials are the same as those of lawyers for private citizens. "All lawyers, whether they are White House lawyers, or private lawyers, or Justice Department lawyers, are bound by the same ethical obligations," he said.³

I want to assess this claim by exploring two important features of the role of counsel for public officials that bear on ethical appraisal. The first arises from the fact that a public official client occupies an

* Stephen and Barbara Friedman, Visiting Professor of Law, Columbia University; Gertrude and William Saunders Professor of Law, Stanford University. I gave a version of this Essay as the Blank Lecture at Pace University School of Law on October 11, 2001. Thanks to David Cohen, Steve Goldberg, and the Pace faculty for encouragement and stimulating discussion.

1 See *Text of [Nussbaum's] Resignation Letter and Clinton Reply*, N.Y. TIMES, Mar. 6, 1994, § 1, at 23.

2 *Id.*

3 *Investigation of Whitewater Development Corporation and Related Matters: Hearings Before the Spec. Comm. To Investigate Whitewater Dev. Corp. and Related Matters of the Senate Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 1203 (1995) [hereinafter *Hearings*] (testimony of Bernard Nussbaum, White House Counsel). Nussbaum testified on August 9 and 10, 1995.

institutional role entailing public duties that potentially conflict with her individual interests. The second feature arises from the fact that a public official sometimes has a selfish interest in avoiding responsibility for her decisions and sometimes finds lawyers distinctly useful for this purpose.

To be sure, neither condition is unique to public clients. Many private clients are organizations, and lawyers who represent them must distinguish between the organizational client and the officers with whom they deal directly. And these officers may be inclined to shift responsibility for difficult decisions to lawyers. But the relatively higher visibility of public decisions and the political nature of the processes through which these officials are accountable make the frequency and intensity of these issues greater in the public sphere. Whether we call these distinctions matters of kind or of degree, they are worth considering. Insensitivity to them can lead to missing the ethical stakes in public representation.

This danger is illustrated by one of the episodes that led to Nussbaum's resignation—his response to the FBI's request to search the office of White House Associate Counsel Vincent Foster after Foster was found shot to death in a Washington park. Nussbaum's decision was disputed by Deputy Attorney General Philip Heymann⁴ and was then the subject of a hearing before the Senate Whitewater Committee.⁵ At the hearing, Nussbaum argued that his conduct was compelled by the *Model Code of Professional Responsibility* (Model Code).⁶ He invoked the Model Code in reverential tones and at one point waved a copy of it before the Committee.⁷ In fact, Nussbaum's arguments were both wrong and inconsistent with the conduct he was trying to defend. No one noticed; even the hostile Republicans on the committee failed to bring out these failings. Yet, the failings were fundamental and bore significantly on the issues of Presidential accountability with which the Committee was concerned. Exploring them will give substance to the claim that there are differences in public representation worth bearing in mind.

4 *Id.* at 762 (testimony of Philip B. Heymann, Former Deputy Attorney General).

5 *Id.* at 4 (opening statement of Chairman Alfonse M. D'Amato).

6 MODEL CODE OF PROF'L RESPONSIBILITY (1980).

7 See *Hearings*, *supra* note 3, at 1207 (testimony of Nussbaum); see also *infra* notes 73–74 and accompanying text.

I. THE SEARCH OF VINCENT FOSTER'S OFFICE

On July 20, 1993, Vincent Foster was found dead in a Washington park, apparently killed by the gun that was found lying next to him.⁸ Foster was Deputy White House Counsel and a longtime personal friend of both President Clinton and Hillary Clinton.⁹ Because of the location of the body, the Park Police undertook to investigate, and asked permission to search Foster's office in the White House to look for "a suicide note . . . an extortion note . . . or some other such document."¹⁰ As White House Counsel, Nussbaum phoned Deputy Attorney General Philip Heymann to ask the Department of Justice (DOJ) to coordinate the investigation.¹¹ Heymann designated two DOJ lawyers to do so.¹² Nussbaum agreed to meet the lawyers in Foster's office the following day.¹³

When the DOJ lawyers arrived on June 22, to their surprise Nussbaum declined to allow them to examine any documents in Foster's office.¹⁴ They had thought that Nussbaum had agreed previously with Heymann on a procedure that would permit limited examination: the DOJ lawyers would inspect the first page of each document, put aside any documents that seemed relevant to the investigation, and after Nussbaum had had an opportunity to consider whether to assert any kind of privilege with respect to the documents, would examine all except those as to which privilege had been asserted.¹⁵ However, Nussbaum declined to follow this procedure.¹⁶ Instead, he insisted that only he examine the documents; as he did so, he would describe to the DOJ lawyers the nature of the documents as they appeared from the first page or so, and would put aside any documents the DOJ lawyers requested.¹⁷

The DOJ lawyers were sufficiently disturbed by Nussbaum's position that they phoned Heymann, who then spoke to Nussbaum and told him that, in a phrase that was later widely reported, he was mak-

8 The factual account is based on Nussbaum's and Heymann's testimony at the hearings before the Senate Whitewater Committee. See *Hearings*, *supra* note 3, at 762-831 (testimony of Heymann); *id.* at 1201-400 (testimony of Nussbaum).

9 *Id.* at 3 (opening statement of Chairman D'Amato).

10 *Id.* at 1231 (testimony of Nussbaum).

11 *Id.* at 1215 (testimony of Nussbaum).

12 *Id.* at 766 (testimony of Heymann).

13 *Id.* at 1206 (testimony of Nussbaum).

14 *Id.* at 768-69 (testimony of Heymann).

15 *Id.* at 767-68 (testimony of Heymann).

16 *Id.* at 769 (testimony of Heymann).

