S. HRG. 106–255

THE EFFECT OF STATE ETHICS RULES ON FEDERAL LAW ENFORCEMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

THE EFFECT OF STATE ETHICS RULES ON FEDERAL LAW ENFORCEMENT, FOCUSING ON SECTION 530B OF TITLE 28 OF THE UNITED STATES CODE, WHICH REQUIRES DEPARTMENT ATTORNEYS TO COMPLY WITH STATE LAWS AND RULES, AND LOCAL FEDERAL COURT RULES, GOVERNING ATTORNEYS IN EACH STATE WHERE SUCH ATTORNEY ENGAGES IN THAT ATTORNEY'S DUTIES, THE CITIZENS PROTECTION ACT, AND POTENTIAL ABUSE OF POWER

MARCH 24, 1999

Serial No. J–106–9

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
60–098 CC WASHINGTON : 1999

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
JON KYL, Arizona
MIKE DEWINE, Ohio
JOHN ASHCROFT, Missouri
SPENCER ABRAHAM, Michigan
JEFF SESSIONS, Alabama
BOB SMITH, New Hampshire

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
ROBERT G. TORRICELLI, New Jersey
CHARLES E. SCHUMER, New York

MANUS COONEY, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Minority Chief Counsel*

SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

STROM THURMOND, South Carolina, *Chairman*

MIKE DEWINE, Ohio
JOHN ASHCROFT, Missouri
SPENCER ABRAHAM, Michigan
JEFF SESSIONS, Alabama

CHARLES E. SCHUMER, New York
JOSEPH R. BIDEN, JR., Delaware
ROBERT G. TORRICELLI, New Jersey
PATRICK J. LEAHY, Vermont

GARRY MALPHRUS, *Chief Counsel*
GLEN SHOR, *Legislative Assistant*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Thurmond, Hon. Strom, U.S. Senator from the State of South Carolina	1
Schumer, Hon. Charles E., U.S. Senator from the State of New York	3
DeWine, Hon. Mike, U.S. Senator from the State of Ohio	5
Biden, Joseph R., Jr., U.S. Senator from the State of Delaware	33
Hatch, Hon. Orrin G., U.S. Senator from the State of Utah	75, 84
Leahy, Hon. Patrick J., U.S. Senator from the State of Vermont	76

CHRONOLOGICAL LIST OF WITNESSES

Statement of Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice, Washington, DC; accompanied by Zachary W. Carter, U.S. attorney, Eastern District of New York, Brooklyn, NY, and P. Michael Patterson, U.S. attorney, Northern District of Florida, Pensacola, FL	20
Panel consisting of John Smietanka, former Principal Associate Deputy Attorney General, U.S. Department of Justice, Grand Rapids, MI; John R. Justice, president, National District Attorneys Association, Chester, SC; Richard L. Delonis, president, National Association of Assistant United States Attorneys, Detroit, MI; G. Andrew McKay, chair, National Litigation Committee, American Corporate Counsel Association, Washington, DC; and Geoffrey C. Hazard, Jr., trustee professor of law, University of Pennsylvania, Philadelphia, PA	47

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Carter, Zachary: Testimony	26
Delonis, Richard L.:	
Testimony	57
Prepared statement	59
Hazard, Geoffrey C., Jr.: Testimony	72
Holder, Eric H., Jr.:	
Testimony	20
Prepared statement	39
Justice, John R.:	
Testimony	53
Prepared statement	55
McKay, G. Andrew:	
Testimony	69
Prepared statement	71
Patterson, P. Michael: Testimony	23
Smietanka, John:	
Testimony	47
Prepared statement	48
Thurmond, Hon. Strom:	
The McDade amendment	6
A bill S. 250, to establish ethical standards for Federal prosecutors, and for other purposes	7
Articles:	
The Washington Post, "Repealing a Bad Law," dated Jan. 25, 1999	80
The Washington Post, "Quashing the Prosecutors," dated Aug. 13, 1999	81
The Washington Post, "Hampering Law Enforcement," dated Oct. 18, 1999	81

Page

Thurmond, Hon. Strom—Continued
Letters to:
Senator Thurmond from The Supreme Court of South Carolina, dated Mar. 22, 1999 82
The Subcommittee on Criminal Justice from David Beatty, director of public policy, National Victim Center, dated Sept. 28, 1998 83
The chairman and ranking member of the Committee on Appropriations and the chairman and ranking member of the Subcommittee on Commerce, Justice, State and Related Agencies from the Senate Committee on the Judiciary, dated July 21, 1998 90
The chairman and ranking member of the Committee on Appropriations from the Senate Committee on the Judiciary, dated Mar. 24, 1999 91

APPENDIX

Questions and Answers

Responses to Senator Leahy questions from:
Geoffrey C. Hazard, Jr 93
Eric Holder 96

Additional Submissions for the Record

Letters submitted by the American Corporate Counsel Association on Mar. 31, 1999:
To Senator Thurmond from Philip S. Anderson, the American Bar Association, dated Feb. 22, 1999 100
To Senator Peter G. Fitzgerald from R.R. Atterbury, Caterpillar, Inc., dated Mar. 9, 1999 101
To Senator Thurmond from R. Bruce Josten, Chamber of Commerce of the United States of America, dated Mar. 30, 1999 101
To Senator Carl M. Levin from Thomas A. Gottschalk, General Motors Corporation, dated Feb. 5, 1999 102
To Senator Ashcroft from Bill Ide, Monsanto Company, dated Feb. 11, 1999 102
To Representative Dennis Hastert from Michael E. Baroody, dated Mar. 16, 1999 103
To Senator Hatch from Michael J. Oths, president, National Organization of Bar Counsel, Inc., dated Mar. 10, 1999 103
To Senator Ted Stevens from Arnold I. Burns, Proskauer Rose LLP, dated Sept. 28, 1998 106
To the Illinois Congresspersons from Janet Langford Kelly, Sara Lee Corporation, dated Mar. 23, 1999 108

THE EFFECT OF STATE ETHICS RULES ON FEDERAL LAW ENFORCEMENT

WEDNESDAY, MARCH 24, 1999

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:02 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the subcommittee) presiding.

Also present: Senators DeWine, Sessions, Schumer, and Biden.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. The subcommittee will come to order. I am pleased today to hold the first solo hearing of the Subcommittee on Criminal Justice Oversight. This new subcommittee demonstrates the commitment of the Judiciary Committee to fighting crime in America. Of course, this commitment is not new. Crime was always a major interest of mine when I served as chairman and later as ranking member of the full Judiciary Committee, and it has been a primary focus of current Chairman Hatch.

Oversight is a key function of this committee, and I look forward to taking a hard look at our Federal law enforcement, prosecution and incarceration efforts. I am pleased to have Senator Schumer as the ranking member and look forward to working with him.

Our hearing today is on an issue that has the potential to greatly interfere in Federal law enforcement. The McDade amendment, which was passed late in the last Congress as part of the omnibus appropriations bill, subjects Federal Government attorneys to State laws and rules and local Federal court rules in any State where the attorney engages in his duties. It becomes effective in less than 1 month if it is not repealed or modified.

Requiring Federal prosecutors to follow State ethics rules is generally not a problem. However, in the grand scheme of attorney ethics, the Department of Justice has followed a small, critical exception in order to prevent certain rules from interfering in Federal law enforcement.

The problem arises when some States make certain prosecution practices and investigative techniques unethical that are otherwise clearly legal and constitutional. This can result in Federal prosecutors being disciplined under State ethics rules for conduct that is otherwise valid, even routine, and has been approved by their superiors. It can also mean that the evidence that is critical to a convic-

tion is excluded from evidence, possibly resulting in a criminal not being convicted based on a legal technicality.

Probably the most crucial example is that, based on State ethics rules, some States prohibit undercover investigations or sting operations. Of course, undercover operations are critical to efforts to discover the facts about an illegal enterprise. This is especially true in large, complex investigations such as organized crime or drug conspiracies. Prohibiting them could cripple law enforcement.

Also, some States greatly restrict the ability of authorities to speak with low-level company employees who voluntarily wish to expose corporate wrongdoing. This could bring to a halt criminal or civil investigations of serious corporate misconduct, such as telemarketing fraud. It could also prevent a low-level member of a drug cartel from voluntarily cooperating with authorities.

Moreover, some States attempt to interfere in traditional, established Federal grand jury practice, imposing their limitations on a Federal criminal grand jury. They may give attorneys special protections from grand jury subpoenas, or they may attempt to dictate what evidence must be presented to the grand jury.

Because of the vague language of McDade, the problem extends beyond ethics rules. Any State law governing attorneys, whether substantive or procedural, arguably could apply. For example, some States prohibit the use of wiretaps by prosecutors, and defense counsel will argue that these laws now trump established Federal law in this regard. Indeed, the possibilities of McDade are limited only by the imaginations of defense counsel in making their arguments to the court. At the very least, this will divert scarce resources from the pursuit of justice to unnecessary litigation.

Moreover, this new law will encourage further variance in State ethics rules than exists today. With State conduct rules clearly applying to Federal prosecutors, those who advocate for the interests of criminal defendants will be encouraged in their efforts to get States to make their rules even tougher for law enforcement.

The problem is especially acute because Federal criminal investigations have become increasingly national in scope, routinely crossing State lines. Prosecutors often supervise investigations or grand juries in many States at the same time. For Federal prosecutors, the need to comply with any applicable State ethics rule is more important than the success of a particular case. An ethics violation goes against a prosecutor personally and can impact his or her career and livelihood.

The McDade amendment will limit multi-State prosecutions to the rules of the most restrictive State involved. Indeed, because of the need for Federal authorities to maintain clarity, we could have ethics rules essentially dictating how all Federal investigations in the country are conducted.

Let me state that I do not dispute that the drafters and supporters of the McDade legislation had the best of intentions. Federal prosecutors have great power and they should be held to high ethical standards. Prosecutorial misconduct should not be and cannot be tolerated.

The Justice Department currently has an extensive process for uncovering and punishing unethical prosecutors. The disciplinary system should be as efficient and effective as possible, and we

should always evaluate whether there is room for improvement. However, the problem is not that there are not enough rules and regulations for Federal prosecutors to follow.

Some argue that the public will be safer if this law becomes effective. I cannot agree. It is my fear that this law will make law-abiding citizens less safe and secure, less protected from the criminal element. Indeed, my concern is that the real winners from this law will be the criminal element—drug cartels, violent gangs, serial armed bank robbers, and child pornographers.

In my view, it is critical that the Congress either repeal the McDade amendment or replace it with compromise legislation such as S. 250, the Federal Prosecutor Ethics Act, proposed by Senator Hatch. I look forward to the testimony of all of our very able witnesses today, especially the distinguished Deputy Attorney General and the Solicitor for the Sixth Circuit of South Carolina, John Justice. I hope we will learn much today about the effect of State ethics rules on Federal law enforcement.

Senator Schumer, we would be glad if you would care to make an opening statement.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, sir. Well, thank you very much, Mr. Chairman, and I apologize for being late and I want to thank you for holding this hearing. I appreciate the opportunity to serve alongside you as ranking member of this subcommittee. It is an opportunity I certainly did not expect to have in my first term in the Senate.

I also want to welcome today's witnesses, but particularly Zack Carter, the U.S. Attorney from the Eastern District, my home. He is a good friend and does a great job.

Mr. Chairman, on the 21st of this month, the so-called McDade language is scheduled to take effect. The purpose of this provision was to protect citizens from over-zealous prosecutors. However, based on the concerns expressed by Federal prosecutors whom I know and I trust, who I know are careful and not over-zealous prosecutors, like Mr. Carter, I fear that it may to some extent protect criminals from valid law enforcement techniques.

State ethics rules governing attorney contacts with represented persons typically offer prosecutors little in the way of a clear safe harbor for supervising undercover preindictment sting operations, very important particularly in our Eastern District, because it has our airports, for drug operations, and speaking to low-level corporate whistleblowers. Indeed, some State courts have interpreted these rules in ways that could chill what I think all of us would deem legitimate prosecutorial techniques, such as sending in investigators to infiltrate organized crime entities.

Rather than spelling out a way to alleviate this potential chilling effect without undermining protections that Congress intended against prosecutorial over-reaching, the McDade simply enshrines the current uncertainty into Federal law. It would be a mistake to assume that the only price we would pay for discouraging prosecutors from initiating undercover investigations of criminal entities with counsel on retainer is a diminished ability to bring down drug

lords or mob bosses. We would also lose the benefit of having prosecutors advise agents during the course of investigations of the legal and constitutional bounds of such investigations.

So the McDade language—I realize it is well-intentioned—also injects other uncertainties into the process of determining the propriety of prosecutorial conduct. Here is one example, and it is only one. There is already some confusion about whether Federal prosecutors must comply with the ethical rules of the district courts in which they are litigating or the rules of the States in which they are licensed, where those rules happen to be in conflict.

The McDade would appear to supply a new element of confusion by directing that Federal prosecutors also comply with the ethical rules of each State in which they, "engage in attorney's duties." Does this mean that prosecutors must now abide by the ethical rules of every State in which they conduct their positions or in which agents act according to their instructions? And what happens when those rules conflict with other States' ethical rules governing prosecutors? Where Federal prosecutors needed clear answers, the McDade language appears to have supplied them only with more questions.

