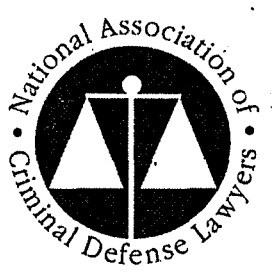

Written Statement of
Tim Evans

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Judiciary Committee of the United States House of Representatives;
Subcommittee on Courts and Intellectual Property

Re: H.R. 3386
("Ethical Standards for Federal Prosecutors Act of 1996")

Tim Evans
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National Association of Criminal Defense Lawyers' Director, Tim Evans of Fort Worth, Texas, has practiced criminal law for over 25 years.

He graduated from Texas Tech School of Law in 1970 and prosecuted as a Tarrant County (Ft. Worth) Assistant Criminal District Attorney until 1976.

He has since served as President of the Texas Criminal Defense Lawyers Association and Chairman of the Criminal Justice Section of the State Bar of Texas. In 1987, Mr. Evans was selected as the "Outstanding Criminal Defense Attorney of the Year" by the State Bar of Texas.

He is currently serving his second term on the Board of Directors of the National Association of Criminal Defense Lawyers.

Mr. Evans has represented clients ranging from the National President of the Bandidos Motorcycle Club to judges, bankers, and the Speaker of the Texas House of Representatives. He represented, *pro bono*, Norman Allison, a defendant in the Waco-Branch Davidian case. His client was acquitted and is at home with his family in England.

Mr. Chairman and Distinguished Members of the Committee:

Thank you for providing me this opportunity to testify on behalf of the members of the National Association of Criminal Defense Lawyers (NACDL), in strong support of H.R. 3386, which would clarify that federal prosecutors must abide by the same state and federal court rules of ethics by which all other lawyers must abide -- *i.e.*, that federal prosecutors are not "above the law," as DOJ unfortunately asserts.

The 9,000 direct, 22,000 state and local affiliated members of NACDL are private defense attorneys, public defenders, law professors and judges. They have devoted their lives to ensuring justice and due process for persons and corporations accused of crime, and promoting the proper and fair administration of criminal justice in America. NACDL's interest in, and qualifications for understanding the grave dangers posed by allowing federal prosecutors to usurp unto themselves the state and federal court rules of ethical practice, and to police themselves as the Department of Justice (DOJ) has proclaimed it has the power to do.

BROAD-BASED APPLAUSE FOR H.R. 3386

H.R. 3386 is a much-needed, long overdue measure to reign in professed self-policing prosecutors run amuck, and to end the reign of prosecutorial imperialism begat by the roundly condemned "Thornburgh Memorandum" of June 1989. We support the bill and its effort to re-confirm the basic principle of fairness that prosecutors must abide by the rules of ethics just like all other lawyers.

NACDL joins the federal courts, the (unanimous) Conference of Chief Justices of the 50 State Supreme Courts, the American Corporate Counsel Association, and numerous other national, state, and local authorities and organizations, in staunch condemnation of DOJ's attempt to opt itself out of the fundamental state and federal court rules of attorney practice forbidding all lawyers from communicating directly with opposing parties who are already represented by counsel. *See e.g.*, Attachment A (Unanimous 1994 Resolution by the State Court Chief Justices, in opposition to Reno Justice Department's elevation of "Thornburgh Memorandum" to status of Federal Regulations); Attachment B (resolution condemning Reno Regulations, by Illinois State Bar Association); Attachment C (condemnation of Reno Regulations by General Motors); Attachment D (condemnation of Reno Regulations by University of Pennsylvania Law School Professor and Director of Center on Professionalism, Curtis R. Reitz); Attachment E (Joint Organizational Letter of October 24, 1995, at pp. 4-6, calling for congressional disapproval of "Thornburgh Memorandum"/Reno Regulations).

FEDERAL PROSECUTORS: ABOVE THE LAW?

All lawyers, including those employed by the federal government, must be admitted to practice law in one or more states. The Supreme Court of each state adopts and enforces ethical rules applicable to all lawyers admitted and practicing within its jurisdiction. Federal courts in each state normally adopt those rules (at least) as their own. State and federal *judicial authorities* monitor the conduct of admitted or practicing attorneys. *See generally e.g.,* Attachment D (condemnation of Reno Regulations on Separation of Powers (federal

court powers) grounds in particular, by University of Pennsylvania Law School Professor and Director of Center on Professionalism, Curtis R. Reitz).

Section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations ("The Final Rule" or "Reno Regulations"), 59 Fed. Reg. 39910, purports to self-exempt federal prosecutors from all state and local federal court rules governing lawyers' conduct. The Final Rule is the *self-regulatory aggrandizement* of the roundly condemned "Thornburgh Memorandum" on DOJ un-ethics, which was first circulated among federal prosecutors in June of 1989. *See generally* 55CrL 2269 (BNA) (effective Sept. 1994).

The Thornburgh Memorandum advised DOJ lawyers that any disciplinary rule for the profession that placed a burden on them was invalid under the Supremacy Clause of the U.S. Constitution, and therefore, the rule against contacts with represented parties was unenforceable against federal lawyers. The Memorandum created immediate controversy, in the legal profession, Congress and the Courts (State and federal). *See e.g.*, Attachments.

Why? Because in America, until June 1989, anyway, attorney conduct rules have always applied equally to private practitioners and government lawyers alike, including the powerful prosecutors. The particular rule at issue here, which forbids a lawyer from communicating with another lawyer's client, has been on the books for almost 90 years, and is no exception. But instead of following the rules by which all other lawyers must abide, under DOJ's self-aggrandizing regulations, attorneys for the federal government claim to be subject only to "rules of conduct adopted by the Attorney General." In other words, the prosecutors' own boss, rather than neutral state or judicial authorities, would be responsible

for regulating, or not, the prosecutors' conduct. H.R. 3386 would overturn this DOJ attempt at self-aggrandizement; deservedly so.

FAILURE OF DOJ SELF-POLICING

For those alarmed by the prospect of prosecutors unconstrained by state and federal court rules of conduct, the history of the Department of Justice (DOJ) self-regulation is anything but comforting.

For instance, in 1990, a House Government Operations Subcommittee looking into DOJ's internal controls asked the Department's Office of Professional Responsibility (OPR) what disciplinary action it had taken in each of ten cases in which federal judges had made written findings of prosecutorial misconduct. After lengthy delay, the panel was informed that "no disciplinary action has been taken in any of the ten cases." The Subcommittee observed that "repeated findings of no misconduct, and the Department's failure to explain its disagreements with findings of misconduct by the courts raises serious questions regarding what [it] considers 'prosecutorial misconduct.' . . ." *See* Attachment F (Report findings).

Things have not gotten better since 1990. In 1993, federal judges reversed the convictions of 13 alleged members of the El Rukn street gang on conspiracy and racketeering charges after learning that assistant U.S. attorneys had plied "informants" with alcohol, drugs, and sex in federal offices in exchange for their "cooperation," and had knowingly used perjured testimony. Finally, after two years, the DOJ's OPR did recommend that one prosecutor be terminated, but even that prosecutor has remained on the DOJ payroll.

Likewise, that same year, Judge Richard Posner of the Seventh Circuit Court of Appeals (a Reagan-appointee) observed: "[t]he increase in the number of federal prosecutors in recent years has brought with it problems of quality control." *U.S. v. Van Engel*, 15 F.3d 623, 626 (1993), *cert. denied,* 114 S.Ct. 2163 (1994). Judge Posner (now the Chief Judge for the Seventh Circuit) went on to describe and condemn a campaign of harassment waged against a respected criminal defense attorney who was forced to abandon his representation of a client in order to defend himself:

> The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; . . . . On meager grounds the U.S. Attorney's office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the operation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years.

Id. at 629.

In yet another recent case, in which an assistant U.S. attorney concealed evidence and then lied about it, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit (another Reagan-appointee) wrote: "Troubled as we are by the prosecutor's conduct, we're more troubled still by the lack of supervision and control exercised by those above him. *** *How can it be* that a serious claim of prosecutorial misconduct remains unresolved — even unaddressed — until oral argument in the Court of Appeals?" *U.S. v. Kojayan,* 8 F.3d 1315, 1320 (1993) (emphasis added here).

Indeed, how *can* this be? There is real concern that public fear about crime has prompted many federal prosecutors to "cut corners." In numerous cases, such as in the *Kojayan* case, prosecutors either withhold material evidence or lie about it (or both), with no consequence from their superiors of the department (Main Justice). In *Kojayan*, for example,

the U. S Attorney "supervising" the lawless prosecutor actually defended the conduct of the assistant before the Ninth Circuit. And the problem seems to be rooted "at the top." Is the DOJ's answer to systematic prosecutorial misconduct really the one professed in the Press Release issued by then-Chief of the Criminal Division, Jo Ann Harris during my testimony before the House Waco hearings -- that unconstitutional behavior by federal prosecutors, subverting material evidence, to say nothing of "mere" unethical behavior, is but "prosecution 101" among DOJ lawyers? *See* Attachment G (internal agency memoranda revealed through House Waco Investigatory Hearings of 1995; and official mischaracterization of same in DOJ "prosecution 101" Press Release). Clearly, the problems begat and/or reflected in DOJ's claim for self-aggrandized, self-policing, persist.

DOJ'S SUPREMACY CLAUSE ARGUMENT

As I've noted, the current DOJ regulations date back to 1989, when then-Attorney General Richard Thornburgh issued an internal memorandum advising his federal prosecutors that the extent to which they were bound by the practice rules of the states where they are licensed is strictly up to DOJ to decide, as a matter of internal policy. The purported basis for this bald claim was that the Supremacy Clause of the United States Constitution empowered the federal executive branch to self-police itself, thereby "trumping" generations-old state (and local federal court) licensing rules about communicating with represented parties.

First, absent congressional delegation of such supreme powers, the Supremacy Clause fails. Further, Federalism renders this argument an empty rationale. *See e.g.*, Attachments A and B.

This Supremacy Clause claim has been roundly rebuffed by the Constitution-guarding courts that have considered it. For example, in upholding the right of New Mexico's attorney disciplinary board to discipline a federal prosecutor, U.S. District Judge Juan Burciaga wrote:

> The idea of placing the discretion for a rule's interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession.

In the Matter of Doe, 801 F. Supp. 478 (D.N.M. 1992). In a similar case in California, *United States v. Lopez*, 765 F. Supp. 1433 (N.D.Cal., 1991), U.S. District Court Judge Marilyn Patel wrote:

> Relying on a faulty and tortured reading of existing authority, the Attorney General has issued a policy directive instructing attorneys of the Department of Justice to disregard a fundamental ethical rule embraced by every jurisdiction in this country. . . . The Department of Justice, invoking the separation of powers doctrine, now seeks to render the court powerless to enforce its own rules and to protect the integrity of the criminal justice system. This court will not allow the Attorney General to make a mockery of the court's constitutionally-granted judicial powers.

In reviewing the trial court's decision in *Lopez*, the federal appellate court stated:

> The government, on appeal, has prudently dropped its reliance on the Thornburgh Memorandum in justifying AUSA Lyon's conduct, and has thereby spared us the need of reiterating the district court's trenchant analysis of the inefficacy of the Attorney General's policy statement.

U.S. v. Lopez, 4 F.3d 1455 (9th Cir. 1993). *See also U.S. v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995) (Buckley, J.) (overruling DOJ's latest self-aggrandizing regulations by holding that

the New Mexico State disciplinary did indeed have the power, indeed, the responsibility, to investigate one of its licensed lawyers, assistant U.S. Attorney G. Paul Howes, for misconduct).

Arrogantly failing to heed the condemnations, the current regulations are likewise bottomed on the flawed Supremacy Clause argument. *See e.g.*, Attachment A (unanimous resolution by the nation's State Court Chief Justices in condemnation of DOJ's Supremacy Clause argument, on Federalism grounds).

Moreover, the Supremacy Clause fails completely to recognize the Separation of Powers problems inherent in DOJ's proclamation that its lawyers need not abide by the local practice rules of the *federal* courts in which they practice. The current regulations' subversion of the local rules of practice of the federal courts is something the Supremacy Clause cannot even arguably justify. *See e.g.,* Attachment D. These local federal court rules frequently, if not almost always track the state rules of the state in which the federal court is located. And they are all essentially the same. The DOJ's protestations notwithstanding, there is simply no crazy, chaotic plethora of different rules of conduct. Moreover, all attorneys are responsible for knowing the rules of the courts in which they practice. These rules are certainly no more ambiguous than any of the others. Again, all other lawyers manage. We should expect no

less from those who wield the power to take one's life, liberty and/or property.[1]

DOJ claims about a "new and sensitive" set of regulations notwithstanding, these current regulations, like the predecessor Memorandum, place DOJ on record advocating a special exemption from the fundamental, generations-old, judicial rules of ethical attorney practice by which all others, including the prosecutors' adversaries -- the attorneys for the citizen and corporation accused -- must abide.

August 1994, in flagrant disregard of numerous comments from a broad array of organizations, ranging from NACDL to General Motors, the Department issued a formal regulation permitting its prosecutors to communicate directly with defendants who have lawyers. 77.2(a) of Part 77 of title 28 of the Code of Federal Regulations. The regulation also explicitly self-allows the blanket, unethical practice by federal prosecutors of questioning employees of corporate targets and defendants, without the corporations' attorneys being present. The regulations' "limitation" of this endorsement of unethical conduct to "control group" employees is still over-broad, and unacceptable.

Rather than heed these condemnations of the courts and numerous other groups victimized by the department's flawed Supremacy Clause argument, this Administration has

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[1] *See e.g., Berger v. U.S.*, 295 U.S. 78 (1935):

> [The prosecutor] 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 [he] shall win a case, but that justice shall be done . . . . He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Nor should his boss, the nation's Top Prosecutor, be able to make it otherwise.

actually elevated the dangerous internal memorandum precedent to a regulatory status, in the Reno Regulation.

CONCLUSION

Lawyers working for the federal government should be held to ethical standards *at least as high* as those to which all other lawyers are subject.[2] In a country where the only true sovereign is the Constitution, and in turn, the people, federal prosecutors must not be elevated to royalty. The grandiose federal self-regulation by DOJ, to consolidate judicial power in the Justice Department for its unilateral deployment against the citizenry, must be stopped immediately. H.R. 3386 would do this. We urge the Committee's strong support for the bill, and the Congress's adoption of it into law.

Thank you again for providing me this opportunity to share the views of the National Association of Criminal Defense Lawyers on the dire need for H.R. 3386.