17 *Id.* at 1236, 1248 (testimony of Nussbaum).

ing "a terrible mistake."¹⁸ Heymann was under the impression that Nussbaum had agreed to reconsider and would phone him before going ahead; he intended to order his lawyers not to participate in the search if Nussbaum remained adamant.¹⁹ Nussbaum, not sharing this interpretation, proceeded to examine and describe the documents himself as he had proposed, to Heymann's subsequent surprise and annoyance.²⁰

Nussbaum characterized his approach as a "middle ground" between the one the DOJ wanted and the one urged on him by some White House staffers, who thought that the DOJ should be given no access to any documents until they first had been fully inventoried by White House lawyers.²¹ During the course of the search, the DOJ lawyers identified several documents as potentially relevant to their investigation²² and, after a brief delay, all of them were turned over.²³

As Heymann subsequently explained it, the concern that prompted his proposal for more active DOJ participation in the search was this:

The federal law enforcement authorities have a responsibility to assure a process that credibly promises objectivity, when high officials are part of the investigation. To keep this promise of objectivity, even in a case that showed all the early signs of being a suicide, the White House counsel could not be the one to decide what documents would be shown to the investigators and which would be retained or distributed as irrelevant to the investigation or as privileged despite potential usefulness to the investigation.²⁴

Referring to his experience as a Watergate prosecutor and in other investigations of executive branch officials, Heymann suggested that White House personnel were likely either to have, or to be per-

18 See, e.g., Stephen Labaton, *White House Counsel Faulted in Inquiry on Aide's Suicide*, N.Y. TIMES, July 21, 1995, at A1; Stephen Labaton, *Former Presidential Counsel Cast as Whitewater's Heavy*, N.Y. TIMES, July 31, 1995, at A1; Timothy J. McNulty, *White House Warned on Foster Probe; Investigation Curbs 'A Terrible Mistake,' Ex-Justice Aide Says*, CHI. TRIB., Aug. 3, 1995, § 1, at 12; Susan Schmidt, *Lawyer Says Hillary Clinton Urged Search Limit; Whitewater Panel Is Told of Concern About Access to Foster's Papers*, WASH. POST, July 23, 1995, at A4. The Hearing testimony indicates that Heymann was paraphrasing his own words. Heymann testified, "Please don't assume that what I now paraphrase would be the words I actually used. This is 740 days ago and it would be quite unreliable to thing they're the exact words." *Hearings*, *supra* note 3, at 769.

19 *Hearings*, *supra* note 3, at 769 (testimony of Heymann).

20 *Id.* at 770 (testimony of Heymann).

21 *Id.* at 1207-08 (testimony of Nussbaum).

22 *Id.* at 1208.

23 *Id.*

24 *Id.* at 763 (testimony of Heymann). Heymann testified on August 2, 1995. *Id.*

ceived to have, a bias in favor of confidentiality interests at the expense of law enforcement interests.²⁵ Thus, a procedure in which only White House insiders looked at the documents and in which investigators were dependent on an insider's characterization of the documents would have less "credibility" than one in which investigators were more active. Nussbaum's procedure, he thought, was more likely to leave doubts that relevant documents may have been withheld because they reflected unfavorably on the President.²⁶

The DOJ ultimately concluded that Foster's death was a suicide and that there was no indication that it was a consequence of illegal activity such as extortion.²⁷ Today, no one in the mainstream disputes this conclusion, and those who do dispute it would not have been reassured if Heymann's proposed procedure had been accepted. In the short run, however, Nussbaum's refusal contributed strikingly to concerns about the "credibility" of the investigations. These concerns were intensified by three subsequent developments.

First, a few days after the initial search, another White House lawyer discovered an apparent suicide note in the briefcase in Foster's office.²⁸ Nussbaum had looked in the briefcase in his initial search but had missed the note.²⁹ Nussbaum's failure delayed the discovery of the note and, at least temporarily, raised questions about the note's authenticity.

Second, in the months following Foster's death, the Clintons' investment in an Arkansas real estate project known as Whitewater, which was under investigation by the banking authorities at the time of Foster's death, became headline news. There was a file on Whitewater, as well as others on the Clinton's personal finances, among those in Foster's office.³⁰ Nussbaum testified that he was not aware of Whitewater at the time (though apparently he had been sent a memo about it by Treasury Department official Robert Altman).³¹ Moreover, Heymann testified that the DOJ lawyers did not have Whitewater in mind.³² Nevertheless, once Whitewater became a prominent issue,

25 See *id.* at 762-63.

26 See *id.* at 763, 781 (testimony of Heymann).

27 See Michael Tackett & Mitcehl Locin, *Clinton Counsel's Final Note Blasts D.C.*, CHI. TRIB., Aug. 11, 1993, § 1, at 1.

28 *Hearings*, *supra* note 3, at 1211 (testimony of Nussbaum).

29 *Id.*

30 *Id.* at 1209 (testimony of Nussbaum).

31 See, e.g., William Safire, *Foster's Ghost*, N.Y. TIMES, Jan. 6, 1994, at A21.

32 See *Hearings*, *supra* note 3, at 786 (testimony of Heymann).

speculation that Nussbaum was trying to preclude access to inculpatory material on this subject became rife.³³

Third, following the initial examination, Nussbaum turned over the files from Foster's office that he deemed to concern the Clintons' personal affairs to Maggie Williams, the First Lady's chief of staff, for transmittal to the Clintons' personal lawyers at Williams & Connolly.³⁴ Some of these files—pertaining to Hillary Clinton's work at the Rose law firm—were later sought by the Senate Whitewater Committee, but turned out to be lost.³⁵ The files were later found in the White House, but their temporary loss fueled suspicions about a cover-up.³⁶

This aftermath of confusion and suspicion, culminating in Nussbaum's resignation and the Senate inquiry into the search, seems a stunning vindication of Heymann's concern that the "credibility" of the investigation would be compromised if Nussbaum insisted on controlling the search. To be sure, some part of Heymann's prophecy may have been self-fulfilling. Public concerns were probably aroused simply by virtue of the fact that an important federal official suggested Nussbaum's procedure was a mistake, and perhaps executed in a peremptory and devious manner.

But Heymann's basic point was plausible. In balancing the interest in executive confidentiality against the need for law enforcement information, White House insiders are likely to be biased in favor of confidentiality. They are naturally focused on protecting the President and tend to be suspicious of career government officials. Nussbaum's avowed preoccupation with protecting the President's confidences to the same extent as a private client might seem to confirm Heymann's point.