In addition to commenting on the substance of the McDade language and its implications for Federal law enforcement, I also want to comment briefly on how we got to this point, and I beg the Chair's indulgence on this.

In part, the problem was one of, "insufficient process." The McDade language was not marked up by either the House or Senate Judiciary Committees in the previous Congress; I know because I was a member of the House Judiciary Committee then. It was not included in the Senate version of the fiscal year 1999 Commerce, State, Justice appropriations bill.

The language was voted on by this body not separately, but only as part of the omnibus appropriations bill passed at the end of last year. Surely, an issue of this magnitude deserved more sustained and thoughtful consideration than it was given.

I also believe the adoption of this language last year had something to do with the fact that 1998 presented us with a high-profile example of overreaching on the part of one prosecutor. In this sense, Federal prosecutors as a whole were punished for the sins of Ken Starr. And I want to make it clear today that the idea that what Ken Starr did is standard fare for Federal prosecutors, an idea advanced by Mr. Starr himself on numerous occasions, including when he testified before the House Judiciary Committee, is simply false.

Federal prosecutors do not typically discuss immunity agreements with individuals in the absence of their counsel. Federal prosecutors do not typically haul targets of investigations before grand juries. Federal prosecutors typically do disclose blatant conflicts of interest that might at least appear to compromise their independence in pursuing certain matters. In short, the vast majority of Federal prosecutors do not do what Ken Starr did.

And so I look forward to working with the other members of this subcommittee, and thank the Chair for holding this timely hearing toward developing a reasonable solution to the issues discussed today, a solution targeted specifically at the true, "bad apples,"

among the ranks of Federal prosecutors and targeted specifically at the problems the Department of Justice is, in fact, experiencing with the current ethics regime.

Let me be clear. I feel very strongly Federal prosecutors should be held to the highest of ethical standards, and I am sympathetic to the concerns of those who oppose vesting the Justice Department with broad and exclusive authority to regulate and sanction its attorneys. I would accordingly like to see implementation of the McDade language delayed to give us time to find the middle ground and do right by both law enforcement and civil liberties. One way or the other, however, we cannot afford to let this language remain on the books in its current form.

Thank you, Mr. Chairman. I appreciate the time.

Senator THURMOND. Thank you, Senator Schumer.

Senator DeWine, do you have an opening statement?

STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Just very briefly, Mr. Chairman, I want to say how honored I am to be serving on this subcommittee with you as the subcommittee chairman. You have been a leader in anticrime issues for so many years and I just look forward to serving with you.

I want to congratulate you also for holding this hearing. This is a hearing that is timely. This is a very important issue. It is an issue that many U.S. attorneys have contacted me about and I have talked to them about, so I look forward to hearing the testimony.

Senator THURMOND. Thank you, Senator DeWine.

If any Senators wish to place statements in the record, I ask unanimous consent that they appear at this point in the record.

I also wish to submit for the record a copy of the McDade amendment, as passed last year, and a copy of Senator Hatch's bill, S. 250, from this Congress.

[The McDade amendment and S. 250 follow:]

Copr. © West 1999 No Claim to Orig. U.S. Govt. Works

28 USCA s 530B
28 U.S.C.A. § 530B

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II--DEPARTMENT OF JUSTICE
CHAPTER 31--THE ATTORNEY GENERAL

Copr. © West Group 1999. No Claim to Orig. U.S. Govt. Works

Current through P.L. 106-38, approved 7-22-99

§ 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

CREDIT(S)

1999 Electronic Update

(Added Pub.L. 105-277, Div. A, § 101(b) [Title VIII, § 801(a)], Oct. 21, 1998, 112 Stat. 2681-118.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective Dates

1998 Acts. Pub.L. 105-277, Div. A, § 101(b) [Title VIII, § 801(c)], Oct. 21, 1998, 112 Stat. 2681-119, provided that: "The amendments made by this section [enacting this section] shall take effect 180 days after the date of the enactment of this Act [Oct. 21, 1998] and shall apply during that portion of fiscal year 1999 that follows that taking effect, and in each succeeding fiscal year."

28 U.S.C.A. § 530B

28 USCA § 530B

END OF DOCUMENT

II

106TH CONGRESS
1ST SESSION

S. 250

To establish ethical standards for Federal prosecutors, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. HATCH (for himself, Mr. DEWINE, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish ethical standards for Federal prosecutors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Prosecutor Ethics Act".

SEC. 2. ETHICAL STANDARDS FOR FEDERAL PROSECUTORS.

(a) AMENDMENTS TO TITLE 28, UNITED STATES CODE.—

1 (1) GENERAL.—Section 530B of title 28,
2 United States Code, is amended to read as follows:
3 **"§ 530B. Ethical standards for Federal prosecutors**
4 "(a) GENERAL.—Except as provided in subsection
5 (b), a Federal prosecutor shall be subject to all laws and
6 rules governing ethical conduct of attorneys of the State
7 in which the Federal prosecutor is licensed as an attorney.
8 "(b) EXCEPTION.—A Federal prosecutor shall not be
9 subject to a State law or rule governing ethical conduct
10 of attorneys, to the extent that the State law or rule is
11 inconsistent with Federal law or interferes with the effec-
12 tuation of Federal law or policy, including the investiga-
13 tion of violations of Federal law.
14 "(c) FEDERAL PROSECUTOR DEFINED.—In this sec-
15 tion, the term 'Federal prosecutor' means an attorney em-
16 ployed by the Department of Justice who is directly en-
17 gaged in the prosecution of violations of Federal civil or
18 criminal law.".
19 (2) TECHNICAL AND CONFORMING AMEND-
20 MENT.—The analysis for chapter 31 of title 28,
21 United States Code, is amended by striking the item
22 for section 530B and inserting the following:

"530B. Ethical standards for Federal prosecutors.".

23 (3) REGULATIONS.—Not later than 90 days
24 after the date of enactment of this Act, the Attorney
25 General shall promulgate such regulations as may be

1 necessary to carry out section 530B of title 28,
2 United States Code, as added by paragraph (1) of
3 this subsection.

4 (b) PROHIBITED CONDUCT FOR DEPARTMENT OF
5 JUSTICE EMPLOYEES.—

6 (1) IN GENERAL.—The Attorney General shall
7 establish by rule that it shall be punishable conduct
8 for any officer or employee of the Department of
9 Justice, in the discharge of his or her official duties,
10 intentionally to—

11 (A) seek the indictment of any person in
12 the absence of a reasonable belief of probable
13 cause, as prohibited by the Principles of Fed-
14 eral Prosecution, United States Attorneys'
15 Manual 9–27.200 et seq.;

16 (B) fail to disclose exculpatory evidence to
17 the defense, in violation of his or her obligations
18 under Brady v. Maryland (373 U.S. 83
19 (1963));

20 (C) mislead a court as to the guilt of any
21 person by knowingly making a false statement
22 of material fact or law;

23 (D) offer evidence known to be false;

24 (E) alter evidence in violation of section
25 1512 of title 18, United States Code;

1 (F) attempt to corruptly influence or color
2 a witness's testimony with the intent to encour-
3 age untruthful testimony, in violation of section
4 1503 or 1512 of title 18, United States Code;
5 (G) violate a defendant's right to discovery
6 under Rule 16(a) of the Federal Rules of
7 Criminal Procedure;
8 (H) offer or provide sexual activities to any
9 government witness or potential witness in ex-
10 change for or on account of his or her testi-
11 mony; or
12 (I) improperly disseminate confidential,
13 non-public information to any person during an
14 investigation or trial, in violation of—
15 (i) section 50.2 of title 28, Code of
16 Federal Regulations;
17 (ii) Rule 6(e) of the Federal Rules of
18 Criminal Procedure;
19 (iii) subsection (b) or (c) of section
20 2232 of title 18, United States Code;
21 (iv) section 6103 of the Internal Reve-
22 nue Code of 1986; or
23 (v) United States Attorneys' Manual
24 1–7.000 et seq.

1 (2) PENALTIES.—The Attorney General shall
2 establish a range of penalties for engaging in con-
3 duct prohibited under paragraph (1), which shall
4 include—
5 (A) reprimand;
6 (B) demotion;
7 (C) dismissal;
8 (D) suspension from employment;
9 (E) referral of ethical charges to the bar;
10 and
11 (F) referral of evidence related to the con-
12 duct, if appropriate, to a grand jury for possible
13 criminal prosecution.
14 (3) SUBSTANTIVE RIGHTS.—Nothing in para-
15 graph (1) may be construed to—
16 (A) establish any substantive right on be-
17 half of a criminal defendant, civil litigant, tar-
18 get or subject of an investigation, witness,
19 counsel for a represented party or parties, or
20 any other person; or
21 (B) provide a basis for—
22 (i) dismissing any criminal or civil
23 charge or proceeding against any person in
24 any court of the United States; or

1 (ii) excluding relevant evidence in any
2 proceeding in any court of the United
3 States.
4 (c) ANNUAL REPORT.—
5 (1) IN GENERAL.—Beginning on June 1, 1999,
6 and on June 1 of each year thereafter, the Attorney
7 General shall submit to the Committees on the Judi-
8 ciary and on Appropriations of the House of Rep-
9 resentatives and the Senate a report on the activities
10 and operations of the Office of Professional Respon-
11 sibility of the Department of Justice during the fis-
12 cal year that ended on September 30 of the preced-
13 ing year.
14 (2) ELEMENTS OF REPORT.—Each report sub-
15 mitted under paragraph (1) shall—
16 (A) include the number, type, and disposi-
17 tion of all investigations conducted or super-
18 vised by the Office of Professional Responsibil-
19 ity;
20 (B) include a summary of the findings of
21 each investigation in which the Department of
22 Justice found that an officer or employee of the
23 Department of Justice—
24 (i) engaged in willful misconduct; or

1 (ii) committed a willful violation of
2 subsection (b)(1); and
3 (C) be confidential and not disclose infor-
4 mation that would interfere with any pending
5 investigation or improperly infringe upon the
6 privacy rights of any individual.
7 (d) COMMISSION ON FEDERAL PROSECUTORIAL CON-
8 DUCT.—
9 (1) ESTABLISHMENT AND FUNCTIONS OF COM-
10 MISSION.—
11 (A) ESTABLISHMENT.—There is estab-
12 lished a Commission on Federal Prosecutorial
13 Conduct (referred to in this subsection as the
14 "Commission").
15 (B) FUNCTIONS.—The functions of the
16 Commission shall be to—
17 (i) conduct a review regarding—
18 (I) whether there are specific
19 Federal duties related to investigation
20 and prosecution of violations of Fed-
21 eral law which are incompatible with
22 the regulation of the conduct of Fed-
23 eral prosecutors (as that term is de-
24 fined in section 530B of title 28,
25 United States Code) by any State law

1 or rule governing ethical conduct of
2 attorneys; and
3 (II) the procedures utilized by
4 the Department of Justice to inves-
5 tigate and punish inappropriate con-
6 duct by Federal prosecutors; and
7 (ii) not later than 12 months after the
8 date on which the members of the Commis-
9 sion are appointed under paragraph
10 (2)(B), submit to the Attorney General a
11 report concerning the review under clause
12 (i), including any recommendations of the
13 Commission relating to the matters re-
14 viewed under clause (i).
15 (C) CONSULTATION.—In carrying out sub-
16 paragraph (B), the Commission shall consult
17 with the Attorney General, the Chairmen and
18 Ranking Members of the Committees on the
19 Judiciary of the House of Representatives and
20 the Senate, the American Bar Association and
21 other organizations of attorneys, representatives
22 of Federal, State, and local law enforcement
23 agencies, and Federal and State courts.
24 (2) MEMBERSHIP.—

1 (A) IN GENERAL.—The Commission shall
2 be composed of 7 members, each of whom shall
3 be—
4 (i) appointed by the Chief Justice of
5 the United States, after consultation with
6 the Chairmen and Ranking Members of
7 the Committees on the Judiciary of the
8 House of Representatives and the Senate,
9 and representatives of judges, prosecutors,
10 defense attorneys, law enforcement offi-
11 cials, victims of crime, and others inter-
12 ested in the criminal justice process; and
13 (ii) a judge of the United States (as
14 defined in section 451 of title 28, United
15 States Code).
16 (B) APPOINTMENT.—The members of the
17 Commission shall be appointed not later than
18 30 days after the date of enactment of this Act.
19 (C) VACANCY.—Any vacancy in the Com-
20 mission shall be filled in the same manner as
21 the original appointment.
22 (D) CHAIRPERSON.—The Commission
23 shall elect a chairperson and vice chairperson
24 from among its members.

