1999

The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Poorer but Wiser: The Bar Looks Back at Its Contribution to the Impeachment Spectacle

H. Richard Uviller

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol68/iss3/10

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
POORER BUT WISER: THE BAR LOOKS BACK AT ITS CONTRIBUTION TO THE IMPEACHMENT SPECTACLE

H. Richard Uviller*

INTRODUCTION

It is hardly surprising that lawyers often find themselves at the center of controversy, public as well as private. We seek controversy, thrive on it, and sometimes make it where we can find none waiting for us. We are not drawn to controversy to perpetuate it, like Jarndyce and Jarndyce,1 into a grotesque; nor are we drawn to it for the love of controversy as such (though there are surely those among us who think a well-joined issue is a thing of beauty) any more than a plumber is drawn to a leaky pipe because he loves leaky pipes. Rather, we are often in the vicinity of conflict because we—and others—believe we can reduce, relieve, or resolve the matter in contention. In the department I know best, criminal law, resolution is frequently achieved by knock-down, drag-out fight—or at least the armed and credible threat of it. Some litigating lawyers may love the forum, love the fight, and even love the negotiation in the corridors of the Coliseum. But the lawyers’ job is always to end the struggle, not to struggle on.

Regularly, the controversy attracts considerable public attention, and the roving spotlight of media interest comes around brightly to illuminate the Lawyer—the visible, the active, the vocal, and in some poses, the mastermind of the operation. The matter in dispute lights up tubes across the land, and frequently the lawyers are on prominent display, as both participants and commentators, until the viewers begin to wonder, is this a lawyers’ show? Particularly from the protracted, the painful exposure to media campaigns of saturation plus, the public—nausea rising—generally emerge asking themselves: Can’t we do something to control our appetite? Even the media ask: Did we do something wrong? And the Bar echoes: Are we to blame?

How many such searching inquiries followed the prosecution of O.J. Simpson? Or similar media picnics serving local fare? I remember the post-mortems in the ebb tide of Watergate. Because so many law-

---

* Arthur Levitt Professor of Law, Columbia University School of Law.

897
yers seemed to be involved in that presidential fiasco, law schools began beefing up their offerings in Professional Responsibility—or making some feeble effort to do so—as though teaching law students the demands of professional ethics would avert future lawyer-presidents, and their legions of lawyer-associates, from conducting and covering up politically inspired burglaries.

Now, as we emerge, limping, from the ordeal of the Lewinsky caper, the pathetic presidential effort to conceal it, and the circus impeachment that followed, it is fitting that we ask again: Are there any enduring lessons for the Bar that might be useful in our perennial project of self-improvement? For, smug as I am sure we appear to many of our fellow citizens, lawyers are gnawed by self-doubt. From our first lean days as law students to our well-upholstered retirement, we lawyers ask ourselves: Why do the people persistently mistrust and resent us? Are we contributing somehow to the general impression that we do more harm than good in the world (which we know to be false)? What can we do to convey to those beyond our satisfied clientele that we are generally earnest of purpose, conciliatory by nature, and the source of sound advice and sturdy assistance?

This Special Issue is a welcome opportunity to share some thoughts and reflections on the national grief and outrage that is only beginning to recede. I, for one, will resist the temptation to analyze the blame-the-lawyers inclination in the body politic. And I have scant appetite to explore the uneasy symbiosis of lawyer and news reporter. Rather, this essay seeks lessons for three branches of the Bar, branches where I think the national scandal has most pertinence. The essay dowses for latent instruction, if any, to enlighten: the ordinary public prosecutor (Part I); the government lawyer as counselor to government officials (Part II); and the private lawyer representing a public official (Part III). The Article concludes that special prosecutors, not Independent Counsel, should investigate alleged wrongdoing of high government officials and that government lawyers, because their first duty is to the public, cannot provide confidential counseling to a government official as client. Finally, I conclude that a private lawyer's responsibility to his client goes beyond advice; he should urge his client to do the right thing. In truth, I don’t have much to contribute to this project beyond my own reflections from the sidelines, assisted to some small extent by a taste of experience and much cogitation. But I shall try, nevertheless, to make some sense of it all.

2. See Jerome J. Shestack, The Independent Counsel Act: From Watergate to Whitewater and Beyond—Foreword: The Independent Counsel Act Revisited, 86 Geo. L.J. 2011, 2013 (1998) (“Public confidence in the government and in the legal profession was shaken, since virtually all of the actors, including the President, were lawyers.”).
I. THE PUBLIC PROSECUTOR

To the public prosecutor, I say first: Relish your crowded docket; be grateful for the multiple and diverse demands upon your attention. Do not curse your stretched budget, your short-handed staff, or the tide of new cases perpetually lapping at your beach. These constraints help teach you and your staff the fine faculty of judgment. In the conscientious prosecutor's office, the urgency and the variety of ordinary business present competing opportunities, and often on various coordinates of importance. Both selecting a target for pursuit and simply sorting out for prosecution, the harvest of the daily tide afford the prosecutor the obligation of choice. The discharge of that responsibility instructs the public officer that, while all cases standing alone are of prime importance, taken together some must yield to others. Prosecutors frequently use the phrase "the interests of justice"; it is not a purely rhetorical expression. Its discernment is part of the daily job of the prosecutor—and it must be learned the hard way. The art of triage is essential in the development of the sense of justice, it turns out, and no decent prosecutor can survive without it.