Tim Evans
Director
National Association of Criminal Defense Lawyers

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[2] *See id.*

ATTACHMENT A

CONFERENCE OF CHIEF JUSTICES

RESOLUTION XII

Proposed Rule Relating to Communications with Represented Persons

WHEREAS, the Attorney General of the United States has promulgated for comment a proposed rule (Proposed Rule) which would permit lawyers employed by the U.S. Department of Justice (the Department) to communicate with represented persons under certain circumstances; and

WHEREAS, lawyers employed by the Department derive authority to practice law from their admission to the bar of the highest court of a State; and

WHEREAS, each State, under the authority of its highest court, is exclusively responsible for regulating the professional conduct of the members of its bar and establishing appropriate ethical standards and enforcement mechanisms; and

WHEREAS, this authority is essential to the administration of justice in each State, and could be eroded by such a regulation; and

WHEREAS, the Conference of Chief Justices (the Conference), by Resolution unanimously adopted on February 10, 1994, has expressed its grave concerns regarding the proposed rule; and

WHEREAS, pursuant to the foregoing resolution, the President of the Conference appointed a committee to present the Conference's grave concerns to the Attorney General; and

WHEREAS, the members of the Committee met with the Attorney General and her staff and prepared and submitted to the Attorney General on March 31, 1994, on behalf of the Conference, the "Comment on Proposed Regulation Governing Contacts by Department of Justice Attorneys with Represented Persons" (the Comment), and a proposal for resolving the issue; and

WHEREAS, the Comment, with supporting authorities concluded, in part, as follows:

(1) Lawyers employed by the Department are required by federal statutory law to be a member of the bar of a state, territory or the District of Columbia.

(2) Every lawyer admitted to practice by a state supreme court, including federal and state government lawyers, must abide by and be governed by that court's ethical rules.

(3) As a matter of policy and ethics, as well as principles of federalism and separation of powers, the state supreme courts have the sole and exclusive responsibility to supervise the practice of law in each jurisdiction.

(4) The Proposed Rule is antithetical to such policies, principles, and ethical considerations.

(5) The state supreme courts cannot permit one class of lawyers (in this case lawyers employed by the Department, an agency of the executive branch of the federal government), unilaterally to exempt itself from ethical rules imposed upon all lawyers by the judiciary of each state and the local federal district courts.

(6) The Proposed Rule does not fit within the term "authorized by law" in Rule 4.2 of the ABA Model Rules of Ethics or DR7-104(A)(1) of the ABA Code of Professional Responsibility, and it would fly in the face of the official comment and the ethical underpinning of Rule 4.2.

(7) The ABA House of Delegates (which promulgated the Model Rules and Code of Professional Responsibility adopted by the various state supreme courts and U.S. district courts) has unanimously opposed the principle behind the Proposed Rule.

(8) Federal statutory law, rather than supporting the Department's Supremacy Clause argument, would invalidate the Proposed Rule to the extent that it purports to create a "law" for purposes of the Supremacy Clause.

(9) Assuming Rule 4.2 could or should be amended or construed to permit some narrow law enforcement exemption, it must be the state supreme courts which do the amending or construing, not the Department.

WHEREAS, by letter dated August 1, 1994, the Department replied for the first time to the substance of the Comment and proposal for resolution of the issue which had been sent by the Conference to the Department on March 31, 1994, and in such letter the Department : (a) rejected the positions set forth in the Comment; (b) rejected the proposal of the Conference for resolution of the dispute without offering any counter -proposal; and (c) informed the Conference that the Department "has decided to proceed with our own regulation [and] expect the Final Rule to be published in the Federal Register at the end of this week."

WHEREAS, the legitimate law enforcement concerns of the Department can be accomplished by communication and cooperation with the Conference rather than by the Department's unilateral adoption of the Proposed Rule which is: (a) contrary to ethical considerations; (b) violates principles of federalism and separation of powers; and (c) is promulgated without appropriate authority.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Conference endorses the Comment and proposed resolution prepared and submitted by the Committee, and strongly opposes the Proposed Rule and the Final Rule of the Department.

2. The Conference respectfully urges the Attorney General not to make the Proposed Rule final as stated in the Department's letter of August 1, 1994 and to continue discussions with representatives of the Conference in an effort to resolve the issue and to avoid any regrettable constitutional confrontation which might arise if and when the Final Rule is implemented.

3. Without regard to the adoption of the Proposed Rule by the Attorney General, the Conference respectfully urges each of its members to continue to enforce the ethical rules upon all members of bars of the various states and jurisdictions.

Unanimously adopted by the Conference of Chief Justices at the Forty-sixth Annual Meeting in Jackson Hole, Wyoming, on August 4, 1994.

ATTACHMENT B

RESOLUTION

WHEREAS, the Attorney General of the United States has promulgated a Rule which would permit attorneys employed by the U.S. Department of Justice (the Department) to communicate directly with represented persons under certain circumstances; and

WHEREAS, attorneys employed by the Department derive authority to practice from their admission to the bar of the highest court of the state; and

WHEREAS, each state, under the authority of its highest court, is exclusively responsible for regulating the professional conduct of members of its bar and establishing appropriate ethical standards and enforcement mechanisms; and

WHEREAS; this authority is essential to the administration of justice in each State which could be eroded by such a Rule; and

WHEREAS; the Rule permits, among other things, Department attorneys to engage in ex parte communication directly with persons known to be represented by counsel on anticipated charges which have not yet been formally filed; or regarding grand jury testimony;or to further a Department investigation and preparation of a case against the represented person so long as the represented person has not been arrested or formally charged as to the specific charges about which the Department attorney is interrogating the represented person; and

WHEREAS; (1) Attorneys employed by the Department are required by federal statutory law to be a member of the bar of a state, territory or the District of Columbia,

(2) Every attorney admitted to practice by a state supreme court, including federal and state government attorneys, must abide by and be governed by that court's ethical rules,

(3) As a matter of policy and ethics, as well as principles of federalism and separation of powers, the state supreme courts have the sole and exclusive responsibility to supervise the practice of law in each jurisdiction,

(4) The state supreme courts cannot permit one class of attorneys (in this case attorneys employed by the Department, an agency of the executive branch of the

federal government), unilaterally to exempt itself from ethical rules imposed upon all attorneys by the judiciary of each state and the local federal district courts,

(5) The Rule does not fit within the term "authorized by law" in Rule 4.2 of the American Bar Association Model Rules of Ethics or Disciplinary Rule 104(A)(1) of the American Bar Association Code of Professional Responsibility, and it would fly in the face of the official comment and ethical underpinning of Rule 4.2,

(6) The American Bar Association House of Delegates (which promulgated the Model Rules and Code of Professional Responsibility adopted by the various state supreme courts and U.S. district courts) has unanimously opposed the principle behind the Rule,

(7) Federal statutory law, rather than supporting the Department's Supremacy Clause argument, would invalidate the Rule to the extent that it purports to create a "law" for purposes of the Supremacy Clause; and

WHEREAS, the Conference of Supreme Court Justices has unanimously condemned this Rule; and

WHEREAS, it is antithetical to an ordered system of justice for Department attorneys to be exempt from the same ethical standards that apply to all other attorneys; and

WHEREAS, all Department attorneys licensed to practice law in the state of Illinois have sworn a solemn oath to uphold and abide by the Illinois rules of Professional Conduct; and

WHEREAS, the Attorney General of the United States has no authority to interfere with the responsibility of the Illinois Supreme Court to regulate the professional conduct of members of its Bar; therefore

BE IT RESOLVED that any attorney licensed to practice law in the state of Illinois, whether employed by the Department or otherwise, who violates the Illinois Rules of Professional Conduct, shall be subject to all of the consequences attendant to such a violation, 28 C.F.R. pt. 77, et seq. notwithstanding; and,

BE IT FURTHER RESOLVED that this resolution be spread of record and delivered to the Illinois Supreme Court, the Attorney General of the United States, and members of the Illinois Congressional Delegation by the President of the Illinois State Bar Association.

Adopted by the Illinois State Bar Association's Board of Governors this 18th day of November, 1994.

ATTACHMENT C

ATTACHMENT C

General Motors Corporation
Legal Staff

Facsimile
(313) 974-0115

Telephone
(313) 974-1461

April 1, 1994

VIA FAX

F. Mark Terison, Esq.
Executive Office for United
States Attorneys
United States Department of Justice
10th St. and Constitution Ave., N.W.
Washington, D.C. 20530

Dear Mr. Terison:

Re: Comments to Proposed Department of Justice Rule on Communications with Represented Persons

Included for your consideration are comments on the subject proposed rule. If we can provide any additional information which would be of use to the Department, please contact me.

Introduction

There can be little argument that the intention of the proposed rule, and related Department of Justice United States Attorney Manual provisions, are laudatory to the extent they seek to "... ensure that government attorneys adhere to the highest ethical standards ..." while creating a single standard under which these attorneys must conduct their duties. However, there can also be little argument that if promulgated as a federal rule, the standard proposed by the Department will in fact create the lowest threshold for ethical conduct for any group of attorneys in this country. Putting aside for another day the question of whether such a development is lawful, it is simply irreconcilable with the role and stature of United States Attorneys within the United States legal system generally, and the criminal justice system specifically.

The proposed rule would stand on its head the minimum ethical rule imposed on every other practicing attorney. The Department, on the one hand, cannot express a "commitment" to the ethical standard detailed in DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and Rule 4.2 of the Model Rules of Professional Conduct, and on the other hand, then proceed to excuse the very thrust of the conduct proscribed by those standards: all in the name of

investigative efficiency. The standard the Department imposes on itself should meet or exceed, not fall short of, the behavior demanded of the least common denominator in the profession. The Department should reconsider the inherently inconsistent implications of this proposed rule, both in its theory and its application, before proceeding any further.

Artificial Distinction Between
Represented Persons and Represented Parties

The Department's attempted distinction between represented persons and represented parties for purposes of the proposed differences in ethical considerations by government attorneys is fundamentally flawed. The divining rod to be used by the Department attorneys to guide the different treatment of persons and companies under the proposed rule is the status of the person or company at a moment in time -- a status, of course, not determined by some objective third party or court, but by the government attorney. Therefore, attorney conduct, which would be unethical the moment after the government chooses to classify the subject or target of its investigation as a defendant, would by the same rule be deemed ethical if the attorney performs the same act only a moment before the government (that same attorney) chooses to indict, arrest or name that person or company as a defendant. One need not be a cynic to immediately understand the problems with that analysis or its consequences.

The strain of the government's own explanation for the proposed different classes of unindicted persons and companies during the "negotiation" of an agreement reveals the fundamental flaw with its approach. The government recognizes that: "In this context, the prosecutor's superior legal training and specialized knowledge could be used to the detriment of the untutored layperson." 54 CRL 2191, 2193 (March 9, 1994). However, proposing a rule which would place a prosecutor possessing these same "unfair" advantages in a position to exploit that disparity and extract from a represented person the predicate information fundamental to the "negotiation" of a plea or settlement is the ultimate in exalting form over substance. An attorney does not check his skills at the door when he proceeds with an "interview" instead of a negotiation. The distinction cannot be logically reconciled. In short form, the government is asserting that ethics are tolerable as long as the result it desires is achieved, but those ethics should not be allowed to interfere with obtaining the result. Ethics and integrity can't be so conveniently "compromised" in the name of investigative efficiency.

The stated rationale for this proposed leniency in the ethical standard demanded of all other attorneys can be distilled down to an argument about results and efficiency. Certainly, it would be easier for government prosecutors to be given license to end-run counsel and contact represented persons at their own discretion as an investigation unfolds. However, the assertion that somehow the closer relationship between prosecuting attorneys

and the agents investigating cases today justifies a surgically altered ethical standard -- indeed makes such an amputation of the body of the basic ethical standard an indispensable element of government investigations -- is mystifying. Certainly, these government attorneys can continue to work closely with agents on cases as they deem appropriate without gutting the ethical strictures demanded of the profession. Other than to forego an unfair advantage over intimidated, frightened potential defendants or their employees, what other real issue is at stake for government attorneys living by the minimum standard expected of all other attorneys within the profession?

Representation by counsel is the oldest and most guarded of our rights as free people. Equally fundamental are the corollary principles that attorneys must respect the sanctity of the attorney-client privilege and the right to communicate with hostile attorneys through known, designated counsel. These principles cannot be violated justifiably on the premise of investigative efficiency suggested by the Department.

It is inconceivable that an attorney in private practice representing a person with a potential money damage claim against General Motors is subjected to a higher ethical standard under the Department's proposal than a government attorney with the potential to pursue criminal sanctions against the company or its employees. In every other respect, the standards under the criminal law require a higher showing than the civil system. The reasons are obvious. No stakes are as high for a person or company than the prospect of being named a defendant in, let alone convicted of, a criminal prosecution. The goal of the government to succeed in its criminal prosecutions cannot be the vehicle upon which the Department proposes to ride a compromise of the ethical standard expected of a lawyer in a garden variety personal injury claim. The ends stated in its explanation certainly don't justify these extreme means by the Department.

Moreover, in its application, the proposed rule works an equally untenable strain upon the attorneys it seeks to assist. The hair-splitting distinctions for different classes of represented persons will undoubtedly result in different treatment of similarly situated potential defendants depending on the conscience of the individual government attorney. With all due respect to the salutary stated desire of the Department to eliminate "uncertainty and confusion," the proposed rule would have just the opposite effect. Rather than providing the bright line intended, the government attorney will be required to wrestle with sub-issues, largely driven by his own integrity, in assessing the status of an individual or company, and his own motives in choosing the timing of those decisions about status. It creates a larger ethical swamp for individual attorneys in the government than the one the proposed rule is intended to drain.

With all due respect to the good intentions of the Department, its suggestion that it will police itself under the rubric of "policy" considerations is not comforting to those subject to the potential abuses of the proposed rule. Ethics are not always convenient or efficient. They are, however, more indispensable than any efficiency to the Department their abolition would create.

Organizations and Employees

This section of the proposed rule is equally disturbing in its artificial distinction between "control group" employees and the vast majority of company employees who make decisions for the company and/or seek and obtain legal counsel from company attorneys. There is no legal, or practical, basis for the limitation the Department seeks to place upon its ethical obligations when companies are the represented person or party.

The Supreme Court was faced with the same type of "control group" argument in the context of similar attorney-client privilege issues in Upjohn Company v. United States, 449 U.S. 383 (1981). It is well settled that the communications between average, middle-level (even low-level) company employees and company counsel -- regardless of who initiates the communication -- are subject to the same privileges and rights as communications between individuals and their legal counsel.

For the same reasons that the control group test once posited by the government has been rejected in Upjohn, it has no place in the government's consideration of the ethical standards for government attorneys. The Supreme Court has recognized that "... middle level--indeed lower level--employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties ...." Id. at 391. The Department's proposed distinction among classes of company employees is artificial. It is also wrong. It ignores the reality of business that the Supreme Court recognized 13 years ago; a reality which has been underscored by company "downsizing" and empowerment of even lower levels of authority to make company decisions in an effort to compete in a global marketplace. Company decisions, and attorney involvement with company employees, don't take place in ivory towers.

Consequently, the assumptions upon which the Department's stated rationale for its distinction about classes of employees, reserving for ethical treatment only anticipated government attorney communications with the so-called control group, are just plain wrong. There is no factual support for the assertions contained in the stated premise based on the real world conduct among large companies like General Motors. Likewise, the government's own theories of attribution have been applied to the conduct of low-level employees when the government is pursuing a criminal prosecution against a company. Unless the

Department is now suggesting a radical departure from its own theories of attribution, and will seek prosecution only when members of the so-called control group act, the employee class distinction in the proposed rule is not logical. The Department can't have it both ways.