1 (E) QUORUM.—Four members of the Com-
2 mission shall constitute a quorum, but 2 mem-
3 bers may conduct hearings.
4 (3) COMPENSATION.—Members of the Commis-
5 sion who are officers, or full-time employees, of the
6 United States shall receive no additional compensa-
7 tion for their services, but shall be reimbursed for
8 travel, subsistence, and other necessary expenses in-
9 curred in the performance of duties vested in the
10 Commission, but not in excess of the maximum
11 amounts authorized under section 456 of title 28,
12 United States Code.
13 (4) PERSONNEL.—
14 (A) EXECUTIVE DIRECTOR.—The Commis-
15 sion may appoint an Executive Director, who
16 shall receive compensation at a rate not exceed-
17 ing the rate prescribed for level V of the Execu-
18 tive Schedule under section 5316 of title 5,
19 United States Code.
20 (B) STAFF.—The Executive Director, with
21 the approval of the Commission, may appoint
22 and fix the compensation of such additional
23 personnel as the Executive Director determines
24 to be necessary, without regard to the provi-
25 sions of title 5, United States Code, governing

1 appointments in the competitive service or the
2 provisions of chapter 51 and subchapter III of
3 chapter 53 of such title relating to classification
4 and General Schedule pay rates. Compensation
5 under this subparagraph shall not exceed the
6 annual maximum rate of basic pay for a posi-
7 tion above GS–15 of the General Schedule
8 under section 5108 of title 5, United States
9 Code.

10 (C) EXPERTS AND CONSULTANTS.—The
11 Executive Director may procure personal serv-
12 ices of experts and consultants as authorized by
13 section 3109 of title 5, United States Code, at
14 rates not to exceed the highest level payable
15 under the General Schedule pay rates under
16 section 5332 of title 5, United States Code.

17 (D) SERVICES.—The Administrative Office
18 of the United States Courts shall provide ad-
19 ministrative services, including financial and
20 budgeting services, to the Commission on a re-
21 imbursable basis. The Federal Judicial Center
22 shall provide necessary research services to the
23 Commission on a reimbursable basis.

24 (5) INFORMATION.—The Commission may re-
25 quest from any department, agency, or independent

1 instrumentality of the Federal Government any in-
2 formation and assistance the Commission determines
3 to be necessary to carry out its functions under this
4 subsection. Each such department, agency, and inde-
5 pendent instrumentality is authorized to provide
6 such information and assistance to the extent per-
7 mitted by law when requested by the chairperson of
8 the Commission.

9 (6) REPORT OF THE ATTORNEY GENERAL.—
10 Not later than 60 days after the date of enactment
11 of this Act, the Attorney General shall submit to the
12 Commission a report, which shall, with respect to
13 the 3-year period preceding the date on which the
14 report is submitted under this paragraph—

15 (A) include the number, type, and disposi-
16 tion of all investigations conducted or super-
17 vised by the Office of Professional Responsibil-
18 ity of the Department of Justice;

19 (B) include a summary of the findings of
20 each investigation in which the Department of
21 Justice found that an officer or employee of the
22 Department of Justice engaged in willful mis-
23 conduct; and

24 (C) be confidential and not disclose infor-
25 mation that would interfere with any pending

1 investigation or improperly infringe upon the
2 privacy rights of any individual.
3 (7) TERMINATION.—The Commission shall ter-
4 minate 90 days after the date on which the Commis-
5 sion submits the report under paragraph (1)(B)(ii).
6 (8) AUTHORIZATION OF APPROPRIATIONS.—
7 There is authorized to be appropriated to the Com-
8 mission such sums, not to exceed $900,000, as may
9 be necessary to carry out this subsection. Amounts
10 made available under this paragraph shall remain
11 available until expended.

○

Senator THURMOND. We will now turn to the witnesses. I ask that all witnesses keep their opening statements to 5 minutes, and we will submit any written testimony for the record.

Our first witness is Deputy Attorney General Eric Holder, Jr. He is a graduate of Columbia University Law School and served as a prosecutor in the Justice Department Public Integrity Section. Later, he served on the Superior Court of the District of Columbia. In 1993, Mr. Holder became U.S. Attorney for the District of Columbia. Four years later, he was elevated to his current position of Deputy Attorney General of the United States.

He is accompanied by two U.S. attorneys, Zachary Carter—raise your hand, Mr. Carter—of the Eastern District of New York, and Michael Patterson of the Northern District of Florida.

I see Senator Biden has come in. Senator Biden, we are glad to have you here.

Senator BIDEN. Thank you, Mr. Chairman. I don't have any opening statement. I will reserve my statement and comments for the question-and-answer period.

Senator THURMOND. It is my pleasure to recognize the Deputy Attorney General at this time.

STATEMENT OF ERIC H. HOLDER, JR., DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; ACCOMPANIED BY ZACHARY W. CARTER, U.S. ATTORNEY, EASTERN DISTRICT OF NEW YORK, BROOKLYN, NY, AND P. MICHAEL PATTERSON, U.S. ATTORNEY, NORTHERN DISTRICT OF FLORIDA, PENSACOLA, FL

STATEMENT OF ERIC H. HOLDER, JR.

Mr. HOLDER. Mr. Chairman, I want to thank you and the members of the subcommittee for inviting me and my colleagues to testify before you today concerning the impact of 28 U.S.C. 530B, what we have come to call the McDade amendment, and the effect that that will have on Federal law enforcement. I would request that the full text of my prepared statement be made a part of the record.

Senator THURMOND. Without objection, it is so ordered.

Mr. HOLDER. Thank you. Mr. Chairman, it seems to me that this is not a Justice Department issue; it is a law enforcement issue. I do not stand alone in believing that this statute will have a chilling effect on our ability to both investigate and prosecute crimes against the United States. There have been many other groups who have expressed similar concerns about this statute.

Before addressing the specifics of the problems associated with the implementation of McDade, I would like to take a moment to express my support for the many dedicated men and women who sacrifice more lucrative careers in private practice for the honor of serving the Nation through their work at the Justice Department.

Because of the outstanding reputation the Department of Justice has earned over the years, we are able to attract the best and the brightest to the Department. We have been able to attract, I believe, highly ethical professionals who represent the United States and its citizens with great distinction everyday in the courts throughout this country.

Having said that, I also want to assure members of this subcommittee that the Department has a zero level of tolerance for misconduct by its employees. Those who misuse their offices or who abuse the public trust have been and will be swiftly and appropriately punished. The Department of Justice enforces the civil and criminal law of the United States without fear or favor, and its attorneys are expected—our attorneys are required to adhere to the highest standards of conduct in carrying out their duties.

The Department is involved in thousands of civil and criminal actions every year. In only a small percentage of those cases are there even allegations of misconduct. In even fewer cases are actual instances of misconduct found. In those few instances, the Department, the courts, and, yes, even State bars take action to punish the wrongdoing.

While those voting for the McDade amendment were well-intended, I believe the process, as Senator Schumer indicated, was flawed. It was added to an appropriations measure without full hearings before the Judiciary Committee, without the Department of Justice having had an opportunity to thoroughly discuss its potential pitfalls with you. And we are very pleased to finally have that opportunity now.

Let me be very clear about my position. I believe that if this provision should take effect on April 19, it is my strong view and considered professional judgment that it will have a very serious and very negative effect on Federal law enforcement activities across the country. And I would just like to share with you some concrete examples in that regard.

First, with regard to undercover operations, they are critical to many major investigations, including the investigation of major drug trafficking rings, terrorist groups, and traditional organized crime. The Committee on Professional Ethics of the Florida State Bar Association, however, has opined that under the Florida version of the contacts rule, attorneys and agents working with the attorneys may not communicate with anyone who claims to have a lawyer with respect to a particular matter.

The Florida bar has minimized the obvious harm to law enforcement that this rule would cause by observing that the target would likely be unaware of the undercover operation and so would not be represented in the matter even if the target had counsel. But this completely ignores the realities of modern Federal law enforcement.

Would the Florida bar really believe that John Gotti, for instance, did not know that he was under investigation? Under the Florida bar rule, Mr. Gotti's lawyer might have been able to write to the U.S. attorney stating his knowledge of the investigation, announce his representation of Mr. Gotti, and thereby preclude the Government from wiring an undercover FBI agent to try to elicit incriminating information from Mr. Gotti.

Second, with regard to investigations after arrest, investigation of criminal activity that continues after arrest could also be seriously hampered. For example, in a recent case investigated by a U.S. attorney's office, defendants in a securities fraud case were released on bail following their arrest. In the course of interviewing victims, prosecutors learned that one elderly victim had been con-

tacted by a defendant seeking $250,000 based on the same fraud. Prosecutors arranged for the victim to tape record ensuing conversations with the defendant, producing evidence of ongoing fraud by the defendant and by others. Prosecutors must be able to investigate such ongoing conduct in order to ensure that indicted defendants are not able to continue their illegal conduct.

A similar and even more dangerous situation occurs when prosecutors become aware that a defendant is trying to arrange for the murder of a witness. Under the Department's regulation and Federal case law, prosecutors can place a wire on a cooperator with instructions to try to get the defendant to talk about such plans. A rigorous no-contact rule would prevent prosecutors from using this essential investigative technique, with potentially disastrous consequences.

And this is not a hypothetical circumstance. In a recent case, a U.S. attorney's office was told by an informant that an indicted defendant was seeking to murder a witness against him and a law enforcement officer involved in the investigation. The office consulted with the State bar counsel about the issue of an undercover contact of the defendant by the informant. The State bar counsel said that the contact would violate the State's ethics rules, although it was unlikely that the prosecutor would be disciplined.

The problems presented by State bar contacts rules are by no mean limited to criminal law enforcement. Attorneys representing corporations often claim to represent all employees of the company, and sometimes even former employees. The U.S. attorney in San Francisco received a letter from counsel for a corporation under criminal investigation who asserted that California's contact rule prohibits contacts with employees, "even in situations where the corporation's and the employee's interests may not be the same." Under the more expansive State contact rule, Department attorneys might not even be able to speak to employees such as whistleblowers who want to speak to the Government and who have no interest in being represented by corporate counsel.

Although I have focused on State rules on contacts with represented persons, which pose the most serious challenge to effective law enforcement, many other bar rules threaten to interfere with legitimate investigations. For example, in Oregon a State bar rule prohibiting deception has been interpreted to prohibit government attorneys' participation in undercover operations. A Federal prosecutor conducting an investigation of a drug organization would thus be prohibited from authorizing an undercover purchase of drugs. A prosecutor could not supervise a sting operation intended to lure burglars and thieves into selling their ill-gotten proceeds to an undercover FBI agent posing as a fence. A prosecutor could not authorize law enforcement agents to pose as children to fool pedophiles using the Internet in order to sexually exploit minors.

The response of the Oregon bar to criticism of its interpretation of its rule is that law enforcement agents are not bound by ethics rules and can continue to conduct undercover operations without attorney involvement.

Mr. Chairman, I see my time has expired. If I could just have another minute to just finish my remarks, I would appreciate that.

Senator THURMOND. Oh, you say you want another minute? Go ahead.

Mr. HOLDER. Thank you, Mr. Chairman.

Senator THURMOND. Your time is up, but we will give you another minute.

Mr. HOLDER. Thank you very much.

The Oregon view, we believe, reflects a completely unrealistic view of contemporary law enforcement, and is terrible public policy to boot. Prosecutors conduct investigations because they have to. In addition, prosecutors should be involved in investigations. Prosecutors can help ensure that investigations are conducted in accordance with the Constitution, and are in a better position to decide what additional investigation is necessary to prove a case in court and to decide whether a case should be prosecuted or dropped.

Before concluding my remarks, I just want to thank Senator Hatch and other members of this committee who have introduced legislation to revise the McDade language in order to prevent what I believe will be the inevitable damage it will have on our ability to properly investigate and prosecute Federal crimes.

I believe, as you indicated, Mr. Chairman, that this should be a nonpartisan issue, and we stand ready to work with you and all members of the committee on both sides of the aisle to find an appropriate legislative solution. Working together over the past 6 years, we have seen a very dramatic drop in crime. It is our view that section 530B poses a serious threat to our future progress.

We must not impede the legitimate work of our Federal prosecutors, and I would urge this committee and Congress to, at a minimum, extend the implementation of the McDade amendment for 6 months in order to provide the subcommittee, the Congress and the Department of Justice sufficient time to fashion an appropriate bipartisan legislative remedy.

Thank you very much.

Senator THURMOND. Mr. Patterson, do either you or Mr. Carter want to make a brief statement?

STATEMETN OF P. MICHAEL PATTERSON

Mr. PATTERSON. Yes, Mr. Chairman. I would like to thank the subcommittee for the honor of appearing before you.

28 U.S.C. 530B subjects Federal prosecutors to State laws and rules in each State where the prosecutor engages in his duties. This law is fundamentally flawed because the underlying concept fails to recognize the incompatibility of applying portions of a complex system to a different and equally complex system of criminal justice.

Each State's system of criminal justice has developed an intricate structure of checks and balances between grants of authority to State prosecutors and ethical and legal restraints on the exercise of that authority. Though many of the State systems bear significant similarities, virtually none are identical and few, if any, are identical to the Federal system of criminal justice.