Nussbaum, however, refused to concede that there would have been any plausibility to public intuition that DOJ lawyers would be less likely to shortchange law enforcement interests or overweigh executive confidentiality ones than White House lawyers:

That notion is foreign to our system of civil and criminal justice. It is contrary to how our system functions.

All lawyers, whether they are White House lawyers, private lawyers, or Justice Department lawyers, are bound by the same ethical obligations. No one of us stands on a higher pedestal than the other.

33 See, e.g., *id.* at 1202, 1204 (testimony of Nussbaum) (denying widespread suspicion).

34 *Id.* at 1210.

35 See Stephen Labaton, *Senate Committee Says Files on Whitewater Are Missing*, N.Y. TIMES, Dec. 19, 1995, at A1.

36 See Stephen Labaton, *Elusive Papers of Law Firm Are Found at White House*, N.Y. TIMES, Jan. 6, 1996, at 1.

No one of us is more or less of a player with a stake than the other. No one of us is more or less deserving of trust than the other. In our system of justice, tens of thousands of lawyers each day act as referees under strict ethical rules when it comes to reviewing and producing documents. This is how our system functions.³⁷

The latter point was a reference to the lawyer's role in responding to subpoenas or civil discovery requests for documents. When investigators or an adverse party properly demand production of documents from the client, the lawyer is responsible for identifying and producing the documents.³⁸

Nussbaum's response here was both implausible and beside the point. It was implausible to the extent that it claimed that professional responsibility norms are incompatible with the idea that lawyers' judgments are likely to be biased in favor of their clients' interests. Far from denying this point, professional responsibility doctrine insists on it and has elaborated a whole body of "conflict of interest" norms around it. The rules limit the lawyer's ability to make commitments to multiple people with differing interests because they assume lawyers will have a natural and appropriate tendency to identify strongly with a client's interests. If lawyers are charged with producing documents properly demanded from their clients, it is not because we think their judgments are just as adequate to protect the interests of the discovering party as that party's own lawyer. It is because any other procedure would jeopardize the client's privacy interest in materials he had no obligation to turn over.

Nussbaum's argument was beside the point because Heymann had framed his point in terms of political, not professional, responsibility. He recognized that the investigators had no basis for a subpoena or a search warrant. On the other hand, he also assumed that the White House had some public responsibility to cooperate in an investigation of Foster's death and that this responsibility would be enforced by political pressures. His proposal was designed to increase popular confidence in the process.

Treated as a claim about popular perception, Heymann's point was both patently plausible and substantiated by subsequent events. Unable to deny this fact in the midst of a hearing, the very existence of which confirmed it, Nussbaum sought to re-frame the issue as a matter of professional ethics. I turn now to two issues that arise when we frame the matter this way: first, the distinction between Nussbaum's institutional client and the individual incumbents; and sec-

37 *Hearings, supra* note 3, at 1203 (testimony of Nussbaum).

38 *See* FED. R. CIV. P. 34.

ond, the allocation of responsibility between lawyer and client for making decisions about the representation.

II. INCUMBENT AND INSTITUTION

"It was my duty to preserve the right of the White House . . . to assert executive privilege, attorney-client privilege, and work product privilege," Nussbaum said, explaining his refusal to conduct the search in the manner proposed by the DOJ.³⁹ He made no further mention of the work product privilege and never referred to any litigation-related materials in Foster's office that might have qualified for that privilege. (It seems doubtful that Whitewater was thought of as a litigation matter at this time; in any event, Nussbaum was clear that he was not thinking about it at all.⁴⁰) With respect to executive privilege, Nussbaum mentioned that files from the FBI background investigations of Ruth Bader Ginsburg and Stephen Breyer in connection with their nominations to the Supreme Court were in Foster's office.⁴¹ He also suggested, without elaboration, that there might be "national security" materials there.⁴² These sound like plausible candidates for executive privilege, but they do not seem a strong basis for Nussbaum's opposition to the search. Many DOJ people had already participated in the background checks, and it seems implausible that any national security materials in the White House counsel's office would be so sensitive that disclosure to the DOJ would involve a serious risk.

However, the most important point is that, even assuming there were materials protected by executive privilege, the search proposed by Heymann was not much of a threat to their confidentiality. The DOJ lawyers asked only to examine documents sufficiently to determine their general nature, and it should not have taken more than a cursory look to identify and exclude the kind of materials that Nussbaum mentioned. Allowing the investigators a cursory look would not have affected the ability to assert executive privilege with respect to these materials later. No one suggests that executive privilege is inadvertently waived by limited voluntary disclosure.

There is, however, such an inadvertent waiver doctrine with respect to the attorney-client privilege, and Nussbaum's defense depended largely on that privilege and that doctrine.⁴³ Evidence law holds that voluntary disclosure of part of a protected communication

39 *Hearings*, *supra* note 3, at 1202 (testimony of Nussbaum).

40 *See id.* at 1204 (testimony of Nussbaum).

41 *Id.* at 1202, 1206 (testimony of Nussbaum).

42 *Id.* at 1206.

43 *See* WEINSTEIN'S FEDERAL EVIDENCE §§ 503.40, 511.04[5] (2d ed. 2001).

to a third party (someone not covered by the privilege) can waive the privilege with respect to the entire communication.⁴⁴ Nussbaum specifically mentioned three types of materials in Foster's office as to which the most plausible privilege claim would have been attorney-client privilege. There were files concerning the President and First Lady's income taxes, compliance with public official financial disclosure laws, and Whitewater.⁴⁵

When Nussbaum raised the waiver concern on July 22, Heymann suggested that the DOJ and the White House could moot the issue by stipulating that no privileges had been waived by the search.⁴⁶ Nussbaum told the Senate Committee that Heymann's suggestion showed a naiveté that reflected his insufficient exposure to private practice. "Any lawyer in private practice knows that agreements [about waiver] will not stand up," he said.⁴⁷ Nussbaum's point about waiver agreements was substantial,⁴⁸ but in retrospect it appears that his own private practice orientation had blinded him to a much larger issue—whether and to what extent a federal official has any attorney-client privilege that can be asserted against the DOJ.

