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## Government Lawyers and Confidentiality Norms

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# GOVERNMENT LAWYERS AND CONFIDENTIALITY NORMS

KATHLEEN CLARK\*

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### INTRODUCTION

*Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2005. Mora was concerned about the government's treatment of prisoners at Guantanamo Bay. He had led an internal Defense Department effort to ensure that the government would begin to treat those prisoners humanely. But he had met powerful opposition—including Secretary of Defense Donald Rumsfeld and Defense Department General Counsel William Haynes—who wanted the government to have a free hand to treat the Guantanamo Bay prisoners more harshly during interrogations. Mora fought an internal, bureaucratic battle on this issue, marshalling allies from within the uniformed services, but he never revealed to anyone outside the government this internal struggle over prisoner treatment. Eventually, after the Abu Ghraib scandal, he wrote a lengthy memorandum to the Navy Inspector General describing how he and Judge Advocate General lawyers argued for humane treatment, and how Haynes and other Defense Department officials responded.<sup>1</sup>*

*Mora left the Defense Department in December of 2005 and was approached by a journalist, Jane Mayer of the New Yorker, who had obtained a copy of his memorandum. Mayer wanted to speak with Mora to better understand the policy battle that had taken place within the Defense Department. Mora agreed to speak with her, and Mayer wrote about the internal Defense Department battle and profiled Mora in the New Yorker.<sup>2</sup>*

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1. See Memorandum from Alberto J. Mora, Gen. Counsel, Dep't of the Navy, to Navy Inspector Gen. (July 7, 2004), [http://aclu.org/pdfs/safefree/mora\\_memo\\_july\\_2004.pdf](http://aclu.org/pdfs/safefree/mora_memo_july_2004.pdf). See also Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32.

2. See Carnegie Council, Dan Rather Interviews Alberto J. Mora, Former U.S. Navy General Counsel (Nov. 2, 2006), <http://www.cceia.org/resources/transcripts/5404.html>; Mayer, *supra* note 1.

*When asked why he agreed to speak with a journalist about this issue after remaining publicly silent for so long, Mora noted that his memorandum to the Inspector General was unclassified, and thus the government had deemed that release of the information could not cause damage to national security. Someone had provided Mayer with a copy of the memorandum, and so Mora thought that he could legitimately amplify and give her additional background on the memorandum. When asked whether his duty of confidentiality as a lawyer prevented him from revealing further information, Mora responded that because Mayer already had some information, it seemed that the duty of confidentiality had been waived.<sup>3</sup>*

A lawyer's duty of confidentiality is not subject to the kind of waiver that Alberto Mora posited. A client's revelation of some information about a topic does not give her lawyer the option of revealing additional information about that same topic.<sup>4</sup> In most states, a lawyer's duty of confidentiality is defined very broadly and applies to all information relating to the representation of the client. The lawyer is required to be discreet with such information whether or not it could harm or embarrass a client, and whether or not the client has revealed the information to others. In most states, the professional confidentiality rule does not distinguish between government and private sector lawyers.<sup>5</sup> Thus, government lawyers appear to be bound by the same broad confidentiality obligation as lawyers for private sector clients.<sup>6</sup>

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3. Alberto Mora, Remarks at Ethics of Lawyering in Government course, Washington University Congressional & Administrative Law Clinic, Washington, D.C. (Apr. 3, 2006).

4. See discussion of confidentiality exceptions *infra* notes 27–32 and accompanying text. Attorney-client privilege, by contrast, is subject to client waiver. If a client reveals information about a conversation with a lawyer, then the client has waived the privilege for that conversation and can be forced to reveal more information about that otherwise privileged conversation. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 79 (2000) (“The attorney-client privilege is waived if the client . . . voluntarily discloses the communication in a non-privileged communication.”).

5. The exception is Hawaii, which has adopted different confidentiality standards for government lawyers. See HAWAII RULES OF PROF'L CONDUCT R. 1.6(c)(4)–(5) (2007) (discussed *infra* Part III.A).

6. This Article uses the term “government lawyers” to refer to lawyers who are either employed or retained by the government. Most government-retained lawyers generally have traditional lawyer-client relationships with their government clients, while some lawyers employed by governments have the authority to make decisions that are usually in the hands of the client. This difference in the structure of authority can have implications for the lawyer's confidentiality duty. See *infra* Part II.C. For a discussion of how several legal ethics rules (but not the duty of confidentiality) apply to lawyers retained by governments, see Ronald D. Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 GEO. J. LEGAL ETHICS 85 (1987).

This broad confidentiality obligation would seem to prohibit a former government lawyer like Mora from giving any information about his work. Although there are exceptions to this duty of confidentiality (the professional confidentiality rule identifies eight in particular<sup>7</sup>), it is not clear that any of these exceptions would permit Mora's disclosure.<sup>8</sup>

Was Mora permitted to discuss these internal Defense Department debates about prisoner treatment? This Article is an attempt to answer that question for Mora and for the more than 100,000 federal, state, and local government lawyers who need to determine which information they can ethically reveal.<sup>9</sup>

Surprisingly little has been written on the question of government-lawyer confidentiality.<sup>10</sup> A spate of law review articles and student notes

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7. ABA Model Rule of Professional Conduct (hereinafter "Model Rule") 1.6(a) identifies two exceptions. The lawyer may disclose information if:

- "the client gives informed consent" to the disclosure; or
- the lawyer is impliedly authorized to make the disclosure "in order to carry out the representation."

MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007). The remaining exceptions are found in Model Rule 1.6(b)(1)–(6). See *infra* notes 27–32 and accompanying text.

8. It appears that Mora's conduct would be governed by the D.C. Rules of Professional Conduct because he is licensed to practice by the District of Columbia. D.C. Bar, Find a Member, [http://www.dcbbar.org/find\\_a\\_member/index.cfm](http://www.dcbbar.org/find_a_member/index.cfm) (last visited Mar. 21, 2008) (indicating that Alberto Mora was admitted to practice in D.C. in 1994).

The information that Mora disclosed would constitute "secret" information "the disclosure of which would be embarrassing . . . to the client." D.C. RULES OF PROF'L CONDUCT R. 1.6(b) (2006). Mora might be able to justify his disclosure by arguing that his client consented to disclosures related to government wrongdoing. See *id.* 1.6(d)(1) ("A lawyer may . . . reveal client . . . secrets . . . with the consent of the client affected, but only after full disclosure to the client."). See also *infra* Part III.A.1 (arguing that the whistleblower protection laws constitute government consent to lawyer disclosure of wrongdoing).

9. The Bureau of Labor Statistics indicates that the federal government employs 28,440 lawyers, state governments employ 34,760 lawyers, and local governments employ 49,110 lawyers, for a total of 112,310 lawyers employed by the government. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES MAY 2006, <http://www.bls.gov/oes/current/oes231011.htm#nat>.

10. Robert P. Lawry wrote one of the most comprehensive examinations of this issue before the American Bar Association adopted the Model Rules of Professional Conduct, which is now the model for lawyer regulation in forty-seven states and the District of Columbia. Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979) [hereinafter Lawry, *Confidences*]; see also Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (Fall 1978) [hereinafter Lawry, *Wrong Question*]; [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (last visited Apr. 3, 2008) (indicating that California, New York and Maine are the only states that have not adopted professional conduct rules that follow the format of the ABA Model Rules). Several articles have briefly examined confidentiality in the course of a broader look at the ethical issues facing government lawyers. See Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 31–45 (2003); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U.

about the government's attorney-client privilege were published after the high-profile legal battle on this issue between Independent Counsel Kenneth Starr and President Bill Clinton.<sup>11</sup> But outside the context of Freedom of Information requests, the issue of attorney-client privilege arises relatively rarely for government lawyers. On the other hand, government lawyers face the confidentiality issue every day when they decide which information they can share with friends and colleagues both inside and outside of government.

This Article makes several significant contributions to the literature on government lawyers. First, it provides a theoretical basis for identifying the client of a government lawyer. There is no single answer to the question of client identity for government lawyers. Instead, one must

CHI. L. REV. 1293 (1987); Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265 (1996).

Several articles have examined the ability of government lawyers to blow the whistle on government misconduct. See Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Charles S. Duskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey To Nowhere)*, 25 WHITTIER L. REV. 21 (2003); James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633 (2005); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003). Others have looked specifically at the confidentiality obligations of prosecutors. See Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809 (1995); Rachel Luna, Note, *The Ethics of Kiss-and-Tell Prosecution: Prosecutors and Post-Trial Publications*, 26 AM. J. CRIM. L. 165 (1998).

11. That legal battle occurred in separate court cases in the D.C. and Eighth Circuits. See *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). Articles about these cases include Lance Cole, *The Government-Client Privilege After Office of the President v. Office of the Independent Counsel*, 22 J. LEGAL PROF. 15 (1998); Todd A. Ellinwood, "In the Light of Reason and Experience": *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291 (2001); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469 (2002); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998); Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799 (2001); Patricia E. Salkin & Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561 (2006); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999); Amanda J. Dickmann, Note, *In re Lindsey: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291 (1999); Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695 (1999); Katherine L. Kendall, Note, *In re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Governmental Realm?*, 1998 UTAH L. REV. 421 (1998); Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995 (1999). For earlier treatments of the issue, see Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725 (1988); Ronald I. Keller, Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U. L. REV. 1003 (1982).

examine the structure of authority within government to identify which of several possible entities is actually the client.

Second, the Article explains how government and private sector lawyers' confidentiality duties differ even though the ethics rules do not differentiate between them. Government lawyers' confidentiality duties are not based solely on the broad mandate of confidentiality found in the legal ethics rules, but also on the complex regime for control of government information. While lawyers are normally bound by a broad duty of confidentiality (applying to all "information relating to representation") under the legal ethics rules, a client can consent to disclosure of otherwise confidential information.<sup>12</sup> One of the insights of this Article is that government clients have *consented* to large amounts of disclosure by their lawyers through enactment of open government laws.

In other words, to determine whether the client of a government lawyer has consented to a specific disclosure, the lawyer need not rely solely on a particular government official's ad hoc decision about whether to consent. Instead, that official is bound to respect the legal regime controlling government information. If that legal regime requires that information be disclosed, then the institutional client has consented to its disclosure. If that legal regime prohibits the information from being disclosed, then the institutional client has withheld consent to disclosure.

The third significant contribution of this Article is that it identifies for the first time the need to revise the confidentiality rule to clarify that government lawyers have the discretion to disclose government wrongdoing. Examination of case law and statutes suggests a norm that governments—unlike private sector clients—do not have a legitimate interest in keeping secret information about their own wrongdoing. Other scholars have not previously recognized that the implication of this norm is that government lawyers may be able to disclose government wrongdoing.

Part I of this Article outlines the lawyer's confidentiality obligation, which is both strict and broad. One of the exceptions to that obligation, however, is that clients can consent to disclosure. Thus, Part II examines in some depth the identity of the government lawyer's client, and concludes that no single definition of a client applies to all government lawyers. Instead, one must examine the structure of authority within the particular government context where the lawyer works. Only with such a contextualized and structural analysis can one properly identify the

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12. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

government lawyer's client and the extent of the lawyer's authority to make decisions on behalf of that client. In addition, Part II notes that certain government lawyers are authorized to make decisions that are normally in the hands of clients.

Part III explains the specific ways in which government lawyers' confidentiality obligations differ from those of private sector lawyers. First, policy concerns and specific whistleblowing protection laws suggest that government lawyers may disclose government wrongdoing. Second, as a substantive matter, government lawyers must be permitted to disclose information that is subject to mandatory disclosure under open government laws. Since this could result in a chaotic situation with each government lawyer applying her own conception of open government laws, this Article recommends that governments adopt a set of procedures that lawyers can use to get approval of such disclosures. To that end, Part III sets out the substantive standard for the government lawyer's confidentiality obligation. Part IV recommends the adoption of specific procedures so that government lawyers can make these disclosures in an orderly fashion, providing their clients with advance notice and protecting legitimate government interests.

#### I. SECRECY AND TRANSPARENCY IN LAWYER-CLIENT RELATIONS AND IN GOVERNMENT

*In the early 1970s, Mark Felt, a law school graduate and licensed lawyer, was the Associate Director of the Federal Bureau of Investigation (FBI). On several occasions, Felt had provided information to Bob Woodward, an acquaintance of his who was a reporter for the Washington Post. When Woodward was assigned to cover the Watergate break-in in June 1972 he asked for Felt's assistance, and Felt provided it. As the number two official at the FBI, Felt had "full responsibility for the day-to-day Watergate investigation."<sup>13</sup> Felt surreptitiously provided Woodward with leads and confirmed information that Woodward learned from other sources.<sup>14</sup> In the book chronicling the Watergate investigation, Woodward referred to Felt as "Deep Throat" and credited this*

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13. MARK FELT & JOHN O'CONNOR, A G-MAN'S LIFE: THE FBI, BEING "DEEP THROAT," AND THE STRUGGLE FOR HONOR IN WASHINGTON 193 (2006).

14. *Id.* at 215 ("Only two days after the [Watergate] burglary, [Felt] helped Woodward on the Washington Post's first big story, confirming that [Howard] Hunt was connected to the White House and a prime suspect in the break-in.").



source with a critical role in the Post's investigation.<sup>15</sup> While there was much speculation about the identity of this anonymous source, Woodward indicated he would not reveal Deep Throat's identity until after the source died. But in 2005, Felt came out as Deep Throat in a Vanity Fair profile written by a Felt family friend, and Felt later published a revised memoir acknowledging his role in the Watergate investigation.<sup>16</sup> Felt's memoir asserts that he was motivated by a desire to protect the FBI from interference by the White House.<sup>17</sup> Frustrated that the White House had prevented the FBI from fully investigating the ties between the Watergate burglars and the Nixon White House, Felt used Woodward to instigate public and congressional pressure for a more thorough investigation.<sup>18</sup>

When Felt leaked information about the FBI's investigation to Bob Woodward, he was apparently trying to protect the FBI's institutional interest in its independence from the White House.<sup>19</sup> Yet by providing information to Woodward, he violated the FBI's own rules for protection of confidential information. If Felt had been acting as a lawyer rather than as an administrator, would this leak have violated his professional duty of confidentiality?<sup>20</sup> If Felt's role as Deep Throat had been revealed while his law license was current, could he have been disciplined for revealing this information to Woodward, or was he legally justified in making these disclosures?<sup>21</sup>

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15. CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 71 (1974).

16. John D. O'Connor, "I'm the Guy They Called Deep Throat," *VANITY FAIR*, July 2005, at 86; see also FELT & O'CONNOR, *supra* note 13. In 1979, Felt published his original memoir, which was, of course, silent about his role as "Deep Throat." W. MARK FELT, *THE FBI PYRAMID FROM THE INSIDE* (1979).

17. FELT & O'CONNOR, *supra* note 13, at xiii.

18. *Id.* at 216–21.

19. *Id.* at xiii (asserting that Felt "stood alone to guard the FBI's integrity" and that "when the Nixon administration tried to subvert the Bureau as it had other government agencies, Mark met with Woodward to shed light on the abundant misuses of power").

20. Felt was in a government job that routinely required legal judgments about compliance with constitutional and statutory standards as well as court rules, but it appears that he was not acting as a lawyer. Lawyers advise and advocate on behalf of clients. Felt was an administrator who was advised by lawyers.

21. Felt actually did face bar discipline for other actions he took at the FBI. He had authorized warrantless searches of the homes and apartments of people associated with the Weather Underground. W. MARK FELT, *THE FBI PYRAMID FROM THE INSIDE* 327 (1979). After his retirement, Felt acknowledged his role in these warrantless searches, *id.* at 330, and was eventually convicted for criminal violation of the constitutional rights of those subjected to these illegal searches. Robert Pear, *2 Ex-F.B.I. Officials Are Found Guilty in Break-ins Case*, *N.Y. TIMES*, Nov. 7, 1980, at A1. After his felony conviction, the District of Columbia Bar suspended Felt's bar license. *In re W. Mark Felt*, No.

To understand the legal status of any government lawyer's disclosure, one must consider two distinct legal regimes: that which applies to all lawyers and that which applies to all government employees. This Article explains how these two legal regimes intersect. In the lawyer-client setting, there is an overriding expectation of confidentiality, with only limited exceptions to confidentiality. In the government setting, by contrast, there is an expectation of transparency, with important but limited exceptions to that transparency. This part of the Article examines the theoretical underpinnings for confidentiality and transparency in the lawyer-client and government settings, respectively.

#### A. Secrecy in Lawyer-Client Relationships

The secrecy of lawyer-client information is protected by two distinct legal doctrines that are sometimes conflated: the lawyer's confidentiality duty and the attorney-client privilege. The lawyer's confidentiality duty prevents a lawyer from *voluntarily* disclosing a client's information.<sup>22</sup> Under the professional rules, lawyers owe clients a confidentiality obligation that is both strict and broad. Most states require lawyers to keep confidential *all* "information relating to representation" unless a client consents to disclosure or unless another specific exception applies.<sup>23</sup> The confidentiality obligation applies not just to information that the client has told the lawyer in confidence, but to all other factual information that the lawyer learns in connection with the representation.<sup>24</sup> The confidentiality

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M-68-81 (D.C. Cir. Mar. 27, 1981) (on file with author). Later, President Ronald Reagan pardoned Felt and his law license was restored. *In re* W. Mark Felt, No. M-68-81 (D.C. Cir. June 21, 1982) (on file with author). Years later, the D.C. Court of Appeals decided that it could still discipline a lawyer for conduct that was subject to a presidential pardon. *In re* Abrams, 689 A.2d 6, 2325 (D.C. 1997) (censuring former Assistant Secretary of State Elliott Abrams for giving false testimony to Congress in connection with the Iran-Contra scandal).

22. The confidentiality duty also prohibits a lawyer from using client information for the lawyer's or someone else's benefit to the disadvantage of the client. This prohibition is in a distinct professional rule. See MODEL RULES OF PROF'L CONDUCT R. 1.8(b) & cmt. 5 (2007).

23. Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." *Id.* R. 1.6(a). Model Rule 1.6(b) sets out exceptions.

A few states use an older, narrower formulation of the confidentiality obligation, requiring lawyers to keep confidential only information that the client has told the lawyer in confidence and information that could be detrimental to the client if disclosed. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.6; ILL. RULES OF PROF'L CONDUCT R. 1.6. This formulation comes from the ABA Model Code Disciplinary Rule 4-101, which states that "a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client." MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

24. The confidentiality obligation applies to the factual information that the lawyer learns about a client's situation (and any other factual information), but does not apply to the legal expertise that a

duty continues even after the representation has ended.<sup>25</sup> Lawyers who violate the duty of confidentiality can be disciplined by bar authorities or held liable to their clients for breach of fiduciary duty.<sup>26</sup>

The principle underlying the confidentiality duty is the lawyer's status as a fiduciary and the client's status as a beneficiary. The client entrusts the lawyer with information so that the lawyer can provide a service to the client. The information belongs to the client, and it would be misappropriation for a lawyer to disclose or use the information, just as it would be misappropriation for a lawyer to use a client's financial asset for the lawyer's benefit.

A lawyer's confidentiality duty is subject to several exceptions, and these exceptions reflect a policy judgment that a client's interest in confidentiality may give way to a societal interest (such as the prevention of crime, fraud, bodily harm, and death<sup>27</sup>) or even the lawyer's interest (such as the lawyer's need to obtain legal advice or defend herself).<sup>28</sup> Two

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lawyer develops in a particular area of the law. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 59 cmt. e.

25. There is some support for the notion that the client's interest in confidentiality diminishes over time. See Bonnie Hobbs, Note, *Lawyers' Papers: Confidentiality Versus the Claims of History*, 49 WASH. & LEE L. REV. 179, 204-08 (1992) (discussing an implied "historical interest" exception allowing lawyers to donate their papers to archives and historians and others to examine these documents decades after the matters have closed, even without client consent). But see Swidler & Berlin v. United States, 524 U.S. 399, 403-11 (1998) (attorney-client privilege survives the death of the client).

