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THE FEDERAL GOVERNMENT LAWYER'S DUTY TO BREACH CONFIDENTIALITY

by JAMES E. MOLITERNO*

The lawyer's duty of confidentiality springs from the lawyer-client relationship and its parameters are determined by the nature of that relationship. The federal government lawyer's client is like no other. The uniqueness of representing the United States calls for a unique approach to the duty of confidentiality. Unlike the private individual client, the government as a client does not speak with a single, unmistakable voice. Unlike the private entity client, the federal government has a paramount interest in the public good, including the public's right to know about government (the entity's conduct), especially its misconduct. The result is a client in whose interest it is for confidentiality to be waived in instances of client misconduct, giving rise to the federal government lawyer's duty to breach confidentiality.

I. THE UNITED STATES AS A CLIENT

Government lawyers certainly have some duty of confidentiality to their client, but their lawyer-client relationship is in many ways strikingly different from that of a private lawyer and client relationship. The government lawyer's duty is much more modest in scope and perhaps even different in kind. The client of the government lawyer is vastly different from the private lawyer's privately interested client who generally holds no special public-abiding interests and duties. Just who the government lawyer's client is has been subject to widely different claims. Roger Cramton has usefully articulated the spectrum of possibilities, ranging from the people and the public interest, or the United States as a whole, or the branch of government within which the lawyer works, and even the specific agency for whom the lawyer works.¹ Some have argued that the specific identity of the government lawyer's client does not matter so much as an understanding of the lawyer's particular role.² Whatever may be the precise answer, if indeed the answer matters,

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1. Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) [hereinafter, Cramton, *The Lawyer as Whistleblower*].

2. Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer: An Analysis of the*

it is clear that the government lawyer represents a public-abiding client whose genuine interests will not be served by the same level of secrecy to which private clients may be entitled, no matter how much particular agents of the government may wish to have that higher level of secrecy.

Confidentiality proceeds from a well-known starting point: we balance the moral force pressing for revelation against our lawyer role and its force toward non-disclosure or active concealment. In the easy cases, in the everyday work of lawyers, when little moral force demands revelation, this balance is easy to strike. But when some stronger moral force arises, when revelation would help remedy a wrong, prevent a wrong, or prevent further harm from a past wrong, the moral force toward revelation increases, and the balance gives us pause. The bar rules provide an institutional expression of the profession's balance point for us as lawyers, dictating when future wrongs or harms may be revealed, prohibiting revelation of past wrongs in most instances, and providing for other exceptions to the general duty to maintain client confidences.³

When a court or other government power such as a grand jury gets involved, we speak of this same balancing process by invoking the attorney-client privilege. The balancing work is largely the same. Now, however, the court's need for the information adds to the moral force toward revelation and inserts into the equation an entity with the power to command revelation. The privilege, to be sure, has different parameters from the general duty of confidentiality, but the process of balancing is largely the same. Even the different scope of the duty and the privilege produce the same results once a court is involved. For example, although the future crime-fraud exception to the ethical duty may be narrower than the crime-fraud exception to the privilege, the difference hardly matters once a court is involved. The court works with the broader exception relevant to the claim of privilege. When it is met and disclosure is commanded, the duty and its narrower exception yield based on the exception to the duty of confidentiality for court orders.

In the case of a government lawyer, the moral force toward revelation has an element not present for the private lawyer: the government lawyer works for a public-abiding client, one that would expect disclosure of internal government wrongdoing. The government has expressed this desire in statutes like 28 U.S.C. section 535(b)⁴ and the Federal Whistle Blower Statute.⁵ The former commands revelation of criminal wrongdoing and the latter encourages and protects revelation of a wide range of criminal and non-criminal government wrongdoing.

The lawyer-role force for protecting confidences in the first instance is about

Wrong Question, 37 FED. B. ASS'N J. 61, 62 (1978).

3. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

4. 28 U.S.C. § 535(b) (2002). Section 535(b) requires that:

[a]ny information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees [to] be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate.

Id.

5. See *infra* section II.

protecting the client. Having a client that wants revelation of certain information alters the confidentiality balance dramatically. The force favoring non-disclosure is reduced to nothing with respect to information covered by revelation statutes and the force toward revelation is increased by the public-abiding nature of the government. This difference in moral force toward revelation applies with or without a court's involvement. It exists in the day-to-day work of the government lawyer, in the nature of the government lawyer's client and in the revelation statutes.

To be sure, in some instances the force toward non-disclosure remains high even for the government lawyer: dealing with properly classified material; matters of criminal investigation that would be compromised by revelation; safety interests of clandestine government employees; and those instances in which the government lawyer plays a role analogous to a private lawyer. But when wrongdoing is implicated by the information, the government lawyer's duty of confidentiality yields to the moral force pressing for revelation.