In fact, it now seems clear that there was nothing to waive. In two Whitewater-related cases decided after the incident over Foster's papers, the Eighth and D.C. Circuits held that White House officials had no attorney-client privilege against a federal prosecutor's grand jury subpoena.⁴⁹ Indeed, the subpoena in the Eighth Circuit case reached notes of White House lawyers' conversations with Hillary Clinton about Foster's death.⁵⁰ The circuit court opinions differ, and they are controversial, but their holdings are supported by powerful logic.

Nussbaum's largest mistake was not to assume that confidentiality was as important in the public as in the private realm, but to ignore that we protect confidentiality even in the private sphere in a very limited way. "[T]he guarantee of privacy encourages people . . . to be open and honest with their advisors . . . ensur[ing] that clients get the legal counsel they need to solve their problems and obey the law," said

44 *Id.*

45 *Hearings, supra* note 3, at 1209 (testimony of Nussbaum).

46 *See id.* at 793 (testimony of Heymann).

47 *Id.* at 1233 (testimony of Nussbaum).

48 *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427–28 (3d Cir. 1991) (noting that voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications).

49 *See In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998); *In re Grand Jury Subpoena*, 112 F.3d 910, 921 (8th Cir. 1997), *cert. denied*, 525 U.S. 1105 (1997).

50 *Grand Jury Subpoena*, 112 F.3d at 914.

Nussbaum.⁵¹ But in the private sphere clients are often organizations, and organizations consult lawyers through agents who typically have no privilege themselves and no expectation of confidentiality vis-à-vis their principals. The organizational client's privilege belongs to the organization, not the agents.⁵² This means that when agents disclose to the organization's lawyers past or contemplated wrongdoing in which they are personally implicated, they cannot be assured either that the information will not be disclosed to others in the organization or that the organization will not disclose it to outsiders, including prosecutors. Although we tend to think of this situation as an exception to the general rule of strict confidentiality, in business practice, where most clients are organizations, it is really strict confidentiality that is the exception.

Now the limitation of confidentiality in the organizational context represents an uncompromising repudiation of the conventional rationales for confidentiality. If confidentiality really deterred unlawful conduct and increased the vindication of valid claims, it would be in the interest of both the organizational client and larger society to treat disclosures of an organization's agents to its lawyers as privileged as against the organization, as well as outsiders. But we quite emphatically do not do that.

Why not? I am unaware of any articulated explanation. I cannot exclude the possibility that the incentives of individuals hypothesized by the conventional rationales might operate differently in the organizational than in the individual context, but it seems unlikely. I think a more plausible explanation is that confidentiality sometimes requires lawyers to remain passive in the face of serious harm or injustice and that this condition is more tolerable when the harm or injustice befalls a stranger rather than when it befalls the client. Lawyers who support strong confidentiality norms tend to view loyalty to clients as the most important value underlying the lawyering role. To apply the confidentiality norm in ways that preclude lawyers from protecting the client would be personally degrading to the lawyer and corrosive of the sense of pride in the role that motivates ethical behavior generally.

No doubt the denial of confidentiality to the agent discourages some communications, and, perhaps, this reduces the ability of lawyers to prevent lawlessness, but competing policies favor denying a

51 Bernard W. Nussbaum, *The Role of a White House Lawyer*, N.Y. L.J., Aug. 7, 1995, at 2.

52 See MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1980) ("A lawyer employed or retained by a corporation . . . owes his allegiance to the entity and not to a . . . person connected with the entity.").

privilege to the agent. The most important competing policy is loyalty to the institution. It would corrode the lawyer's fiduciary position to require her to remain silent while in possession of knowledge of importance to the client.

Thus, the key point was that Nussbaum's client was an institution. But the question remains: what institution? Nussbaum's answer to the Senate Committee was clear. He conceded that he did not personally represent Bill Clinton. Rather, Nussbaum said, he represented the "President in his official capacity."⁵³ This view implied that the DOJ was a separate institution, a stranger to this attorney-client relation and that the attorney-client privilege should be available against it. Since the Presidency is a one-officer institution, the answer also has the troubling implication that the President has to be the judge in his own case. In theory, he would have to decide whether it is compatible with the public institutional interests of the government or nation to assert the privilege in a situation where he had a personal interest in asserting it.

But the circuit courts took Nussbaum's client to be the "Executive Branch."⁵⁴ The Constitution creates a single executive branch under the control of the President. The DOJ may be a distinct administrative unit, but for law enforcement purposes, it is not separate from the Presidency. If the DOJ is not separate, the President has no attorney-client privilege that can be asserted against the DOJ.

If we look beyond formal considerations to functional considerations, the question arises whether it is compatible with the constitutional idea of a single executive to permit a DOJ official to seek information over the objection of the President or his lawyer. The answer seems to be yes. Although not everyone is happy about it,⁵⁵ the Supreme Court has often upheld measures fragmenting executive power.⁵⁶ The two cases involving special or Independent Counsel—*United States v. Nixon*⁵⁷ and *Morrison v. Olson*⁵⁸—exemplify the practice

53 *Hearings*, *supra* note 3, at 1253–56 (testimony of Nussbaum).

54 This is clear in the Eighth Circuit opinion and implicit in the opinion from the D.C. Circuit. For an interpretation of the opinions and a compelling argument for their holdings, see generally Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998).

55 See, e.g., *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (criticizing the fragmentation of Executive Power).

56 See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Morrison*, 487 U.S. 654.

57 418 U.S. 683.

