

New York State Judicial Institute on Professionalism in the Law
PROTECTING THE INDEPENDENCE OF THE GOVERNMENT LAWYER

Keynote Address by Bernard W. Nussbaum¹

November 15, 2010

A shared value brings us together today — our commitment to professionalism in the law. As you heard from Paul Saunders' welcome, the groundwork for this Institute was laid with a set of principles — of professionalism; independence; excellence — principles that inspired Judith Kaye, my good friend and our former Chief Judge. For more than a decade you have explored these principles in the legal profession from a variety of perspectives — from the solo practitioner; to partners in large law firms; to in-house General Counsel; and to government attorneys.

Today the Institute has chosen to tackle an issue that cuts across these perspectives, one that implicates the foundation of professionalism in the law — attorney independence. Our focus will be on the lawyer in *government*. But as you will hear, many of the concerns about protecting the independence of government attorneys, arise in the private bar as well. I will reflect on this a little later on. Right now, let me describe why the independence of the *government* attorney is so important.

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On a daily basis, public officials rely on their lawyers for candid, independent advice — whether they are worried about lobbying, gifts, conflicts of interests, political uses of their public office, or the administration and enforcement of complex legal mechanisms.

But what is at the heart of this relationship between government attorneys and officials? What makes these communications possible? What makes them worthwhile?

¹ Mr. Nussbaum wishes to thank Kevin S. Schwartz, an associate at the law firm Wachtell, Lipton, Rosen & Katz, for his assistance in the preparation of these remarks.

The key to the independence of the government lawyer — and this will be the theme of my talk — is the *attorney-client privilege*. The oldest of the common-law privileges for confidential communications, the attorney-client privilege protects communications between lawyers and their clients from being divulged to others. The purpose, of course, is to encourage full and frank discussions between lawyers and their clients.

That purpose is undermined unless there is a guarantee of confidentiality. As I will show, in recent years this guarantee has, in fact, been undermined for *government attorneys*, by a number of significant federal court decisions. I will discuss those decisions I will discuss this worrisome trend. And my basic proposition is that — if this erosion continues, it will undermine compliance with law — it will undermine the independent role of the lawyer in both the public and private sectors; it will undermine the rule of law.

I. Erosion of the Attorney-Client Privilege

The erosion of the attorney-client privilege for the government lawyer raises core questions involving his independence, or lack of independence, *questions our panels will be discussing today*:

— Are the obligations of government lawyers different from those of the private bar?

— Who is the client of the government lawyer?

— And what is the impact on the professionalism of government attorneys if the guarantee of confidentiality is diminished?

These questions have divided the courts in addressing the privilege issue.

Several federal appeal courts (the DC Circuit, the 7th Circuit, the 8th Circuit) have ruled that when a grand jury issues a subpoena for documents or

testimony, the privilege does not shield a *government* attorney's confidential legal advice to his client, the public official.² It must be disclosed. That means there is no privilege protecting the advice, for example, a White House Counsel gives to the President, at least in connection with a possible criminal investigation. No such exception has ever been recognized for lawyers outside government.

The courts have given two main explanations for this position. Each is wrong, in my judgment, but before telling you why, I want to set them out for you. I also want to note that at least one federal appeals court — the Second Circuit in 2005 — has wisely pushed back.

If you review the decisions from the appellate courts in the Seventh, Eighth, and D.C. Circuits over the past 15 years, you will find a certain incantation — *that government lawyers are different*. These courts acknowledge the need for full and frank communication between government attorneys and their clients. They concede the importance of the privilege to attorney independence. *But* they have concluded that this paramount interest should be subordinated.

Why? Because a government lawyer owes his duty to the public; he has a higher calling.

This, then, is the mantra used to eviscerate the privilege for *government* attorneys; they have what the courts called a “*higher, competing duty to act in the public interest*”³ — they take an oath to that effect; their salaries are paid by public assets; their client agencies do not face criminal liability while private corporations do. And, the courts reason, government officials bear a special responsibility to act in the public interest as they exercise the power of the state. “Unlike a private practitioner,” they conclude, “the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client

² *In re Bruce R. Lindsey (Grand Jury Testimony)*, 158 F.3d 1263 (D.C. Cir. 1998); *In re A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

³ *In re Special Grand Jury*, 288 F.3d at 293.

agency.”⁴

In effect, these court decisions rest upon a view that in government, “*the proper allegiance*”⁵ of lawyers is different, their clients are different — and so, too, should their attorney-client privilege be different.