One of several troublesome things I learned from contemplating the work of the Office of the Independent Counsel ("OIC") is that it seemed to proceed without the enforced cultivation of judgment. I say nothing of Kenneth Starr as an individual or as the Independent Counsel ("IC"). While some of his personal decisions may seem questionable, I have no reason to think that as a judge or as Solicitor General, he was anything but a perfectly honorable man. But he never ran a prosecutor's office. He was dropped into his role as IC without basic training in separating the important from the trivial. He may well have composed a staff that, compared to the lynch mob that investigated Richard Nixon, was a model of bipartisan balance. But, by reason of the statute that empowered them, this team had a mission. Beware, say I in my conservative mode, of the missionaries. The IC

3. Philip B. Heymann makes much the same point in *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 Geo. L.J. 2119, 2120 (1998) ("Independent counsels are different from ordinary prosecutors because they lack the practical pressures and institutional standards ordinarily operating to guide the exercise of prosecutorial discretion."). Heymann served as Deputy Attorney General and Associate Special Prosecutor in the Watergate investigation. *See id.* at 2119.

4. I am principally indebted, as succeeding citations will testify, to Georgetown Professor Julie R. O'Sullivan, formerly on the staff of both Robert B. Fiske, Jr. and Kenneth Starr, for enlightening my contemplation of this esoterica. It should be noted, however, that the electronic shelves groan under the academic output generated by the Independent Counsel experiment. I could not, and do not, propose to attempt here to provide a survey of this literature.

5. Julie O'Sullivan, in *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 484 (1996) puts it this way: "The constraints upon resources generally available to 'normal' federal prosecutors ensure that the criminal process will be effectively reserved for egregious violations in which criminal rather than civil prosecution is clearly appropriate."
carried many portfolios: Whitewater, Travelgate, the death of Vincent Foster, Hillary's law firm billing practices, and heaven knows what else. But is there any doubt that the principal target, first and last, was Bill Clinton? There is something pernicious *per se* about a collection of highly motivated lawyers, answerable to no one, with limitless time and money to spend, charged with the single object of getting the President.6

The birth of the OIC was perfectly understandable.7 In the wake of Watergate, we realized that a conspiracy to pervert justice centered in the White House could easily reach the Department of Justice where, after all, the Attorney General, according to pre-Clinton tradition, is likely to be a close companion (if not a relative) of, and trusted political advisor to, the President. A special prosecutor, operating out of the DOJ, responsible—at least nominally—to the authority of the AG, hardly seems the right person to trust to conduct a detached and vigorous investigation of the Boss's Boss.8 Yet the record of the independence and vigor of the DOJ special prosecutors has been notably good,9 including the indictment of an incumbent Vice President, Spiro Agnew.10 But following the Saturday Night Massacre in which the Nixon White House asserted its ultimate control of the special prosecutor, we were bound and determined to create a truly independent attorney for the investigation and possible prosecution of high executive officials.11

What we didn't fully realize when we designed—and subsequently revived—the IC law was that, by building a freestanding office around

---

6. See O'Sullivan, supra note 5, at 491.
8. Cass Sunstein writes:
The original goal of the Independent Counsel Act was simple, laudable, and entirely appealing: to ensure that the decision whether to prosecute high-level government officials would not be made by high-level government officials. In the aftermath of the Watergate scandal, a genuine constitutional crisis, the Act seemed indispensable as a way of promoting public trust in government, by giving an assurance that high-level officials would be investigated by people who were not controllable by their hierarchical superiors.
9. See id. at 2281. Commenting on the success of the system before the enactment of the Independent Counsel Act, Sunstein notes: "The system worked. And there was no Independent Counsel Act. The true lesson of the Watergate scandal is that political safeguards and ordinary prosecutors are perfectly sufficient." Id.
10. See O'Sullivan, supra note 5, at 476 n.57.
11. Just how independent the IC actually is under the Act is reflected in the debate over the "good cause" standard for presidential removal of the IC. See John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 Minn. L. Rev. 1285, 1290-1301 (1999). The standard is frequently viewed as distancing the IC from executive control. See id. at 1287. Manning offers a "revisionist" view. He views the standard as allowing the IC's removal on reasonably debatable matters of legal judgment. See id. at 1288.
a single task, we had deprived our knights of the school of judgment. Even though many of Starr’s troops, unlike their leader, had had battle experience, the effects of the single-mindedness inherent in the IC setup could be expected to dull their judgment. Balanced exercise of discretion requires the daily conflict of multiple obligations.\(^\text{12}\)

I do think this lesson is paradoxical in a way. As a prosecutor, I counted caseload as a burden. I longed for the freedom to prosecute each case as though it were my only obligation. The burden turns out to be a blessing. A full file cabinet does not dull sensibility and corrupt judgment by the urgency of making dispositions, as I previously believed. It provides the occasion for learning the difficult business of making comparative evaluations. And this, I have come to think, is an important ingredient in the sensible exercise of discretion.\(^\text{13}\)

Another lesson regarding the controlled deployment of the prosecutor’s discretion is the matter of answerability. In the interest of total independence, we created a constitutional goblin. Abiding in none of the constitutional branches, the creature swings free of all political accountability. Ultimately, of course, the people will judge the work of the IC. But “ultimately” means (or so one would think) on the expiration of the IC’s commission.\(^\text{14}\) The IC does not stand for re-election, nor do those who appointed him. No one will have to face the voters on the strength of the product of the IC’s labors. While liberating, the freedom from political accountability may also enhance the tendency among virtuous prosecutors to self-righteousness.