Moreover, the problems attendant with trying to establish the so-called control group further illustrate the fallacy of the proposed rule. The rule leaves to the government attorney, or apparently other government attorneys in supervisory positions, the assignment of making these distinctions -- in all likelihood with little or no knowledge about the company, its structure or the details about who the most appropriate witnesses may be.

Finally, the theoretical or potential "abuses" by company counsel upon which the Department seeks to premise this relegation of companies to second-class status (with respect to government attorney ethical standards) are unfamiliar to us. The practicing attorneys responsible for handling such matters at General Motors are mostly former Assistant United States Attorneys. Our ability to identify appropriate witnesses and documentation preparatory to an interview desired by government attorneys as part of an investigation has eliminated countless waste, frustration and unnecessary sabre-rattling.

There are sufficient disincentives already in existence for uncooperative, recalcitrant companies (the sentencing guidelines come to mind) without creating artificial benchmarks for disparate treatment of company employees on the basis that a company counsel "might" be abusive. The side-effects of the medicine proposed by the Department is certainly far worse than the perceived illness -- particularly in light of the other available remedies to the disease.

Conclusion

The proposed rule should not be promulgated by the Department. If there is uncertainty about the ethical standard by which its attorneys must conduct their affairs, we urge the Department to simply adopt the model rule. The proposed rule has neither the ethical sufficiency, nor the exactitude, the Department desires. The Department, its attorneys, and potential defendants are entitled to more.

Respectfully submitted,

Michael J. Robinson
Attorney

MJR:kjp

ATTACHMENT D

ATTACHMENT D

UNIVERSITY of PENNSYLVANIA

The Law School
3400 Chestnut Street
Philadelphia, PA 19104-6204

April 4, 1994

The Office of the Associate Attorney General
United States Department of Justice
10th St. and Constitution Ave. NW
Washington, DC 20530
FAX: 202-514-1724

Attn: John Dwyer, Esq.

Re: Proposed Rule on Communications With Represented Persons

Dear Mr. Dwyer:

The Proposed Rule on Communications With Represented Persons, 59 FR 10086, fails completely to take account of the primary and exclusive source of authority to regulate the conduct of attorneys, government and private, in judicial matters arising out of federal law enforcement proceedings. This failure undermines the validity of the proposed rule in its entirety.

Federal courts are the final repository of authority to determine the law governing lawyers in matters before them. Within the federal judicial branch, the Supreme Court has permitted lower courts to exercise this power by local rule. Acting under that delegated authority, all federal district courts have adopted local rules that govern the professional conduct of attorneys. Typically, local rules of district courts incorporate by reference the conduct rules in force in the states in which the federal courts sit, but district courts' local federal rules can and do depart from the local state rules.

The proposed rule fails to recognize that the primary law governing government attorneys are these federal rules adopted by federal courts. The regulation, whatever its power may be to preempt state law, does not purport to preempt rules of federal court. Very likely every federal district court has in force a local rule that governs communications with represented persons, whether by incorporating into federal law a version of the Code of Professional Responsibility or of the Rules of Professional Conduct or by adopting its own rule on this subject.

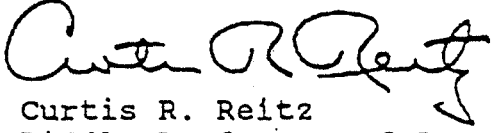
Preemption of state law, whatever that may mean in this context, does not affect or change controlling federal law. If the proposed regulation were to be promulgated, it would result in an immediate confrontation between the executive branch and the judicial branch. Government attorneys who follow the proposed rule will violate federal courts' rules. The Department of Justice should not instruct or authorize its attorneys to violate or ignore controlling federal law. The proposed rule is fatally deficient.

The Department of Justice has valid basis for concern about the content of current law governing lawyers engaged in federal law enforcement investigations and proceedings. Decentralized and fragmented federal law governing lawyers poses major problems for multistate and national law enforcement. The solution, however, - and the only solution - is to address the problem of current federal law at its source. The Department of Justice, with others, should formulate proposals for national rules to be adopted under the rulemaking powers of the federal courts.

The Department of Justice has no valid basis for concern about application of the disciplinary machinery of state systems to government attorneys. Attorneys, whether government or private, who conduct themselves in federal proceedings in accordance with - or who violate - the federal law governing lawyers are subject to the discipline of federal law. State disciplinary law does not displace or supersede federal law. Lawyers who violate a controlling conduct rule of a federal court may also violate state norms; in this circumstance they may lawfully be subject to sanctions by both federal and state authority. Lawyers whose conduct does not violate a controlling conduct rule of a federal court are not subject to federal discipline. Nor are these lawyers, government or private, subject to state discipline if, perchance, their conduct, lawful in federal court, may be deemed violative of different conduct rules that exist for state proceedings. If state courts or disciplinary authorities were to exert their power in these circumstances, the Supremacy Clause bars their actions.

The Department of Justice should withdraw the proposed rule.

Sincerely,



Curtis R. Reitz
Biddle Professor of Law
Director, Center on Professionalism

ATTACHMENT E

A Joint Letter from

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October 24, 1995

Honorable Bill Zeliff
Chairman
Subcommittee on National Security,
International Affiars, and Criminal Justice
Committee on Government Reform and Oversight
B-373 Rayburn House Office Building
Washington, D.C. 20515

Honorable Karen L. Thurman
Ranking Member
Subcommittee on National Security,
International Affairs, and Criminal Justice
Committee on Government Reform and Oversight
B-373 Rayburn House Office Building
Washington, D.C. 20515

Subject: Necessary Federal Law Enforcement Reforms -- Some Lessons from Waco and Ruby Ridge

Dear Representatives Zeliff and Thurman:

We represent a diverse group of organizations that frequently disagree on a number of policy issues. We are united, however, in the depth of our concern about the need for consistent oversight of federal law enforcement practices and remedies for abuses of power.

In January 1994, many of us wrote to President Clinton urging him to appoint a national commission to review the policies and practices of all federal law enforcement agencies and to make recommendations regarding steps that should be taken to ensure that such agencies comply with the law. We told the President that there was evidence of significant abuses of civil liberties and human rights by these agencies. We listed general areas of concern, and we cited specific examples of abuse. A copy of the letter is enclosed so that you may review our original concerns.

Recent Congressional hearings on the Waco and Ruby Ridge tragedies and the controversy surrounding them further highlight the need for consistent and strong oversight of federal law enforcement practices. Accordingly, we set forth below a description of those issues that have become the focus of questions regarding abusive federal law enforcement practices.

Execution of Search Warrants and "Dynamic Entry"[1]

Generally, law enforcement officers are authorized to use the "dynamic entry" method to execute a search warrant in two circumstances: (1) when the warrant explicitly authorizes "no knock" entry, and (2) when the officers(s) have knocked and announced themselves, and been refused entry. The use of this method must be judicious, as it is likely to precipitate a confrontation. It is to be used only in exigent circumstances, judged on a case-by-case basis.

Serious questions have been raised regarding whether the use of the "dynamic entry" during the Waco incident met the standards set out above. In order to assure that these standards are met prospectively, it is imperative that Congress take steps to encourage the following reforms:

1. The Attorney General, pursuant to her authority under Executive Order 11396, February 7, 1968, should establish clear and uniform guidelines for all federal law enforcement functions, regardless of department, in the execution of search warrants and the use of "dynamic entry," restricting the use of such entry to only the most exigent of circumstances.

2. Proposals for use of "dynamic entry"should be subject to high-level review and approval on a case-by-case basis to assure that the "dynamic entry," whether or not pursuant to a warrant is necessary and lawful and that the risk of loss of life is minimized.

3. U.S. Attorneys should be required to review and approve applications for warrants.

4. There should be appropriate penalties for federal law enforcement agents who file untruthful, misleading, or unlawful applications for warrants.

5. The use of hearsay in an affidavit seeking a warrant should be permitted only if the actual witnesses are unavailable because of death or incapacity.

6. Warrant affiants should be required to note exculpatory evidence in their warrant applications.

7. There should be a limit on the period of time for which warrants, affidavits, and related items can be sealed prior to and after service, with limited periodic review if extensions are shown necessary.

8. Congress should establish standards for a very high degree of supervision of "informant" activity and guidelines for verifying informant claims when agents rely

[1] By "dynamic entry" we mean forcible, no-knock entry.

upon such claims for the issuance of warrants or as the basis for other enforcement operations.

9. The inherently corrosive government practice of paying informants on a "contingency" basis, with payments for their "information" contingent upon arrest or conviction, should be ended.

II. Other Fourth Amendment Concerns

Ironically, even as members of the House Committees conducting oversight of the Waco raid were expressing deep concern about alleged civil liberties abuses at Waco, the House of Representatives adopted and the Senate had under consideration legislative measures to expand the unchecked powers of federal law enforcement officers. (H.R. 666; S.3, §507)

The United States Supreme Court has weakened the exclusionary rule by holding that evidence seized pursuant to a defective external source of authority (e.g., defective warrants, faulty court records, limited or unconstitutional state statutes) could be used. The Court has nonetheless consistently held that the exclusionary rule is the only effective means of reining in unbridled law enforcement and deterring Fourth Amendment violations, and that the exclusionary rule is therefore constitutionally required. (See, for example, the Court's opinion in *Arizona v. Evans*, 514 U.S. --, 131 L.Ed.2d 34, 115 S.Ct. -- (March 1, 1995).) The exclusionary rule generally forbids the government from using evidence that is obtained in violation of the Constitution.

In a time of increasingly sophisticated and more intrusive electronic surveillance, rather than providing less protection for the rights of citizens, Congress should be ensuring greater safeguards. Congress should certainly preserve, and indeed strengthen, the exclusionary rule to safeguard citizen rights and curb police misconduct.

As Supreme Court Justice Brandeis said: "[I]t is...immaterial that [a Fourth Amendment violative] intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent....The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." Justice Scalia recently quoted these words in stressing the importance of maintaining Fourth Amendment standards against government claims of "benevolent purposes." *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 687 (1989)(Scalia, J.). Congress should heed this warning against weakening Fourth Amendment protections.

H.R. 666, the Exclusionary Rule Reform Act of 1995 (introduced by Congressman McCollum) was adopted by the House of Representatives in February 1995. This legislation would expand police powers beyond those conferred by the Supreme Court's decision in *United States v. Leon,* 468 U.S. 897 (1984), which created a "good faith" exception to the exclusionary

rule for illegal searches and seizures based on a flawed warrant. H.R. 666 would codify a "good faith" exception to the exclusionary rule for all types of **warrantless** searches and seizures -- effectively removing the only check on excessive uses of the search and seizure power of the police. The adoption of amendments in the House of Representatives that would exclude the ATF and the Internal Revenue Service from this invitation to abuse does not make the legislation acceptable. The rights of citizens will continue to be vulnerable to abuses from the 100+ federal law enforcement agencies not excluded by the amendment.

Pending "counter-terrorism" bills will encourage additional violations of individual rights by expanding the circumstances under which wiretapping may be initiated and by expanding the circumstances under which prior court orders are not required. Under the pending bills, the authority of federal agents to deploy "roving" electronic surveillance for suspected federal felonies will also be substantially expanded beyond those limited circumstances specified under current law. Moreover, these bills would allow prosecutors to use evidence gathered illegally and without a warrant so long as police could convince the trial judge that their illegal acts were not committed in "bad faith." Federal agents already have adequate legal authority and a full range of surveillance techniques necessary to combat terrorism. For these reasons, among others, the pending "counter-terrorism" bills should be rejected.

Necessary Reforms

1. Congress should take no action to codify or expand the "good faith" exception to the exclusionary rule, and H.R. 666 should be rejected by the Senate.

2. Pending "counter-terrorism" bills, expanding the government's ability to electronically surveil individuals and groups and use evidence obtained through illegal wiretaps, must be rejected by Congress.

3. Section 507 of S. 3, seeking to do away with the exclusionary rule altogether, must be rejected.

4. The Supreme Court's 1984 *Leon* decision should be legislatively overturned by a Congress now sensitized to the potential for police abuse.

III. Prosecutorial Misconduct

Federal prosecutors have a constitutional obligation to reveal exculpatory information to the defense. Questions have been raised about serious breaches of this obligation by federal prosecutors in the Waco case. For example, the Waco hearings in the House revealed that ATF agents were instructed by prosecutors to stop their routine shooting review for fear that exculpatory material would be generated that would have to be disclosed to the accused Branch

Davidians.[2] We are even more concerned by the suggestion, contained in a memorandum from Assistant Attorney General Harris, that this practice may be widespread. The Harris memorandum states that the instructions given in the Waco case to the Treasury Department were "prosecution 101."

Finally, we are troubled by the fact that the Department of Justice (DOJ) has promulgated a federal regulation purporting to allow it unilaterally to exempt its lawyers from certain state and local court rules of ethics governing all other lawyers. 28 C.F.R., Part 77.[3]

---

[2] The April 14, 1993 Treasury interoffice memorandum on "Preliminary Investigative Plan" from the Assistant General Counsel for Enforcement provides in part:

> o DOJ does not want Treasury to conduct any interviews or have discussions with any of the participants, who may be potential witnesses; the prosecutors do not want us to generate additional Jencks, Brady or Giglio material or oral statements which could be used for impeachment.
>
> > PROB: our information will be limited to what the TRs ask, which will focus on the gunfight and not necessarily on the other major topics in which we are interested; we may not have the first-hand information that we need to conduct our review;
> >
> > -- at some point we are going to have to interview the crucial witnesses and perhaps may have to take statements; while we may be able to wait for some of them to have testified in the criminal trial, the passage of time will dim memories;
>
> o DOJ does not want us to make any findings or draw any conclusions from what we review; the prosecutors are concerned that anything negative, even preliminary, could be grist for the defense mill;

Similarly, the September 17, 1993 memorandum on "ATF Statements and Issues concerning ATF Knowledge of the Loss of the Element of Surprise," prepared for the Assistant Secretary of the Treasury for Enforcement contains this summary:

> March 1, 1993 Troy WAR Interview
> ATF initiates a shooting review. David Troy and Bill Wood interview Rodriguez and Mastin (3/1), Chojnacki (3/3), Cavanaugh (3/3), Sarabyn (3/2). Troy tells Review they immediately determined that these stories did not add up. They communicated information to both Hartnett and Conroy on the day or day after each interview. Conroy gave Troy's handwritten notes to Hartnett. (Note -- Johnston at this point advised Hartnett to stop the ATF Shooting review because ATF was creating Brady Material. Because Chojnacki had not yet been interviewed, Johnston authorized that interview but no notes were created.)

[3] For example, the regulation purports to authorize DOJ attorneys to bypass corporate counsel by granting expansive authority to conduct ex parte interviews with corporate employees outside the presence of corporate counsel both during an investigation and after enforcement proceedings have begun. 28 C.F.R., § 77.10.

Necessary Reforms

1. Congress should establish an open discovery process for federal criminal litigation unless a neutral and detached judicial officer finds that a compelling reason has been established that such government disclosure to the defendant is impossible or too dangerous in a particular case. (This disclosure obligation on the government should not be imposed on the defense, as the two sides are not similarly situated in a criminal case; such would subvert the presumption of innocence and Fifth Amendment protections of the citizen accused; and it is the government that has the overwhelming and frequently the sole investigatory resources in a criminal proceeding.)