This is a view — the “higher calling” view — with which I strongly disagree and to which I will return.

II. Attorney-Client Privilege and Executive Privilege

But before I do, let me turn to the second ground relied on by the Courts — which compares the attorney-client privilege to *executive* privilege and reasons that because executive privilege is limited in nature, so must the attorney-client privilege be limited. Now, why did this comparison arise?

It is significant that several of these cases eroding the attorney-client privilege involved the White House Counsel’s Office under President Clinton. That setting led the courts to perceive *a connection* between disputes over the President’s attorney-client privilege and the President’s executive privilege. These cases were decided after my time in the White House. But I want to discuss two of them — from the Eighth and D.C. Circuits — focusing on *how* they related attorney-client privilege to executive privilege.

As you will recall, in 1974, the Supreme Court issued its landmark decision ordering the White House to produce the Nixon tapes in response to the special prosecutor’s subpoena. The White House had refused, invoking Executive privilege, and the Supreme Court agreed there *is* such a thing as Executive privilege — that the Constitution’s separation of powers *does* protect the

⁴ *In re Lindsey*, 158 F.3d at 1273.

⁵ *Id.*

confidentiality of presidential communications.⁶ But, the Court found that constitutional privilege to be “significantly diminished” in the face of a subpoena.⁷ Between these supposedly competing objectives, the Court determined that the “legitimate needs of the judicial process outweigh Presidential privilege.”⁸

How does the Court’s limitation on executive privilege relate to our topic today? Decades later, in construing the White House Counsel’s attorney-client privilege, the reasoning from the *Nixon* decision was front and center.

In effect, the Eighth and D.C. Circuits concluded that legal advice is no different from a President’s communications with his other advisors — communications which are only protected by a qualified executive privilege under the *Nixon* decision. As the D.C. Circuit put it in 1998:

“Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy or politics, or why a President’s conversation with the most junior lawyer in the White House Counsel’s Office is deserving of more protection . . . than a President’s discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.”⁹

Well, that ruling was clear: If the President’s executive privilege can be limited, so can the attorney-client privilege in government.

In 2005, the Second Circuit took a different tack.¹⁰ It acknowledged the public’s interest in ensuring that grand juries collect all relevant information. But unlike its sister circuits, the Second Circuit found that objective outweighed by the public’s interest in having state officials receive and act upon the best possible legal advice. In fact, the court noted, the rationale for the attorney-client privilege

⁶ *United States v. Nixon*, 418 U.S. 683 (1974).

⁷ *Id.*, at 706.

⁸ *Id.* at 707.

⁹ *In re Lindsey*, 158 F.3d at 1278.

¹⁰ *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005).

applies with “special force” in *government*, because officials must be encouraged to seek out and receive fully informed legal advice while conducting the public’s business.¹¹ And there you have a split.

The Supreme Court has not reviewed the split on this question, but I have no such hesitation. I want to tell you why each of the two grounds on which courts have eroded the privilege is wrong — and I’ll start with their conflation of the privileges in relying on *United States v. Nixon*.

Nearly two decades before I was in the White House thinking about the attorney-client privilege, I actually devoted a bit of time to the other privilege discussed by both the Eighth and D.C. Circuits — executive privilege. That was in 1974 when I was a member of the staff of the House Judiciary Committee conducting the Nixon impeachment inquiry.

And I have a confession to make: I believe the Supreme Court’s decision in the *United States v. Nixon* case — which did turn out to be so useful to us on the impeachment staff — was wrong.

The Supreme Court is, of course, the final arbiter of the Constitution, and it properly determined that Executive privilege arises from the Executive Branch’s co-equal, independent status. But the Court decided to qualify that privilege — to balance — to weigh whether that privilege may be overridden based on the general interests of the judicial process. This, I believe, was a mistake.

If there is a privilege, as executive privilege, inhering in the Constitution, then it should be absolute. There is, for example, another privilege set forth in the Constitution — the Fifth Amendment privilege against self-incrimination. That privilege is absolute. No balancing test is administered before a citizen may invoke it. And that is appropriate. Why, then, should executive privilege be less protected?

¹¹ *Id.* at 534.