All good prosecutors, to a greater or lesser degree, suffer from the occupational hazard of overconfidence in their own rectitude. It’s built into the job. I can report from my fourteen years in a first rate office that an otherwise modest young prosecutor finds daily confirmations of his belief that he and his office are primarily responsible for justice in the criminal dockets.\(^\text{15}\) Judges are usually uninformed, often less than fully alert, and occasionally untrustworthy.\(^\text{16}\) And the

\(^{12}\) See Sunstein, supra note 8, at 2279-80 (recognizing the baleful effect of the single mission, even though his emphasis is on the justice-distorting incentives in the design of the Independent Counsel Act).

\(^{13}\) See id. at 2273. Noting that ordinary prosecutors regularly decide which of the many violations of law deserve prosecution, Sunstein comments: “This use of prosecutorial discretion, it should be emphasized, is a major, if overlooked, safeguard of liberty under law.” Id.

\(^{14}\) See O’Sullivan, supra note 5, at 493 (rejecting the efficacy of this sort of post facto accountability). “If ‘accountability’ is to mean anything, . . . it seems to me to require some degree of ongoing control to address such problems [as potential abuses and inequities] at the earliest possible moment.” Id. at 494.

\(^{15}\) In fact, I did so report shortly after exchanging my badge for a cap and gown. See H. Richard Uviller, Commentary, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA, 71 Mich. L. Rev. 1145, 1145 (1973).

\(^{16}\) As the husband of a state court judge of general felony jurisdiction, I should hastily note that I am not at present intimately acquainted with any judges of this description.
defense bar? Even among the few who would qualify for praise from the prosecutor, not one has the slightest interest in justice—except in those rare cases where they represent innocent clients. That leaves the prosecutor, a lawyer without a client, a public servant answerable only to law and conscience. This worthy may be a knight of justice, but let us be candid, is this not a creature susceptible to arrogance? I cannot know how far the political process, the censorious constituency, serves to stem abuses of authority resulting from prosecutorial arrogance. But experience with the OIC has taught that some form of political control is a balancing force.

Once again, I sense a lurking paradox in this observation. In the prosecutor’s office in which I worked and learned the ropes, political considerations were deemed a blight. Politicians were the subjects of our investigations, not our moral mentors. Politics bred corruption; principle was anathema to the political animal, or so I thought. How can it be that the integrity of the IC suffers from the severance of all political ties?

The release must be that it is not the immediate ties of prosecutor with political figures, pursuing their own agendas, that keeps the prosecutor’s swollen self-regard under control. Rather, it is the sense of an attentive constituency in the background, a critical public with whom the prosecutor maintains a distant fiduciary obligation. The likelihood may be remote that an active local prosecutor will be dislodged at the next election, or that the appointing authority—or the party of the appointing authority—will suffer at the polls because of some lapse of judgment in the prosecutor’s office. Still, I can attest that ordinary prosecutors are civic republicans at heart. They have a strong sense that they are contributing their skills to the improvement of their environs, and that they are serving a constituency faithfully by doing what the people expect them to do. It is a political process of the mind, largely, but reinforced by the actual process in which they may be more or less actively involved from time to time.

It is hard to know the extent to which the political independence granted to the OIC ironically undermined the sense of responsibility of that office. It may well be that Ken Starr or others in the office had a sufficiently strong sense of connection, of participation with a constituency in a larger political process, that their lack of actual accountability was a negligible factor. But it does seem to me that one of the lessons for prosecutors is: remember you are part of a political process in which you are, in some manner, answerable to the people you serve.

To make the implicit explicit, and to recognize that not all share my underlying assumptions, I should say that these lessons are derived from my belief that the OIC made serious errors of judgment in its pursuit of the President. I do not here refer to the several tactical decisions that might have been faulted as overzealous such as: the
prosecutors' handling of Monica Lewinsky when she appeared for interrogation; the subpoena to her mother; the instruction to Linda Tripp secretly (and illegally)\(^\text{17}\) to record her conversations with Monica; the failure to ask Betty Currie whether Clinton had ever asked her to testify falsely; etc. Whether these or other such incidents occurred, and whether they manifested overreaching may be debatable. But they are not far removed from what any earnest and overzealous prosecutor may do in the investigation of an important case. Wrong, perhaps, but only as a matter of degree, and—it seems to me—not the result of any inherent weakness of the OIC setup.