2. The Department of Justice must ensure that federal prosecutors adhere to constitutional and ethical obligations. The Department must also strengthen its disciplinary programs to punish prosecutors who conceal any relevant evidence (including any evidence of perjury) in violation of the law, court orders, and the rules of professional responsibility.

3. Pending S. 3, Section 502, seeks to amend the United States Code by expanding the already unfair, probably unconstitutional DOJ "regulation" (discussed at footnote 3 above) by empowering the Attorney General to "opt out" her lawyers from all rules of legal ethics at her sole, unreviewable discretion. Congress should reject S. 3, Section 502, and overrule the Justice Department Regulation.

IV. The Use of Consultants and Experts by Federal Law Enforcement Agencies

Concerns have been raised that law enforcement officials in the Waco case failed to grasp that they were dealing with a highly committed ideological and religious group rather than with a typical hostage situation. Although religious or ideological groups are not immune from legitimate law enforcement, there is a need to avoid the risk of abuse that can easily result from demonizing minority groups or relying on prejudicial stereotypes.

Necessary Reforms

1. When confronted with crisis situations involving groups with religious or ideological convictions, the Attorney General should be certain that law enforcement has sought the expertise of a cross-section of qualified scholars. In cases dealing with religious groups, such as at Waco, law enforcement should seek the expertise of qualified scholars on religion.

2. Guidelines should be promulgated to eliminate religious or other viewpoint bias in federal law enforcement investigations and practices, including public affairs announcements and other comments before and during trial.

V. The Use of Lethal Force

Serious questions have been raised during the hearings on the Ruby Ridge incident regarding the use of deadly force. There is certainly a need for clarification -- and likely tightening -- of the rules of deadly force by federal law enforcement officers. For example, the FBI's interpretation and application of the standard rules of deadly force at Ruby Ridge, even disregarding the *ad hoc* rewriting of those rules that appears to have taken place, has been condemned as unconstitutional even by a former FBI director and Department of Justice officials.

In this regard, specific attention should be paid to the philosophy and role of the FBI's Hostage Rescue Team (HRT) or any successor group. There seems to be no resolution of the conflict between the team's stated objective of protecting lives and its tactical impulse to bring all pressure, including deadly force, to bear to "resolve" a situation. The use of helicopters, armored personnel carriers, and other military equipment should especially be curtailed. There should be vigilance to prevent the general militarization of federal law enforcement.

Necessary Reforms

1. The federal deadly force policy should clearly state (a) that a threat of physical harm must be immediate in order to justify the use of deadly force; and (b) that when the immediacy of the threat passes, the justification ceases.

2. Federal law enforcement agents should be carefully trained in the law on the use of deadly force. Emphasis should be placed on learning to distinguish between appropriate and excessive applications of force.

VI. Accountability and Checks and Balances

The issue of accountability for federal law enforcement abuses has been placed in sharp focus by the hearings on Waco and Ruby Ridge.

Law enforcement agencies cannot be expected to investigate themselves adequately. A mechanism for independent review is required. For example, an FBI internal review conducted soon after the Ruby Ridge incident found no wrongdoing by FBI officials. Subsequently, however, a 542-page report by a 24-member Justice Department team recommended consideration of criminal charges against responsible FBI agents. Yet other DOJ offices concluded otherwise. Even after the FBI Director announced on January 6, 1995, that there had been "major areas of inadequate performance, neglect of duty, and failure of FBI executives to exert proper

management oversight," only relatively minor administrative disciplinary actions were taken. This failure to respond has been reflected in other cases involving DEA agents, Treasury agents and the Border Patrol.

The failure of the federal government to have an adequate mechanism in place to hold accountable federal law enforcement officers who are guilty of abuses undermines trust in the integrity of the system. With the exception of those rare times when the Civil Rights Division reviews complaints against non-Justice Department federal law enforcement agencies, all review of complaints against federal law enforcement is internally conducted by personnel within the same department in which the particular law enforcement agency is located. Intra-departmental review systems are not independent. They are inherently subject to internal bureaucratic pressure to defer to the initial action or reach a conclusion without regard to the merits. Intra-departmental review systems justifiably lack credibility.

Within the United States, more and more cities and counties have established some form of independent review of citizen complaints. According to a survey in January 1995 by the Police Executive Research Forum (PERF), 36 of the nation's 50 largest cities have citizen review mechanisms. A number of smaller cities such as Dubuque, Iowa and counties such as Orange County, Florida have citizen review bodies. A number of European nations have adopted review mechanisms that allow complaints against police to be independently reviewed by persons who are not sworn officers. The PERF report found that such "(c)itizen review is now almost universal in English-speaking countries." In 1988, the Canadian Parliament established an independent review process for making police officers of the national government accountable to the public for police conduct. The Canadian Public Complaints Commission is composed of a full-time chairman and vice-chairman and 12 part-time members.

Necessary Reforms

1. Congress should establish a uniform means of permanent, independent oversight of federal law enforcement policies and practices with full redress for allegations of abuse.

2. Congress should ensure that there are adequate penalties for those federal law enforcement agents who engage in misconduct and should conduct oversight to ensure that they are properly enforced.

VII. Posse Comitatus Act

The hearings on Waco have raised serious questions regarding the use of the military by federal law enforcement in violation of the Posse Comitatus Act. The Posse Comitatus Act, as amended, 18 U.S.C. §1385, reads:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned no more than two years, or both.

The Posse Comitatus Act was passed in 1878. Just prior to its passage, the armed forces were used by revenue officers (the precursors to the BATF) in finding and destroying illegal whiskey distilleries, enforcing voting laws, and a number of other purposes. See, Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force,* 83 Yale L.J. 130 (1973).

The exceptions to the Act include those purposes "...authorized by...Act of Congress...." They have been expanded to provide for military support to civilian law enforcement agencies in limited circumstances, 10 U.S.C. §371, *et seq.* This statute permits the armed forces to provide training in the use of equipment and "expert advice relevant to the purposes of this chapter." 10 U.S.C. §373(2). The lawful purposes include enforcement of portions of the Controlled Substances Act, the Immigration and Nationality Act, the Tariff Act, and the Maritime Drug Law Enforcement Act.

Necessary Reform

Congress should establish a requirement that any federal law enforcement official who seeks to invoke the drug or any other legislative nexus exception to the Posse Comitatus Act should give an oath or affirmation to a neutral and detached judicial officer as to the facts which he is asserting. In short, the same rules as are proposed for search warrants and for penalties for false or misleading information should apply here. In addition, Congress should reexamine whether the existing exceptions to the Posse Comitatus Act should be retained.

VIII. The Need for a National Commission

In addition to the above reforms which Congress and the Executive Branch should immediately undertake, we urge Congress to create a national commission to comprehensively review federal law enforcement policies and practices. Many of the serious questions regarding coordination, oversight and accountability of so many different federal law enforcement agencies are complex ones and need the long-term careful consideration only a commission can provide. We suggest that such a commission should include a diversity of local, state and federal law enforcement officers, bar association leaders and representatives of civil liberties and civil rights organizations. This body should make specific statutory and regulatory recommendations to Congress and to the President regarding needed changes.

IX. Conclusion

We hope that you will give thoughtful consideration to these issues. The fabric of a society is best bound together by a mutual sense of justice and fairness. Nothing can so swiftly divide a society like the resentment and hostility that are the inevitable fruits of injustice.

Sincerely,

Ira Glasser,
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Laura W. Murphy, Director
Washington National Office
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Malcolm Wallop,
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Executive Director
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Conrad Martin,
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David C. Condliffe,
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The Drug Policy Foundation

cc: Members of the Leadership
Members of the Subcommittee

WacoRuby.ref

ATTACHMENT F

Union Calendar No. 579

101ST CONGRESS
2d Session

REPORT
101-986

FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED

NOVEMBER 27, 1990.—Ordered to be printed

Mr. CONYERS, from the Committee on Government Operations, submitted the following

THIRTY-THIRD REPORT

BASED ON A STUDY BY THE GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE SUBCOMMITTEE

On October 19, 1990, the Committee on Government Operations approved and adopted a report entitled "Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

Public concern over the extent of illegal drug usage and disclosures regarding problems in the saving and loans industry have prompted Congress to enact new and expanded criminal laws. Congress has increased funding for the Department of Justice, authorized the hiring of additional prosecutors, and in some cases, given prosecutors expanded powers.[1]

Many within the legal community are concerned that some of these statutory changes coupled with developments in investigative and prosecutive practices undermine the effective exercise of an individual's right to counsel. Others claim that prosecutors, in their zeal to seek convictions, overreach and do so without fear of discipline. Department of Justice officials respond that the private bar is encroaching on its ability to carry out its responsibilities to enforce the law and is interfering with its ability to "fight crime."

[1] There are now approximately 7,000 lawyers at the Department of Justice.

These complaints raise serious questions about whether legislative enactments may require modification and whether the Attorney General in the "prosecution of proceedings to punish crimes and enforce appropriate remedies against wrong doers" is properly discharging his duties.[2] Accordingly, the Subcommittee on Government Information, Justice, and Agriculture undertook an inquiry and conducted a hearing on May 10, 1990.

The subcommittee's chairman began the hearing by pointing out that he was not sure it was a hearing with "good guys or bad guys," but that it had a "lot of thorny issues." [3] Another subcommittee member, who has been both a prosecutor and defense attorney, wondered if the discussion were little more than another example of the well established tradition of "moaning and groaning" about the "powers that one side or the other had that was felt to be unfair." [4] While agreeing that "both sides do groan," one witness responded by highlighting a concern he felt was common to several of the issues under discussion: "[t]he point is it is the old concept we have in American justice, don't give arbitrary discretion to any one party." [5]

We believe that it is important that Congress have an increased awareness of what one witness characterized as the "interconnectedness" of the issues under discussion, and their impact on the criminal justice system. (These include the applicability and enforcement of ethical rules to Department of Justice attorneys; attorney fee forfeitures; and the issuance of subpoenas and Internal Revenue Service summonses to attorneys.) We agree with one witness who testified that more attention should be given to questions regarding the amount of discretion vested in Federal prosecutors and how it is exercised. The fact that such questions are being raised, does not mean, as is sometimes suggested by ill-advised and divisive rhetoric, that anyone is less committed to fighting crime. Rather, it means that we believe it is important that all branches of the Federal Government strive to insure that its prosecutors "strike hard blows," but not "foul ones." [6]

II. Perspectives on the Roles of Federal Prosecutors and Defense Lawyers

Prosecutors and defense attorneys have different and extremely important roles in our criminal justice system. The Supreme Court has characterized the role of the prosecutor in terms of a responsibility to society at large:

> [The prosecutor] 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 . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.[7]

The prosecutor has wide discretion and power. As a former Deputy Attorney General recently observed, the prosecutor has ". . . more direct power over the lives, property and reputations of those in [his] jurisdiction than anyone else in this nation . . ." [8] Because the prosecutor has "responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused, as well as deciding whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice . . . the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers." [9]

The defense lawyer works on behalf of the individual defendant to put the government to its proof. Justice White, joined by Justices Harlan and Stewart in their concurring and dissenting opinion in *United States* v. *Wade*, described the role as follows:

> . . . defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case . . .[10]

As a former prosecutor said: "we shouldn't apologize that the prosecutor has an uphill battle to convict a citizen of the United States of a crime and send him or her to jail . . . It should be a . . . hard climb to the top for a prosecutor to get a conviction, and they are usually successful . . .[11]

Witnesses appearing before the subcommittee were asked to share their views regarding recent changes in the legal environment, with particular attention to the role of the prosecutor. Professor Samuel Dash, director of the institute of criminal law and procedure of Georgetown University Law Center, summarized his concerns as follows:

> I think that these issues—primarily the ones relating to the aggressive tactics of the Federal prosecutors in attempting to get client information from lawyers either through grand jury subpoenas or though intimidating ef-

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[2] *McGrain* v. *Daughtery*, 273 U.S. 135, 177 (1927).
[3] Hearing on the Exercise of Federal Prosecutorial Authority, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives, May 10, 1990. Hearing at 2.
[4] Hearing at 31 and 32.
[5] Hearing at 32.
[6] *Berger* v. *United States*, 295 U.S. 78 (1935).
[7] *Id.* at 88.
[8] Corrigan, 13 Hastings Constitutional Law Quarterly 537, at 540 (1986).
[9] Prepared statement of William W. Taylor III, on behalf of the American Bar Association before the Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives, concerning prosecutorial authority, May 10, 1990. Hearing at 48. This is reference to the commentary to the "ABA Standards for Criminal Justice."
[10] *United States* v. *Wade*, 388 U.S. 218, 256–257 (1967).
[11] Hearing at 223 and 224.

> forts for forfeiture of fees . . . can have a very chilling effect on the adversary system, particularly as that system relies on strong defense of accused persons.[12]

William W. Taylor III, testifying on behalf of the American Bar Association, said: "We used to think of prosecutorial discretion as of the decision whether to charge. Now we think about prosecutorial discretion as to the decision whether to subpoena an attorney for a client in an ongoing piece of litigation . . ." [13]

Edward S.G. Dennis, Jr., Assistant Attorney General for the Criminal Division, Department of Justice, had the following perspective:

> . . . it has been my view that although the role of the Federal prosecutor has not been changing, the demands placed upon Federal prosecutors, the terrain in which they have been asked to operate has placed greater demands upon Federal prosecutors to explore areas that perhaps in the past had not really been that critical insofar as criminal investigations and prosecutions are concerned.
>
> * * * * * * *
>
> We have gone from a responsibility that primarily dealt with individual criminal transactions—whether that be drugs or bank robberies or individual frauds—to an era in which many of our prosecutions deal with fairly sophisticated, international, wide ranging and well organized criminal enterprises. In conjunction with investigating these enterprises . . . we also have been asked to explore the finances related to those enterprises.
>
> * * * * * * *
>
> . . . the stakes have become very high because of the forfeitures that are now mandated by criminal law. . . . we have indeed begun to see investigations that involve more transactions in which lawyers are involved.[14]
>
> . . . the defense bar does feel that their ability to represent their clients are being constrained. This is not a strategy or a tactic that is being engineered by the prosecutors. I think it is a result of . . . recent changes in criminal procedure and criminal statutes . . . that have had an impact on the way in which defense lawyers practice law.[15]

Recognizing these different roles and perspectives is important to understanding today's controversies. The subcommittee had a first hand look at the tensions within the legal community when they erupted during the hearing. The witness from the American Bar Association began his testimony with a reference to remarks contained in the Department of Justice's prepared statement about the "agenda of the defense bar," which for "good public policy reasons . . . must not be Congress's agenda." [16] He talked about the "increasingly expressed, and more often implied view of Federal prosecutors in the U.S. Department of Justice that lawyers representing their clients are contributing to crime. . . . I was struck and offended by the written remarks of the Assistant Attorney General of the United States, prepared and submitted to this committee. We have been in good-faith discussions with the Department for some time on some of these issues, and I find it shocking that the Department of Justice would describe the American Bar Association, and its members, as having an agenda which is contrary to the fight against crime." [17] In turn, the departmental spokesman departed from his prepared statement to say "that I certainly do not consider, and I do not think the Attorney General considers nor does the Department of Justice consider, the defense bar to be 'the enemy' . . . In my experience, in the Department of Justice . . . I have never been taught, instructed, or encouraged to consider defense lawyers as the 'enemy' . . ." [18]

[12] Hearing at 8.
[13] Hearing at 41.
[14] Hearing at 242.
[15] Hearing at 243.
[16] Hearing at 251.