Don't get me wrong, I believe the Nixon tapes should have been produced. But not to the special prosecutor. It was the subpoena from Congress, in its impeachment inquiry, that should have been obeyed.

Congress's power of impeachment triggers the only exception to Executive privilege established in the Constitution. That's because "the very purpose of such an inquiry is to permit the legislative branch, acting on behalf of the people, to curb the excesses of another branch, in this instance the Executive."¹² This was the view expressed 36 years ago by the House Committee on the Judiciary.

You may recall that the third article of impeachment against President Nixon involved his refusal to comply with the Impeachment Committee's subpoenas. The Committee's report explained that "it is for the Committee — not a trial judge in a criminal case — to determine what is relevant and necessary to the Committee's [impeachment] inquiry."¹³

In support of this position, the Committee traced the long history of the impeachment exception to Executive privilege, including President James Polk's concession in 1846 that only by an order of the "House of Representatives, as the *grand inquest of the nation*," would "all the archives and papers of the executive departments, public or private, be subject to the inspection and control. . . . The power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Department."¹⁴

So, while I believe the Nixon tapes should have been produced to Congress, I also believe the *Nixon* decision — abrogating executive privilege in the face of a grand jury subpoena — was incorrect. And, consequently, relying on it to

¹² Report of the Committee on the Judiciary, House of Representatives Report No. 93-1305, at 208 (Aug. 20, 1974) [hereafter "Committee Report"].

¹³ Committee Report, at 189.

¹⁴ H.R. Jour. , 29th Cong., 1st Sess. 693 (1846), quoted in Committee Report at 207.

undermine the attorney-client privilege for government attorneys is also incorrect.

But even assuming the *Nixon* decision was correct — even accepting that you can diminish executive privilege in the face of a subpoena — the lower appellate courts were nonetheless wrong to apply that reasoning to the attorney-client privilege.

In refusing to distinguish these privileges, they failed to appreciate that the President’s lawyer is a *lawyer*, and every lawyer — even one representing the President in his official capacity — must be able to provide independent, confidential legal advice to his client, both to ensure his compliance with, and to assist in his implementation of, the law.

I fear the courts’ concern about the “conceit” of lawyers clouded their insight into the nature of the advice at stake — legal advice. It is indeed the *special* nature of legal advice — its importance to ensure compliance with law — that for centuries has formed the basis of the common law attorney-client privilege.

III. The “Higher Calling” Rationale

Let me now return to the other ground I mentioned earlier which is cited by courts to justify piercing the governmental attorney-client privilege. These courts concluded, as I indicated, that government attorneys are different; they have a higher calling. They have taken an oath to uphold the law, they are paid by public assets, and their clients are expected to enforce the law and obey the law.

This rationale — while rhetorically satisfying — is not sound. All lawyers, whether in the public or private sector, take an oath to uphold the Constitution of the United States. All attorneys must promise to follow the law as a prerequisite for admission to any bar. All lawyers are officers of the court. And all clients, public or private, are expected to follow the law.

Now, courts have not been alone in trying to find distinctions between

government attorneys and the private bar. Some commentators have taken up this charge, pointing to the various identities of a government lawyer's "client" as proof that attorney communications with public officials cannot be insulated in the same way as they are for clients in the private sector.¹⁵ They cite a host of possible clients of a government lawyer:

- the supervising official
- the government agency, like the White House
- the branch of government
- the United States as a whole
- "the people" or "the public interest"¹⁶

The argument goes, that among any of these clients, the privilege must be pierced, at least for criminal proceedings, because "the government lawyer works for a public-abiding client, one that would expect disclosure of internal government wrongdoing."¹⁷ Government lawyers "do not have the same ethic of client protection as do private lawyers."¹⁸

In my judgment, these distinctions are baseless.

First, it is misleading to suggest that the governmental privilege must be pierced in light of what one scholar called "the moral force toward revelation" of wrongdoing.¹⁹ It is already part of the law that the attorney-client privilege is abrogated by the crime-fraud exception. If there was evidence that a government official used a government attorney to further a crime, the privilege would not apply.

¹⁵ See, e.g., Ross Garber, *The Government Attorney-Client Privilege*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 325 (2008); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 *S. TEX. L. REV.* 269, 269-274 (1999); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 *HARV. L. REV.* 1244, 1414 (1981).

¹⁶ See, e.g., Ugarte, *supra* note ___, at 271.