58 487 U.S. 654; see also Itzhak Zamir, *Administrative Control of Administrative Action: The Exceptions*, 51 N.Y.U. L. REV. 587, 589–99 (1976) (discussing the statutory and judicial sources of subordinate independence). Whether the Supreme Court's acceptance of executive fragmentation is consistent with constitutional text or original

with respect to federal law enforcement activity. Limitations on the President's control have most often arisen through imposition by Congress. Thus, *Morrison* upheld provisions of the independent counsel statute permitting judicial appointment of an independent counsel with extensive immunity from control by the rest of the executive branch.⁵⁹ Congress has also mandated that all federal employees report knowledge of criminal activity by federal officials to the Attorney General, a provision understood to apply to federal lawyers, including White House Counsel.⁶⁰

Another way in which limitations on the President's power can arise is through the President's own actions. The President can limit his power through regulation, as President Nixon did with respect to the Watergate Special Prosecutor.⁶¹ In the *Nixon* case, the Court treated the President as bound by his own regulation permitting the prosecutor to seek enforcement of subpoenas against other executive officers.⁶²

Constitutional doctrine thus portrays a single, but moderately fragmented, executive. There are limitations on the President's powers to control his subordinates in many areas, and law enforcement is one of the areas in which such limitations have traditionally been most prominent.⁶³ Nevertheless, the limitations often leave the President with a good deal of control; they attenuate rather than eliminate his power. The President can exercise control through general regu-

intent is hotly debated. Compare Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing in the affirmative), with Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing in the negative).

59 See *Morrison*, 487 U.S. at 673-77, 685-96.

60 See 28 U.S.C. § 535 (1994); *In re Grand Jury Subpoena*, 112 F.3d 910, 920 (8th Cir. 1997), cert denied, 525 U.S. 1105 (1997) (interpreting § 535 to apply to White House Counsel).

As the House Committee Report accompanying section 535 explains, "[t]he purpose" of the provision is to "require the reporting by 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." Section 535(b) suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes.

In re Lindsey, 148 F.3d 1100, 1110 (D.C. Cir. 1998) (internal citation omitted).

61 See *Nixon*, 418 U.S. at 694-96.

62 *Id.*

63 See Lessig & Sunstein, *supra* note 58, at 14-22, 70-71, 108-10. But see Calabresi & Prakash, *supra* note 58, at 558-611.

lation. Often, he can even remove or re-assign a noncompliant official. What he most often lacks is a power to direct specific action.⁶⁴

The President's indirect powers of regulation and removal will usually be enough to accomplish any purpose he might have, even where he cannot direct action. Nevertheless, the limitation arguably serves a purpose. It requires him to act in a way that is likely to attract attention and perhaps be perceived as disruptive. As is sometimes said, the President has to pay a "price" in this circumstance, a higher price than he would incur if he could act by specific command. The potential magnitude of the price can be gauged by the outcry when President Nixon fired his first special prosecutor, Archibald Cox, and by the fact that he never rescinded the executive regulation under which Cox sought the White House tapes, though this might have ended Cox's effort.⁶⁵

The implication of the moderately fragmented view of the executive is that the President can preserve confidentiality of communications with White House Counsel against a federal investigation, but only by the costly, salient exercise of removal power against the investigator, rather than through the low-cost exercise of attorney-client privilege.

This resolution may be a plausible compromise. The limits on the privilege may inhibit the official's willingness to seek legal advice. But if confidentiality is sufficiently important, the President can obtain it by paying the "price" of public visibility. This arguably contributes to some public accountability without entirely abrogating confidentiality. It seems undesirable to let the President assert confidentiality without cost in a situation where he may have a strong individual conflict of interest with respect to the decision whether disclosure is in the public interest.⁶⁶

64 See *Myers v. United States*, 272 U.S. 52, 135 (1926); Zamir, *supra* note 58, at 601–19. On the extent to which the federal "whistleblower" statute limits executive power to dismiss or re-assign lawyers for breaches of confidence or other recalcitrance, see Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 306–15 (1991).

65 BARRY SUSSMAN, *THE GREAT COVERUP: NIXON AND THE SCANDAL OF WATERGATE* 274–77 (1974).

66 The President can also get strong confidentiality by consulting a private lawyer. With respect to matters such as tax returns and financial disclosure, this confidentiality seems entirely appropriate, and as a result of the Nussbaum episode, Presidents are likely to restrict consultations over personal matters to private counsel. To the extent that limited confidentiality in the public sphere induced officials to seek only private legal advice about *public matters*, there would be a substantial public concern. Private lawyers may be less qualified to advise on public matters than public lawyers, and the public would not get the benefit of the limitations on confidentiality in the public

There is a further functional concern raised by confidentiality. A key purpose of confidentiality in the organizational context is to encourage organizations to monitor their agents.⁶⁷ The rationale for confidentiality in the individual context focuses on the person who fears that conduct in which he has engaged or plans to engage may be illegal. Without some assurance of confidentiality, she will not consult a lawyer. The organizational context, however, also involves people who have no such fears about themselves but may have them about their subordinates. They will be less inclined to investigate such matters if the information will be available for use by outsiders against the corporation. Thus, the organizational attorney-client privilege encourages such people to have lawyers investigate possible wrongdoing by insiders.

In our context, there is a trade-off. Treating the White House as a client might increase the willingness of the President to investigate internal wrongdoing. On the other hand, it impedes the ability of the DOJ to do so. Thus, how we delineate the privilege might be influenced by which agency we think would be more effective at such investigation. My guess is that most people would think that the DOJ would be more effective. The White House is not equipped for much investigation of any kind. There was never any question that it would conduct the investigation of Foster's death. And when it comes to the type of investigation most relevant to the privilege doctrine—investigation of internal abuses—history does not encourage much confidence in the ability and willingness of the White House to investigate such matters.

After the circuit court decisions, the situation appears thus: federal officials have no attorney-client privilege that can be asserted against federal investigators with respect to consultations with government lawyers. The federal government as a whole has an attorney-client privilege that can be asserted against non-federal litigants. Paula Jones, for example, could not have deposed Nussbaum in her lawsuit on his legal consultations with the President. In the case of the President, and perhaps other officials with authority over the investigating officials, confidentiality can be preserved through control over the investigators, ultimately by re-assignment or removal. But the lat-

sphere. However, it seems unlikely that this danger is great. Officials have a duty to seek legal advice over many matters, and their failure to seek it from the public lawyer with direct responsibility to provide it would itself send a signal that often would be costly.