III. Administrative and Legislative Developments Affecting the Prosecutor and the Defense Lawyer

A. Departmental Practices

1. Action of the Attorney General Seeking to Exempt Departmental Attorneys from Ethical Rules

Attorney General Dick Thornburgh triggered a furor in the legal community with the issuance on June 8, 1989, of a memorandum to the effect that Rule 4.2 of the Model Rules of Professional Conduct does not apply to departmental attorneys.[19] Lawyers are licensed and regulated by the states and most states have adopted a version of the American Bar Association's "Model Rules of Professional Conduct" as the standard for regulating the conduct of lawyers.[20] Model Rule 4.2 provides that a lawyer shall not communicate with a person represented by counsel on the subject of the representation, unless the lawyer has the consent of counsel or is "authorized by law" to do so.[21] The Attorney General concluded that contact with a represented individual in the "course of authorized law enforcement activity" is not a violation of the rule (and its predecessor, Disciplinary Rule 7-104 (A)(1)).[22] The AG's memorandum explains that in the course of an investigation a government attorney can direct and supervise the use of an undercover law enforcement agent to gather evidence by communicating with any person who has not been made the subject of formal Federal criminal adversar-

[17] Hearing at 40.
[18] Hearing at 241.
[19] Memorandum from Dick Thornburgh, Attorney General To All Justice Department Litigators, "Communication with Persons Represented by Counsel", June 8, 1989. Reprinted in hearing at 283.
[20] Hearing at 45 and 46.
[21] Model Rule 4.2 states:
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. American Bar Association, "Annotated Model Rules of Professional Conduct" at 268.

[22] Thornburgh memorandum at 7. Hearing at 289.

ial proceedings and that what the Federal Government may do in an undercover setting it may also do overtly.[23]

The Thornburgh memorandum was reportedly issued in response to a 1988 case *U.S.* v. *Hammad* which created problems for the conduct of Federal investigations.[24] The court had found that an assistant U.S. attorney violated Model Rule 4.2 by using an undercover informant to gather information from a criminal suspect who had a lawyer. Ultimately, however, the Second Circuit said that it would *not* interpret the disciplinary rule as precluding undercover investigations.[25]

Nevertheless, the Attorney General proceeded with issuance of the memorandum to exempt departmental attorneys from the rule's coverage. "Although *Hammad* no longer poses the same threat to federal law enforcement objectives that it once did, the case will still exacerbate the uncertainty felt by many government attorneys over what is appropriate conduct in this area." [26]

The Attorney General relied on the Department's interpretation of the Supremacy Clause of the Constitution: "The Department of Justice has consistently taken the position that the Supremacy Clause of the Constitution does not permit local and state rules to frustrate the lawful operation of the federal government." [27] To explain its position regarding the Attorney General's authority, the Department cited a letter from Deputy Attorney General Burns to the District of Columbia bar:

> . . . Justice Department attorneys are "required and expected" to comply with ethical rules, and that "[a]s a practical matter, we expect that the obligations of federal attorneys in carrying out their federal duties will rarely if ever preclude compliance with state or local ethical requirements." Deputy Attorney General Burns concluded, however, that in the "rare instance where an actual conflict arises," the Supremacy Clause forbids that the state from regulating the attorneys' conduct in a manner inconsistent with their federal responsibilities, as determined by federal law and *the Attorney General* [emphasis added.] [28]

As the Department's witness explained:

> We do not feel the prosecutor should be subject to any kind of disciplinarian complaint or proceeding in the first place, because to have those licenses in jeopardy even while questions like this are being decided has a very substantial chilling effect, we believe, on prosecutors carrying out their duties.[29]

[23] Thornburgh memorandum at 5 and 6. Hearing at 287 and 288.
[24] Stephen Gillers, "Ethical Questions for Prosecutors in Corporate-Crime Investigations," New York Law Journal, September 6, 1988, at 1 and 6.
[25] *U.S.* v. *Hammad*, 846 F. 2d 864 (2nd Cir. 1988), later revised, 858 F. 2d 834 (2nd Cir. 1988). Thornburgh memorandum at 3.
[26] Thornburgh memorandum at 4. Hearing at 286.
[27] Prepared statement of Edward S.G. Dennis, Jr., Assistant Attorney General for Criminal Division, Department of Justice before the Committee on Government Operations, Subcommittee on Government Information, Justice, and Agriculture concerning prosecutorial authority, May 10, 1990. Hearing at 256, 321–327.
[28] Hearing at 257.
[29] Hearing at 351.

During the hearing, it became clear that the Department's position is essentially that its lawyers are only subject to Constitutional limitations. Accordingly, in the Department's view, the position stated in the memorandum did not represent a change in the law but was merely a statement of existing law:

> First of all, the memo does not expand upon the authority of Federal prosecutors or Federal agents or government agents to contact represented parties. Those limitations are constitutional limitations, are questions of when contact can be made, how it can be made, when warnings have to be given, are all a matter of Constitutional limitation.[30]

The Attorney General's formulation of his authority under the Supremacy Clause was questioned in an opinion prepared by the American Law Division of the Congressional Research Service:

> The Department's reliance on the Supremacy Clause in this context may be misplaced. The Supremacy Clause applies where the federal Constitution, a federal statute, or a validly promulgated federal regulation conflicts with a state law in such a way that compliance with both federal and state requisites is physically impossible. (Citing *Townsend* v. *Swank*, 404 U.S. 282 (1971).) In this case, the Department is lacking specific federal statutory authority to communicate with suspects without consent of counsel . . .[31]

Referring to this memorandum, the subcommittee's chairman asked the Department's witness to identify "the specific statutory authority that is in conflict with what the states have adopted." Mr. Dennis was unable to do so, instead he responded with a generalized discussion of the Constitution as dealing with "questions of power," the "privileges of the individual," and "[w]here does that authority end and the rights of the individual begin?" [32] Questioned further as to the source of the Attorney General's authority, he explained: ". . . we are not speaking in terms of any particular statute insofar as contacting represented individuals. This is a constitutional matter as we see it." [33]

Mr. Dennis cited *Massiah* v. *United States* [34] in support of his position:

> We believe that with regard to the contacting represented parties, the question of the power of the Executive Branch or the government in the criminal justice system to contact represented parties when they can and when they can't on the Sixth Amendment basis has been deter-

[30] Hearing at 350.
[31] Memorandum to the House Committee on Government Operations, Government Information, Justice, and Agriculture Subcommittee from American Law Division, Congressional Research Service, "Alleged Act of Federal Prosecutorial Misconduct: Communication With Persons Represented by Counsel Without Consent of Counsel or the Authority of Law," November 16, 1989, at CRS–2. Included in the subcommittee's hearings as exhibit No. 1 at 322. Hereinafter cited as "November 16 CRS memorandum."
[32] Hearing at 326.
[33] Hearing at 327.
[34] *Massiah* v. *United States*, 377 U.S. 201 (1964).

mined by the Supreme Court to be only restricted after an indictment has been returned.

In the *Massiah* case, for example, it was determined the pre-indictment right to counsel did not exist, that an individual can be interrogated, can be questioned in a non-custodial situation without counsel having to be present; and we believe that without counsel having to be notified.[35]

However, upon review of the case, the committee notes that *Massiah* dealt with the question of the admissibility of evidence in a criminal proceeding and not the question of the applicability of the ethical requirements. In *Massiah* the Court determined that incriminating statements elicited from a defendant by Federal agents in the absence of his attorney deprived the petitioner of his right to counsel under the sixth amendment; therefore, such statements could not be admitted as evidence in his trial.

The Department also cited *Sperry* v. *Florida,*[36] to support its position that the states' authority to regulate the ethical conduct of attorneys admitted to practice before the courts permits regulation of Federal attorneys only if the regulation does not conflict with the Federal law or with the Attorney General's Federal responsibilities. We believe that the facts of *Sperry* v. *Florida* are relevant here. The Supreme Court said that the Florida State bar could not prevent a nonlawyer from practicing at the U.S. Patent Office. The reason was that Congress had enacted a statute which provided specifically that the Commissioner of Patents "may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office . . ." [37]

Witnesses appearing before the subcommittee were highly critical of the Department's position regarding the inapplicability of Rule 4.2 to departmental lawyers. Professor Dash said the Department's position was "a silly argument and cannot hold water." He described the existing authority and practice of the states to license lawyers:

> . . . we are talking about conduct of lawyers who have problems as Federal prosecutors. But each of these lawyers has been admitted under State laws and recognized by Federal laws to State Supreme Court bars; and that admission requires that those State lawyers, so admitted, be bound by these ethical codes.
>
> In no way is there any Federal supremacy clause argument that says that despite the fact that you are admitted, say, in the State of Pennsylvania and bound by the Codes of Ethics of the State of Pennsylvania, that when you work as a Federal prosecutor, you are freed from those ethical codes by the supremacy clause . . .[38]
>
> . . . A lawyer cannot be freed of these professional obligations simply by accepting employment in the Federal

[35] Hearing at 326.
[36] *Sperry* v. *Florida*, 373 U.S. 379 (1963).
[37] *Id.* at 384.
[38] Hearing at 28.

> government as a prosecutor. The Attorney General does not have the authority to remove these obligations imposed by the court having jurisdiction over the lawyer . . .[39]

The American Bar Association characterized the Attorney General's Supremacy Clause argument as "specious." ABA pointed out that in addition to the fact ". . . that Congress has recognized the power of States to license lawyers to practice in their courts . . ." [40] "[i]n many instances, the Federal District Courts have formally adopted the same ethics rules as the State courts have . . . and so it is very difficult to argue that a Federal prosecutor is not bound by a rule which has been adopted by the U.S. District Court in which he practices." [41]

Adoption of the rule by the Federal courts was also cited in the American Law Division's analysis of the Attorney General's Supremacy Clause arguments:

> In a notable omission, the Justice Department fails to address the fact that some variation of the Model Code of Professional Responsibility, including the substance of Rule 4.2, has been adopted by the federal courts and that all attorneys appearing in a federal court are subject to these rules. Consequently, each federal court has the authority to reprimand, censure, suspend, disbar, or otherwise discipline a federal prosecutor who is found to be in violation.[42]

In turn, the Department's witness challenged the authority of the Federal courts to adopt such rules:

> I think there may well be a separation of powers problem in terms of the judiciary through adoption of these rules limiting the investigative options of the Executive Branch.[43]
>
> * * * * * * *
>
> Federal courts cannot adopt local rules of practice that are inconsistent with federal statutes or the Federal Rules of Criminal Procedure . . . The scope of the federal courts' rule-making authority is generally limited to procedural as opposed to substantive matters . . . Congress has, by statute, imposed upon the Attorney General and the United States Attorneys the duty of "detect[ing] and prosecut[ing] crimes against the United States." . . . These statutes authorize, by implication, all reasonable and necessary means to effectuate that duty consistent with the Constitution and other federal statutes, which impose significant limitations. In this context, attempts to apply DR 78-104

[39] Prepared statement of Professor Samuel Dash, Georgetown University Law Center before the Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations, U.S. House of Representatives on the exercise of Federal prosecutorial authority, May 10, 1990. Hearing at 19.
[40] Hearing at 59.
[41] Hearing at 230.
[42] November 16 CRS memorandum at 3 and 4.
[43] Hearing at 327.

as a rule of court to restrict these means could constitute an excessive judicial intrusion upon a core executive function, detecting and prosecuting crimes, and a core legislative function, defining the scope of executive investigatory authority.[44]

The American Law Division opinion contains a discussion of the authority of the states to adopt rules:

> Moreover, assuming arguendo that the Supremacy Clause does somehow apply, those in opposition to the Department's position cite *United States* v. *Klubock* [45] for the proposition that, on Supremacy Clause grounds, federal prosecutors are not insulated from state ethics rules in instances where they bypass counsel to communicate with clients. In *Klubock*, the federal prosecutors relied on *Sperry* v. *Florida* [46] for the principle that under the Supremacy Clause a state ethical rule must fall if it is in conflict with federal law. The court, however, "emphasized that the conflict must be 'actual,' resulting in a 'physical impossibility' and obstruction of the '"accomplishment and execution" of federal objectives.' [47] Accordingly, the *Klubock* court held that the Massachusetts state ethical rule requiring a prosecutor to obtain prior judicial approval when the prosecutor seeks to compel an attorney/witness to provide information regarding a client did not conflict with Rule 17 of the Federal Rules of Criminal Procedures. Instead, the court noted that the state ethical rule merely created an additional review at an earlier stage in the process than was provided for by Rule 17." [48]

The subcommittee also explored questions relating to the practical impact of the rule. The Department has identified examples of situations in which it believes that the prohibition against direct contact with a represented person hampers the Department in carrying out its investigative and law enforcement responsibilities. The subcommittee's chairman asked Professor Dash to comment on the problems presented by these factual circumstances.

The first example the chairman asked about was the case involving a corporation where the corporation is represented by an attorney and the employees may not know, or "indeed may not choose to be represented" by this lawyer: [49]

> Mr. DASH. . . . Actually, under the Model Rules of Professional Responsibility, the lawyer for the corporation is not the lawyer for the employees; and when a lawyer for a corporation gets information, in essence, he often has to caution those employees, "I am not your lawyer, so don't rely on me that way."
>
> So clearly, if . . . a prosecutor wants to approach that employee who can be a witness to the fact, I think that that is proper.
>
> Mr. WISE. So you are saying that there is no bar then?
>
> Mr. DASH. There is no bar. The lawyer for the corporation is not the lawyer for those employees. I think he may be confusing another case which says on attorney-client privilege, a lawyer representing the corporation, meaning the directors, the shareholders, all that, when he goes to get information carrying out his duties for that corporation from an employee, you can't subpoena the lawyer to get him to testify on that information.[50]

The second situation he asked about is where "there may be an attorney representing a client, but the attorney is actually paid by a drug kingpin and the client may not want that attorney." [51]

> Mr. DASH. . . . there is a very serious situation involving lawyers representing either a labor union or a Mafia organization . . . the fact that he is being paid by, say, the boss and is also representing some of the lesser members creates a conflict of interest.
>
> * * * * * * *
>
> The conflict is that it might be in the best interests of the little guy to make a deal with the prosecutor and be a government witness. You are not going to do that if you represent the interests of the top guy. I don't think it is a good idea for lawyers to have that kind of conflict.
>
> I see the problem prosecutors have particularly if the client, the so-called lesser figure, informs the prosecutor that he doesn't think he is properly served and doesn't really want that lawyer. If a client, by the way, does that, he has a right to terminate the lawyer-client relationship and talk to the prosecutor.
>
> My problem is that shouldn't be the prosecutor's initial discretion. The prosecutor should not make the decision that every time a lawyer represents more than one person, that some of the lesser people aren't being properly represented and he can approach them without advising the lawyer because if he tells the lawyer, the lawyer will put pressure on that person not to tell the truth or something.
>
> I think unless he has information from that client that the client doesn't want that lawyer's representation any more, and doesn't consider himself bound by that lawyer, then he can talk to that person. But I don't think he should initiate it on his own. He ought to be bound by 4.2

[44] Hearing at 258.
[45] *United States* v. *Klubock*, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, 832 F. 2d 649 (1st Cir. 1987), 832 F. 2d 664 (en banc). In a footnote reference, the memorandum notes: "It should be noted that the Court of Appeals declined to rule on the Supremacy Clause argument because the State ethical rule had been incorporated into the federal court rules and because the federal prosecutors' actions occurred outside the state; ergo, the ethical rule did not apply and no case or controversy was presented. However, in another context, the Supremacy Clause argument contained in the district court opinion may prevail. The Justice Department has decided not to seek review of this decision in the Supreme Court."
[46] *Sperry* v. *Florida*, 373 U.S. 379 (1963).
[47] *United States* v. *Klubock*, 639 F. Supp. at 125.
[48] November 16 CRS memorandum at 2 and 3.
[49] Hearing at 28.
[50] Hearing at 28 and 29.
[51] Hearing at 28.

that says he ought to consult the lawyer first before he talks to his client.

