Government Lawyers and Confidentiality Norms

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Introduction

Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2005. A political appointee, Mora believed it was an honor to serve in this position, and found great satisfaction in his job. But there had also been some frustrations. In particular, he had been concerned about the government’s treatment of prisoners at Guantanamo Bay. Mora had led an internal Defense

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I want to thank the law faculties at Rutgers, Temple and Washington universities and the participants in the Government Secrecy panel at the Law & Society Conference in Berlin, where I presented earlier versions of this Article, as well as Steven Berenson, James Cooper, Howard Erichson, Mark Fenster, Morgan Frankel, Bruce Green, Leslie Griffin, Peter Joy, Dan Keating, Robert Lawry, Leslie Levin, Ron Levin, Ronald Mann, Peter Margulies, Susan Martyn, David McGowan, Laura Rosenbury, Margo Schlanger, Kent Syverud, and Robert Vaughn, who commented on earlier drafts.
Department effort to ensure that the government treated those prisoners humanely. But he had met up with 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 those 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 Graib 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.2

Mora left the Defense Department in the winter 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 Feb. 28, 2006 issue of the New Yorker.

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 that information could not cause damage to the national security. Someone in the government had provided this journalist with a copy of the memorandum, and so he thought he could legitimately amplify on 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 since she already had some information, it seemed that the duty of confidentiality had been waived.

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.3 In most states, the lawyer’s duty of confidentiality is defined very broadly, and applies to all information relating to representation. 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

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2 Mora’s memo can be found at http://www.newyorker.com/images/pdfs/moramemo.pdf (last visited Oct. 9, 2006). See Jane Mayer, The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted, NEW YORKER (Feb. 27, 2006).

3 See discussion of confidentiality exceptions in § I,infra. 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 OF THE LAW GOVERNING LAWYERS § 79 (“The attorney-client privilege is waived if the client . . . voluntarily discloses the communication in a non-privileged communication.”).
government and private sector lawyers. Thus, government lawyers appear to be bound by the same broad confidentiality obligation as lawyers for private sector clients.

This broad confidentiality obligation would seem to prohibit a former government lawyer like Mora from giving any information about his work. There are exceptions to this duty of confidentiality. The professional rule identifies eight exceptions, but it is not clear that any of these exceptions would permit Mora’s disclosure.

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.

Surprisingly little has been written on this question of government lawyer confidentiality. A spate of law review articles and student notes about the government’s

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4 The exception is Hawaii, which had adopted different confidentiality standards for government lawyers. See Hawaii Rules 1.6(c)(4) and (c)(5), discussed in § III.A infra.

5 This article uses the term “government lawyers” to refer to lawyers who are either employed or retained by the government. Most lawyers retained by governments 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 § II.C infra. For a discussion of how several legal ethics rules (but not the duty of confidentiality) apply to lawyers retained by governments, see Ronald Rotunda, Ethical Problems in Federal Agency Hiring of Private Attorneys, 1 GEO. J. LEGAL ETHICS 85 (1987).

6 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.”

The remaining exceptions are found in Model Rule 1.6(b)(1)-(6). See § I infra.

7 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. http://www.dcbar.org/find_a_member/searchAction02.cfm (last checked Oct. 5, 2006) (indicating that Alberto Mora was admitted to practice in D.C. in 1994).

The information that Mora disclosed would constitute a “secret,” information “the disclosure of which would be embarrassing . . . to the client.” D.C. Rule of Professional Conduct 1.6(b) (2006) (hereinafter 2006 D.C. Rule). Mora might be able to justify his disclosure by arguing that his client has consented to disclosures related to government wrongdoing. See 2006 D.C. Rule 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.”) and § III.A infra arguing that the whistleblower protection laws constitute government consent to lawyer disclosure of wrongdoing).

8 Occupational Employment and Wages, May 2006, Bureau of Labor Statistics, indicating 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.

The attorney client privilege was published after the high profile legal battle on this issue between Independent Counsel Kenneth Starr and President Bill Clinton.\textsuperscript{10} But outside the context of Freedom of Information requests, the attorney client privilege issue arises relatively rarely for government lawyers. On the other hand, they 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 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 differ even though the ethics rules do not differentiate between them. Government lawyers’ confidentiality duty is 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 the legal ethics rules indicate that while lawyers are normally bound by a broad duty of confidentiality (applying to all “information relating to representation”), a client can consent to


disclosure of otherwise confidential information. One of the insights of this article is that governments 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 reveals a norm that governments – unlike private sector clients – do not have a legitimate interest in keeping secret information about their own wrongdoing. Others have not previously recognized that the implication of this norm is that government lawyers are permitted to disclose government wrongdoing.

Section I of this article outlines lawyers’ confidentiality obligation, which is both strict and broad. One of the exceptions to that obligation, however, is that clients can consent to disclosure. So Section 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 government client and the extent of the lawyer’s authority to make decisions on behalf of that client. In addition, the section notes that certain government lawyers are authorized to make decisions that are normally in the hands of clients. Section 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 indicate 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. So while Section III sets out the substantive standard for government lawyers’ confidentiality obligation, Section 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 & Transparency in Lawyer-Client Relations and in Government

In the early 1970s Mark Felt, a law school graduate and a 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 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.” Felt surreptitiously provided Woodward with leads and confirmed information that Woodward learned from other sources. In the book chronicling the Watergate investigation, Woodward referred to Felt as “Deep Throat,” and credited this source with a critical role in the Post’s investigation. 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. Felt’s memoir asserts that he was motivated by a desire to protect the FBI from interference by the White House. 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.

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. 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? 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?

13 John D. O’Connor, I’M THE GUY THEY CALLED DEEP THROAT, VANITY FAIR (July 2005) p. 86; MARK FELT & JOHN O’CONNOR, A G-MAN’S LIFE: THE FBI, BEING “DEEP THROAT,” AND THE STRUGGLE FOR HONOR IN WASHINGTON xiii (2006) (asserting that Felt “stood alone to guard the FBI’s integrity. 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.”). In 1981, Felt published his original memoir, which was, of course, silent about his role as “Deep Throat.”
14 MARK FELT & JOHN O’CONNOR, A G-MAN’S LIFE: THE FBI, BEING “DEEP THROAT,” AND THE STRUGGLE FOR HONOR IN WASHINGTON (2006) (hereinafter “A G-MAN’S LIFE”). Others have speculated that Felt was motivated by his disappointment after President Nixon decided not to choose Felt as the FBI Director of J. Edgar Hoover’s death.
16 A G-MAN’S LIFE xiii (asserting that Felt “stood alone to guard the FBI’s integrity. 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.”).
17 Felt was in a government job that routinely requires legal judgments about the 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.
18 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. After his retirement, Felt testified about his role in these warrantless searches before the Church Committee investigating intelligence
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 section examines the theoretical underpinnings for confidentiality and transparency in both the lawyer-client and government settings.

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

agency abuses, and he was eventually convicted for criminal violation of the constitutional rights of those subjected to these illegal searches. After this felony conviction, Felt’s law license to practice law in the District of Columbia was suspended. Later, President Ronald Reagan pardoned Felt, and his law license was restored. (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 (D.C. 1997) (censuring former Assistant Secretary of State Elliott Abrams for giving false testimony to Congress in connection with the Iran-Contra scandal).)

The confidentiality duty also prohibits the lawyer from using client information for the lawyer’s or someone else’s benefit. This prohibition is found in a distinct professional rule. See Model Rule 1.8(b).

Model Rule 1.6(a) states: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).” 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. Some states have retained the American Bar Association’s Model Code Disciplinary Rule (DR) 4-101, which states that “a lawyer shall not knowingly . . . reveal a confidence or secret of his client.” DR 4-101(B). In addition, several states that have adopted the Model Rules have nonetheless retained the Model Code’s narrower confidentiality definition. See e.g., Illinois Rule 1.6(a).

The confidentiality obligation applies to the factual information that the lawyer learns about client’s situation (and any other factual information), but does not apply to the legal expertise that a lawyer develops in a particular area of the law.

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 (1992) (discussing an implied “historical interest” exception, allowing lawyers to donate their papers to archives and for historians and others to examine these documents decades after the matters have closed, even without client consent). But see Swidler & Berlin. United States, 524 U.S. 399 (1998) (attorney-client privilege survives the death of the client).

See, e.g., Thiery v. Bye, Bye, Goff & Rohde, Ltd., 597 N.W.2d 449 (WI 1999) (lawyer sued for breach of
The principle underlying this confidentiality duty is simply 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) or even the lawyer’s interest (such as the lawyer’s need to obtain legal advice or defend herself). Two of these exceptions actually further client interests. First, a lawyer may reveal otherwise confidential information if the client gives informed consent. 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. 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.