26. See, e.g., *In re Gemmer*, 566 N.E.2d 528, 529, 533 (Ind. 1991) (lawyer suspended from practice of law for three years for, inter alia, writing letter to tax authorities asserting that former client did not have any documentary support for his position); *In re Nelson*, 327 N.W.2d 576, 579 (Minn. 1982) (lawyer suspended for six months for "attempt[ing] to use clients' confidences to their detriment and to his own advantage"); *In re Metrik*, 240 N.Y.S.2d 443, 444 (N.Y. App. Div. 1963) (lawyers censured for revealing confidences unnecessarily in a fee dispute with former client); *Grutman Katz Greene & Humphrey v. Goldman*, N.Y. L.J., June 11, 1996, at 27 (lawyer breached fiduciary duty when he revealed confidential information about his former clients in his book, *Lawyers and Thieves*); *Bar Ass'n v. Watkins*, 427 N.E.2d 516, 517 (Ohio 1981) (lawyer suspended indefinitely from practice of law for revealing client confidence); *In re Pressly*, 628 A.2d 927, 928-29, 931 (Vt. 1993) (lawyer reprimanded for revealing against client's will her suspicion that her husband had sexually abused their daughter); *Thiery v. Bye, Bye, Goff & Rohde, Ltd.*, 597 N.W.2d 449, 451, 453 (Wis. 1999) (lawyer sued for breach of fiduciary duty for disclosing confidential client information while teaching college course); *In re Rader*, 359 N.W.2d 156, 159-60 (Wis. 1984) (lawyer suspended for ninety days for revealing client confidences).

27. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (to prevent death or substantial bodily harm); *id.* R. 1.6(b)(2) (to prevent client from committing crime or fraud using the lawyer's services); *id.* R. 1.6(b)(3) (to prevent, mitigate, or rectify financial injury caused by a client's crime or fraud, where client is using the lawyer's services).

28. *Id.* R. 1.6(b)(4) (to obtain legal advice); *id.* R. 1.6(b)(5) (to establish claim or defense in lawyer's dispute with client, or to establish defense to criminal charge or civil claim against lawyer). While most states have adopted the Model Rules, the confidentiality exceptions vary considerably from state to state. See SUSAN R. MARTYN, LAWRENCE J. FOX & W. BRADLEY WENDEL, *THE LAW GOVERNING LAWYERS 2006-2007 EDITION: NATIONAL RULES, STANDARDS, STATUTES, AND STATE*

other exceptions actually further client interests. First, a lawyer may reveal otherwise confidential information if the client gives informed consent.<sup>29</sup> This consent exception recognizes that clients have autonomy and can consent to conduct that would otherwise constitute a violation of fiduciary duty if done without consent. Second, a lawyer representing an entity client may under certain circumstances disclose otherwise confidential information in order to protect the entity from a disloyal employee.<sup>30</sup> If an entity's lawyer learns that an entity employee has engaged in serious wrongdoing that could harm the entity or that could be attributed to it, the lawyer is required to refer the matter to a higher authority within the entity and ensure that the entity adequately addresses the issue.<sup>31</sup> If the higher authority fails to adequately address the issue, then the lawyer may reveal the information outside the entity in order to prevent substantial injury to the entity.<sup>32</sup> This exception recognizes that entity clients sometimes need to be protected from their agents and that outside disclosure may be necessary to effect that protection.

The attorney-client privilege, by contrast, is an evidentiary privilege. In court and other official proceedings, the state can compel individuals and entities to provide information unless a privilege prevents such mandatory disclosure. The attorney-client privilege prevents the state from requiring the disclosure of certain communications between a lawyer and client regarding legal representation. The privilege is narrow in scope and covers only those communications between a lawyer and client that were made in confidence and for the purposes of providing or obtaining legal advice.<sup>33</sup> If the client reveals the contents of the lawyer-client communication to anyone, then the client waives the privilege.<sup>34</sup>

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LAWYER CODES 112–19 Ch. (2006) (“State Lawyer Code Exceptions to Client Confidentiality That Permit (May) or Require (Must) Disclosure”).

29. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). This Article argues that open government laws should be construed as client consent to disclosure. *See infra* Part III.B.

30. MODEL RULES OF PROF'L CONDUCT R. 1.13(b). The ABA added this exception when it adopted revised Model Rule 1.13 in the wake of the Enron and Worldcom scandals and the passage of Sarbanes-Oxley. Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 732–33 (2004). Twenty-two states have adopted this additional entity-based exception to confidentiality. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 165–67 Ch. (2008) (“Chart of Ethics Rule on Disclosure Outside the Organization”).

31. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

32. *Id.* R. 1.13(c). This rule and its confidentiality exception is relevant to a government lawyer if that lawyer's client is an entity (such as a government agency) rather than a particular government official. *See infra* Part II (discussing government client identity).

33. RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 68 (2000).

34. *Id.* § 79.

The principle underlying the attorney-client privilege is the recognition that the public interest in the availability of evidence sometimes must give way to the countervailing interest of individuals and entities in obtaining legal advice to guide their actions. The privilege is based on two assumptions: first, that a lawyer can adequately advise a client only if the client provides complete information about the circumstances relevant to the legal issue, and second, that a client will communicate that information only if assured that the communication is protected by the attorney-client privilege.<sup>35</sup>

The confidentiality duty is robust. Even if a client recounts to a third party the client's conversation with his lawyer, the lawyer must still keep that information confidential. The attorney-client privilege, by contrast, is easily lost through waiver. If the client has shared the information with a third party, then the client can no longer claim the protection of the privilege to prevent mandatory disclosure in a state proceeding.

The professional rules seem to require lawyers to keep client information confidential in perpetuity.<sup>36</sup> Some commentators have argued for a "historical interest" exception to confidentiality that would allow disclosure long after the representation has ended.<sup>37</sup> At present there is no formal recognition of a "historical interest" exception to lawyer confidentiality.

In the government setting, by contrast, one can find support for the idea that the government's interest in confidentiality diminishes after time. In

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35. *Id.* § 68 cmt. c (identifying also a third assumption that clients need to consult lawyers in order to vindicate rights and comply with legal obligations). For an excellent critique of the second empirical assumption, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

For clients who might be subject to criminal prosecution, the Fifth and Sixth Amendments to the Constitution also provide additional bases for protecting lawyer-client communications from compelled disclosure.

36. See Legal Ethics Advisory Panel, Okla. Bar Ass'n, Op. 301 (1983), *reprinted in* [Ethics Opinions 1980–1985] Laws. Man. of Prof. Conduct (ABA/BNA), at 801:7001 (June 25, 1986) (lawyer may not donate papers with client confidences and secrets to libraries without express client consent); Legal Ethics Comm., D.C. Bar, Op. 128 (1983), *reprinted in* [Ethics Opinions 1980–1985] Laws. Man. of Prof. Conduct (ABA/BNA), at 801:2308 (July 19, 1983) (lawyers may not donate their papers to university archive unless they get clients' consent or delete from the papers all client confidences and secrets); see also Hobbs, *supra* note 25, at 200–02; Patrick Shilling, Note, *Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6*, 69 FORDHAM L. REV. 2741, 2751 (2001). Despite this apparent perpetual obligation, some lawyers have donated papers containing confidential client information to archives, apparently breaching confidentiality. See Shilling, *supra*, at 2757 (D.C. lawyer Joseph Rauh donated his papers to the Library of Congress with the stipulation that if historians or journalists wanted to publish information about living clients or those with active estates, they had to seek clients' consent).

37. Hobbs, *supra* note 25, at 202 (proposing amendment to confidentiality rule so that a lawyer may donate her papers to a library twenty-five years after the client's death).

*Attorney-General v. Jonathan Cape Ltd.*, a British court was asked to enjoin publication of a former cabinet minister's memoir because it revealed confidential cabinet deliberations.<sup>38</sup> The court acknowledged that cabinet discussions are confidential in character, but noted that there was no single rule regarding how long such discussions must be kept confidential and observed that different types of information require different lengths of confidentiality.<sup>39</sup> The court explained that at some point the government's interest in the confidentiality of these discussions would lapse, but noted the difficulty in determining exactly when that would occur.<sup>40</sup> The court ruled that it should enjoin publication only if the continuing confidentiality of the material could be clearly demonstrated and concluded that this was not that case.<sup>41</sup>

In the national security field there is a presumption that confidential national security-related information can be released ten years after its creation, unless the sensitivity of the information requires that automatic declassification occur in twenty-five years.<sup>42</sup> One also finds some support for the concept of diminishing confidentiality over time with respect to the secrecy of criminal investigations. Courts have noted that the need for secrecy may end when the investigation ends.<sup>43</sup> On occasion, courts have

38. (1975) 3 All E.R. 484 (Q.B.).

39. *Id.* at 495. The court wrote that

[s]ome secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over. . . . Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations . . . . It is evident that there cannot be a single rule governing the publication of such a variety of matters.

*Id.* at 492, 495.

40. *Id.* at 496.

41. *Id.* ("In less clear cases—and this, in my view, is certainly one—reliance must be placed on the good sense and good taste of the minister or ex-minister concerned.")

42. Exec. Order No. 13,292 §§ 1.5(b), 3.3(a), 3 C.F.R. 196, 198–99, 203 (2003); *see id.* § 3.3(b), 3 C.F.R. at 203 (identifying factors that can rebut the presumption of declassification); *id.* § 4.4(a), 3 C.F.R. at 209–10 (permitting access to classified information by historians as well as former high-level government officials, presumably to assist them in the writing of their memoirs); *see also* President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (2000). Some previous executive orders have included automatic declassification after varying lengths of time. *See, e.g.*, Exec. Order No. 11,652 § 5.A (1972).

43. *See, e.g.*, *Butterworth v. Smith*, 494 U.S. 624, 632–33 (1990). In *Butterworth*, the Supreme Court struck down a Florida statute that imposed a permanent ban on grand jury witnesses' disclosing their own testimony because

[w]hen an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on

noted that some government interests in secrecy diminish over time,<sup>44</sup> and have ruled that the historical significance of particular events combined with “the long passage of time”—measured in decades—may justify disclosure of secret grand jury proceedings.<sup>45</sup>

### *B. Secrecy and Transparency in Government*

While the overriding norm regarding lawyer-client information is secrecy unless there is a good reason for disclosure, the overriding norm regarding government information in the modern era is disclosure unless there is a good reason for secrecy. One finds this principle not in the U.S. Constitution, but in constitutive statutes that determine how governments will operate. The federal open government laws include the Freedom of Information Act (FOIA),<sup>46</sup> Privacy Act of 1974,<sup>47</sup> Government in the Sunshine Act,<sup>48</sup> Federal Advisory Committee Act,<sup>49</sup> and the Presidential Records Act of 1978.<sup>50</sup> These statutes establish a baseline of providing the public with access to government information, both in terms of government documents and government meetings. Under the FOIA, executive-branch agencies are required to publish their rules, regulations,

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the other. There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over.

*Id.* (footnote call number omitted); *see also* *Brown v. Thompson*, 430 F.2d 1214, 1215 (5th Cir. 1970) (privilege preventing discovery of police investigative files “will expire upon the lapse of an unreasonable length of time”).

44. *In re Am. Historical Ass’n*, 49 F. Supp. 2d 274, 292, 295, 297 (S.D.N.Y. 1999) (stating that some of the justifications for grand jury secrecy—such as protecting grand jury witnesses from retaliation or tampering—“dissolve[ ]” when the appeals of any convictions are complete, that “fifty years after the proceedings [had] ended . . . [t]he inhibiting effect of . . . disclosure is insignificant,” that the public’s interest in establishing an accurate historical record may strengthen over time, and that “[t]he public must acquire, at an appropriate time, a significant, if not compelling, interest in ensuring the pages of history are based upon the fullest possible record”).

45. *In re Am. Historical Ass’n*, 49 F. Supp. 2d at 293–94 (granting partial disclosure of grand jury proceedings related to Alger Hiss investigation). *See also In re May*, 13 Media L. Rep. (BNA) 2198, 2199 (S.D.N.Y. 1987) (granting disclosure thirty-five years after grand jury investigation of William Walter Remington); *In re O’Brien*, No. 3-90-X-95 (M.D. Tenn. May 16, 1990) (granting disclosure forty-five years after grand jury investigation), *cited in In re Am. Historical Ass’n*, 49 F. Supp. 2d at 293. *But see In re Craig*, 131 F.3d 99, 107 (2d Cir. 1997) (denying historian access to 1948 grand jury investigation). Note that similar requests for disclosure of grand jury materials were denied in 1977 in *Hiss v. Dep’t of Justice*, 441 F. Supp. 69, 71 (S.D.N.Y. 1977) (ruling under the Freedom of Information Act that the historical significance of the Alger Hiss grand jury investigation did not provide an exception to Federal Rule of Criminal Procedure 6(e)’s requirement of grand jury secrecy).

46. 5 U.S.C. § 552 (2000).

47. 5 U.S.C. § 552a (2000).

48. 5 U.S.C. § 552b (2000).

49. 5 U.S.C. app. §§ 1–16 (2000).

50. 44 U.S.C. §§ 2201–2207 (2000).

and policies; final opinions made in the adjudication of cases; and information about how the agencies are organized.<sup>51</sup> The statute makes all other government documents public upon request, unless there is a good reason for the government to keep the document secret.<sup>52</sup> The FOIA sets out nine specific exceptions to this mandated disclosure upon request.<sup>53</sup> When someone seeks disclosure of government information, there is a presumption that the information will be made available. Where the government refuses to disclose it, the burden is on the government to justify the refusal.<sup>54</sup> This presumption in favor of disclosure is consistent with principles of robust democratic government.

Our government is based on the premise that the government is of, for, and by the people.<sup>55</sup> But if the people do not have access to information about what the government is doing, then this premise is little more than an empty promise.<sup>56</sup> One can find a constitutional basis for the right to know only indirectly in the U.S. Constitution.<sup>57</sup> The First Amendment prohibits the government from restricting the freedom of press, but does not directly give the press access to government information. On the other hand, the First Amendment does ensure that government employees may speak about their work unless there is a compelling reason to restrict their speech.<sup>58</sup>

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51. 5 U.S.C. § 552(a)(1)–(a)(2) (2000).

52. *Id.* § 552(a)(3), (b).

53. *Id.* § 552(b).

54. *Id.* § 552(a)(4)(B) (where a requester appeals an agency's denial of information "the burden is on the agency to sustain its action").

55. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* <http://www.ourdocuments.gov/doc.php?doc=36&page=transcript>.

56. Letter from James Madison to William T. Barry (Aug. 4, 1822), *available at* [http://1stam.umn.edu/main/historic/Madison\\_letter\\_1822.htm](http://1stam.umn.edu/main/historic/Madison_letter_1822.htm) ("A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.").

57. See Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 23–24 (1976); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CON. L. (forthcoming 2008) ("[T]he body of the Constitution provides no right to public information. What the Constitutional text omits, the last generation has embedded as a part of modern constitutional practice in the Freedom of Information Act.").

58. *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) ("[T]he First Amendment limits the extent to which the United States . . . may impose secrecy requirements upon its employees . . . . It precludes such restraints with respect to information which is unclassified . . . .").



*C. Harmonizing the Lawyer-Client Secrecy Norm with the Governmental Openness Norm*

Returning to the story that began this section, how would one evaluate Mark Felt's disclosure of the details of the FBI's Watergate investigation if Felt had been acting as a lawyer? This analysis requires several counterfactual assumptions. First, one must identify Felt's client. Felt believed that his primary loyalty was to the FBI.<sup>59</sup> When the White House attempted to thwart the FBI's Watergate investigation, Felt was severely limited in what he could do through official government channels. The FBI could investigate the connections between the Watergate burglars and other activities of the Nixon reelection campaign only with the permission of the Justice Department, which was under the control of the White House. So Felt went outside of official government channels and used his leaks of information to Woodward to spur congressional and public pressure for a more complete investigation of the Watergate-White House ties.

Applying today's legal ethics standards to this situation, could Felt legally justify his disclosures to Woodward? The exception that comes closest is the entity exception to confidentiality.<sup>60</sup> While Felt had primary loyalty to the FBI, it would be more accurate to identify his putative client as the executive branch of the federal government.<sup>61</sup> Under the current ethics rule for entity clients, if Felt knew that executive-branch officials had engaged in "a violation of law that reasonably might be imputed to" the executive branch and that was "likely to result in substantial injury to" the branch, then he had an obligation to "refer the matter to higher authority."<sup>62</sup> In this situation, higher authority would be the Director of the FBI, the Attorney General, and the President. There is no indication that Felt ever confronted any of these officials over the alleged transgressions. So even under the current more lax confidentiality rules now in place, Felt would not be able to legally justify his leaking this information to Woodward.

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59. O'Connor, *supra* note 16, at 130.

60. See MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2007).

61. See *infra* Part II.

62. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

## II. IDENTIFYING THE CLIENT OF A GOVERNMENT LAWYER

*In 2000, Cindy Ossias was a lawyer in the California Insurance Department, where she investigated California insurance companies. Ossias had investigated the companies' practices in settling cases arising out of the 1994 Northridge earthquake, concluded that the companies had violated state law, and recommended that the companies be fined. Instead, California Insurance Commissioner Chuck Quackenbush, the head of the Insurance Department and an elected official, authorized secret settlements under which the companies would donate to private foundations formed by Quackenbush. When Ossias learned of these secret settlements, she believed they were improper and disclosed them to state legislators who were investigating the Insurance Department. When Quackenbush discovered that Ossias had disclosed this information to the legislators, he placed her on administrative leave, and state bar authorities investigated whether Ossias had violated her professional duty of confidentiality.<sup>63</sup> Ossias argued that her disclosure was authorized by state whistleblower protection laws, and bar authorities ultimately decided not to discipline her.<sup>64</sup> The state bar proposed a rule allowing government lawyers to disclose government misconduct, but the state supreme court rejected the proposed rule.<sup>65</sup> The California legislature passed legislation that would have clarified that a government lawyer does not violate confidentiality by*

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63. As a California lawyer, Ossias was bound by the California Business and Professions Code § 6068(e)(1), which states that a lawyer must “maintain inviolate the confidence . . . and . . . preserve the secrets . . . of his or her client.” CAL. BUS. & PROF. CODE § 6068(e)(1) (West Supp. 2007). The statutory duty of confidentiality has an exception for disclosure that “is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.” *Id.* § 6068(c)(2); *see also* CAL. RULES OF PROF'L CONDUCT R. 3-100(A), (B) (2008) (providing a similar exception and an additional exception when the client gives informed consent). For an extensive discussion of Ossias's case, *see* Duskow, *supra* note 10, at 24–26; *see also* Radack, *supra* note 10, at 126, 138–40.

64. Letter from Donald R. Steedman, Deputy Trial Counsel, State Bar of Cal., to Richard Alan Zitrin, Attorney for Cindy Ossais (Oct. 11, 2000), *available at* Response by Respondent to Bar Ass'n's Counter Statement at 21–22 app., *In re Schafer*, No. 00031 (Wash. State Bar Ass'n Dec. 7, 2000), <http://www.dougschafer.com/Response2Bar.pdf>. One might argue that the decision of the California bar authorities not to discipline Ossias indicates that government lawyers in California may disclose otherwise confidential information about government wrongdoing. But a decision not to discipline has no precedential value and would provide little comfort for a lawyer seeking definitive guidance on her ethical obligations.

65. Duskow, *supra* note 10, at 23. The proposal can be found at <http://www.calbar.ca.gov/calbar/pdfs/rule3-600request.pdf>.

*disclosing government wrongdoing, but the Governor vetoed the legislation.*<sup>66</sup>

*To whom did Ossias owe a duty of confidentiality? Was it to the California Insurance Department, or its head, Chuck Quackenbush? The government of California? The people of California?*

#### A. A Wide Range of Possible Clients

Government officials, courts, and commentators have identified a wide variety of possible clients that the government lawyer might represent.<sup>67</sup> One can find some support for the following as clients: the “public interest,”<sup>68</sup> the public at large,<sup>69</sup> the entire government,<sup>70</sup> the branch of

66. State Bar of California, Office of Governmental Affairs, *Governor Vetoes Public Attorney Whistleblower Bill*, SACRAMENTO SCENE, Oct. 4, 2002, at 1, available at <http://www.calbar.ca.gov/calbar/pdfs/legis/Newsletter1-37.pdf>. The text of the bill is available at [http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_0351-0400/ab\\_363\\_bill\\_20020828\\_enrolled.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_bill_20020828_enrolled.html). The veto message is available at [http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_0351-0400/ab\\_363\\_vt\\_20020930.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_vt_20020930.html).

