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The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics

Cover Page Footnote

Briggs & Morgan Professor of Law, University of Minnesota School of Law. My thanks to Patrick Schlitz, John Nagle, Daniel Farber, Geoffrey Stone, Susan Wolf, William Hodes, and David McGowan for their valuable comments and suggestions, and to Jay Pralle for his resourceful research.

DEAD MAN'S PRIVILEGE: VINCE FOSTER AND THE DEMISE OF LEGAL ETHICS

Michael Stokes Paulsen

INTRODUCTION

THE facts are worthy of a Grisham legal thriller or a Shakespearean tragedy, and seem to partake of elements of both. The web of characters and events frames a story of political intrigue, ethical dilemmas, corruption and greed, honor and loyalty, friendship, anguished indecision, and, ultimately, death. But the story is real and deadly serious: On July 20, 1993, Vincent Foster, Jr., the Deputy White House Counsel and personal friend of President Bill Clinton and First Lady Hillary Rodham Clinton, finished lunch at his desk, left his office in the West Wing of the White House, and drove to Fort Marcy Park in suburban northern Virginia, where he took his own life by putting a .38 caliber revolver in his mouth and shooting himself through the head.¹

It may seem callous, almost cruel, to think of such a human tragedy in terms of its legal significance, but there is legal significance to this suicide that cannot be ignored: Vince Foster killed a material witness in a federal criminal investigation. It is quite possible he did so in part with the deliberate object of preventing that material witness (himself) from testifying. Whatever his precise intent, Foster's suicide had the inevitable effect of permanently silencing a potentially very important witness in what has become the most notorious criminal investigation of the decade: Independent Counsel Kenneth Starr's variegated inquiry into "Whitewater," "Travelgate," "Filegate," and ancillary matters (related and unrelated) involving possible obstruction of justice by officials in the administration of President Clinton, including the President and the First Lady.

Some of the events involved in Starr's investigation occurred long after Foster's death (most famously, allegations that President Clinton

* Briggs & Morgan Professor of Law, University of Minnesota Law School. My thanks to Patrick Schiltz, John Nagle, Daniel Farber, Geoffrey Stone, Susan Wolf, William Hodes, and David McGowan for their valuable comments and suggestions, and to Jay Pralle for his resourceful research.

1. See Office of Independent Counsel, Report on the Death of Vincent W. Foster, Jr., In Re: Madison Guaranty Savings & Loan Association at 1-3, 18-19 (1997) [hereinafter IC Report].

committed perjury and obstruction of justice in connection with Paula Jones's civil lawsuit for sexual harassment and Clinton's attempts to cover-up his clandestine sexual relationship with twenty-two-year-old White House intern Monica Lewinsky). One of the areas of inquiry assigned to Starr was Foster's death itself.² But Starr's investigation initially was directed at events in which Vince Foster, as Deputy White House Counsel, had been an important player: allegations concerning White House efforts to prevent a criminal inquiry into the Whitewater Development Corporation and Madison Guaranty matter and, even more centrally, the suspicious firing of career White House Travel Office employees allegedly to make room for Clinton relatives and friends and the use of the FBI and the Department of Justice to investigate the former employees ("Travelgate").³

By all accounts, Vince Foster was a highly skilled, unfailingly professional, and scrupulously honest lawyer who, in his work for the Clinton White House, became entangled in events of questionable legality and rapidly became overwhelmed by the personal and professional pressures and public criticism associated with those events.⁴ Nine days before his suicide, Foster, deeply distraught over matters at work, sought legal advice from a private attorney, James Hamilton, most likely concerning Foster's legal and ethical responsibilities with respect to matters in which he had acted as Deputy White House Counsel and which were expected soon to come under investigation by Congress and perhaps eventually by an Independent Counsel.⁵ Five years later, the U.S. Supreme Court, in the case of *Swidler & Berlin v. United States*,⁶ ruled on whether Foster's conversations with Hamilton remained privileged following Foster's suicide, as against a grand jury subpoena in a criminal investigation of events involving the Whitewater and Travel Office matters. The Court speculated, not without basis, that Foster may already have been contemplating suicide at the time he went to Hamilton for legal advice (a premise that would prove important to its legal analysis of the privilege issue):

In the case at hand, it seems quite plausible that Foster, *perhaps already contemplating suicide*, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.⁷

What did Vince Foster tell his lawyer? A plausible theory, sup-

2. *See id.* at 8-9.

3. For a summary description of "Travelgate," see *infra* note 21; see also H.R. Rep. No. 104-849, at 11-28 (1996) (discussing the history and investigation of Travelgate as well as the White House's response).

4. *See infra* Part I (discussing the legal-ethical dilemma likely confronting Foster in the weeks leading up to his suicide).

5. *See infra* notes 40-42 and accompanying text.

6. 524 U.S. 399 (1998).

7. *Id.* at 408 (emphasis added).

ported by much of the available evidence, is that Foster was an honest lawyer who found himself trapped in a legal-ethical dilemma from which he sensed, rightly, that there was no good escape. Foster, under tremendous stress and (as the Court would later note) perhaps already contemplating suicide, did what his professional habits as a lawyer indicated was the prudent course: he consulted a lawyer. It seems quite plausible that James Hamilton, another careful professional, confirmed what Foster likely had already figured out for himself: that, as Deputy White House Counsel, Foster's "client" was neither President Bill Clinton nor Hillary Clinton, but the United States government as an entity; that Foster had an affirmative duty to report to the Attorney General or other appropriate Department of Justice official—including an Independent Counsel, were one to be appointed—any information he had concerning the possible involvement of any federal official in criminal activity; that Foster could in any event be compelled to testify before a federal grand jury or congressional inquiry concerning such matters; and that, in all probability, no attorney-client, executive, or Fifth Amendment privilege would shield Foster from being compelled to testify fully and truthfully concerning the possible criminal wrongdoing of others.⁸

Foster was in a terrible bind—one that obviously weighed on him more heavily than those around him knew.⁹ Foster was personally loyal to the Clintons, his long-time friends. But he was also an ethical lawyer acutely aware of his professional obligations under the law. Foster would not want to provide evidence harmful to the Clintons; but he would not lie under oath either. Nor would he withhold from government investigators material information concerning possible criminal wrongdoing by others, where he had a legal duty to report such information. For Foster, neither course—disclosure or silence—was consistent with his character.¹⁰ He was trapped between a rock and a hard place, and he chose a hard place.

Is it possible that Foster's suicide was in part a response to his ethical dilemma, and the depression to which it likely contributed? Is it possible that Foster viewed suicide as a "way out" of his ethical box? The pressures, emotions, and conflicts with which Foster obviously was wrestling in the last days of his life make it impossible to disentangle his motives for committing suicide. Almost certainly, though, the underlying events and issues associated with his decision to seek out legal advice were contributing factors to the state of mind that led Foster to take his own life. If the Supreme Court is right that Foster may already have been contemplating suicide at the time of his conversation with Hamilton, it is also possible—possible, not necessarily

8. See *infra* notes 42-64 and accompanying text.

9. See IC Report, *supra* note 1, at 101.

10. See *infra* notes 23-39 and accompanying text.

probable—that he expressed such suicidal thoughts to Hamilton. At the very least, it is likely that Foster discussed his legal-ethical dilemma with Hamilton. Some of the emotional pressure associated with the dilemma may have been part of that conversation; and the results of that conversation may in turn have heightened the emotional pressure on Foster.

Might Foster and Hamilton have discussed whether their conversation would remain privileged even if Foster were to die? (We know that they discussed Foster's desire that their conversation remain privileged.)¹¹ Might Vincent Foster, Jr., an astute lawyer notwithstanding the personal and professional crisis that engulfed him, have concluded, with or without Hamilton's assistance, that his suicide would permanently silence both him and his lawyer? Like the Supreme Court's speculation as to Foster's state of mind at the time he sought legal advice, this too is only speculation—plausible speculation, but speculation nonetheless.

If this (or something like it) was Foster's conclusion, the Supreme Court effectively ratified it five years later in its decision in *Swidler & Berlin*.¹² In *Swidler & Berlin*, the Court held that the common law attorney-client privilege survives the death of the client and that no exception exists in the situation where information about attorney-client communications is sought for a criminal grand jury investigation, even where such information is assumed to be of substantial importance to the investigation.¹³ The Court sustained a motion to quash a grand jury subpoena, issued in connection with the investigation of Independent Counsel Kenneth Starr, directed to Hamilton, instructing Hamilton to produce his handwritten notes of his meeting with his now-deceased client, Vince Foster.

The Court did not consider whether (and no party argued that) client suicide might pose a different issue than that presented by deceased clients generally. Implicitly, the Court's decision rejects any such suggestion. The Court also did not consider whether (and no party argued that) client suicide might pose a different case, especially where the client's suicide might be shown to have been motivated, in part, by a desire to *destroy evidence*—specifically, the availability of the client's own testimony. Implicitly, though far less clearly, the

11. See *Swidler & Berlin*, 524 U.S. at 402; Transcript of Oral Argument at 3, *Swidler & Berlin* (No. 97-1192) (statement of attorney James Hamilton, petitioner) (“Before we began, Mr. Foster asked me if the conversation was privileged and, without hesitation, I said that it was.”); *infra* note 65.

12. 524 U.S. 399 (1998).

13. The Court noted, without specifically embracing, the recognized exception to the posthumous privilege where necessary to establish testamentary intent. See *id.* at 408. The Court also noted attorney Hamilton's concession that (in the words of the Court) “exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege,” but explicitly declined “to reach this issue.” *Id.* at 408 n.3.

Court's opinion seems to have rejected this position as well.

There is much that is vulnerable in the Court's opinion in *Swidler & Berlin*: its assumption about the strength of the policy justification for the attorney-client privilege generally; its empirically-questionable assumptions about clients' expectations concerning privilege and confidentiality; even its premises concerning the common law method as applied to the development and modification of the law of privilege. On the whole, however, the Court's legal analysis is not obviously wrong, as far as it goes. Indeed, neither the dissent, nor the opinion of the Court of Appeals below, nor the briefs and arguments of the Office of Independent Counsel persuasively refutes the majority opinion on its own terms.

Still, it is hard to agree wholeheartedly with *Swidler & Berlin*, for the Court's holding ignores facts that suggest a far more tangled web of relevant and difficult legal-ethical issues than is reflected in the workmanlike opinion of the Court by Chief Justice Rehnquist. These ethical issues should have counseled against embracing the sweeping claim of a permanent post-mortem privilege. Yet neither the dissent, nor the Court of Appeals, nor the Office of Independent Counsel suggested any narrower ground for piercing the attorney-client privilege than the one rejected by the Supreme Court. One is left with the sense that the Court rejected a straw man and adopted a much broader common law rule than is supported by policy, precedent or the facts of the Vince Foster case.

This Article is about Vince Foster's ethical dilemma, the way he resolved it, the implications of that dilemma and the circumstances of Foster's death for the question of post-mortem attorney-client privilege, and the implications of the entire Vince Foster story—from dilemma to suicide to privilege—for legal ethics generally. I explore first (in Part I) the thorny legal-ethical dilemma that apparently confronted Foster shortly before his death and that may have been the subject of his conversations with attorney James Hamilton. Against this backdrop, I then examine and critique (in Part II) *Swidler & Berlin*'s holding that Foster's statements to Hamilton remain privileged after Foster's death, irrespective of their potential relevance to a criminal investigation or the fact of Foster's suicide and its possible evidence-destroying motive.

Finally, I speculate (in Part III) about what may be the larger significance of the events of 1993 and 1998 for the future of "legal ethics" in American law. A lot has happened to the public ethos of "legal ethics" in the mid-to-late 1990s—so much so that this period may mark a watershed as important as Watergate. There is a sense in which Foster's death in 1993, and the Court's decision in the Foster case in 1998 (along with other extremely important public battles over government officials' claims of executive and attorney-client privilege

that same year,¹⁴ and the related events surrounding President Clinton's impeachment by the House of Representatives and trial by the Senate), symbolically frame a transition from a post-Watergate era in which legal ethics centrally included notions of public truthfulness, candor, and integrity to a post-Clinton era in which the dominant themes and expectations underlying lawyering are fierce loyalty to the client, confidentiality, privilege, and aggressive advocacy—even at the expense of truth.

I. WHAT DID FOSTER KNOW?

First, a caveat: we do not know all the facts. Indeed, the very nature of the Supreme Court's decision in *Swidler & Berlin*, sustaining the claim of posthumous attorney-client privilege, means that we may never know what Vince Foster shared with Hamilton about possible illegal conduct of administration officials in connection with the Whitewater and Travel Office matters. Foster took his knowledge to the grave. What Foster told Hamilton is governed by Hamilton's duty of confidentiality and, by virtue of the Court's holding, is permanently protected from compelled disclosure. The District Court examined Hamilton's notes *in camera*, but held them privileged.¹⁵ The Court of Appeals reversed, but its decision was in turn reversed by the Supreme Court.¹⁶ The Office of Independent Counsel never saw the notes.

Still, it is possible to make educated guesses concerning what Foster told Hamilton. The Office of Independent Counsel ("OIC") subpoenaed Hamilton's notes because it believed the notes would contain information relevant to the OIC's inquiries into Foster's death and immediate subsequent events, and also to the inquiries into Whitewater and the Travel Office affair.¹⁷ Foster had been involved in Whitewater matters both as a private attorney for the Clintons and, subsequently, in at least a limited role, as Deputy White House Counsel. Prior to joining the administration, Foster had been a law partner of Hillary Rodham Clinton and of convicted Whitewater figure (and former Clinton administration Associate Attorney General) Webster L. Hubbell at the Rose Law Firm in Little Rock.¹⁸ Foster had served

14. See *infra* note 67 and accompanying text.

15. See *Swidler & Berlin*, 524 U.S. at 402.

16. See *id.*

17. According to the OIC's brief, the grand jury subpoenas were initially issued during the OIC's investigation into "activities connected to Mr. Foster's death and the aftermath. The OIC subsequently received jurisdiction to investigate the Travel Office matter in March 1996, and the July 11 notes are likewise relevant and important to that aspect of the OIC's grand jury investigation." Brief for the United States at 7 n.3, *Swidler & Berlin* (No. 97-1192).

