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THE GOVERNMENT'S DUTY TO "SEEK JUSTICE" IN CIVIL CASES

by James W. Diehm*

It was a distinct honor for me to have the opportunity to serve as the moderator for the discussion of Professor Bruce A. Green's excellent article, *Must Government Lawyers "Seek Justice" in Civil Litigation?*,[1] and to hear the insightful and thought-provoking remarks of Professor Green and our commentator, the Honorable Yvette Kane. Having served as a United States Attorney, an Assistant United States Attorney, and an Assistant Attorney General, I have represented the federal government and a territorial government in both criminal and civil cases. However, as a partner in a law firm, I have also been involved in both civil and criminal litigation where both the federal and the territorial governments have been on the other side. Therefore, this topic is of great interest to me.

As Professor Green notes, both the courts and rules of professional conduct make it clear that it is the professional responsibility of the government lawyer to seek justice in criminal cases.[2] He goes on to consider whether this obligation should extend to civil litigation as well. In his discussion of the issue he gives examples of different civil cases including habeas corpus cases, civil enforcement proceedings, and cases, such as contract actions or personal injury actions, where the government's position would appear to be very similar to that of a private party.[3] Professor Green takes the position that in quasi-criminal cases, such as habeas corpus

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[1] Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000).

[2] *Id.* at 236-37.

[3] *Id.* at 243-56.

proceedings, the government attorney's position is essentially the same as that of a prosecutor in a criminal case, and the *Berger*[4] duty to see that justice is done applies to such litigation.[5] I wholeheartedly agree with his conclusion and commend him for the position that he and others have taken in the case of *Williams v. Taylor*.[6] I would be inclined to extend the *Berger* obligation to other clearly quasi-criminal situations as well and resolve all doubts as to the nature of the proceedings in favor of its application.

The question then remains whether the duty to see that justice is done applies to civil enforcement proceedings and other cases that are undisputably only civil in nature. Professor Green discusses possible extrinsic sources of this obligation including ethics codes, judicially imposed obligations, and a self-imposed duty.[7] However, he goes on to note that these sources have not been explicit as to the nature of the obligation and, more importantly, they seem to be merely acknowledging what they view to be a preexisting obligation.[8] The duty to seek justice in civil cases appears to be intrinsic in the role of a government lawyer, and Professor Green finds substantiation of that understanding in the inherent nature of the government lawyer's constitutional and statutory role. He notes that components of that role that could lead to the obligation include the fact that the lawyer represents the sovereign, the government's interest to govern justly and see that justice is done, and the government lawyer's professional status as a government official.[9] I agree.

The offices of Attorney General, United States Attorney, Deputy District Attorney, and all government attorney positions involve a public trust that transcends the interests of any individual or political party, and the awesome power inherent in such positions must be

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[4] In *Berger v. United States*, 295 U.S. 78, 88 (1935), the Court noted that the United States Attorney represents the government whose interest in a criminal case is not to win a conviction, but to see that justice be done.

[5] Green, *supra* note 1, at 244-45.

[6] In this case, *Williams v. Taylor*, 529 U.S. 420 (2000), Professor Green and others filed an amicus brief taking the position that government attorneys have the obligation to see that justice is done in such cases. Green, *supra* note 1, at 244-46.

[7] Green, *supra* note 1, at 257-63.

[8] *Id.* at 264-65.

[9] *Id.* at 265-66.

exercised solely for the public good. In that regard, there is no difference between civil and criminal cases. This is perhaps based, at least in part, on the attorney's status as a public official, the duty to faithfully carry out the law, and the attorney's oath. However, in my view, the government lawyer's duty to seek justice in civil cases is primarily based upon the obligation that the lawyer owes to his or her client and, as Professor Green states, that client's "fiduciary duty to the public."[10]

The position of government lawyers, particularly those serving in an advisory capacity, may not always be clear. As counsel to the President or another government official, an attorney may be a political advisor, a policy advisor, a legal advisor, and, in some cases, a litigator representing the government in court. Even the role of a line attorney in a government litigation division may not always be well-defined.[11] However, it is imperative that when an attorney undertakes the representation of the government in litigation, it must be very clear to all, and especially to the attorney himself or herself, that the attorney has only one client–the people.