Rather, I refer to the IC's most grievous and pervasive error of judgment: over-rating his case. In the mis-assessment, the IC lost the critical sense of appropriate proportion; distorting a minor, if adolescent, sexual transgression into a cause for removal from office. It all began with a naive decision by the Supreme Court—none of whose members had had litigation experience—that proceeding with discovery in the Paula Corbin Jones lawsuit would not seriously interfere with the President's daily discharge of his public responsibilities.\(^\text{18}\) So he was deposed, but it was not your ordinary deposition. For one thing, there was a judge, Susan Webber Wright, presiding.\(^\text{19}\) For another, she participated by providing a definition—a rather peculiar definition—of a critical term, a noteworthy articulation that would shape all that was to follow.\(^\text{20}\) Third, the judge made rulings on relevancy that were, to my ear, odd and inconsistent.

Let me take a closer—if brief—look at these peculiarities and their amplification in subsequent events. Just how Judge Susan Webber Wright came to preside at a pretrial deposition of a party to a civil lawsuit is unclear.\(^\text{21}\) But she did provide a definition of the term sexual relations that was binding on the parties for the purposes of the interrogation.\(^\text{22}\) Of course, as I understand the ground rules, counsel

\(^{17}\) Taping is illegal in the state of Maryland (where it occurred) without the consent of both parties. See Md. Code Ann., Cts. & Jud. Proc. § 10-402 (1973); Adams v. State, 406 A.2d. 637, 642 (Md. Ct. Spec. App. 1979). Under federal law, one consenting conversant takes the recording out of the category of eavesdropping. See 18 U.S.C. § 2511 (1994). Perhaps the IC, ignorant of the local law, thought himself on solid ground. Still, the upshot was that a private and frightened citizen, Linda Tripp, was required not only to violate the obligations of personal loyalty, but the law of the jurisdiction.


\(^{19}\) See Jones v. Clinton, 36 F. Supp. 2d 1118, 1121 (E.D. Ark. 1999).

\(^{20}\) See id. at 1121 n.5; infra note 22.

\(^{21}\) Depositions are normally taken before a clerk or a person appointed by the court and empowered to administer the oath. See Fed. R. Civ. P. 28(a).

\(^{22}\) She defined "sexual relations" as follows: "For the purposes of this deposition, a person engages in 'sexual relations' when the person knowingly engages in or causes... contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person." Jones, 36 F. Supp. 2d at 1121 n.5.
were under no obligation to restrict their questions to the employment of this defined term. The President’s responses, however, were continually framed in terms of sexual relations. The definition appeared to be limited to sexual interaction that had as its purpose the gratification of the other person. On this understanding—technical but not unwarranted—Clinton answered, and continued thereafter to insist, that he had not had sexual relations with Lewinsky. It seems likely that any other prosecutor, viewing this answer in light of the ambiguity of the controlling judicial ruling, would conclude that he could never convince a petit jury that, beyond a reasonable doubt, the answer was intentionally false, though perhaps intentionally misleading.

Even an intentionally false statement does not amount to the federal crime of perjury unless it concerns a material matter. At this stage, remember, President Clinton is being deposed on an alleged incident in a hotel room between himself and Paula Jones while he was Governor of Arkansas. The question he falsely answered at the deposition concerned sexual interactions between himself and Monica Lewinsky years later in the White House. How is the matter elicited by these questions material to the issues in the Jones lawsuit? Those who have not studied the Federal Rules of Evidence might be tempted to say the Lewinsky business revealed a sexual predator with weak judgment or control, or went to prove a pattern of seductive conduct likely to be repeated. Maybe so, but those familiar with the Federal Rules—and, in particular, Rule 404(a)—know that character is inadmissible to show that this is just the sort of thing a person like that would do. Even if one—or more than one—prior, unrelated in-

The definition allowed the President, there and later before a grand jury, steadfastly to deny that he had engaged in the sexual relations—thus defined—with Monica Lewinsky. See id. at 1129-30.

23. Indeed, the President was asked if he had ever had an “extramarital sexual affair” or “sexual relationship” with Monica Lewinsky. See id. at 1129-30. The president answered he had not. See id.

24. When asked at his January 17th deposition if he had had an “extramarital sexual affair” with Monica Lewinsky, the President’s answer was, “I have never had sexual relations with Monica Lewinsky.” Id. at 1129. During his August 17th grand jury appearance, the President continually refused to answer questions concerning any specific sexual activity with Monica Lewinsky. See id. at 1130. He stated “‘sexual relations’ as defined by himself and ‘most ordinary Americans’ means, for the most part, only intercourse.” Id. The President concluded “he did not engage in intercourse . . . [or] any other contact . . . that would fall within the definition of ‘sexual relations’ used at his deposition.” Id.

25. The President stated that he had not had “sexual relations” with Monica Lewinsky because he had not engaged in “directly touching those parts of her body with the intent to arouse or gratify.” Id.

26. See id.


28. Rule 404(a) of the Federal Rules of Evidence provides in pertinent part: “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .” Fed. R. Evid. 404(a).
cident establishes a pattern, patterns to prove propensity to prove the conduct at issue are clearly (if counter-intuitively) excluded. In fact, Judge Wright correctly ruled that the answers to the Lewinsky questions would be inadmissible in the trial of the Jones case.29

Can a false answer to a question impermissible under the Rules of Evidence be material? Judge Wright also ruled (erroneously, I thought) that the question was nevertheless allowed at the deposition because the Rules of Evidence do not apply at pre-trial discovery.30 True, but there are limits at discovery too. A question may not be asked at discovery if there is little chance that it will lead to admissible evidence.31 Since the whole Lewinsky affair was inadmissible at the Jones trial, it is hard to see how the question at issue might discover admissible evidence. The point of all this is merely to note that a federal prosecutor without the IC’s peculiar commission might well hesitate to indict for perjury under these circumstances. While some have argued that a “high crime or misdemeanor” need not be a criminal offense, an und indictable disingenuous attempt to conceal shameful private behavior hardly seems to fill the bill.