18. Webster Hubbell served as Associate Attorney General in the Clinton Administration from January 1993 to April 1994. In December 1994, Hubbell pled guilty to one count of willful tax evasion and one count of mail fraud in connection with

as private attorney for Bill and Hillary Clinton in the 1992 transfer of the Clintons' interest in the Whitewater Development Corporation to the Clintons' partner in that enterprise, James McDougal (who was subsequently convicted of eighteen counts of fraud in connection with Whitewater).¹⁹ While serving as Deputy White House Counsel, Foster had been involved in overseeing the preparations of the Clintons' tax returns in April 1993, including several matters in connection with the Clintons' sale of their interest in Whitewater.²⁰

fraudulent overbilling and hiding of income while at the Rose Law Firm. He served 18 months in prison, and subsequently was indicted twice more. The first subsequent indictment asserted charges of conspiracy, tax evasion, and mail fraud related to his receipt of questionable payments for nonexistent legal work that may have been in exchange for Hubbell's noncooperation with the Independent Counsel's investigation of Whitewater. That indictment was dismissed by a district court judge as outside the purview of the Independent Counsel's jurisdiction. See Ruth Marcus & Susan Schmidt, *Judge Dismisses Hubbell Tax Case*, Wash. Post, July 2, 1998, at A1. However, the dismissal was reversed on appeal by the U.S. Court of Appeals for the D.C. Circuit. See *United States v. Hubbell*, 167 F.3d 552, 554 (D.C. Cir. 1999). The second subsequent indictment, focusing on the initial Whitewater matters, was handed up on November 13, 1998. The indictment charged that Hubbell "falsified, covered up by scheme and concealed from agents and investigators . . . the true nature of his . . . relationships . . . [with] Madison Guaranty, Madison Financial and a series of transactions that came to be known as the IDC/Castle Grande transactions." Pete Yost, *Starr Indicts Webster Hubbell*, AP Online, Nov. 13, 1998, at 3, available in 1998 WL 22418374 (quoting indictment). Hubbell pled guilty to one felony count of lying to investigators and one misdemeanor count of tax evasion, but as part of the plea agreement received no additional prison time. Glenn R. Simpson, *Hubbell Set to Make Guilty Plea*, Wall St. J., June 29, 1999, at A16; Roberto Suro & Bill Miller, *Starr Notes Scandal Exhaustion at Hubbell Pleading*, Wash. Post, July 1, 1999, at A2.

19. See Brief for the United States at 5 n.2, *Swidler & Berlin* (No. 97-1192) (setting forth Foster's activities); Glenn R. Simpson, *Three Defendants in Whitewater Case are Found Guilty on Fraud Charges*, Wall St. J., May 29, 1996, A3 (noting Whitewater convictions of James McDougal, Susan McDougal, and Arkansas Governor Jim "Guy" Tucker, who had been Bill Clinton's Lieutenant Governor when Clinton was Governor).

20. Brief for the United States at 5 n.2, *Swidler & Berlin* (No. 97-1192). While Foster served as Deputy White House Counsel, Whitewater documents had been kept in his White House office. Department of Justice investigators had sought to review these documents the day after Foster's death, but White House officials did not allow them to do so. See *id.*

There was an apparent conflict of interest in Foster's private representation of the Clintons and his subsequent involvement as a government attorney in matters concerning Whitewater. See Model Rules of Professional Conduct Rule 1.11(c) (1998) ("Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."). It is not clear whether Foster understood that such a possible conflict of interest existed, though it seems likely that he did. Foster expressed concerns as a general matter with the use of government lawyers to handle arguably personal business for government officials, including the Clintons. See Susan Schmidt, *Depositions, Interviews Hint at Foster's Worries: Ethics May Have Troubled White House Lawyer*, Wash. Post, Jan. 30, 1995, at A6 [hereinafter Schmidt, *Depositions, Interviews Hint at Foster's Worries*] (recounting testimony of Foster friend and attorney James Lyons that "Foster believed that private sector at-

Even more important than Foster's connections to Whitewater, however, was the fact that Foster had been very significantly involved in the White House's deliberations and decisions concerning the firing of the Travel Office employees—the scandal that came to be known as "Travelgate."²¹ Foster ordered the outside audit of the Travel Office that led to the firings. Foster directly supervised Associate Counsel William Kennedy, who instigated the FBI investigation of Travel Office employees (of which Foster was aware). Foster spoke in advance of the firing decision with Mr. David Watkins, Assistant to the President for Management and Administration, who eventually carried out the firings. Foster directed that Watkins keep Hillary Clinton informed of all activities in connection with the Travel Office investigation and audit. Foster also spoke, in advance of the firings, to Hil-

torneys should be handling many of the matters they were handling, both for ethical and workload reasons").

21. The essence of the "Travelgate" affair is as follows. At the behest of Clinton friend and Hollywood producer Harry Thomason (whose air consulting firm had worked closely with the 1992 Clinton campaign) and Clinton third-cousin and White House aide Catherine Cornelius (who desired to head the Travel Office and install a Little Rock travel agency that included Clinton friends and campaign contributors as the White House travel agent), David Watkins, a campaign official who had taken charge of White House administration, authorized Cornelius to "keep her eyes and ears open" about rumors of petty cash discrepancies and improper bookkeeping in the Travel Office. Thomason informed Hillary Rodham Clinton of the rumors (apparently generated by Thomason, Cornelius, and Thomason's business partner in the air consulting firm, Darnell Martens), and the White House Counsel's office was brought in. Vince Foster and Associate Counsel William Kennedy worked on the matter. Kennedy brought in the FBI to investigate the Travel Office, even though the FBI initially said there was insufficient evidence to warrant an investigation. Foster sought an outside audit, and apparently argued against firing the Travel Office employees until one was completed. Foster directed that Watkins keep Hillary Rodham Clinton informed of all events associated with the Travel Office matter.

After KPMG Peat Marwick found problems in the Travel Office and a petty cash discrepancy, Watkins ordered the entire Travel Office staff fired and the White House announced publicly that the FBI had launched a criminal investigation. The Little Rock travel agency moved in quickly to set up a White House operation, but soon abandoned the effort in the face of mounting press and public criticism over the circumstances of the Travel Office firings. A later congressional investigation revealed evidence, in the form of a contemporaneous memorandum by Watkins, that Mrs. Clinton, who had denied any connection to the decision to fire the Travel Office employees, in fact had directed that the firings occur. A White House internal "management review" concluded in early July 1993 that mistakes of judgment were made, but that no one behaved in a seriously improper manner. Kennedy received a reprimand. See H.R. Rep. No. 104-849, at 11-28 (1996); Michael K. Frisby, *Clinton Fires White House Travel Office, FBI Is Probing Allegations of Kickbacks*, Wall St. J., May 20, 1993, at A5; Michael Isikoff & Bill Turque, *Snow Job?*, Newsweek, Jan. 22, 1996, at 30-31; Toni Locy, *For White House Travel Office, a Two-Year Trip of Trouble*, Wash. Post, Feb. 27, 1995, at A4; *A Stealthy, Evasive Confession*, N.Y. Times, July 11, 1993, § 4, at 18.

Five of the fired employees eventually were reinstated to other government jobs. One retired. The director of the office, Billy Dale, was prosecuted by the Justice Department, but acquitted of all charges. See *Former Boss of Travel Office is Acquitted*, Tampa Trib., Nov. 17, 1995, at 2.

lary Clinton, who expressed to Foster her strong desire (which Foster relayed to Watkins) that the Travel Office situation be taken care of as quickly as possible by firing the career employees.²² In short, Foster appears to have been a central go-between among all the major actors in the Travel Office affair—Mrs. Clinton, David Watkins, Associate Counsel William Kennedy, the FBI—and was the highest ranking administration legal official involved in overseeing the administration's actions.

The Independent Counsel's brief in *Swidler & Berlin* notes that Foster thus would have been

a significant witness in the [Travel Office] investigation: He had talked to Mr. Watkins about the Travel Office prior to the firings, and he was one of only a handful of persons known to have talked with Mrs. Clinton about the matter. If alive, Mr. Foster would have been in a position to provide valuable information, whether inculpatory or exculpatory. In light of Mr. Foster's death, the communications from Mr. Foster to Mr. Hamilton on July 11, 1993 would be important in understanding Mr. Foster's role in the Travel Office events and in understanding the roles of others—and thus in determining whether individuals made false statements, committed perjury, obstructed justice, or committed other federal crimes.²³

It is also known that Foster was, at the time he sought out Hamilton, deeply distressed over the Travel Office matter and the resulting investigations and public disclosures—especially with the effect of these matters on his own reputation for integrity. In a report by Dr. Alan Berman, Executive Director of the American Association of Suicidology, prepared at the request of the Office of Independent Counsel, concerning Foster's state-of-mind at the time of his death, Foster's concern over the Travel Office matter and his professional reputation are treated as extremely important factors contributing to the state-of-mind that led to Foster's suicide. Dr. Berman noted that descriptions of Foster's personality by a wide variety of persons interviewed “were extraordinarily consistent in describing a controlled, private, perfectionistic character whose public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance.”²⁴

22. See *supra* note 21 and accompanying text. A memorandum written by Mr. Watkins in 1993 stated that “[t]he First Lady took interest in having the Travel Office situation resolved quickly . . . [Vince] Foster regularly informed me that the First Lady was concerned and desired action—the action desired was the firing of the Travel Office.” H.R. Rep. No. 104-849, at 41.

23. Brief for the United States at 6, *Swidler & Berlin* (No. 97-1192).

24. Report to the Office of Independent Counsel, submitted by Dr. Alan L. Berman, Ph.D. at 3 [hereinafter Berman Report], cited in IC Report, *supra* note 1, at 98; see also Schmidt, *Depositions, Interviews Hint at Foster's Worries*, *supra* note 20 (“The document archive on Foster released this month by the Senate Banking Committee is in part a collection of impressions about his final days. It is clearly a portrait of a

Foster had lived almost his entire adult life, and his entire professional life, in Little Rock, until he moved to Washington in January 1993. Foster was graduated first in his class at the University of Arkansas Law School in 1971. He joined the Rose Law Firm as an associate that year, becoming a partner in 1974 and staying with the firm until January 1993—a tenure of twenty-two years, from age twenty-six to age forty-eight.²⁵ His family did not initially move to Washington with him, but arrived six months later, in June 1993 (a little over a month before his suicide).²⁶ Dr. Berman observed that Foster's life, after arriving in Washington, "was filled with long, intense and demanding hours of work."²⁷ During much of that time, with his family remaining in Arkansas, he did not have access to his usual network of personal support.

His professional life in Washington was not happy—a change from his comfortable years in Arkansas. The legal and political issues with which he was involved during his six months in the White House were stressful, not always very successful in outcome, and exposed Foster to unaccustomed public criticism. They included the selection and vetting of three candidates for Attorney General, of a Supreme Court Justice, and of other personnel. As the Independent Counsel's report on Foster's death notes, some of these matters "developed into difficult situations abounding with unfavorable public comment."²⁸ Other issues included the Clintons' tax returns (including issues concerning the sale of their interest in Whitewater to James McDougal), litigation related to the Health Care Task Force and, of course, the dismissal of the White House Travel Office employees and the resulting fallout.²⁹ Foster also became embroiled in a controversy concerning his (and other administration officials') membership in a Little Rock country club that had no black members. Foster eventually resigned his membership in the wake of the controversy.³⁰ During that first six months of the Clinton Administration, the White House staff—including Foster personally—was subjected to a barrage of media criticism on a wide range of issues, suggesting that the staff was incompetent.³¹ The public pressure in connection with Travelgate, including demands for appointment of an Independent Counsel, crescendoed steadily from

proud man and careful lawyer who followed Clinton from Little Rock to the White House and was soon humiliated by bad press and his own missteps.").

25. See IC Report, *supra* note 1, at 17.

26. See *id.* at 18.

27. Berman Report at 3, *cited in* IC Report, *supra* note 1, at 98.

28. IC Report, *supra* note 1, at 103.

29. See *id.* at 103.

30. See *id.* at 104.

31. The Editorial Page of *The Wall Street Journal* singled-out Foster for criticism in two June 1993 editorials. *Who Is Vincent Foster?*, *Wall St. J.*, June 17, 1993, at A10; *Vincent Foster's Victory*, *Wall St. J.*, June 24, 1993, at A12.

June to mid-July.³²

In a letter to a friend in Arkansas, Foster wrote in March of 1993 that he had "never worked so hard for so long in my life. The legal issues are mind boggling and the time pressures are immense. . . . The pressure, financial sacrifice and family disruption are the price of public service at this level. As they say, 'The wind blows hardest at the top of the mountain.'"³³ According to Dr. Berman's report, Foster "uncharacteristically . . . talked of quitting,"³⁴ but thought that doing so and returning to Little Rock would be a "humiliation."³⁵ According to Foster's brother-in-law, former U.S. Representative Beryl Anthony (Foster lived with his sister and brother-in-law in Washington prior to his family's move to the capital in June), Foster had expressed chagrin that he had "'spent a lifetime building [his] reputation' and was 'in the process of having it tarnished.'"³⁶

In early May of 1993, in the midst of the Little Rock country club controversy and the beginnings of the Travel Office scandal, Foster returned to Arkansas to give the commencement address at the University of Arkansas Law School, his alma mater. Dr. Berman later characterized the address as "'replete with reflections upon and regret regarding the changes wrought by his experiences in Washington.'"³⁷ Foster emphasized the importance of a lawyer's reputation for integrity: "Dents to the reputation in the legal profession are irreparable," he said. "[N]o victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." He added that the "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."³⁸ At some point, probably shortly before his death, Foster wrote a note, which he apparently tore up, saying that he had "made mistakes from ignorance, inexperience and overwork." The note continued that Foster "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."³⁹ In legislation enacted

32. See, e.g., *Who Is Vincent Foster?*, Wall St. J., June 17, 1993, at A10; *Vincent Foster's Victory*, Wall St. J., June 24, 1993, at A12; *A Stealthy, Evasive Confession*, N.Y. Times, July 11, 1993, § 4, at 18; *The Travel Office Controversy Isn't Over*, Wash. Times, July 12, 1993, at F2; *Appoint Special Counsel*, USA Today, July 19, 1993, at 10A. Foster met with attorney Hamilton on July 11, 1993, the morning of the *New York Times* article referenced here. Foster committed suicide the day after *USA Today* called for an Independent Counsel to investigate the Travel Office affair.