24 Model Rule 1.6(b)(1) (to prevent death or substantial bodily harm); 1.6(b)(2) (to prevent client from committing crime or fraud using the lawyer’s services); 1.6(b)(3) (to prevent, mitigate or rectify financial injury caused by a client’s crime or fraud using the lawyer’s services).

25 Model Rule 1.6(b)(4) (to obtain legal advice); 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 ABA Model Rules, the confidentiality exceptions vary considerably from state to state. See “State Lawyer Code Exceptions to Client Confidentiality That Permit (May) or Require (Must) Disclosure,” in SUSAN R. MARTYN, LAWRENCE J. FOX & W. BRADLEY WENDEL, THE LAW GOVERNING LAWYERS 2006-2007 EDITION: NATIONAL RULES, STANDARDS, STATUTES, AND STATE LAWYER CODES 112-119 (2006).

26 Model Rule 1.6(a). This Article argues that open government laws should be construed as client consent to disclosure. See § III.B infra.

27 Model Rule 1.13. This exception was added when the American Bar Association adopted a revised Model Rule 1.13 in the wake of the Enron and WorldCom scandals and 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 (2004). Fifteen states have adopted this additional entity-based exception to confidentiality. See Chart of Ethics Rule on Disclosure Outside the Organization, in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2007 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 163-64 (2007)
then the lawyer may reveal the information outside the entity in order to prevent substantial injury to the entity.\textsuperscript{29} 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.\textsuperscript{30} If the contents of the lawyer-client communication has been revealed to anyone, then the privilege has been waived, and is thus no longer available.\textsuperscript{31}

The principle underlying the attorney client privilege is the recognition that the public interest in the availability of all evidence sometimes must give way to a countervailing interest that individuals and entities obtain 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.\textsuperscript{32}

The confidentiality duty is robust. Even if a client recounts to a third party the clients 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.\textsuperscript{33} Some commentators have argued for an “historical interest” exception to

\begin{itemize}
\item \textsuperscript{29} Model Rule 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 § II infra discussing government client identity.
\item \textsuperscript{30} Restatement of the Law Governing Lawyers § 68.
\item \textsuperscript{31} Restatement of the Law Governing Lawyers § 79.
\item \textsuperscript{32} Compare Restatement of the Law Governing Lawyers § 68 comment c (identifying 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).
\item 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. See Okla. Bar Eth. Op. 1983-301 (lawyer may not donate papers with client confidences and secrets to libraries without express client consent); D.C. Bar Eth. Op. 128 (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 Patrick Shilling, Note, Attorney Papers, History And Confidentiality: A Proposed Amendment To Model Rule 1.6, 69 Fordham L. Rev. 2741 (2001); Bonnie Hobbs, Note, Lawyers' Papers: Confidentiality Versus The Claims Of History, 49 Wash. & Lee L. Rev. 179 (1992). 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 paper to the Library of Congress with the stipulation
\end{itemize}
confidence that would allow disclosure long after the representation has ended.\textsuperscript{34} At present there is no formal recognition of any kind of “historical interest” exception to lawyer confidentiality. (By contrast, one can find support for the idea that a government’s interest in confidentiality diminishes after time.\textsuperscript{35})

that if historians or journalists wanted to publish information about living clients or those with active estates, they must seek clients’ consent).

\textsuperscript{34} Bonnie Hobbs, Note, Lawyers’ Papers: Confidentiality Versus The Claims Of History, 49 WASH. & LEE L. REV. 179 (1992) (proposing amendment to confidentiality rule so that a lawyer may donate her papers to a library 25 years after the client’s death.

In Attorney-General v. Jonathan Cape Ltd. [1976] 1 Q.B. 752, a court was asked to enjoin publication of a former cabinet minister’s memoir because it revealed confidential cabinet deliberations. 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.

Some 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. . . .

The court noted that at some point, the government’s interest in the confidentiality of these discussions will lapse, but determining exactly when that occurs is difficult. 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. (“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.”).

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. Ex. Ord. 13292, §§ 1.5(b), 3.3(a) (2003). \textit{See id. at § 3.3(b)} (identifying factors that can rebut the presumption of declassification). Previous executive orders have all included automatic declassification after varying lengths of time. \textit{See also} Ex. Ord. 12392 § 4.4(a) (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); \textit{see also} Assassination Records Collection Act of 1992.

One also finds some support for this concept of diminishing confidentiality over time in with respect to the secrecy of criminal investigations. Court have noted that the need for secrecy may end when the investigation ends. Butterworth v. Smith, 494 U.S. 624 (1990) (striking down Florida statute that imposed permanent ban on grand jury witnesses disclosing their own testimony because

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

494 U.S. at 632-33.s). \textit{See also} Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970) (privilege preventing discovery of police investigative files “will expire upon the lapse of an unreasonable length of time”).

On occasion, courts 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. In re Petition of American Historical Association, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (granting partial disclosure of grand jury proceedings related to Alger Hiss investigation); In re Petition of Craig, 131 F.3d 99 (2d Cir. 1997) (same); In re Petition of May, 651 F. Supp. 457 (S.D.N.Y. 1987) (same); In re Petition of O’Brien, No. 3-90-X-95 (M.D. Tenn. May 16, 1990) (unpublished opinion) (ordering disclosure 45 years after grand jury investigation) (cited in In re Petition of American Historical Association, supra); \textit{but see} Craig v. United States, 131 F.2d 99 (2nd Cir. 1997) (denying historian access to 1948 grand jury investigation). Note that similar requests for disclosure of this material was denied in 1977 in Hiss v. Department of Justice, 441 F. Supp. 69 (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). These courts have noted
B. Secrecy & 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’s 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), Privacy Act of 1974, Government in the Sunshine Act, Federal Advisory Committee Act, and the Presidential Records Act of 1978. These statutes establish a baseline of providing the public with access to government information, both in terms of government documents and government meetings. Under FOIA, executive branch agencies are required to publish their rules, regulations and policies; final opinions made in the adjudication of cases, and information about how the agencies are organized. All other government documents will be made public upon request, unless there is a good reason for the government to keep the document secret. FOIA sets out nine specific exceptions from this mandated disclosure upon request. 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. 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. But if the people do not have access to information about what the government is doing, then this premise is little more than a forgotten promise. One can find a constitutional basis for the right to know only indirectly in the U.S. Constitution. The First Amendment that some government interests in secrecy diminish over time; In re Petition of American Historical Association, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (noting 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); id. (“[F]ifty years after the proceedings ended . . . [, t]he inhibiting effect of . . . disclosure is insignificant . . .”); and that the public’s interest in establishing an accurate historical record may strengthen over time. In re Petition of American Historical Association, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (“The 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.”).
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.\(^{48}\)

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.\(^{49}\) 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.\(^{50}\) 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.\(^{51}\) 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” that branch, then he had an obligation to “refer the matter to higher authority.”\(^{52}\) 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.

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

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\(^{48}\) United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (“the 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 . . . .”)

\(^{49}\) John D. O’Connor, I’m The Guy They Called Deep Throat, VANY FAIR (July 2005) p. 86.

\(^{50}\) See Model Rule 1.13.

\(^{51}\) See infra Section II.

\(^{52}\) Model Rule 1.13(b).
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. Ossias argued that her disclosure was authorized by state whistleblower protection laws, and bar authorities ultimately decided not to discipline her. The California legislature passed legislation that would have clarified that a government lawyer does not violate confidentiality by disclosing government wrongdoing, but the Governor vetoed that legislation. The State Bar Committee on Professional Responsibility and Conduct proposed a rule allowing government lawyers to disclose government misconduct, but the state Supreme Court rejected the proposed rule.

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

A. Wide Range of Possible Clients

Government officials, courts and commentators have identified a wide variety of possible clients for the government lawyer. One can find some support for the following as clients: the “public interest,” the public at large, the entire government, the branch of government

53 As a California lawyer, Ossias was bound by Cal. Bus. & Prof. Code Ann. § 6068(e), which states that a lawyer must “maintain inviolate the confidence . . . and . . . preserve the secrets . . . of his or her client.” 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.” See also California Rules of Professional Conduct 3-100 (providing similar exception and exception when client gives informed consent). For an extensive discussion of Ossias’ case, see Charles S. Doskow, 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); see also Jesselyn Radack, The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last, 17 GEO. J. LEGAL ETHICS 125 (2003).