At times, a government lawyer's duty of confidentiality and the associated attorney-client privilege approximate that of private counsel, but in most respects, federal lawyers do not have the same ethic of client protection as do private lawyers. Communications involving properly classified military, diplomatic, or national security issues should be subject to protections equal to those that private lawyers owe their clients. Certain aspects of Freedom of Information Act litigation incorporate ordinary attorney-client privilege principles.⁶ Information about ongoing criminal investigations requires protection when its premature release would disrupt legitimate law enforcement activities. When government lawyers represent agency personnel as if they were private counsel, private attorney-client privilege and duties apply.⁷ And in litigation, while special rules command

6. In re Lindsey, 158 F.3d 1263, 1268 (D.C. Cir. 1998) ("We have recognized that 'Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege.'" (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980))). See also 5 U.S.C. § 552(b)(5) (2002) (clarifying when governmental agencies' obligation to make information available to the public applies); Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) (stating that "[t]he attorney client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services," and that "[i]n the government context, the 'client' may be the agency and the attorney may be an agency lawyer"); Brinton v. Dep't of State, 636 F.2d 600, 603-04 (D.C. Cir. 1980) (stating that "when the attorney communicates to the client, the [attorney-client] privilege applies only if the communication 'is based on confidential information provided by the client,'" and that "[t]his limitation applies generally to attorney-client privilege cases whether or not in the context of the FOIA").

7. Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 OP. OFF. LEGAL COUNSEL 481, 495 (1982); Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee* (Mar. 29, 1985). See also 28 C.F.R. § 50.15(a)(3) (1998) (stating that "[a]ttorneys employed by . . . the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege," and "[i]f representation is authorized, Justice Department attorneys who

disclosures from government lawyers, disclosure of favorable information may be delayed to the same extent as for a private lawyer in gaining appropriate litigation strategy advantages. Ordinary advantages in the litigation and regulation processes allow the government's lawyers to behave as adversaries legitimately do. But government lawyers are not to remain quiet when their client has information that will aid a criminal defendant,⁸ nor when the government has behaved wrongfully. Especially when agency wrongdoing is implicated, the government lawyer's duty of confidentiality and ability to resist official demands for information are far more restricted than that of a private lawyer: "The government lawyer has a responsibility to question the conduct of agency officials more extensively than a lawyer for a private organization would in similar circumstances."⁹ The government is not like a private client who has a right to expect her lawyer to maintain confidence about past wrongdoing.¹⁰ The government, by contrast, owes revelation of its own wrongdoing to the public. The government itself, its mission properly conceived, ought to want such information revealed. The government has expressed this preference by enacting statutes that either command or encourage revelation of government wrongdoing.¹¹

Federal employees have a statutory obligation to report criminal wrongdoing by other employees to the Attorney General.¹² The statute applies to lawyers as well as other employees.¹³ A private lawyer has no such obligation.¹⁴ Even under the Enron-inspired August 2003 amendment to Model Rule 1.6, unless the lawyer's services were used to commit the past criminal act of a client, the lawyer may not disclose. Even then, the disclosure is permissive rather than mandatory.¹⁵ No rule requires a private lawyer to report criminal conduct of non-lawyer third parties.¹⁶ For federal lawyers, however, the statute requires disclosure of certain client acts, even past acts with which the lawyer has had no involvement, much less those that have used or misused the lawyer's services.¹⁷ "[T]he general duty of public service calls upon government employees and agencies to favor disclosure over concealment."¹⁸ The statute, along with the Federal Whistle Blower Protection Act, is a positive indication of the reduced confidentiality that federal lawyers owe their client. The statute advances a salutary purpose, one desired by the government that enacted it: "[To] require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention

represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege").

8. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

9. FED. BAR ASS'N RULES OF PROF'L CONDUCT R. 1.13 cmt. (1990).

10. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

11. 28 U.S.C. § 535(b) (2002).

12. *Id.*

13. *Lindsey*, 158 F.3d at 1274.

14. *Subpoena Duces Tecum*, 112 F.3d at 920.

15. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

16. The duty to report unprivileged information about the serious misconduct of a fellow lawyer stands in contrast to this general principle. *Id.* R. 8.3.

17. *Lindsey*, 158 F.3d at 1274; *Subpoena Duces Tecum*, 112 F.3d at 920-21.

18. *Subpoena Duces Tecum*, 112 F.3d at 920.

concerning any alleged irregularities on the part of officers and employees of the Government.”¹⁹

Well before the enactment of the Federal Whistle Blower Statute,²⁰ official guidance provided to government lawyers followed a whistle blower theme. Federal Bar Association Opinion 73-1 instructed the government lawyer that her clients are the agency and the public interest.²¹ Further, the confidentiality owed to the agency yielded when an official ceased to act in the public interest.²² The Opinion authorized a federal lawyer to disclose agency misconduct outside the agency as long as the agency is given a first opportunity to correct its own errors. “[T]he lawyer himself is to determine whether the [internal] remedial measures taken are sufficient.”²³

The public interest is difficult to identify, of course, and each government lawyer cannot be charged with the responsibility of acting purely on her sense of it. Chaos would ensue within agencies if each lawyer could apply her own unfettered vision of the public interest. Rather, the government lawyer functions in a direct line from some legitimate articulator of the public interest.²⁴ But disclosing wrongful conduct is not reflective of a mere public interest dispute about the better course for government action to take. That judgment, that a colleague’s or superior’s conduct is wrongful or criminal, is the individual lawyer’s judgment to make.²⁵ The individual’s judgment is not final, of course, but it is determinative for purposes of defining the lawyer’s proper conduct when faced with acting on the wrongful conduct. That is what is expected by 28 section 535(b) and the Federal Whistle Blower Statute, through the general reduction in confidentiality owed. And if the lawyer engages in conduct that is considered participation in the wrongdoing, it is expected by the law governing the lawyer’s own liability for the