33. IC Report, *supra* note 1, at 104.

34. Berman Report at 13, *cited in* IC Report, *supra* note 1, at 99.

35. Berman Report at 14, *cited in* IC Report, *supra* note 1, at 99.

36. IC Report, *supra* note 1, at 105 (quoting Anthony interviews).

37. Berman Report at 5, *cited in* IC Report, *supra* note 1, at 98-99.

38. See *id.*; see IC Report, *supra* note 1, at 105. Foster's speech also warned that there would be "failures, and criticisms and bad press and lies, stormy days and cloudy days." He counseled the graduates that, if they should find themselves "'getting burned out or unfulfilled, [or] unappreciated,'" they should "'have the courage to make a change.'" *Id.* at 106.

39. IC Report, *supra* note 1, at 106-07. For the full text of the note, see *infra* note

on July 2, 1993, the General Accounting Office ("GAO") was assigned to investigate the Travel Office firings—firings in which, it had been publicly reported, Foster had had a hand.⁴⁰

It was in the midst of this political, legal, and personal maelstrom that Foster sought legal advice from James Hamilton of the Washington law firm of Swidler & Berlin. The record in *Swidler & Berlin* shows that the general subject matter of Vince Foster's conversations with James Hamilton in July of 1993 concerned Hamilton's legal representation of Foster in connection with expected investigations by congressional committees, the General Accounting Office, and possibly the Department of Justice in connection with the Travel Office matter (and perhaps other matters as well).⁴¹ From the facts and circumstances that are known, it can fairly be surmised that Foster was concerned about his own legal and professional obligations and potential liability under the circumstances—especially with respect to the Travel Office matter—and that these concerns figured prominently in his decision to seek private legal counsel from Mr. Hamilton.⁴²

If this information is accurate, it is probable that Vince Foster, in the days shortly preceding his suicide, found himself confronted with, and sought advice concerning, a classic problem of legal ethics: What is the in-house lawyer's duty when confronted with wrongdoing by officials of the entity the lawyer represents? What are the lawyer's duties, and potential liability, where the lawyer's own actions may have provided assistance to official wrongdoing? And are such duties af-

64. The note had been torn up, apparently discovered in Foster's briefcase several days after Foster's suicide, and was turned over to investigators by White House Counsel Bernard Nussbaum.

40. See IC Report, *supra* note 1, at 106.

41. See Brief for the United States at 3, *Swidler & Berlin* (No. 97-1192); Joint Appendix at 5, *Swidler & Berlin* (No. 97-1192).

42. See IC Report, *supra* note 1, at 106 & n.336 ("During the week of July 12, Mr. Foster contacted private attorneys seeking advice in connection with the Travel Office incident."). This simple declarative statement is based upon reports of witness interviews that, apparently, provided information (perhaps second-hand reports from Foster) concerning the nature of the representation sought. The referenced witness statements include two interviews with Beryl Anthony, Foster's brother-in-law, and with James Lyons, a Denver attorney who had worked on Whitewater issues for the Clinton campaign and with whom Foster had worked in the past. According to Lyons, just days before Foster's suicide (and, apparently, after Foster's meeting with James Hamilton), Foster called Lyons, asking if Lyons could come to Washington on short notice because Foster was considering asking him (Lyons) to serve as Foster's personal attorney in connection with the Travelgate inquiries. The meeting was set to occur on Wednesday, July 21, 1993—the day after Foster committed suicide. See Schmidt, *Depositions, Interviews Hint at Foster's Worries*, *supra* note 20.

Lyons did not invoke attorney-client privilege concerning these conversations with Foster, apparently because he either did not believe that an attorney-client relationship had been created, because he did not believe that the conversations involved Lyons in his capacity as an attorney, because he did not believe that Foster intended the conversations to be confidential, because he did not believe the privilege survived Foster's death, or because it simply did not occur to him to invoke the privilege.

fectured by the special context of an attorney's representation of the *government*, rather than the more common context of an in-house attorney for a corporation (and, if so, how)?

From the standpoint of legal ethics, these questions are, in theory, not especially difficult. A lawyer's ethical duty of loyalty when representing an organizational client, like a corporation, is to *the organization*, not to individual officers within the organization, who may have interests in conflict with those of the organization itself and who may not always act in the best interests of the organization. While an organization acts through its duly authorized officers, and the interests of the organization ordinarily are determined by these officers (when acting within the lawful sphere of their powers), that does not obviate the fact that the lawyer for the entity represents the entity, not the officers. This is elementary law of agency and legal ethics.⁴³

This principle applies to government attorneys the same as to attorneys representing any other type of organizational client. The government lawyer's client is the United States government, not any particular government official. Even the "Deputy Counsel to the President" does not represent the President personally. His client is the executive branch of the United States government. To borrow the corporate analogy, he works in the General Counsel's office of "USA, Inc." His particular area of *job responsibility* within the corporation may be advancing (within the bounds of the law) the political and legal interests of the President as CEO of USA, Inc., and he will therefore be particularly sensitive to defend the power of present management to pursue its lawful policy and political objectives, in the interests (as determined by present management) of USA, Inc. Ultimately, however, the Deputy Counsel to the President represents the office, not the officer; his client is the organization, not the individual interests of the person who happens to hold the office of President of the United States.⁴⁴

Vince Foster was a good lawyer. He probably knew all this. His judgment may have been clouded, however (as he himself appeared to suspect) by public criticism, overwork, pressure, inexperience with work as a government lawyer,⁴⁵ and perhaps also by his personal and

43. See generally Model Rules of Professional Conduct Rule 1.13 and cmt. (1998) (setting forth an attorney's ethical obligation to the organization over that of the organization's officers).

44. I have set forth this analysis, and the corporate analogy, at greater length elsewhere. See Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 Minn. L. Rev. 473, 485-493 (1998) [hereinafter Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*]; Michael Stokes Paulsen, *Hell, Handbaskets, and Government Attorneys: The Duty of Loyalty and its Limits*, 61 Law & Contemp. Probs. 83, 99-100 (Winter 1998) [hereinafter Paulsen, *Hell, Handbaskets, and Government Attorneys*].

45. See IC Report, *supra* note 1, at 106-07 (quoting torn-up note found in Foster's briefcase after his death).

political loyalties to the Clintons. The problem is a familiar one: corporate attorneys often owe their positions to present management and are personally loyal to the individuals holding positions as officers of the corporation, with whom they work closely and personally on a daily basis. The corporation is a legal fiction. It is easier for lawyers to identify with the interests of individuals than of fictitious legal constructs. The principle that the corporate attorney represents the corporation, not the officers, is often a hard one for the corporate attorney faithfully to apply in the real world. The legal ethics texts are replete with examples of violation of this principle, sometimes in circumstances where it is easy to sympathize with the lawyer's misidentification of the client as being the officers rather than the entity.⁴⁶ But it remains clear, unambiguous black letter law.⁴⁷

Once this framework is understood, the answers to the questions concerning the in-house lawyer's proper response to unlawful conduct by officers of an entity-client become relatively easy—and are, in any event, spelled out in detail in bar ethics rules and, often, in applicable substantive law as well. In the words of Model Rule 1.13(b) of the Model Rules of Professional Conduct,

when a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, *the lawyer shall proceed as is reasonably necessary in the best interest of the organization.*⁴⁸

46. See Geoffrey C. Hazard, Susan F. Koniak & Roger C. Cranton, *The Law and Ethics of Lawyering* 99-125, 300-13, 747-96 (2d ed. 1994).

47. See Model Rules of Professional Conduct Rule 1.13 (1998) ("Because the organization is the client, the lawyer owes his or her obligations to the organization itself and not to the organization's constituents."); see generally, Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.13, at 395-416 (1992 & Supp. 1996) (describing attorney's duty to corporation, including situation where attorney becomes aware of violation of law); Charles W. Wolfram, *Modern Legal Ethics* §§ 8.3.2, 13.7.2 (1986) (same).

Vince Foster's past representation of Bill and Hillary Clinton, in their individual capacities, in connection with the sale of their interest in Whitewater to James McDougal created a conflict of interest that probably should have prevented him from representing the executive branch ("USA, Inc."), including the interests of the incumbent President, in connection with Whitewater matters. See Model Rules of Professional Conduct Rule 1.11(c) (1998). The extent of Foster's involvement in Whitewater issues in his capacity as Deputy White House Counsel is unclear as a factual matter. Short of an actual conflict of interest in violation of ethics rules, however, it seems evident that Foster's past private representation of the Clintons, together with his close personal association with them, may have led Foster, like many other in-house counsel, too readily to identify with the individual officers of the entity (the Clintons) as his "client," rather than the entity itself (the government of the United States of America).

48. Model Rules of Professional Conduct Rule 1.13(b) (1998) (emphasis added).

The Rule goes on to explain that “[i]n determining how to proceed,” the lawyer should consider the seriousness of the violation, the responsibilities and apparent motivation of the person or persons involved, “the policies of the organization concerning such matters,” and, the Rule adds (somewhat unhelpfully), “any other relevant considerations.”⁴⁹ The Rule directs that whatever measures are taken should minimize disruption of the organization and the risk of revealing the information in question to persons outside the organization, and recommends such measures as (1) asking the officials involved to reconsider their action, (2) advising that an outside legal opinion be sought, and (3) “referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.”⁵⁰

This ethics rule has a specific statutory analogue in the case of the federal government lawyer who learns of illegal conduct by officials within the administration he or she serves. 28 U.S.C. § 535(b) makes reasonably clear “the policies of the organization concerning such matters” (the “organization” here being the government of the United States of America). Section 535(b) imposes an affirmative duty on government lawyers—indeed, on all offices and agencies within the executive branch—to report any “information, allegation, or complaint” relating to violations of federal criminal law “involving Government officers and employees” to the Attorney General or other person specifically assigned responsibility to perform an investigation with respect to such matters. This statute in effect designates the Attorney General as the “highest authority that can act in behalf of the organization” in such matters,⁵¹ and thus the person within the corporate governance structure of USA, Inc. to whom the government attorney should report misconduct by other government officials—except, of course, where an Independent Counsel has jurisdiction.⁵² If

49. *Id.*

50. *Id.*

51. *See id.* Of course, as a matter of constitutional law, the President is the highest official of the executive branch and the nation's chief federal law enforcement official. Thus, 28 U.S.C. § 535(b) should be understood as making the Attorney General the President's designee for purposes of receiving information concerning unlawful actions by government officials. *See Paulsen, Who "Owns" the Government's Attorney-Client Privilege?, supra* note 44, at 508.

52. Section 535(b) requires that the report be made to the Attorney General, unless “the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law.” 28 U.S.C. § 535(b)(1). 28 U.S.C. § 594(a) provided (until recently) that an Independent Counsel exercises the full power and responsibilities of the Attorney General in matters within the Independent Counsel's jurisdiction. This provision most likely has the effect of making the reporting duty of section 535(b) run to the Independent Counsel, not to the Attorney General, in matters within the Independent Counsel's jurisdiction. As an original matter, the duty of executive branch employees (including attorneys) to report possible wrongdoing by executive branch officials to an executive branch officer not subject to the

Vince Foster, acting as Deputy White House Counsel, became aware of likely violations of federal criminal law by White House officials, including the President or the First Lady, his ethical and legal duties were clear: He was obliged to report such information to the Attorney General or, had one been appointed at the time, to an Independent Counsel with jurisdiction over the matter.⁵³

The Model Rules of Professional Conduct go on to address the situation where, despite the organizational lawyer's taking the recommended steps, the "highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization."⁵⁴ In such a case, "the lawyer may resign in accordance with Rule 1.16."⁵⁵ The word "may" is a bit misleading, however, since the referenced rule, Rule 1.16, provides that the lawyer "*shall* withdraw from the representation" if "the representation will result in violation of the rules of professional conduct or other law."⁵⁶

Significantly, such a violation of the ethics rules, and frequently of other law, occurs whenever an in-house attorney assists or furthers unlawful conduct by officers or employees of the organization to the detriment of the legal interests of the organization. Assisting such persons in unlawful conduct violates both an attorney's duty to the organization (Model Rule 1.13) and the ethical duty not to assist a client's (or anyone else's) criminal or fraudulent conduct (Model Rule 1.2(d)). A violation of the latter duty frequently is also a criminal act or a civil fraud, exposing the aiding-and-abetting attorney to other le-

direction and control of the President might well be considered unconstitutional, but the Supreme Court's decision in *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988), has rejected that premise. See Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, *supra* note 44, at 481-93; Paulsen, *Hell, Handbaskets, and Government Lawyers*, *supra* note 44, at 100 n.38;

The D.C. Circuit, in the course of rejecting the claim of governmental attorney-client privilege by Deputy White House Counsel Bruce Lindsey as a defense to a subpoena to testify before a Grand Jury in an Independent Counsel investigation, appeared to accept, at least for purposes of argument, the claim that 28 U.S.C. § 535(b) does not in terms apply to the Office of the President. See *In re Lindsey*, 158 F.3d 1263, 1274 (D.C. Cir. 1998), *cert. denied sub nom.* Office of the President v. Office of Independent Counsel, 119 S. Ct. 466 (1998). The Court nonetheless concluded that, at a minimum, the provision "suggests that all government employees, including lawyers, are duty-bound not to withhold evidence of federal crimes." *Id.*

53. As of late spring and early summer 1993, an Independent Counsel had not yet been appointed. However, congressional investigations of "Travelgate" had begun, and it was clear that some members of Congress, as well as some voices in the media, would be pressing for appointment of an Independent Counsel to investigate the matter. See *Appoint Special Counsel*, *supra* note 32; Ann Banzer, *White House Admits it Goofed*, San Diego Union Trib., July 3, 1993, at A18; *Appoint Special Counsel*, USA Today, July 19, 1993, at 10A.