67 See *Upjohn v. United States*, 449 U.S. 383, 390 (1981).

ter entails moves that are likely to be perceived as dramatic and disruptive.

Thus, the government lawyer does resemble the private lawyer, but the private institutional lawyer, not the private lawyer for an individual. This distinction means that the duty of loyalty often requires a judgment, not just about client interests but about client identity. In particular, it requires an assessment of the incumbent's position within the structure of authority and responsibility. The lawyer has to consider, for example, whether a particular course of action that is open to the organization as a whole is within the authority of the incumbent and will sometimes have to insist that the incumbent seek authorization from superior constituents. Nussbaum's client was the highest authority in the executive branch; but even here, the failure to consider the client's position in the authority structure led Nussbaum to over-estimate the degree of confidentiality that his client could claim. To be sure, the limitations on government attorney-client privilege were less clear in 1993 than they are now, but it seems likely that Nussbaum's failure to appreciate the institutional dimension of his representation biased his consideration of this issue.⁶⁸

Office also entails responsibility, and responsibility bears on the scope of advice an officer should receive. This connection suggests that confidentiality was not the only interest relevant to White House Counsel's duties. The concerns urged by Heymann that public confidence might be enhanced by loosening White House control over this phase of the investigation were interests shared by Nussbaum's institutional client.

There is, moreover, a sense in which the public official client might be considered different, for professional responsibility purposes, from even the private institutional client. The principle of moderate fragmentation in the executive branch has no clear counterpart in private organizations. Power is often fragmented in private organizations, especially large ones, but this is primarily to take account of the interests of diverse constituencies. In an organization with a single homogeneous constituency—say, a one-person business

68 Stephen Gillers's claim that "[e]verything Mrs. Clinton learned as a Yale law student more than two decades ago would have assured her that the lawyer-client privilege protected" her conversations with White House lawyers from discovery by the Independent Counsel was preposterous. Stephen Gillers, *Hillary Clinton Loses Her Rights*, N.Y. TIMES, May 4, 1997, § 4, at 15. It appears from the Eighth Circuit opinion that the First Lady's lawyers were able to cite only two cases in support of her position, both from lower courts and decided after she graduated from law school. *In re Grand Jury Subpoena*, 112 F.3d 910, 916 (8th Cir. 1997), cert. denied, 525 U.S. 1105 (1997). But the principles that underlie the denial of privilege are longstanding.

corporation—a unitary governance structure would present no problem.

But the executive branch is fragmented, not for the benefit of its internal constituents, but for that of the public. Moderate fragmentation is a check against the dangers of internally consolidated power. It is designed to facilitate political accountability. Thus, the natural tendency of the lawyer to identify the institution with the incumbent is more dangerous here.⁶⁹

III. LAWYER AND CLIENT

We have seen that Nussbaum's invocation of the lawyer's duty to a private individual client was a mistake.⁷⁰ But there is a further problem. For even if we assume that the private individual standard was the applicable one, that standard is not consistent with Nussbaum's conduct.

What did the private individual standard require? Nussbaum repeatedly asserted without qualification that lawyers have a duty to protect the confidentiality of client information.⁷¹ However, this could not possibly mean that lawyers should always assert whatever confidentiality rights clients have. Nussbaum acknowledged that it is often in clients' interests to waive confidentiality rights and then refined his claim to assert that the lawyer's duty is never to waive confidentiality without a "prior review" by the lawyer of the materials in question.⁷²

For the most part, Nussbaum treated this proposition as self-evident, but at one revealing point he attempted to invoke authority for it. He cited Ethical Consideration (EC) 4-6 of the ABA *Model Code of Professional Responsibility*, which refers to confidentiality concerns on the death of a client:

I was acting as a lawyer should act after a colleague dies in the possession of a client's personal papers.

69 The ABA's *Model Code of Professional Responsibility* supports this point indirectly. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-9 (1980). Although Nussbaum repeatedly referred to the Code as support for his theory that public and private lawyers have the same duties, the Code's only explicit references to public lawyers suggest different responsibilities. EC 7-13 says that the public prosecutor's role "differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *Id.* EC 7-13. EC 7-14 emphasizes the duty of a "government lawyer" to avoiding making "unfair" claims. *Id.* EC 7-14.

70 See *supra* Part II.

71 See, e.g., *Hearings*, *supra* note 3, at 1203, 1207, 1211, 1233 (testimony of Nussbaum).

72 See *id.* at 1203, 1252-53 (testimony of Nussbaum).

When a client dies, and the rules talk about this, ethical consideration 4.6 of the New York State Code of Professional Responsibility talks about this. It says, after a client dies, excuse me, after a lawyer dies, it's the obligation of other lawyers to see to it that a client's confidence is still protected and his personal papers should basically be sent to the client or to a new lawyer. All I was doing was acting according to the rules that apply to all lawyers, whether they are personal lawyers or Government lawyers.⁷³

Nussbaum's description of EC 4-6 is questionable. Directing that client papers be delivered to another lawyer is only one of three examples given of ways to handle the problem. More importantly, Nussbaum did not mention the concluding sentence of EC 4-6: "In determining the method of disposition, *the instructions and wishes of the client should be a dominant consideration.*"⁷⁴

What were the instructions and wishes of the client? Nussbaum made it clear that he got no instructions from his clients and made his own judgment about what their wishes were.⁷⁵ Not only did he not claim the Clintons told him to insist on confidentiality, he went to great lengths to deny that they did so. He specifically said that he did not speak to the President or First Lady about the matter.⁷⁶ The hostile Republicans on the Committee, far more interested in establishing that the Clintons were anxious about Whitewater materials than exploring Nussbaum's compliance with professional responsibility norms, pressed him to acknowledge that various White House insiders had conveyed to him that the First Lady was concerned about confidentiality, but he insisted that this was not the case.

It was not part of any of the interlocutors' agendas to examine Nussbaum about why he never asked the clients, but from the perspective of professional responsibility doctrine, this is a question of interest. There seem to be four answers worth considering.