19. H.R. Rep. No. 83-2622, 1954 U.S.C.C.A.N. 3551, 3551 (1954).

20. Discussed *infra*, section IIB.

21. Fed. B. Ass’n, Op. 73-1, 32 FED. B. J. 71 (1973).

22. Lawry, *supra* note 2, at 64. See also, ABA, *The Survey of the Legal Profession*, quoted in Murray Seasongood, *Public Service by Lawyers in Local Government*, 2 SYRACUSE L. REV. 210, 222 (1951) (“To Inspire Confidence, . . . Public Legal Positions Shall be Conducted and Opinions Rendered According to Law and Not to Please Politicians.”).

23. Lawry, *supra* note 2, at 65.

24. See Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294-95 (1987) (stating that although government attorneys represent the public interest, “[n]othing systemic empowers [them] to substitute their individual conceptions of the good for the priorities and objectives established through . . . governmental process”); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 846 (2000). Berenson states that:

execution of the public interest serving role for government attorneys is not the equivalent of attorneys following their individual policy preferences. . . . Rather, application of the standard techniques of legal analysis and merit, bureaucratic accountability, and democratic governance . . . can provide adequate constraints against lawyers running amok in pursuit of their personal policy preferences.

Id.

25. See, e.g., William Josephson and Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 556 (1986) (stating that “[t]he government lawyer . . . must determine whether the public official is acting in accord with the law and only obey or represent officials who are”).

misconduct.

Consider the unusual confluence of cases that surrounded Vince Foster's death and the information sought regarding Foster's knowledge of White House activities. Vincent Foster was Bill Clinton's White House Counsel. Before his tragic death, he had met with private counsel, likely about matters occurring in the White House. After his death, a meeting occurred among Hillary Clinton, White House lawyers, and her private lawyers.²⁶ The Office of Independent Counsel (OIC) wanted to know about Mr. Foster's knowledge of various activities of the Clintons.²⁷ An OIC-led grand jury issued subpoenas to Foster's private lawyers, demanding their notes of meetings with Mr. Foster.²⁹ They also issued subpoenas to the White House and its lawyers, demanding notes of White House conversations regarding Mrs. Clinton's activities following Mr. Foster's death.³⁰ In a stark juxtaposition that illustrated the contrasting extent of the attorney-client privilege for private and public lawyers, the Supreme Court protected Foster's private counsel's notes³¹ as the Eighth Circuit and the D.C. Circuit ordered revelation of the White House lawyers' notes of meetings likely regarding substantially the same subject matter.³²

Writing in praise of government lawyers, Roger Cramton suggested that the Attorney General ought to be an independent advisor to the President, willing to demand that the President comply with legal authority and execute the laws without favor, and if the President refuses, "resign and *publicly explain the circumstances* that led to his resignation. . ."³³ In a variety of critical moments, government lawyers have behaved just this way or affected events by announcing their intentions to do so. When then Solicitor General Robert Bork was asked to join President Nixon's legal defense team, he captured the difference: "A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I'll have to turn it over. I won't be able to sit on it like a private defense attorney."³⁴ Acting on this difference, Peter Wallison, White House Counsel under President Reagan, produced his diary for the Iran-Contra investigation.³⁵

The obligation of a government lawyer to uphold the public trust reposed in her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As Judge Weinstein put it, "if there is wrongdoing in government, it must be exposed. . . [The government lawyer's] duty to the

26. *Subpoena Duces Tecum*, 112 F.3d at 914.

27. *See id.* (stating that OIC sought disclosure of Foster's notes).

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

30. *Subpoena Duces Tecum*, 112 F.3d at 924.

31. *Swidler & Berlin*, 524 U.S. at 411.

32. *Lindsey*, 158 F.3d at 1278; *Subpoena Duces Tecum*, 112 F.3d at 924.

33. Roger C. Cramton, *On the Courage and Steadfastness of Government Lawyers*, 23 J. MARSHALL L. REV. 165, 173-174 (1990) (emphasis added) [hereinafter Cramton, *On the Courage*].

34. *A Conversation with Robert Bork*, D.C. BAR REP., Dec. 1997-Jan. 1998, at 9.

35. Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters* 44, 470 n.137, 517, 520 (1993).

people, the law, and his own conscience requires disclosure. . . ."³⁶

Other government lawyers have been bitten by the justifiably less generous attorney-client privilege possessed by the government. Richard Kleindienst was working on the ITT antitrust matter when President Nixon called to insist he terminate the appeal.³⁷ Cooler heads prevailed, and Nixon withdrew his instruction.³⁸ When later asked at Senate hearings whether he had spoken to anyone at the White House regarding the ITT case, Kleindienst said, "no," mentally applying an unreasonably narrow interpretation of the question to include only White House staff but not the President. He was later charged with a felony and pleaded guilty to a misdemeanor for failing to fully answer committee questions.³⁹ A private lawyer might have successfully invoked the attorney-client privilege regarding that conversation with his client, but a government lawyer? Surely not.⁴⁰

Government lawyers have not always functioned as they should. Many government lawyers remained quiet in the face of government fraud and wrongdoing (and some actively dissembled) during litigation of the *Hirabayashi*⁴¹ and *Korematsu* cases.⁴² They should not have. John J. McCloy, Assistant Secretary of War, and Assistant Attorney General Herbert Wechsler, in particular, knowingly allowed the Supreme Court to be misled regarding the record in the case.⁴³ Wechsler's client was the government. The government is not entitled to a lawyer who will conceal material facts or even fail to reveal that his client has done so. Courts expect that when dealing with a government lawyer, they get a more candid picture of the facts and the legal principles governing the case.⁴⁴ In doing so, the government lawyer is doing nothing more or less than following the wishes of her client.

36. *Lindsey*, 158 F.3d at 1273 (quoting Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966)).

37. Cramton, *On the Courage*, *supra* note 33, at 169.

38. *Id.*

39. *Id.* at 171.

40. See *Subpoena Duces Tecum*, 112 F.3d at 920-22 (explaining the different treatment of government and private counsel for attorney-client privilege treatment). "No one, the White House argues, would suppose that the special prosecutor could compel the production of notes made by a private lawyer concerning a conversation with a client about even the most routine traffic ticket." *Id.* at 919; cf. *Swidler*, 524 U.S. at 401 (holding that private counsel's notes of interview with White House counsel, as a private client, were privileged as against the same Independent Counsel's grand jury subpoenas even beyond the client's death).

41. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

42. *United States v. Korematsu*, 323 U.S. 214, 224 (1944); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (granting *coram nobis* to petitioner, reciting circumstances of Department of Justice failures to make court aware of true state of facts and internal DOJ opinions expressed). For a brief story of the *Korematsu* and *Hirabayashi* cases and a collection of relevant document excerpts, see NEAL DEVINS & LOUIS FISHER, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 229-241 (2d ed. 1996).

43. PETER H. IRONS, *JUSTICE AT WAR* 195-218, 287-302 (1983). McCloy continued to believe that his conduct was justified by his view of the need for the internment. See *id.* at 348, 351-54. He has won praise from other important commentators. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11 (1993).

44. See, e.g., Harold Leventhal, *What the Court Expects of the Federal Lawyer*, 27 FED. BAR J. 1 (1967).

War Department lawyers found themselves in a pressurized situation. General DeWitt's report on the military need for evacuation of Japanese-Americans was unacceptable to Assistant Secretary of War McCloy for critical reasons—DeWitt steadfastly refused to authorize changes.⁴⁵ Ten copies of the report had been printed and bound.⁴⁶ Intermediaries worked out amended language to solve the dispute between DeWitt and McCloy.⁴⁷ The Justice Department, through an Edward Ennis request,⁴⁸ already had asked to see any “published material” on the evacuation.⁴⁹ War Department lawyers did not want the Justice Department to see the bound, flawed report. They eliminated their problem by destroying the ten copies of the original offending report along with the “galley proofs, galley pages, drafts and memorandums [of it].”⁵⁰ The resulting brief filed by the Department of Justice in the *Hirabayashi* case reflected only discussions of the report but not the actual report, and it included claims and factual assertions that were flatly contradicted in the now-destroyed report.⁵¹ Even lacking the report, some material contradictions between the War Department position and the government's briefs were clear. Ennis lost his effort to persuade Solicitor General Fahy to reveal that intelligence agency advice to the War Department (actually to General DeWitt) was directly contrary to the statements regarding the issue relied on in the government brief.⁵²

These government lawyers owed no duty of confidentiality to their client to protect the War Department's frauds from disclosure to the Court. No legitimate picture of the desires of their client dictated that their client would demand such confidentiality, nor could it legitimately do so. Irons wrote, “As a loyal government lawyer, Ennis swallowed his doubts and added his name to the *Hirabayashi* brief. . . .”⁵³ In reality, Ennis swallowed his inclination to reveal fraud by the government. In fairness to Ennis, he never learned of the destruction of the original report and did not receive the substituted report until long after the *Hirabayashi* opinion had been rendered.⁵⁴ Frauds by War Department lawyers had kept Justice lawyers ignorant of many of the most critical contradictions between War Department positions and the positions taken in the government's briefs to the Court. By the time the *Korematsu* brief was being drafted, the substituted War Department Report had been published the first publication of the Report as far as Ennis and other Justice lawyers knew.⁵⁵ The Report claimed that Japanese Americans had engaged in espionage activities after Pearl Harbor, maintaining radio contact to Japanese submarines and passing information that led to the sinking of American ships. At Justice lawyers' request, the FBI and FCC reported

45. IRONS, *supra* note 43, at 209.

46. *Id.* at 207.

47. *Id.* at 210.

48. Ennis was Director of the Department of Justice's Alien Enemy Control Unit. *Id.* at 23.

49. *Id.* at 206.

50. *Id.* at 210-11.

51. *Id.* at 211-12.

52. *Id.* at 204.

53. *Id.* at 207.