Of course, the President also made several other denials outside the blurry scope of this definition of sexual relations, which seem patently false.32 For example, the President initially stated that he did not remember ever being alone with Monica Lewinsky in the Oval Office. On a follow-up question he did admit, “It’s possible that she [Monica Lewinsky], in, while she was working there [Oval Office] brought something to me and that at the time she brought it to me, she was the only person there. That’s possible.”33 But these denials somehow did not make it to the status of impeachable perjury when the IC rendered his report to Congress.

The alleged perjury that gave Congress the most trouble (when the matter arrived in that august forum) concerned the President’s testimony before a federal grand jury where, essentially, he reiterated his sworn statements at the Jones deposition.34 The IC’s use of the grand
jury as an aid to investigation is, of course, exactly what any prosecutor would do. The grand jury provides the essential tools for compelling evidence from reluctant witnesses: subpoena and immunity. However, where an ordinary prosecutor puts evidence before the grand jury—compels evidence before the grand jury—it is with the object of eventually charging someone with a crime. At least as concerns the President, his prime target, it is probably fair to say that the OIC had no intention of seeking an indictment. Why, then, the grand jury and testimony under oath?

A grand jury is the customary—and in the case of federal felonies, the constitutionally necessary—means for establishing the underlying support for a criminal accusation. But there is nothing in the Constitution or statute that requires that preliminary inquiry into grounds for impeachment adduce sworn evidence or obtain the grand jury'imprimatur. In a sense, then, the setting in which the second, and some would say graver, presidential perjury took place was gratuitous. Of course, the Nation's Chief Magistrate should not lie under oath to a grand jury (nor should anyone else). But, if the grand jury proceeding was itself an inessential ornament on the IC's mandate to investigate charges that might amount to impeachable offenses, a false statement to that body may not be material to the investigation by the IC.

Apart from these considerations, an ordinary prosecutor would never have called a suspected wrongdoer before a grand jury unless the prosecutor was prepared to grant that person immunity in exchange for testimony against some other target. The prosecutor would expect that his witness, if implicated, will assert the privilege of silence. While it was unlikely that the President would refuse to answer questions on grounds of possible self-incrimination, it was also unlikely that he would furnish incriminating evidence against himself. It also seems unlikely that the IC hoped to get evidence from the President to furnish the basis for bringing a criminal indictment against someone else—his secretary, Betty Currie, or his buddy, Vernon Jordan, for example. Rather, the President was called in the expectation that he would persist in his pathetic attempt to conceal his sexual transgression—and thereby accord a predicate for an accusation of perjury or obstruction of justice. This sort of perjury trap is certainly not unknown in the annals of law enforcement. But it is a device of last resort, the propriety of which might be deemed dubious,


35. In the ordinary case, of course, the perjury trap is sprung on the suspected malefactor against whom substantive evidence has failed to materialize (or, in the classic Alger Hiss case, prosecution on the substantive charge is barred by the statute of limitations). See United States v. Hiss, 107 F. Supp. 128, 129 (S.D.N.Y. 1952). If the witness declines—as expected—to fill the gap in the evidence against him, he is immunized and the questions narrow, eliciting denials that can be disproved.
especially where there is no substantive evidence against the target. I would hope the ethical prosecutor in the ordinary course would scruple to bring an otherwise respectable figure before a grand jury only to try to elicit the basis for a criminal charge from his efforts to protect himself in his testimony against a baseless—or imaginary—accusation.

So I must conclude that serious errors of judgment were made by the IC's office that appear to be the direct result of the unique structure of its responsibility—free of the constraints of constituency and the tempering influence of a multi-dimensional docket. I concede that any person or agency investigating possible impeachment of a President might develop a headlong mentality, a determination to find some basis for accusation. But the peculiar mission of the OIC, and the questionable calls it produced, teaches that we had better leave prosecutorial judgment to prosecutors—those who have had, by virtue of the diverse demands of their office, fuller opportunity to develop the sensitivity to make the delicate assessments required by the interests of justice.36

II. THE GOVERNMENT LAWYER AS COUNSEL TO A PUBLIC OFFICIAL

From time to time a government lawyer may be called upon to give legal counsel to a public official. An agent of the Federal Bureau of Investigation may consult with a lawyer in the Office of Legal Counsel on the legality of paying a foreign agent for information regarding an investigation of international terrorism. A bureaucrat may discuss with agency counsel some irregularities in accounting for disbursements. Insofar as the communications between the two concern official business, they may be protected against future disclosure by executive privilege.37 Occasionally, the conference may have more to do with the exposure of the official's personal affairs than with government operations. In addition to whatever protection the government operations privilege may afford, to what extent are the communications between the two—as conversations between lawyer and client—under the broad umbrella of the lawyer-client privilege?