54. Model Rules of Professional Conduct Rule 1.13(c) (1998).

55. *Id.*

56. *Id.* Rule 1.16 (a)(1).

gal sanctions as well.⁵⁷ Perhaps most significant of all, "assistance" in the underlying illegality, sufficient to impose ethical and substantive legal liability on the attorney, can consist of tacit acquiescence in the unlawful actions of clients or officers of the organization. Such acquiescence, which may consist of nothing more than the lawyer's *silence* when the lawyer has a duty to speak, when done with knowledge that the acquiescence or silence will further the underlying illegal act or scheme (by preventing its detection), may constitute unlawful aiding and abetting of the primary illegality.⁵⁸

It follows that a lawyer's continued representation of a corporation or other organizational client, where the highest authority empowered to act on behalf of that organization insists on continuation of a course of unlawful conduct (including covering up past criminal or fraudulent conduct), is unethical.⁵⁹ In such a situation, a lawyer cannot carry out the wishes of management consistent with his or her duty to represent the interests of the organizational client. Such representation almost unavoidably would involve ethical and legal violations by the attorney—if indeed the representation has not already created such a situation.

The latter scenario is certainly not unheard of in the corporate world. In many situations in which corporate counsel is aware of improper conduct by other corporate officials, the reason counsel is aware is that counsel already has become enmeshed with or entangled in—if not an active participant in—the actions or decisions that the lawyer subsequently has come to realize are law violations and that thus impose on the lawyer a duty of rectification or, at minimum, withdrawal from the representation.⁶⁰ In short, the lawyer, by virtue of acting as a lawyer for the entity in matters involving wrongful conduct by officers of the entity, has been sucked into the course of improper conduct.

This suggests a further problem that may well have confronted Vince Foster. Not only might Foster have had information concerning questionable and possibly unlawful conduct by White House officials in connection with the Travel Office matter, but it also appears that

57. See, e.g., *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682, 712 (D.D.C. 1978); *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1453 (D. Ariz. 1992). See generally Hazard et al., *supra* note 46, at 75-127, 294-323, 776-96.

58. See generally *supra* notes 47, 57 (and sources cited therein surveying relevant Model Code provisions).

59. See Hazard & Hodes, *supra* note 47, § 1.13, at 410 ("If, for example, a lawyer became convinced that the entire hierarchy of an organization was engaged in a serious and ongoing fraud, the lawyer would be *required* to withdraw from the representation under Rule 1.16, and might in addition be permitted to reveal the reasons for withdrawal to successor counsel or to the victims."); see, e.g., Paulsen, *Hell, Handbaskets, and Government Lawyers*, *supra* note 44, at 98 & n.32 (criticizing conduct of Attorney General Janet Reno on this ground).

60. See Hazard & Hodes, *supra* note 47, § 1.13.

Foster, in his role as Deputy White House Counsel, might have been an active or passive participant in the firing of the Travel Office employees and in the White House's entreaties to the FBI to launch a criminal investigation of the employees, in order to provide cover for possibly improper political patronage.⁶¹ Foster may also have known of efforts by some White House officials (possibly including the First Lady⁶²) to lie to or mislead federal investigators concerning their roles in the firings. If so, Foster's silence may have constituted complicity in ongoing wrongdoing.

Foster's actions doubtless were those traditionally associated with an in-house attorney: preparing documents; providing advice; researching issues of law; acting as an intermediary. There is nothing unlawful in such acts, in and of themselves. But if Foster became aware that the underlying actions of the officials involved were unlawful, such ordinary lawyering, done in furtherance of known unlawful activity, may have constituted substantial assistance to the unlawful conduct and subjected Foster to potential ethical, civil, and even criminal liability.⁶³

Foster, a good lawyer, probably knew all of this as well. The torn-up note found in the bottom of Foster's briefcase shortly after his death indicates not only his distressed emotional state, but also, connected with that distress, his consciousness of his own mistakes as a lawyer and the possibility that his conduct, and that of others, in connection with the Travel Office matter could well have violated ethical or legal standards. At the very least, Foster was acutely aware that he and others might be *accused* of unethical or illegal conduct in connection with the Travel Office firings.⁶⁴

61. See *supra* notes 20-22 (detailing Foster's possible knowledge of alleged improper conduct).

62. See Glenn R. Simpson, *Ex-Aide Contradicts Stance of First Lady on Firings; Notes, Testimony Depict Her as Central Player in Travel-Staff Removals*, Wall St. J., Jan. 18, 1996, at A16 (detailing contradictions between Hillary Clinton's account of events and that of aides, reflected in contemporaneous documents); *supra* notes 21, 22.

63. See Hazard et al., *supra* note 46, at 99-125, 300-13.

64. One can hear, in Foster's pained personal musings, self-doubt mixed with attempted self-justification:

I made mistakes from ignorance, inexperience, and overwork I did not knowingly violate any law or standard of conduct. No one in the White House, to my knowledge, violated any law or standard of conduct, including any action in the Travel Office. There was no intent to benefit any individual or specific group. The FBI lied in their report to the AG. . . . The public will never believe the innocence of the Clintons and their loyal staff. The WSJ [Wall Street Journal] editors lie without consequence. I was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport.

Reflections by Vincent Foster on Law and His Life, Nat'l L.J., Aug. 23, 1993, at 31 (setting forth full text of the torn note and also of Foster's May 8, 1993 commencement address at University of Arkansas Law School).

This note offers a window into Foster's probable legal and emotional thought proc-

It was in the context of these events that Foster sought legal advice from Hamilton. Almost certainly, Foster was seeking legal advice concerning his own personal legal duties and potential liability. And almost certainly, Foster intended and expected that his communications to Hamilton would be protected by the attorney-client privilege and held by Hamilton in the strictest professional confidence. According to Hamilton's representation in the *Swidler & Berlin* litigation, the first word at the top of the first page of his notes is "Privileged."⁶⁵

We may never know for sure, but the substance of Foster's conversation with Hamilton very likely was along the lines of the following. Foster explained the facts of the Travel Office situation and of his involvement in the firings and in recruiting the FBI to launch a criminal investigation of the Travel Office employees. Foster explained what he knew of conduct by other White House officials. Hamilton then likely confirmed what Foster already knew: Foster's professional responsibility obligations as an attorney probably would not permit him to refuse to disclose to the Attorney General, or other appointed investigator within the executive branch, his knowledge of events. Foster's duty as an attorney ran to the United States government, not to the Clintons personally or any other officer within the Clinton administration. Moreover, 28 U.S.C. § 535(b), the mandatory reporting statute, constituted a specific reporting obligation—an affirmative duty that Foster could not ignore.⁶⁶ For Foster not to report, because of his own involvement in events, would be to become further involved in the misconduct (if any). In any event, communications made to Foster by Watkins, by Hillary Rodham Clinton, or by others, even if intended by the person making them to remain confidential communications to "their" attorney, the Deputy White House Counsel, would most likely not be covered by the attorney-client privilege as against the United States government (a point confirmed, years later, by two

ess concerning Travelgate. It is part confession, part legal brief. His mistakes were from "ignorance" and "inexperience." He did not "*knowingly*" violate any law or standard—a classic technical defense of lack of knowledge—nor did anyone at the White House "to my knowledge" commit such violation. There was "no intent" to benefit anyone else by firing the Travel Office employees. Yet, "the public will never believe" the innocence of the Clintons "and their loyal staff" (including, perhaps, Watkins, Kennedy, and Foster himself).

65. See *Swidler & Berlin v. United States*, 524 U.S. 399, 401-02 (1998) ("During a 2-hour meeting, Hamilton took three pages of handwritten notes. One of the first entries in the notes is the word 'Privileged.'"); see also United States Supreme Court Official Transcript at 3, *Swidler & Berlin* (No. 97-1192) (oral argument of Mr. Hamilton) ("On Sunday, July 11, 1993, at 10:00 a.m. in the morning, Vince Foster came to my home to consult me as a lawyer in the Travel Office matter, which was then the matter of intense public controversy. We spoke alone for 2 hours, during which time I took three pages of notes Before we began, Mr. Foster asked me if the conversation was privileged and, without hesitation, I said that it was.").

66. See *supra* notes 51-53 and accompanying text.

extremely important U.S. Court of Appeals cases presenting exactly this issue).⁶⁷ Such conversations quite possibly would not be privileged as against Congress, either.⁶⁸ The Fifth Amendment provides no privilege against compelled testimony incriminating third parties (as long as the witness is not forced to incriminate himself in the proc-

67. See *In re Lindsey*, 148 F.3d 1100, 1114 (D.C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998) (rejecting claim of attorney-client privilege as against grand jury subpoena of communications from President Clinton to Deputy White House Counsel Bruce Lindsey); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir. 1997), *cert. denied sub nom.* 521 U.S. 1005 (1997) (rejecting claim of attorney-client privilege as against grand jury of communications by Hillary Rodham Clinton to lawyers in the White House Counsel's office, and notes of such conversations). For a detailed analysis of the legal issues presented by these cases, see Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, *supra* note 44.

The D.C. Circuit's decision in the *Lindsey* case, together with its rejection of a claim of Secret Service "protective function privilege," *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir.) 1079 (per curiam), *reh'g denied*, 146 F.3d 1031 (D.C. Cir. 1998), *stay denied sub nom.* Office of the President v. Office of the Independent Counsel, No. A-108, 1998 WL 438524, at *1 (U.S. Aug. 4, 1998), *cert. denied*, 119 S. Ct. 461 (1998), opened the door to grand jury testimony by White House officials, including attorneys and Secret Service agents, which in turn likely played a role in persuading Monica Lewinsky to agree to provide testimonial and physical evidence under a grant of immunity (lest she otherwise face criminal prosecution for perjury and obstruction of justice). These events effectively forced President Clinton to admit (in part) conduct he had denied repeatedly and publicly for seven months and that he had denied in sworn proceedings in a federal district court in the *Jones v. Clinton* civil sexual harassment case. 36 F. Supp. 2d 1118 (E.D. Ark. 1999). The rejection of these claims of privilege, along with the development of other evidence against President Clinton in the summer of 1998 (including evidence provided by Monica Lewinsky), unquestionably had a large effect on subsequent events and in leading to the initiation of impeachment proceedings against President Clinton.

The Eighth Circuit's decision in the *In re Grand Jury Subpoena Duces Tecum* case is significant because it specifically rejects the claim of an identity of interest between the United States, as a distinct legal entity, and its officers or employees, such as Mrs. Clinton, and further, because it specifically rejects the claim that Mrs. Clinton's perception or belief that her communications to attorneys in the White House Counsel's office would be privileged rendered them privileged, as against the officer representing the legal interests of the United States in the matter (i.e., the Independent Counsel). See 112 F.3d at 922-23.

[T]here is lacking in this situation the requisite common interest between the clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest. . . . [T]he White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests . . .

We next confront the conclusion of the District Court that Mrs. Clinton's reasonable belief that her conversations with White House lawyers were privileged is sufficient to prevent their disclosure. . . .

[W]e know of no authority, and Mrs. Clinton has cited none, holding that a client's beliefs . . . about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.

Id. at 922-23.

68. See Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, *supra* note 44, at 490 & n.52.

ess).⁶⁹ Moreover, any personal Fifth Amendment privilege that Foster might possess could be overcome by a grant of immunity.⁷⁰ At most, the Fifth Amendment could provide a justification for Foster's failure to immediately report to the Attorney General possible criminal activity of which he had knowledge (if such knowledge derived from his own involvement). At a minimum, however, compliance with his ethical duties would have required that Foster extricate himself from the situation by resigning—and even this probably would not have been sufficient, in the absence of reporting what he knew to the Attorney General or her designee, or other designated investigator.

Vince Foster was caught on the horns of a dilemma. Foster was personally loyal to the Clintons. He believed in their innocence and that of their "loyal staff."⁷¹ But Foster also understood that this personal loyalty did not authorize or permit him to violate his legal and ethical duties as an attorney and as a government employee. Foster could not betray the Clintons. Nor could he ignore his legal obligations and become (either for the first time, or more deeply) involved personally in potentially unlawful conduct and attempts to cover it up. Nor could he accept without considerable personal distress that his own conduct may have been unethical or illegal—or that others would perceive it as such.⁷² Foster's conversation with Hamilton probably confirmed the existence of this enormous personal ethical and legal dilemma—in addition, no doubt, to setting forth at least some important factual information concerning the Travel Office (and perhaps other matters) that formed the basis for his dilemma.

Foster committed suicide on July 20, 1993, while the Travel Office controversy was still swirling about him,⁷³ and just nine days after his meeting with James Hamilton. It would be going too far to assert unequivocally that Vince Foster killed himself to escape his ethical and personal dilemma. Yet there is a strong factual basis for believing both that such a dilemma existed and that it troubled Foster deeply—deeply enough to fuel his growing depression and deeply enough to lead him to seek legal counsel. It is generally agreed that the Travel Office affair, coming on top of everything else, was a significant contributing factor to Foster's distressed emotional state⁷⁴ and that his depression led to his suicide.⁷⁵ As the Supreme Court noted, Foster

69. See *Fisher v. United States*, 425 U.S. 391, 398 (1976) (citing *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906)).

70. See *Kastigar v. United States*, 406 U.S. 441 (1972) (noting that the Fifth Amendment is satisfied by granting use immunity); see also *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).

71. See *supra* note 64 (quoting text of torn-up note).

72. See *supra* notes 23-24 (describing Foster's probable state of mind).

73. See *supra* note 32 (noting proximity of suicide to press calls for Independent Counsel investigation of Travelgate).