Each State has developed a criminal justice structure in which prosecutors and police are authorized to investigate and prosecute violations of that State's criminal laws. Within each State's system, prosecutors and law enforcement personnel are restrained by legal

and ethical rules. However, these rules relate to and are intertwined with that State's grant of authority to its prosecutors. Federal criminal practice is governed by a different sovereign jurisdiction, and the needs of Federal prosecutors and Federal law enforcement played no part in the development of these State rules, nor was their impact on Federal practice weighed or considered.

In Florida, for example, the chief prosecutor in each of the State's 20 circuits is the State attorney. Under chapter 27 of the Florida statutes, the State attorneys are authorized to issue subpoenas to compel the attendance of individuals and the production of documents to the office of the State attorney. This power is further enlarged by authorizing the issuance of instanter subpoenas by State prosecutors in Florida.

Thus, Florida's prosecutors can require an individual to immediately come to the prosecutor's office for the purpose of providing investigative information to the prosecutor. Each prosecutor is authorized to administer the oath to the witnesses appearing before him or her. State prosecutors in Florida can formally charge individuals with serious crimes by information signed only by the prosecutor. Florida prosecutors, by signing an information, can charge offenses including those requiring mandatory life sentences.

These extensive powers are not enjoyed by Federal prosecutors. The necessity for restraints on the exercise of Federal prosecutorial authority is thus substantially different from that of Florida state prosecutors. Yet, section 530B would impose the same limitations on Federal prosecutors as are imposed on State prosecutors. In a very real sense, Federal prosecutors have the worst of both worlds—substantially different and in many respects less authority than Florida prosecutors, but the same legal and ethical constraints.

The potential for section 530B to interfere with grand jury investigations in Federal practice is very real. Unlike Florida, where crimes are charged by information, the U.S. Constitution requires all serious Federal charges to be brought by grand jury indictment. Florida rules, which give witnesses the right to legal representation within the grand jury, are thus less likely to interfere with State law enforcement because that system utilizes grand juries very differently from Federal grand jury practice.

Similarly, Florida rules regarding grand jury secrecy are significantly more restrictive than Federal grand jury secrecy rules. Under Florida law, witnesses appearing before the grand jury are prohibited from disclosing the nature of their testimony or the inquiries of the grand jury. No such prohibition exists under the Federal rules.

The development of the legal and ethical restraints on the exercise of prosecutorial authority are inextricably intertwined with the authority and power granted to the prosecutors within that specific criminal justice system. To apply those restraints without limitation to a wholly different criminal justice system is illogical and self-defeating.

As a State prosecutor, on numerous occasions I effectively utilized the subpoena power granted to Florida prosecutors, including the instanter provisions of that authority. While investigating the homicide of a patient in a secure mental health facility, the neces-

sity for acquiring information regarding the location and identities of patients arose. This information was needed immediately. Unfortunately, the facility was unwilling to cooperate with law enforcement and, in fact, had refused to provide any information despite the fact that much of the requested information did not relate to patients or patient care.

Within a few minutes of being notified by law enforcement of the problem, the director of the facility personally appeared before me, pursuant to subpoena, and was required to respond to the inquiry. The information thus obtained significantly contributed to the successful conclusion of the investigation and ultimately to the conviction of the defendant for first-degree murder. The specific procedure utilized in this State prosecution is unavailable to Federal prosecutors.

Further compounding the problem for Federal prosecutors is the fact that they would be subjected to very restrictive ethical covenants regarding contacts with represented persons in Florida. Florida bar rule 4–4.2, in essence, makes it unethical to communicate with a represented person without the consent of the individual's lawyer. On its face, this is a very reasonable rule. However, when applied to the public necessity for undercover investigations, it has the very real potential to substantially impact on the public safety.

A recent case in my office is illustrative of the necessity for the use of undercover investigations against represented persons. A $100 million-a-year drug distributor was arrested in Hong Kong and extradited to the Northern District of Florida in March 1994. He pled guilty and agreed to cooperate in the prosecution of the other members of his worldwide organization and to forfeit the proceeds of his drug trafficking. This defendant did identify and forfeit nearly $100 million, but he chose to hide additional assets.

According to an indictment returned in the Northern District of Florida in 1998, this drug trafficker, with the help of one of his lawyers, conspired to launder some of his hidden assets to finance a scheme to bribe the district judge responsible for his sentencing.

Senator THURMOND. Mr. Patterson, your time is up. Are you about through? Just put the rest in the record.

Mr. PATTERSON. Yes, sir, if I could have 30 seconds.

Senator THURMOND. OK; we will limit you to 30 seconds.

Mr. PATTERSON. In closing, I am very grateful for the opportunity I have had to serve as a prosecutor in both the State of Florida and as U.S. attorney for north Florida. I am deeply humbled by the authority entrusted to me. I left private practice in 1983, when my oldest son was old enough to understand what my work was all about. I became a prosecutor so that I could tell him that his father's job, indeed his father's duty, was to do the right thing and to seek justice. I am as proud of the innocent people that I have exonerated as I am any conviction I have obtained.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you, Mr. Patterson.

Mr. Carter.

Mr. CARTER. Thank you, Mr. Chairman. Thank you for the——

Senator THURMOND. Excuse me just a minute. Now, these lights are not to be just looked at because they are pretty. As long as it

is blue, you can talk. If it turns yellow, your time is about up, so arrange to stop quickly. The red means it is up and you must stop.

OK, go ahead.

Senator BIDEN. Otherwise, you will be indicted. [Laughter.]

Mr. CARTER. I will try to avoid that.

Senator SCHUMER. The rules of the Capitol.

STATEMENT OF ZACHARY CARTER

Mr. CARTER. Thank you for this opportunity to share my concerns regarding the probable impact of section 530B on Federal law enforcement in the Eastern District of New York.

Nowhere is the distinctive role of Federal law enforcement more prominently implicated than in the New York metropolitan area. The Eastern District of New York covers the New York City boroughs of Brooklyn, Queens and Staten Island, as well as the suburban counties of Nassau and Suffolk on Long Island.

As host to both John F. Kennedy International Airport and a major seaport, the Eastern District is one of the Nation's busiest centers of national and international commerce. Like many of this Nation's major ports of entry for both goods and travelers, our district is afflicted by major trafficking in narcotics, customs and immigration violations, thefts from interstate and international shipments, and a myriad of other distinctly Federal offenses associated with busy commercial hubs.

Investigations of criminal enterprises across State boundaries are not the exception for our office, but the rule. If you were to visit our office on a typical day, you would observe most of our assistant U.S. attorneys on the phone issuing long-distance direction to Federal law enforcement agents assigned to field offices across the various States to interview witnesses, engage in undercover operations, electronically monitor conversations of suspected criminals, and take other investigative steps in support of ongoing investigations into narcotics trafficking, thefts from national and international commerce, alien smuggling, and trafficking in illegal firearms.

It is not the multi-State character of most Federal investigations that makes Federal law enforcement missions unique. The fact is that the Federal Government is charged with the primary responsibility to investigate complex crimes committed by multilayered organizations. Whether the enterprise under investigation is a drug cartel, an organized crime syndicate, a health maintenance organization, or a publicly traded corporation, Federal law enforcement depends on its capacity to identify and interview witnesses within these organizations in order to fulfill our law enforcement responsibilities.

Currently, the assistant U.S. attorneys supervising these important investigations are guided by ethical rules of the States where they are admitted and the courts before whom they practice, unless those rules are inconsistent with Federal laws or regulations. As a result, insofar as the performance of their Federal law enforcement responsibilities are concerned, Department attorneys can be secure in the knowledge that their conduct will be guided by largely consistent principles, even where investigations touch several different States.

To date, the Federal courts have generally recognized the special nature of law enforcement, and specifically Federal law enforcement, by interpreting ethical rules in a way that carefully balances the civil liberties interests of all individuals against the special challenges of Federal law enforcement. If Section 530 of Title 28 is permitted to take effect, however, this situation could fundamentally change.

Permit me to offer a few examples of how section 530B may impact on important investigations conducted under the supervision of assistant U.S. attorneys in my office. Virtually by definition, major narcotics investigations touch multiple jurisdictions. While individual transactions may be intrastate, for the most part major Federal law enforcement investigations of major cartels' responsibilities for trafficking in narcotics span both international and national boundaries.

Typically, significant investigations commence with the seizure of a substantial shipment of narcotics either at the border or during its transshipment across the United States. Individuals arrested in possession of substantial quantities of drugs often cooperate with law enforcement agents and agree to initiate electronically monitored conversations with their co-conspirators. These conversations often lead to the introduction of an undercover officer or confidential informant into the drug organization under investigation. The undercover investigation, in turn, may present further opportunities for electronic monitoring, and the development of additional accomplice witnesses as participants in the scheme are discreetly arrested and persuaded to cooperate.

If section 530 is permitted to take effect, the availability of any or all of these standard investigative techniques may turn on whether ethics rules of one of the many States touched by a major drug trafficking enterprise permit their use. There are States in which the surreptitious recording of conversations, even in the course of criminal investigations, are prohibited by the State's ethics rules. Imagine the irony of a single investigation where consensual monitoring of conversations of suspected drug traffickers conducted in one State is permissible, but consensual monitoring of conversations by their co-conspirators in another State is not.

Consider the dilemma for Federal law enforcement when a major drug cartel, suspecting a pending investigation, retains an attorney who declares that he now represents a broad range of persons not yet under indictment or other charged. In certain States, Federal law enforcement agents could be safely directed by Department attorneys to interview potential witnesses. In others, however, such contacts may be prohibited by State ethics rules. In still others, the interpretation of relevant State ethics provisions might be uncertain.

Particularly in the area of narcotics enforcement, section 530B can be expected to undermine the effectiveness of major investigations. At the very least, Department attorneys will be inhibited from undertaking the kind of investigative initiatives that have been repeatedly approved by the Federal courts as consistent with constitutional principles and civil liberties concerns, but may be inconsistent with State ethical provisions that have been enacted

without due regard for the legitimate imperatives of law enforcement.

All of the problems that I have described can recur with equal force in major securities fraud and healthcare fraud cases, most of which are national in scope. In reviewing my district's docket of cases and investigations, I was hard-pressed to find more than a handful of matters that were not multi-State in character.

A Federal system that is unified by its substantive criminal laws, its rules of procedure and its sentencing guidelines should be unified as well by a consistent set of ethical rules governing the conduct of Department attorneys in the enforcement of Federal laws. Such a system honors the unique role of Federal law enforcement and continues to preserve the liberties of the people we are sworn to protect.

Thank you.

Senator THURMOND. Thank you.

Now, Mr. Holder, either you can answer these questions or turn to one of your assistants if you would rather have them answer.

Mr. HOLDER. If the question is too difficult, I will let them answer.

Senator THURMOND. The first question, Mr. Holder, is many proponents of the McDade amendment have said that it is needed to deter prosecutorial misconduct. Will adding more rules and regulations for Federal prosecutors to follow help eliminate isolated instances of impropriety, and what efforts has Attorney General Reno undertaken to address prosecutorial misconduct?

Mr. HOLDER. Well, Mr. Chairman, I don't think that there are needs for additional mechanisms. There are, I think, sufficient mechanisms in place. Attorneys who represent the United States already have to follow the ethical rules that are set by the States in which they are admitted. We follow the rules of the courts in which we practice. And in addition to that, there are internal Justice Department guidelines.

With regard to what the Attorney General has done, she has tripled the size of the Office of Professional Responsibility. We have gone from 10 to 35 FTE, from 7 to 22 lawyers, and we have had a budget increase from $1.4 million to $4.3 million. It seems to me that given what the Attorney General has done, her commitment to continue that kind of effort, and the kinds of things that are in place already, there is really not a need for the McDade amendment.

Senator THURMOND. Mr. Holder or one of your assistants, it seems to me that the variance in some States' rules from established Federal practices could be very unfair for a Federal prosecutor. For example, can you foresee a possible situation where one prosecutor involved in a multi-State investigation could be disciplined under his State's ethics rules for conduct that another prosecutor from another State who is also a member of the same team could be commended for?

Mr. HOLDER. I think Mr. Carter will handle that one.

Mr. CARTER. Certainly, particularly in large-scale narcotics investigations, and even in a recent alien smuggling investigation that occurred in my district, the directions that were given by the assistant U.S. attorney who was coordinating the investigation at

that time could have resulted in different consequences for her ability to practice, depending on where she was giving the direction at a particular time.

In this particular case, the assistant U.S. attorney from my office was admitted to practice in the State of Florida. She was coordinating an investigation of a number of Mexican aliens who were being held in involuntary servitude in Queens, NY. She coordinated a series of arrests and interviews and other investigative steps that spanned several jurisdictions. She coordinated that investigation, curiously, from her cell phone at her high school reunion in Miami, FL.

She caused the arrest of individuals in California, in Illinois, in North Carolina. And depending on what the ethics rules were with respect to contacts with represented persons, with respect to electronic consensual recording of conversations, there could have been different levels of jeopardy or praise with respect to her conduct of that investigation.

Senator THURMOND. Mr. Holder or an assistant, you stated in your testimony that you expect the McDade amendment to discourage the now common practice of Federal prosecutors supervising Federal agents in ongoing investigations. What do you think the consequences of that will be?