The most obvious example of this quasi-professional relationship


can be found in the confidences exchanged between the President and the official bearing the exalted title: Counsel to the President. On the Summer Solstice of 1996, in connection with the so-called Whitewater investigation, the OIC directed a grand jury subpoena to the White House demanding production of "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present)." 38 Although the White House could identify nine sets of documents subject to the subpoena, it refused to produce them, citing executive privilege, attorney-client privilege, and the attorney work product doctrine. 39 Two months later, the OIC moved to compel production of two sets of documents. 40 The first set consisted of notes taken by Associate Counsel to the President a year earlier at a meeting attended by Mrs. Clinton, Special Counsel to the President, Jane Sherburne, and Mrs. Clinton’s personal attorney, David Kendall. 41 The subject of this meeting was Mrs. Clinton’s activities following the death of Deputy Counsel to the President, Vincent W. Foster, Jr. 42 The documents in the second set comprised notes taken by Special Counsel Sherburne during meetings attended by Mrs. Clinton, Mr. Kendall, Nicole Seligman (Mr. Kendall’s partner), and, occasionally, John Quinn, Counsel to the President. 43 The meetings, which took place both during and immediately after Mrs. Clinton’s testimony before a Washington, D.C. grand jury, 44 addressed the possibility of discovery of certain Rose Hill billing records in the White House living area. 45

The White House refused to produce the requested documents, relying exclusively on the attorney-client privilege and the work product doctrine. 46 Hillary Rodham Clinton personally appeared to assert her own attorney-client privilege. 47 The District Court did not consider the question of whether the asserted privilege was available to the White House, but quashed the subpoenas, in effect, on the grounds that Mrs. Clinton’s reasonable belief that the conversations were privileged, though erroneous, brought the privilege to bear. 48 The

39. See id. at 913-14.
40. See id.
41. See id.
42. See id.
43. See id.
44. See id.
45. See id.
46. See id.
47. See id.
48. See id. at 914, 923. The Court of Appeals reversed this conclusion, stating that it knew of "no authority, and Mrs. Clinton has cited none, holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one." Id. at 923.
Court of Appeals for the Eighth Circuit, unsealing their opinion on the motion of the parties, took up the question the District Court had shunned: whether an entity of government can assert the attorney-client privilege. They began by finding that, under federal common law, a governmental creature does enjoy an attorney-client privilege, albeit somewhat truncated where the privilege would interfere with the fact-gathering obligations of another agency, especially in a criminal case. At a loss for persuasive authority, the court resorted to general principles as enunciated by Wigmore, no friend of the privileges. Looking to Wigmore for the basic principles defining the common law privileges, Judge Bowman for the Court of Appeals adopted a scheme in which the duty to furnish evidence in a criminal investigation figures prominently, while the privileges are read as narrowly as possible. In one notable passage, the court wrote: "We also find it significant that executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General. Even more importantly, however, the general duty of public service calls upon government employees and agencies to favor disclosure over concealment."

Ultimately, the court held:

Assuming arguendo that there is a governmental attorney-client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate. Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

What all this means is that Hillary Clinton, in her own right or as a representative of the White House (as the court assumed her to be), was not a client of the government lawyers who advised her, or at least not a client in the same sense as a person consulting with private counsel. Consequently, she was not entitled to the full shield of the attorney-client privilege cloaking confidential communications. The presence of her personal lawyer at the meeting did not convert it into the confidential interchange that she claimed it to be. What the decision connotes—insofar as the majority of the Eighth Circuit Court of

49. See id. at 915.
50. See id. at 915-18.
52. See Grand Jury Subpoena, 112 F.3d at 913, 918, 920; supra note 51.
53. Id. at 920 (citation omitted); see 28 U.S.C. § 535(b) (1994).
54. Grand Jury Subpoena, 112 F.3d at 921 (emphasis added).
Appeals is heard outside the Eighth Circuit—is that the law defines the government lawyer as a law enforcement officer first, and confidential counselor only insofar as his primary allegiance allows.

I heard Bernard Nussbaum, in what he did not then realize were the waning days of his tenure as Counsel to the President, stand up and proclaim to a packed house at the Columbia Law School that, in removing files from the office of Vincent Foster immediately after his suicide, he was doing only what any self-respecting lawyer could have done to protect the interests of his client, the President of the United States. He obviously relished the role. The great attorney-client privilege, he told us, was the right of the President no less than any private person, and he, as counsel, was the sworn keeper of his client's confidences. The widely regarded legal ethicist, Professor Stephen Gillers, took an op-ed column in the New York Times to echo the same view. Both Nussbaum and Gillers—and heaven knows how many others—were laboring under a misapprehension of the nature of government service for lawyers, and the public obligations of our essentially private profession in the context of assisting in criminal investigations.

What I hope rings resoundingly from the Court of Appeals's rather long and tortuous opinion is the second lesson to the Bar from the IC's endeavors. A government lawyer, whatever her title, is not like in-house counsel to a corporation or a private lawyer on retainer to a busy private client. When a lawyer takes the oath of public service, she becomes part of the government apparatus, and thereafter she can no longer assure unconditional loyalty to any individual who consults her. When entrusted with secrets by another government employee seeking legal counsel, those confidences are protected only to the extent they may be by government or executive privilege. The lawyer-client relationship, such as it might be, is subordinated to the civic responsibility of the government lawyer.