¹⁷ James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 *TEMP. POL. & CIV. RTS. L. REV.* 633, 634 (2005).

¹⁸ *Id.* at 635.

¹⁹ *Id.* at 635.

Second, there is no good reason for singling out a criminal proceeding as a basis for piercing the governmental attorney-client privilege. This was made clear in a Supreme Court decision which came down two decades after the *Nixon* case.

In that case, Chief Justice Rehnquist explained that while Executive privilege may perhaps be strictly construed in light of the “judicial goal of truth seeking,” a different analysis applied to the attorney-client privilege, which the Chief called “the oldest recognized privileges in the law.”²⁰

Now, this case also arose from the White House Counsel’s Office, but in this instance a member of that office, my deputy Vincent Foster, had retained a *private* attorney. After Foster’s death, the Independent Counsel — Ken Starr’s office — obtained a grand jury subpoena for production of notes that were taken by Foster’s attorney of their conversations.

In holding the attorney-client privilege survives a client’s death, the Supreme Court noted “there is no case authority for the proposition that the privilege applies differently in criminal and civil cases.”²¹ The Court explained, “a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter.”²²

I believe the focus should always be on private & government attorneys’ *common professional objective* — to provide independent legal advice. For centuries the critical insight of the privilege has been that confidentiality is indispensable for candid communications between lawyers and their clients. That remains a fundamental principle, both inside and outside of government, in civil cases or criminal cases.

That is why the erosion of the attorney-client privilege with regard to

²⁰ *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998).

²¹ *Id.* at 408-409.

²² *Id.* at 409.

government lawyers threatens the public interest, the common good, or whatever broader ideal one may wish to invoke.

IV. The Rule of Law

I believe that the ideal which we must strive to protect is — the rule of law — compliance with law. It is that ideal which is imperiled by limiting the attorney-client privilege in any forum.

Going back to my own experience in Washington, it became fashionable for a time to assert that the Counsel to the President is really Counsel to the Presidency — that I should have dedicated myself to the office, to the institution, to the White House, rather than to the person. In part, I understand that view. My role did include defending the institutional interests of all Presidents — even Republicans. And I agree that there are some purely personal matters that should be handled by a private attorney.

But I also know that the Counsel's responsibility to the institution of the Presidency begins with advising the particular individual in that office. You do not give advice to a building or an office. You can only advise its current occupant, who is a human being. That human being — in his or her official capacity — *is the client* to whom you are bound by an ethical duty. And that duty includes the duty to *preserve his confidences*; to represent him zealously; and to help him achieve his legitimate objectives.

These are duties that a lawyer has in representing *any* client. They cannot be compromised because the client happens to be President of the United States or some other government official. If a Counsel to the President is forced to diverge too far from the role of a lawyer generally, we will have weakened both the Office of Counsel and the Office of President.

Now, let me be clear — one should not kid oneself into thinking that

the reasoning used by courts to limit the privilege *in government* cannot easily be exported to the private bar.

It's not difficult to imagine the courts' rationale about so-called "duties to the public" someday being used in the context of private business lawyers — after all, business entities, like governmental clients, ultimately owe duties to various public constituencies.

Already, the Supreme Court has hailed, for example, accountants' "public watchdog" function, ruling that an independent auditor should not receive work product immunity because he "assumes a *public* responsibility transcending any employment relationship with the client."²³ In fact, the 8th Cir. relied, in part, on this very precedent in limiting the attorney-client privilege in the White House — due to the so-called higher calling of public servants.²⁴

If successful, erosion of the attorney-client privilege for the private bar would have a serious negative effect on the quality of legal service provided to individuals and corporations in this country. By chilling candor and openness between a lawyer and a client, evisceration of the attorney-client privilege will undermine the rule of law.

For, make no mistake about it, compliance with law in a country of 300 million is not, in the first instance, dependent on prosecutors, or courts, or judges.

It is dependent upon honest lawyers giving candid, knowledgeable advice to clients.

To interfere with that relationship — to break down the bond between lawyers and clients — to tear away the veil of confidentiality which is necessary to induce candor and openness — undermines the rule of law.

²³ *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984).

²⁴ *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920-21.

That is why the attorney-client privilege — for government lawyers and their clients, and for private lawyers and their clients — is so important.

That is why it is so essential to their independence.

That is why it must be fiercely defended.

Thank you.