Mr. WISE. . . . in the real world, talking to the defense counsel about this lower person, won't that simply tip them off and expose the lower person to intimidation?

Mr. DASH. I wouldn't require that he talk to the defense counsel about the lesser person, if the lesser person came to the prosecutor . . . if you have a person who wants to talk to the prosecutor, and doesn't want his lawyer to know, I think that is perfectly all right. I think the prosecutor does not have to tip off or tell the defense lawyer about it.

I am talking about the prosecutor initiating . . . It is an entirely different situation where the client doesn't feel he is being properly served and initiates the relationship with the prosecutor.[52]

As mentioned earlier, the stated purpose of the Attorney General's memorandum was to resolve uncertainty. The committee notes, however, that the final version of the memorandum sets forth a broad statement of Departmental position rather than a specific delineation of acceptable and unacceptable conduct. The Department explained its reasons for making such a broad statement of policy:

> . . . the factual bases from which these issues arise are too diverse to be addressed in a single memorandum or in one day's testimony. For that reason, the Attorney General chose not to draft an endless memorandum that might fail to address the specific problems encountered by Assistant United States Attorneys in the field. Instead, he chose to articulate the policy of the Department and to invite specific questions be brought to my attention as the Assistant Attorney General.[53]

Lawyers who have questions regarding whether or not certain action is appropriate are to consult with their supervisors, who in turn, consult further up the supervisory chain until reaching the Assistant Attorney General.[54] One issue not discussed at the subcommittee's hearings, but which is also raised by the provisions of the Code of Professional Responsibility adopted by many State bars and Federal courts, is the role of the supervising lawyer. Rule 5.1 provides that "a lawyer having direct supervisory authority over another lawyer should make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." [55] It also provides that a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if . . . the "lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved . . ." Where such a rule is adopted, there would seem to be an additional risk of disciplinary action against departmental lawyers who are expected by the Attorney General to

[52] Hearing at 29 and 30.
[53] Hearing at 265-266.
[54] 28 C.F.R. Part 45, Sec. 45.735-2(b).
[55] Model Rule 5.1. The comment states that the rule refers also to lawyers in a government agency.

insure that departmental lawyers comply with the policy stated in the June 8, 1989, memorandum.[56]

2. Issuance of Subpoenas to Attorneys

"The problem of attorneys being subpoenaed to give testimony concerning matters in which they are representing or have represented clients is of considerable concern to the American Bar Association." [57] The National Association of Criminal Defense lawyers shares this concern, objecting to "information-gathering techniques which are increasingly aimed at the target defendants' counsel as well as the defendants themselves." [58]

The ABA submitted a summary of a survey of the issuance of subpoenaes which was conducted by Professor William J. Genego of the University of Southern California Law Center:

> . . . Commencing in May and June of 1985 Professor Genego sent 4,024 questionnaires to all members of the National Association of Criminal Defense Lawyers, of which 3,950 were actually delivered. He received 1,648 responses, a response rate of 42%. The first conclusion to be drawn from the study is that subpoenas are being issued to attorneys with alarmingly increasing frequency. Of the attorneys responding, 18% said they had received grand jury subpoenas at some point, and 68% of those had received them between 1983 and 1985. Only 15% had received them before 1980, while 18% received them between 1980 and 1982. The study also revealed that the subpoenas rain most heavily upon the more experienced advocates. Of those who had practiced more than ten years, 26% said that had received grand jury subpoenas. Of those who had practiced six to ten years, 12% had received them. Of those who were in practice three to five years, 9% had received them, while only 3% of those in practice less than three years had received them.[59]

Statistics regarding the number of subpoenas issued to attorneys by the Department of Justice were kept sporadically prior to 1988. Data submitted to the subcommittee by the Department showed an increase from fiscal year 1988 to fiscal year 1989 in the number of subpoenas requested, and a drop off during the first 6 months of fiscal year 1990.[60] Although the rate of the total number of subpoenas requested dropped off, if the rate for the number issued to lawyers in their representational capacity for the first 6 months held

[56] Exhibit No. 2, Hearing at pages 329-348.
[57] Hearing at 57.
[58] Prepared statement of David Irwin on behalf of the National Association of Criminal Defense Lawyers before the Subcommittee on Government Information, Justice, and Agriculture, House Committee on Government Operations, May 10, 1990. Hearing at 228.
[59] From the materials submitted for the record by the American Bar Association, "Summary of Action Taken by the House of Delegates of the American Bar Association", Philadelphia, PA, February 8-9, 1988, Criminal Justice Report No. 122B at 4. Hearing at 167. The survey is also discussed in Genego, "The New Adversary", 54 Brooklyn Law Review 781 (1988) and "Risky Business: The Hazards of Being a Criminal Defense Lawyer," Spring 1986 Criminal Justice 2.
[60] The complete data submitted by the Department of Justice for earlier than 1988, fiscal years 1988 and 1989 is contained in appendix 2 to the subcommittee's hearings. Data for the first 6 months of fiscal year 1990 was submitted along with the testimony presented by the Department of Justice. Hearing at 320.

throughout the year, the total issued to lawyers in their representational capacity will show an increase.

ATTORNEY SUBPOENAS

	Fiscal year 1988	Fiscal year 1989	Fiscal year 1990 (1st 6 months)
Number representing clients who are defendants, targets, or subjects	268	308	167 (×2=334)
Number representing such clients in this matter	103	72	52 (×2=104)
Number representing such clients in this matter before grand jury	84	58	43 (×2=86)
Number representing such clients at trial	19	15	9 (×2=18)

The Department testified that the increase in numbers of subpoenas issued can be explained as the result not of an increase in seeking information that "used to be protected," rather it is due to an increase in assistant U.S. attorneys and the number of cases under investigation.[61]

According to the witnesses, perhaps even more important than the number of subpoenas issued is their practical impact. The ABA's witness, Mr. William W. Taylor III, described their effect as follows:

> What they do is divert attention from the issue of guilt or innocence. They put pressure upon counsel to litigate issues unrelated to the guilt or innocence of his client, to fight to defend against his having to become a witness against his client . . .
>
> That is where the pressure comes. That is where the attention of the defense lawyer is diverted from the representation of his client on the issue of guilt or innocence into a personalized fight with a prosecutor.
>
> And it takes a lot of time, energy, judicial resources, to get to the bottom of these issues. It gets lawyers' names in the paper, but I suggest to you that it doesn't really accomplish anything in connection with the war on crime.[62]

The testimony of Mr. Dennis of the Department of Justice was to the effect that the defense bar exaggerates the impact of Justice subpoenas to lawyers:

> We surveyed the trial subpoena approved by me in the several months preceding the meeting and found that of 52 trial subpoena I authorized, 42 were served. Of those 42, there was only one motion to quash, and it was unsuccessful. With all the publicity attorney subpoena have generated, it is worth repeating that our survey showed that the Department authorized 52 subpoena in a little over 6 months, one of which was challenged, and none of which were disapproved by the courts.[63]

Accordingly, the Department concluded "[o]ur practice simply cannot be that overbearing if it is so uncontroversial in the

[61] Hearing at 24 and 25.
[62] Hearing at 41.
[63] Hearing at 269.

event".[64] Mr. Dennis further testified: ". . . only a small portion of the subpoena that are issued are for information from a criminal defense attorney concerning the target of the investigation that he or she represents. In those cases, we are usually seeking either fee information or testimony that they advised their clients of a court date from which the client is now a fugitive." [65]

In response to such statements, the subcommittee asked the ABA witness whether or not the Association's concerns might be little more than a "tempest in a teapot." His response: "It is a tempest in a teapot until one arrives at your door . . . the issue which is implicated here is the fact that prosecutors do demand unilateral and unreviewable discretion in these circumstances." [66]

Other information provided to the subcommittee raises a question as to whether the data submitted by the Department understates the extent of the Department's practice in issuing subpoenas. For example, the National Association of Criminal Defense Lawyers (NACDL) directly challenged the Department's numbers. Mr. Alan Ellis, president-elect of the NACDL, testified that his experience with the NACDL's "strike force" (which provides assistance to attorneys who have been subpoenaed) indicates that the number of subpoenas being issued by the Department of Justice is much higher than reflected in the Department's statistics.[67] Mr. Irwin, who currently practices criminal law, testified about his personal experience:

> On page 22 of his prepared statement, Mr. Dennis said, of only 42 subpoenas served on lawyers, there has been only one motion to quash.
>
> I don't know what he means. I guess I should be proud: I personally have made two motions to quash in the last six months in the District of Maryland on subpoenas to lawyers; one is currently before the Fourth Circuit . . . where initially a Federal judge in Maryland quashed the subpoena, and the Department through the local U.S. Attorney's Office, moved the court to reassess the subpoena, got a different judge, and the subpoena was enforced, and that case is before the Fourth Circuit.[68]

In October 1989, an attorney who successfully challenged a grand jury subpoena in the southern district of Texas told the court that he believed "no Justice Department approval has been obtained." [69] The Department's statistics are compiled based on its processing of subpoena approval requests by the Witness Immunity Unit. (We note, however, that the court's order quashing the subpoena made no factual finding regarding whether the guidelines re-

[64] Id.
[65] Hearing at 270.
[66] Hearing at 231.
[67] Hearing at 204 and 231.
[68] Hearing at 223.
[69] Motion to Quash Grand Jury Subpoena for Attorney of Record for Defendant Jose Evaristo Reyes-Requena, Mike DeGeurin, *In Re: Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena, Mike DeGuerin,* Misc. No. H-89-522 at 2 (S.D. Tex. Houston Div., Sept. 28, 1989).

garding the issuance of subpoenas were complied with.)[70] In 1985, the U.S. attorney for the Massachusetts district told the court in the *Klubock* case (discussed in section III. A. 1) that "in excess of approximately 50 federal grand jury subpoenas per year have been served in Massachusetts upon attorneys for documents or testimony relating to a person represented by that lawyer."[71] This number is very high compared to the average of from two to five per U.S. attorneys offices based on aggregate data supplied to the subcommittee by the Department for the 94 U.S. attorneys offices.

Furthermore, the data regarding subpoenas issued does not indicate how extensively the threat of a subpoena may be used to obtain essentially the same information. The subcommittee's chairman questioned Mr. Dennis about a practice reflected in a letter written by an assistant U.S. attorney which states: "I have received authorization . . . to proceed with a *Request for Authorization to Issue a Subpoena to an Attorney for Information Relating to the Representation of a Client.*" The letter makes a request for certain documentation, stating that if the lawyer chooses not to provide the information, "my intent is to issue the subpoena for the July 5, 1989 grand jury".[72] The Subcommittee was told that such a letter is consistent with the Department's guidelines, and that the Department does not keep track of how often such a letter goes out.[73]

Having heard testimony regarding the "chilling" effect of the issuance of subpoenas to attorneys for information about their clients, the chairman also asked about the potential "chilling effect" of such a letter. Mr. Dennis agreed that there might be some:

> . . . It depends upon the attorney, I guess, and how confident he was in his representation of the client. I think it is always intimidating to be a defense lawyer, quite frankly. I heard Race Horse Haynes say one time, to be a successful lawyer that one is akin to being able to stand in the middle of the railway tracks and stare the train down as it's bearing down upon you.
>
> * * * * * * *
>
> But if you don't have the stomach for it, you are in the wrong business.[74]

During the initial stages of the inquiry, Justice had assured the subcommittee that it experienced "no difficulty obtaining compliance with the attorney-subpoena policy. Part of the reason is that compliance is mandatory".[75] The Department testified that the

[70] No such finding was necessary because the Court concurred "with the Government that any failure to comply with internal guidelines is not a basis for quashing the Government's subpoena." Order *In Re: Grand Jury Subpoena for Attorney Representing Criminal Defendant Jose Evaristo Reyes-Requena*, Misc. No. H-89-522 at 5 and 6 (S.D. Tex. Houston Div. Oct. 31, 1989).

[71] *United States of America, et al.* v. *Klubock, et al.*, Complaint for Declaratory and Injunctive Relief, No. 85-4909-2 (D. Mass. 1985).

[72] Letter from John S. Morgan, assistant U.S. attorney, Organized Crime Drug Enforcement Task Force, northern district of Oklahoma, to Mr. Ronald L. Daniel, Esq., Tulsa, OK, June 14, 1989. Hearing at 352.

[73] Hearing at 354 and 355.

[74] Hearing at 355.

[75] Letter from Carol T. Crawford, Assistant Attorney General, U.S. Department of Justice, to the Honorable Robert E. Wise, Jr., chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, House of Representatives, September 7, 1989. Reprinted in appendix 2.

"process by which subpoena are approved ensures" a consistent pattern of success and that concerns regarding the issuance of subpoenaes to attorneys were misplaced.[76] The process was described as follows:

> Each Assistant United States Attorney seeking to subpoena an attorney or his files must first convince the United States Attorney personally to approve his or her application. That application is then sent to the Office of Enforcement Operations, where it is reviewed by experienced attorney supervisors. The applications are then sent to the Director of the Office for his approval. After he has approved them, they are reviewed by one or the other of my two Special Counsel. Only if each of the reviewers recommends approval is the subpoena sent to me, as the Assistant Attorney General.[77]

However, having heard assertions that the process is not as effective as claimed—for example, that the copies of manuals containing guidelines sometimes sit without being updated and that individual assistant U.S. attorneys are sometimes not fully aware of all guidelines—the subcommittee attempted to learn what actions are taken by the Department to insure compliance with the subpoena guidelines and its actual success rate in doing so.

At the outset, the Department told the subcommittee that requests to approve attorney subpoenas are "the responsibility of the Witness Immunity Unit . . . which administers the policy's requirements for the Department."[78] Accordingly, prior to the subcommittee's hearings, a request was made to the Department to talk to the individual in the Witness Immunity Unit who, as a matter of public record, is responsible for reviewing subpoena requests within the Department to learn more details about how the process actually works. The Department denied the request asserting that in "the interests of good government" a representative of the subcommittee could not talk to him. The rationale given was that the Justice Department must "speak with one voice."[79] Ultimately, and in the face of a scheduled subpoena meeting, and after

[76] Hearing at 269.