67. For other discussions of the range of possible clients of government lawyers, see Cramton, *supra* note 10, at 296 (identifying five possible clients of government attorney: public interest, government as a whole, branch of government, agency, and particular officer who makes decisions for agency); Bruce A. Green, *Must Government Lawyers “Seek Justice” In Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 266–69 (2000); Joshua Panas, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541 (2004).

Two types of lawyers employed by the government have no client at all because they are not acting as lawyers in a representative capacity: judges, *see infra* text accompanying note 121, and administrators, such as former Secretary of State Warren Christopher and former Director of Central Intelligence William Webster.

68. *Feeny v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977) (“[The Attorney General] also has a common law duty to represent the public interest” in his representation of the Commonwealth and specific Commonwealth officers being sued (citing MASS. GEN. LAWS ch. 12 § 3 (2002)); *Sec’y of Admin. & Fin. v. Att’y Gen.*, 326 N.E.2d 334, 338–39 (Mass. 1975) (same); Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181, 185, 190 (1990) (asserting that the government lawyer must serve the public interest as well as a specific agency and the government as a whole); Keith W. Donahoe, Note, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987, 1000 (1989) (“The client of the government lawyer should be the public interest.”); *see also In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (“Unlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency.”); *Superintendent of Ins. v. Att’y Gen.*, 558 A.2d 1197, 1199–1200, 1202 (Me. 1989) (referring to government lawyers’ representation of “both the public interest and public agencies” in ruling that the state attorney general is not obligated to represent the superintendent of insurance in an action seeking review of a rate order issued by the superintendent).

69. *In re Witness Before Special Grand Jury 2000–2*, 288 F.3d 289, 294 (7th Cir. 2002) (refusing to recognize former state secretary of state’s assertion of attorney-client privilege regarding his conversation with lawyers because, *inter alia*, a government attorney owes “ultimate allegiance” to “public citizens . . . as represented by the grand jury”); *Conn. Comm’n on Special Revenue v. Conn.*

government employing the lawyer,<sup>71</sup> the particular agency employing the lawyer,<sup>72</sup> and a particular government official (such as the head of a

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Freedom of Info. Comm'n, 387 A.2d 533, 538 (Conn. 1978) (“[T]he real client of the attorney general is the people of the state.”); *Levitt v. Att’y Gen.*, 151 A. 171, 174 (Conn. 1930) (state attorney general’s “duty as a lawyer [is] to protect the interest of his client, the people of the state”); *Times Publ’g Co. v. Williams*, 222 So. 2d 470, 475 (Fla. Dist. Ct. App. 1969) (referring to “the public” as the government lawyer’s “real client” in a case examining the effect of state open meeting laws on confidential government lawyer-client consultations); *Humphrey v. McLaren*, 402 N.W.2d 535, 540–41, 543 (Minn. 1987) (stating that a government attorney “has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies” and ruling that the state attorney general is not disqualified from suing the former head of a state agency because he never represented the head of the agency); W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEMPHIS ST. U. L. REV. 453, 457 (1993) (“the people of the states are [the] clients” of state Attorneys General); Charles Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. BAR J. 331, 332 (1974) (the government lawyer’s client is “the people as a whole”); Patricia M. Wald, “*For the United States*”: *Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS., Winter 1998, at 107, 110 (“[T]he government lawyer’s client is seen as being . . . the U.S. citizenry at large, a client whose ultimate objective is that justice be done.”). *But see In re Grand Jury Investigation*, 399 F.3d 527, 533–34 (2d Cir. 2005) (rejecting federal government’s assertion that the court should not recognize Connecticut governor’s assertion of attorney-client privilege because a lawyer’s “loyalty to the Governor . . . must yield to her loyalty to the public, to whom she owes ultimate allegiance when violations of the criminal law are at stake”).

Some have asserted that while the government lawyer may have a more immediate client (such as a government agency), she also represents the public. *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983) (asserting in dicta that “government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large”); Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1069 (1978) (“Although our client is the government, in the end we serve a more important constituency: the American people.”); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 TOURO L. REV. 1, 4–5 (1985) (“[Government lawyers] represent not only the government entity, but also the public.”); Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 412 (2005) (“State attorneys general . . . owe allegiances to two clients—the ‘people’ and the executive officers and agencies.”).

70. Lawry, *Wrong Question*, *supra* note 10, at 66 (“[T]he client of the federal government lawyer is the federal government.”); *see also* James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1575–76, 1594 (1996) (noting that “the Solicitor General[’s] . . . client is most often the government as a whole, or the executive branch in particular, rather than an individual agency”).

71. Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987) (“[T]he duties of an [executive branch] agency attorney run to the executive branch generally rather than to the agency only. . . . [T]he attorney’s obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head.”); *cf.* Babcock, *supra* note 68, at 185 (asserting that the Justice Department’s client is sometimes “the Congress whose legislation is under attack”).

72. D.C. RULES OF PROF’L CONDUCT R. 1.6(k) (2007) (stating that “[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order”); *see In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915–21 (8th Cir. 1997) (asserting that “the White House is the real party in interest in this case” and refusing to recognize attorney-client privilege for a lawyer’s notes of a conversation with then First Lady when they were sought by a federal grand jury); Prof’l Ethics Comm., Fed. Bar Ass’n Op. 73-1

government organization) in his official or individual capacity.<sup>73</sup>

In some situations a government lawyer is assigned to defend an individual government employee rather than represent a government entity. Such is routinely the case for Judge Advocate General military defense lawyers, who take on a traditional lawyer-client relationship with their individual clients.<sup>74</sup> Justice Department lawyers representing government officials who have been sued in their individual capacity face a more complex situation. Federal government lawyers represent individual government officials only if the Attorney General has determined that it is “in the interest of the United States” to provide such representation.<sup>75</sup> Under Justice Department regulations, the government lawyer’s confidentiality duty toward her individual client is more limited than in a traditional lawyer-client relationship. The lawyer must keep confidential only that information that is covered by the attorney-client

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(1973) (“The Government Client and Confidentiality”), in 32 FED. B.J. 71, 72 (1973) (“[T]he client of the federally employed lawyer . . . is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business.”); FED. BAR ASS’N, MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (1990) (“[A] Government lawyer represents the Federal Agency that employs the Government lawyer.”); D.C. BAR, REPORT BY THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS AND THE MODEL RULES OF PROFESSIONAL CONDUCT, reprinted in WASH. LAW., Sept.–Oct. 1988, at 53, 54 [hereinafter D.C. BAR REPORT] (“[T]he employing agency should in normal circumstances be considered the client of the government lawyer.”); Cramton, *supra* note 10, at 298 (“For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed.”).

73. The Attorney General’s Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 54 (1982) (stating that the President is the client of the Attorney General); Bruce E. Fein, *Promoting the President’s Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. NEWS & J. 406, 406 (1983) (referring to “the incumbent President” as the client of “a government attorney in the Executive Branch”); Harvey, *supra* note 70, at 1607–12 (suggesting that the President might appropriately be viewed as the client whenever a federal agency is involved in litigation).

As a practical matter, there may not be much difference between identifying the client as an agency and identifying the client as the head of the agency in her official capacity. The latter formulation simply makes explicit who is empowered to make decisions on behalf of the agency. But in certain circumstances, the difference in conception is significant. Lawyers licensed in states that have adopted the new Model Rule 1.13 on entity representation have an additional exception to confidentiality if their client is the agency rather than the individual heading the agency. See MODEL RULE OF PROF’L CONDUCT 1.13(c) (2007).

74. See D.C. RULES OF PROF’L CONDUCT R. 1.6 cmt. 39 (2007) (noting that government lawyers may “be assigned to provide an individual with counsel or representation,” such as “a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant’s government employment, and a military lawyer representing a court-martial defendant”); Legal Ethics Comm., D.C. Bar, Op. 313, available at [http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion313.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion313.cfm) (explaining that a JAG lawyer’s client is an individual defendant rather than the government).

75. 28 C.F.R. § 50.15(a) (2007).

privilege.<sup>76</sup> Any nonprivileged information need not be held confidential, and Justice Department attorneys have been required to disclose information adverse to their individual client where the lawyer learned it from a source other than a client communication.<sup>77</sup>

In most situations, the government lawyer represents a government entity rather than an individual government employee.<sup>78</sup> While the professional rules provide guidance for entity representation,<sup>79</sup> they generally leave open the key question for government lawyers: which government entity does the lawyer represent?<sup>80</sup>

The identity of the client has important implications for lawyer confidentiality. If a government lawyer represents “the people,” then presumably she could disclose information to anyone who is one of “the people.”<sup>81</sup> If a government lawyer represents an agency, then the entity exception to confidentiality will apply,<sup>82</sup> but if she is representing the agency head, then it will not.<sup>83</sup> If a Justice Department lawyer represents

76. *Id.* § 50.15(a)(3) (“Justice Department attorneys who 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.”).

77. Memorandum from Ralph W. Tarr, Acting Assistant Att’y Gen., Office of Legal Counsel, to Ralph K. Willard, Acting Assistant Att’y Gen., Civil Div. 6 (Mar. 29, 1985) (on file with author).

This approach—providing only limited confidentiality to a government employee client—may no longer be sustainable. The Tarr memorandum asserts that the United States Constitution’s Supremacy Clause will prevent state bar authorities from disciplining a government lawyer who reveals (non-privileged) information in violation of state legal-ethics rules. *Id.* at 9 n.7. But in 1998, Congress passed the McDade Amendment, which prohibits the Justice Department from using the Supremacy Clause to opt out of state ethics rules. Act of Oct. 21, 1998, Pub. L. No. 105-277, sec. 101(b), §§ 801(a), 112 Stat. 2681, 2681–118 (codified at 28 U.S.C. § 530B(a) (2000)) (“An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”).

78. *E.g.*, *Ward v. Superior Court*, 138 Cal. Rptr. 532, 538 (Cal. Ct. App. 1977) (holding that county counsel represented county rather than former assessor, so there was no conflict of interest in counsel’s defending county in assessor’s defamation action against county); *Humphrey v. McLaren*, 402 N.W.2d 535, 540–41 (Minn. 1987) (holding that state attorney general represented state agency rather than agency’s executive director, so there was no conflict of interest when attorney general sued executive director for misuse of public funds).

79. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2007) (organization as client).

80. *But see* D.C. RULES OF PROF’L CONDUCT R. 1.6(k) (2007) (asserting that the government lawyer’s client is the agency that employs the lawyer).

81. *Cf.* *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 380 n.5 (1993) (rejecting resident’s assertion that “because the city attorney has a duty to serve the public, she is the client of the city attorney as a member of the public and has the authority to waive the privilege”).

82. MODEL RULES OF PROF’L CONDUCT R. 1.13(c) (2007); *see* discussion *supra* notes 30–32 and accompanying text.

83. As a practical matter, the key difference between conceiving of the client as a government agency rather than as the head of the government agency in his official capacity is the Model Rule 1.13 duty to protect entity clients from disloyal agents. *See* *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005). In *Ross*, a city was being sued for alleged civil rights violations by its police force. The

the entire government, then she can reveal information to a member of Congress, but if she represents the executive branch, she cannot. If a state natural resources department lawyer represents her agency, then she cannot reveal information about wrongdoing at the department to anyone outside of the department, including the state attorney general.<sup>84</sup> If a lawyer in the California Insurance Department (such as Cindy Ossias) represents the entire government of California, then she can reveal information to state legislators. But if she represents only the Insurance Department, then she cannot—unless an exception to confidentiality applies.

Writing years before the American Bar Association adopted its Model Rules of Professional Conduct—including its rule specifically dealing with entity clients—Robert Lawry argued that client identity was the wrong question for government lawyers to ask.<sup>85</sup> Lawry correctly noted that identifying the client does not end the inquiry regarding a government lawyer's confidentiality duty.<sup>86</sup> But client identity is an appropriate starting point for an inquiry about confidentiality. Correctly identifying the government lawyer's client will help the lawyer determine the set of individuals to whom she can reveal information.

Some have attempted to provide a universal answer to the question of the identity of the government lawyer's client. Politicians often claim that the government lawyer's client is "the public,"<sup>87</sup> and a few commentators

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court ruled that the city could assert attorney-client privilege even though the former police director (a co-defendant) purported to waive the privilege by defending on the basis of the legal advice he received. *Id.* at 603. As long as the city rather than the police director was the client, the city could maintain the privilege. *Id.* at 605–06.

84. *But see* HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(4)–(5) (2007) (permitting government lawyers licensed in Hawaii to make such disclosures).

85. Lawry, *Wrong Question*, *supra* note 10; Lawry, *Confidences*, *supra* note 10. The American Bar Association adopted its Model Rules of Professional Conduct, including Model Rule 1.13 on entity clients, in 1983. *See* MODEL RULES OF PROF'L CONDUCT preface (2007).

Steven Berenson has also argued that identifying the government lawyer's client is unnecessary. Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 364 (2005) ("[C]hoosing a single client from among the many possibilities mentioned above would be arbitrary . . ."). He suggests that government lawyers should instead "seek guidance from a wide range of the sources . . . [and] serve a mediating function in considering how to incorporate those views in the representation." *Id.* But this approach would often result in indeterminacy.

86. Lawry, *Confidences*, *supra* note 10, at 631 ("The primary reason this is the wrong question is that the answer to it does not automatically answer other, separate questions of immense practical importance, not least of which is the question of confidentiality.").

87. Senator Patrick Leahy asserted that the memoranda John Roberts wrote when he was at the Solicitor General's office were not subject to attorney-client privilege because "[t]hose working in the solicitor general's office are not working for the president. They're working for you and me, and all the American people." Interview by George Stephanopolous with Sen. Patrick Leahy (July 24, 2005)

assert that government lawyers should pursue “the public interest.”<sup>88</sup> But these formulations fail to identify who can give direction to the lawyer on behalf of the client.<sup>89</sup> Some assert that the government lawyer represents the government as a whole,<sup>90</sup> but Geoffrey Miller persuasively rebuts that notion as it pertains to a government with separated powers.<sup>91</sup> Miller notes that lawyers in the executive branch do not generally represent Congress or the judiciary.<sup>92</sup> Many assert that the client is the particular agency that employs the lawyer,<sup>93</sup> but this approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court.

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(transcript available at [http://blog.washingtonpost.com/campaignforthecourt/2005/07/talk\\_shows\\_leah.html](http://blog.washingtonpost.com/campaignforthecourt/2005/07/talk_shows_leah.html)).

88. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) [hereinafter Berenson, *Public Lawyers*]; see also Berenson, *supra* note 10.

89. See Prof'l Ethics Comm., Fed Bar Ass'n, Op 73-1 (1973) (“The Government Client and Confidentiality”) in 32 FED. B.J. 71, 72 (1973) (“[W]e do not suggest . . . that the public is the client as the client concept is usually understood.”); see also D.C. BAR REPORT, *supra* note 72, at 54 (concluding “that ‘the public interest’ was an unworkable ethical guideline” and that “the ‘public interest’ [is] too amorphous a standard to have practical utility in regulating lawyer conduct”); Cramton, *supra* note 10, at 298 (noting that “conceptions of the ‘public interest’ vary significantly from one person to the next” and that “defining the government lawyer’s client as the public interest would fail to provide any real guidance in regulating lawyers’ conduct”); Harvey, *supra* note 70, at 1601 (“The public interest model . . . allows unelected officials to substitute their judgment for that of an agency.”); Miller, *supra* note 10, at 1294–95 (“[T]he notion that government attorneys represent some transcendental ‘public interest’ is, I believe, incoherent. . . . [T]here are as many ideas of the ‘public interest’ as there are people who think about the subject.”).

On the other hand, certain government lawyers have client-like decision-making authority, such as whether to bring or settle a lawsuit and whether to appeal an adverse court decision. If a lawyer does have this client-like authority, she can appropriately consider the public interest in making such decisions. See discussion *infra* Part II.C.

90. See Lawry, *Wrong Question*, *supra* note 10, at 66 (“[T]he client of the federal government lawyer is the federal government.”); see also Harvey, *supra* note 70, at 1575–76 (regarding the Solicitor General in particular). But in a longer article published just a year later, Lawry asserts that “[t]he client for the federal government lawyer is the head of the agency or department or the head of the public or quasi-public body to which the lawyer is currently attached . . . .” Lawry, *Confidences*, *supra* note 10, at 644.

91. Miller, *supra* note 10, at 1296 (“The notion . . . that an agency attorney serves the government as a whole is misplaced.”).

92. *Id.* (“In a system of checks and balances it is not the responsibility of an [executive branch] attorney to represent the interests of Congress or the Court. Those [branches] have their own ‘constitutional means and personal motives’ to protect their prerogatives.” (footnote call number omitted)); see also D.C. BAR REPORT, *supra* note 72, at 55 (“The identification of one’s client as the entire government would raise serious questions regarding client control and confidentiality. For example, without some focus of responsibility, each government lawyer would be free to perform as he or she saw fit, subject only to the practical constraint of internal agency discipline.”).

93. D.C. BAR REPORT, *supra* note 72, at 55; see also Prof'l Ethics Comm., Fed. Bar Ass'n, Op. 73-1 (1973), in 32 FED. B.J. 71 (1973).



There are problems with each of these formulations. Given the wide variety of roles that government lawyers play, it is no wonder that a universal definition of the government lawyer's client evades us. The next section develops an alternative approach. It identifies the government lawyer's client by examining the specific context in which the government lawyer works, paying particular attention to the structure of government authority.

*B. Client Identity Depends on Context and Structure of Governmental Power*

While there is no universal answer to the question of identifying a government lawyer's client, one can determine a particular government lawyer's client by examining the particular context and the precise structure of governmental authority.<sup>94</sup> This section describes the process for identifying a government lawyer's client and gives examples of that analysis. It does not purport to provide a comprehensive list of clients for all government lawyers. Instead, it explains how one can identify a particular lawyer's client and provides some examples of this method.

To determine the identity of the client, one must examine the range of possible clients of the government lawyer and consider the relationships among those putative clients. Is one of those entities subordinate to another or do they act independently? One must then consider the relationship between the lawyer and those entities. A few concrete examples will show how complex and contextual the issue of client identity can be in the government context.<sup>95</sup>

The issue of client identity often comes up in cases involving claims of attorney-client privilege or conflicts of interest. For example, an attorney-client privilege case arose when a federal grand jury subpoenaed the

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94. See RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 97 cmt. c ("No universal definition of the client of a governmental lawyer is possible."); Harvey, *supra* note 70, at 1615–16 ("[N]o one model completely describes Department loyalty. . . . The varied facts and forces that operate in each case of representation make a single model inappropriate for describing the loyalty relationship."); see also Lawry, *Wrong Question*, *supra* note 10, at 62–63; Lawry, *Confidences*, *supra* note 10, at 631–32 (noting that the question of client identity also depends on the particular question being asked: confidentiality, conflict of interest, or whether the government lawyer must do what the particular government official has instructed).

95. See Gray v. R.I. Dep't of Children, Youth and Families, 937 F. Supp. 153, 157 (D.R.I. 1996) ("[A]scertaining who the client really is can be a complex affair when a governmental entity is involved."); United States v. Am. Tel. & Tel. Co., 86 F.R.D. 603, 617 (D.D.C. 1979) (adopting a contextualized approach to identifying the government lawyer's client, indicating that the client can be more than one government agency "if the two agencies have a substantial identity of legal interest in a particular matter").

minutes from the Detroit City Council's closed sessions. The Detroit corporation counsel had attended those sessions and the federal prosecutor argued that the corporation counsel represented only the executive arm of city government, not the Detroit City Council.<sup>96</sup> Under this theory, the presence of corporation counsel would waive the City Council's attorney-client privilege. The Sixth Circuit closely examined the particular legal context of these closed sessions, which dealt with condemnation proceedings. The Detroit city government is normally bifurcated, with the corporation counsel representing the city administration rather than the City Council. But in condemnation proceedings, the City Council actually instructs the corporation counsel whether to proceed. So, the City Council was able to assert attorney-client privilege for its meetings with corporation counsel.<sup>97</sup>

The Sixth Circuit used a similar structural, contextual approach to come to a different conclusion in a case involving Murfreesboro, Tennessee city council members, the city manager, and a lawyer for the city.<sup>98</sup> The issue was again application of the attorney-client privilege. The court found that the city-council members were investigating an executive decision and had interests adverse to those of the city manager. Thus, the city council members were not clients of the city attorney and the city could not assert attorney-client privilege because the meeting with the lawyer occurred with non-clients (i.e., city council members) present.<sup>99</sup>

In a California case, the issue was a possible conflict of interest by a county counsel who had given legal advice to the county's civil service commission.<sup>100</sup> The court ruled that ordinarily a county counsel's client is the entire county rather than a constituent agency of the county, even when the lawyer is giving specific legal advice to such an agency. But the court identified an exception to this general rule where the agency has the authority to act independently of the county.<sup>101</sup> In this particular case the

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96. *In re Grand Jury Subpoena*, 886 F.2d 135, 137-38 (6th Cir. 1989).