First, perhaps Nussbaum did not ask because he did not have sufficient access to his clients to bring the matter to their attention in time. This seems unlikely, however. Nussbaum emphasized his close relation with the First Lady and indicated they spoke frequently. He saw the President in the White House residence the day after he learned of Foster's death, and again in the White House Counsel's

73 *Id.* at 1256 (testimony of Nussbaum).

74 MODEL CODE OF PROF'L RESPONSIBILITY EC 4-6 (emphasis added). This Ethical Consideration speaks, not of the duty of a lawyer "after a colleague dies," but of the duty of a lawyer to make arrangements for the protection of client papers after his own death. *Id.*

75 See *Hearings*, *supra* note 3, at 1206-07 (testimony of Nussbaum).

76 *Id.* at 1207.

office the following day—the day before the first discussion with Heymann.⁷⁷ When Nussbaum finally found the suicide note, he was able to bring it to the President's attention right away.⁷⁸

Second, Nussbaum offered an interesting characterization of the First Lady's motivations in the course of denying that he had spoken to her about the matter. "I assume[d] from the outset of this tragedy," he said, "that the First Lady, who's a very good lawyer, like every other good lawyer in or out of the White House, would believe that permitting unfettered access to a lawyer's office is not proper."⁷⁹ Having sought to define his responsibilities as a government lawyer in terms of the norms applicable to a private lawyer, Nussbaum here seeks to define the First Lady's interests as a client in terms of her status as a lawyer. But if we take EC 4-6 seriously, this is circular since the rule for lawyers refers back to the client's decision. According to EC 4-6, a good lawyer does not insist on any particular position with regard to confidentiality; she simply looks to the instructions and wishes of the client.⁸⁰

Third, perhaps Nussbaum did not ask the clients because it is generally pointless for lawyers to ask because *any client* would find Heymann's proposal unacceptable. Nussbaum implied as much more than once during his testimony.⁸¹ In fact, however, the claim is wrong, for reasons that were illustrated in an exchange with Senator Shelby:

SHELBY: Why didn't you say [to] Mr. Heymann, come on down and we'll look this over together?

NUSSBAUM: Senator, did you trust the Justice Department?

SHELBY: On stuff like that, I certainly would.

NUSSBAUM: Would you let them into your office, your counsel's office, to look at your personal stuff?

SHELBY: Absolutely. *I have nothing to hide.* They can come tomorrow or today.⁸²

Of course, talk is cheap when the question is hypothetical, as it was for Senator Shelby. But we need make no judgment about the Senator's candor to see that there is an important point here. There

77 *Id.* at 1204–05 (testimony of Nussbaum).

78 *Id.* at 1205–06, 1211, 1271 (testimony of Nussbaum).

79 *Id.* at 1207 (testimony of Nussbaum).

80 See MODEL CODE OF PROF'L RESPONSIBILITY EC 4-6 (1980).

81 See, e.g., *Hearings, supra* note 3, at 1210, 1224, 1233, 1251–52 (testimony of Nussbaum) (indicating that public examination of personal, privileged material would be unreasonable to anyone).

82 *Id.* at 1253 (testimony of Nussbaum) (emphasis added).

are usually costs to the assertion of confidentiality—in particular, the inference that a person on whose behalf confidentiality is asserted has something “to hide,” and the foregone opportunity to demonstrate by waiving the privilege that one has “nothing to hide.” The suspicion that fueled the very hearing where Nussbaum was testifying was evidence of the costs of asserting confidentiality. A client confident that she has nothing to hide often has a strong interest in demonstrating that fact. And when the client is a public official, there will sometimes be an important public value in demonstrating that nothing of public significance is being concealed. This, of course, was Heymann’s point.

Nussbaum suffered from a common lawyer bias. Lawyers prize confidentiality because it is a benefit that they can offer but that most other occupations cannot. They speak of it sanctimoniously because it (sometimes) requires altruistic dedication on their part. But it does not follow from these facts that confidentiality is routinely more important *to clients* than other competing values or that there is anything noble, from the client’s perspective, about invoking it.

So we are left only one other explanation for Nussbaum’s failure to consult his clients: he did not ask them because he thought that their preference would be to protect confidentiality *without having to take responsibility for doing so*. Here we can profit from a political insight of Shakespeare. It appears in *Antony and Cleopatra*, after the death of Julius Caesar, where the four most prominent contenders to succeed him are gathered on the barge of one of them, Pompey, in the Medeterranean.⁸³ Pompey’s lieutenant Menas draws him aside and whispers that if Pompey would but tell him to do so he would slay the other three and put Pompey in power.⁸⁴ Pompey replies with intense disappointment:

Ah, this thou shouldst have done,
And not spoken on’t! In me ‘tis villainy
In thee’t have been good service . . .
. . . Being done unknown,
I should have found it afterwards well done;
But must condemn it now.⁸⁵

In this perspective, there is an important sense in which Nussbaum served his client well, but only if we assume that the client had

83 See WILLIAM SHAKESPEARE, *ANTONY AND CLEOPATRA* act 2, sc. 7.

84 *Id.*

85 *Id.*

"something to hide," or without being aware of any specific thing, was concerned that there might be something compromising in Foster's files. On this assumption, Nussbaum not only minimized a threat of disclosure but did so in a way that allowed his clients to avoid taking responsibility for it. He made clear that he made the decision himself, and by insisting that it was dictated by professional responsibility norms, made it seem natural that he should do so, and implicitly (if implausibly) denied that he did so out of fear that there might be damaging material to be found.⁸⁶

We can be fairly sure that the President did not disapprove of Nussbaum's decision. After Lloyd Cutler and Abner Mikva served brief stints as Nussbaum's immediate successors, Clinton appointed Jack Quinn to the White House Counsel job.⁸⁷ Unlike Cutler and Mikva, who were outsiders without strong ties to Clinton, Quinn was a member of the White House staff. In his Senate testimony, Nussbaum had described Quinn as urging a more uncompromising position than Nussbaum's own in response to the investigators' demands. Quinn's advice had been that investigators should not be allowed to see any document in Foster's office until White House lawyers had examined and inventoried them all.⁸⁸