Mr. HOLDER. Well, we have great faith in those people who work in the FBI, the DEA, and the Federal agencies that work with us in the Justice Department. But I think that the involvement of Federal prosecutors in investigations and at an early stage is an important way in which to conduct investigations. It is kind of a trend that has been continued, I would say, for the last 50 years or so.

If lawyers are involved in investigations at an early stage, we can ensure in a way that you would not expect investigators to make that all constitutional protections are being followed while the investigation is going on, to make sure that only constitutionally appropriate things are being done while an investigation is ongoing. It does not mean to say—and I don't mean to criticize in any way agents who work for us. It is just that that is the responsibility; it is what we are schooled at doing as Federal prosecutors. And our involvement in these kinds of cases, I think, can only be of benefit.

Senator THURMOND. Mr. Holder or one of your assistants, given the vague wording of the McDade amendment, are you concerned that courts may apply it outside of the area of ethics rules and to substantive State law and procedure, such as wiretaps or Federal grand jury practices?

Mr. HOLDER. We certainly do not view the McDade amendment that way. It is our belief that it only applies to ethical rules and not substantive rules. And yet we certainly expect that there will be satellite litigation. In fact, there have been instances where defense attorneys, citing McDade, have indicated that substantive rules are covered by the McDade amendment.

So we would expect that we would have to deal with those kinds of motions. I think we should win them because I think the law itself is relatively clear, but I think there is at least a basis for an argument for a defense attorney to make such a contention.

Senator THURMOND. And one more question. Mr. Holder, I understand that the ABA is currently reviewing its model rules. Even if the ABA were to satisfactorily address all of the Department's concerns, which is probably unlikely, would having acceptable ABA model rules alleviate all of your concerns about the McDade issue?

Mr. HOLDER. No, it would not, Mr. Chairman. We continue to work with the ABA on rule 4.2. In fact, the Attorney General and I, along with the Associate Attorney General, met with the leadership of the ABA. We had lunch at the Justice Department just a couple of days ago, and we have pledged to work to try to resolve those differences. But if that were resolved, that would not minimize the impact of the McDade amendment.

We have the problem, as you just mentioned in your previous question, about satellite litigation that would be a continuing concern. And it seems to us that there just has to be a limit on the number of ethical rules that we can expect prosecutors to have to follow, and at the same time be as aggressive as we want them to be in pursuing these interstate cases that are the essence of what we do as Federal prosecutors. So I do not think that a resolution of rule 4.2 with the ABA would completely make the need for amending the McDade amendment go away.

Senator THURMOND. My time is up.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. Many of your questions were the ones I was going to ask, so they are right on point. So I just have a few more.

First, just to summarize to my friend and U.S. attorney from my home of Brooklyn, NY, to Mr. Carter, I guess in summary what you are saying is if the McDade rule were in effect, or the McDade language stays in effect, it would put a major crimp in many of your investigations, particularly narcotics investigations.

Mr. CARTER. That is correct.

Senator SCHUMER. And one of the main reasons for that, I guess, would be the multi-State nature of so many of the things that you do.

Mr. CARTER. It is because of the multi-State nature of the things that we do, and it is also because inherent in our unique Federal responsibility is a responsibility for investigating complex enterprises that not only span State boundaries, but also have layers of organizational structure that can only be penetrated by interviewing and soliciting the cooperation of people who are members of these organizations, whether criminal or not.

Senator SCHUMER. OK; to Mr. Holder, as I understand it, the Justice Department is trying to sort of find a compromise approach to regulating contacts with represented persons, and you have been talking to the Conference of Chief Judges about this.

Mr. HOLDER. That is correct.

Senator SCHUMER. Could you tell us a little about that?

Mr. HOLDER. Yes; we have had ongoing conversations with the Conference, and in particular with Chief Judge Vesey from Delaware. We have been at this for some time. Our positions were substantially farther apart than they are now. I could not predict, very honestly, that we are going to resolve these matters or reach an agreement within a set period of time, but I think we have been

making progress. And I think that is one of the reasons why I think it would be important for us to have this 6-month extension to allow us to continue those conversations, as well as the conversations that we have started with the ABA.

And for the record, Senator Schumer, I am from Queens.

Senator SCHUMER. You know, I would say to my good friend and our Chair, Senator Thurmond, and my colleagues I still regard that as my district. When someone says "Congressman," I turn right around. When someone says "Senator," I just walk right by. So I am glad to have two people from my congressional district.

Mr. HOLDER. I thought I would play that for all it was worth, yes. [Laughter.]

Senator SCHUMER. Great. Thank you. I think that really does it for me, and I appreciate very much all three of your very comprehensive and strong testimony. I look forward to working with our chairman in terms of trying to get some kind of extension.

Thank you, Mr. Chairman.

Senator THURMOND. Thank you very much.

Senator DeWine.

Senator DEWINE. Thank you, Mr. Chairman.

Mr. Holder, as I think you know, I am very sympathetic to your testimony and the concerns that have been raised. Let me play the devil's advocate, though, on the other side and just get your reaction. You talked about Florida and what they prohibit. How do the State prosecutors get along with that kind of prohibition?

I mean, it would seem to me you could argue that if it was such a horrible, horrible thing that the State of Florida would have been faced with a very serious problem. Is there a public outcry about the problem? For example, if Attorney General Reno was back in Florida, she would be, I assume, under those rules that you just talked about.

Mr. HOLDER. Well, actually, that is a very, very good question, Senator DeWine, and why don't I let Mr. Patterson answer it, only because I think I know the answer, but he, as a person who is very well-versed in the Florida rules——

Senator DEWINE. Well, you said you were going to give him the hard questions.

Mr. HOLDER. This is actually not too hard, but I——

Senator DEWINE. We just didn't know whether you were going to go to Mr. Carter or Mr. Patterson.

Mr. PATTERSON. For a couple of reasons, the application of that rule to State prosecutions is somewhat different. First of all, the practice, in general—as I said in my statement, the grant of authority to State prosecutors is substantially different than it is to Federal prosecutors. In the way they conduct their business that way, the use of investigative subpoenas obviates some of the problems with regard to contacts. Also, many of the kinds of cases that State prosecutors do don't run into the more complex issues with regard to contacts. They are less——

Senator DEWINE. I appreciate that, Mr. Patterson, but I have some familiarity with this. I was a prosecutor, and I still have friends who are county prosecutors in Ohio and some of those cases do get a little complex. I mean, they do involve undercover agents and they do involve the same type operations. They may not be as

complex as what you all are doing, but it seems to me some of those same basic principles apply.

Mr. PATTERSON. I agree. I think they do.

Senator DEWINE. With all due respect, sometimes there is a tendency on U.S. attorneys to think that they only get the complicated and tough cases.

Senator SESSIONS. I have heard that before.

Mr. PATTERSON. I was a State prosecutor for 10 years.

Senator DEWINE. Thank you. You qualify, then. You are all right. [Laughter.]

Mr. CARTER. As was I.

Senator DEWINE. The credibility just went up. Thank you.

Mr. PATTERSON. I do think there is a significant difference in the practice. And some of it may be subtleties, but the way investigations are conducted by the State prosecutors in Florida is just substantially different. They are given different tools with which to accomplish those investigations and it impacts on the contacts issue in a different way than with Federal prosecutors.

The other reason it is different, and it is not a matter of doing complex or more important—I look over at my State colleagues now and suggest to them that many of the cases in their offices are probably more difficult, more complex, and some of the ones that are mine probably ought to be in their offices. I don't know that we always sort that out exactly right. But the fact of the matter is with regard to contacts, Florida takes the position that the represented person, as opposed to party, has to pertain to the same matter, and that applies to State practice in a different way than it applies to Federal practice.

Senator DEWINE. I appreciate your answer.

Mr. Holder, let me turn to a related issue, but a different question. The public in the last several years, because of the investigation of the President, because of the high profile of not just one independent counsel but numerous independent counsels, I think has had a look into some questions. Some questions have been raised, right or wrong, about prosecutorial practices, and Senator Schumer made reference to that.

I don't want to get into the merits of any of that today, but my question, though, is because of the spotlight on these issues, is your Department doing any recent review of prosecutorial practices? I am not talking about the independent counsel, I am not talking about any one prosecution in your Department or independent counsel. I am just talking about in general. This issue is now much higher profile than it has been before.

Mr. HOLDER. Yes; the Attorney General, as I indicated, I think, earlier, has really given this special attention in that she has tripled, I think, the size of the force, increased the budget of our Office of Professional Responsibility. We have also, in an attempt to calm the fears of people of what Federal prosecutors do, made public in a way that we have not in the past the results of OPR investigations, subject to the Privacy Act limitations that we have.

I believe in 1997, we completed roughly—OPR completed roughly 100 full investigations, found professional misconduct in about 20 cases——

Senator DEWINE. Mr. Holder, my time is almost up, and you know the chairman does enforce the rules. I want to make sure I get my question answered that was at least in my mind. I am not talking about specific cases. I am talking about broad, general policy. We do this, we don't do that. I mean, that is what the public is looking at. Do we do certain things, interviewing of witnesses, the procedure that is followed, all the things that have come out in the last several years that clearly have been high-profile? Are you looking at those issues? I am not saying you should change one thing. I just want to know, are you looking at them.

Mr. HOLDER. Yes; we do these things on an ongoing basis in a variety of fora. I mean, our Attorney General's Advisory Committee looks at these things. That is a group of U.S. attorneys who come in once a month. There are about 15, 17 of them there. Our Criminal Division has ongoing reviews with regard to issues that come up specifically.

It is the responsibility of the Deputy Attorney General to kind of coordinate all of these things, and so we have at any one time people in my office interacting with people in the AGAC, people in the Criminal Division, people in other parts of the Department on the civil side as well—and we tend to forget people on the civil side—always asking questions about things that we either read about in the newspapers or general policy questions that we have just to make sure that we are doing things in appropriate ways.

And to be very honest with you, there have been questions raised about independent counsels that we then consider to see whether or not we are doing things in similar ways. If an independent counsel is being criticized for something, that raises the issue in the Justice Department and we ask questions about that, sometimes finding that we have done things in a similar way that an independent counsel has done, sometimes not.

Senator DEWINE. I appreciate it. Thank you very much.

Senator THURMOND. Senator Biden.

Senator BIDEN. Mr. Chairman, thank you very much. I would ask unanimous consent that my statement be placed in the record as if read, if I may.

Senator THURMOND. So ordered.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Mr. Chairman, thank you for holding this hearing on an issue that has triggered much debate. I do not believe that anyone questions the importance of fairness to the proper functioning of our legal system. This is particularly true when we talk about how prosecutors behave and what effect that behavior has on citizens.

We talk about this in terms of "ethics." But what we are really talking about is *power,* the *potential abuse of power,* and what limits are or are not appropriate on how prosecutors do their jobs.

One reason I am pleased that this hearing is being held today is that it is an opportunity for us to talk, and to listen, to all points of view. Too often we talk at each other or past each other. Perhaps in our zeal to make the other understand our point of view, we overstate our case. I hope we can avoid that today.

What I believe is at the root of the debate here is a fundamental feeling many people increasingly have in their gut that they are vulnerable to exercises of Federal power in every part of their lives.

Vulnerable to losing their privacy.

Vulnerable to losing their reputation.

Vulnerable to losing their liberty.

In saying this, I do not mean to suggest that there are thousands of prosecutors running around with a total disregard for citizens' privacy, reputations, or liberty. Nothing could be further from the truth.

But we have some recent experience with just how far a prosecutor without limits can go—and most likely few of us would ever have thought that some of the things we have seen individuals suffer in the name of vigorous prosecution could or would ever happen. But they did.

And so, we are having today's discussion in an atmosphere in which we look for what the appropriate limits are to a guard against potential abuses of power in the future. That debate is healthy and good.

But we must also look at the *reason* why limits, or sometimes a rule that appears to relax those limits, exists in the first place. I have learned that sometimes what seems to be relaxation of accountability is in fact only a way to level the playing field.

No one here today will argue that State ethics laws should not apply in many ways to Federal prosecutors. They have before, they do today, and they will in the future—with or without the McDade law going into affect. But, as I believe we will hear today, different States have different rules that govern how their State criminal prosecutors operate. Sometimes those rules allow substantial flexibility to the State prosecutors—even to allowing a single prosecutor to decide whether or not someone should be indicted! That a prosecutor can do so just by signing his or her name to a piece of paper is a very broad discretion indeed.

And so it is no surprise that in those States there may be ethics rules that impose restraints on prosecutor conduct. Should those rules equally apply to a federal prosecutor who does not have so broad a power? Maybe yes. Maybe no. That is a question we need to explore today.

It is important so that the rights of all parties are properly protected. It is important because without it, faith in our system of laws and courts will erode. It is important because in the long run it ensures that our laws are effectively enforced and our courts function properly.

I believe that the vast majority of lawyers—and especially those who are privileged to serve the Nation as Federal prosecutors—conduct themselves consistently according to the highest standards of ethical conduct. However, I also believe that it is important to our system of laws and justice that there be an effective check on possible lapses from that general rule. This protects everyone—prosecutors, defendants, and the courts.