97. *Id.* at 138-39.

98. *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998).

99. *Id.* at 357-58.

100. *Civil Serv. Comm'n v. Superior Court*, 209 Cal. Rptr. 159, 164 (Cal. Ct. App. 1985) ("We . . . accept the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall governmental entity of which the agency is a part.").

101. *Id.* The court further states that

an exception must be recognized when the agency lawfully functions independently of the overall entity. Where an attorney advises or represents a public agency with respect to a matter as to which the agency possesses independent authority, such that a dispute over the

court found that the civil service commission had independent authority because when the county opposed a commission decision, the county had to take the commission to court rather than simply overrule it.<sup>102</sup> Since the county counsel had given legal advice to a commission with independent authority, the commission itself was a distinct client of the county counsel.<sup>103</sup>

In another conflicts of interest case, employees of the Rhode Island Department of Children, Youth and Families sued the department for alleged civil rights violations.<sup>104</sup> The employees' lawyer also did legal work for two Rhode Island state boards, and the state's attorney general argued that representation of the employees constituted an improper conflict of interest. The issue was whether the lawyer represented just the two specific state boards, or instead represented the entire state government. The court noted that governmental agencies sometimes oppose each other in litigation, and thus the agency, rather than the government as a whole, is the client.<sup>105</sup> It examined Rhode Island's restrictions on its employees and found that state employees are prohibited from serving as lawyers for a party suing the particular agency where they are employed.<sup>106</sup> By contrast, federal law prohibits executive branch employees from serving as lawyers for a party suing the executive branch.<sup>107</sup> Thus, the court found that the clients of this lawyer were the particular boards he represented, rather than the entire state government.

While this kind of structural analysis is the most satisfying way to identify a government lawyer's client, not all courts that have decided the issue of client identity use the structural approach. In a case involving the possible disqualification of a private law firm that arguably represented the

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matter may result in litigation between the agency and the overall entity, a distinct attorney-client relationship with the agency is created.

*Id.*

102. *Id.* The court states:

Here, . . . the conflict between the Department of Social Services and the Commission cannot be resolved in the usual manner because the County Charter gives the Commission authority independent of the County's normal hierarchical structure. The Board of Supervisors has been forced to sue the Commission in an attempt to overturn its rulings.

*Id.*

103. *Id.* at 164, 167 (disqualifying county counsel from representing county in litigation against commission). For further discussion of this case, see Solomon, *supra* note 10, at 274–75.

104. Gray v. R.I. Dep't of Children, Youth and Families, 937 F. Supp. 153 (D.R.I. 1996).

105. *Id.* at 160 (noting that government agencies' "interests are quite often conflicting or divergent").

106. *See id.* at 156–58 (applying the Rhode Island Code of Ethics (1990) and citing R.I. GEN. LAWS § 36-14-5(e)(2)).

107. *Id.* (citing 18 U.S.C. § 205(a)(2) (2000)).

State of New York but was now representing a tobacco company being sued by the state, the court concluded that the firm represented only specific agencies rather than the state as a whole, analogizing in a rather strained fashion to the situation of a firm that represents an association's members but not the entire association.<sup>108</sup> In a case involving a county's claim of attorney-client privilege for communications between the county attorney and a county employee, where those communications had also been shared with "the county personnel office, the county auditor's office, and the county judge's office," a Texas state court found that those other offices constituted third parties outside the lawyer-client relationship, thus waiving the attorney-client privilege.<sup>109</sup> But the court failed to consider whether those offices were all part of the county attorney's client.<sup>110</sup>

The identity of the client is determined by examining the structure of authority within the government. Applying this structural analysis to the federal government's executive branch, client identity depends on one's theory about the structure of executive-branch authority. Proponents of the unitary-executive view have asserted that all executive-branch lawyers have as their client the entire executive branch, with the President ultimately responsible for defining client interests.<sup>111</sup> But this unitary-executive view is not universally held. Some commentators note that individual departments have some independent authority based on congressional enactments, even though the President can put political pressure on a department secretary, or even fire the secretary.<sup>112</sup> These commentators would likely conclude that the client of a department lawyer is the department itself rather than the entire executive branch.<sup>113</sup> For

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108. *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 282–89 (S.D.N.Y. 2001) (refusing to disqualify the law firm from representing a tobacco company being sued by the state). See discussion of this case in Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283, 292 (2003).

109. *Cameron County v. Hinojosa*, 760 S.W.2d 742, 745–46 (Tex. App. 1988).

110. See *id.* Compare the Texas court's approach in *Hinojosa*, 760 S.W.2d at 746, with the California court's approach in *Civil Serv. Comm'n v. Superior Court*, 209 Cal. Rptr. 159, 163–67 (Cal. Ct. App. 1985).

111. See, e.g., Miller, *supra* note 10, at 1298 (asserting that "the [executive branch] attorney's obligation is most reasonably seen as running to the executive branch as a whole and to the President as its head"); Paulsen, *supra* note 11, at 487 ("[A]s a matter of the constitutive law of the legal entity in question . . . an attorney working for an agency within the executive branch represents . . . the executive branch.").

112. See, e.g., Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. (2007).

113. *But cf.* Lawry, *Wrong Question*, *supra* note 10, at 67. Lawry states:

[C]alling the agency the "client" only confuses . . . sound policy, for it is never the case that the matter cannot be pursued by the individual lawyer at least to the Attorney General or

many of the lawyers employed by independent agencies, such as the Securities and Exchange Commission (SEC) or the Federal Communications Commission, their client is the agency itself.<sup>114</sup> Such an agency is even more insulated from presidential control and thus can take positions that will dissatisfy the President. An SEC lawyer who disagrees with an agency decision can appeal that decision up to the Commission itself, but not beyond the Commission. A Justice Department lawyer who is defending a lawsuit against the Agriculture Department may in common parlance refer to that department as her client. But by statute the Justice Department controls the litigation and is concerned with the effect of any rulings on the rest of the executive branch.<sup>115</sup> Even if the Secretary of Agriculture would prefer a particular position, the Attorney General can overrule that position if he deems it in the interest of the executive branch. So it would be more accurate to say that the client of the Justice Department lawyer is the entire executive branch.<sup>116</sup> Federal prosecutors have as their clients the executive branch, and they have significant independence in how they go about their duties.<sup>117</sup>

Most congressional lawyers have as their clients individual legislators, while a few represent entities within the legislative branch.<sup>118</sup> The former work either on the personal office staff or the committee staff of a particular member of the House of Representatives or Senate. They owe duties of loyalty and confidentiality to the individual legislator. Similarly,

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Justice Department level. If the lawyer is working in the Executive Branch, the process may not stop until it reaches the President himself.

*Id.*

114. In a few cases, lawyers work for individual commissioners rather than the commission as a whole. In those cases, the client is the individual commissioner in his official capacity.

115. 28 U.S.C. § 516 (2000) (“[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice . . .”).

116. By contrast, the D.C. Rules of Professional Conduct assert that “[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.” D.C. RULES OF PROF’L CONDUCT R. 1.6(k) (2007). This would make the Justice Department lawyer’s client the Justice Department.

117. *See infra* Part I.C (discussing lawyers with client-like authority to make decisions). Under the former Independent Counsel statute, Independent Counsels had the same authority as the U.S. Attorney General. 28 U.S.C. § 594(a) (2000). The statute provides that

an independent counsel appointed . . . shall have, with respect to all matters in such independent counsel’s prosecutorial jurisdiction . . . full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . .

*Id.*

118. Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 31, 36–37.

lawyers in the Office of the Legislative Counsel have transitory lawyer-client relationships with the individual legislators to whom they give legal advice on the drafting of legislation.<sup>119</sup> By contrast, there are a few lawyers on Capitol Hill whose clients are legislative entities rather than individual legislators. For example, the Senate Legal Counsel represents the Senate as an institution, regularly defending the Senate in lawsuits and pursuing subpoena enforcement actions in connection with Senate Committee investigations.<sup>120</sup>

In the judicial branch, although judges are lawyers, they do not act in a representative capacity and therefore do not have any clients. Judicial clerks give legal advice to the judges for whom they work, so one might classify the judge as the clerk's client. But many judicial clerks are not yet licensed as lawyers when they begin their clerkships. So it is unclear that judicial clerks are lawyers at all, let alone whether their judges are their clients.<sup>121</sup> For example, Edward Lazarus clerked for Justice Blackmun during the 1988–89 Term and ten years later published a book that critiqued the Supreme Court's handling of certain highly charged cases.<sup>122</sup> Lazarus's book was met with a chorus of criticism.<sup>123</sup> Lazarus was accused of violating the confidentiality inherent in the clerk-Justice relationship and of violating the confidentiality provision in the Supreme Court's rules for clerks.<sup>124</sup> But there was little discussion of whether he violated the confidentiality rule for lawyers.<sup>125</sup>

With regard to local governments, normally the client is the local government itself rather than the local officials who run the government.<sup>126</sup>

119. See MATTHEW ERIC GLASSMAN, CONG. RESEARCH SERV., OFFICE OF LEGISLATIVE COUNSEL: SENATE (2007), available at <http://www.senate.gov/reference/resources/pdf/RS20856.pdf>. These lawyers are required "to maintain the attorney-client relationship with respect to any communications with Senators or staff." *Id.* at 2.

120. Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 47, 56–62.

121. Cf. Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1247 (1981) (asserting that a clerk's putative client would be the court rather than the individual judge, based on Prof'l Ethics Comm., Fed. Bar Ass'n, Op. 73-1 (1973) (identifying a government lawyer's client as the employing agency)).

122. See EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

123. See, e.g., Richard W. Painter, *A Law Clerk Betrays the Supreme Court*, WALL ST. J., Apr. 13, 1998, at A23; Gretchen Craft Rubin, *Betraying a Trust*, WASH. POST, June 17, 1998, at A27.

124. See, e.g., Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 843–46 (1999); Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1435 (1999).

125. See Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087, 1100 (1999) ("[T]he attorney-client relationship is not analogous to the clerk-Justice relationship.")

126. *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2005) ("[G]enerally in conversations between municipal officials and the municipality's counsel, the municipality, not any individual

One would need to look closely at the structure of the particular local government to determine whether the client is the entire local government, the local legislature, the local government's executive branch, or some other subset of the government.

*C. Some Government Lawyers Have Authority to Make Decisions That Are Normally in the Hands of the Client*

The previous section showed how complicated it can be to determine the identity of a particular government lawyer's client. This section addresses two related issues: the fact that the lawyer-client relationship in government is sometimes—but not always—fundamentally different from the lawyer-client relationship in the private sector and the fact that some government lawyers may, and indeed should, consider the public interest in making decisions about the representation.<sup>127</sup>

*1. "Runaway" Lawyers*<sup>128</sup>

Some government lawyers have a traditional lawyer-client relationship with their government client. The client decides on the objectives of the representation and the lawyer pursues those objectives.<sup>129</sup> Other government lawyers serve both as the lawyer and essentially as a trustee, entrusted to make decisions that clients normally make.<sup>130</sup> The professional rules require a lawyer to abide by a client's decision on whether to settle a case or whether to appeal an adverse decision.<sup>131</sup> Yet some government lawyers routinely decide whether to litigate or settle

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officers, is the client.”).

127. See *Humphrey v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987) (“[I]n the public attorney-public client relationship, there is a quality of disinterested interest not usually found in the private sector.”).

128. Compare a discussion of “runaway” grand juries in Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821 (2000).

129. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”).

130. For an example of a state rejecting this type of trustee-like power for an attorney general, see *State ex rel. Amerland v. Hagan*, 175 N.W. 372, 374 (N.D. 1919) (“[T]he Attorney General . . . [does not] step[] into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.”), *overruled on other grounds by Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96, 107 (N.D. 1979).

131. Model Rule 1.2(a) states: “A lawyer shall abide by a client's decision whether to settle a matter.” MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

cases on behalf of their clients.<sup>132</sup> Prosecutors decide themselves whether to seek indictments and whether to allow plea agreements and cannot allow other officials in the government to make these decisions.<sup>133</sup> In addition, many state attorneys general have this client-like authority in civil cases. For example, in a case where the South Carolina Attorney General was representing the state tax commission, the Attorney General was permitted to settle a tax dispute even though two of the three members of the commission objected to the settlement.<sup>134</sup> In Massachusetts, after the Attorney General unsuccessfully defended the civil service commission in a sex discrimination lawsuit, the commission voted not to appeal the decision. But the Attorney General took the appeal anyway against the wishes of his client.<sup>135</sup> The Massachusetts Supreme Court found that the Attorney General's "relationship with the State officers he represents . . . is not constrained by the parameters of the traditional attorney-client relationship."<sup>136</sup> In another case, the Massachusetts Attorney General refused to appeal an adverse judgment even though the state officer being sued wanted to appeal.<sup>137</sup>

At the federal level, Congress has set out by statute that the Department of Justice controls most litigation decisions.<sup>138</sup> Justice Department lawyers represent executive-branch agencies in court, but it is the Justice Department—not the agencies—that decides whether to bring litigation

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132. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 709 (2005) (noting that the U.S. Solicitor General files petitions for certiorari in "less than ten to twenty percent" of cases in which federal agencies and department want Supreme Court review of lower court decisions and "turns down . . . the overwhelming majority of [agency] requests for authorization to seek rehearing en banc" and "two to three times per year" confesses error, "abandoning the government's victory in a lower court . . . [i]f [his] own analysis disagrees with the judgment of the lower court that sustained the government's position"). In some cases where the government has confessed error, the court has appointed amicus curiae to argue in favor of the judgment below. *See id.* at 719 n.130.

133. Nancy V. Baker, *The Attorney General as a Legal Policy-Maker: Conflicting Loyalties*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 44 (Cornell W. Clayton ed., 1995). After a Dallas policeman received a light sentence from a state court jury for killing a 12-year-old Hispanic boy, President Carter wanted his Justice Department to bring a federal civil rights prosecution against the policeman. Attorney General Griffin Bell refused and told the President, "You can't tell me who to prosecute. You delegated the prosecutorial discretion to me. I have to exercise it. But you can get rid of me." *Id.* *See also* Green, *supra* note 67, at 238 ("Unlike most other lawyers, prosecutors cannot look to a client, or the client's representative, to decide how to carry out this objective [to seek justice].").

134. *Cooley v. S.C. Tax Comm'n*, 28 S.E.2d 445, 449–511 (S.C. 1943).

135. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1264, 1266–67 (Mass. 1977).

136. *Id.* at 1266.

137. *Sec'y of Admin. & Finance v. Att'y Gen.*, 326 N.E.2d 334, 336 (Mass. 1975) (rejecting the secretary's argument that he had a traditional attorney-client relationship with the attorney general, which would allow the secretary to decide whether to appeal).

138. 28 U.S.C. § 516 (2000).



and whether to settle it.<sup>139</sup> The Solicitor General “is not bound by the views of his ‘clients.’ He may confess error when he believes they are in error. . . . He may refuse to approve their requests to petition the Court for writs of *certiorari*.”<sup>140</sup>

As part of the Congressional Accountability Act of 1995, Congress made itself subject to employment discrimination laws and set up a mechanism allowing congressional employees to seek redress despite the Constitution’s Speech or Debate Clause immunity.<sup>141</sup> When a Senate employee alleges discrimination, he can file suit against the office where he was employed (rather than against the particular senator or the Senate itself). The Senate Chief Counsel for Employment represents the defendant office, and any monetary judgment is paid out of general Senate coffers rather than a particular senator’s allotment.<sup>142</sup> Under this arrangement, Senate employees can obtain compensation for wrongful discrimination, but individual senators are not subject to liability. The Senate as an institution has determined that it has an interest in assuring that its employees are able to seek compensation for discrimination, while individual Senate offices presumably have an interest in avoiding any finding of wrongful discrimination. The Senate Chief Counsel for Employment apparently takes direction from the particular offices that she represents and has vigorously defended offices accused of discrimination, repeatedly arguing for broad immunity under the Constitution’s Speech or Debate Clause.<sup>143</sup> This situation finally came to a head in a discrimination case when the senator whose office the plaintiff was suing retired before

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139. Harvey, *supra* note 70, at 1573. The division of responsibility between the Justice Department lawyer and the “client” agency deserves a closer empirical look. See Wald, *supra* note 69, at 118 (describing a court-initiated mediation program under which the mediator can “request that agency representatives attend the mediation sessions if it appeared that it was the lawyer—and not the agency—who was resistant to settlement and to communicate offers directly to those representatives (with prior notice to government counsel)”).

140. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 230 (1977). It is significant that this opinion puts “clients” within quotation marks. See *id.* The opinion appears to be referring to individual agencies’ officeholders who have preferences regarding particular legal disputes. It is more accurate to assert that the Solicitor General’s client is the entire executive branch, and that these individual agencies or officeholders may have parochial interests that must be subjugated to the more wide-ranging interests of the executive branch, both laterally across the branch and across time. See Pillard, *supra* note 132, at 729 (noting that “the SG considers the impact of any given litigation position both across the government as a whole and over time”).

141. Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified as amended at 2 U.S.C. § 1301 et. seq. (2000)).

142. 2 U.S.C. § 1415(a) (2000).

143. John Bresnahan, *Supreme Court Case Pits Senate Lawyer Against Senate Lawyer*, POLITICO, Apr. 2, 2007, <http://www.politico.com/news/stories/0407/3392.html>.

the case had been adjudicated.<sup>144</sup> The Senate Chief Counsel for Employment argued for broad speech or debate immunity,<sup>145</sup> while the Senate itself filed an amicus brief disclaiming immunity applied in the case.<sup>146</sup> Perhaps even more remarkable, the Senate Chief Counsel for Employment argued that her client, the Office of Senator Dayton, no longer existed and that the case was moot because the senator's term had expired and he had not sought a new term.<sup>147</sup> But if her client no longer existed, one wonders from whom she was taking direction in the case. Congress needs to clarify whether the Senate itself—rather than a particular senator whose office is being sued—controls the defense of these lawsuits, just as the Senate itself is ultimately responsible for any monetary judgment.<sup>148</sup> Under the current arrangement, the Senate Chief Counsel for Employment appears to be untethered to any client and has made arguments that undermine the institutional interests of the Senate.<sup>149</sup>

At the state level, the situations vary considerably. Many states allocate to a state attorney general decisions on whether to bring and settle lawsuits.<sup>150</sup> The Illinois Attorney General, for example, has the authority to “direct the legal affairs of the State and its agencies.”<sup>151</sup> In such a situation, the relationship between the state attorney general and the agency is not “precisely akin” to that between a private sector lawyer and client.<sup>152</sup> Because the lawyer-client relationship is different, the state

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144. Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007).

145. Brief for Appellant at 23–47, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 621862, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-618\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-618_Petitioner.pdf).

146. Brief for the United States Senate as Amicus Curiae Supporting Appellee at 19–30, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 1022679.

147. Brief for Appellant, *supra* note 145, at 16–22.

148. Brief for the United States Senate as Amicus Curiae Supporting the Appellee, *supra* note 146, at 17 (noting that “[t]he employing office is nothing more than an administrative unit of the Senate; it is the Senate that provides the resources for the vigorous defense of suits and for the payment of judgments” (footnote omitted)).

149. Transcript of Oral Argument at 4, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (No. 06-618), 2007 WL 1198567 (Senate Chief Counsel for Employment arguing that the Supreme Court does not defer to Congress's own interpretation of the speech and debate clause because “Congress of course is a political body . . . that . . . will make decisions that are politically expedient . . . , which means that over time their decisions can change”).

150. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2455–61 (2006); Davids, *supra* note 69, at 371–73, 399–400.