54 Letter from Donald R. Steedman to Richard Alan Zitrin (October 11, 2000) (available at http://www.dougshafer.com/Response2Bar.pdf (pp. 21-22 of 25) (last visited July 20, 2006)). One might argue that the decision of California bar authorities not to discipline Ossias indicates that California government lawyers 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.


employing the lawyer,\(^{59}\) the particular agency employing the lawyer,\(^{60}\) and a particular government official (such as the head of a government organization) in his official or individual capacity.\(^{61}\)
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, and those lawyers take on a traditional lawyer-client relationship with their individual clients. Justice Department lawyers who represent 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. Under Justice Department regulations, the government lawyer’s confidentiality duty toward this individual client is more limited than a traditional lawyer-client relationship. The lawyer must keep confidential only that information that is covered by attorney-client

branch as a whole and to the President as its head” and “the duties of an agency attorney run to the executive branch generally rather than to the agency only”). Cf. Barbara Allen Babcock, Defending the Government: Justice and the Civil Division, 23 J. MARSHALL L. REV. 181 (1990) (asserting that the Justice Department’s client is sometimes “the Congress whose legislation is under attack”).

60 D.C. Rule of Professional Conduct 1.6(k) (asserting 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.”); Federal Bar Association, Model Rules of Professional Conduct, Rule1.13(a) (“a Government lawyer represents the Federal Agency that employs the Government lawyer.”); Roger C. Cramton, The Lawyer As Whistleblower: Confidentiality And Government Lawyer, 5 GEO. J. LEGAL ETHICS 291 (1991) (“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.”); Fed. Bar Assn. Op. 73-1 “The Govt Client & Confidentiality” 32 FED. B.J. 71 (1973) (“the 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”); Report by the District of Columbia Bar Special Committee of Government Lawyers and the Model Rules of Professional Conduct [hereinafter D.C. Bar Report], reprinted in THE WASH. LAWYER, Sept.- Oct. 1988, at 53 (“the employing agency should in normal circumstances be considered the client of the government lawyer”); In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (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 lawyer notes of conversation with then First Lady when they were sought by a federal grand jury).

61 James Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY L. REV. 1569, 1592 (1996) (suggesting that the President might appropriately be viewed as the client whenever a federal agency is involved in litigation); Bruce E. Fein, Promoting the President's Policies through Legal Advocacy: An Ethical Imperative of the Government Attorney, 30 FED. B.J. 408 (1983) (referring to “the incumbent President” as the client of “the government attorney in the Executive Branch”); The Attorney General's Role As Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 48 (1982) at 481, 483 (stating that the president is the client of the attorney general).

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.

62 See D.C. Rule of Professional Conduct 1.6, comment 39 (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”); DC Ethics Opinion 313 (JAG lawyer’s client was individual defendant rather than the government).

63 28 C.F.R. 50.15(a)
privilege. Any non-privileged 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.

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

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.” If a government lawyer represents an agency, then the entity exception to confidentiality will apply; but if she is representing the agency head, then that exception will not apply. If a Justice Department lawyer represents the entire government, then she can reveal information to a member of Congress; but if she represents the Executive Branch, she could not. If a state Natural Resources Department lawyer represents her agency, then she could not reveal information about wrongdoing at the Department to anyone outside of

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64 28 C.F.R. 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”).
65 Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee at 6 (March 29, 1985) (on file with author).
66 E.g., Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987) (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); Ward v. Superior Court, 70 Cal. App. 3d 23, 138 Cal. Rptr. 532 (Ct. App. 1977) (county counsel represented county rather than former assessor, so there was no conflict of interest in counsel defending county in assessor’s defamation action against county).
67 Model Rule 1.13 (organization as client).
68 But see D.C. Rule 1.13, which asserts that the government lawyer’s client is the agency that employs the lawyer.
69 Cf. Roberts v. City of Palmdale, 5 Cal. 4th 363, 379-80 n.5, 20 Cal. Rptr. 2d 330, 339-40 n.5. (Cal. 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”).
70 Model Rule 1.13. See discussion in § I, supra
71 As a practical matter, the key difference between conceiving of the client as a government agency and conceiving of the client as the head of that government agency in his official capacity is the Model Rule 1.13 duty to protect entity clients from disloyal agents. See also Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005). In that case, a city was being sued for alleged civil rights violations by its police force. The 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. As long as the city rather than the police director was the client, the city could maintain the privilege.)
the Department, including the state Attorney General.72 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 could not -- 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.73 Lawry correctly noted that identifying the client does not end the inquiry regarding a government lawyer’s confidentiality duty.74 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 government lawyer’s client identity. Politicians often claim that the government lawyer’s client is “the public,”75 and a few commentators assert that government lawyers should pursue “the public interest,”76 but these formulations fail to identify who can give direction to the lawyer on behalf of the client.77 Some assert that the government lawyer represents the government as a whole,78

72 But see Hawaii Rule of Professional Conduct 1.6(c)(4) & (5) (permitting government lawyers licensed in Hawaii to make such disclosures)
74 Lawry, Confidences and the Government Lawyer, 57 N.C.L. REV. 625 (1979) (“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 confidentiality.”)
75 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 “Those 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.” Transcript of “This Week,” July 25, 2005, found at http://blog.washingtonpost.com/campaignforthecourt/2005/07/talk_show_leah.html (last visited June 4, 2007).
77 Fed Bar Assn Op 73-1 “The Govt Client & Confidentiality” 32 FED. B.J. 71 (1973) (“we do not suggest . . . that the public is the client as the client concept is usually understood”). Geoffrey P. Miller, Government Lawyers' Ethics in a System of Checks and Balances, U. CHIC. L. REV. 1293 (1987)(“the notion that government attorneys represent some transcendental ‘public interest’ is, I believe, incoherent. . . . there are as many ideas of the ‘public interest’ as there are people who think about the subject.”); Roger C. Cranton, The Lawyer As Whistleblower: Confidentiality And Government Lawyer, 5 GEO. J. LEGAL ETHICS 291 (1991) (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”); Report by the District of Columbia Bar Special Committee of Government Lawyers and the Model Rules of Professional Conduct
but Geoffrey Miller persuasively rebuts that notion for a government with separated powers.\textsuperscript{79} Miller notes that lawyers in the federal government’s executive branch do not generally represent Congress or the Judiciary.\textsuperscript{80} Many assert that the client is the particular agency that employs the lawyer,\textsuperscript{81} but this approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court.

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.

\textbf{B. Client Identity Depends on Context & 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.\textsuperscript{82} This section describes the process

\textsuperscript{78} See [hereinafter D.C. Bar Report], reprinted in WASH. LAWYER, Sept.-Oct. 1988, at 53 (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”; “The governmental client, to be encouraged to use lawyers, must believe that the lawyer will represent the legitimate interests the governmental client seeks to advance, and not be influenced by some unique and personal vision of the "public interest."”); James Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY L. REV. 1569, 1592 (1996) (“The public interest model . . . allows unelected officials to substitute their judgment for that of an agency”).

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 and 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 in § II.C infra.

\textsuperscript{79} Geoffrey P. Miller, Government Lawyers’ Ethics in a System of Checks and Balances, U. CHIC. L. REV. 1293 (1987) (“The notion . . . that an agency attorney serves the government as a whole is misplaced.”).

\textsuperscript{80} Geoffrey P. Miller, Government Lawyers’ Ethics in a System of Checks and Balances, U. CHIC. L. REV. 1293 (1987). (“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.”). See also Report by the District of Columbia Bar Special Committee of Government Lawyers and the Model Rules of Professional Conduct [hereinafter D.C. Bar Report], reprinted in WASH. LAWYER, Sept.-Oct. 1988, at 53 (arguing that “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.”).

\textsuperscript{81} Report of the D.C. Bar, supra; Fed. B. Op. 73-1.

\textsuperscript{82} See RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 97, Comment c (“no universal definition of the client of a governmental lawyer is possible.”); James Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY L. REV. 1569, 1592 (1996) (“no one model completely describes Department loyalty. . . . The varied facts and forces that operate in each case of
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 issues of client identity can be in the government context. 83

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 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. 84 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. 85

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 city. 86 The issue was again application of attorney-client privilege, and 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.

representation make a single model inappropriate for describing the loyalty relationship.”

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
(1978); Lawry, Confidences and the Government Lawyer, 57 N.C.L. REV. 625 (1979) (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 officials has instructed).

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(”ascertaining who the client really is can be a complex affair when a governmental entity is involved”); United
States v. AT&T Co., 86 F.R.D. 603 (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”).