In my view, the debate here must focus not on speculation as to potential "chilling effects" but should be based on real life examples. And I should say that "chilling effects" are not always a bad thing. I am interested in hearing about the facts and about the types of situations that are of concern to prosecutors, to State courts, and to counsel for defendants.

In particular, I am interested in hearing from the witnesses their suggested solutions for the question of contact with represented parties, the narrow area that I understand is at the core of this debate. For example, what kind of changes to model ethics rules are in the works that could resolve this problem without overreaching?

In finding a solution to the concerns that I am sure we will hear much about this afternoon, I suggest that we all look for a middle ground—a way to accommodate both the legitimate needs of prosecutors to build their cases fairly and the interests of the judicial system as a whole in ensuring that those who have the privilege of practicing law do so consistently in accordance with the highest ethical standards.

I think this matter is really more simple than it looks. It is about the *potential* for abuse of power and the *proper constraints* to prevent that from happening. We need balance, but we also need to be sure that we avoid unintended consequences in our search for that balance. I look forward to hearing from the distinguished witnesses before us regarding their various perspectives, based on their wealth of experience. And, I look forward to hearing some suggestions for how we can come to a solution that can take into account the range of important interests at stake here.

Senator BIDEN. Gentlemen, if I can give you just one Senator's view, this is not about ethics. This is about power and the abuse of power. And I think there is a heightened awareness on the part of the American people, unrelated and related to Federal prosecutors, about their vulnerability to invasions of their privacy; the

abuse of power, whether it is by you, a special prosecutor, a State prosecutor; about a whole range of things that have taken this in a direction different than if we had this hearing 3, 4, 5, 6, 10 years ago.

If 10 years ago you came up, Mr. Carter, and could make the case, which in my view you made, that this would diminish the ability of Federal prosecutors to get the bad guy, you would have everybody up here saying, oh, we don't want to do that. But now we are all aware when we look at out there—and I don't want to get into an argument about Mr. Starr or any special prosecutor, but about special prosecutors' apparent abuse of power, or if it is not a technical abuse in the minds of the public—gee, he went too far—all the way to issues where they turn on "20/20" and find out how a hacker can get access to their bank account and their medical records, having nothing to do with the Federal Government. So there is this heightened awareness.

And what I don't think, if I may be so blunt, that you have all explained in the past—you began, Mr. Patterson, to do it today, in my view—is this balance of power, the power that is available to a prosecutor, and the constraints on the abuse of that power. And let me be very specific.

As I understand it, in the State of Florida, when you were a State prosecutor you had a power that far exceeded the individual power that you have as a Federal prosecutor. If you wanted to call me in as a potential target or to indict me, you could as a State prosecutor call me before you, swear me in, and based upon your signature on an information, the equivalent of an indictment, you could bring me to trial. Is that right? Is that a fair statement?

Mr. PATTERSON. That is correct, with one possible exception. The issuance of the subpoena in the State of Florida grants use immunity. So I couldn't subpoena you in, ask you questions that I then use to charge you. But I could subpoena you in, I could question you and charge you based on my signature, yes.

Senator BIDEN. All right. Now, as a Federal prosecutor, can you do that?

Mr. PATTERSON. No, sir.

Senator BIDEN. So that in order for you to indict me, you have got to go to a grand jury. You have to get a whole group of folks out there who are citizens in the State of Florida to be convinced when you go before them or your assistant goes before them that there is enough information on which to indict me to take me to trial. Is that right?

Mr. PATTERSON. Yes, sir.

Senator BIDEN. And when you were a prosecutor in the State of Florida, you had certain limitations on you based on the State ethics rules, which are, in a sense—my phrase—the ethics are more restrictive in the State of Florida, but then again the power you have as a prosecutor is broader, right?

Mr. PATTERSON. Yes, sir.

Senator BIDEN. Now, the Federal ethics rules, if you will, are a little less restrictive on a Federal prosecutor, but you have less power. Is that right?

Mr. PATTERSON. Yes, sir.

Senator BIDEN. So it seems to me we should think about either giving you the power that a State prosecutor has if we are going to hold you to the ethics rules of the State of Florida or if we are not going to give that power, not hold you to the same ethics rules. And I don't think most people get that.

What we are all after here is how to balance out power because we know all power is abused, all power is abused. There has never been a grant of authority given to anybody, not individually, but generically, that ultimately somebody hasn't abused—Senators; Presidents; prosecutors, Federal, State, and so on.

So I think in order for us to be able to get a handle on this, Mr. Holder—there are a lot of people very upset, and the reason they are upset is not just because of Congressman McDade's amendment. You saw the investigation that the Pittsburgh Post Gazette did. You have seen other investigations. There are a lot of people around here who think—and I am going to end; I see the amber light, Mr. Chairman.

What I think we have got to do here, in my view—and I am going to suggest this as just one Senator—we have got to have a time-out here. I think we should have a breather, a delay of 6, 8 months for McDade to go into effect, have you continue your negotiations, which I think did not start early enough, with the ABA, as well as the State chief justices.

And I think, Mr. Carter, if you could for the committee submit a specific example of how one prosecutor working you could be found in violation of a State ethics code and another prosecutor working for you, because they are licensed in a different State, could be praised for the same action, two different people—you gave an example of one woman in three States.

Find me an example, Mr. Holder, where you can show me one investigation, two prosecutors involved in the same investigation, each prosecutor a member of a different bar, where the one bar were to hold them accountable under that State ethics laws and another bar would not, because that is the kind of information Senators need. They need to understand that because we are worried about you abusing power, not you personally, but we are worried about abusing power.

And I will close, Mr. Chairman, by saying you have appointed more judges, you have appointed more U.S. attorneys than any man in American history. I have recommended to the President judges and U.S. attorneys. I take a whole lot less time deciding who I want to recommend as a judge than I do as a U.S. attorney because a U.S. attorney is more powerful. A U.S. attorney, if they don't have an ethical equilibrium, can do great damage—the most dangerous people in America if they are off, the best people in America if they are on. You have got to convince us here that this notion that seems on its face so reasonable—why shouldn't you be held to the strictest standard, why that is not a good idea. It is not a good idea because they have a lot more power when the standard is stricter. You have got a lot less power and you have got more hoops to go through so that we can guarantee that you don't get out of whack.

Thank you, Mr. Chairman.

Senator THURMOND. There is a vote on in the Senate, so we will have to take a recess and allow the Senators to go and vote.

Do you want to go ahead?

Senator SESSIONS. I can do it briefly, yes, sir. I believe we would have time to finish my little bit.

Senator THURMOND. Do that, and take charge.

Senator SESSIONS. All right, sir.

Senator THURMOND. And then call a recess until we get back.

Senator SESSIONS. Thank you. Thank you, Mr. Chairman.

Senator THURMOND. Senator Sessions, of Alabama.

Senator SESSIONS [PRESIDING]. Mr. Chairman, thank you for conducting this hearing. I do believe this is a very important issue, and Mr. Holder and I have talked about it a number of times and I share his concern.

I really agree with Senator Biden in all of what he said and I think it is a question of power, but it strikes me, Senator Biden, it is also a question of power as to whether or not the Federal Government, the U.S. Government, will allow perfectly legal, legitimate law enforcement techniques to be declared illegal by a bar association in some State. They weren't elected to set techniques or rules of behavior, and then they would just turn around and say, well, it may be legal for you to do that in Federal court, but we are going to disbar you, Assistant U.S. Attorney.

Mr. Holder, am I exaggerating the danger we are dealing with here?

Mr. HOLDER. No; that is a major concern. I mean, Oregon, for instance, talks about the inability of prosecutors to engage in undercover activities, which is something that we want our assistant U.S. attorneys to be involved in, in response to what Senator Biden was saying.

Senator SESSIONS. You want them monitoring because there less violations of civil rights occur when lawyers are involved with the investigators and supervising or monitoring an investigation. Is that correct?

Mr. HOLDER. Right, exactly. Somebody who was subject to the Oregon rules might be disciplined for doing the same kind of thing that somebody in Brooklyn following New York rules would get praised for, and that is the concern that we would have.

Senator SESSIONS. And one of the unintended consequences—correct me if I am wrong, but one of the unintended consequences could well be that the agents would say, let's don't talk to the prosecutor because he bound by all those rules; this is a perfectly legal technique; let's just do it on our own and not talk to the lawyer. Do you agree with that, Mr. Patterson?

Mr. PATTERSON. I think that is one of the most pernicious and likely effects of this Act going into effect. I think that is exactly right.

Senator SESSIONS. Mr. Carter, do you agree with that?

Mr. CARTER. Yes.

Senator SESSIONS. You know, we learned one thing in the war of Northern aggression. One of the things is that the Federal law is supreme, and we are really subjugating legitimate Federal power to a State or local bar association who is not elected by anybody of significance, except for a few members of the bar. And I am a

member of the ABA and I respect it greatly. But, in truth, a rarified group are on the national ABA criminal law committees and the local criminal committees. They are not even typical of lawyers, and some of them have strange ideas about what is ethical and what is not. I just really think that would be a serious thing.

Let me read you this little matter from a case I think you cited earlier. The 11th circuit case of *Lowry* highlighted this problem, I think. The court recognized that ethics rules can, in effect, be not much different or really the same as evidentiary rules. That is your circuit, Mr. Patterson.

Mr. PATTERSON. Yes, sir.

Senator SESSIONS. The 11th circuit rejected the notion that Congress, "intended to turn over to State supreme courts in every State the authority to decide that otherwise admissible evidence can't come into Federal court." Do you think that is a legitimate point the 11th circuit made?

Mr. PATTERSON. I think many of the expressions in *Lowry* are right on point. I think they also go on to suggest that there are only a few ways you can exclude evidence from Federal court, and one of the primary ones is through Congress and the other is through the Federal courts, and not through State bar associations. But that is a very real concern.

The practice of the grand jury, which is near and dear to my heart, because of the differences in State and Federal practice in Florida—in Florida, you are permitted to have an attorney in the State grand jury, inside the grand jury. Are we now going to get into ethical concerns if a Federal prosecutor keeps a witness' lawyer out of the grand jury, that somehow he has violated ethically that person's right to counsel because the State law permits them to be in there? There are many of those kinds of rules that are very problematic.

And, Senator, I would just like to say that I am not from New York, but many of the people in my district call it "L.A.," "lower Alabama."

Senator SESSIONS. Lower Alabama, next door, I guess.

One more thing. Mr. Holder, I appreciate your increasing the OPR section, although sometimes I think just money isn't necessarily a strengthening of any institution. Are you satisfied that you have an effective system that takes complaints of prosecutorial misconduct seriously and that attorneys can and will be sanctioned if they violate the highest standards of ethics?

Mr. HOLDER. Yes, I am very confident of that. And I think you are right; it is not just a question of money. We have a person there now whose name is Marshall Jarrett, who has been the head of OPR now for just a few months, a person whom I have worked with over a good number of years who I think is an aggressive prosecutor who will do a good job at OPR.

Let me be very honest with you. When the Attorney General took over, there was a huge backlog in the number of cases in OPR that had just not been resolved. We got in people from the field to look at those cases, to reduce that backlog, to make sure that these cases were being done as quickly and as efficiently as they could. We were criticized by members of the judiciary for the length of

time we were taking to conduct these investigations, and frankly I think some of that criticism was justified.

I think we have in place now a system that does the appropriate job, that can do a good job at looking at these matters and making sure that in those instances where our people engage in misconduct or make mistakes that they are appropriately disciplined.

Senator SESSIONS. Well, I think we need to go cast our vote. Thank you so much, and we will have the next panel as soon as we can get back. We will be back in probably 10 minutes. Thank you.

Mr. HOLDER. Thank you.

[The prepared statement of Mr. Holder follows:]

PREPARED STATEMENT OF DEPUTY ATTORNEY GENERAL ERIC H. HOLDER, JR.

I want to thank the members of the Subcommittee for permitting me to testify concerning section 530B of title 28 of the United States Code. Section 530B requires Department attorneys to comply with "state laws and rules, and local federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Section 530B will take effect on April 19, 1999, absent action by the Congress, and this provision will cause significant problems for federal civil and criminal law enforcement.

I will give you specific examples of the kinds of problems that section 530B creates, but I want to say at the outset that the Department of Justice demands that its attorneys carry out their law enforcement responsibilities in conformity with the highest ethical standards. And they do so. That is what the American public expects of its government attorneys, that is what the Congress expects, and I can assure you, as a federal prosecutor and former judge, that is what federal judges expect. Indeed, federal judges hold Department attorneys to a higher standard than anyone else who appears before them.

I also want to emphasize that the Department has no desire to oust states of disciplinary authority or to exempt Department attorneys from the reach of state ethics rules. The Department's policy is that its attorneys conform in general to the ethical rules of the jurisdictions in which they are licensed and the rules of the courts in which they appear. In addition, the Department has volumes of regulations to which its attorneys must conform upon pain of disciplinary action. Moreover, Department attorneys are subject to discipline not only by state bars and federal courts, but also by the Department's Office of Professional Responsibility, which Attorney General Reno has more than tripled in size during her tenure. And, these attorneys are subject to the code of conduct set by the Office of Government Ethics for all executive branch employees. *See* 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.