151. EPA v. Pollution Control Bd., 372 N.E.2d 50, 53 (Ill. 1977).

152. *Id.* at 52–53 (“[A]lthough an attorney-client relationship exists between a State agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of private counsel apropos of a client.”); see also Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n, 387 A.2d. 533, 537–38 (Conn. 1978).

attorney general is permitted to do things that conflict-of-interest standards would normally prohibit. Thus, a state attorney general's office has been permitted to represent opposing parties in a lawsuit—two separate state commissions that disagreed about application of state law.<sup>153</sup> State attorneys general routinely file lawsuits *against* state agencies and officials that they normally represent.<sup>154</sup>

In other states, attorneys general have a more traditional lawyer-client relationship with client agencies.<sup>155</sup> The agencies make legal policy

153. *See, e.g., Conn. Comm'n*, 387 A.2d. at 537 (finding that the state attorney general was not “guilty of any professional impropriety” when his office represented both plaintiff and defendant in a lawsuit); *Pollution Control Bd.*, 372 N.E.2d at 53 (“[T]he Attorney General may represent opposing State agencies in a dispute” when the Attorney General is not an actual party to the dispute); *see also* *Scott v. Cadagin*, 358 N.E.2d 1125, 1128–29 (Ill. 1976) (permitting attorney general to withdraw from representation of state commission and represent government department that was intervening and opposing commission); *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 782, 784 (Miss. 1982) (permitting attorney general to intervene in lawsuit and challenge rate increase approved by public service commission, even though a member of his office represented commission and acknowledging that attorney general “will be confronted with many instances where he must, through his office, furnish legal counsel to two or more agencies with conflicting interest or views”).

154. *See, e.g., People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1129–31 (Colo. 2003) (attorney general can sue secretary of state regarding constitutionality of congressional redistricting); *People ex rel. Scott v. Ill. Racing Bd.*, 301 N.E.2d 285, 288–89 (Ill. 1973) (attorney general could sue Racing Board seeking review of its decision to grant licenses); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. Ct. App. 1974) (attorney general's “constitutional, statutory and common law powers include the power to initiate a suit” against a state agency challenging the constitutionality of a statute); *Superintendent Of Ins. v. Att’y Gen.*, 558 A.2d 1197, 1204 (Me. 1989) (“[W]hen the Attorney General disagrees with a state agency, he is not disqualified from participating in a suit affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceedings.”); *State ex rel. Olsen v. Pub. Serv. Comm'n*, 283 P.2d 594, 600 (Mont. 1955) (attorney general can sue public service commission challenging its approval of a telephone rate hike, even though he “is the attorney for the commission”). *But see* *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1207–11 (Cal. 1981) (attorney general cannot sue State Personnel Board where lawyers in his office had previously advised Board on same issue); *Reiter v. Wallgreen*, 184 P.2d 571, 575 (Wash. 1947). The *Reiter* court stated:

[The Attorney General's] paramount duty is . . . the protection of the interest of the people of the state, and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not to assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.

*Id.* (quoting *State ex rel. Dunbar v. State Bd. of Equalization*, 249 P. 996, 999 (Wash. 1926)).

155. *See* *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 862 (W. Va. 1995) (citing *Manchin v. Browning*, 296 S.E.2d 909, 920 (W. Va. 1982)) (“[T]here [is] a traditional attorney-client relationship between the Attorney General and the state officer he represents.”); *State ex rel. Caryl v. MacQueen*, 385 S.E.2d 646, 649 (W. Va. 1989) (“[T]he relationship between the Attorney General and the Tax Commissioner is clearly one of an attorney to his client and shall be treated as such by the Attorney General with regard to the confidentiality of the information.” (footnote call number omitted)); *Manchin v. Browning*, 296 S.E.2d 909, 920 (W. Va. 1982) (“The Legislature has thus created a traditional attorney-client relationship between the Attorney General and the state officers he is required to represent.”); *see also* *Deukmejian*, 624 P.2d at 1207–11.

decisions and the attorney general defends those decisions in court.<sup>156</sup> These government lawyers must defer to their clients' decisions, even when the lawyers believe that the clients are acting against the public interest.<sup>157</sup> For example, in a Texas case, the Attorney General asked a court to overturn a state agency's water regulation because of alleged violations of equal protection.<sup>158</sup> The court ruled that the Attorney General could not sue a state agency.<sup>159</sup>

Occasionally, government lawyers who do not have this trustee-like power will nonetheless make decisions as though they did have the power. The results can be rather strange. For example, in a 1997 case involving a voter initiative, the "Legal Division" of the California Fair Political Practices Commission filed an amicus brief in a case on behalf of the Legal Division itself, even though the Commission had not taken a position on the case.<sup>160</sup> When a lawyer is not tethered to a client, the lawyer may make arguments with which the client would disagree.<sup>161</sup> The West Virginia Attorney General was called upon to defend the Secretary of State in a federal case challenging the state's apportionment plan for

156. See, e.g., *McGraw*, 461 S.E.2d at 862 ("[T]he role of the Attorney General 'is not to make public policy in his own right on behalf of the state[.]' but rather 'to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation' . . . ." (quoting *Manchin*, 296 S.E.2d at 920)); see also *York v. Penn. Pub. Util. Comm'n*, 295 A.2d 825, 832 (Pa. 1972) (prohibiting attorney general from arguing against decision made by state agency and stating that "boards and commissions are given authority to make decisions which involve . . . conclusions of law. . . . The legislature provided for the review of these decisions by courts . . . . Appeals from these decisions are not to the attorney general." (internal quotation marks omitted)).

157. *Deukmejian*, 624 P.2d at 1209 (rejecting the attorney general's contention that he "may determine, contrary to the views of the Governor, wherein lies the public interest"); *Motor Club of Iowa v. Dep't of Transp.*, 251 N.W.2d 510, 514 (Iowa 1977) (attorney general's role is "to defend the department, not to assert his vision of state interest"); see *Solomon*, *supra* note 10, at 323 (extensively discussing *Deukmejian*, 624 P.2d 1206); see also *Miller*, *supra* note 10, at 54 (arguing against consideration of public interest). *But cf.* *Davids*, *supra* note 69, at 373-74 (asserting that some lawyers have as a client the public interest).

158. *Hill v. Tex. Water Quality Bd.*, 568 S.W.2d 738, 739 (Tex. Civ. App. 1978). The court ruled that a state statute required the attorney general to represent the agency and to supervise any lawyer working for the agency. Thus, allowing the attorney general to sue the agency "would put him on both sides of the lawsuit." *Id.* at 741. This and other cases concerning the Texas Attorney General's authority are discussed extensively in Bill Aleshire, Note, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187 (2000).

159. *Tex. Water Quality Bd.*, 568 S.W.2d at 741. *But see Davids*, *supra* note 69, at 401 (criticizing courts that prioritize application of the ethics rules to state attorneys general rather than focusing on the attorney generals' roles within state governments).

160. *Yes on Measure A v. City of Lake Forest*, 70 Cal. Rptr. 2d 517, 518 n.2 (Cal. Ct. App. 1997) (noting that the brief of the Fair Political Practices Commission states that the "position taken in this brief is that of the General Counsel and the Legal Division of the agency" and that the issue "ha[d] not been presented to the Commission for a formal discussion and vote").

161. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (special prosecutor did not have authority to seek certiorari against wishes of Solicitor General).

congressional districts.<sup>162</sup> But rather than pursuing the wishes of the Secretary of State and conceding the unconstitutionality of the plan, the Attorney General sought to defend the apportionment plan. So, the Secretary of State obtained a mandamus from the state's supreme court, directing the Attorney General to pursue the Secretary of State's objectives in the apportionment litigation.<sup>163</sup>

## 2. *Basing Decisions on the Public Interest*

Although one finds some support for consideration of the public interest, most commentators have criticized this approach. Geoffrey Miller, in particular, wrote a convincing critique of government lawyers' considering the public interest, pointing out that this approach would lead to chaos since different lawyers have different conceptions of the public interest.<sup>164</sup> This is a valuable insight, but it is limited in its application. For there is a set of government lawyers who should consider the public interest: those who can make client-like decisions.

Government lawyers who have this client-like decision-making authority essentially serve as trustees for the client.<sup>165</sup> When making those client-like decisions in their role as trustees, it is appropriate for government lawyers to consider the public interest.<sup>166</sup> For example, the California Attorney General has the authority to bring lawsuits on behalf of the State and has a "paramount duty to represent and protect the public interest."<sup>167</sup>

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162. *Manchin v. Browning*, 296 S.E.2d 909, 912–13 (W. Va. 1982). The West Virginia Supreme Court acknowledged that when the attorney general pursues litigation in his own name (rather than on behalf of a particular state official), he is free to pursue the public interest as he sees it. *Id.* at 918.

163. *Id.* at 912–13, 923.

164. Miller, *supra* note 10, at 1294–95. Bruce Green has characterized the "public interest" approach this way: "In this conception, . . . as a practical matter, the lawyer has no client and is not in an attorney-client relationship. . . . [T]he lawyer essentially has a roving commission to do what, in the exercise of professional judgment, seems best to serve the public." Green, *supra* note 67, at 267–68.

165. Former Attorney General Francis Biddle asserted that the Solicitor General "stands in his client's shoes," and that "the client has no say in the matter." FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962), *quoted in* Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 230 (1977).

166. *In re Witness Before Special Grand Jury 2000–2*, 288 F.3d 289, 294 (7th Cir. 2002) ("Public officials . . . exercise the power of the state . . . [and have] the responsibility to act in the public interest."); *Conn. Comm'n on Special Revenue v. Conn. Freedom of Info. Comm'n*, 387 A.2d 533, 538 (Conn. 1978); *EPA v. Pollution Control Bd.*, 372 N.E.2d 50, 53 (Ill. 1977) (noting that the state attorney general represents not only "the particular interests of State agencies," but also "the broader interests of the State"); *Humphrey v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987) ("[A] government litigator must take positions with the common public good in mind, unlike the private practitioner who seeks vindication of a particular result for a particular client.").

167. *D'Amico v. Bd. of Med. Exam'rs*, 11 Cal. 3d 1, 16, (Cal. 1974) (rejecting idea that the public interest is unrepresented when state attorney general makes concession in litigation).

While some have asserted that, for these lawyers, the “public interest” is their client, it makes more sense to conceive of these lawyers as trustees of the client (such as the state government) who can consider the public interest in making their decisions. So, it is not that the public interest is the client, but rather the state is the client, and the state attorney general is entrusted to make decisions about what is in the best interest of the State, and then to implement those decisions through her legal work.<sup>168</sup> The attorney general is both the lawyer and the trustee of the client. The attorney general has the power as trustee to make the determination of what is in the interest of the State.

If a government lawyer has the authority to make client-like decisions (such as whether to bring or settle cases), then she also has the responsibility to act not just like any client, but in a way this particular client—a sovereign—should act. In our legal tradition, the sovereign is not free to act in the same way as any private litigant but is expected to act fairly and impartially.<sup>169</sup> This obligation of fairness is seen most prominently in criminal prosecutions. As the United States Supreme Court declared in *Berger v. United States*,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>170</sup>

This requirement that government lawyers be fair is reflected in prosecutors’ obligations to provide criminal defendants with information that can help the defense, a deviation from the normal adversary process.<sup>171</sup> This obligation to act fairly is so central to the government

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168. For a rather prescient prediction of how the role of a state attorney general would expand to include protection of the public interest, see William J. Baxley, *The State’s Attorney*, 25 ALA. L. REV. 19, 21 (1972) (predicting that the state attorney general “in the year 2000 will find himself more the ‘people’s lawyer’ than the state’s lawyer . . . . He will be somewhat of an ‘ombudsman’—a person who is a buffer between the citizen and his government and whose ultimate allegiance is to the people-at-large.”).

169. Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 311–13 (1989).

170. *Berger v. United States*, 295 U.S. 78, 88 (1935).

171. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963). Model Rule 3.8(d) requires prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

lawyer's mission that the Justice Department building has this quotation inscribed near the entrance to the Attorney General's office: "The United States wins its point whenever justice is done its citizens in the courts."<sup>172</sup>

As the Supreme Court explained in *Berger*, the obligation to do justice is based on the government's obligation as a sovereign "to govern impartially."<sup>173</sup> As such, the obligation to govern impartially and do justice would seem to apply with equal force to the government's civil litigation.<sup>174</sup> One finds strong support for this principle in civil condemnation cases, where courts have found that government lawyers have an obligation to develop a full and fair record to arrive at just compensation, not just to minimize the financial payout by the government.<sup>175</sup> Judge Jack Weinstein has explained that when he was a county attorney handling a condemnation action against an unsophisticated elderly couple, he rejected a proposed settlement because it did not adequately compensate the couple for their valuable land.<sup>176</sup>

MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007). Some scholars have argued that prosecutors can best seek justice by scrupulously following the specific procedures required of them rather than by attempting to implement a more inchoate notion of "justice" in particular cases. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

172. This quotation from former Solicitor General Lehmann is inscribed in the Rotunda of the Justice Department building. See Janet Reno, *Indigent Defense: Legal Service for Poor Needs Vigilance*, CHAMPION, May 1998, at 32, available at <http://www.nacdl.org/CHAMPION/ARTICLES/98may05.htm>; see also Pillard, *supra* note 132, at 723 (identifying the quote's author as former Solicitor General Frederick W. Lehmann).

173. *Berger*, 295 U.S. at 88.

174. See Green, *supra* note 67, at 277 (persuasively arguing that government civil litigators—particularly those who "act as surrogate[s] of the client"—should seek justice); see also *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 350–53 (Cal. 1985) (disqualifying lawyer hired by a city to handle abatement action on contingent fee basis). In *Clancy*, the California Supreme Court declared that a prosecutor

is a representative of the sovereign; he must act with the impartiality required of those who govern. . . . [This duty is] not limited to criminal prosecutors: A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record . . . .

*Id.* at 350 (internal quotation marks omitted).

175. *City of Los Angeles v. Decker*, 558 P.2d 545, 551 (Cal. 1977) (holding that the duty of a government attorney in an eminent domain action includes developing full and fair record to arrive at just compensation and reversing compensation award because city attorney withheld from jury information about land's commercial use and its value); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 7–14 (1980) ("A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record . . .").

176. Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155 (1966) (describing his rejection of a proposed settlement compensating unrepresented elderly couple with consideration worth only a third of assessor's valuation of land and paying couple more than they requested); Weinstein & Crosthwait, *supra* note 69, at 6–7 (same).

Aside from civil condemnation cases, one finds only a few cases supporting the obligation to be fair.<sup>177</sup> One academic commentator, Steven Berenson, has looked at these few civil cases and concluded that government civil litigators “should be much more concerned with pursuit of the public interest than their counterparts who represent private clients.”<sup>178</sup> But in each of the identified cases, the assertion that government civil litigators must do justice was merely dictum and had no impact on the outcome of the case. For example, in *Freeport-McMoRan Oil & Gas Co. v. FERC*, Judge Abner Mikva noted that while “[t]he Supreme Court was speaking of government prosecutors in *Berger*, . . . no one, to our knowledge (at least prior to oral argument), has suggested that the principle does not apply with equal force to the government’s civil lawyers.”<sup>179</sup> But Mikva’s assertion had no impact on the outcome of this case, in which the court dismissed an appeal as moot. Instead, Judge Mikva was simply excoriating the FERC lawyer for pursuing an appeal after the case had clearly become moot and for “so unblushingly deny[ing] [at oral argument] that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.”<sup>180</sup>

Most of the academic commentary on this issue rejects the notion that government lawyers should consider the public interest, concluding that it is too vague a standard for government lawyers to apply in specific situations.<sup>181</sup> While government lawyers who have client-like decision-making authority should consider the public interest, those who are acting

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177. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992); *Douglas v. Donovan*, 704 F.2d 1276, 1279–80 (D.C. Cir. 1983); *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983). Judge Abner Mikva wrote each of these decisions.

178. Berenson, *Public Lawyers*, *supra* note 88, at 794; *see also* Berenson, *supra* note 10.

179. *Freeport-McMoRan Oil*, 962 F.2d at 47.

180. *Id.* at 48. In *Douglas v. Donovan*, while the court wrote that “government attorneys . . . have special responsibilities to both this court and the public at large,” it admonished both the government and the private lawyer for failing to inform the court that the underlying dispute had been settled and therefore the case was moot. 704 F.2d 1276, 1279–80 (D.C. Cir. 1983).

In *Gray Panthers v. Schweiker*, while the court wrote that “[t]here is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large,” it directed the district court to consider a form of written notice for entitlement to a hearing that the government had only recently submitted, even though it had “been circulating within the Department for many years.” 716 F.2d 23, 23 (D.C. Cir. 1983).

181. Miller, *supra* note 10, at 1294 (“[T]he notion that government attorneys represent some transcendental ‘public interest’ is, I believe, incoherent.”); *see also* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 *HOW. L.J.* 539, 564 (1986) (“The government lawyer who uses the public interest approach . . . is not a lawyer representing a client but a lawyer representing herself.”); Lanctot, *supra* note 10, at 975 (criticizing the public interest approach as anti-democratic).



in more traditional lawyer roles vis-à-vis their government clients should defer to their clients' decisions about what is in the public interest.

One can find some support for the position that government lawyers should take into account the public interest when making decisions about whether to disclose information. For example, the Hawaii Rules of Professional Conduct specifically empower government lawyers to assess "the public good" in deciding whether to disclose information about government wrongdoing.<sup>182</sup>

A more modest, alternative formulation of the public interest approach is that the public interest is embodied in a government's duly enacted statutes, regulations, and rules. A government lawyer promotes the public interest by ensuring compliance with the law.<sup>183</sup> This Article argues that those statutes and regulations that constitute the government's information-control regime are the substantive standards that define a government lawyer's confidentiality obligation.<sup>184</sup>

Usually, the government structure makes it clear that there is an elected or appointed government official who has the authority to make decisions on behalf of the public. Unless the government lawyer has been delegated the authority to make such a determination, she should defer to the appropriate government officials and their determination of what is in the public interest and should take direction from them, rather than implement her own concept of what "the people" desire.<sup>185</sup>

Returning to the factual scenario that began this Part, Ossias's client would be the Department of Insurance, which has as its head an elected official, Charles Quackenbush. Even if Ossias believed that Quackenbush was violating the law, she was not permitted to disclose that information to anyone outside the client.<sup>186</sup> Under California law, Ossias had the option

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182. HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(4)-(5) (2007).

183. Miller, *supra* note 10, at 1295. Miller writes:

Although the public interest as a reified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes.

*Id.* Similarly, at least one Justice Department opinion has reduced the "do justice" command to requiring that a government lawyer act in accordance with the law. Role of the Solicitor General, 1 Op. Off. Legal Counsel 228, 232 (1977) (asserting that Solicitor General "must 'do justice'—that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government's case in the Supreme Court").

184. See *infra* Part III.

185. Miller, *supra* note 10, at 1298.

186. California Rule of Professional Conduct 3-600(B) states that if a lawyer

of raising the issue with Qackenbush personally,<sup>187</sup> but there is no indication that she did so. The following Part develops an approach to government-lawyer confidentiality that would have specific application to a situation like the one Ossias faced: where a government lawyer comes across information about government wrongdoing.

### III. A GOVERNMENT LAWYER'S CONFIDENTIALITY OBLIGATION

This Part examines two characteristics of governments that bear on the question of confidentiality. The first characteristic concerns the legitimacy of the government's keeping secret its own wrongdoing. While the private sector may legitimately keep secret past wrongdoing, several sources—including statutes, court decisions, and commentators—suggest that a government has no such right. This Part will explore the support for the proposition that, as a substantive matter, government lawyers may disclose government wrongdoing.

The second characteristic concerns the way that the government controls its information. Private sector clients may make disclosure decisions on an ad hoc basis, but most governments have a complex legal regime for controlling their information.<sup>188</sup> This regime includes statutes and regulations prohibiting the disclosure of certain information (such as

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acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the [lawyer] shall not violate his or her duty of protecting all confidential information . . . .

CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2008). In contrast, Model Rule 1.13(c) permits an entity lawyer to disclose otherwise confidential information if "the highest authority that can act on behalf of the [entity] insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law." MODEL RULES OF PROF'L CONDUCT R. 1.13(C) (2007).