Nussbaum was not the only lawyer to whom the Clintons sought to shift responsibility for not cooperating with public investigations. On other occasions, they told the press that they could not discuss matters under investigation or make materials available because their lawyers had told them not to, ignoring that they themselves had control over, and arguably responsibility for, the matter.⁸⁹

86 In addition to the claim that "any good lawyer" would always protect privilege, Nussbaum sought to avert the inference that he was concerned that the Clintons had "something to hide" by suggesting that invoking the privilege was necessary to protect the ability of future presidents to do so. He suggested that "waiver" would have acted as a "precedent" that would impair the ability of this "and future Presidents" to protect confidential materials. *Hearings, supra* note 3, at 1202 (testimony of Nussbaum). This argument is familiar. White House officials like it because it suggests that there is often a public interest in confidentiality independent of the content of the particular materials. The argument is not very plausible, however. Waiving a privilege is considerably different from conceding that it does not exist. Moreover, "waiver" connotes a discretionary act of a sort we do not usually treat as precedent. Even if it were treated as precedent, waiver in a situation where the White House determined that there would be no direct harm would not be precedent for waiver in a situation where it determined there was such harm.

87 *Appendix A—Digest of Other White House Announcements*, 1995 II PUB. PAPERS 1944 (Sept. 20, 1995).

88 See *Hearings, supra* note 3, at 1207 (testimony of Nussbaum).

89 See William Safire, *Kill All the Lawyers*, N.Y. TIMES, Dec. 7, 1998, at A25 (complaining about Clinton's reliance on lawyers).

Nussbaum's effort to relieve the President of responsibility ultimately required his resignation. Like Pompey, Bill Clinton was obliged to condemn publicly a deed of which he almost certainly privately approved. Nussbaum, to continue the classical allusion, fell on his sword for the benefit of his political superior. This loyalty is a familiar form of political service. It is an extreme loyalty highly valued by many political figures. But whether it is admirable or even defensible in terms of disinterested political values or professional responsibility norms is a different question.

Nussbaum did serve the President's interests but not in the manner contemplated by the professional responsibility doctrine. That doctrine purports to protect the client's autonomy, not shield the client from responsibility for his decisions. The particular provision of the Model Code that Nussbaum mis-invoked is consistent with the professional responsibility doctrine in general in giving decisional authority to the client. The principal exceptions involve minor tactical decisions that do not implicate client goals and clients who are incapable of independent decision. Neither seems applicable to our situation.⁹⁰

Nevertheless, the provisions that give clients decisionmaking authority are for the benefit of the client. When the client prefers not to take responsibility, no doctrine tells the lawyer that she must force the client to make a decision. Thus, we might ask, what is wrong with the lawyer doing this when the interests and desires of the client would be served by doing so? Surely there is no clear, palpable wrong of the sort that should prompt disciplinary prohibition. But the practice raises two sorts of concerns.

First, it seems to degrade the idea of client autonomy. A thick conception of autonomy clearly implies not just having your way but making choices and taking responsibility for them. A client who uses his lawyer to evade responsibility for choice seems to mock that idea of autonomy. The lawyer might seem to be prostituting his talents, using them for an ignoble purpose.

Second, when the client is a political actor, there is an objection grounded in democratic accountability. The official who gets confidentiality without having to take responsibility for it, in the terms I

90 See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (stating that a lawyer is to abide by client decisions regarding "goals" and to consult the client regarding "means"); *id.* R. 1.14 (stating that with a disabled client, the lawyer should maintain "normal" relations to the extent it is feasible).

used earlier, avoids paying the "price" for it, but values of public accountability suggest that it is desirable for him to pay for it.⁹¹

Both of these concerns seem weighty enough to support criticism of the lawyer for facilitating avoidance of responsibility by the public official client. To be sure, it may be too much to expect lawyers to resist the pressure they experience to do this. But we ought to be clear about the values they jeopardize when they do so.

CONCLUSION

We have seen two senses in which the ethical responsibilities of public lawyers are potentially different from those of private lawyers. First, the public lawyer's client is an institution, and the institution exists independently of the incumbent with whom the lawyer deals. The public lawyer has to be sensitive to this distinction, and he will not be able to define his ethical responsibilities until he has made often difficult judgments about the identity of the client. The private institutional lawyer has this task as well, but the principles that define the public lawyer's client are distinct and perhaps more complex.

Second, the public lawyer is more likely to experience pressure from those who speak for the client to relieve them of responsibility for their decisions within their authority. The ethical stakes raised by such pressures are distinctive to the public realm. They include norms of political responsibility and accountability that are jeopardized when the lawyer relieves the incumbent of responsibility.

91 In an interesting article on our subject, Nelson Lund elaborates a hypothetical in which the Solicitor General is considering whether the government should appeal an adverse district court decision. The President has a strong political stake in the decision—going one way would enhance his prospects of re-election. Lund suggests that the lawyer should make the decision herself, weighing the political interest in the same way she thinks the President would. Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, LAW & CONTEMP. PROBS., Spring 1998, at 65, 76–77. Lund argues that the Constitution permits the President to make such a decision himself, and that by doing it for him, the lawyer enables him to avoid the "damaging perception of a 'politicized' litigation decision" that would result if she left the decision to the President or the Attorney General. *Id.* at 75.

The hypothetical is too complex for full analysis here, but, as I say in the text, the desire to help the President avoid taking responsibility for what will be accurately viewed as a "politicized" decision is not a consideration that can ethically be given weight. From a moral or disinterested political point of view, such a "perception" is entirely desirable. As support for his conclusion, Lund offers only (a) that it is the President "alone in whom the executive power is vested by the Constitution," which simply begs the question of the extent of "the executive power"; and (b) that it would be difficult to frame and enforce a disciplinary prohibition of the lawyer's conduct, which even if true, does not affect the conclusion that it would be better morally if lawyers did not engage in it. *Id.* at 72–80.

Both considerations mean that public lawyers have to be sensitive to the distinctive kind of "price" that practices of political accountability and responsibility often impose on political incumbents—especially in terms of public visibility—and should not seek too quickly or unreflectively to spare officials from having to pay such prices.