74. See IC Report, *supra* note 1, at 106.

75. See *id.* at 113-14.

may already have been contemplating suicide when he went to see Hamilton.⁷⁶ If his conversation with Hamilton led Foster to conclude that there was no good way out of his ethical and personal quandary—no way for him to act both faithfully to the law and faithfully to his friends—that could have deepened his depression and suicidality. As Dr. Berman reported to the Independent Counsel:

[F]or certain executives facing difficult circumstances, “[i]n essence, death is preferred to preserve one’s identity. The suicide has an inability to tolerate an altered view of himself; suicide maintains a self-view and escapes having to incorporate discordant implications about the self. These types of suicides are typically complete surprises to others in the available support system.”⁷⁷

Combined with everything else that was going on in Foster’s life—the stress and public pressure of work, the press criticism, the damage to his public reputation (which, Dr. Berman’s report would later conclude, was fundamental to Foster’s sense of personal identity)—it is possible that Foster’s dilemma proved to be one he could not live with.⁷⁸ If so, the Foster tragedy is in part a tragedy of legal ethics.

II. SWIDLER & BERLIN: THE POST-MORTEM PRIVILEGE

Compared with the high drama of Foster’s wrenching personal and ethical dilemma, and with the tragedy of Foster’s suicide, the Supreme Court’s opinion in *Swidler & Berlin v. United States* is almost anticlimactic. None of this background—Foster’s dilemma, his possible knowledge of illegality (and his possible involvement in it), his state-of-mind at the time of his suicide, the likely subjects of his conversation with Hamilton—is anywhere to be found in the Court’s opinion. The only hint of any of this is the Court’s understated speculation, in passing, that Foster may have been suicidal at the time he sought legal advice.⁷⁹

Chief Justice Rehnquist’s opinion for the Court presents a dispassionate and, on the whole, fairly persuasive case for the proposition

76. See *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998).

77. Berman Report at 14, cited in IC Report, *supra* note 1, at 101.

78. Berman Report at 14, cited in IC Report, *supra* note 1, at 99. Dr. Berman reported that:

[m]istakes, real or perceived, posed a profound threat to his self-esteem/self-worth and represented evidence for a lack of control over his environment. Feelings of unworthiness, inferiority, and guilt followed and were difficult for him to tolerate. There are signs of an intense and profound anguish, harsh self-evaluation, shame, and chronic fear. All these on top of an evident clinical depression and his separation from the comforts and security of Little Rock. He, furthermore, faced a feared humiliation should he resign and return to Little Rock. [The torn note] highlights his preoccupation with themes of guilt, anger, and his need to protect others.

Id.

79. See *Swidler & Berlin*, 524 U.S. at 408.

that the attorney-client privilege should survive the death of the client even where information is sought from the attorney that may be very important to a criminal proceeding.⁸⁰ The opinion first recites the standard policy arguments offered for the attorney-client privilege: the privilege encourages full and frank communications to attorneys, enabling them to give clients legal advice that promotes public interests in the observance of law and the administration of justice.⁸¹ The

80. *See id.* at 403-11.

81. *See id.* at 403 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); *see also* Erick S. Ottoson, Comment, *Dead Man Talking: A New Approach to the Post-Mortem Attorney-Client Privilege*, 82 Minn. L. Rev. 1329, 1333 (1998) ("The settled rationale behind the attorney-client privilege is that it promotes honest and complete disclosure by clients and thereby serves the public's interest in competent legal representation."). *See generally id.* at 1333-36 (collecting and discussing authorities).

The honest-and-complete-disclosure rationale for the privilege is certainly subject to serious question, however, on both empirical and practical grounds. First, it is unclear the extent to which clients actually rely on the privilege in being truthful and forthcoming with their attorneys. Second, it is unclear whether, even with the privilege, clients *are* truthful and forthcoming with their attorneys. Third, the privilege itself is afflicted with many uncertainties and ambiguities, so that a lawyer, even after reciting the standard exceptions to the privilege, cannot truly assure a client, up front, that any particular communication will remain privileged. (Hamilton's blanket assurance to Foster that his statements would be "privileged," Oral Argument Transcript at 3, *Swidler & Berlin* (No. 97-1192), was simply not accurate unless functionally serving as shorthand for an assumed shared understanding that they would be covered by Hamilton's duty of *confidentiality* and that Hamilton would *invoke* privilege against any attempt to compel disclosure of such statements.)

Finally, even to the extent the privilege is thought clear and clients in fact rely on it, it is unclear whether attorneys in fact invariably encourage honest and complete disclosure by their clients. Because ethics rules impose obligations on attorneys not to offer known false evidence or testimony, *see* Model Rules of Professional Conduct Rule 3.3(a) (1998) (lawyer must not make false statements of law or fact to tribunal, fail to disclose material facts where disclosure is necessary to avoid assisting a client's criminal or fraudulent act, offer evidence the lawyer knows to be false or fail to remedy, upon discovery, the inadvertent introduction of false material evidence), some lawyers (reportedly) seek to avoid "actual knowledge" of facts that might impair their ability to present a claim or defense and, to that end, discourage honest and complete disclosure from their clients. This practice is ethically dubious (to say the least) but reputedly common among criminal defense lawyers (or at least so some of them say). *See, e.g.,* Stephen Gillers, *A Fool For a Client?* *Am. Law.*, Oct. 1998, at 74-75. It would appear that such a practice is improper in civil litigation, under Federal Rule of Civil Procedure 11 (which requires a good faith inquiry by the attorney into the factual basis for a claim or defense—an obligation that would seem to require an attorney to press his or her client for full and candid information), but such a proposition is not clearly settled and the practical weakening of Rule 11's substantive and enforcement standards in recent years may weaken the force of this claim. *See* 146 F.R.D. 507 (1993) (Scalia, J., dissenting). Even if the practice is improper, that does not mean that lawyers never engage in it, at least some of the time. In any event, a lawyer and client may not know at the time legal representation is commenced whether the matter in question has criminal, rather than merely civil, implications, and some lawyers may therefore discourage complete candor from their clients at least at the outset.

To all of these points, there is a flipside: Some clients might be completely candid with their attorneys, irrespective of the existence of any privilege, either for reasons of psychological or emotional need, out of self-interested concern that such disclosure is

opinion then notes that interpretation of the scope of the privilege is governed by Federal Rule of Evidence 501's instruction to look to "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience."⁸² The Court canvassed the relatively few precedents for the survival of the attorney-client privilege after the death of the client, noting both the well-recognized testamentary exception⁸³ and the premise (if not the actual holding) of most cases that the privilege otherwise survives.⁸⁴ The Court concluded that "[t]he great body of this case law supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one."⁸⁵ The burden thus rested with the Independent Counsel, the Court concluded, to show that "reason and experience" justified a departure from the presumption of a posthumous privilege.⁸⁶

In the Court's view, the Independent Counsel failed to make "a sufficient showing to overturn the common law rule embodied in the prevailing caselaw."⁸⁷ The Court first rejected the Independent Counsel's argument that the testamentary exception effectively swallowed the supposed posthumous privilege rule since the testamentary exception covered the vast majority of cases in which the posthumous privilege was at issue.⁸⁸ The Court reasoned that, in such cases, unlike cases involving compelled grand jury testimony by the deceased's attorney, disclosure of the communication "furthers the client's intent."⁸⁹

The Court also rejected the argument that there should be no posthumous privilege because "the attorney is being required to disclose only what the client could have been required to disclose" as being "at odds with the basis for the privilege even during the client's lifetime. . . . [T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place."⁹⁰ This, the Court concluded "is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application,

necessary in order to enable the lawyer to provide the best representation possible (outweighing any concern over disclosure), or simply out of honesty.

Regrettably, there is very little empirical research on any of these points, as the Supreme Court noted in *Swidler & Berlin*. See 524 U.S. at 409 n.4.

82. *Swidler & Berlin*, 524 U.S. at 403 (citing Fed. R. Evid. 501).

83. The testamentary exception provides that communications of a deceased client to his attorney may be revealed in order to show true testamentary intent in a contested proceeding over the meaning of a will or trust. See *id.* at 404-05.

84. See *id.*

85. *Id.* at 405.

86. *Id.* at 406.

87. *Id.* at 411.

88. See *id.* 406.

89. *Id.*

90. *Id.* at 408.

the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real."⁹¹ The Court used Foster's situation to illustrate the point: "[I]t seems quite plausible that Foster, *perhaps already contemplating suicide*, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged."⁹²

This is an interesting sentence, to which I will return presently, for it raises intriguing questions concerning whether the result in the case should be different if Foster expressed suicidal intentions to Hamilton or inquired whether the privilege would survive his death—matters bearing on whether Foster's suicide was in part intended to destroy evidence, and whether any legal advice Hamilton may have given concerning the permanency of the privilege, combined with advice about the inescapability of Foster's dilemma, might have contributed to Foster's decision to take his own life. These questions are especially intriguing in light of the Court's rejection, in the next paragraph of its opinion, of the Independent Counsel's argument (which had been adopted by the Court of Appeals in the opinion below⁹³) that the privilege should yield where the testimony or evidence sought is of substantial importance to a criminal proceeding or investigation.⁹⁴

Petitioner James Hamilton had conceded in oral argument before the Supreme Court that breach of the privilege might be warranted where necessary to protect a criminal defendant's constitutional rights, as when, for example, the deceased had confessed to his attorney a crime for which another person stood wrongfully accused.⁹⁵ Justice O'Connor's dissent (for herself and Justices Scalia and Thomas) made much of this concession—arguing that it justified a more general exception to the posthumous privilege: "In my view," O'Connor wrote, "a criminal defendant's right to exculpatory evidence *or a compelling law enforcement need for information* may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality."⁹⁶ Justice O'Connor's dissent, like the

91. *Id.*

92. *Id.* (emphasis added). Of course, Hamilton could *not* have offered such assurance with any degree of certainty. The issue resolved by the Court in *Swidler & Berlin* could not fairly be said to have been settled prior to the Court's decision itself. See also *infra* notes 104-08 and accompanying text.

93. See *In re Sealed Case*, 124 F.3d 230, 235 (D.C. Cir. 1997).

94. See *Swidler & Berlin*, 524 U.S. at 408-09.

95. See *id.* at 408 n.3.

96. *Id.* at 411 (O'Connor, J., dissenting) (emphasis added). The dominant view of most academic commentators has also been that the posthumous privilege should yield for compelling reasons. See, e.g., Restatement (Third) of the Law Governing Lawyers § 127 cmt. d (Proposed Final Draft No. 1, 1996) (suggesting situations in which an exception to the privilege might be warranted); McCormick on Evidence § 94 (Edward W. Cleary ed., 3d ed. 1984) (stating that the privilege is nullified in certain cases after the death of the client where the attorney's testimony would be more reliable and would promote the client's interests); Wolfram, *supra* note 47, § 6.3, at 256

opinion of the Court of Appeals, emphasized that the attorney-client privilege does not protect disclosure of the underlying *facts* communicated by the client to the attorney, and that, "were the client living, prosecutors could grant immunity and compel the relevant testimony."⁹⁷

The Supreme Court majority, however, rejected any substantial-importance-to-criminal-proceeding exception as introducing "*ex post* balancing" that would introduce "substantial uncertainty into the privilege's application,"⁹⁸ uncertainty that would be at odds with the privilege's ostensible purpose of promoting full and frank discussions between clients and lawyers. The Court explained that "a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance."⁹⁹

The Court's analysis disguises a large set of implicit assumptions about the certainty of application of the attorney-client privilege apart from the specific issue of posthumous privilege. A client, for example, might not know a lot of things about application of the privilege in some as-yet-uncommenced (or even commenced) legal proceeding, and his lawyer might not be able to tell him with any degree of objective certainty. Not only might a client not know in advance whether, after his death, his communications to an attorney might be relevant to a criminal rather than a civil proceeding, but the client might also not know in advance—and likely would care a great deal more—whether his communications will be privileged *at all*, even during his lifetime: What is the exact scope of the crime-fraud exception? What if the client engages in legally questionable conduct, against his lawyer's advice, that attempts to skirt illegality by making use of the lawyer's advice? What if the client tells his lawyer one thing, then

(stating that the privilege does not apply to testimony by a will-drafting lawyer after a client's death when the lawyer's testimony concerns the execution of the will); 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5498, at 483-86 (1986) (determining that most of the major figures in evidence scholarship favored ending the privilege with the death of the client); Christopher B. Mueller & Laird C. Kirkpatrick *Evidence*, § 526, at 430-31 (stating that the attorney-client privilege surviving the death of a client has been sharply criticized and suggesting that the privilege should be qualified); *cf.* Ottoson, *supra* note 81, at 1353-56 (arguing for a "probable conspiracy" involving the deceased exception to posthumous privilege). *But see* Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 *Geo. J. Legal Ethics* 45, 55-79 (1992) (arguing that the current rule that the attorney-client privilege will generally survive the client's death should continue as this policy would further promote the interests the privilege seeks to protect); *Harvard Law Review, The Supreme Court - Leading Cases*, 112 *Harv. L. Rev.* 122, 222-32 (1998) (endorsing Supreme Court's analysis in *Swidler & Berlin*).

97. *Swidler & Berlin*, 524 U.S. at 412 (O'Connor, J., dissenting); *see also In re Sealed Case*, 124 F.3d at 234 ("[The client's] availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to the truth.").

98. *See Swidler & Berlin*, 524 U.S. at 409.

99. *Id.*

advice? What if the client tells his lawyer one thing, then wishes to change his story for a deposition or other testimony? Apart from questions of privilege (against compelled disclosure by legal process), will the lawyer be permitted to disclose certain communications, in certain circumstances, and will this particular lawyer do so or not? And if the law of privilege is judge-made "common law," what assurance exists that new exceptions will not be created, especially where application of the privilege to a given set of circumstances is not well settled by controlling precedent (certainly the case in *Swidler & Berlin* itself)? For that matter, cannot the common law of privilege simply be *changed* by the courts, overruling previous precedents that a majority of the court no longer finds persuasive, or finds unpersuasive on a particular set of facts?