187. California Rule of Professional Conduct 3-600(B) states that the entity lawyer who knows of wrongdoing

may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2007). In contrast, Model Rule 1.13(b) requires an entity lawyer in such circumstances to "refer the matter to higher authority in the organization." MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

188. Cramton, *supra* note 10, at 294 (referring to the "pervasive regulations [that] govern much of the information with which a government lawyer must necessarily deal").

private information about a particular taxpayer);<sup>189</sup> rules requiring disclosure of other types of information (such as an agency's organizational structure and its final decisions);<sup>190</sup> rules requiring disclosure of certain information upon request (such as unclassified, unprivileged information that must be disclosed under the Freedom of Information Act (FOIA));<sup>191</sup> and additional rules allowing the government to withhold some of the requested information (such as documents subject to FOIA exceptions).<sup>192</sup> This Part asserts that, as a substantive matter, government lawyers may disclose information that the government is required to disclose—either in general or in response to a FOIA request.

#### *A. Norm of Openness Regarding Government Wrongdoing*

One state has adopted a specific exception to confidentiality for government wrongdoing. Hawaii's confidentiality rule explicitly permits government lawyers to disclose information about both future and past wrongdoing by government officials. Government lawyers licensed by Hawaii may disclose information in order to prevent a government official or agency "from committing a criminal or illegal act" that the lawyer believes would "result in harm to the public good"<sup>193</sup> or to rectify the consequences of a government official's or agency's "criminal or illegal" act that the lawyer reasonably believes was "harmful to the public good."<sup>194</sup>

But are lawyers licensed outside of Hawaii free to disclose government wrongdoing even though there is no explicit exception?<sup>195</sup> This section argues that many governments have consented to the disclosure of past misconduct by government employees—including lawyers. One finds such consent in laws encouraging all government employees to come forward with information about misconduct and in whistleblower protection statutes. This section discusses whistleblower protection statutes and how they interact with the lawyer's ethical obligation of confidentiality.

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189. 5 U.S.C. § 552a(a)(8)(B)(iv) (2000).

190. *Id.* § 552(a)(1)–(2).

191. *Id.* § 552(a)(3).

192. *Id.* § 552(b).

193. HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(4) (2007).

194. *Id.* R. 1.6(c)(5).

195. One finds in the scholarly literature an undertheorized intuition that government lawyers should be able to disclose government wrongdoing. *See, e.g.*, Comment, *supra* note 121, at 1260–61 (proposing a confidentiality rule for judicial clerks, with an exception for "specific wrongdoing").

*1. Statutes Encouraging Government Employees to Disclose Government Wrongdoing*

*Jesselyn Radack was working at the Justice Department's Professional Responsibility Advisory Office in December 2001 when she received a phone call from an FBI lawyer who wanted to find out whether the FBI could legally interrogate John Walker Lindh, an American in Afghanistan who was being held by American forces. CNN had broadcast an interview with Lindh, and the Attorney General had announced that the government would prosecute Lindh to the full extent of the law. In response, Lindh's father hired a lawyer to represent him. Lindh's lawyer faxed a letter to the Attorney General and the FBI Director informing them that Lindh was represented by counsel. The FBI lawyer wanted to know whether the government could legally interrogate Lindh, since a legal ethics rule prohibits a lawyer from speaking to another lawyer's client without that other lawyer's permission.<sup>196</sup> Radack told the FBI lawyer that the ethics rule prohibited such an interrogation. A couple of days later, the FBI lawyer informed Radack that the interrogation had occurred and together they strategized about how the government should handle the situation. The FBI lawyer and Radack exchanged numerous emails, which Radack printed out and put into the case file.*

*About a month later, Radack was given a poor performance evaluation and told that unless she left the Justice Department, the evaluation would become part of her personnel file. Radack began looking for a different job. A few weeks later, the FBI lawyer contacted Radack again because the district court in the Lindh prosecution had ordered the Justice Department to disclose all documents related to the legality of the Lindh interrogation. Radack looked through the case file for the emails on this issue and could find only two of them. After consulting a more experienced colleague, Radack concluded that someone had cleansed the file. Radack asked the information technology specialists to recover the e-mails electronically, and they were able to recover some of them. When Radack informed her supervisor of the action she had taken in recovering the missing e-mails, the supervisor was not pleased.*

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196. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2007).

*Radack eventually left the Justice Department and started her new job. One morning, Radack heard Newsweek's David Isikoff report that the Attorney General said the Justice Department had never taken the position that its interrogation of Lindh had been illegal. Radack thought that this meant that Justice Department did not disclose her e-mails to the district court judge. She had retained copies of those e-mails and faxed them to Isikoff, who put them on the Newsweek website. After an Inspector General investigation pointed to Radack as the likely source for the leak of these e-mails, the Justice Department opened a criminal investigation of Radack and filed ethics charges against her in the two jurisdictions where she was licensed as a lawyer, Maryland and the District of Columbia. The Maryland bar authorities decided not to pursue a case against Radack. The District of Columbia has not yet made a decision on the Justice Department complaint.*<sup>197</sup>

A variety of statutes indicate that the government does not claim to have a legitimate interest in keeping secret information about government wrongdoing. In 1958, Congress adopted a resolution calling upon all government employees to “[e]xpose corruption wherever discovered.”<sup>198</sup> More concretely, federal, state, and local governments have passed dozens of whistleblower statutes prohibiting retaliation against government employees who disclose government wrongdoing.<sup>199</sup>

At the federal level, federal law prohibits retaliation against certain executive-branch employees who disclose information that they

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197. See generally Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50. For an excellent analysis of Radack's situation using insights from rational-choice theory and psychology, see David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1058–70 (2007) (asserting that a rational actor in Radack's position would not conclude that the Justice Department failed to disclose the emails to the federal district court).

198. H.R. Con. Res. 175, 85th Cong. July 11, 1958, 72 Stat. B12 (1958) (“[I]t is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees . . . . Expose corruption wherever discovered.”). *But cf.* Kenneth W. Dam, *The Special Responsibilities of Lawyers in the Executive Branch*, 55 CHI. BAR REC. 4, 8 (1974) (asserting that this Concurrent Procedure should not “be regarded as having the force of law [because] the legislative history itself states that it ‘creates no new law’”).

199. Robert T. Begg, *Whistleblower Law and Ethics*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 156, 161, 168 (Patricia E. Salkin ed., 1999) [hereinafter ETHICAL STANDARDS] (asserting that forty-six states and “even some local governments” have adopted whistleblower protection statutes); Radack, *supra* note 10, at 136 (asserting that thirty-eight states have adopted whistleblower protection for government employees). See generally DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE (2d ed. 2004).

“reasonably believe[] evidences . . . a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>200</sup> The statute applies to many but not all executive-branch employees. In general, it applies to civil service employees, to career appointees in the Senior Executive Service, and to employees in the “excepted service” unless their positions have been “excepted from the competitive service because of [their] confidential, policy-determining, policy-making, or policy-advocating character.”<sup>201</sup> It does not apply to military service members or to employees of the FBI, CIA, NSA, or any other agency or unit of an agency that the President determines has as its “principal function . . . foreign intelligence or counterintelligence.”<sup>202</sup> Employees of the judicial and legislative branches are also excluded from its coverage.<sup>203</sup>

Employees can blow the whistle internally by disclosing the information to another government official, such as an inspector general, or externally by disclosing it to someone outside government, such as a member of the press.<sup>204</sup> Where disclosure of the information is *not* “specifically prohibited by law,” the employee may choose either internal or external disclosure.<sup>205</sup> But if disclosure of the information is

200. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (2000). The statute provides protection to current employees, former employees, and applicants. 5 U.S.C. § 1221(a) (2000). For an excellent discussion of the federal Whistleblower Protection Act and its history, see Begg, *supra* note 199, in *ETHICAL STANDARDS*, *supra* note 199, at 156.

201. 5 U.S.C. § 2302(a)(2)(B) (2000).

202. 5 U.S.C. § 2302(a)(2)(C)(ii) (2000). Congress has passed legislation providing limited whistleblower protection to intelligence agency employees and military service members who disclose information to members of Congress. Intelligence Community Whistleblower Protection Act of 1998 § 702(b), Pub. L. No. 105-272, 112 Stat. 2413 (codified at Inspector General Act of 1978, 5 U.S.C. app. § 8H); Military Whistleblower Protection Act, 10 U.S.C. § 1034 (2000); *see also* LOUIS FISHER, CONG. RESEARCH SERV., NATIONAL SECURITY WHISTLEBLOWERS (2005). Rep. Waxman has introduced legislation that would provide additional whistleblower protection to employees of these agencies who disclose information to an agency Inspector General or to certain members of Congress. Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. § 10(a) (2007).

203. 5 U.S.C. § 2302(a)(2)(C) (2000) (defining the statute’s coverage as executive-branch agencies and the Government Printing Office). Senator Grassley has introduced legislation that would provide some whistleblower protection to legislative-branch employees. *See* Congressional Whistleblower Protection Act of 2007, S. 508, 110th Cong. (2007).

204. If the employee is disclosing information the disclosure of which is “specifically prohibited by law,” including information that is “specifically required by Executive order to be kept secret,” then the employee will be protected from retaliation only if he discloses the information to an agency Inspector General, to the Special Counsel, or to another official designated by the agency head. Otherwise, the employee is not protected against retaliation. 5 U.S.C. § 2302(b)(8)(A)–(B) (2000); *see* H.R. REP. NO. 103-769, at 18 (1994), *quoted in* L. PAIGE WHITAKER, CONG. RESEARCH SERV., THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW 4 (2007), *available at* <http://www.fas.org/sgp/crs/natsec/RL33918.pdf>.

205. While the Whistleblower Protection Act purports to protect *any* disclosure, the Court of

“specifically prohibited by law,” then in order to be protected from reprisal, the government employee must disclose the information internally to one of several identified government officials.<sup>206</sup>

Many government lawyers are within the class of employees protected by the statute.<sup>207</sup> For these lawyers, what effect does the Federal statute have on their professional obligation of confidentiality under state ethics rules? Several commentators have attempted to answer this question.

The first to examine this question was Roger Cramton, who in 1991 concluded that the whistleblower statute supersedes state ethics rules because of the Constitution’s Supremacy Clause.<sup>208</sup> But Cramton was writing before Congress’s 1998 enactment of the McDade Amendment, which requires that federal government lawyers comply with state legal ethics rules.<sup>209</sup> In the post-McDade Amendment era, one can no longer rely on the Supremacy Clause to privilege federal whistleblower protection over state confidentiality rules.

A second commentator, Jesselyn Radack (who blew the whistle on alleged government misconduct as described at the beginning of this

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Appeals for the Federal Circuit—the only appellate court with jurisdiction over whistleblower lawsuits—has construed the statute narrowly, and has excluded from protection disclosures to supervisors within the chain of command, to co-workers, and to suspected wrongdoers. Radack, *supra* note 10, at 136 n.76 (citing *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1344, 1351 (Fed. Cir. 2001)).

206. 5 U.S.C. § 2302(b)(8)(B) (2000).

207. Government lawyers have filed whistleblower claims, primarily for internal whistleblowing. *See, e.g., Kalil v. Dept. of Agric.*, 479 F.3d 821 (Fed. Cir. 2007) (rejecting whistleblower claim by government employee who was licensed as a lawyer and allegedly disclosed government misconduct to Justice Department officials and federal district court clerk); *Buckley v. Social Sec. Admin.*, 125 Fed. App’x. 988, 989–90 (Fed. Cir. 2005) (rejecting government lawyer’s whistleblower claim after he allegedly made an internal disclosure); *DeLeonardo*, 2006 M.S.P.B. 269 (2006) (remanding for further consideration of government lawyer’s claim that she was retaliated against for internal whistleblowing).

208. Cramton writes:

Although the whistleblower provisions 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. If that were not the case, the federal goal of assuring disclosure of official wrongdoing would be subverted by state law, which expresses a contrary policy of protecting confidences. The supremacy clause assures that the federal policy of disclosure prevails over the inconsistent state policy of confidentiality.

Cramton, *supra* note 10, at 312. Cramton noted that no lawyer had attempted to defend disclosure using the Whistleblower Protection Act and acknowledged that there was uncertainty about the interaction of whistleblower protection with the confidentiality duty. *Id.* at 314–15.

209. 28 U.S.C. § 530B(a) (2000) states that “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” Act of Oct. 21, 1998, Pub. L. No. 105-277, Sec. 101(b), § 801(a), 112 Stat. 2681, 2681–118 (codified at 28 U.S.C. § 530B(a) (2000)).

section), has argued that government lawyers are permitted to make whistleblowing disclosures because the confidentiality rule has an exception permitting disclosure of information in order “to comply with other law.”<sup>210</sup> But Radack’s argument would be persuasive only if the federal whistleblowing law actually required government employees to blow the whistle on government wrongdoing. A third commentator, James Moliterno, recently asserted that the federal whistleblowing statute functions as the government’s consent to lawyers’ disclosure of wrongdoing.<sup>211</sup> But Moliterno never addresses whether the statute’s provision restricting disclosures that are “specifically prohibited by law” prevents government lawyers from blowing the whistle externally.<sup>212</sup>

What is the proper application of the whistleblowing statute to government lawyers? For purposes of blowing the whistle on wrongdoing, are lawyers no different from other government employees? Does their professional duty of confidentiality simply melt away in the face of information evidencing “a violation of any law, rule, or regulation, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety”?<sup>213</sup> Does the restriction on disclosures “specifically prohibited by law” apply to information that is covered by a lawyer’s ethical duty of confidentiality? If so, then a government lawyer may blow the whistle only through internal disclosure to the specified government officials.

The Merit Systems Protection Board, the administrative agency that adjudicates whistleblower claims, has ruled that when the statute specifies

210. Radack, *supra* note 10, at 133–35 (quoting MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(6) (2007)).

211. Moliterno, *supra* note 10, at 644–47.

212. In addition, Moliterno incorrectly asserts that another statute, 28 U.S.C. § 535(b), allows government employees—including lawyers—to disclose criminal misconduct to those outside the government. *Id.* at 644 (“Statutes such as 28 U.S.C. § 535(b) . . . are express waivers of confidentiality . . .”). But § 535(b) requires government employees to make such disclosures to the Attorney General, not outside the government. 28 U.S.C. § 535(b) (2000 & Supp. V 2005) states:

Any 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 shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate . . .

Moliterno is not the only commentator to misconstrue this statute. Steven Berenson also asserts that “to the extent that [28 U.S.C. § 535(b)] trumps the broader duty of confidentiality owed by an attorney to their clients, it . . . represents a narrowing of the scope of confidentiality that government attorneys can offer to their clients.” Berenson, *supra* note 10, at 40 (footnote call number omitted). But this statute does not trump confidentiality at all because it requires reporting of wrongdoing within the client to the Attorney General, not reporting outside of the client.

213. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (2000).



disclosures that are “specifically prohibited by law,” it refers only to disclosures that are prohibited by statute or by executive orders dealing with classified information.<sup>214</sup> Legislative history supports a narrow reading of this provision, as Congress was concerned that agencies would restrict the ability of employees to blow the whistle on wrongdoing by issuing regulations mandating confidentiality.<sup>215</sup>

Congress did not differentiate between government lawyers and other government employees in its whistleblower protection. One may question whether it is appropriate to allow government lawyers to be as free to publicly disclose alleged government misconduct as are other government employees.<sup>216</sup> As Roger Cramton has noted, government lawyers should be able to reveal an alleged “cover-up of corrupt conduct,” but the federal whistleblowing statute may go “too far in eroding the loyalty and confidentiality that government lawyers owe to the governmental client.”<sup>217</sup> In light of a lawyer’s obligation to communicate with her client,<sup>218</sup> should not a lawyer be required to attempt to solve the problem internally, and go outside only if internal measures are ineffective?<sup>219</sup>

As a policy matter, the federal government’s whistleblower protection seems to go too far in allowing government lawyers to blow the whistle externally without first requiring them to try internal whistleblowing. Until Congress does differentiate between government lawyers and other government employees in its whistleblower protection, the federal statute signals the government’s consent to its lawyers’ disclosure of government wrongdoing.

This Part has discussed in detail how the federal government’s Whistleblower Protection Act applies to executive-branch lawyers. State

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214. Kent, 56 M.S.P.R. 536, 542–43 (1993) (disclosure prohibited by Federal Acquisition Regulation was not “specifically prohibited by law” under whistleblower statute).

215. *Id.* (discussing legislative history); Cramton, *supra* note 10, at 311–12 (same).

216. Courts are split on whether corporate in-house counsel should be treated the same as other corporate employees for the purpose of retaliatory discharge claims, which are the common law analog to statutory whistleblowing claims. *Compare* Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 495–96, 504–05 (Cal. 1994) (permitting corporate in-house counsel to pursue retaliatory discharge claim as long as the claim can be established without breaching attorney-client privilege), *with* Balla v. Gambro, Inc., 584 N.E.2d 104, 105–09 (Ill. 1991) (prohibiting corporate in-house counsel from bringing retaliatory discharge claims).

217. Cramton, *supra* note 10, at 309, 213 (“If these are permitted disclosures, the confidentiality duties of lawyers employed by the federal government have been significantly eroded.”).

218. MODEL RULES OF PROF’L CONDUCT R. 1.4 (2007).

219. *See id.* 1.13 (requiring an entity lawyer to disclose wrongdoing up the chain of command within the entity, and permitting the lawyer to make external disclosure if the entity’s leadership fails to adequately address the wrongdoing); *see also* Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, CAL. L. REV. (forthcoming 2008).

and local government lawyers may receive similar protections, depending on the scope of the applicable whistleblower laws and their state ethics rules.<sup>220</sup> A similar analysis of particular state and local whistleblower protection laws would be required to determine whether those laws serve as the government's consent to disclosure by government lawyers.

## 2. *Common-Law Doctrines Regarding the Disclosure of Government Wrongdoing*

The coverage of whistleblower statutes is broad, but not comprehensive. But even government lawyers who fall outside the protection of whistleblower statutes may be able to disclose past government wrongdoing. Two lines of common-law decisions support the government lawyer's ability to disclose past government wrongdoing. First, in construing the government's evidentiary privileges, courts have found exceptions to those privileges for government wrongdoing. Second, courts have permitted lawyers for a fiduciary to disclose the fiduciary's wrongdoing to the beneficiaries. The following section addresses these common-law doctrines.

The norm of exposing government wrongdoing surfaces not just in whistleblower protection statutes, but also in court decisions construing the government's evidentiary privileges to allow the exposure of government wrongdoing. These courts have found that a government's very legitimacy depends on its abiding by its own laws.<sup>221</sup> They have found a "strong public interest in honest government and in exposing wrongdoing by public officials"<sup>222</sup> and have concluded that concealing government wrongdoing "would represent a gross misuse of public assets."<sup>223</sup> One long-time observer put it this way: "[I]f there is wrongdoing in government, it must be exposed. . . . [The government

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220. WESTMAN & MODESITT, *supra* note 199, at 66–76.

221. *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) ("[P]ublic officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority . . .").

222. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997).

223. *Id.* at 915–21 (denying White House claim of attorney client privilege in Independent Counsel's investigation); *see also In re A Witness Before Special Grand Jury 2000–2*, 288 F.3d 289, 293 (7th Cir. 2002) (denying former Illinois Secretary of State George Ryan's assertion of attorney-client privilege in federal criminal investigation ("It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.")).

lawyer's] duty to the people, the law, and his own conscience requires disclosure . . . ."<sup>224</sup>

One finds these statements in cases dealing with the government's evidentiary privileges.<sup>225</sup> Across a range of different evidentiary privileges, courts have limited the government's ability to keep secret information about government officials' wrongdoing. This Part examines governmental attorney-client, deliberative-process, state-secrets, and presidential-communications privileges. In each of these areas, courts have rejected governmental privilege where the privilege would prevent disclosure of government wrongdoing.