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In Re Grand Jury Subpoena, 886 F.2d 135 (6th Cir. 1989).
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In Re Grand Jury Subpoena, 886 F.2d 135 (6th Cir. 1989).
86

Reed v. Baxter, 134 F.2d 351 (6th Cir. 1998).
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. 87 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. 88 In this particular case, 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 overruling it. 89 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. 90

In another conflicts of interest case, employees of the Rhode Island Department of Children, Youth and Families were suing the Department for alleged civil rights violations. The employees’ lawyer also did legal work for two Rhode Island state boards, and the state’s Attorney General argued that this constituted an improper conflict of interest. The issue was whether this 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. 91 It examined Rhode Island’s restrictions on its employees, and found that state employees are prohibited from serving as a lawyer for a party suing the particular agency where he is employed. 92 By contrast, federal law prohibits executive branch employees from serving as lawyers for a party suing the executive branch. 93 Thus, the court found that the clients of this lawyer were the particular boards he represented rather than the entire state government.

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87 Civil Service Commission v. Superior Court, 209 Cal. Rptr. 159 (Ct. App. 1984). (“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.”).

88 Id.

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

89 Id.

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.


While this kind of structural analysis is the most satisfying way to identify a government lawyer’s client, not all courts that have decided this issue of client identity use the structural approach. In a case involving the possible disqualification of a private law firm that arguably represented the 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.94 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.95 But the court failed to analyze in any way whether those offices were all part of the county attorney’s client.96

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 have asserted that all executive branch lawyers have as their client the entire executive branch, with the President ultimately responsible for defining client interests.97 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.98 These commentators would likely conclude that the client of a department lawyer is the department itself rather than the entire executive branch.99 For many of the lawyers employed by independent agencies, such as the Securities and Exchange Commission (S.E.C.) or

95 Cameron County v. Hinojosa, 760 S.W.2d 742, 746 (Tex. Ct. App. 1988)
97 See, e.g., Geoffrey P. Miller, Government Lawyers’ Ethics in a System of Checks and Balances, U. CHIC. L. REV. 1293 (1987) (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.”); Michael Stokes Paulsen, Who “Owns” the Government’s Attorney-Client Privilege?, 83 MINN. L. REV. 473 (1998) (“as 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”).
98 See, e.g., Peter L. Strauss, Overseer, or “The Decider”? The President in Administrative Law, G.W.L. REV. (2007) (in pageproofs)
Calling 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 Justice Department level. If the lawyer is working in the Executive Branch, the process may not stop until it reaches the President himself.
the Federal Communications Commission, their client is the agency itself. Such an agency is even more insulated from Presidential control, and thus can take positions that will dissatisfy the President. An S.E.C. lawyer who disagrees with an agency decision can appeal that decision up to the Commission itself, but not beyond the agency. 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. 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. Federal prosecutors have as a client the executive branch, and have significant independence in how they go about their duties.

Most Congressional lawyers have as their client individual legislators, while a few represent entities within the legislative branch. These lawyers work either on the personal office staff or on the committee staff of a particular member of the House of Representatives or the Senate. They owe duties of loyalty and confidentiality to the individual legislator. Similarly, 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. By contrast, there are a few lawyers on Capitol Hill whose clients are legislative entities rather than an individual legislator. 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.

In the judicial branch, while 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

100 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.
101 28 U.S.C. § 516 (“the 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”).
102 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. Rule 1.6(k) (2007). This would make the Justice Department lawyer’s client the Justice Department.
103 See § I.C, infra. (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. § 494(a) (“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 . . . ”).
105 See Matthew Eric Glassman, CRS Report for Congress, Office of Legislative Counsel: Senate (Feb. 8, 2007) (available at http://www.senate.gov/reference/resources/pdf/RS20856.pdf) (last viewed June 6, 2007). These lawyers are required “to maintain the attorney-client relationship with respect to any communications with Senators or staff.” Id.
clerks are lawyers at all, let alone whether their judges are their clients. For example, Edward Lazarus clerked for Justice Blackmun during 1988-89 term, and ten years later published a book that attempted to critique the Supreme Court’s handling of certain highly charged cases. Lazarus’ book was met with a chorus of criticism. 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, but there was little discussion of whether he violated the confidentiality rule for lawyers.

With regard to local governments, normally the client is the local government itself rather than the local officials who run the government. 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.

1. “Runaway” Lawyers

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. Other government lawyers serve both as the lawyer and essentially as a trustee, entrusted to make decisions that are normally made by clients. The professional

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107 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 F.B.A. Op. 73-1 (identifying a government lawyer’s client as the employing agency)).
111 Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) (“generally in conversations between municipal officials and the municipality's counsel, the municipality, not any individual officers, is the client”).
112 See Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987) ("In the public attorney-public client relationship, there is a quality of disinterested interest not usually found in the private sector.").
113 Compare discussion of “runaway” grand juries in Roger Roots, If it’s not a Runaway, It’s not a Jury, 33 CREIGHTON L. REV. 821 (1999).
114 Model Rule 1.2(a) (“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.”)
115 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 (N.D. 1919), overruled on other grounds, Benson v. North Dakota Workmen’s
rules require a lawyer to abide by a client’s decision on whether to settle a case, or whether to appeal an adverse decision. Yet some government lawyers routinely decide whether to litigate or settle cases on behalf of their clients. Prosecutors themselves decide whether to seek indictments and whether to allow plea agreements, and cannot allow other officials in the government to make these decisions. 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. 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. 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.” In another case, the Massachusetts Attorney General refused to appeal an adverse judgment even though the state officer being sued wanted to appeal. At the federal level, Congress has set out by statute that the Department of Justice controls most litigation decisions. Justice Department lawyers represent executive branch agencies in court, but it is the Justice Department -- not the agencies -- that decides whether to bring litigation and whether to settle it. The Solicitor General “is not bound by the views of

Compensation Bureau, 283 N.W.2d 96 (N.D. 1979) (“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”).

Model Rule 1.2(a) states: “A lawyer shall abide by a client’s decision whether to settle a matter.”

Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 MICH. L. REV. 676 (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; “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 n.130.

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.”). See also Bruce A. Green, Must Government Lawyers “Seek Justice” In Civil Litigation?, WIDENER J. PUB. L. (2000) (“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].”)


Secretary of Administration & Finance v. Attorney General 326 N.E.2d 334 (MA 1975) (rejecting Secretary’s argument that he had a traditional attorney-client relationship with Attorney General, which would allow Secretary to decide whether to appeal).


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.”

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 and debate clause immunity. 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). That office is represented by the Senate Chief Counsel for Employment, and any monetary judgment is paid out of general Senate coffers rather than a particular Senator’s allotment. 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 and debate clause. This situation finally came to a head in a discrimination case when the Senator whose office was being sued retired before the case had been adjudicated. The Senate Chief Counsel for Employment argued for broad speech and debate immunity, while the Senate itself filed an amicus brief disclaiming immunity applied in this case. Perhaps even more remarkable, the Senate Chief Counsel for Employment argued that her client, the Office of Senator Dayton, no longer existed and the case was moot because the Senator’s term had expired and he had not sought a new term. 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

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125 Role of the Solicitor General, 1 Op. Off. Legal Counsel 228 (1977). It is significant that this opinion puts “clients” within quotation marks. 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 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 at 729 (noting that “the SG considers the impact of any given litigation position both across the government as a whole and over time”).

126 2 U.S.C. § 1301 et seq.


130 Office of Senator Mark Dayton v. Hanson (No. 06-618) Brief for Appellant (available at http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-618_Petitioner.pdf (last visited July 3, 2007)).

131 Office of Senator Mark Dayton v. Hanson (No. 06-618) Brief for the United States Senate as Amicus Curiae (on file with author).

132 Office of Senator Mark Dayton v. Hanson (No. 06-618) Brief for Appellant (available at http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/06-618_Petitioner.pdf (last visited July 3, 2007)).
ultimately responsible for any monetary judgment. Under the current arrangement, the Senate Chief Counsel for Employment can be untethered to any client, and has made arguments that undermine the institutional interests of the Senate.

At the state level, the situations vary considerably. Many states allocate to a state Attorney General decisions on whether to bring and settle lawsuits. The Illinois Attorney General, for example, has the authority to “direct the legal affairs of the State and its agencies.” 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. Because the lawyer-client relationship is different, the state Attorney General is permitted to do things that are normally prohibited by conflict of interest standards. 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. State Attorneys General routinely file lawsuits against state agencies and officials that they normally represent.