[77] Id.

[78] Letter from Carol T. Crawford to Robert E. Wise, Jr., September 7, 1989 at 4. Reprinted in appendix No. 2 of the hearing.

[79] The Office of Legislative Affairs stated that the individual requested to be interviewed was not authorized to speak on matters of policy. When the subcommittee suggested that he be instructed not to speak on matters of policy, the Office of Legislative Affairs continued to prohibit the contact. The rationale was that it would be "inappropriate" to put departmental employees "at risk" in distinguishing between fact and policy. Conversation with Tom Reinhardt, Office of Legislative Affairs, November 8, 1989:

During a meeting with the subcommittee's chairman, the Assistant Attorney General for Legislative Affairs further explained the Department's position: The Department has a "vested interest" in preventing individual views, and it had to protect line attorneys who will feel a "chilling" effect from congressional probes. The interviews could not take place because it was important that departmental staff be protected from "intimidation" by congressional staff.

Meeting between Bob Wise, chairman of the Subcommittee on Government Information, Justice, and Agriculture and Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, and including representatives of the subcommittee staff and the staff of the Office of Legislative Affairs, November 17, 1989.

needlessly time-consuming wrangling over the terms of the discussion, a discussion took place.[80]

For the hearing, the Department was asked to explain the process for insuring compliance with guidelines. The Department's statement explains: the "Executive Office of United States Attorneys has it own Deputy DAEO, who, together with his staff, advises AUSA's on . . . the guidelines, and who helps to process appropriate disciplinary actions when an AUSA either violates the Standards of Conduct or the Department's Guidelines." [81] The Chairman had requested that the Department be prepared at the hearing to respond to questions about the role of the executive office of the U.S. Attorneys in insuring "compliance . . . with Departmental guidelines governing matters such as the issuance of subpoenas." But, when the chairman began to ask questions regarding those issues, the witness was unable to respond.[82]

The committee notes that the executive office for U.S. attorneys is responsible for peer reviews which are conducted at the U.S. attorneys' offices to insure compliance with departmental procedures and that the Evaluation Manual used to guide the conduct of these peer reviews does not contain a section regarding the review of the issuance of subpoenas to attorneys.[83]

The Department also told the subcommittee: "[T]he Inspector General . . . conduct[s] both audits and inspections of U.S. Attorneys' Office, and either of those activities may uncover deficiencies in the office's adherence to Departmental procedures." [84] Upon review of the actual audit reports, however, we note that in fact they do not address these issues. Only three audit reports of U.S. attorneys offices had been completed. Two dealt with matters such as time and attendance, travel and procurement, and one examined debt collection efforts.[85]

[80] The Department took the position that a supervisor needed to be present. The chairman objected. But, given the routine nature of the information sought and the needless delay which had already occurred, he decided to allow the discussion to take place with the supervisor present.

Letter to Richard Thornburgh, Attorney General of the United States, Department of Justice, from Bob Wise, chairman, and Al McCandless, ranking minority member, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives, November 11, 1989; letter to the Honorable Robert E. Wise, Jr., chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, from Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, November 20, 1989; and response to Richard Thornburgh, Attorney General of the United States, Department of Justice, from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives, November 21, 1989.

[81] Hearing at 280.

[82] Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture to the Honorable Dick Thornburgh, Attorney General, U.S. Department of Justice, April 18, 1990.

Hearing at 357 and 358.

[83] U.S. Department of Justice, executive office for U.S. attorneys, Evaluation Manual.

[84] Hearing at 280.

[85] U.S. Department of Justice, Office of the Inspector General, "Audit Report: Debt Collections at the United States Attorney's Office, Eastern District of Texas," January 1990, 90-4; from Robert C. Gruensfelder, Regional Inspector General for Audit, Chicago Regional Audit Office, Office of the Inspector General, to Stephen Markman, U.S. Attorney, Eastern District of Michigan, "Review of Administrative Controls in the Eastern District of Michigan, United States Attorney's Office, Report Number: GR-50—90-001," November 7, 1989; from Robert C. Gruensfelder, Regional Inspector General for Audit, Chicago Regional Audit Office, Office of the Inspector General, "Review of Administrative Controls in the Northern District of Indiana, United States Attorney's Office Report Number: GR-50—90-002," November 7, 1989.

Continued

On the matter of processing "appropriate disciplinary actions when an AUSA either violates the Standards of Conduct or the Department's Guidelines," the chairman asked about disciplinary actions:

> Mr. WISE. Do you consider the failure to comply with these guidelines for issuing subpoenas as misconduct?
>
> Mr. DENNIS. It depends upon the circumstances. If it is inadvertent, it is probably not going to be viewed as misconduct. It may give rise to some—what I would call concern or an attorney that is not familiar with the manual, or is sloppy in his work. I mean you deal with that as you would with any other problem.
>
> Mr. WISE. . . . have you disciplined anyone for improperly issuing a subpoena under this?
>
> Mr. DENNIS. Not that I can recall . . .[86]

The Department also testified: "defense lawyers are not helpless in the face of a subpoena. In fact, in every case there is an opportunity to quash a subpoena if it is burdensome, overbroad or for some other reason, such as privilege, it seeks inappropriate information. In subpoenaing attorneys, we are not invading the defense camp for privileged information, we are seeking evidence of crimes where that evidence is often uniquely located." [87] As a practical matter, according to research conducted by the American Law Division, the courts vary in their exercise of their supervisory power. For example, some courts, such as the 9th and 4th circuits require a preliminary showing of the need, or need and relevance of an attorney subpoena and others, such as the 2nd, 7th, 8th, and 11th circuits, do not.[88] In other words, in some courts lawyers are less "helpless" than in others.

The ABA has proposed a model rule change to establish an ethical requirement for judicial approval of a subpoena issued "where a prosecutor seeks to compel an attorney to provide evidence obtained as a result of the attorney-client relationship." [89] The Department of Justice strongly objects to the proposal, arguing it will put "an egregious and unnecessary burden" on the courts, "effectively brings to a close the secrecy of grand jury practice, makes a substantive change in the Rules of Criminal Procedure," and "does nothing to change the protection to the attorney-client privilege." [90] According to news reports, in August, the Attorney General held a news conference at which he criticized the proposals: "The defense bar, with ABA sponsorship, is attempting to use rules

According to the Acting Inspector General, "inspections are underway at the Districts of South Carolina and Western Washington" and the inspection reports would be transmitted as soon as they were completed "within the next several weeks." However, these reports have not yet been transmitted to the subcommittee. Letter from Anthony C. Moscato, Acting Inspector General, U.S. Department of Justice to the Honorable Robert E. Wise, Jr., chairman, Government Information, Justice, and Agriculture Subcommittee, Committee on Government Operations, U.S. House of Representatives, June 8, 1990. Hearing at 380-382.

[86] Hearing at 356.

[87] Hearing at 268.

[88] Hearing at 355 and 356. Memorandum to the House Committee on Governmental Operations, Subcommittee on Government Information, Justice, and Agriculture, from American Law Division, Congressional Research Service, "Attorney Subpoenas," March 23, 1990.

[89] ABA. Report No. 122B. Hearing at 162.

[90] Hearing at 272.

of professional conduct to stymie criminal investigations and prosecutions." [91]

3. Questions Regarding Attorney Discipline

The action of the Attorney General in attempting to exempt by "memorandum and pronouncement" [92] Departmental attorneys from the regulation of the state bars (as discussed in Section III. A. 1.above) and allegations of misconduct raise broader questions about the standards which are applicable to departmental attorneys and the manner in which they are enforced. The committee notes that there have been occasional news reports regarding allegations of misconduct on the part of Federal prosecutors.[93] The most recent annual report of the Office of Professional Responsibility (OPR) covering the calendar year 1988 indicated a "notable increase over the previous year in the number of complaints alleging abuse of prosecutorial or investigative authority. In 1988, that category increased from 12 percent to 15 percent of the total number of complaints received." [94] And, from time to time, Federal judges make findings of prosecutorial misconduct.[95]

Accordingly, the Department was asked to include in its statement a description of the ethical rules applicable to U.S. attorneys and their assistants. Mr. Dennis testified that "we are subject to probably the most stringent rules and regulations, and we intend to work within that frame work." [96] Justice explained that the Department has issued an Ethics Handbook.[97] It is an 11-page document containing a summary of statutory provisions and regulations issued by the Department. Most of the provisions relate to financial and personal conflicts of interests, financial disclosures and regulations regarding outside activities.[98] Attorneys are listed in a category "Special Applications" with the following statement:

> If you are an attorney with the Department, you are expected to comply not only with the rules in this booklet, but also with relevant professional codes of conduct. Consult your Deputy DAEO for advice on which codes apply and what they require.[99]

The Department said "there is a presentation on prosecution ethics" in the Attorney General's Advocacy Institute, that each "Assistant is required to familiarize himself or herself with the "United States Attorneys' Manual"; and the United States Attorneys' Bulletin is sent to United States Attorneys' Offices and in-

[91] "Prosecutors See ABA as 'Arm of the Defense Bar' " Legal Times, September 17, 1990 at 6 and 7. Department of Justice, press release, August 6, 1990.

[92] Hearing at 245.

[93] See in particular the Legal Times, published in Washington, DC.

[94] Annual Report to the Attorney General, 1988, Office of Professional Responsibility at 5.

[95] Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations to the Honorable Richard Thornburgh, the Attorney General, U.S. Department of Justice, April 30, 1990 lists 10 such cases. Hearing at 373.

[96] Hearing at 351.

[97] U.S. Department of Justice, Ethics Handbook, 1989. Hearing at 291.

[98] There are several categories of conflicts of interest, including matters relating to nepotism, financial disclosure and investigations involving someone with whom one has a personal relationship. There are other categories, such as the appropriateness of outside activities, including public speaking, writing and fundraising; accepting things of value; political activities; misuse of Federal property; post-employment restrictions; and special applications.

[99] Id. at 11.

cludes guidelines for our practice as well as notes on our Standards of Conduct." [100]

Mr. Dennis explained that "[w]here there is an allegation that a prosecutor has violated the Code of Professional Responsibility, our Standards of Conduct, or any other rule of law, the Office of Professional Responsibility (OPR) in the Department of Justice conducts an investigation and recommends disciplinary action where appropriate . . . To supplement and effectuate the work of OPR, the Executive Office of United States Attorneys has its own Deputy DAEO, who, together with his staff, advises AUSA's on ethics and guidelines, and who helps to process appropriate disciplinary actions when an AUSA either violates the Standards of Conduct or the Department's Guidelines."[101]

Finding out what the Department has actually done to insure compliance with "those stringent rules and regulations" is a different matter. The Assistant Attorney General reported that each year the Office of Professional Responsibility produces an Annual Report to the Attorney General. However, the most recent report is almost two years out of date, having been completed for Calendar Year 1988. The reports are approximately 25 pages. They provide some information on the work of the Office of Professional Responsibility at Main Justice and the five departmental units that have their own internal inspection units and which are "monitored" by the Office of Professional Responsibility.[102] They contain statistical information regarding the number, type and source of complaints received. There is an overall statement of findings regarding the total percentage of cases substantiated: in calendar year 1988, "allegations of misconduct were substantiated in 38, or slightly less than 10 percent, of the cases closed during the year,"[103] and "calendar year 1987, allegations of misconduct were substantiated in 60, or about 11 percent of the cases closed during the year."[104] Each year, in about 6 percent of the matters closed, the subject resigned prior to completion of the investigation or the imposition of discipline. There are also a few selected case summaries. However, there is no overall information regarding findings to assist in identifying trends in the types of problems being substantiated. Except for the few selected case studies, there is no information regarding disciplinary action taken. The explanation provided for the latter is

[100] Hearing at 279.

[101] Hearing at 279 and 280. The Standards of Conduct are contained in 28 C.F.R. Part 45. Sec. 45.735-2 provides:

> Employees shall (a) Conduct themselves in a manner that creates and maintains respect for the Department of Justice and the U.S. Government. In all their activities, personal and official, they should always be mindful of the high standards of behavior expected of them;

[102] These units are the Bureau of Prisons Office of Inspections, the Drug Enforcement Administration's Office of Professional Responsibility, the Federal Bureau of Investigation's Office of Professional Responsibility, the Immigration and Naturalization Service's Office of Professional Responsibility and the U.S. Marshals Service's Office of the Assistant Director for Inspections. The Inspector General Act Amendments of 1988 made some changes in the responsibilities of the Office of Professional Responsibility.

The OPR/Main Justice investigates allegations of misconduct against personnel "who are not employed by a Departmental component having its own internal inspection unit"—that is, employees in the various offices and litigating divisions, employees of the U.S. attorneys offices, and personnel in various bureaus and boards of the Department.

1988 OPR Annual Report at 2.

[103] 1988 OPR report at 5.

[104] Annual Report to the Attorney General, 1987, Office of Professional Responsibility at 6

that the Office of Professional Responsibility investigates misconduct but does not take disciplinary action.

At the request of the subcommittee's chairman, OPR provided a more detailed breakdown of data regarding complaints in two of the reported categories with respect to U.S. attorneys and assistant U.S. attorneys for a 5-year period.[105] (The committee notes with appreciation the fact that OPR provided the data [including brief summaries of the cases] within the timeframe requested even though according to OPR, the data requested "was not readily retrievable in the form requested".) [106]

According to data submitted in January 1990, of the number of cases that were closed, the percentage of unsubstantiated complaints regarding "abuse of prosecutorial or investigative authority" remained about the same over the 5 years (generally 88 percent to 90 percent). The percentage of cases closed in which the subject resigned or retired before completion of the investigation were the following: 7 percent in 1989; 10 percent in 1988; 8 percent in 1987; 3 percent in 1986; and 12 percent in 1985.[107] However, with respect to allegations of "unprofessional or unethical behavior" there was an increase in the number substantiated. In 1989, the allegations were unsubstantiated in 79 percent of the cases and 75 percent of the cases in 1988. This compares to 89 percent for 1987, 86 percent for 1986, and 89 percent for 1985. (At the time the data was provided to the subcommittee, approximately one half of the complaints regarding "abuse of prosecutorial or investigative authority" and one fourth of the cases involving allegations of "unprofessional or unethical behavior" were still open.) Updated information submitted on September 21, 1990, shows that the number of unsubstantiated complaints of unprofessional behavior came out to be 83 percent for 1989.[108]

Efforts to discuss at the hearing matters related to the response were thwarted. Although the Department was notified to be prepared to respond to questions related to the letter [109] (and the Office of Legislative Affairs was informed orally that the subcommittee wanted someone specifically from the OPR office) when the chairman began to ask questions, the Department's representative refused to allow an OPR representative who was in the room to respond. Mr. Dennis' position was that the Justice Department insists that "someone at my level actually handle the testimony." [110] However, as pointed out by the subcommittee's Chairman, this was inconsistent with the actions of the Department only days earlier

[105] Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture to the Honorable Richard Thornburgh, the Attorney General, U.S. Department of Justice, December 19, 1989 and response from Michael E. Shaheen, Jr., to the Honorable Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, House of Representatives, January 29, 1990.