54. *Id.* at 207.

55. *Id.* at 278.

back regarding these War Department claims, flatly refuting them.⁵⁶ Further, the FCC chairman assured the Justice lawyers that General DeWitt and his staff had been made aware of the FCC's and FBI's intensive investigation that had determined that these radio reports were false.⁵⁷ Nonetheless, the War Department report, on which Justice's Supreme Court brief would rely, made the false radio report claims.

In the first draft of the Justice brief in *Korematsu*, a footnote was inserted that clearly communicated to the Court the factual conflicts with the War Department Report, particularly on the Japanese American espionage claims.⁵⁸ First, Solicitor General Fahy toned down the footnote, removing language that would alert the Court to the sources of the conflicting facts: the FCC and FBI investigations and their reports.⁵⁹ The conflict then shifted to Ennis and McCloy, who found themselves opposed yet again.⁶⁰ McCloy demanded first of Ennis, then of Fahy, that the footnote be removed entirely.⁶¹ Ennis and the brief's initial drafter, John L. Burling, argued to Assistant Attorney General Wechsler that their ethical obligations required they not rely on a War Department Report that they knew to be based on key falsehoods.⁶² As the negotiations ensued, they threatened to refuse to sign the brief if the footnote was deleted.⁶³ Armed with a more complete version of the conflict, brought to his attention by Wechsler, Fahy decided to argue for Burling's original footnote.⁶⁴ After a meeting attended by Fahy, Wechsler and War Department lawyer, Captain Fisher, the footnote debate changed.⁶⁵ When finally submitted to the court, the footnote gave no notice of contrary views at the Justice Department, contrary facts to those in the Report, or the FCC and FBI reports.⁶⁶ The names of Ennis and Burling both appeared on the brief's signature page.⁶⁷

A loyal government lawyer should swallow doubts about differences in legal and policy arguments, but not about government frauds regarding critical,

56. *Id.* at 280-82.

57. *Id.* at 284-85.

58. *Id.* at 286.

The Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.

Id.

59. *Id.* at 286.

60. *Id.* at 287.

61. *Id.* at 207-288.

62. *Id.* at 288.

63. *Id.* at 290.

64. *Id.* at 289.

65. *Id.* at 281-92.

66. *Id.* at 290-91. "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the [War Department] Final Report only to the extent that it relates to such facts." *Id.*

67. *Id.* at 292.

underlying facts. A single, courageous lawyer who would have disclosed the government's fraud might have changed the course of the internment. Outside of discrete areas of protection, whenever wrongdoing has occurred, a government lawyer should reveal information about a client that a private lawyer would protect.

II. "OTHER LAW"

The bar ethics rules account for the government lawyer difference regarding the duty of confidentiality. The D.C. Bar, with its great experience dealing with government lawyer issues, provides an exception to the duty of confidentiality that expresses this difference in roles between government and private lawyers. Its bar rules allow revelation by government lawyers whenever the law permits revelation.

In general, lawyers are permitted to reveal client confidences when *required* by other law.⁶⁸ Government lawyers in the District of Columbia are permitted to reveal client confidences when *permitted* by other law.⁶⁹ Other jurisdictions should consider following the District's lead on this issue, with which the District obviously has substantial experience and expertise.

A. 28 U.S.C. § 535(b)

As discussed in section I, 28 U.S.C. section 535(b) demands that federal employees, including lawyers, report criminal misconduct of other federal employees. This obligation to report and reveal information represents "other law" that requires disclosures of otherwise confidential government-client information.⁷⁰

B. The Federal Whistle Blower Statute

The Whistle Blower Protection Act⁷¹ occupies a middle status between laws that *require* and laws that *permit* disclosure of otherwise confidential information. While it may not require disclosure, the Act does more than merely permit it. The statute's very purpose is to *encourage* disclosure of information regarding violations of law, rules, or regulations, and other abuses of authority.⁷² Whistle blowers have permission to reveal information within the scope of the statute, but they need more than mere permission to make disclosures. The personal and professional disadvantages of whistle blowing are substantial.⁷³ Without substantial encouragement to disclose, in the form of protection and, when appropriate, causes of action, few whistles will be blown.⁷⁴ The statute occupies a

68. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2003). The rule's permission to reveal what is required by law to be revealed is internally misleading. The permission relieves the lawyer of disciplinary liability when she does what other law requires. Thus, a lawyer is not merely permitted to make such revelations; she is required to do so.

69. D.C. Bar Rule 1.6(d)(2)(B) (1990).

70. *Lindsey*, 153 F.3d at 1274; *Subpoena Duces Tecum*, 112 F.3d at 920-21.

71. Pub. L. No. 101-12, 103 Stat. 16 (1989).

72. 5 U.S.C. § 2302(b)(8) (1989).

73. See generally CHARLES PETERS & TAYLOR BRANCH, *BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST* (1972) (collecting government whistle blower stories).

74. Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44

legislative place analogous to a common law tort claim for wrongful discharge in private employment, the purpose of which is to encourage disclosures that advance certain important public policies.⁷⁵ Conduct protected by a whistle blower statute should not produce lawyer discipline. When such conduct is engaged in by a government lawyer exposing government misconduct, bar discipline is a highly inappropriate, unproductive response.⁷⁶

The Whistle Blower Protection Act encourages federal employees to “serve the public interest by assisting in the elimination of fraud [and other enumerated wrongs]...”⁷⁷ The encouragement comes in the form of protection from retaliation for disclosures that the employee reasonably believes will expose the fraud or violation of law.⁷⁸ More than mere permission to disclose certain facts, the Act serves the interests of the United States (the government lawyer’s client) by empowering those most likely to know of such frauds to reveal and remedy them.

The Act affords its protection to applicants, employees, and former employees.⁷⁹ Nothing less would serve the statutory purpose. Applicants might learn of government frauds and be deprived job opportunities because of disclosure. As a former employer of a covered employee, the government retains significant power to punish harmful or embarrassing revelations by alumni whistle blowers. Former employees have substantial, continuing exposure to retaliatory conduct by the government: negative references; government threats of disclosures to current employers; criminal charges; and even bar discipline complaints.

The Act does not afford protection for disclosures merely within the chain of command.⁸⁰ Disclosures to anyone else (“including, for example, a reporter, a congressional staffer, or an interest group representative”)⁸¹ are protected and therefore encouraged.⁸²

CASE W. RES. L. REV. 665, 702-03 (1994).

75. See, e.g., *Liberatore v. Melville Corporation*, 168 F.3d 1326, 1327 (D.C. Cir. 1999) (finding pharmacist stated a wrongful discharge claim where he was fired because he intended to report violations to the FDA); *Fingerhut v. Children’s National Medical Center*, 738 A.2d 799, 806-07 (D.C. 1999) (finding a valid wrongful discharge claim where director of hospital security was fired for reporting bribe to FBI officials and cooperating in subsequent investigation). See also *Balla v. Gambro*, 584 N.E.2d 104, 108 (Ill. 1991) (rejecting common law retaliatory discharge action in favor of in-house corporate lawyer because ethical requirements to make the same disclosure obviated need for tort action encouragement to report).

76. The statute supplies its own protection from retaliation for protected revelations. That protection likely extends to prohibit the employer from making a bar ethics complaint, but that issue, the statute’s explicit protection, is largely outside the scope of this article. For the issues discussed in this article, the statute occupies the place of other law that permits disclosure of client confidences.

77. Whistleblower Protection Act of 1989, Pub. L. No. 101-12 § 2(a)(1) (1989) (codified at 5 U.S.C. § 1201 (1989)) (“The Congress finds that—(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest . . .”).

78. 5 U.S.C. § 2302(b)(8)(A) (1989).

79. 5 U.S.C. § 1221 (1989).

80. See *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351 (Fed. Cir. 2001) (finding that disclosures to a supervisor are not protected but disclosures to press are protected).

81. Cramton, *The Lawyer as Whistleblower*, *supra* note 1, at 308.

82. See *Horton v. Dep’t of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (noting that disclosures to the press are protected disclosures); H.R. Rep. No. 100-413 at 12-13 (1988) (listing the media as an independent entity, such as Congress, to which disclosures may be made).

The Act itself would not protect a government lawyer from a bar association imposition of discipline.⁸³ The bar association is not the government employer; the Act does not explicitly restrict the bar. Nonetheless, some have asserted that bar discipline is prohibited by inference from the Act.⁸⁴ The Act's coverage prohibits the government employer from taking the retaliatory action of filing a bar complaint. The Act's real protection against bar discipline comes from its status as other law that permits disclosure, taking the material revealed outside the protection of the duty of confidentiality.⁸⁵

III. CLIENT WAIVER

Considered another way, the government lawyer's client has consented to the revelation of certain kinds of otherwise confidential information. The government-client, by enacting statutes such as 28 U.S.C. § 535(b) and the Whistle Blower Protection Act, has instructed its lawyers to behave in a way that allows, encourages, and sometimes requires categories of information to be revealed. No agency head, let alone a lesser government official, has the power to speak for the government-client in a way that controverts what the laws enacted by that client have said in more forceful, public, and binding ways.

These statutory provisions amount to more than an "other law" exception to confidentiality. For the federal government lawyer, they represent the best statements of what the client wants the lawyer to do with the client's confidences. Private clients may, of course, give informed consent to disclosures of confidences.⁸⁶ Federal government lawyers ought to look to their superiors and to government policy for guidance regarding consent to disclosure of confidences. But those murky indicators cannot trump the clear, positive law statement of the legislature, signed by the President in the form of statutory pronouncements. Statutes such as 28 U.S.C. § 535(b) and the Whistle Blower Protection Act are express waivers of confidentiality with respect to the information covered by the statutes by the government lawyer's client, whatever might be the preference of current policymakers and superiors.

83. Project on Government Oversight (POGP); Government Accountability Project (GAP); Public Employees for Environmental Responsibility (PEER); *The Art of Anonymous Activism: Serving the Public While Surviving Public Service* 58 (Nov. 2002). Other government Whistle blowers have been subjected to bar complaints based on their conduct. Cindy Ossias, who disclosed frauds in the California Department of Insurance was the subject of a bar complaint. The bar committee concluded that she had not engaged in disciplinable conduct. Nancy McCarthy, *Rule Change Proposed to Protect Government Whistle Blowers*, CAL. ST. B.J., March 2002, at 1; Editorial, *A Gadfly Wins at Last*, WASH. POST, Aug 16, 2000.