If the rationale for the privilege—encouraging client candor to attorneys so attorneys can give sound legal advice, serving public ends in promoting justice¹⁰⁰—depends on a high degree of up-front certainty on the part of clients as to whether a given communication will remain confidential, then the rationale for the privilege is already undermined by the significant number of other factors that defeat certainty. As noted earlier, there are many reasons why clients might not be fully candid with their attorneys, including uncertainty as to scope of the privilege, lack of knowledge, and perhaps even their attorneys' instructions not to be too forthcoming so as not to hamper the presentation of a factually false defense.¹⁰¹

Good empirical work does not exist to answer the question of how uncertainties concerning privilege and confidentiality affect clients' willingness to disclose damaging or embarrassing information to their lawyers.¹⁰² Of course, the fact that uncertainty already exists does not justify creation of a rule that would increase uncertainty. It seems obvious, however, that almost all of the uncertainties set forth in the previous paragraphs would be of far more relevance to a client contemplating the degree to which he safely can be forthcoming to his lawyer, than would be the question of whether attorney-client privilege will survive the client's death in the event the communications become relevant to a criminal investigation—unless, that is, the client is near death, in fear of his life, or "perhaps already contemplating suicide"¹⁰³ *and* believes that the topics of his communications to his

100. See *id.* at 410; *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

101. See *supra* note 81 (suggesting that clients often are not willing to rely on the privilege to disclose all information to their attorneys, and even where they are willing the attorney sometimes might discourage such disclosure). If attorneys discourage candor for such a reason, this seriously undercuts the traditional rationale for the privilege insofar as that traditional rationale posits the attorney's need for full information in order to provide legal advice that promotes the public ends of justice. See *Swidler & Berlin*, 524 U.S. at 410; *Upjohn*, 449 U.S. at 389.

102. See *Swidler & Berlin*, 524 U.S. at 409 n.4.

103. *Id.* at 408.

lawyer are in fact likely to become (or already are) the subject of a criminal investigation.

That brings us back to the unique facts of the Vince Foster case. The Court's premise was that a client may not know in advance whether the information he confides to his attorney will later be relevant to a criminal matter, and that this uncertainty might lead him to hold back. But what if the client *does* know that the information is likely to be highly relevant to an expected criminal investigation (as was very probably the case with Foster)? What if the client is, moreover, contemplating suicide (as the Court itself speculated might have been the case with Foster)? And what if the client's contemplation of suicide is in part related to the criminal investigation itself and the client's knowledge of the facts (and involvement in the events themselves)?

These are the salient questions in Vince Foster's case, but the Court ignored them, even as it noted the relevance of such factors to a client's expectations concerning confidentiality. This renders the Court's analysis vulnerable on two counts: First, if uncertainty as to posthumous application of the privilege were a strong barrier to a client's willingness to communicate confidences to his lawyer, it should have been so with Vince Foster. There is unintended irony in the Court's suggestion that Foster, if already contemplating suicide, might not have confided in Hamilton "if had he not been assured that the conversation was privileged."¹⁰⁴ Given the state of the law prior to the Court's decision, Hamilton could not have given any such assurance, *at least not with respect to survival of the privilege after the death of the client*. The law of posthumous privilege at the time was uncertain, at best. Case law assumed survival of the privilege, but mostly in dicta in cases where the privilege in fact was pierced for reasons of ascertaining testamentary intent.¹⁰⁵ Treatises and law review articles were generally critical of the survival premise.¹⁰⁶ No prominent federal court decision existed on point, let alone any controlling Supreme Court decision. Few state courts of last resort had ruled on the point. (And one cannot be certain in advance whether state or federal privilege law will govern a given communication.¹⁰⁷) Moreover, few lawyers are sufficiently conversant in the details of attorney-client privilege to know all of this at the drop of a hat; probably fewer yet would immediately *explain* all this at the threshold of a client's initial consultation, even if they knew. It thus seems highly unlikely that Hamilton's as-

104. *Id.*

105. *See id.* at 404-05.

106. *See, e.g., id.* at 406-07 (collecting authorities critical of survival of the privilege after death of the client); *see also supra* note 96 (collecting authorities).

107. *Cf. Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) ("[A]ny State's promise of confidentiality would have little value if the patient were aware that the [psychotherapist-patient] privilege would not be honored in a federal court.").

surances to Foster about the privileged status of their conversation included, at the outset, assurance that the privilege would apply posthumously. (Hamilton told the Supreme Court that he had assured Foster that their conversation was "privileged." But he did not, of course, tell the Court that he had advised Foster that their conversation would remain privileged were Foster to commit suicide.¹⁰⁸)

Despite all this, Foster (apparently) confided important information to Hamilton. Foster may indeed have desired and intended that his statements would remain privileged, but he could not have had any degree of certainty about the posthumous privilege, unless he relied without reservation on Hamilton's blanket assurance (which was at least overbroad, and arguably reckless, given the state of the law of privilege at the time). Thus, the example of Foster himself is at odds with the Court's analysis: uncertainty about posthumous application of the privilege does not invariably chill clients—even very sophisticated ones, and even potentially suicidal ones—from confiding in their attorneys.

The second problem with the Court's analysis is that, were it known to the client, up front, that the privilege would *not* apply posthumously in a criminal proceeding—that is, if the rule proposed by the dissent and by the D.C. Circuit were adopted—the application of the privilege would in fact be *predictable*; clients could take the rule into account in considering their own prospective conduct. Clients would know (or could be told) that the privilege would exist during the client's lifetime, but would yield after the client's death where a compelling law enforcement need for the underlying facts is shown. (The same would hold true of any narrower exception to the privilege after death as well, so long as the exception is clear.) To be sure, this might deter certain attorney-client communications, *but only where the client had reason to believe or expect that his death would prevent his own testimony*—exactly the situation that, if the Court was right in its speculation about Foster's state of mind, should have deterred Foster from disclosing confidences to Hamilton.

Interestingly, if it is true that Foster was "perhaps already contemplating suicide" when he went to see Hamilton, then a substantial-need-for-criminal-proceeding exception to the posthumous privilege (or a narrower exception, such as the suicide-to-destroy-evidence exception I propose presently), if explained to Foster, would make clear that suicide would not solve Foster's dilemma. The opposite rule—that is, the rule the Court announced in *Swidler & Berlin*—could have the perverse effect of encouraging a client's suicide by assuring that conversations with one's attorney will always remain sealed. By declining to recognize an exception to the posthumous attorney-client privilege under the circumstances of the case, the rule of *Swidler &*

108. See *supra* note 65.

Berlin, if known to the client in advance, tells a client in a situation analogous to Vince Foster's that suicide *is* the way out of his legal and ethical quandary. By killing himself, he silences a witness, avoids having to testify, and avoids having to come forward. And his lawyer cannot be compelled to reveal anything the client told the lawyer.

On the other hand, knowledge of such an exception to the posthumous privilege might discourage the already-suicidal material witness (or co-conspirator) from seeking legal advice in the first place, and we do not wish to deter persons in desperate emotional states resulting from legal difficulties from seeking legal advice, just as we do not wish to deter persons from seeking help from psychiatrists, psychologists, or other mental health professionals.¹⁰⁹ This, however, begins to assume a level of detailed knowledge of attorney-client privilege law that is not typical of the average client and probably not discussed *ex ante* in a typical attorney-client relationship. (Moreover, as noted, even though Vince Foster was not an average client and doubtless had a far better understanding of attorney-client privilege than most, he still was not deterred from seeking legal advice under such circumstances.)

All of this speculation depends heavily on hunches and assumptions about what rule is most likely to affect the conduct of a person contemplating suicide in a situation where suicidality is connected in some way to the person's knowledge as a witness, potential witness, or subject of a criminal legal proceeding. The answer to all of this, as an empirical matter, is probably unknowable. But it is reasonable to speculate as to the consequences of different rules in structuring discussions between a client and an attorney. Imagine, for example, a possible conversation between Foster and Hamilton where Foster specifically asked the legal question presented by *Swidler & Berlin*. "Will the privilege survive my death?" (What if Foster asked a yet more specific question: "Will the privilege survive my *suicide*?" What if that question came in the midst of a conversation discussing Foster's legal obligations and liabilities in connection with his knowledge about the Travel Office situation—such that maintenance of silence after death and the legal ethics dilemma confronting Foster were linked in the same conversation?) Imagine a hypothetical conversation along the following lines. (Think about the problem first, as it would have been presented in July 1993, and then as it would have been presented in July 1998, the month after the Supreme Court's decision.)

Foster: So what you're saying is that I'm probably professionally and legally obligated to report what I know to the Attorney General?

109. See generally *Jaffee*, 518 U.S. at 10-11 (explaining the reasons behind certain recognized privileges, such as psychotherapist-patient and attorney-client).

Hamilton: That seems pretty much right.

Foster: And it's not attorney-client privileged, because neither Hillary nor any other White House official is my client.

Hamilton: That's right.

Foster: And it's only protected by the privilege against self-incrimination to the extent *I'm* likely to be incriminated by it.

Hamilton: Right. If subpoenaed, the Fifth Amendment doesn't permit you to refuse to disclose what you may know about another person's wrongful acts, as long as that doesn't tend to incriminate you. In any event, a grand jury or a congressional investigation could grant you immunity and compel you to testify, irrespective of any Fifth Amendment privilege.

Foster: It looks like there's no sure way that I can avoid telling what I know.

Hamilton: In fact, it looks like you are legally and ethically obligated to come forward with what you know.

Foster: [After a long pause] Just speaking theoretically, if I were dead, they obviously can't compel my testimony. And our conversation today would still be privileged, right? I'm just coming to you, in confidence, for legal advice. Your duty of confidentiality, and the attorney-client privilege, survive the death of the client, don't they?

Hamilton: That's my understanding. But Vince, you shouldn't be even thinking along those lines.

Foster: No, no, of course not. But I do want to be clear that I want this to be kept totally confidential, no matter what. Right?

Hamilton: I understand completely.

Is such a conversation far-fetched? Not necessarily. It is not uncommon for suicidal persons to discuss with others, in advance of their suicide, its moral, financial, practical, and even religious implications.¹¹⁰ It is certainly not outlandish to think that a lawyer might in-

110. One of my first cases as a private attorney involved a wrongful death action brought against a protestant Christian church for "negligent spiritual counseling" of a twenty-four year old seminary student (who was considering law school) who later committed suicide. One of the main theories of liability was that the victim had asked a church pastor whether he would lose his eternal salvation if he committed suicide. The pastor told the victim that the church's theology was that a person who was once saved was always saved, and could not lose salvation by subsequent sins just as he could not gain salvation by good works. (This teaching apparently contradicted that of the victim's Roman Catholic upbringing, which taught that certain mortal sins, including suicide, resulted in eternal damnation.) The pastor added that the victim should not be thinking along such lines, however. The California Supreme Court found for the church. See *Nally v. Grace Community Church*, 763 P.2d 948 (Cal.

quire as to suicide's *legal* implications, concerning the subjects about which he (and others) faced potential legal liability and about which he had come to another attorney for advice.

It would of course be improper for a lawyer affirmatively to advise suicide as a course of action.¹¹¹ But it would *not* be improper for the lawyer to tell the client what *Swidler & Berlin* holds.¹¹² And what *Swidler & Berlin* holds is that a client's suicide permanently silences the lawyer as to all otherwise privileged communications between the client and the lawyer. *Swidler & Berlin* never addresses these possibilities or their implications. Neither the majority opinion, nor the dissent, nor the Court of Appeals, nor the briefs of the parties, consider whether the privilege should survive the death of the client where the client's *suicide* destroys access to valuable information, in the form of the deceased's own testimony, that the government otherwise would have been able to obtain in a criminal investigation—especially where that suicide may have been intended (in part) to destroy such evidence. Suicide is, or often can be, a *volitional act*.¹¹³

1988).

111. It seems unlikely that such a conversation would be susceptible to discovery under the crime-fraud exception to the attorney-client privilege, unless it can be shown that the communications were made for the purpose of, or in furtherance of, the client's intended criminal act. There of course may be limitations on the ability of *the attorney* to advise the client to commit suicide, to the extent that suicide remains a crime in some jurisdictions. Moreover, if the client comes to the lawyer seeking advice as to whether he may effectively destroy access to his own testimony (a crime) by committing suicide (even if not a crime), the lawyer not only may not provide such advice in apparent furtherance of the unlawful scheme, *see* Model Rules of Professional Conduct Rule 1.2(d) (1998), but the conversation becomes unprivileged under the crime-fraud exception in the event the client attempts to carry out the plan, and no longer covered by the attorney's professional duty of confidentiality under most versions of the confidentiality rule. *See id.* Rule 1.6(b)(1) (providing exception to duty of confidentiality permitting lawyer to reveal information "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.").

112. *See id.* Rule 1.2(d) (" . . . but a lawyer may discuss the legal consequences of any proposed course of conduct with a client.").

113. *See generally* James Werth, *Rational Suicide: Implications for Mental Health Professionals* (1996) (arguing "that it is possible to make a rational decision to commit suicide"). The legal literature concerning suicide has focused mainly on the problems of physician-assisted suicide, euthanasia, and the rights of the terminally ill to decline medical assistance, issues that have given rise to two important Supreme Court decisions. *See Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (holding that the Due Process Clause does not protect a right to assistance in committing suicide); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 280-81 (1990) (holding that a state may require "clear and convincing" evidence of an incompetent's wishes to refuse life-saving treatment). A detailed discussion of this literature would take me far afield from the question of attorney-client privilege in the context of client suicide. To oversimplify crudely, a consensus exists that there is at least a category of suicide in which the victim is *competent* to make the decision to take his or her own life, or to decline care that could prevent his or her death, and that it is possible for medical officials (and thus the law) to assess issues of voluntariness. For an excellent treatment, *see* J.

While it has been decriminalized in many American jurisdictions (chiefly for purposes of not stigmatizing the deceased), it is still a law crime in some and is treated as a wrongful or strongly disfavored act by the law in a great many.¹¹⁴ It is not at all clear why, especially where the client was himself either involved in probable unlawful activity or possessed (while alive) an affirmative legal obligation to disclose his knowledge of such unlawful activity, the attorney-client privilege should not be deemed forfeited (much as is the case with the crime-fraud exception to the privilege) as to underlying factual information in the attorney's possession concerning the client's knowledge of underlying events. A balancing of policy considerations, focused on the special case of suicide and its consequent destruction of evidence, should have weighed heavily against application of the privilege, especially where the policy arguments in its favor appear so speculative and (on the facts of this case at least) even counterfactual.