In the last decade, four federal appellate courts have examined whether governments can assert attorney-client privilege in the face of federal grand jury investigations of alleged corruption.<sup>226</sup> The first two of these decisions arose out of Independent Counsel Kenneth Starr's investigation of the Clinton White House<sup>227</sup> and involved a federal executive-branch lawyer disclosing information about alleged wrongdoing to another federal executive-branch lawyer, the Independent Counsel, through the mechanism of a grand jury subpoena. Since most executive-branch employees have a statutory obligation to disclose evidence of wrongdoing to the Attorney General,<sup>228</sup> and the Independent Counsel stood in the role of the Attorney General for matters under its jurisdiction,<sup>229</sup> these cases might be seen as simple applications of the mandatory-reporting statute in the Independent Counsel context. Alternatively, one might argue that there was no breach of lawyer confidentiality in these cases at all, as long as one conceives of the lawyer's client as the entire executive branch.<sup>230</sup> But the courts in these cases did not base their decisions on these theories. Instead,

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224. *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (alterations in original) (quoting Weinstein, *supra* note 176, at 160).

225. *See, e.g., In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

226. In addition, the Sixth Circuit ruled that the City of Detroit could assert attorney-client privilege to prevent disclosure in a grand jury investigation, but remanded for further determination of whether the city council's private meeting with its lawyer was legal under state open government laws. *In re Grand Jury Subpoena*, 886 F.2d 135, 138-39 (6th Cir. 1989). Similarly, New Jersey appellate court allowed a locality to assert attorney-client privilege in a state grand jury investigation. *In re Grand Jury Subpoenas Duces Tecum by Sussex County on Farber*, 574 A.2d 449, 454-55 (N.J. Ct. App. Div. 1989) [hereinafter *In re Farber*].

227. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 913-14, 915-21 (rejecting President Clinton's claim of the privilege); *see also In re Lindsey*, 158 F.3d at 1263 (same).

228. 28 U.S.C. § 535(b) (2000 & Supp. V 2005). *But see* Dam, *supra* note 198, at 7 (asserting that although this statute requires agency heads to report criminal violations to the Attorney General, it does not require government employees to report them to the agency head).

229. *See* 28 U.S.C. § 510 (2000).

230. *Cf. Paulsen, supra* note 11, at 487.

the courts seemed to assume that the client was a particular government agency, and that disclosing the information would breach the lawyer's confidentiality obligation to that agency.<sup>231</sup> The courts justified allowing this breach of confidentiality with general statements about the repugnance of keeping government wrongdoing secret.<sup>232</sup>

The remaining two appellate cases involved federal criminal investigations of corrupt state governments. In a case arising out of a federal investigation of former Illinois Secretary of State George Ryan, the Seventh Circuit ruled that the state's interest in lawyer confidentiality must give way to the federal government's interest in rooting out government wrongdoing.<sup>233</sup> In a case involving former Connecticut Governor John Rowland, the Second Circuit ruled that the state's interest in lawyer confidentiality prevailed over the federal government's law enforcement interest, relying in part on a Connecticut statute indicating that the state government can assert attorney-client privilege in any governmental proceeding.<sup>234</sup>

With respect to all three types of executive privilege (presidential communications, deliberative process, and state secrets), courts have rejected government claims of privilege where application of the privilege would conceal government wrongdoing. The Supreme Court ruled in *United States v. Nixon* that President Nixon's claim of the presidential-communications privilege had to give way to the governmental interest in uncovering evidence of wrongdoing.<sup>235</sup> In a case rejecting a claim of the deliberative-process privilege, a federal district court noted that while there is a public interest in the deliberative-process privilege, there is also a competing public interest in ensuring "the basic right of the citizen to petition his government for the redress of grievances."<sup>236</sup> With respect to

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231. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915–21 (referring to "the White House" as the client).

232. *In re Lindsey*, 158 F.3d at 1263 (referring to "the public's interest in uncovering illegality among its elected and appointed officials").

233. *In re Witness Before Special Grand Jury 2000–2*, 288 F.3d 289, 294 (7th Cir. 2002).

234. *In re Grand Jury Investigation*, 399 F.3d 527, 533–36 (2d Cir. 2005). The argument for limiting government attorney-client privilege would seem to apply with equal force in civil litigation where there are allegations of wrongdoing by government officials, but courts have not accepted these arguments. *See, e.g., In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) ("[I]n civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.").

235. *United States v. Nixon*, 418 U.S. 683, 703–16 (1974); *see also In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

236. *Rosee v. Bd. of Trade*, 36 F.R.D. 684, 689, 690 (N.D. Ill. 1965) (permitting disclosure of otherwise privileged government documents because plaintiff alleged official misconduct and "has shown (1) that there is a reasonable basis for his request and (2) that the defendant government agents

both the presidential-communications and deliberative-process privilege, the executive branch itself has publicly disclaimed any desire to withhold information that would disclose government wrongdoing.<sup>237</sup> Similarly, in a case arising out of the government's unlawful, warrantless surveillance of a private citizen in 1963, the government admitted that its conduct had been illegal but nonetheless claimed the state-secrets privilege shielded documents regarding the surveillance.<sup>238</sup> The district court refused to recognize this claim of executive privilege because it would prevent discovery of government conduct that was admittedly illegal.<sup>239</sup>

The cases described above all deal with a government's evidentiary privileges and exceptions to those privileges allowing one arm of the government to compel disclosure of information related to government officials' misconduct. Such exceptions to evidentiary privileges do not necessarily imply an analogous exception to a confidentiality duty.<sup>240</sup> But these exceptions do suggest that the government has a lessened interest in keeping confidential information about its own misconduct.

Additional support for the government lawyer's ability to reveal wrongdoing can be found in cases dealing with the obligations of lawyers who represent fiduciaries. A lawyer who represents a fiduciary may reveal

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played some part in the operative events"); see *In re Sealed Case*, 121 F.3d at 746 (stating that the "[deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred").

237. See, e.g., Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsels 1 (Sept. 28, 1994) ("In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings."); MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 13 (2007), available at <http://www.fas.org/sgp/crs/secretcy/RL30319.pdf>; see also Exec. Order No. 13,292, § 1.7 3 C.F.R. 196, 200 (2003) (prohibiting government officials from using security classification to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency"). Elsewhere in the national security sphere, the executive orders authorizing the classification of national security-related information explicitly forbid government officials from using the classification system for the purpose of keeping secret government wrongdoing or other embarrassing information.

238. *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 101 (D.D.C. 1974) (referring to the government's "admitted misconduct").

239. *Id.* at 101 (rejecting government's claim of state-secrets privilege regarding FBI's warrantless surveillance because government "[sought] to shelter improper, unauthorized acts from disclosure"). On the other hand, the government has often succeeded in asserting the state-secrets privilege as a shield against civil litigation challenging unlawful government conduct. See, e.g., *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007), *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

240. While there is widespread recognition of a crime fraud exception to attorney-client privilege, some states still do not recognize an exception to lawyers' confidentiality obligation for client fraud. See, e.g., MO. RULES OF PROF'L CONDUCT R. 4-1.6(b) (2007).

the fiduciary's wrongdoing to the beneficiary.<sup>241</sup> Since government officials are fiduciaries of the public, these court decisions suggest that government lawyers may disclose government officials' wrongdoing to the public.<sup>242</sup>

This Part has argued that both whistleblowing statutes and common-law doctrines support government lawyers' ability to disclose government wrongdoing. Applying this analysis to Jesselyn Radack's disclosure discussed at the beginning of this Part, she may have believed that the government made an incomplete disclosure to the federal court hearing John Walker Lindh's criminal case. But, as discussed later in this Article, she should have pursued her concerns within the Justice Department prior to breaching confidentiality. The following Part asserts that government lawyers may disclose information that would be subject to mandatory disclosure under freedom of information laws.

*B. Open Government Laws Should Be Construed as Client Consent to Disclosure*

*Jeffrey Toobin, a federal prosecutor, wrote a memoir about his experiences working on the Iran-Contra investigation.<sup>243</sup> While working on that case, Toobin was subject to two separate confidentiality regimes: the legal ethics obligation of confidentiality<sup>244</sup> and the secrecy and prepublication-review requirements for government officials who have access to highly classified national security information.<sup>245</sup> In connection with the latter obligations, Toobin submitted his manuscript to the Central*

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241. Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 949. For a discussion of some parallels between representation of fiduciaries and representation of fiduciary entities, see Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994).

242. See Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 73–77 (government officials owe fiduciary duties); Green, *supra* note 67, at 269 (“Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public. It may then be suggested that the government lawyer owes some derivative duties to the public . . .”).

243. JEFFREY TOOBIN, *OPENING ARGUMENTS—A YOUNG LAWYER'S FIRST CASE: UNITED STATES V. OLIVER NORTH* (1991).

244. Toobin was licensed in New York and thus subject to the N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101 (2007) (requiring lawyers to maintain the confidentiality of client confidences and secrets).

245. See discussion of these obligations in *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983), and *Snepp v. United States*, 444 U.S. 507 (1980).

*Intelligence Agency, which reviewed it to ensure that it did not contain any confidential national security–related information, and it passed that review.<sup>246</sup> His former supervisor, Iran-Contra Independent Counsel Lawrence Walsh, was concerned about the disclosure of information about the Independent Counsel’s office. Walsh threatened to file a bar disciplinary complaint if Toobin went forward with publication. Toobin and his publisher filed suit preemptively, seeking a declaratory judgment that publication would not violate his ethical obligation of confidentiality. Walsh countersued, claiming that publication would breach lawyer confidentiality, grand-jury secrecy, and the federal regulation barring employees from disclosing nonpublic government information. While the district court refused to rule on the legal ethics claim, it rejected Walsh’s argument that grand-jury secrecy was so broad that it prohibited the manuscript’s physical descriptions of the prosecutors and rejected Walsh’s regulatory claim because it found that the only nonpublic government information revealed was trivial.<sup>247</sup> This district court decision has no precedential value, however, because the appellate court eventually vacated it in response to the publisher’s decision to publish the book before the appellate court had an opportunity to hear the oral arguments in the case.<sup>248</sup> Although Walsh sent a draft ethics complaint to Toobin’s then-current employer (the federal prosecutor for the Eastern District of New York), he never did file a complaint with bar authorities.*

One difference between governments and private clients is the way they control their information. This difference is significant because lawyers are permitted to disclose client information if the client consents. Private individual clients generally have an ad hoc approach to controlling their information. A lawyer who represents a private client and wants to disclose particular information can seek that client’s consent. Even in the case of an entity client, the lawyer could go to the appropriate representative of the entity and ask for consent to make the disclosure.<sup>249</sup> That individual can make the decision of whether to grant or withhold the entity’s consent on an ad hoc basis.

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246. *Penguin Books USA, Inc. v. Walsh*, 756 F. Supp. 770 (S.D.N.Y. 1991).

247. *Id.* at 783–84.

248. *Penguin Books USA, Inc. v. Walsh*, 929 F.2d 69, 74 (2d Cir. 1991).

249. MODEL RULES OF PROF’L CONDUCT R. 1.13(a) & cmt. 1, 1.6(a) (2007).

Governments, on the other hand, generally have a complex legal regime for the control and disclosure of their information. A government official cannot consent to a lawyer's disclosure of this information without first considering that complex legal regime. This regime can be divided into four categories: laws that prohibit the government from disclosing information, laws that require the government to disclose information, laws that require the government to disclose certain information upon specific request, and laws that exempt some information from mandatory disclosure upon that request.

Some statutes and regulations prohibit the government from disclosing information.<sup>250</sup> These include laws that protect information about individuals' privacy, such as the Privacy Act,<sup>251</sup> statutes that prevent the government from revealing information from individuals' tax returns,<sup>252</sup> and statutes, executive orders, and regulations that prevent the government from revealing security-related information, such as the requirements that the Director of National Intelligence protect intelligence sources and methods and that atomic and cryptographic information be safeguarded.<sup>253</sup> In addition, executive-branch regulations prohibit employees from disclosing "nonpublic" information for their own or a third party's benefit.<sup>254</sup> The difficulty comes in determining which government information is considered to be "nonpublic."

A second category of information-related laws actually *requires* the government to disclose certain information. For example, at the federal level each executive-branch agency is required to disclose a description of how it is organized, statements of its functions and procedures, descriptions of forms, "statements of general policy or interpretations of general applicability,"<sup>255</sup> statements of policy and interpretations, final opinions and orders made in the adjudication of cases, and manuals and

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250. *See, e.g.*, *Hollywood v. Superior Court*, 49 Cal. Rptr. 3d 598, 607 (Cal. Ct. App. 2006) (disqualifying prosecutor who "virtually gave the entire [prosecution] file, owned by the public, to the filmmakers" who were considering making a film about a case against a capital defendant, perhaps in violation of laws restricting dissemination of documents to third persons), *cert. granted*, 149 P.3d 737 (Cal. 2006).

251. 5 U.S.C. § 552(a) (2000).

252. 26 U.S.C. § 6103 (2000).

253. 50 U.S.C. § 403-1(g)(1)(d) (2000) (intelligence sources and methods); 42 U.S.C. § 2272 (2000) (atomic energy information); 28 U.S.C. § 798(a)(1) (1992) (cryptographic information).

254. 5 C.F.R. § 2635.703 (2007); *see* OFFICE OF INSPECTOR GEN. DEP'T OF INTERIOR REPORT OF INVESTIGATION: JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS, 21-22 (2007) (concluding that government official violated 5 C.F.R. § 2635.703 when she shared with industry lobbyist draft policies that were not subject to disclosure under FOIA).

255. 5 U.S.C. § 552(a)(1) (2000).



instructions that affect members of the public.<sup>256</sup> Similarly, the federal government and the states have myriad open meeting laws requiring much of the government's business to occur in public.<sup>257</sup>

A third category of information-related law requires the government to disclose information upon request. The Federal Freedom of Information Act (FOIA) imposes this obligation on all executive-branch agencies, but exempts the legislative and judicial branches.<sup>258</sup> But some of what the government giveth with one hand, it taketh away with the other. The Federal FOIA has nine exceptions, the most important of which are the following: where a statute prohibits the government from disclosing the information;<sup>259</sup> where an executive order authorizes the government to keep the information secret;<sup>260</sup> where an evidentiary privilege would protect that document from disclosure in litigation;<sup>261</sup> certain law enforcement documents;<sup>262</sup> and personnel or medical files that, if released, would constitute a violation of personal privacy.<sup>263</sup>

It is by no means obvious how open government laws should mesh with the law of attorney-client confidentiality. But courts and commentators have tackled this type of issue scores of times in an attempt to harmonize open meeting laws with the law on attorney-client privilege. Courts generally acknowledge the conflicting principles behind these two areas of law and attempt to find an accommodation between these two principles.<sup>264</sup>

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256. *Id.* § 552(a)(2).

257. *Id.* § 552(b). A list of state open meeting laws can be found at the National Freedom of Information Coalition, <http://www.nfoic.org/foi-center/state-foi-laws.html>.

258. 5 U.S.C. § 552. A list of state freedom of information laws can be found at the National Freedom of Information Coalition, <http://www.nfoic.org/foi-center/state-foi-laws.html>.

259. 5 U.S.C. § 552(b)(3) (2000).

260. 5 U.S.C. § 552(b)(1) (2000).

261. 5 U.S.C. § 552(b)(5) (2000).

262. 5 U.S.C. § 552(b)(7) (2000).

263. 5 U.S.C. § 552(b)(6) (2000).

264. *See, e.g.,* State v. U.S. Dep't of Interior, 298 F.3d 60, 63 (1st Cir. 2002) (discussing "the tension between the substantive provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the application of the attorney-client and work-product privileges"); *Dunn v. Ala. State Univ. Bd. of Trs.*, 628 So. 2d 519, 529–30 (Ala. 1993) (despite state open meeting law, state university board of trustees can meet in secret with its attorney in order to obtain attorney's legal advice on pending litigation), *overruled on other grounds by* Proctor v. Riley, 903 So. 2d 786, 791 (Ala. 2004); *Laman v. McCord*, 432 S.W.2d 753, 756 (Ark. 1968) (attorney-client privilege, which is codified in the state's civil code, did not create an exemption to the state's open meeting law); *Roberts v. City of Palmdale*, 853 P.2d 496 (Cal. 1993) (applying attorney-client privilege exception to California Public Records Act, CAL. GOV'T CODE, § 6250 (West 2007), and the Ralph M. Brown Act, CAL. GOV'T CODE § 54950 (West 2007)); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 492 (Cal. Dist. Ct. App. 1968) (open meeting law "did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly

Government employees who make unauthorized disclosures of government information can be disciplined administratively or by bar authorities if they are lawyers, and they can even be subjected to criminal prosecution under limited circumstances. The government has criminally prosecuted leaks of national security and other information as thefts of government property.<sup>265</sup>

This Article argues that to determine the scope of a government lawyer's confidentiality duty, one must look not just at legal ethics doctrine but also at the government's information-control regime. Dozens of courts have taken a similar approach in a related legal context: determining the scope of the government attorney-client privilege. State courts across the country have determined what information state and local governments can claim to be privileged by looking closely at state open meeting laws and coming to an accommodation between these open government laws and the traditions of confidential lawyer-client relations.<sup>266</sup>

As discussed above, the government, like any client, can consent to disclosure of information that would otherwise be protected by lawyer confidentiality. But, unlike other clients, the government's decision about consent is constrained by its legal regime for the control of its information. To determine the scope of the government's consent to lawyer disclosure,

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requiring confidentiality"); *Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824–26 (Fla. 1985) (state sunshine law applied even to city council meetings with city attorney, preventing application of attorney-client privilege to those meetings); *Harris v. Balt. Sun Co.*, 625 A.2d 941, 947 (Md. 1993) (construing lawyer confidentiality obligation to prohibit only disclosures that could harm client in case involving FOIA request to state public defender's office); *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737 (Minn. 2002) (open meetings law has exception for meetings with attorney, but "only when there is a need for absolute confidentiality"); *McKay v. Bd. of County Comm'rs*, 746 P.2d 124, 128 (Nev. 1987) (state open meeting law prohibits county board from meeting with its attorney in private); *Okla. Ass'n of Mun. Att'ys v. State*, 577 P.2d 1310, 1314–15 (Okla. 1978) (local government could meet in secret with attorney despite state sunshine law); *see also* *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 861, 863–64 (W. Va. 1995) (reprimanding state attorney general for revealing information in violation of lawyer confidentiality even though the information would be subject to mandatory disclosure under state freedom of information law).

265. *United States v. Morison*, 844 F.2d 1057, 1060–63, 1076–80 (4th Cir. 1988) (Defense Department employee leaked satellite photos to newspaper convicted of theft of government property and espionage); *Ashcroft v. Randel*, 391 F. Supp. 2d 1214, 1217–18 (N.D. Ga. 2005) (Drug Enforcement Agency employee leaked government documents to press pleaded guilty to theft of government property).

266. *Roberts*, 853 P.2d 496; *Sacramento Newspaper*, 69 Cal. Rptr. at 492; *Maxwell v. Freedom of Info. Comm'n*, 794 A.2d 535, 538 (Conn. 2002); *Neu*, 462 So. 2d 821 at 824–25; *Prior Lake Am.*, 642 N.W.2d at 731; *In re Farber*, 574 A.2d 449, 455 (N.J. Ct. App. Div. 1989) (harmonizing open meeting law with attorney-client privilege); *McKay*, 746 P.2d 124; *Okla. Ass'n*, 577 P.2d at 1314–15; *Markowski v. City of Marlin*, 940 S.W.2d 720, 725–27 (Tex. App. 1997); *see also Harris*, 625 A.2d at 947–48 (harmonizing state public defender's confidentiality duty and his disclosure obligation under state FOIA).

one must examine the government's information-control regime. Government consent occurs as follows: If the information-control regime requires the government to disclose particular information (such as an agency's final decision in an adjudication<sup>267</sup>), then the government has consented to disclosure of that information.<sup>268</sup> If the government is prohibited from disclosing particular information, then the government has withheld its consent. But a great deal of government information will fall between these two extremes and the government will have the discretion to disclose or withhold the information. If the information is subject to mandatory disclosure upon request, then, as a substantive matter, the government has consented to disclosure. But as a procedural matter, the government lawyer should seek the assent of a disinterested government official.<sup>269</sup>

In addition, unlike private sector clients, governments generally have policies favoring disclosure of information unless there is a specific reason not to disclose. Demonstrative of this policy are freedom of information laws, which set out a general right of access to government records and then specify exceptions to that right of access. In other words, when someone seeks disclosure of government information, there is a presumption that the government will make the information available. Where the government refuses to disclose it, the burden is on the government to justify the refusal.<sup>270</sup> This presumption in favor of disclosure is consistent with principles of robust democratic government. It also has a constitutional basis, in that the First Amendment requires that government employees be permitted to discuss their work unless there is a good reason that such disclosures cannot be allowed.<sup>271</sup>

One jurisdiction has already made explicit this type of exception to confidentiality in the government context. Lawyers licensed by the District of Columbia are permitted to disclose "when . . . *required* by law or court

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267. 5 U.S.C. § 552(a)(2) (2000).