84. Cramton, *supra* note 1, at 320 ("Although the whistle blower protections deal expressly only with retaliatory actions of the employing agency, the application of professional discipline by a state disciplinary board is likely to be precluded.").

85. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2003); D.C. RULES OF PROF'L CONDUCT R. 1.6(d)(2)(B) (2002).

86. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003); D.C. RULES OF PROF'L CONDUCT R. 1.6(d)(2)(B) (2002).

IV. "NOISY WITHDRAWAL" AND THE NEW SCOPE OF CONFIDENTIALITY

In general, the balance between revealing a client's frauds and protecting legitimate confidences is moving toward disclosure and away from protection of confidentiality. Even with private sector clients, the August 2003 amendment to Model Rule 1.6 has moved the balance away from confidentiality and toward revelation by inserting exceptions that have been proposed and re-proposed on several occasions.⁸⁷ While confidentiality is a lawyer's core duty to be protected at great cost, ultimately confidences are either legitimate or illegitimate. In effect, the rules identify which nuggets of client information are illegitimate confidences and permits or requires their revelation. Without question, the balance's movement has been in reaction to public frauds that lawyers have claimed an inability to rectify because of their confidentiality duty.⁸⁸

The federal government lawyer's client has an even less legitimate expectation that its lawyers will remain silent when it uses their work in a fraud. An example of such an instance occurred in 2002, following the capture of John Walker Lindh. John Walker Lindh had been captured on November 21, 2001, in Afghanistan.⁸⁹ On December 7, John DePue, a Terrorism and Violent Crime Section Department of Justice (DOJ) lawyer asked Jesselyn Radack what the law of professional responsibility said about whether Lindh could be directly interviewed in a custodial, overt way: specifically, whether he should be made aware that his father had retained counsel to represent him.⁹⁰ A 1995 Yale Law graduate, Radack had spent the six-plus years since graduation in government, an Attorney General's Honors Program lawyer, representing the United States first at DOJ's Civil Division, and then in the Professional Responsibility Advisory Office (PRAO).⁹¹ In this capacity, Radack gave advice to inquiring DOJ lawyers about a wide range

87. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2003); The Legislative History of the Model Rules of Professional Conduct, at 47-51 (Center for Professional Responsibility ABA 1987); Margaret Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 1, 11-12 (2002).

88. *E.g.* Watergate; the S&L debacle. Dan Ackman, *It's the Lawyers' Turn to Answer for Enron*, FORBES, Mar. 14, 2002 ("[A]s lawyers they have no obligations to blow the whistle on client wrongdoing. Indeed, they have the opposite obligation to maintain client secrets." (quoting a Vinson & Elkins partner)).

89. *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002).

90. *Examining the E-mail*, MSNBC NEWS, June 15, 2002, at 1, available at www.MSNBC.msn.com/id/3067190; Motion to Inspect and Copy, *United States v. Lindh*, case no. 02-37-A, 227 F. Supp. 2d 565 (2002), filed December 31, 2003, Exhibit 15, Jesselyn Radack affidavit. The lawyer to whom Mr. DePue referred, James Brosnahan, eventually did meet with Lindh more than a month later, on January 24, 2002. Brosnahan, among other things having served with the Special Prosecutor for the Iran/Contra matters investigating the first President Bush's pardon of Caspar Weinberger, represented Lindh as lead counsel in negotiating his later plea agreement. Brosnahan complained fervently about his many faxes to the Justice Department asserting his representation of Lindh during December 2001. Byron York, *American Tali-lawyer: Defending John Walker Lindh*, THE NATIONAL REVIEW, February 25, 2002; Washington File, *John Walker Lindh Was Denied Legal Representation, Defense Says*, U.S. DEPT OF STATE, Jan. 24, 2002, <http://usinfo.state.gov/topical/pol/terror/02012417.htm>.

91. Motion to Inspect and Copy, *supra* note 90.

of ethics issues. She was good at her work.⁹² She had never herself been the subject of a bar discipline complaint. According to DOJ, she was good at her work until that day.⁹³

She gave her opinion in a series of at least fourteen exchanged emails with Mr. DePue. In part, she said, "I consulted with a Senior Legal Advisor here at PRAO and we don't think you can have the FBI agent question Walker. It would be a pre-indictment, custodial overt interview, which is not authorized by law."⁹⁴ She was asked for the type of advice that was regularly given to DOJ lawyers once she left for PRAO. She gave it. It seems not to have been the advice her client, the United States of America, wanted to hear. Her advice was not taken. Instead, her client, through FBI agents on the ground in Afghanistan, decided to question Lindh without informing him that his family had retained counsel to represent him.⁹⁵ Radack's advice was reflected in a series of at least a dozen emails. When the Lindh court ordered the production of internal DOJ communications regarding Lindh's right to counsel, Radack discovered that the hard copies of her emails had been purged from the file. She had placed the hard copies in the file. They were gone. Only three of them had been delivered to Assistant United States Attorney Bellows for submission to the court.