133 Office of Senator Mark Dayton v. Hanson (No. 06-618) Brief for the United States Senate as Amicus Curiae at 17 (noting that the “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).
134 Office of Senator Mark Dayton v. Hanson (No. 06-618) transcript of oral argument at 4 (Senate Chief Counsel for Employment arguing that Supreme Court does not defer to Congress’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”).
136 EPA v. Pollution Control Board, 372 N.E.2d 50 (Ill. 1977)
137 EPA v. Pollution Control Board, 372 N.E.2d 50 (IL 1977) (“although 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 Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission, 387 A.2d. 533 (Conn. 1978).
138 See, e.g., Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission, 387 A.2d. 533 (Conn. 1978) (finding that state Attorney General was not “guilty of any professional impropriety” when his office represented both plaintiff and defendant in lawsuit); EPA v. Pollution Control Board, 372 N.E.2d 50 (IL 1977) (“Attorney General may represent opposing State agencies in a dispute” when the Attorney General is not an actual party to the dispute). See also State of Mississippi ex rel., Allain v Mississippi Public Service Commission, 418 So. 2d 779 (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) (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”); Scott v. Cadagin, 258 N.E.2d 1125 (Ill. 1976) (permitting Attorney General to withdraw from representation of state commission and represent government department that was intervening and opposing commission).
139 See, e.g., People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (attorney general can sue secretary of state regarding constitutionality of congressional redistricting); Superintendent Of Insurance v. Attorney General, 558 A.2d 1197 (Me. 1989) (“when 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”); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (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); People ex rel. Scott v. Illinois Racing Board, 301 N.E.2d 285 (Ill. 1973) (Attorney General could sue Racing Board seeking review of its decision to grant licenses); Montana ex rel. Olsen v. Public Service Comm’n, 283 P.2d 594 (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, 29 Cal. 3d 150, 172
In other states, attorneys general have a more traditional lawyer-client relationship with client agencies. The agencies make legal policy decisions, and the attorney general defends those decisions in court. These government lawyers must defer to their clients’ decisions, even when the lawyers believe that the clients are acting against the public interest. For example, in a Texas case, the state Attorney General asked a court to overturn a state agency’s water regulation because of alleged violations of Equal Protection. The court ruled that the Attorney General could not sue a state agency.

Cal. Rptr. 478 (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 (Wash. 1947) (quoting State ex rel. Dunbar v. State Board, 249 P.996 (Wash. 1926):

[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.


See, e.g., Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W.V. 1995) (quoting Manchin v. Browning, 296 S.E.2d 909 (W.V. 1982)) (“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[,]’”); York v. Penn. Pub. Utility Comm’n. 295 A.2d 825 (Pa. 1972) (prohibiting attorney general from arguing against decision made by state agency) (“[B]oards 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.”).


Hill v. Texas Water Quality Board, 568 S.W.2d 738 (Tex. Civ. App. 1978). The court ruled that 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.” 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).

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 its own behalf, even though the Commission had not taken a position on the case. 145 When a lawyer is not tethered to a client, the lawyer may make arguments with which the client would disagree. 146 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 congressional districts. 147 But rather than pursuing the wishes of the Secretary of State and defending the plan, the Attorney General acknowledged the unconstitutionality of 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. 148

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. 149 This is a valuable insight, but 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. 150 When making those client-like decisions in their role as trustee, it is appropriate for these government lawyers to consider the public interest. 151 For

145 Yes on Measure A v City of Lake Forest, 70 Cal. Rptr. 2d 517, 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. This issue has not been presented to the commission for a formal discussion and vote.")
147 Manchin v. Browning, 296 S.E.2d 909 (W.V. 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 919.
148 Id.
149 Geoffrey P. Miller, Government Lawyers’ Ethics in a System of Checks and Balances, U. CHIC. L. REV. 1293 (1987). 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.” Bruce A. Green, Must Government Lawyers “Seek Justice” In Civil Litigation?, WIDENER J. PUB.L. (2000).
151 EPA v. Pollution Control Board, 372 N.E.2d 50 (Ill. 1977) (noting that state attorney general represents not only “the particular interests of State agencies,” but also “the broader interests of the State”); Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission, 387 A.2d. 533 (Conn. 1978); Humphrey v. McLaren, 402 N.W.2d 535 (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
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.”

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’s not that the public interest is the client. It is that 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. 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. This obligation of fairness is seen most prominently in criminal prosecutions. As the U.S. 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.

This requirement that government lawyers be fair is reflected in prosecutors’ obligation to provide criminal defendants with information that can help the defense, a deviation from the normal adversary process. This obligation to act fairly is so central to the government lawyer’s mission that the Justice Department building has this quotation inscribed near the particular client”); In Re: A Witness before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002) (“Public officials . . . exercise the power of the state . . . [and have] the responsibility to act in the public interest.”)

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 (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 & whose ultimate allegiance is to the people-at-large.”).


Brady v. Maryland, 373 U.S. 83 (1963); see also Model Rule 3.8(d), requiring 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.

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, 2000 G’TOWN L.J. 207.
entrance to the Attorney General’s office: “The United States wins its point whenever justice is done its citizens in the courts.”

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.” As such, the obligation to govern impartially and do justice would seem to apply with equal force to the government’s civil litigation. 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. 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.

Aside from civil condemnation cases, one finds only a few cases supporting this obligation to be fair. 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.” But in each of the identified cases, the assertion that government civil litigators must do justice is merely dicta, and has no impact on the outcome of the case. For example, in *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.* Judge Abner Mikva notes that while “[t]he Supreme Court [in *Berger*] was

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159 See *Bruce A. Green, Must Government Lawyers “Seek Justice” In Civil Litigation?*, WIDENER J. PUB. L. (2000) (persuasively arguing that government civil litigators – particularly those who “act as surrogate[s] of the client” – should seek justice); see also *In People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 218 Cal. Rptr. 24 (Cal. 1985) (disqualifying lawyer hired by a city to handle abatement action on contingent fee basis), where 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 . . .

160 City of Los Angeles v. Decker, 558 P.2d 545 (Ca. 1977) (duty of government attorney in eminent domain action includes developing full and fair record to arrive at just compensation) (reversing compensation award because city attorney withheld from jury information about land’s commercial use and its value). See also ABA Model Code Ethical Consideration 7-14 (“A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record”).


162 Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992); Douglas v. Donovan, 704 F.2d 1276 (D.C. Cir. 1983); Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983). Each of these decisions was written by Judge Abner Mikva.

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.” 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 F.E.R.C. lawyer for pursuing an appeal after the case had clearly become moot, and for “so unblushingly denying [at oral argument] that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.”

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. While government lawyers who have client-like decision making authority should consider the public interest, those who are acting 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 this 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.

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.

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164 Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992).
165 Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992).
167 Hawaii Rule of Professional Conduct 1.6(c)(4) & (5).
168 Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, U. CHIC. L. REV. 1293 (1987): 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.

164 Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992).
165 Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992).
167 Hawaii Rule of Professional Conduct 1.6(c)(4) & (5).
168 Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, U. CHIC. L. REV. 1293 (1987): 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.
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.169

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.170

Returning to the factual scenario that began this Section, Ossias’ 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 outside the client.171 Under California law, Ossias had the option of raising the issue with Quackenbush personally,172 but there is no indication that she did so. The following section 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

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 (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”).

See section IV.A, infra.


171 CA Rule 3-600(B) states that if a lawyer:
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.
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.”

172 CA Rule 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.
In contrast, Model Rule 1.13(b) requires an entity lawyer in such circumstances to “refer the matter to higher authority in the organization.”
This section examines two characteristics of governments that are particularly important for this question of confidentiality. The first characteristic concerns the legitimacy of the government 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 governments have no such right. This section will show 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. This regime includes statutes and regulations prohibiting the disclosure of certain information (such as private information about a particular taxpayer); rules requiring disclosure of other types of information (such as an agency’s organizational structure and its final decisions); and rules requiring disclosure of certain information upon request (such as unclassified, unprivileged information that must be disclosed under the Freedom of Information (FOIA)); and additional rules allowing the government to withhold some of the requested information (such as documents subject to FOIA exceptions). This section 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. Government Lawyers May Reveal 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,” 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.”

But are lawyers licensed outside of Hawaii free to disclose government wrongdoing even though there is no explicit exception? This section argues that many governments have consented to the disclosure of their own past misconduct by government employees – including lawyers. One finds this consent in laws encouraging all government employees to come forward with information about misconduct, and in whistleblower protection statutes. This section

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175 5 U.S.C. § 552(a)(1) and (2).
178 Hawaii Rule 1.6(c)(4).
179 Hawaii Rule 1.6(c)(5).
180 One finds in the scholarly literature an under theorized intuition that government lawyers should be able to disclose government wrongdoing. See, e.g., Comment, *The Law Clerk’s Duty of Confidentiality*, 129 U. PA. L. REV. 1230 (1981) (proposing a confidentiality rule for judicial clerks, with an exception for “specific wrongdoing”);
discusses whistleblower protection statutes and how they interact with lawyers’ ethical obligation of confidentiality.