268. Cramton, *supra* note 10, at 294 ("[A] government lawyer's duty of confidentiality does not extend to information that the government has made available upon request to the public. In terms of the professional ethics rules, the government in effect has consented to disclosure.").

269. Glavin, *supra* note 10; *see* *Snepp v. United States*, 444 U.S. 507, 510–13 (1980) (former CIA employee breached his fiduciary obligation by failing to comply with agency's prepublication review procedure even though his disclosure contained only information that would be subject to mandatory disclosure under FOIA).

270. 5 U.S.C. § 552(a)(4)(B) (2000) (where a requester appeals an agency's denial of information, "the burden is on the agency to sustain its action").

271. *McGehee v. Casey*, 718 F.2d 1137, 1143–47 (D.C. Cir. 1983) (rejecting former CIA employee's challenge to CIA's decision preventing him from disclosing confidential national-security information).

order,”<sup>272</sup> but a government lawyer may also disclose when “*permitted or authorized by law.*”<sup>273</sup> This language seems to suggest that a government lawyer may disclose information whenever disclosure would be permitted under open government laws, such as the FOIA.<sup>274</sup>

Applying this analysis to Jeff Toobin’s memoir (discussed at the beginning of this Part), Toobin’s disclosure appears to be consistent with the types of information that are subject to disclosure under the FOIA. Also, Toobin followed a disclosure-approval procedure similar to the procedure that the next Part recommends be adopted for all government lawyers.

#### IV. THE NEED FOR AN ORDERLY PROCEDURE FOR DISCLOSURES

The previous Part identified two ways in which a government lawyer’s duty of confidentiality is different from that of a private sector lawyer: government lawyers may reveal information about past government wrongdoing and may reveal information that the government client must reveal under freedom of information (FOI) laws. But the substantive standard is only part of the story. There also needs to be a procedure for making such disclosures. With regard to misconduct, state supreme courts need to set up a procedure requiring the lawyer to give the government advance notice of her plan to disclose, similar to the current procedure for entity lawyers disclosing misconduct.<sup>275</sup> With regard to information

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272. D.C. RULES OF PROF’L CONDUCT R. 1.6(e)(2)(A) (2006) (emphasis added). The D.C. Court of Appeals adopted a revised set of professional rules effective Feb. 1, 2007. Alberto Mora’s disclosure of information occurred prior to the effective date of the new rules, and so this Article analyzes his conduct using the version of the D.C. Rules that were effective in 2006. All other discussion of the D.C. Rules in this article will refer to the 2007 version.

273. *Id.* R. 1.6(e)(2)(B) (emphasis added).

274. A comment accompanying the rule suggests a narrower interpretation. The comment states that this provision “is designed to permit disclosures . . . which the government authorizes its attorneys to make in connection with their professional services to the government,” *id.* R. 1.6 cmt. 37, suggesting that this provision is aimed only at disclosures that are necessary for the government lawyer to carry out her responsibilities. On the other hand, the D.C. confidentiality rule already has another exception for disclosures that are “impliedly authorized . . . in order to carry out the representation.” *Id.* R. 1.6(e)(4). In light of the existence of this “impliedly authorized” exception, the government-lawyer exception should be read as permitting government lawyers to disclose information that may be disclosed under the open government laws.

275. Model Rule 1.13(b) states:

If 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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not

covered by FOI laws, governments need to set up a procedure so that someone other than the lawyer wishing to disclose makes the determination whether this information must be disclosed under the law. Otherwise, lawyers attempting to apply the FOI laws themselves are likely to have a bias favoring disclosure.<sup>276</sup> This Part sketches out a few ideas about the appropriate procedures for government lawyers' disclosing government wrongdoing and other government information.

*A. Procedures for Disclosing Government Wrongdoing*

*Lieutenant Commander Matt Diaz had spent eighteen years in the Navy when he was assigned to be a legal advisor at Guantanamo in 2004. While there, he became concerned that the U.S. government was treating prisoners inhumanely and violating their rights under the Geneva Conventions and the U.S. Constitution. Earlier, a human rights organization had filed a lawsuit on behalf of the prisoners, requesting a list of all those being held at Guantanamo. The government had resisted that demand. Just before his Guantanamo assignment was to end, Diaz anonymously sent a list of the Guantanamo prisoners to a lawyer at the human rights organization. The lawyer turned the list over to the judge in the case, who gave it to court security personnel. Fingerprint analysis pointed to Diaz, who was eventually convicted after a court martial. Diaz said, "Obviously I chose the wrong path . . . [M]y career is in . . . much more serious jeopardy than it would have been if I had raised the issue to my chain of command."<sup>277</sup>*

There are better and worse ways for government lawyers to blow the whistle on misconduct. Contrast the approach of Navy JAG Matt Diaz, who, without consulting other government officials, secretly and anonymously sent a list of Guantanamo detainees to a human rights organization, with that of Navy General Counsel Alberto Mora, who joined with other government employees who also opposed mistreatment

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necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

276. See Glavin, *supra* note 10, at 1836–43.

277. Brooks Egerton, *Losing a Fight for Detainees*, DALLAS MORNING NEWS, May 18, 2007, at 1A; see also Ari Shapiro, *Navy Lawyer's Guantanamo Leak Trial Begins* (Nat'l Pub. Radio broadcast May 14, 2007) (audio available at <http://www.npr.org/templates/story/story.php?storyId=10173248>).

of prisoners and argued internally for a change in policy.<sup>278</sup> Diaz was prosecuted and sentenced to six months in prison for the unauthorized release of defense information.<sup>279</sup> Mora received a “Profile in Courage” award from the JFK Library.<sup>280</sup> Diaz’s situation points out the need for an orderly procedure for disclosures.

This Article has argued that, as a substantive matter, government lawyers are permitted to disclose government wrongdoing. But even if a government lawyer’s confidentiality duty has an exception for wrongdoing, the lawyer still must communicate adequately with and be loyal to her client.<sup>281</sup> Because of these other duties, the lawyer needs to take certain steps prior to disclosing government wrongdoing. Responsible officials may not even be aware of the wrongdoing, and the lawyer should alert such officials to the problem prior to disclosing the wrongdoing to the public.<sup>282</sup> If the wrongdoing is ongoing, the government needs to make changes so that it does not continue the misconduct. If the wrongdoing has already occurred, the government may need to rectify the harm that the past wrongdoing has caused. In either case, the client deserves the opportunity to plan for the forthcoming disclosure of the wrongdoing.

In light of these considerations, the lawyer needs to bring the wrongdoing to the attention of a responsible party within the government client prior to disclosing the wrongdoing outside the client. The responsible party should be given the opportunity to make the appropriate changes to prevent future wrongdoing or remedy the harm caused by the past wrongdoing. Only after ensuring that a responsible party has received notice would it be appropriate for the government lawyer to disclose the wrongdoing outside the client.

Outside disclosure should proceed first to another government official or entity that properly has the authority to respond to the specific allegations of wrongdoing. For example, if Cindy Ossias had attempted to convince the California Insurance Commissioner of the need to change his

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278. Egerton, *supra* note 277.

279. Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAGAZINE, Oct. 21, 2007, at 78. For an interesting analysis of the Diaz case, see Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, HOFSTRA L. REV. (forthcoming 2008).

280. John Shattuck, *In Search of Political Courage*, BOSTON GLOBE, May 22, 2006, at A11.

281. MODEL RULES OF PROF’L CONDUCT R. 1.4 (b) (2007) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); *Id.* R. 1.7 cmt. 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

282. *Id.* R. 1.4 cmt. 6 (“When the client is an organization or group, . . . the lawyer should address communications to the appropriate officials of the organization.”).

policies and had been unsuccessful, then she could have appropriately approached either the state attorney general, state auditor, or state legislature, all of which would have had authority to investigate the alleged misconduct. Only if other government agencies are unwilling or unable to take action may the lawyer then disclose the misconduct to the public or the press.<sup>283</sup> This step-wise disclosure approach is more moderate and nuanced than that present in most state and federal whistleblower protection statutes, which permit disclosure to anyone.

This proposed procedure is similar to—but not exactly the same as—the procedure prescribed for entity lawyers in the new legal ethics rule for entities that the American Bar Association adopted after Sarbanes-Oxley.<sup>284</sup> Under the rule, an entity lawyer must attempt to remedy the illegal conduct within the entity client. Only if the entity client fails to take appropriate action may the lawyer disclose information outside the client.<sup>285</sup> Under this proposed procedure for government lawyers, the lawyer must first bring the information to the attention of an appropriate actor within the government client. That official may happen to agree with the lawyer's legal assessment and therefore begin taking corrective action.<sup>286</sup> On the other hand, the official may convince the lawyer that the alleged wrongdoing was not actually illegal.<sup>287</sup> One lawyer who could have benefited from this approach was Joyce Crandon, who was general counsel of the Kansas Office of the State Banking Commissioner, a bank regulatory agency. Another agency employee told Crandon that a deputy commissioner had obtained loans from two of the regulated banks and Crandon believed that the loans were illegal under federal and state banking laws. But she did not raise this concern with the deputy commissioner or the commissioner. Instead, she reported it to the Federal Deposit Insurance Corporation (FDIC). The Commissioner learned that Crandon reported this situation to the FDIC while he was meeting with the

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283. For an example of partial step-wise disclosure, see Carol D. Leonnig & Josh White, *An Ex-Member Calls Detainee Panels Unfair Lawyer Tells of Flawed 'Combatant' Rulings*, WASH. POST, June 23, 2007, at A3 (describing how naval reserve lawyer Stephen E. Abraham repeatedly complained to his commander about problems with the Combatant Status Review Commissions at Guantanamo before providing an affidavit about those problems for a habeas proceeding on behalf of one of the Guantanamo prisoners). Abraham's approach was not completely step-wise; he could have gone outside the client to Congress before going to court.

284. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2007).

285. *Id.* R. 1.13(c).

286. Compare discussion of the State Department's "Dissent Channel" in Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–30 (2006).

287. *Cf.* Crandon v. State., 897 P.2d 92, 103–04 (Kan. 1995).

FDIC, and he proceeded to fire Crandon. A state court rejected her wrongful discharge claim, finding that she had improperly disclosed confidential information.<sup>288</sup>

Under this proposed procedure, if the lawyer has given internal notice, then, after a reasonable time has passed, the lawyer may publicly disclose the wrongdoing even if the government has taken remedial action. This different result reflects the different values at stake in entity and government representation. The entity procedure is aimed at having the lawyer take action to ensure that the entity protects itself from disloyal servants.<sup>289</sup> If the entity succeeds in remedying the situation, there is no need for the lawyer to make a public disclosure. This proposed government procedure is simply aimed at giving the government a heads-up prior to the disclosure of wrongdoing.

The substantive standard—permitting lawyers to disclose government wrongdoing—reflects the fact that governments do not have a legitimate interest in keeping wrongdoing secret. This procedural requirement—requiring lawyers to notify responsible government officials prior to public disclosure—will both help the government plan for disclosure and help prevent the government lawyer from making the kind of mistake that Joyce Crandon and Matt Diaz made. The substantive standard serves to protect the public from government wrongdoing. The procedure serves to protect governments from overzealous government lawyers.

In light of the statutory and common-law support for the government lawyer's ability to disclose government wrongdoing, state supreme courts should amend their professional rules to clarify that government lawyers may disclose past government wrongdoing and to create an appropriate procedure for such disclosure. The rule should clarify that a government lawyer must first exhaust the internal process before disclosing the wrongdoing outside the government.

An explicit exception would assist lawyers in clarifying their legal obligations. Setting out a specific and orderly procedure for these lawyers to follow is necessary because the government ought to be given the benefit of notice of forthcoming disclosure.

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288. *Id.* at 94–100. The Kansas Supreme Court affirmed the trial court's rejection of Crandon's wrongful discharge claim, but did not find that Crandon had violated the professional ethics rules. It found that Crandon acted with "reckless disregard for the truth or falsity of the disclosure" when she reported the allegations to the FDIC before investigating the truth of her suspicions. *Id.* at 102–04.

289. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 3 (2007).



*B. Procedures for Disclosing Information that Must Be Released Under Freedom of Information Laws*

*Darrell McGraw was the elected Attorney General of West Virginia and representing the Division of Environmental Protection (DEP) in litigation to enforce state landfill laws. During a meeting with the landfill owner, a representative of the DEP indicated that its position on landfill requirements might change. Attorney General McGraw later revealed this possible DEP change in position to a member of the public who was part of an environmental group. That revelation could have undermined the political ability of DEP to make the change, so DEP filed ethics charges against McGraw based on this unauthorized disclosure.<sup>290</sup> McGraw argued that DEP had already revealed this information to the opposing party in a case and that this information would have had to be disclosed under the state FOIA. But the West Virginia Supreme Court ruled that the information was still subject to confidentiality under Rule 1.6 of West Virginia's Rules of Professional Conduct and that the duty of confidentiality under that rule was not subject to waiver through disclosure to third parties as was the attorney-client privilege.<sup>291</sup> The court publicly reprimanded Attorney General McGraw for the unauthorized disclosure.<sup>292</sup>*

If one accepts the assertion that the government lawyer's confidentiality obligation does not, as a substantive matter, cover information that must be disclosed under FOI laws, then it would seem that Darrell McGraw did not violate his duty of confidentiality. But this

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290. Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 852–58 (W. Va. 1995).

291. See W.VA. RULES OF PROF'L CONDUCT R. 1.6.

292. *McGraw*, 461 S.E.2d at 860–61, 862 n.25, 864 (noting that “FOIA sets forth specific procedures for requesting and obtaining public records”). See discussion of this case in Foster Cobbs Arnold, *The “Public Record/Third Party Rule” of the Duty of Confidentiality: Situations in Which the Rule Arises and Attitudes Toward Its Application*, 23 J. LEGAL PROF. 399, 405–06 (1999).

The inability of the West Virginia Attorney General to authorize his own disclosures may reflect the fact that the West Virginia Attorney General does not have the same kind of decision-making authority that the U.S. Justice Department has. The *McGraw* court explained that in West Virginia, there is “a traditional attorney-client relationship between the Attorney General and the state officer he represents.” *McGraw*, 461 S.E.2d at 862. The court also noted that “the role of the Attorney General is not to make public policy in his own right on behalf of the state[,] but rather to exercise his skill as the state's chief lawyer to zealously advocate and defend the policy position of the officer or agency in the litigation . . . .” *Id.* (internal quotations omitted) (quoting *Manchin v. Browning*, 296 S.E.2d 909, 920 (W. Va. 1982)). Lawyers who by statute are given more decision-making authority may also have the ability to consent to disclosures on behalf of their clients.

Article asserts that there is also a procedural component to the duty of confidentiality in order to ensure that the lawyer is not making a biased judgment about application of the FOI laws. The Supreme Court has recognized a similar procedural component to a confidentiality duty imposed on government employees who have had access to classified information. In *Snepp v. United States*, the Court imposed a constructive trust on book royalties earned by a former CIA employee who published his book without first submitting it to the agency for prepublication review.<sup>293</sup> Even though the book did not contain any confidential information,<sup>294</sup> the Court nonetheless found that Snepp violated his fiduciary duty to safeguard confidential information by refusing to submit to the designated prepublication-review procedure.<sup>295</sup> Similarly, government lawyers need to deal with both a substantive confidentiality standard as well as procedures for protecting confidential information.

In order to implement this FOI exception in an orderly fashion, governments need to adopt a procedure for reviewing requests for disclosure. The federal government does not have such a procedure in place for government lawyers.<sup>296</sup> But two federal agencies do have similar procedures in place: the Securities and Exchange Commission (SEC) has a screening procedure for its employees who have had access to confidential investigations and the CIA has a prepublication-review procedure for employees with security clearances. The SEC regulation prohibits its employees from using “confidential or nonpublic information” when writing, lecturing, or teaching, and implements that prohibition by requiring employees to submit all publications and prepared speeches to the SEC General Counsel’s office for review.<sup>297</sup> Similarly, the CIA

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293. 444 U.S. 507, 510 (1980).

294. *Id.* at 509–10 (government stipulated that Snepp’s book did not reveal any classified information).

295. *Id.* at 508 (finding that his “promise [to submit the manuscript for prepublication review] was an integral part of Snepp’s concurrent undertaking ‘not to disclose any classified information’”).

296. *But cf.* Pillard, *supra* note 132, at 712 (noting that the Justice Department’s Office of Legal Counsel publishes the opinions it issues only after “seek[ing] permission from the requestors”).

297. 17 C.F.R. § 200.735-4(e)(1)–(2) (2007). *See also* 5 C.F.R. § 2635.703(a) (2007), which prohibits all executive branch employees from “the improper use [by any executive-branch employee] of nonpublic information to further his own private interest or that of another.” The regulation further states that nonpublic information includes information that is

- routinely exempt from disclosure under the FOIA,
- otherwise protected from disclosure by statute, Executive order or regulation,
- is designated as confidential by an agency, or
- has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

5 C.F.R. § 2635.703(b).

requires its employees to submit all writings related to the CIA to its Publications Review Board, which vets the documents to ensure that they do not contain any confidential national security information.<sup>298</sup> While these review procedures are not without problems,<sup>299</sup> they do provide an authoritative answer to the question of whether the government employee can disclose particular information.

### CONCLUSION

It is not uncommon for current and former government lawyers to disclose information that appears to be covered by their professional obligation of confidentiality. In their memoirs, these lawyers generally do not acknowledge their professional confidentiality obligation.<sup>300</sup> The actual practice of current and former government lawyers and the degree to which they acknowledge and comply with their professional duty of confidentiality are issues that deserve further attention.

This Article has examined the content of the government lawyer's professional duty of confidentiality, and in particular how that duty interacts with whistleblower protection and open government laws. It examined the complex question of the identity of a government lawyer's client, noted that many government lawyers make decisions that are normally reserved for clients, and found that those lawyers can appropriately consider the public interest in making those decisions.

The Article began with the story of Alberto Mora, who told a reporter about the internal Defense Department legal debates over the treatment of prisoners at Guantanamo. This information about the content of a lawyer's advice to his client would be subject to the attorney-client privilege, and thus is not subject to mandatory disclosure under the Freedom of Information Act.<sup>301</sup> But Mora was describing what he saw as misconduct on the part of other government officials. Under the analysis in this

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298. See *McGehee v. Casey*, 718 F.2d 1137, 1139 (D.C. Cir. 1983); *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) (upholding requirement that former CIA employees submit manuscripts for prepublication review for classified information).

299. See Adam Liptak, *Agent in Leak Case Sues C.I.A. for Blocking the Release of Her Memoir*, N.Y. TIMES, June 1, 2007, at A18; Dana Priest, *Suing Over the CIA's Red Pen: Retired Operative Says Agency Unfairly Edited His Book*, WASH. POST, Oct. 9, 2006, at A15.

300. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW & JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007). Goldsmith acknowledges his confidentiality duty based on national security classification, *id.* at 12, 219, but not his duty of confidentiality as a lawyer. While Goldsmith does not analyze his professional duty of confidentiality, he does point out that his memoir continues a long tradition of memoirs by former government lawyers. *Id.* at 221–23 (citing twenty-nine memoirs as well as law review articles, interviews, and testimony).

301. 5 U.S.C. § 552(b)(5) (2000).

Article, as a substantive matter, Mora would be able to disclose government misconduct. As a procedural matter, Mora attempted to address the problem within the government, going all the way up to the Defense Department's General Counsel.<sup>302</sup>

As a substantive matter, government lawyers may disclose government wrongdoing and may reveal information that is subject to disclosure under freedom of information laws. But as a procedural matter, state supreme courts and governments need to establish procedures for government lawyers to follow when disclosing wrongdoing or other information that would be subject to disclosure under freedom of information laws.

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302. Mayer, *supra* note 1, at 35.