I hear in the peal of this bell reassuring overtones of old fashioned civic republican virtue. In our decidedly liberal democracy—which we justly celebrate—there is still room for collective responsibility. The lawyer serves her country by heeding the call of this higher duty, even at the expense of the individual interests of those who seek her advice in confidence. Lawyers abound in private practice who are encumbered by no such public responsibility; as the court rightly says, let the public official with something to fear from a grand jury consult one of their number.

III. PRIVATE LAWYERS REPRESENTING PUBLIC OFFICIALS

There were surely a number of lawyers outside the constraints of

government service who consulted with the President and his wife throughout their ordeal, to say nothing of the legions of satellite clients, each helping in his or her small way to fatten the 1040s of the practicing Bar. Of course, we have no idea—and probably never will—how they exercised their advisory prerogatives. Fortunately, the bonds of professional loyalty hold fast. But I think it is possible to imagine various postures chosen by these lawyers. Perhaps the events as they became known to the avid consumers of the evening news hold some message for each of these imagined counseling styles.

A. Passive Deference

Notwithstanding the comparative youth of President and Mrs. Clinton and their unpretentious manner, I can well understand how a lawyer—even a grey and distinguished lawyer—might be loath to take charge of the Clintons’ affairs, though the evidence was strong of surprisingly poor judgment on both their parts theretofore. From what I understand, the mystical reverence for the Oval Office might make it difficult to take responsibility for the decisions in their case when they have taken responsibility for making decisions for all Americans in so many matters of far graver importance. So I think we may imagine a lawyer who takes a passive role—not in awe but out of respect—stating matters as plainly as possible, attempting to paint a clear picture on both sides of every option, but leaving decision to the client.56

I can imagine such a lawyer saying, “Well, Mr. President, (even Bill), Judge Wright’s definition leaves room for interpretation. Read for its general tenor—and that may be the way most people will read it—it would seem to include sexual contact of all sorts. But read strictly, as a lawyer might, it would seem to include only sexual contact intended to impart excitement or gratification. You know best what actually happened, you’re a lawyer, and you can decide which reading you want to give the definition.”

Or later, the passive lawyer may have added, “Well, no one can say with assurance what Ken Starr has in mind, but if he is looking for a perjury or obstruction charge against you, it might make things easier if you changed your story and admitted to the grand jury that you did not tell the full truth at that Paula Jones deposition. Your testimony is secret, of course, but we don’t know how far we can trust that secrecy, or indeed, if you want to rely on it from a public relations standpoint. On the other hand, perjury is problematic in this case and the indictment of an incumbent president is contrary to Department

56. I have recently written, in another context, of the issue of the allocation of responsibility for tactical and strategic decisions between client and counsel. See H. Richard Uviller, Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case, 52 Rutgers L. Rev. (forthcoming Apr. 2000) [hereinafter Uviller, Calling the Shots].
of Justice policy and seems unlikely. If you revised your testimony now that you are before a grand jury it might take some of the steam out of the impeachment people—or at least they couldn’t use your testimony before the grand jury as evidence of sworn deception, insofar as that may be a high crime or misdemeanor. It’s up to you, sir.”

We can easily imagine our balanced, deferential counsel putting all sorts of choices before the client. Full explanation is given of options and consequences, but no strong advice on which to choose. Would that performance satisfy us that fully effective assistance of counsel had been accorded?

B. Assertive Deputy

I’m sure we can also imagine a very different type, a lawyer who would love to command the Commander-in-Chief. This lawyer, as I see him, is accustomed to coming into highly fraught, high-stakes cases, and after fully detailing the grave hazards faced by the client, saying with welcome assurance: “But rest easy. I am now on the case. Leave everything to me. I will, I promise you, secure the best possible outcome for you.” It’s not just an ego trip. I know lawyers who fervently believe that the best service they can provide for their clients is to save them from themselves. “My clients have defective judgment concerning their own interests,” I was told. “That’s a given. That’s why I’m there. So I make it clear from the start; if they choose me as their lawyer, they leave the decisions to me.” Such a person might change the line somewhat with the President as a client, I imagine, but the general approach would be similar. “I’ll be frank with you Mr. President,” he might say. “In my opinion this cockamamie lawsuit is garbage. It’s nothing but a stick-up and should be thrown out of court—which is just what I hope we’ll be able to do eventually. Meanwhile, you owe Paula Jones nothing in return for this harassment, and I would construe all these questions at the deposition as narrowly as possible. If there’s a way to avoid telling the whole story, you are entitled to take it, and that’s just what I would do if I were in your shoes.” Such confidence is frequently persuasive, even if the advice is poor.

Most lawyers would probably place themselves somewhere in be-

57. See Jeffrey L. Bleich, Executive Privilege and Immunity: The Questionable Role of the Independent Counsel and the Courts, 14 St. John’s J. Legal Comment. 15, 32 (1999) (“Justice Departments under both Democrats and Republicans have taken the position that a sitting President cannot be indicted.”); see also Posner, supra note 36, at 265 (“We do not need to be able to sue our Presidents during their term of office.”).