Initially, the government's response to the court's order was resultantly incomplete. Radack's advice regarding Lindh's right to counsel had been ignored. Radack was simultaneously threatened with a sudden change in job performance evaluation by her superiors. She had good reason to believe that DOJ would not reveal her advice to the court and that the DOJ's submission of some but not all of her emails was a fraud on the court. A fraud on a court accomplished by misusing the lawyer's services requires the lawyer to undertake "reasonable remedial measures," including revelation of the fraud.⁹⁶ Under principles of noisy withdrawal, even as a private lawyer and even had the fraud not been perpetrated on a court, she would have been entitled to withdraw and give notice identifying the fraudulent submissions from which she was disassociating herself. While the notion of a noisy withdrawal does not explicitly permit revelation of client confidences, commentators recognize that the permitted notice effectively reveals confidences and operates as a hidden exception to the confidentiality rule.⁹⁷ The most recent amendments to Model Rule 1.6 explicitly allow this type of disclosure without the need of a noisy withdrawal subterfuge.

The August 2003 amendment to ABA Model Rule 1.6 and even former notions of noisy withdrawal both suggest that even if she had been private counsel, Ms. Radack's conduct was permissible, if not required. Under Model Rule 1.6, when a client, even a private client, misuses the lawyer's work as part of a fraud, a

92. *Id.* at ¶¶ 5, 6, and 8.

93. *Id.*

94. *Examining the Email*, *supra* note 90, at 1.

95. *Id.* at 3.

96. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002).

97. Geoffrey C. Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 306 (1984) ("[S]ome fools may not understand that Rule 1.6 does not mean what it seems to mean."); Monroe Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 61 (1991).

lawyer may reveal the client's confidences to rectify the fraud or wrongdoing.⁹⁸

Further general erosion of the duty of confidentiality is indicated by new obligations to report on client misconduct, such as Sarbanes-Oxley,⁹⁹ which have joined old obligations to report, such as 28 section 535(b), permitting and in some instances requiring lawyers to reveal what would otherwise be confidential client information. On the pages of the D.C. Bar's official magazine, addressing D.C. lawyers' concerns that reporting under Sarbanes-Oxley could subject them to discipline for revealing confidences, SEC Chairman Harvey Goldschmid offered reassurance:

"Federal law is supreme. Any lawyer in D.C. who finds material, ongoing financial fraud, reports it up, and sees that the wrongful conduct has not stopped, is in a position to go outside, pursuant to the Sarbanes-Oxley section 307 and the SEC's rulemaking. *No one* may discipline that lawyer for properly reporting out."

Hirschhorn [chair of the D.C. Bar Legal Ethics Committee] affirms Goldschmid, adding reassuringly, "One of the exceptions to keeping client confidences in the D.C. rules is where it's required by law or court order. So if there's a federal law, such as Sarbanes-Oxley, that says you must make disclosures, my guess, without having litigated it, is that the federal law trumps a D.C. law that prohibits disclosure."¹⁰⁰

Regardless of the supremacy clause, Sarbanes-Oxley and other laws requiring disclosure, or for government lawyers, permitting disclosure, fit the other law exception to the duty of confidentiality.

The crime-fraud exception to the privilege provides yet another useful analogy: consider cases like *United States v. Jacobs*.¹⁰¹ In *Jacobs*, a lawyer's advice was unheeded, and further, the client told third parties that the lawyer had approved of the transaction the client was proposing.¹⁰² Here, Radack gave advice to her client; the advice was unheeded; the client was later asked about advice it had been given; and the client responded that it had not been advised in the manner Radack had advised. This sort of fraudulent use of a lawyer's advice both waives the privilege and permits the lawyer to rectify the fraud. To be sure, the *Jacobs* defendant had formed an intent to misuse his lawyer's advice before asking for it. That fact removed the communication from the privilege based on the crime-fraud exception in the first instance. But even without the planned misuse fact in *Jacobs*, Jacobs's lawyer would have been permitted to reveal Jacobs's confidences upon learning that Jacobs was misusing the lawyer's advice.

98. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2002); Hazard, *supra* note 97, at 306.

99. Pub. L. No. 107-204, 116 Stat. 745 (2002).

100. Robert Pack, *Dilemmas in Attorney Client Confidentiality*, WASHINGTON LAWYER, Jan. 2004.

101. 117 F.3d 82 (2d Cir. 1997).

102. *Id.*

CONCLUSION

Whether analyzed as a matter of general principles of the lawyer-client relationship or as a matter of ethics rule application, federal government lawyers occupy a unique position. Confidentiality is not a lawyer responsibility that is unaffected by the identity of his or her client. By its nature as a public-abiding entity, the federal government commands reduced expectations of its lawyers' confidential maintenance of information. The ethics rules of the District of Columbia recognize as much. Statutes represent both "other law" exceptions to the duty of confidentiality and unequivocal, binding statements of client consent to the revelation of certain classes of information. Their encouragement of and in some instances command of information disclosure represent more than mere permission to reveal the information. They represent the federal government lawyer's duty to reveal information, or conceived of in a different way, the federal government lawyer's duty to breach confidentiality.