Nor did prior case law unquestionably establish that the privilege should apply in this context. In light of the generally unsettled state of the law on posthumous privilege at the time of the Supreme Court's decision—and especially in light of the absence of any precedent directly addressing facts like those presented in *Swidler & Berlin*—recognition of a Dead Man's Privilege for communications with counsel, under the circumstances of Foster's suicide, should have been viewed

Werth et. al., Requests for Physician Assisted Death: Guidelines and Suggestions for Assessing Mental Capacity, (unpublished manuscript, on file with the author), to be published in *Psychology, Public Policy, and Law* (forthcoming 1999). I do not purport to enter this debate. I merely posit here (in accord with apparent current medical and psychological consensus) that *some* suicides are committed by persons who are not so overcome by depression or other mental illness as to have lost the mental capacity to understand their actions and to have chosen suicide voluntarily and competently (if nonetheless tragically). The Vince Foster case seems to fall into that category. See *supra* notes 23-39 and accompanying text (discussing Foster's apparent mental state). I address below whether some modification of the rule I propose is justified in cases where the client's suicide is thought to be involuntary because the client lacked the mental capacity to have made a competent, uncoerced choice of suicide at the time of his or her death. See *infra* note 131.

114. Blackstone described suicide as "Self Murder, the pretended heroism, but real cowardice, of the stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure" and noted that "the law has . . . ranked [suicide] among the highest crimes, making it a peculiar species of felony, a felony committed on one's self." 4 William Blackstone, Commentaries on the Laws of England 189 (8th ed. 1778). Many American jurisdictions continue to regard suicide as a crime or otherwise as an act strongly against the public interest, for purposes of adjudicating a wide variety of related issues. See, e.g., *Gentry v. State*, 625 N.E.2d 1268, 1272-73 (Ind. App. 1993) (stating that both causing a suicide and assisting a suicide are felonies in Indiana, even though committing suicide is not); *State v. Willis*, 121 S.E.2d 854 (N.C. 1961) (noting that attempted suicide is a crime); *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 808 (R.I. 1996) (noting that suicide is a felony in Rhode Island); *Wackawitz v. Roy*, 418 S.E.2d 861, 864 (Va. 1992) (noting that "[s]uicide . . . remains a common law crime in Virginia as it does in a number of other common-law states" and collecting authorities). See generally 40A Am. Jur. 2d §§ 619-625 (1999).

by the Court as a proposed *extension* of the common law, not as the presumptive common law rule. The Court's conclusion that "[t]he great body of this caselaw supports . . . the position that the privilege does survive *in a case such as [this] one*"¹¹⁵ simply disregards the distinctive facts that *make* this case "a case such as [this] one": voluntary suicide, destroying access to testimony, and avoiding the deceased's (probable) legal duty to come forward with information to investigating officials.

Client death is simply not the same as client suicide. Prior to *Swidler & Berlin*, only one state court of last resort had ever found a post-mortem attorney-client privilege where the client's suicide destroyed access to testimony that was the only alternative source of the information sought.¹¹⁶ At least one other state court has gone the other way, in civil cases where suicide versus accidental death was relevant to an issue in litigation and the deceased's communications to an attorney were relevant to that issue.¹¹⁷ The remaining state and federal cases were divided as to whether the privilege survives client death generally,¹¹⁸ or else addressed the point only in dicta.¹¹⁹ Especially in light of the oft-stated principle that privileges are in derogation of the search for truth and therefore should be construed narrowly and not lightly created or expanded,¹²⁰ the presumption should

115. *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998) (emphasis added).

116. See *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990).

117. See *Prink v. Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 521 (N.Y. 1979) (finding that deceased's communications to wife and to psychiatrist were not privileged in action for negligence where deceased's voluntary suicide was asserted as defense to liability and the deceased would not have been able to maintain the privilege had he survived and brought the action); *Martin v. John Hancock Mut. Life Ins. Co.*, 466 N.Y.S.2d 596, 597, 599 (Sup. Ct. 1983) (finding that deceased's communications to attorney were not privileged where deceased had apparently committed suicide and the issue in civil suit was suicide-exclusion provision of life insurance policy). *Martin* relies heavily on the reasoning of *Prink* and extends it to attorney-client communications. See *Martin*, 466 N.Y.S.2d. at 598-99.

118. Compare *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 692 (Pa. Super. Ct. 1976) (privilege does not survive death), with *State v. Doster*, 284 S.E.2d 218, 219 (S.C. 1981) (privilege survives death), and *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (privilege survives death).

Cohen, *Doster*, and *Macumber* are all cited in the Supreme Court's opinion in *Swidler & Berlin*. See *Swidler & Berlin*, 524 U.S. at 404-05. Interestingly, however, *Doster* and *Macumber* (the two cases, in addition to *John Doe Grand Jury Investigation*, that supported the Court's position), refuse to pierce the privilege even in the face of a criminal defendant's claim that the information obtained thereby would be material and exculpatory. The Supreme Court in *Swidler & Berlin* noted Hamilton's concession that protecting a criminal defendant's constitutional rights might warrant breach of the privilege, and expressly declined to reach the issue. See *id.* at 408 n.3. Nonetheless the Court relied in part on state cases that support the Court's conclusion about the weight of common law precedent *only* if those state cases are correct in their resolution of an issue the Supreme Court declined to reach.

119. See *Swidler & Berlin*, 524 U.S. at 403-04 (collecting cases on the testamentary exception).

120. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) ("[W]e start with the primary

have been the opposite of the one the Court embraced in *Swidler & Berlin*—against recognition of the post-mortem privilege on the facts of this case.

What, then, moved the Court to its result? The Court may simply have thought that the alternative rule advanced by the Independent Counsel,¹²¹ the dissent,¹²² and the D.C. Circuit¹²³ was worse: a broad exception for criminal cases upon satisfaction of an unfocused, after-the-fact balancing test. The Court was evidently quite concerned (not without some justification) that such an exception would create a gaping hole in the post-death privilege and, by virtue of clients' inability to anticipate its application, diminish the value of the privilege generally.¹²⁴

The Court was right, I believe, in sensing the overbreadth of the D.C. Circuit's exception.¹²⁵ But the Court was wrong in not seeing the possibility of a narrower exception (though it did not receive much help from the lower court or the Office of Independent Counsel in this regard). I propose an alternative rule, that focuses more crisply on the critical features of the Vince Foster case: (1) the *client's voluntary act*; (2) of *suicide*; (3) causing the *knowing and voluntary destruction of evidence* that otherwise could have been obtained had the client lived.

It is not the fact that the client is deceased, but the fact that the client took his own life, that is important. It is the fact of suicide—the client's volitional and arguably wrongful act, within his or her own control—that is key. Moreover, it is not so much the fact that the prosecutor's access to evidence is more difficult because the client is deceased, but the fact that the client *made* it more difficult (and perhaps even impossible) by the client's own intentional conduct, that is important. It is these critical facts that support an exception to the privilege, after the client's death, where the client voluntarily causes his or her own death. An exception triggered only by the presence of these factors would be an exception to the privilege within the client's complete ability to anticipate and control by his or her own voluntary future conduct.

I therefore propose the following formulation: *The attorney-client*

assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." (original quotation marks and citations omitted)); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[Privileges] are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

121. See *Swidler & Berlin*, 524 U.S. at 403-04.

122. See *id.* at 412 (O'Connor, J., dissenting).

123. See *In re Sealed Case*, 124 F.3d 230, 235 (D.C. Cir. 1997).

124. See *Swidler & Berlin*, 524 U.S. at 410.

125. The difficulties with the D.C. Circuit's approach are astutely analyzed in *Otto-son*, *supra* note 81, at 1345-53.

privilege should not extend, after the suicide of the client, to attorney-client communications relevant to an extant or subsequent criminal investigation or [other legal¹²⁶] proceeding, where the client's intentional act of suicide destroys material testimony or evidence, unavailable by other means after the suicide and the production of which could have been compelled by process of law when the client was alive, upon a *prima facie* showing of probable cause that the suicide was related to or motivated in part by the subject(s) of the criminal investigation. Put somewhat more colloquially, if the prosecutor can show good reason to believe that an individual committed suicide in part with the known and intended consequence of rendering his or her own material testimony unavailable in a criminal investigation or other criminal proceeding, the individual forfeits the attorney-client privilege as to communications related to the subject of the investigation or other criminal proceeding.

This narrower rule has a much sounder basis in the policy of the privilege and other important public policies than either the rule settled on by the Court or the one proposed by the Independent Counsel (and adopted by the D.C. Circuit). This proposed exception to the posthumous privilege, which might be called the "suicide/destruction of evidence" exception, would not work the broad impairment of the privilege that the Independent Counsel's rule would have created and that the Supreme Court majority feared. Moreover, like other exceptions to the attorney-client privilege, this one would be within the client's control. The client can know in advance the circumstances under which the client's voluntary action in the future (suicide) will vitiate the privilege. The exception thus does not upset or balance away, after-the-fact, reasonable expectations of the client concerning the privileged nature of the communications. A client's mistaken expectation that the legal rule would be different (i.e., that the privilege always survives death) could be corrected *ex ante* by competent legal advice, once the exception became settled law.¹²⁷

126. This rule could perhaps be expanded to *civil* litigation as well. The *Martin* case, for example, in which the New York court pierced the posthumous attorney-client privilege in a case where the client's apparent suicide was directly relevant to the ultimate legal issue, creates reason to believe that a persuasive case could be made for expansion of the suicide/destruction-of-evidence exception to civil matters as well. See *Martin v. John Hancock Mut. Life Ins. Co.*, 466 N.Y.S.2d 596, 598-99 (Sup. Ct. 1988). For methodological reasons set forth below, see *infra* note 136 and accompanying text, the Court in *Swidler & Berlin* need not (and should not) have resolved the question of a suicide/destruction-of-evidence exception in the civil context, as it was not presented by the facts of the case. In principle, however, if it is the *client's wrongful conduct*, not the importance of the *state's interest*, that justifies an exception to the posthumous privilege in criminal cases, it is difficult to see why the same result should not obtain in civil cases.

127. Cf. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997) (explaining that a client's mistaken belief of law that communications would be privileged does not transform unprivileged communication into privileged one).

In this respect, the proposed exception is analogous to (but distinct from) the "crime-fraud" exception, in terms of its policy justification: the client's improper action, within the client's control, can result in forfeiture of the privilege.¹²⁸ In the crime-fraud context, the improper act is the use of legal advice in furtherance of crime.¹²⁹ In the client-suicide context, the improper act is the intentional destruction of evidence through the taking of one's own life. To draw the analogy a little more tightly: Just as it is the client's subsequent use of legal advice to commit a crime or fraud that triggers the crime-fraud exception (whether or not the client had such a plan at the time of the communications),¹³⁰ so too it is the client's subsequent suicide that triggers the client-suicide exception (whether or not the client had contemplated suicide at the time of the communications). In both cases, the privilege is vitiated by a voluntary act within the client's control.¹³¹ There is thus no difficulty with the predictability of the privilege's application.

In both cases, the client's voluntary act is also a wrongful act. (Even where suicide is not a crime, that should not diminish the common law's ability to treat suicide as wrongful, for purposes of analyzing whether a privilege denying access to probative evidence in a criminal proceeding should be recognized as continuing to exist.) In the crime-fraud context, the attorney-client relationship is itself being abused by the client for improper purposes. In the client-suicide context this is not necessarily the case, but a wrongful act of another kind has been committed if the suicide was (in part) designed to destroy access to evidence. The dead client cannot be prosecuted for obstruction of justice; but he should not also be entitled to the attorney-client privilege as to communications showing facts that otherwise could not be known or proven because of the client's acts to "impede[] the due administration of justice" by preventing the testimony of a witness.¹³² The prosecutor should be obliged to make a showing, akin to that

128. A similar exception exists for a client's breach of a duty to his or her attorney. The classic example is a dispute over nonpayment of fees. See Hazard et al., *supra* note 46, at 280-84.

129. See, e.g., *United States v. Zolin*, 491 U.S. 554, 566 (1989) (noting that there is no privilege if communication was made in furtherance of a crime or fraud); *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) (explaining conditions necessary for crime-fraud exception).

130. See *Ottoson*, *supra* note 81, at 1340 & nn.64-65 (collecting authorities); see, e.g., *In re Sealed Case*, 107 F.3d at 50 (stating that "the government had to demonstrate that the Company sought the legal advice with the intent to further its illegal conduct").

131. I set to one side the case of an "involuntary" suicide, and presume that there is a nontrivial category of cases in which suicide is a voluntarily chosen act by a person not so affected by mental defect or illness as to be incapable of freely choosing to commit suicide. An involuntary suicide should be treated the same as any other involuntary death of the client. See *supra* notes 113-14.

132. 18 U.S.C. § 1503 (1994) (federal obstruction of justice statute).

made in the crime-fraud context, that *in camera* review may reveal evidence showing that the suicide was motivated in part by a desire to destroy access to evidence.¹³³

Perhaps in few cases would this standard be met. But the salient point here is that *the Vince Foster case is one of those cases*. As discussed above, there is a basis beyond mere speculation for believing that Foster's suicide was affected by his legal/ethical conundrum, and that the latter may have played a part in his motivation for taking his own life.¹³⁴ It is entirely possible that the Independent Counsel could have produced sufficient evidence to support a conclusion of probable cause, permitting an *in camera* inspection of Hamilton's notes (and, further, *in camera* examination of Hamilton) to ascertain whether there was a sufficient basis for concluding that Foster's suicide was a knowing and intentional act of destruction of (testimonial) evidence, in an attempt to circumvent his legal-ethical responsibilities.¹³⁵

To be sure, there is a sense in which the client-suicide exception seems tailor-made for the Vince Foster case. But that is how it should be with case-by-case development of the common law of privilege: the circumstances of a particular case suggest a policy justification for a given rule; prior precedent supplies a baseline of practice and experience against which to judge the wisdom of that policy justification; and uncertainty about circumstances not before the court, or unforeseen future cases, leads to a narrow formulation of the rule of the case

133. Or, as another commentator has suggested, an exception could be keyed to a showing of a probable conspiracy in which the deceased was involved, and for which evidence is sought against other conspirators. See Ottoson, *supra* note 81, at 1353-55.