58. The Model Rules of Professional Conduct defines a “normal client-lawyer relationship” as one that is “based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.” Model Rules of Professional Conduct Rule 1.14 cmt. 1 (1999).
tween these prototypes. But I suspect that Clinton's disastrous decisions were in part the result of bad advice from private counsel. Not that the bad advice was not augmented, compounded, and perhaps initiated by others: spin doctors, public relations consultants, old buddies, and their ilk. But in my jurocentric way, I continue to believe that the lawyers had a central role—and a special responsibility. So, sailing on suspicion alone, I maintain that the shipwreck of state taught a bitter lesson for the private counsel of public officials.

The lesson is that lawyers are duty-bound not only to describe to clients, legal and other constraints bearing on a proposed course of conduct, to expound on available alternatives and their likely consequences, but to tender their best and most conscientious counsel. Counsel means advice, not explanation, not command. I do not suggest, I hasten to add, that lawyers are uniquely qualified to read the tea leaves, and predict the most successful course. But they do have—or should have—special competence and experience to sort out complex and conflicting considerations, and to evaluate probabilities on a sound understanding of the big, and evolving, picture. Though the ultimate decision may be for the client, the lawyers are duty-bound to attempt to influence that decision along lines suggested by their own best professional judgment.

There is, I am aware, a nice and debatable question (on which I have written elsewhere) concerning the allocation of control between counsel and client. Codes and cases have spoken on the subject, especially in the context of criminal litigation. Schools of thought have arisen favoring either client autonomy or professional prerogative. Issues have been parsed according to whether they are fundamental or instrumental. Ultimately, the matter probably remains quite fluid with individual pairs of lawyers and clients responding to their particular and various differences in temperament, understanding, and concern. Although I favor a few inalienable entitlements of the client—again, especially in the trial of a criminal case, I submit that a robust defense and the adequate discharge of the advisory duty require counsel to take responsibility for decisions, at least to the extent of exerting persuasive influence on the client's choice.

The Lewinsky fiasco, then, should have taught the private bar that their obligation is to advise and persuade. Trusted counsel should have said to the President in those early days when he desperately thought he could get away with evasions and concealments of his rela-

59. For an example of this assertive approach, see United States v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998) (holding that it is not ineffective assistance—indeed, it is counsel's professional duty—to raise with the court the defendant's possible incompetence despite the defendant's wishes not to do so).
60. See Uviller, Calling the Shots, supra note 56.
61. See id.
tionship with "that woman," "Mr. President, let me be frank. Yes there is an interpretation of Judge Wright's definition that would allow you to say that fellatio is not having sexual relations. But it is a very narrow interpretation and contrary to ordinary understanding. If you rely on it to deny that you had sexual relations with Ms Lewinsky, someone is sure to say that you are evading the truth and dishonoring your oath. That person may just possibly be on the IC's staff. You are going to be required to repeat it, perhaps to the IC's grand jury. And they, coached by the IC, are going to take a dim view of your technical and legalistic construction. Wholly apart from what your public relations people may tell you, I hope to persuade you that you are buying a heap of legal trouble down the line if you choose this tack."

For all we know, just such sage advice was imparted to the President, who stubbornly refused to heed it. But to me the President's counseled error of judgment at the Paula Jones deposition serves to highlight to the Bar generally the importance not only of sound assessment, but of persuasive presentation to the obstinate and wrong-headed client.

CONCLUSION

In sum, the Bar has emerged from the impeachment investigation of 1998 and its fallout somewhat sullied in its cloak of wisdom and detachment, though not nearly as badly smeared as following the Watergate investigation. Our precious capital as salty captains of conflict and controversy has been depleted a bit. But, reflecting on the several lessons of the recent era of the Independent Counsel, I think we might be the wiser for appreciation of our errors.

So I conclude that there is little the profession can do to avert future politically-fueled, legally-entangled, media-enhanced government scandals, or to control the damage wrought by them on public confidence. I certainly will not recommend beefing up the professional responsibility offerings at the law schools. But individually we can learn from the structural flaws and ethical errors that may have contributed to the impeachment and trial of President Clinton. We do not need, and should not have, a free-ranging and open-ended prosecutorial team charged with the single mission of bringing to book a highly visible target. We should allow investigation of alleged malfeasance in high places to be conducted by special prosecutors within the Department of Justice under such arrangements as will maximize independent judgment. From the experience we have had with such investigations, we have no reason to fear their corruption. Second, we should not forget that our government lawyers are bound, first and foremost, to the public weal, and cannot offer confidential counseling to public officers concerned about their personal jeopardy. Government officers, no less than ordinary citizens, must have recourse to
private counsel, with professional bonds of undivided loyalty, to take the great advantage of the privilege that shields their conversation from even the most urgent public demand for revelation. Finally, as private lawyers, we should not shrink from the earnest tender of good advice, coupled with such persuasion as we can muster to dissuade even the most illustrious client from the disastrous path. Wise and prescient as may be our description of the possible consequences of competing courses of action, vivid as our projections may be, it is not enough to educate the client. We must, as part of our obligation to counsel our clients, urge them to do what we have concluded is the right thing and to shun their inclinations to err.
Notes & Observations