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 had been captured by American forces. CNN had carried 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, and that 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 it would violate a legal ethics rule for the government to interrogate Lindh, since a legal ethics rule prohibits one lawyer from speaking to another lawyer’s client without that other lawyer’s permission.\footnote{Model Rule 4.2} 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 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.

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 she 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 states where she was licensed as a lawyer, Maryland and the District of
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.” More concretely, federal, state and local governments have passed dozens of whistleblower statutes prohibiting retaliation against government employees who disclose government wrongdoing.

At the federal level, the federal government’s Whistleblower Protection Act (WPA) prohibits retaliation against certain executive branch employees who disclose information that they “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.” Employees can make the disclosure to another government official, such as an Inspector General, or to someone outside government, such as a member of the press. The WPA 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.” It does not apply to military servicemembers, to employees of the FBI, CIA, NSA, the National Imagery and Mapping Agency, or any other agency or unit of an agency
that the President determines has as its “principal function . . . foreign intelligence or
counterintelligence.” Employees of the judicial and legislative branches are also excluded
from its coverage. 188

Some government lawyers are within the class of employees protected by the WPA. 190
For these lawyers, what effect does the federal WPA 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. 191 But Cramton was writing before Congress’ 1998 enactment of the McDade
Amendment, which requires that federal government lawyers comply with state legal ethics
rules. 192 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 section), has argued that government lawyers
are permitted to make whistleblowing disclosures because the confidentiality rule has an

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188 5 U.S.C. § 2302(a)(2)(C)(ii). Congress has passed legislation providing limited whistleblower protection to
intelligence agency employees and military servicemembers who disclose information to members of Congress.
Intelligence Community Whistleblower Protection Act, 112 Stat. 2413-14, Title VII (1998); Military Whistleblower
30, 2005) (RL33215). 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.).
189 5 U.S.C. § 2302(a)(2)(C) (defining 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. Congressional Whistleblower Protection Act of 2007, S. 508 (110th Cong.).
190 Government lawyers have filed whistleblower claims, primarily for internal whistleblowing. See, e.g.,
Kalil v Dept. of Agriculture, 479 F.3d 821 (Fed.Cir. 2007) (rejecting WPA claim by government employee who was
licensed as a lawyer and allegedly disclosed government misconduct to Justice Department officials and federal
district court clerk); DeLeonardo v. EEOC, 2006 MSPB 269 (remanding for further consideration of government
lawyer’s claim that she was retaliated against for internal whistleblowing); Buckley v. SSA, 125 Fed. Appx. 988
(Fed.Cir. 2005) (rejecting government lawyer’s WPA claim after he allegedly made an internal disclosure)
191 Cramton wrote:
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.
Roger C. Cramton, The Lawyer As Whistleblower: Confidentiality And Government Lawyer, 5 GEO. J. LEGAL
ETHICS 291 (1991). 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.
192 28 U.S.C. § 530B(a) states that “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.” (Enacted Oct. 21, 1998, P.L. 105-277,
Div A, § 101(b) [Title VIII, § 801(a)], 112 Stat. 2681-118.).
exception permitting a disclosure of information in order “to comply with other law.” But Radack’s argument would be persuasive only if the WPA actually required government employees to blow the whistle wrongdoing. A third commentator, James Moliterno, recently asserted that the WPA functions as the government’s consent to lawyers’ disclosure of wrongdoing. But Moliterno never addresses whether the WPA provision restricting disclosures that are “specifically prohibited by law” prevents government lawyers from blowing the whistle externally.

What is the proper application of the WPA to government lawyers? 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”? The WPA is a law of general application, and does not explicitly treat lawyers differently from other employees. But it does treat differently the disclosure of a particular class of information. If a disclosure is not “specifically prohibited by law,” the employee may disclose it to anyone – inside or outside of government. If a disclosure is “specifically prohibited by law,” then in order to be protected from reprisal, a government employee who wants to disclose the information may disclose it only to one of several identified government officials, such as an agency Inspector General. So the question is whether the prohibitions referred to in the

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195 In addition, Moliterno incorrectly asserts that another statute, 28 USC § 535(b), allows government employees -- including lawyers -- to disclose criminal misconduct to those outside the government. (“Statutes such as 28 U.S.C. § 535(b) . . . are express waivers of confidentiality . . .”). But that statute requires government employees make such disclosures to the Attorney General, not to disclose it outside the government. 28 U.S.C. § 535(b) 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 . . .


197 While the Whistleblower Protection Act purports to protect any disclosure, the Court of Appeals for the Federal Circuit – the only appellate court with jurisdiction over WPA 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. *See* Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, n.76 (2003).

198 5 U.S.C. § 2302(b)(8).
phrase, “specifically prohibited by law,” includes a lawyer’s ethical duty of confidentiality. If they do, then a government lawyer may blow the whistle only by disclosing the information to the specified government officials.

The Merit Systems Protection Board, the administrative agency that adjudicates whistleblower claims, has ruled that when the WPA specifies disclosures that are “specifically prohibited by law,” it is referring only to disclosures that are prohibited by statute or by executive orders dealing with classified information.\(^{199}\) The WPA’s 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 regulation mandating confidentiality.\(^{200}\)

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.\(^{201}\) As Roger Cramton has noted, government lawyers should be able to reveal an alleged “cover-up of corrupt conduct,” but the WPA may go “too far in eroding the loyalty and confidentiality that government lawyers owe to the governmental client.”\(^{202}\) In light of a lawyer’s obligation to communicate with her client,\(^{203}\) shouldn’t a lawyer be required to attempt to solve the problem internally, and go outside only if internal measures were ineffective?

This section has discussed in detail how the federal government’s Whistleblower Protection Act applies to executive branch lawyers. State and local government lawyers may receive similar protections, depending on the scope of the applicable whistleblower laws and their state ethics rules.\(^{204}\) 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.

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 government lawyers’ ability to disclose past government wrongdoing. First, in construing the government’s

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\(^{199}\) Kent v. G.S.A., 56 M.S.P.R. 536 (M.S.P.B 1993) (disclosure prohibited by Federal Acquisition Regulations is not “specifically prohibited by law” under WPA).


\(^{201}\) 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 General Dynamics Corp. v. Superior Court, 876 P.2d 487 (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, 584 N.E.2d 104 (Ill. 1991) (prohibiting corporate in-house counsel from bringing retaliatory discharge claims).

\(^{202}\) Roger C. Cramton, The Lawyer As Whistleblower: Confidentiality And Government Lawyer, 5 GEO. J. LEGAL ETHICS 291 (1991) (“If these are permitted disclosures, the confidentiality duties of lawyers employed by the federal government have been significantly eroded.”).

\(^{203}\) Model Rule 1.4.

evidentiary privileges, courts have found exceptions to those privileges and have required disclosure of past government wrongdoing. Second, courts have permitted lawyers for a fiduciary to disclose a fiduciary’s wrongdoing to beneficiaries. The following section addresses these common law doctrines.

2. Common Law Doctrines Regarding the Disclosure of Government Wrongdoing

The norm of exposing government wrongdoing can be found not just in whistleblower protections 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. They have found a “strong public interest in honest government and in exposing wrongdoing by public officials,” and have concluded that concealing government wrongdoing “would be a ‘gross misuse of public assets.’” One long-time observer put it this way: “If there is wrongdoing in government, it must be exposed.... [The government lawyer’s] duty to the people, the law, and his own conscience requires disclosure....”

One finds these statements in cases dealing with the government’s evidentiary privileges. Across a range of different evidentiary privileges, the government has been limited in its ability to keep secret information about wrongdoing by government officials. This section 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 dealt with the question of whether the government can assert attorney client privilege in the face of federal grand jury investigations of alleged corruption. The first two of these decisions arose out of Independent Counsel Kenneth Starr’s investigation of the Clinton White House. Each of these cases involved a federal executive branch lawyer disclosing information about alleged wrongdoing to another

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205 In re: The County of Erie, 473 F.3d 413 (2nd Cir. 2007) (“public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority”).
206 In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).
207 In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (denying White House claim of attorney client privilege in Independent Counsel’s investigation); In Re: A Witness before the Special Grand Jury 2000-2, 288 F.3d 289 (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.”)
209 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 remedied for further determination of whether the city council’s a private meeting with its lawyer was legal under state open government laws, In re Grand Jury Subpoena, 886 F.2d 135 (6th Cir. 1989), and a New Jersey appellate court allowed a locality to assert attorney-client privilege in a state grand jury investigation. In re Grand Jury (Farber), 574 A.2d at 455
210 In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (rejecting President Clinton’s claim of the privilege); In re: Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) (same).
federal executive branch lawyer, the Independent Counsel, through the mechanism of a grand jury subpoena. Since executive branch employees have a statutory obligation to disclose evidence of wrongdoing to the Attorney General, and the Independent Counsel stood in the role of the Attorney General for matters under their jurisdiction, these cases could 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 lawyers’ client as the entire executive branch. But the courts in these cases did not base their decision on these theories. Instead, the courts seem 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. The courts justify this breach of confidentiality with general statements about the repugnance of keeping government wrongdoing secret.