As Professor Green notes, the government has a unique interest in governing justly and seeing that justice is done. More importantly, in our democracy a government lawyer really represents "the people," "the public interest," and "the public good."[12] When one considers that every attorney owes a duty of loyalty to the client and a duty of zealous representation of that client's interests in the litigation,[13] the government lawyer's obligations in a civil case, in my mind, become clear. Solely on the basis of existing rules of professional responsibility, that lawyer has the duty of loyalty and the duty to zealously represent only one client– "the people," and the concomitant obligation to pursue only "the public interest" and "the public good."

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[10] *Id.* at 269-70.

[11] *Id.* at 266-69. The situation may become even more complicated in other contexts. For example, in a suit against the government, a government employee such as a police officer may also be sued personally, and even though the officer is advised to retain personal counsel, he or she may not do so. This can place the government attorney in a very difficult position.

[12] Green, *supra* note 1, at 267.

[13] *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities 2, 6, 8; Rules 1.1, 1.3, 1.6, 1.7 (2000).

If at any time during the litigation the government attorney develops the sense or perception that he or she feels compelled to protect the interests of another person or entity, such as a public official or a political party, that attorney is in a conflict that must be resolved immediately.[14] In my view, just as one cannot serve two masters, a lawyer in litigation cannot represent the government while also considering the governor's political future, the upcoming elections, or the possibility that a position taken may embarrass a public official or even subject that official to criminal charges. In some cases the attorney may be able to resolve such conflicts merely by clarifying in his or her own mind, and in the mind of the attorney's superior as well, that such factors simply may not be considered. In others, it may be necessary to appoint separate counsel.

It is recognized that to suggest that a government attorney owes loyalty only to "the people" and "the public interest" may be seen as merely aspirational, Pollyannaish, facile, or even naive. However, as one who has spent considerable time in public service, I do not make this suggestion lightly. It is immediately apparent that, in particular situations, there may be serious, spirited, and reasonable disagreements as to what constitutes the public interest. I also recognize that indications may be given, by direct or subtle means, that the lawyer's future may depend upon his or her giving consideration to matters other than the public interest. In such situations, the response of the attorney and the bar would depend upon the circumstances of the particular case.[15] I am, however, of the opinion that such an approach would constitute a positive step, one which would, in many cases, assist in resolving these difficult issues. To use a few of Professor Green's examples, under such an approach it would be evident that a government lawyer could not continue

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[14] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (2000).

[15] One would hope that, leading from the top, the chief executive would make it clear that the consideration of such factors is improper and will not be tolerated. However, we live in an imperfect world, and while the duty to seek justice is not merely aspirational, it is not suggested that the lawyer must jeopardize his or her career in every such instance. In most cases, it may be enough for the attorney to remonstrate with his or her supervisor and at least attempt to convince that person to pursue the proper course of conduct. However, in particularly egregious situations, the possibility of disciplinary action should not be ruled out.

pursuing a civil enforcement action once it has become obvious that the action lacks merit, nor could the lawyer conceal the fact that the sprinkler systems in a prison were woefully inadequate, nor could the lawyer engage in dilatory or obstructive tactics to avoid the government's compliance with the law.[16] To do so would clearly conflict with the lawyer's obligation to represent "the people" and "the public interest." However, in defending personal injury actions and other actions where considerations of public interest are not directly implicated, it is quite possible that the attorney's ethical obligations would be very similar to those of a private attorney. The protection of the public fisc and the interests of "the people" would permit, and may require, the assertion of defenses and advocacy appropriate to our adversary system in other circumstances.

Perhaps most important, the adoption of such an approach would lead to the establishment of a guiding principle for government service. If everyone, including the chief executive, the supervisor, and the attorney handling the case, agrees that all government litigation attorneys owe their loyalty only to "the people" and "the public interest," at the very least the discussion of each issue will begin with the right focus, and hopefully, it will lead to the development of a culture that will, in all cases, be dedicated to furthering the public interest. Just as the prosecutor may be required, post-trial, to disclose exculpatory evidence resulting in the overturning of a conviction, a government attorney on the civil side may be required to "confess error" and disclose that a prison sprinkler system is inadequate. Both the attorney and the government will be the better for it, and "the people" will be well-served.

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[16] Professor Green discusses these and other examples in his article. *See* Green, *supra* note 1, at 246-56.