Given this background, one might ask—what's wrong with the McDade amendment? The answer to that question requires a look at some of the state bar rules themselves and the quandary that many federal prosecutors will face if the amendment goes into effect. The McDade amendment has two principal flaws. *First,* the amendment subjects federal prosecutors to all rules in all jurisdictions, whether or not those rules were drafted with the nationwide practice of federal prosecutors in mind. Oftentimes, state bar rules, which developed in the particular circumstances of a single state's legal system, do not fairly address the complex work of federal prosecutors, who supervise wide-ranging national investigations and enforce public law to the benefit of everyone. *Second,* the McDade amendment's vague directive to comply with rules in each state where an attorney engages in that attorney's duties leaves prosecutors unsure about what rule applies to particular conduct. There is one certain result of this confusion—cautious attorneys will simply refrain from taking critically important investigative steps or will leave agents to make their own decisions about whom and how to investigate. This turns back the clock on the salutary development of the last 50 years during which attorneys have become much more involved in investigations, a development that helps assure that citizen's rights are respected during federal investigations. In addition, section 530B will result in significant satellite litigation that will have nothing to do with ethics, but rather will serve as a weapon to delay or deter legitimate law enforcement. I will discuss each of these problems in turn.

The bottom line is that there should be no mistake about the effect of Section 530B. It will undermine the ability of federal attorneys to serve the public interest through use of legitimate techniques to investigate crime and fraud against the United States.

STATE ETHICS RULES THAT INTERFERE WITH FEDERAL LAW ENFORCEMENT

Codes of professional responsibility for attorneys developed over the past century as codes designed to promote honesty and integrity among attorneys. State rules with this focus—for example, rules requiring honesty to the court and opposing attorneys and parties, governing conflicts of interest, and regulating trust accounts—are straightforward and even—handed in their treatment of different categories of attorneys. More recently, however, state bar rules have expanded into areas that are more the province of courts and legislatures—for example, rules governing the investigative steps prosecutors are permitted to take, what evidence must be presented to grand juries, and what procedures must be followed to subpoena non-privileged information from attorneys. Such rules, rather than simply regulating honesty and integrity, purport to supplement, if not replace, federal rules of procedure and present problems for federal attorneys that more traditional ethics rules never did. Moreover, because state codes of professional responsibility contain such rules, placing the authority to set these rules in state bars becomes much more problematic. State bars are unlikely to consider federal interests in setting their bar rules. Indeed, state bar rules often reflect the interests and priorities of the private bar.

These problems are illustrated by the recent application of state bar rules governing contacts with represented parties to federal law enforcement. Contacts rules were developed to govern private attorneys in civil litigation. Beginning in the late 1980s, defense attorneys made increasing efforts to have these rules applied to federal prosecutors investigating federal criminal cases. In 1994, faced with different interpretations of Model Rule 4.2 in each state and very restrictive interpretations in some, the Department promulgated its own ethics rule to provide a uniform, national rule on this issue, which is fundamental to so much of what federal prosecutors do. That regulation was not an attempt to exempt Department attorneys from ethics rules—rather, the regulation sets forth explicit rules for Department attorneys, provides sanctions for their violation, and contemplates state bar discipline for intentional violations. Since that time, the Department has been working with the Conference of Chief Justices and others to develop a new Model Rule that would ensure that prosecutors can participate in traditionally accepted investigative, techniques without undue fear of ethical sanctions. Although we continue in these efforts, we are still faced with many different interpretations in the different jurisdictions, and the ABA's Model Rule is even more restrictive today than it was in 1994.

Here are some concrete examples of the problems we will face if the McDade amendment goes into effect:

Undercover operations are critical to many major investigations, including investigation of major drug trafficking rings, terrorist groups, and traditional organized crime. The Committee on Professional Ethics of the Florida State Bar Association, however, has issued an opinion that leaves this basic law enforcement technique in doubt. Most state contacts rules have an exception for contacts "authorized by law." Florida's rule has no such exception, and the Florida state bar apparently considers the rule to be absolute—attorneys and agents working for Attorneys may not communicate with any person who claims to have a lawyer with respect to a particular matter. Accordingly, the bar opined that federal prosecutors are, not permitted to conduct undercover operations against a target who is represented by counsel. Fl. Eth. Op. 90–4 (1990 WL 446959) (Fla. St. Bar Assn.). Thus, for example, a federal prosecutor would not be permitted to supervise an undercover operation to infiltrate an organized crime enterprise if the targeted mob boss was represented by counsel. The Florida bar minimized the obvious harm to law enforcement that this rule would cause by "observing" that the target would likely be unaware of the undercover operation and so would not be represented in the "matter," even if the target had counsel. But this completely ignores the realities of modem federal law enforcement—would the Florida bar really have believed that John Gotti did not know he was under investigation? Criminal organizations are often perfectly well aware that they are being investigated—they just do not know exactly what the government is doing. Under the Florida bar rule, Mr. Gotti's lawyer might have been able to write to the United States Attorney, stating his knowledge of the investigation, and most likely even of the existence of a grand jury probe, announce his representation of Gotti, and thereby preclude the government from wiring an undercover F.B.I. agent to try to elicit incriminating statements from Gotti.

A recent case in Minnesota presents the same problem. In *State* v.*Roers,* 520 N.W.2d 752 (Ct. App. 1994), the court held that Minnesota's contacts rule was violated by undercover communications with someone represented by an attorney. If the court really meant that any such contact, even those prior to arrest or indictment, is prohibited by the rule, undercover investigation of ongoing criminal activity could be seriously hampered.

The pre-indictment, undercover activities that would appear to be prohibited by these rules are exactly the types of legitimate, traditionally accepted activities that federal courts have routinely approved. *See, e.g., United States* v. *Balter,* 91 F. 3d 427 (3d Cir. 1996) (allowing an informant to tape a suspect in a murder-for-hire investigation); *United States* v. *Powe,* 9 F.3d 68 (9th Cir. 1993); *United States* v. *Ryans,* 903 F. 2d 731 (10th Cir. 1990). Under section 530B, a federal prosecutor in those states will be unlikely to authorize or participate in such activities—not because they are not legitimate, fully constitutional investigative techniques, but because they have been questioned or prohibited by state bars. This will seriously interfere with major undercover operations in those states with the most restrictive rules.

Investigation of criminal activity that continues after arrest could also be seriously hampered. In general, prosecutors cannot communicate with a represented defendant about the "matter" for which the individual is being represented, but may communicate with the defendant about another "matter." Oftentimes, U.S. Attorney's offices learn that defendants under indictment are continuing their criminal conduct, such as by making new drug sales, or are seeking to avoid conviction through obstruction of justice or witness tampering. For example, in a recent case investigated by a United States Attorney's office, defendants in a securities fraud case were released on bail following their arrest. In the course of interviewing victims, prosecutors learned that one elderly victim had been contacted by a defendant seeking $250,000 based on the same fraud. Prosecutors arranged for the victim to tape record ensuing conversations with the defendant, producing evidence of ongoing fraud by the defendant and others. Prosecutors must be able to investigate such ongoing conduct in order to ensure that indicted defendants are not able to continue their illegal conduct.

A similar, and even more dangerous situation, occurs when prosecutors become aware that a defendant is trying to arrange for the murder of a witness Under the Department's regulation, prosecutors can place a wire on a cooperator with instructions to try to get the defendant to talk about his plans. A rigorous no-contact rule could prevent prosecutors from using this essential investigative technique, with potentially disastrous consequences. This is not a hypothetical circumstance. In a recent case, a United States Attorney's office was told by an informant that an indicted defendant was seeking to murder a witness against him and a law enforcement officer involved in the investigation. The office consulted with state bar counsel about the issue of an undercover contact of the defendant by the informant. The state bar counsel said that the contact would violate the state's ethics rules, although it was unlikely that the prosecutor would be disciplined.

Of course, a state bar might decide that such contacts are permissible because investigation of the new offense is not the same "matter" under the contacts rule. This is the position taken in the Department's contacts rule and by the federal courts. Most states, however, have no law on point and the contacts rules themselves provide little guidance. The result is that prosecutors will have to put their licenses to practice law on the line in order to do their jobs.

This fact—that the consequence to prosecutors of mistaken predictions of the direction of state ethics rules is professional discipline—is one of the major problems with section 530B. When prosecutors are faced with contacts issues, they do not have time to solicit opinions from state ethics authorities. Consider the predicament of a federal prosecutor licensed by the state of Virginia who faces a situation similar to that one of my prosecutors when I was the United States Attorney for the District of Columbia faced. That prosecutor learned from a witness that an incarcerated defendant was trying to convince the witness to leave town before trial. The prosecutor received information from another source that the defendant was going to have the witness killed if she did not leave. On the day the prosecutor learned this information, he sent the witness, equipped with a hidden tape recorder, to talk to the defendant about his desire that she leave town. Immediately after the visit to the jail, the United States Marshals Service took the witness out of town for her protection. The prosecutor obviously did not have time to seek advice from bar counsel.

In Virginia, the prosecutor might have been deemed to have committed professional misconduct. In *Gunter* v. *Viriginia State Bar,* 385 S.E.2d 597 (Va. 1989), the Virginia Supreme Court held that recording conversations between third parties by a lawyer, or with his or her authorization, without the consent of all parties to the

conversation is unethical. Despite the fact that the court relied on an American Bar Association ethics opinion containing an explicit exception for law enforcement, the Virginia bar recently distributed continuing legal education materials that suggested that, the prohibition was absolute. When a federal prosecutor in Virginia made inquiries of the Virginia bar ethics authorities, he was told that the prohibition contains no exceptions for prosecutors. When the prosecutor asked how Virginia state prosecutors cope with this rule, he was told that the police conducted these sorts of activities without any involvement by prosecutors. Perhaps the bar would arrive at a different conclusion if an actual case presented itself. But an actual case will present itself only when a federal prosecutor licensed in Virginia faces professional discipline. Federal prosecutors carrying out their duties to enforce the law should not have to place their professional licenses at risk in this way.

The problems presented by state bar contacts rules are by no means limited to criminal law enforcement. One of the most significant problems posed by these rules is in the corporate context, involving both civil and criminal law enforcement. Attorneys representing corporations often claim to represent all employees of the company, perhaps thousands of employees, and sometimes even former employees, a group that might include employees fired for whistle-blowing activities. Corporate counsel is often, even usually, aware when the company is under investigation by the government. The Model Rule has been criticized for being vague on this point, and this vagueness has led to different interpretations in many states—even where the, state rules themselves are identical. Some state contacts rules are extremely broad, covering not only senior management but any employee whose statements can be imputed to the corporation. Some state rules may even cover former employees. *Compare Public Service Electric & Gas Co.* v. *AEGIS,* 745 F. Supp. 1037 (D.N.J. 1990) . (prohibiting all contact with former employees except through formal discovery) with *Curled* v. *Cumberland Farms, Inc.,* 134 F.R.D. 77 (D.N.J. 1991) (permitting contacts with former employees).

These rules make it very difficult to investigate corporate wrongdoing. Government attorneys might not even be able to speak to employees, such as whistle-blowers, who want to speak to the government, who have no interest in being "represented" by corporate counsel, and who initiate contact with the government. United State's Attorneys offices regularly receive letters from corporate counsel stating that counsel represents all employees of the company and purporting to forbid the government from speaking to any of them without counsel's permission. Indeed, the United States Attorney's office in San Francisco received such a letter from counsel for a corporation under criminal investigation who asserted that California's contact rule prohibits contacts with employees "[e]ven in situations where the corporation's and the employee's interest may not be the same." The contacts rule attempts to ensure that corporations are not deprived of the benefit of counsel, but it is not intended to shield wrongdoing or to allow corporate counsel to avoid conflicts when individual employees have interests different from the corporation.

A recent decision in California shows how significant this problem could be if state ethics rules apply across the board to Department attorneys. In *United States* v. *Talao,* No. Cr. 97–0217–VRW (N.D. Cal. 1998), the United States initiated a criminal investigation as a result of allegations and information in a *qui tam* action. The *qui tam* action was based on allegations of wage and hour violations and kickbacks against a closely-held corporation and its owners. The company and the owners were represented by one attorney. An employee of the company was subpoenaed to testify in the grand jury. The owners of the company learned of the subpoena and instructed their attorney to accompany the witness to the grand jury. On the day of her grand jury appearance, the employee met with the company and owners' attorney prior to going to the courthouse. However, the employee went to the courthouse and met the prosecutor without the attorney. The employee told the prosecutor that she did not want to be represented by the owners' attorney and, in addition, that one of the owners had telephoned her the previous day and told her to testify falsely in the grand jury. The prosecutor told the employee that she was entitled to counsel and offered to obtain court-appointed counsel. The employee declined counsel. When the owners' attorney arrived at the courthouse, the employee refused to meet with him. Despite all of this—the employee's refusal to be represented by the company and owners' attorney, her refusal even to meet with him, her statement to the prosecutor that the owners of the company were apparently suborning perjury, and the prosecutor's offer to obtain counsel for the employee—the court still found that the prosecutor had violated California's version of Rule 4.2 concerning contacts with represented persons and determined that, if the case proceeded to trial, the jury would be informed of the government's "misconduct" for the purpose of evaluating the credibility of the employee's testimony.