[106] Letter from Michael E. Shaheen, Jr., to the Honorable Bob Wise, January 29, 1990.

[107] OPR stated: "Resignation or retirement may have been for reasons unrelated to the allegations."

[108] Letter to the Honorable Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, House of Representatives from Michael E. Shaheen, Jr., counsel, Office of Professional Responsibility, U.S. Department of Justice, September 21, 1990.

[109] Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture to the Honorable Dick Thornburgh, Attorney General of the United States, Department of Justice, April 18, 1990.

[110] Hearing at 358 and 359.

when witnesses "at a different level" in the Department testified before the subcommittee.

Furthermore, and more importantly, Mr. Dennis was unable to answer adequately questions regarding the day to day mechanics of processing complaints by OPR. For example, in response to the chairman's questions as to whether the OPR staff conducts all investigations, he testified that "if a complaint is worthy of investigation" OPR conducts the investigation.[111] This left the clear impression that the answer was "yes." But, according to additional materials submitted by OPR in response to the chairman's request:

> The Office of Professional Responsibility has overall responsibility for investigating allegations of misconduct against United States Attorneys and their assistants. Although misconduct complaints against federal prosecutors are received from various sources, many complaints are initially received by the Executive Office for United States Attorneys and referred to this Office for investigation. *Certain cases involving management issues and less serious misconduct allegations are referred to (or retained by) the Executive Office for investigation and disposition.*[112] [Emphasis added].

This distinction is relevant to understanding the relative independence of investigations which are conducted within the Department.

The subcommittee also encountered difficulty in obtaining information from the Department regarding the outcome of 10 cases in which Federal courts found that there had been prosecutorial misconduct. On April 30, the chairman wrote to the Attorney General to request information regarding the "disciplinary action, if any, taken by the Department in ten recent cases" in which generally, "the court found that there was prosecutorial misconduct, but allowed the conviction to stand." [113] These cases included a variety of fact situations, some more serious than others. The Department promised that it would "respond to that letter on the record in the near future," [114] and said it wanted to "correct a misunderstanding that is apparent from the nature of your question. Not every action that an appellate court may refer to as prosecutorial misconduct is misconduct within the meaning of either the Code of Professional Responsibility or the Standards of Conduct in the Department of Justice." [115]

It took several reminders and more than 5 months to get a response.[116] Since there was no explanation for the delay, the Com-

[111] Hearing at 359.

[112] Letter from Michael E. Shaheen Jr., counsel, Office of Professional Responsibility, U.S. Department of Justice, to the Honorable Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, U.S. House of Representatives, July 10, 1990. Hearing at 386.

[113] Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives to the Honorable Richard Thornburgh, Attorney General, U.S. Department of Justice, April 30, 1990.

[114] Hearing at 280.

[115] Hearing at 281.

[116] On June 5, the chairman wrote to Mr. Dennis: "I have not yet received a response to my inquiry to the Attorney General dated April 30, 1990." Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government

Continued

mittee is left to speculate as to the reasons. One possibility is that the Department does not keep track of the findings of the courts to routinely ascertain that necessary investigations and appropriate disciplinary action are taken. The response suggests that some of these cases may fall through the cracks: "Five of the cases were administratively determined not to involve conduct sufficiently serious to warrant disciplinary action, and were not referred to the Department's Office of Professional Responsibility." [117] Attached was a memorandum sent to the U.S. Attorneys containing the admonition that "United States Attorneys should be mindful of the requirement to report all allegations of misconduct concerning Assistant United States Attorneys, other Department attorneys and those in criminal investigative or law enforcement positions to the Office of Professional Responsibility . . ." [118] Alternatively, the delay might have been caused by a view held by some within the Department that such information should not be provided to the subcommittee. Both Mr. Dennis' prepared statement and the Office of Legislative Affairs suggested there were Privacy Act problems, but as pointed out by the subcommittee, the Privacy Act contains a specific exemption for the disclosure of information otherwise subject to the act, to Congress and its committees.[119]

As to the results, the Department reported: "no disciplinary action has been taken in any of the ten cases."

> Five of the cases were administratively determined not to involve conduct sufficiently serious to warrant disciplinary action, and were not referred to the Department's Office of Professional Responsibility (OPR). The other five cases were referred to OPR. Three of these were determined after further investigation not to warrant disciplinary action, and two remain open in OPR.[120]

Operations, to Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division, Department of Justice, June 5, 1990.

On August 7, the chairman wrote to the Attorney General: "I would appreciate your prompt submission of a response providing the information which was requested." Letter from Bob Wise, chairman, Subcommittee on Government Information, Justice, and Agriculture to the Honorable Richard Thornburgh, Attorney General, U.S. Department of Justice, August 7, 1990.

On September 5, copies of the previous correspondence were faxed to the Office of Legislative Affairs, with yet another request that an answer be provided.

On October 2, 1990, the Department finally submitted a response. Letter from Bruce C. Navarro, Deputy Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to Honorable Bob Wise, chairman, Government Information, Justice, and Agriculture Subcommittee, Committee on Government Operations, October 2, 1990.

Hearing at 370-377.

[117] October 2, 1990, letter at 1.

[118] Memorandum from Lawrence S. McWhorter, director, executive office for U.S. attorneys, U.S. Department of Justice to all U.S. attorneys, September 4, 1990.

[119] Mr. Dennis's prepared statement contained the following statement: ". . . I am not at liberty to describe what action took place in those cases, given the strictures of the Privacy Act . . ." Hearing at 280 and 281.

5 U.S.C. Sec. 552(b)(9) is the exemption section.

Another possibility is the failure of the OLA to keep track of the requests. Earlier in the Congress, the subcommittee had encountered similar month long delays in obtaining responses to inquiries and routine information requested from the Department of Justice. However, since in November 1989, the Assistant Attorney General for Legislative Affairs told the subcommittee's chairman that her office had instituted a correspondence tracking system to avoid similar problems from occurring in the future, we assume the delay was not due to problems with tracking the correspondence. "U.S. Marshals Service: Don't Arrest Oversight," H. Rept. 101-420, 101st Cong. 2 Sess. at 21.

[120] Letter from Bruce C. Navarro to Bob Wise, October 2, 1990.

The response does not provide explanations for the determinations such as there was "no misconduct," that "prosecutors did not engage in actionable misconduct," and that conduct was "not serious enough to require disciplinary action." In other words, in cases in which a Federal judge found misconduct, and outlined the factual basis for doing so, the Justice Department has determined that there was not misconduct, and has not provided an explanation for its disagreement with the judge's findings.

The subcommittee did not conduct an independent review of the facts and findings in each of these cases nor has it reviewed the actual investigations conducted by Justice.[121] Nevertheless, we are concerned that in some of the cases, the facts as found by the Federal judges were very serious: for example, in one case the court found violations of the grand jury rules, violations of statutory witness immunity sections, violations of the fifth and sixth amendments, the knowing presentation of misinformation to the grand jury, and the mistreatment of witnesses. The long delay, repeated findings of no misconduct, and the Department's failure to explain its disagreements with findings of misconduct by the Courts raises serious questions regarding what the Department considers "prosecutorial misconduct . . . within the meaning of either the Code of Professional Responsibility or the Standards of Conduct in the Department of Justice . . ." [122]

In addition to questions as to what constitutes misconduct, the committee has concerns regarding the Department's position regarding public disclosure in those cases in which public disclosure has already been made. During the hearings, the subcommittee's chairman asked Mr. Dennis to explain the department's position regarding providing information to the public on the outcome of disciplinary cases when it is already a matter of public record that misconduct, at least in the eyes of a Federal judge, has occurred. This question was designed to follow up on the Department's implementation of a recommendation contained in a report issued by this committee in 1978:

> 15. The Department of Justice and OPR should continue their recent steps to make *public final determinations* and related material in administrative cases which have attracted public attention. [123] [Emphasis added.]

The 1978 report was based on an extensive investigation of the Department's handling of allegations of misconduct which was prompted in part by disclosures of break-ins by the Federal Bureau of Investigation. The following rationale was given for the committee's recommendation:

[121] Such a review is appropriate for a congressional committee to conduct. In *McGrain* v. *Daughtery*, 273 U.S. 135 (1927), the Supreme Court upheld a congressional investigation of the Department of Justice—"whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrong doers . . ."

[122] Hearing at 281.

[123] "Justice Department Internal Investigation Policies", Twenty-Sixth Report by the Committee on Government Operations together with additional views, H. Rept. No. 1520, 95th Cong. 2d Sess. at 4.

The committee endorses these efforts [the issuance of press releases] by the Department to report to the public on its actions. The Committee acknowledges that there may be Privacy Act considerations in some types of information release. Particularly where a case has already been subject to publicity, however, it is appropriate for the Department to state what has resulted from its investigation. Where proper administrative action has been taken or no misconduct found, the Department enhances its credibility with the public by announcing such results. [124]

Here's how Mr. Dennis responded:

Mr. DENNIS. . . . There are some of these that are under active investigation by the Office of Professional Responsibility. I really can say no more than the fact there are some under active investigation.

There are some that are not, and having reviewed at least the basic allegations in those opinions, some were apparently situations where the court made it clear that it thought that there was an ethical violation sufficient to warrant a, an (sic) investigation by the Department, and the fact that that may be conducted, I think is a matter that we can't really elaborate on, as we don't elaborate on other ongoing investigations.

I don't know what you would—this is—this is something that we generally follow in criminal cases, and I believe OPR tends to follow it as well in terms of its internal investigations, that we don't get into that and explore the details of where the investigation is and what action might be taken. . . .

I don't think it is a matter they are not taken seriously. It's a matter of public discussion.

Mr. WISE. Do you though reveal publicly the disposition?

Mr. DENNIS. I'm not sure on that. I think there's a report that is prepared annually by the Office of Professional Responsibility, which in an anonymous way, gives dispositions and general descriptions of cases that they have handled, but I don't believe they name names in that.

Mr. WISE. Last year a Federal district judge issued an opinion containing a section entitled, I quote, "Harassment of Defense Attorneys," in raising concerns about several types of activities. . . .

. . . are you willing at the conclusion of the investigation to reveal the outcome of the matter and any disciplinary action that might be taken, if indeed any is found warranted?

Mr. DENNIS. I would certainly be willing to—I would like to consult within the Department and not make a commitment, but I would certainly be willing to respond to that.

[124] H. Rept. 95-1520 at 27.

Mr. WISE. What I would ask you to do is if you decide you are not able to take that step, is then to so inform me of that also.

Mr. DENNIS. Absolutely.

Mr. WISE. And the reason for it.

Mr. DENNIS. All right. [125]

These submissions were not made. However, this case was included in the 10 cases inquired about as mentioned above. When the Department finally submitted its response, it stated "we strongly request that the subcommittee hold the information provided in our letter of October 2nd in the strictest confidence." [126] [emphasis added.] In addition, the Office of Professional Responsibility had earlier stated its position that the Privacy Act, the "deliberative privilege" and the public interest in protecting the confidentiality of individuals who provide information during the course of misconduct investigations precludes disclosure of information in its files to the public. [127] Ironically, we note that days before the subcommittee was admonished to "hold the information in the strictest confidence" a U.S. attorney released to the local press a letter containing the findings of the Department's investigation regarding one of the cases to the local press. [128] The committee also notes that there have been occasional news reports reflecting apparent departmental "leaks" of other departmental investigations. [129]

B. STATUTORY DEVELOPMENTS

Of particular concern to witnesses at the subcommittee's hearings were legislative developments which they believe have had the effect of giving prosecutors the ability to intrude upon the relationship between an attorney and his or her client either by allowing prosecutors to dictate who will represent a defendant or by obtaining information from the lawyer regarding the client. This section summarizes briefly those concerns as described to the Subcommittee.

1. Fee Forfeiture Provisions

Witnesses expressed particular concern about the applicability of the Federal forfeiture statutes to attorneys' fees. These statutes, a relatively recent development in American law, seek to have an economic impact on racketeers and drug dealers by depriving them of the high profits of crime and separating them from legitimate businesses.

The Racketeer Influenced and Corrupt Organizations Act [130] and the Controlled Substances Act [131] provide for criminal forfeiture as

[125] Hearing at 361-369.

[126] Letter to the Honorable Robert E. Wise, chairman, Government Information, Justice, and Agriculture Subcommittee, Committee on Government Operations from Bruce C. Navarro, Deputy Assistant Attorney General, U.S. Department of Justice, October 3, 1990.

[127] July 10, 1990 letter from Michael E. Shaheen, Jr. to Bob Wise.

[128] Associated Press, 10-07-90, AM-WV, "Kolibash Cleared."

[129] The Washington Post, May 15, 1990, at A1 and A10; April 29, 1990, A16; April 4, 1990, A25.

[130] 18 U.S.C. Sec. 1963 et seq.

[131] 21 U.S.C. Sec. 801a et seq.

ATTACHMENT G

MEMORANDUM FOR RONALD K. NOBLE
ASSISTANT SECRETARY FOR ENFORCEMENT

FROM: Sarah Elizabeth Jones

RE: ATF Statements and Issues concerning ATF Knowledge of the Loss of the Element of Surprise

DATE: September 17, 1993

March 1, 1993 Troy WAR Interview

ATF initiates a shooting review. David Troy and Bill Wood interview Rodriguez and Mastin(3/1), Chojnacki(3/3), Cavanaugh(3/3), Sarabyn(3/2). Troy tells Review they immediately determined that these stories did not add up. They communicated information to both Hartnett and Conroy on the day or day after each interview. Conroy gave Troy's handwritten notes to Hartnett. (Note- Johnston at this point advised Hartnett to stop the ATF shooting review because ATF was creating Brady material. Because Chojnacki had not yet been interviewed, Johnston authorized that interview but no notes were created.)

March 2, 1993 Killorin UPI

"I think we lost the element of surprise."

March 3, 1993 Hartnett Reuters Tr. Report CNN, LETN

Answered question "when the undercover agent heard this phone call, did he realize at the time that this was a tip? "He did not realize this was a tip at the time."

March 4, 1993 Hartnett L.A. Times

"An undercover operative who had penetrated the cult overhead Koresh receiving the call but was not aware that he knew about the raid. At the time the phone call was made to the compound the undercover agent did not realize that the raid had been compromised."

Department of Justice

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JUSTICE DEPARTMENT STATEMENT ON LAW ENFORCEMENT PROCEDURES

WASHINGTON, D.C. -- Jo Ann Harris, Assistant Attorney General for the Criminal Division of the Justice Department issued the following statement today:

"During the past two days of Congressional hearings on the tragedy in Waco, a long-standing Justice Department practice has been badly mis-characterized. Documents have been produced at the hearing which suggest that the Justice Department requested the Treasury Department temporarily hold-off from interviewing potential witnesses in the Justice Department's criminal investigation of David Koresh and the Branch Davidians. Such a request would not be the least bit unusual.

"The Department often requests that Congressional committees and other agencies of the federal government temporarily refrain from pursuing investigations which could compromise and interfere with our criminal investigation. It is simply bad law enforcement to conduct simultaneous interviews with potential criminal trial witnesses. This is Prosecution 101, and any prosecutor worth his or her salt should know it."

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95-409

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