With respect to the crime-fraud exception, courts have wrestled with the following issues: (1) what constitutes a sufficient showing of likely crime or fraud to justify *in camera* inspection by a court of the assertedly privileged communications or documents at issue; and (2) what constitutes a sufficient showing (upon *in camera* inspection) to defeat the privilege. The Supreme Court answered the former question in *Zolin*, 491 U.S. at 572. *Zolin* holds that *in camera* inspection may be made upon "a showing of a factual basis adequate to support a good faith belief by a reasonable person' . . . that *in camera* review . . . may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982) (citation omitted)). The answer to the second question has been formulated in various ways. Many years prior to *Zolin*, the Supreme Court stated that the standard for disclosure (i.e., to the prosecutor) is a *prima facie* showing of illegality. See *Clark v. United States*, 289 U.S. 1, 14 (1933). Recent decisions by courts of appeals have debated what is required to make out a *prima facie* showing of illegality. Compare *In re Sealed Case*, 107 F.3d at 46 (government satisfies its burden with respect to showing crime-fraud where it 'offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.' (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Ct. App. 1985))), with *In re John Doe Corp.*, 675 F.2d 482, 491-92 (2d Cir. 1982) (*prima facie* showing exists where there is "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof").

134. See *supra* Part I.

135. The District Court examined Hamilton's notes *in camera*, but not with an eye to the standard suggested here.

(neither precluding nor predetermining the possibility of variations, expansions, or revisions of that rule in future cases). Judicial development of the common law *should* proceed with narrowly drawn rules, narrowly tailored to the precise facts of the case at hand, rather than with broad, categorical rulings not required by the facts of the case. The common law is developed through patterns of cases, decided with reference to their facts, which come to stand for general propositions consistent with the patterns and holdings. It is an inductive method, not a deductive one (as textual interpretation is, or at least should be).¹³⁶

The client-suicide exception is a principled one, and sensible from a policy standpoint. The fact that it likely applies only in relatively rare circumstances is not a point against it; indeed, that is one of its virtues. Unlike the D.C. Circuit's broad and loose exception for situations where the client has died (of any cause, under any circumstances) and the criminal justice system's need for the information is (on balance, *ex post*) considered more important, the client-suicide exception does not rip a hole in the fabric of the attorney-client privilege generally or frustrate clients' knowable expectations concerning the scope of confidentiality.

The Supreme Court's decision in *Swidler & Berlin* goes overboard in the other direction, stating a categorical rule in favor of privilege that was not only broader than required by the facts but in significant tension with those facts. The attorney-client privilege survives the death of the client, period, the Court said.¹³⁷ The only exception left open by the Court is the situation when a deceased client has confessed to his lawyer information that would prevent a criminal accused from being wrongfully convicted.¹³⁸ Implicitly, the Court's holding rejects any other theory, such as the client-suicide exception, under which the claim of privilege might have been rejected on the facts of the Vince Foster case. It is that holding of *Swidler & Berlin*—its

136. The approach to judicial development of the common law stands in marked contrast to the deductive, formalist approach I have advanced elsewhere for constitutional and statutory interpretation. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 226-27 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 *Yale L.J.* 677, 721-33 (1993). This is because the theory of what makes each body of law *law* is different: constitutional and statutory authority proceeds from the premise that the text is law; common law proceeds from the premise that the decisions of judges in cases, taken in aggregate, constitute the law. (Indeed, it is the conflation of these two different conceptions of law, encouraged by legal training in the "common law" or "case" method of legal education, that may explain a good deal of what ails "constitutional law" these days. But that is a topic for another article.)

137. See *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998).

138. See *id.* at 408 n.3. Yet as noted above, two of the cases relied on by the Court as support for its reading of the common law appear to protect the privilege even in such circumstances. See *supra* note 118.

sweeping, categorical acceptance of the posthumous privilege, regardless of the circumstances—that is difficult to accept.

III. CONCLUSION: LEGAL ETHICS AT A CROSSROADS?

The *Swidler & Berlin* case is about privilege; but the *Vince Foster Case* is about far more. Just as *Swidler & Berlin* probably had its genesis in a classic dilemma of legal ethics, so too its ultimate importance may lie less in the Court's resolution of the privilege issue than in the symbolic significance of Foster's apparent "resolution" of his ethical dilemma. If the facts are as they appear, Foster, in the end, failed to comply with his duties under the law. Instead he took his own life and, in so doing, destroyed access to important evidence. In the short term (and maybe in the long), the greater significance of *Swidler & Berlin* likely will not be the evidence-law question of posthumous privilege, but the Court's seeming ratification of Foster's choice—and the powerful symbolic effect of that ratification on our conceptions of legal professionalism.

In *Swidler & Berlin*, the life and death of a lawyer came to the U.S. Supreme Court, five years after the fact, reduced to questions of privilege and confidentiality. What secrets could remain hidden? What truths could be left untold? The case offers no discussion of the dilemma confronting an attorney presented with evidence of wrongdoing by officials of the entity he serves as counsel (the problem for which Foster probably sought legal advice). The case offers no discussion of a lawyer's obligation to the truth—an obligation Foster evidently took seriously enough that it created great emotional anguish for him (and may well have contributed to his suicide). Noticeably absent are the Burger Court-era lectures on professionalism, honesty, integrity, and a lawyer's duties to the legal system¹³⁹—aspects of the ethos of the legal profession at the core of Foster's homily to the graduates of University of Arkansas Law School just two months before his death. The case is about keeping clients' secrets secret after they are dead. It is about nothing more than that.

There is something slightly odd about this, given that Vince Foster, the client, was also Vince Foster, the government attorney in the middle of a serious ethical quandary that was the reason that Foster the

139. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 164-69 (1986) (Burger, C.J.) (extensively discussing legal ethics in course of rejecting claim of ineffective assistance); *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983) (Burger, C.J.) (discussing professional judgment and responsibilities of lawyer in course of rejecting claim of ineffective assistance); cf. *Mallard v. United States District Court*, 490 U.S. 296, 308-10 (1989) (discussing professionalism issues in deciding question of statutory interpretation concerning power of courts to appoint counsel in *in forma pauperis* proceedings); *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (discussing benchmark for judging effective counsel). The *Mallard* case is discussed in Geoffrey C. Hazard, Jr., *After Professional Virtue*, 1989 Sup. Ct. Rev. 213.

lawyer became Foster the client. There is also something odd about this, given the timing of the Supreme Court's decision—the summer of 1998. Questions of attorneys' duties to the legal system and to the truth, and of government attorneys' public and professional duties not to acquiesce in official wrongdoing, were central to the most prominent of public legal controversies in 1998 (and continuing through 1999). The year of 1998 was a dramatic and potentially pivotal year for legal ethics: It is almost universally agreed that the President of the United States (himself a lawyer) made knowingly false and misleading sworn statements in interrogatories, civil depositions, and grand jury testimony over a period of no less than seven months;¹⁴⁰ that the President apparently attempted to induce others to testify falsely and in other ways apparently attempted to obstruct the truth-seeking function of the judicial system; and that the President asserted various legal privileges to attempt to prevent disclosure of facts that would compel him to acknowledge earlier false statements.¹⁴¹ In all of this, in the resulting litigation over claims of privilege, and in the extraordinary event of the impeachment and trial of a President of the United States on charges of perjury and obstruction of justice, the President had the assistance of numerous attorneys—private and government attorneys—who helped him in the construction and presentation of his defense.¹⁴² President Clinton avoided conviction by the Senate sitting as a court of impeachments. But the damage to his presidency was palpable, and even now (this article goes to press in

140. See *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1123 (E.D. Ark. 1999) (holding President Clinton in contempt for giving "intentionally false" testimony). For a thorough and persuasive summary of the facts, see Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* 16-94 (1999).

141. See Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337, 1344, 1384-89 (1999) [hereinafter Paulsen, *Nixon Now*].

142. There is a not insignificant likelihood that President Clinton's attorneys, both within and outside the administration, violated applicable ethics rules concerning candor to the tribunal, assistance to unlawful client conduct, and/or presentation of meritorious claims and defenses. See Model Rules of Professional Conduct Rules 3.3, 1.2(d) & 3.1 (1998). Whether or not an ethical violation occurred turns on the extent of actual or imputed knowledge on the part of the attorneys involved. If President Clinton's private lawyers had knowledge that Clinton had presented, or intended to present, or was in the course of presenting, false testimony or evidence, and failed to take appropriate steps to correct or withdraw the presentation of known false testimony, they acted unethically under the Model Rules. See *id.* But cf. Washington D.C. Rules of Professional Conduct Rule 3.3(d) (1997) (providing that a lawyer may not knowingly present false evidence but that even a lawyer who subsequently receives information "clearly establishing that a fraud has been perpetrated upon the tribunal" has no duty to reveal the fraud if the client does not consent). Irrespective of the ethics rules, such conduct may constitute criminal aiding and abetting of the underlying perjury or obstruction of justice, and subject the lawyer to criminal liability. See *supra* notes 57-58 and accompanying text. For a discussion of some of the legal ethics issues associated with the lawyering in the Clinton-Lewinsky-perjury allegations matter, see Paulsen, *Hell, Handbaskets, and Government Attorneys*, *supra* note 44, at 96-106; Paulsen, *Nixon Now*, *supra* note 141, at 1383-84 n.132.

the winter of 1999-2000) his legal jeopardy may not be over.¹⁴³

Swidler & Berlin was decided in the midst of this extraordinary series of events and involved some of the same players.¹⁴⁴ Yet the Supreme Court's decision makes no mention of these other matters. Against the backdrop of these other scandalous, sensational events, Vince Foster, Jr.'s possible ethical qualms and private angst seem, somehow, sadly quaint, relative to the ethical issues that came later; picayune, compared with the larger allegations of misconduct against President Clinton and the steps that would be taken to defend against them. Foster's dilemma, and Foster's death, can perhaps be taken as a metaphor for the changing face of legal ethics during the 1990s—the increasing irrelevance to real-life lawyering, and the ultimate demise of a particular tradition of legal professionalism. One can almost sense, in Foster's struggles, the struggle of a traditionalist professional ethic of lawyering—the Arkansas Commencement Address Ethic of integrity, truthfulness, and character—against the ascendance of a new “post-modern” legal ethics of essentially unrestricted, no-holds-barred combat on behalf of a client, irrespective of truth, candor to the tribunal, fairness to opposing parties, and even the lawyer's possible complicity in unlawful conduct (as long as not provable). That new ethic is perhaps best captured by a statement reportedly made by President Clinton, when told by his pollster and political advisor Dick Morris in January 1998 (shortly after the possibility of perjury and obstruction of justice by the President exploded into public view) that instant polls showed the public would accept adultery, but not perjury, by a President of the United States: “Well, we just have to win, then.”¹⁴⁵ On this view, law is about power and legal ethics is a function of ultimate success in obtaining one's objectives (or one's client's objectives) without incurring sanction. There is no such thing as objective truth. There are no objective constraints that a lawyer must honor.

143. See Paulsen, *Nixon Now*, *supra* note 141, at 1370-73 (discussing Clinton's amenability to criminal prosecution after he leaves office and arguably even while President).

144. It is interesting, and somewhat perplexing, that *Swidler & Berlin*, argued on June 8, 1998 and decided (with extraordinary speed) on June 25, 1998, makes no mention of the other privilege issues swirling around the Independent Counsel's investigation of the President at the same time: The United States District Court for the District of Columbia had rejected President Clinton's claims of executive privilege and governmental attorney-client privilege on May 27, 1998. See *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 24 (D.D.C. 1998). Clinton's lawyers filed a notice of appeal to the D.C. Circuit on May 6, 1998. Independent Counsel Starr sought certiorari before judgment on May 9, 1998. Although noting its expectation that the D.C. Circuit would proceed expeditiously, the Supreme Court denied the writ on June 4, 1998 (just four days before argument in *Swidler & Berlin*). See *United States v. Clinton*, 118 S. Ct. 2079, 2084 (1998); *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998).

145. Office of Independent Counsel, Referral to the United States House of Representatives pursuant to 28 U.S.C. § 595(c), H.R. Doc. No. 105-310, at 158 (2d Sess. 1998) (quoting grand jury testimony of Dick Morris, quoting President Clinton).

This, of course, was not Foster's view (at least, it was not his view before events in his own life began to spin out of control). Foster told the graduates at Arkansas Law School two months before his death that "[N]o victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." The "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."¹⁴⁶

It would be an overstatement to say that the Vince Foster episode is a defining event marking a paradigm shift in American legal ethics at the close of the twentieth century; or that *Swidler & Berlin*, standing on its own, supports sweeping conclusions about the changing ethos of the legal profession; or even that a genuine paradigm shift (as opposed to certain short-term, temporary trends) is underway. But beneath the surface of the events discussed, between the lines of the Supreme Court's analysis, the Vince Foster case provides occasion to consider what it means to be an ethical attorney. A part of Atticus Finch died with Vince Foster.

In the same fashion, Foster himself may one day be seen as a transitional figure in the paradigm shift from the post-Watergate era to the post-modern era of legal ethics—a man caught in the middle not only of a particular legal-ethical situation, but also of shifting conceptions of lawyering and loyalty. One does not wish to impugn the good name of a man whose death was a true tragedy and who apparently wrestled seriously with what it means to be an ethical attorney. But the test of Foster's commitment to his abstract principles came, and, in the end, the burdens he felt were too great for him. Foster's biggest professional and personal crisis came after he had been in law practice for over twenty years, at what should have been the pinnacle of his career as a lawyer, and at the height of his career prestige as Deputy White House Counsel. Vince Foster's defining moment came, and he killed himself. He carried his dilemma, his misgivings, and his secrets to the grave.

Lawyers face such defining moments, great and small, of other kinds, in all sorts of circumstances. The cumulative decisions made at these moments—not the formal rules of ethics, not the law of privilege, not even the decisions of the Supreme Court—ultimately are what determine the character of the legal profession, and of the legal system.

146. *Reflections by Vincent Foster on Law and His Life*, *supra* note 64.

Notes & Observations