The remaining two appellate cases involved federal criminal investigations of corrupt state governments, and those decisions are split. 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. 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.

With respect to several other privileges, courts have sometimes rejected government claims of privilege where application of the privilege would conceal government wrongdoing. 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.” 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 

211 28 U.S.C. § 535(b); but see Kenneth W. Dam, The Special Responsibilities of Lawyers in the Executive Branch, 55 CHI. B. REC. 4 (1974) (asserting that while 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).


214 In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (referring to “the White House” as the client.

215 In re: Lindsey, 158 F.3d 910 (8th Cir. 1997) (referring to “the public’s interest in uncovering illegality among its elected and appointed officials”)

216 In Re: A Witness before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002).

217 United States v. Doe, 399 F.3d 527 (2nd 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. In re: The County of Erie, 473 F.3d 413 (2nd Cir. 2007) (“in 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”).

218 Rosee v. Board of Trade, 36 F.R.D. 684 (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 played some part in the operative events”).
illegal, but nonetheless claimed the state secrets privilege shielded documents regarding the surveillance. 219 The district court refused to recognize this claim of executive privilege because it would prevent discovery of government conduct that was admittedly illegal. 220 And of course, in United States v. Nixon, the Supreme Court ruled that President Nixon’s claim of presidential communications privilege must give way to the governmental interest in uncovering evidence of wrongdoing. 221

Additional support for government lawyers’ 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 the fiduciary’s wrongdoing to the beneficiary. 222 Since government officials are fiduciaries of the public, these court decisions suggest that government lawyers may disclose government officials’ wrongdoing to the public. 223

This section 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 section, may have reasonably 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 section 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. 224 While working on that

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220 Black v. Sheraton Corp. of America, 371 F.Supp. 97 (D.D.C. 1974) (rejecting government’s claim of state secrets privilege regarding FBI’s warrantless surveillance because government “seeks to shelter improper, unauthorized acts from disclosure.”). The court also found that the Attorney General’s affidavit supporting the privilege claim lacked sufficient specificity.
223 Kathleen Clark, Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory, 1996 U. ILL. L. REV. 57 (government officials owe fiduciary duties); Bruce A. Green, Must Government Lawyers "Seek Justice" In Civil Litigation?, WIDENER J. PUB. L. (2000) (“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 . . .”).
case, Toobin was subject to two separate confidentiality regimes: the legal ethics obligation of confidentiality and the secrecy and prepublication review requirements for government officials who have access to highly classified national security information. In connection with the latter obligations, Toobin submitted his manuscript to the Central Intelligence Agency, which reviewed it to ensure that it did not contain any confidential national security related information, and it passed that review. 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. 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. 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 complaint with bar authorities.

One difference between governments and private clients concerns the way they control their information. This difference is significant because lawyers are permitted to disclose client information if the client consents. Private 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. That individual can make the decision of whether to grant or withhold the entity’s consent on an ad hoc basis.

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

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225 Toobin was licensed in New York and thus subject to the New York Code of Professional Responsibility Disciplinary Rule (DR) 4-101 (requiring lawyers to maintain the confidentiality of client confidences and secrets).
230 Model Rule 1.13(a).
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. These include laws that protect information about individuals’ privacy, such as the Privacy Act
and statutes that prevent the government from revealing information from individual tax returns;
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 the requirement that atomic and cryptographic information
be safeguarded. In addition, executive branch regulations prohibit employees from disclosing
“nonpublic” information for their own or a third party’s benefit. 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, on 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;” statements of policy and interpretations; final opinions and orders made in the
adjudication of cases; and manuals and instructions that affect members of the public. Similarly, the federal government and the states have myriad open meeting laws requiring much
of the government’s business to occur in public.

A third category of information law requires the government to disclose information upon
request. The federal Freedom of Information Act imposes this obligation on all executive branch
agencies, but exempts the legislative and judicial branches. Of the fifty states have similar
statutes. 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: where a statute prohibits
the government from disclosing the information; where an executive order authorizes the
government to keep the information secret; where an evidentiary privilege would protect that
document from disclosure in litigation; certain law enforcement documents; and personnel
or medical files that, if released, would constitute a violation of personal privacy.

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231 Hollywood v. Superior Court of Santa Barbara Cnty., 49 Cal.Rptr.3d 598 (2006) (superseded by grant of
review) (disqualifying prosecutor who “virtually gave the entire [prosecution] file, owned by the public, to the
filmmakers” who were considering making film about case against a capital defendant, perhaps in violation of laws
restricting dissemination of documents to third persons).

232 50 U.S.C. § 403-1(g)(1)(d) (intelligence sources and methods); 42 U.S.C. § 2272 (atomic energy

233 5 C.F.R. 2635.703. See Department of Interior Office of Inspector General, Report of Investigation: Julie
MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks, March 23, 2007 (concluding that government
official violated 5 C.F.R. 2635.703 Use of Nonpublic Information when she shared draft policies that were not
subject to disclosure under FOIA with industry lobbyist).


236 See list of such statutes at http://www.rcfp.org/ogg/ (last visited September 10, 2007).


Determining how open government laws should mesh with the law of attorney-client confidentiality is by no means obvious. But this type of issue has been tackled scores of times by courts and commentators trying 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.242

Government employees who make unauthorized disclosures of government information can be disciplined administratively, disciplined by bar authorities if they are lawyers, and even subjected to criminal prosecution under limited circumstances. The government has criminally prosecuted leaks of national security and other information as theft of government property.243

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 government attorney-client privilege. In state court cases across the country, courts 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.244

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242 See, e.g., Maine v. Department of Interior, 298 F.3d 60 (1st Cir. 2002) (discussing “the tension between the substantive provisions of the Freedom of Information Act (FOIA or the Act), 5 U.S.C. § 552, and the application of the attorney-client and work-product privileges”); Prior Lake Am. v. Mader, 642 N.W.2d 729 (Minn. 2002) (open meetings law has exception for meetings with attorney, but “only when there is a need for absolute confidentiality”); Dunn v. Ala. State Univ. Bd. of Tr., 628 So. 2d 519 (Ala. 1993) overruled on other grounds by Proctor v. Riley, 903 So. 2d 786, (Ala. 2004) (despite state open meeting law, state university board of trustees can meet in secret with their attorney in order to obtain attorney’s legal advice on pending litigation); Harris v. Baltimore Sun, 625 A.2d 941 (Md. 1993) (in case involving FOIA request to state public defender’s office, court construed lawyer confidentiality obligation to prohibit only disclosures that could harm client); Roberts v. City of Palmdale, 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330 (Cal. 1993) (applying attorney-client privilege exception to Public Records Act, Cal. Gov. Code, § 6250 et seq., and the Brown Act, Cal. Gov. Code § 54950 et seq.); McKay v. Board of County Commissioners of Douglas County, 746 P.2d 124 (Nev. 1987) (state open meeting law prohibits county board from meeting with its attorney in private); Neu v. Miami Herald Publishing Co., 462 So. 2d 821 (Fla. 1985) (state sunshine law applied even to city council meetings with city attorney, preventing application of attorney-client privilege to those meetings); Oklahoma Association of Municipal Attorneys v. State, 577 P.2d 1310 (OK 1978) (local government could meet in secret with attorney despite state sunshine law); (Laman v. McCord, 432 S.W.2d 753 (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); Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 69 Cal.Rptr. 480 (Cal.Dist.App.3d 1968) (open meeting law “did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly requiring confidentiality”); see also Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (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).


244 In The Matter Of Grand Jury Subpoenas, 574 A.2d 449 (N.J. App. 1989) (harmonizing open meeting law with attorney client privilege); Markowski v. City of Marlin, 940 S.W.2d 720 (Tex.App. Waco Div. 1997); Maxwell v. Freedom of Info. Comm’n, 794 A.2d 535, 537 (Conn. 2002); McKay v. Board of County Commissioners of
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, one must examine the government’s information control regime. Consent can be found as follows: If the information control regime requires the government to disclose particular information (such as an agency’s final decision in an adjudication\(^\text{245}\)), then the government has consented to its disclosure.\(^\text{246}\) 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. 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.\(^\text{247}\)

In addition, unlike private sector clients, governments generally have policies favoring disclosure of information unless there is a specific reason not to disclose. One finds this policy in freedom of information laws, which set out a general right of access to government records, and then specifies exceptions to that right of access. In other words, 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.\(^\text{248}\) This presumption in favor of disclosure is consistent with principles of robust democratic government. It is 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.\(^\text{249}\)

One jurisdiction has already made explicit this type of exception to confidentiality. Lawyers licensed by the District of Columbia are permitted to disclose “when . . . required by

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\(^{245}\) 5 U.S.C. § 552 (a)(2).

\(^{246}\) Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality And Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991) (asserting that “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.”).

\(^{247}\) Glavin, Note, *supra*. See Snepp (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).

\(^{248}\) 5 U.S.C. § 552(4)(B) (where a requester appeals an agency’s denial of information, “the burden is on the agency to sustain its action.”)

\(^{249}\) McGee v. Casey, 718 F.2d 1137 (DC Cir. 1983) (rejecting former CIA employee’s challenge to CIA’s decision preventing him from disclosing confidential national security information). Provide additional government employee speech cases. Perhaps discuss Garcetti v. Ceballos here?
law or court order,”250 but a government lawyer may also disclose when “permitted or authorized by law.”251 This language seems to suggest that a government lawyer may disclose information whenever disclosure would be permitted under the open government laws, such as the Freedom of Information Act.252

Applying this analysis to Jeff Toobin’s memoir (discussed at the beginning of this section), Toobin’s disclosure appear to be consistent with the types of information that are subject to disclosure under the Freedom of Information Act. And Toobin followed a disclosure approval procedure similar to the procedure that the next section recommends be adopted for all government lawyers.

IV. The Need for an Orderly Procedure for Disclosures

The previous section 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 information which the government must reveal under freedom of information 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 future misconduct.253 With regard to information covered by freedom of information (FOI) laws, governments need to set up a procedure so that someone other than the lawyer desiring disclosure makes the determination of whether this information must be disclosed under the law. Otherwise, lawyers attempting to apply the FOI standard themselves are likely to have a

250 D.C. Rule 1.6(e)(2)(A) (2007) (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.)

251 D.C. Rule of Professional Conduct 1.6(e)(2)(B) (emphasis added)

252 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,” D.C. Rule 1.6, Comment [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,” D.C. Rule 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.

253 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 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.
bias favoring disclosure. This section sketches out a few ideas about the appropriate procedures for government lawyers’ disclosing wrongdoing and other government information.

A. Procedures for Disclosing Government Wrongdoing

Lt. Cmdr. Matt Diaz had spent 18 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 that human rights organization. That 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.”

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 lawyers 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 of prisoners and argued internally for a change in policy. Diaz was prosecuted and sentenced to six months in prison for the unauthorized release of classified information. Mora was given a “Profile in Courage” award by the JFK Library. 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. Because of those duties, the lawyer needs to take certain steps prior to disclosing 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. If the wrongdoing is ongoing, the government needs to make changes so that it does not continue

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257 Model Rule 1.4 (b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); 1.7 Comment 1 (“Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.”).
258 Comment to Model Rule 1.4 (“When the client is an organization or group, . . . the lawyer should address communications to the appropriate officials of the organization.”).
the misconduct. If the wrongdoing is entirely in the past, 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 to 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 wrongdoing. Only after ensuring that a responsible party has been given 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 policies and been unsuccessful, then she could appropriately approach either the state Attorney General, Auditor or state legislature, all of which had authority to investigate the alleged misconduct. Only if other government agencies are unwilling or unable to take action, then the lawyer may disclose the misconduct to the public or the press. This step-wise disclosure approach is more moderate and nuanced than that found in most state and federal whistleblower protection statute, which permits 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 after Sarbanes-Oxley. Under that 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. Under this proposed procedure for government lawyers, the lawyer must first bring the information to the attention of an appropriate actor within government. That official may agree with the lawyer’s legal assessment, and begin taking corrective action. Or the official may convince the lawyer that the alleged wrongdoing was not actually illegal. 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 FDIC. The Commissioner learned about the situation only during a meeting with the FDIC, and proceeded to fire Crandon.

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) p. 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.

A state court rejected her wrongful discharge claim, finding that she had improperly disclosed confidential information.\footnote{Crandon v. State Banking Comm., 987 P.2d 92 (Kan. 1995). 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.}

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.\footnote{Model Rule 1.13 comment.} If the entity succeeds in remediying 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 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 government lawyers from themselves.

In light of the statutory and common law support for government lawyers’ ability to disclose government wrongdoing, state supreme courts should amend the professional rules to clarify that government lawyers may disclose past government wrongdoing and to set out an appropriate procedure for such disclosure. The rule should clarify that a government lawyer must first exhausted 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.

\section*{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 was representing the Division of Environmental Protection (DEP) in litigation to enforce state landfill laws. During a meeting with the landfill owner, a representative of DEP indicated that its position on landfill requirements might change. The Attorney General later revealed this possible DEP change in position to a member of the public who was part of an environmental group. Such a revelation might have undermined the political ability of DEP to make the change, and the DEP filed ethics charges against the Attorney General based on this unauthorized disclosure.\footnote{Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W. Va. 1995).} McGraw argued that DEP had already revealed
this information to the opposing party in a case, and that this information would have to be disclosed under the state FOIA. But the West Virginia Supreme Court ruled that the information was still subject to confidentiality under West Virginia’s Rule 1.6, which is not subject to waiver through disclosure to third parties the same way that the attorney-client privilege is. The court publicly reprimanded Attorney General McGraw for the unauthorized disclosure.

If one accepts the assertion that government lawyers’ confidentiality obligation does not, as a substantive matter, include information that must be disclosed under freedom of information laws, then it would seem that Darrell McGraw did not violate his duty of confidentiality. But this 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 freedom of information laws. The Supreme Court has recognized a similar procedural component to a confidentiality duty with respect to 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 without first submitting the book to the agency for prepublication review. Even though the book did not contain any confidential information, the Court nonetheless found that Snepp violated his fiduciary duty to safeguard confidential information by refusing to submit to the designated prepublication review procedure. Similarly, government lawyers need to deal with both a substantive confidentiality standard as well as the procedures for protecting confidential information.

In order to implement this freedom of information 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. But two federal agencies do have similar procedures in place: one for employees of the Securities and Exchange Commission (SEC) has a screening procedure for employees who have had access to

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267 provide text of W.Va. Rule 1.6


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 federal 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.” 461 S.E.2d at xxx.. 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[,]" (quoting Manchin v. Browning, 296 S.E.2d 909 (W.V. 1982)). Lawyers who by statute are given more decision-making authority may also have the ability to consent to disclosures on behalf of their client.


270 Id. at text accompanying note 4 (government stipulated that Snepp’s book did not reveal any classified information).

271 Id. (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").

272 But see Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 MICH. L. REV. 676 (2005) (noting that the Justice Department’s Office of Legal Counsel publishes the opinions it issues only after “seek[ing] permission from the requestors”)

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confidential investigations, and the Central Intelligence Agency (CIA) has a prepublication review procedure for employees with high-level 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. Similarly, the Central Intelligence Agency requires its employees to submit all writings related to the CIA to its Publications Review Board, which vets the document to ensure that it does not contain any confidential national security information. While these review procedures are not without problems, 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. Usually, these disclosures go unremarked. Occasionally, they cause a furor. 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 finds 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 lawyers’ advice to their client would be subject to the attorney-client privilege, and thus is not subject to mandatory disclosure under the Freedom of Information Act. But Mora was describing what he saw as misconduct on the part of other government officials. Under the analysis in this 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.

273 17 C.F.R. 200.735-4(e)(1). See also 5 C.F.R. 2635.703, which prohibits all executive branch employees from “the improper use of nonpublic information to further his own private interest or that of another.” That regulation states that nonpublic information includes information that is:

- routinely exempt from disclosure under the Freedom of Information Act,
- 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).

274 See McGehee v. Casey, 718 F.2d 1137 (DC Cir. 1983); United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (upholding requirement that former CIA employees to submit manuscripts for pre-publication review for classified information).


277 Jane Mayer, The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted, NEW YORKER (Feb. 27, 2006).
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 in disclosing wrongdoing or other information that would be subject to disclosure under freedom of information laws.