Although I have focused on state rules on contacts with represented persons, which pose the most serious challenge to effective law enforcement, many other bar rules threaten to interfere with legitimate investigations. Some state bar rules purport to regulate when a prosecutor can subpoena an attorney or what information a prosecutor must provide a grand jury. In these areas, the bar rules seem to go beyond the regulation of ethics and instead attempt to regulate rules of procedure and evidence. In addition to interfering with what is properly the province of the legislature and the courts, these rules also create new obstacles for federal prosecutors.

It is difficult to identify all the rules that might affect federal prosecutions because some bar rules, which are wholly legitimate and important on their face, are interpreted in a way that no one would expect. For example, in Oregon, a state bar rule, one with a salutary prohibition of deception, has been interpreted to prohibit government attorneys' participation in sting operations because these operations involve deception. *In re Gatti,* No. 95–18 (Ore. St. Bar). A federal prosecutor conducting an investigation of a drug organization would thus be prohibited from authorizing an undercover purchase of drugs. A prosecutor could not supervise a sting operation intended to lure burglars and thieves into selling their ill-gotten proceeds to an undercover F.B.I. agent posing as a fence. A prosecutor could not authorize law enforcement agents to pose as children to fool pedophiles using the Internet in order to sexually exploit minors.

The response of the Oregon bar to criticism of its interpretation of its rule is that law enforcement agents are not bound by ethics rules and can continue to conduct undercover operations without attorney involvement. This reflects a completely unrealistic view of contemporary law enforcement and is terrible public policy to boot. Prosecutors conduct investigations because they have to. There is no way to conduct a gang investigation, or an organized crime investigation, or investigation of a large-scale drug operation, effectively without the active involvement of prosecutors.

Moreover, this is how it should be. The value of attorneys' direct involvement in investigations cannot be overestimated. Attorneys are well-schooled in the law and can help ensure that investigations stay within constitutional bounds. There are many areas of the law that are highly complex and specialized. In these areas—civil and criminal environmental law enforcement, money laundering, securities fraud, cases arising out of acts of terrorism—federal attorneys are critical because only they will understand the technical issues that are the difference between a case that should be brought to trial and one that does not meet statutory requirements. Attorneys must see and speak to the witnesses in order to make informed decisions about proceeding with a case. Attorneys are often in the best position to decide what the next investigative steps should be.

Unfortunately, federal prosecutors in the Eighth Circuit where the Department's contacts regulation has been invalidated—are reporting that agents are seeking advice from prosecutors less frequently and are simply conducting investigations on their own. Agents are concerned that consulting with attorneys will limit the scope of the agents' investigations. This development is bad for everyone.

The examples that I have given represent the problems that we know about, but there is also much uncertainty about how particular state rules will be applied to federal law enforcement attorneys, and how vigorous state bars will be in using their authority under the section to control the activities of these attorneys. I am sure that the members of this subcommittee are familiar with the since-reversed *Singleton* decision in which a panel of the Tenth Circuit held that offering a plea to a reduced charge to a defendant in return for truthful testimony violated federal criminal law. Many states have rules prohibiting offering inducements to witnesses (one such state rule was cited in the original *Singleton* decision). Since the *Singleton* decision, more defense counsel are making motions to exclude testimony from cooperating defendants on the basis of these rules. While most state rules prohibit only inducements that are prohibited by law, the Florida rule contains no such exception. Does this mean that *any* inducement, such as moving the witness's family to safety pending the trial, is prohibited? We simply do not know. The Eleventh Circuit recently held that section 530B does not require suppression of cooperating witness testimony, but took no position on whether the use of such testimony violates the Florida rule. *United States* v. *Lowery,* 166 F.3d 1119 (11th Cir. 999). This opinion is likely to provide little comfort to Department attorneys licensed in Florida.

SECTION 530B IS VAGUE AND WILL LEAD TO MUCH SATELLITE LITIGATION

Section 530B presents many problems beyond the direct impact of specific rules. I will describe some of the great uncertainties the section creates.

While the caption to section 530B refers to ethics rules, the text of the section refers only to "laws and rules * * * governing attorneys." This language will permit defense counsel to argue (incorrectly, we believe) for a form of reverse preemption—if a state bar has a rule in a particular area, even if it conflicts with clear federal law concerning, for example, wiretapping or consensual monitoring, or with the uniform rules of procedure and evidence that govern federal court proceedings, the state rule will prevail. We are currently litigating against just such an argument: counsel for a state bar argued in a recent case that "the clear intent of [section 530B] was to prevent the Justice Department lawyers from ignoring state ethical standards on the grounds of conflict with federal law."

Over the last 60 years, Congress has developed uniform rules of procedure and evidence for the federal courts, and no state or state bar should be able to override those. Nor should a state law that prohibits wiretapping trump federal law expressly permitting Department attorneys to authorize valid electronic surveillance. If this broad interpretation of section 530B were to succeed, the effect on federal law enforcement would be devastating. State rules concerning electronic surveillance, subpoenas, and grand jury practice vary widely. Our ability to use particular investigative techniques would vary from state to state and would be severely limited in some. I want to emphasize that the Department does not believe that this was Congress's intention and that we will litigate vigorously against this interpretation, but it is already clear that we will face such arguments. *See* ABA/BNA Analysis and Perspective, vol. 14, no. 20, at p. 498 (Oct. 28, 1998) (noting that opposing lawyers are likely to argue for a broad construction of section 530B).

The other area of serious concern is in determining what rules apply to particular conduct. All attorneys face difficult questions about what state bar rules apply to particular conduct. As an ABA Committee explained a few years ago, "the existing authority as to choice of law in the area of ethics rules is unclear and inconsistent." ABA Committee Report Explaining the 1993 Amendment to Rule 8.5. Although the ABA has tried to improve this situation by amending Model Rule 8.5 to make clear that attorneys must generally comply only with the rules of the court before which they are litigating a particular matter, most states have not adopted this rule. This leaves all attorneys at risk that they may, in good faith, comply with the wrong rule.

This problem is especially difficult for federal prosecutors, whose practice necessarily crosses state lines and who often supervise investigations that span a dozen or more states. By statute, the Attorney General has authority to determine who will represent the United States in court, and Department attorneys—particularly those at Main Justice—travel across the country to represent the United States' interest, most often in states where they are not members of the bar. Federal prosecutors also must regularly react quickly to protect the public and bring criminals to justice. Uncertainty about what bar rules apply is thus particularly troubling.

To the extent that there is already confusion, section 530B makes the situation far worse because of its vague directive that government attorneys comply with rules in each state in which the attorney "engages in that attorney's duties." This directive could be read to require Department attorneys (unlike private attorneys) to comply with rules in every state where they take a deposition or supervise an investigation. Although we do not believe this interpretation is correct, we anticipate that there will be significant satellite litigation about what rules apply to particular conduct. This will needlessly slow the enforcement of federal law and will deter prosecutors, whose licenses may be on the line.

Let me give you a realistic example. A team of federal prosecutors may oversee an investigation that has grand juries in three states and investigators in ten states. We do not believe that the prosecutors should have to comply with different rules in each state where an investigator goes. Under current federal law, government attorneys generally comply with the rules of the court where the case is being litigated. Under section 530B, a cautious Department attorneys will have to consider how the rules of multiple jurisdictions might be applied to his or her conduct, with professional discipline as the consequence of a mistaken analysis. If the attorneys on the team are licensed in different states, each attorney may have to do a separate analysis of the rules that apply, and different rules might apply to each of them. Add supervising attorneys with different bar memberships, and you can see how complicated it gets.

This sort of uncertainty does not result in more ethical conduct by federal prosecutors. Rather, it will discourage prosecutors from early and effective involvement in major criminal cases and will make attorneys exceptionally timid about authorizing traditionally accepted law enforcement techniques because they are concerned that their licenses and careers may be jeopardized. Whether one believes that a single nationwide set of ethics rules for practice in federal court is the answer or that

fifty sets of state bar rules for the practice in each state is the answer, I think we all can agree that it should be clear what rules apply to what conduct—something section 530B does not do.

CONCLUSION

I want to conclude with what I said at the outset. The Department is not seeking to exempt itself from ethics rules or to strip state bars of their authority. We firmly believe that federal prosecutors should comply with the highest ethical standards, regardless of who makes and enforces the rules. The federal courts and Congress through its oversight functions insist on this. But we also believe that ethics rules should be clear, predictable, and reasonably uniform—and also that they should not unreasonably interfere with legitimate law enforcement techniques.

Section 530B ensures that none of these things will exist for federal prosecutors. For this reason, we strongly believe that section 530B must be modified prior to going into effect. We are actively working to implement the provision, but we believe in the strongest terms that it should not be permitted to go into effect as is. No issue has galvanized Department attorneys more than this one because their licenses are on the line. The Attorney General and I stand ready to work with Congress to modify the provision to make certain that federal prosecutors are governed by high ethical standards, but also that they are able to do their jobs and effectively represent the interests of the United States.

[The subcommittee stood in recess from 3:15 p.m. to 3:37 p.m.]

Senator THURMOND [PRESIDING]. The subcommittee will come to order.

Let's see if all the witnesses are here. On the second panel, the first witness is John Smietanka. Is that the way you pronounce it?

Mr. SMIETANKA. Yes, Mr. Chairman, John Smietanka.

Senator THURMOND. I did pretty good pronouncing that.

Mr. SMIETANKA. You did beautifully, Mr. Chairman. Could I bring you back to my State?

Senator THURMOND. Where are you from?

Mr. SMIETANKA. I am from Michigan, Mr. Chairman.

Senator THURMOND. A graduate of John Marshall Law School, is that right, in Chicago?

Mr. SMIETANKA. Yes, sir.

Senator THURMOND. Currently in private practice. He became U.S. Attorney for the Western District of Michigan in 1981. Is that right?

Mr. SMIETANKA. Yes, sir.

Senator THURMOND. In the Bush administration, Mr. Smietanka served as Principal Associate Deputy Attorney General and Assistant Special Counsel to Attorney General Bill Barr. He was also President Bush's nominee to be a judge of the Sixth Circuit Court of Appeals.

Our second witness is John R. Justice. It sounds like a South Carolina name.

Mr. JUSTICE. You are correct, sir. [Laughter.]

Senator THURMOND. Are you Solicitor of the sixth circuit?

Mr. JUSTICE. The sixth circuit, Chester, Fairfield and Lancaster Counties.

Senator THURMOND. Yes; we are glad to have you here. Maybe you can help me to keep these others straight.

Mr. JUSTICE. We will try.

Senator THURMOND. The very able Solicitor of the Sixth Judicial Circuit in my home State of South Carolina, Mr. Justice is a graduate of the University of South Carolina Law School. He retired after 25 years of service in the South Carolina Army National

Guard with the rank of lieutenant colonel. He was elected to the South Carolina House of Representatives in 1970. Since 1978, he has served as Solicitor for the Sixth Judicial Circuit of South Carolina. Mr. Justice is also president of the National District Attorneys Association. We are especially pleased to have him with us today.

Mr. JUSTICE. Thank you, Senator.

Senator THURMOND. That is a high honor.

Mr. JUSTICE. Thank you, sir.

Senator THURMOND. The third witness is Richard Delonis. Is that pronounced right, "Delonis?"

Mr. DELONIS. That is close enough.

Senator THURMOND. Close enough. Mr. Delonis is a graduate of the University of Detroit Law School. He is an assistant U.S. attorney in the Eastern District of Michigan, a position he has held for almost 30 years. Is that correct?

Mr. DELONIS. Yes, Senator.

Senator THURMOND. You have almost served long enough to retire.

Mr. DELONIS. Just about.

Senator THURMOND. He is currently president of the National Association of Assistant United States Attorneys.

Next is Drew McKay, a graduate of American University's Washington College of Law and a former assistant U.S. Attorney for the District of Columbia. He is currently executive vice president, chief operating officer and deputy general counsel of Decision Strategies Fairfax International. He is representing the American Corporate Counsel Association, as I understand it.

Mr. MCKAY. Yes, Mr. Chairman.

Senator THURMOND. Our final witness is Prof. Geoffrey Hazard, Jr. Did I pronounce that right?

Mr. HAZARD. Yes, sir.

Senator THURMOND. He is a graduate of the Columbia University Law School, has held teaching appointments at nine different universities, and is currently a trustee professor of law at the University of Pennsylvania. Since 1984, he has been Director of the American Law Institute. Professor Hazard is a widely recognized author and expert on the subject of legal ethics.

I ask that each of you please limit your opening remarks to no more than 5 minutes. You can make it shorter if you want to. All of your written statements will be placed in the record; everything you say will be in the record, without objection.

We will start with Mr. Smietanka and go down the line. Do any of you have statements you want to make before we ask questions?

PANEL CONSISTING OF JOHN SMIETANKA, FORMER PRINCIPAL ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, GRAND RAPIDS, MI; JOHN R. JUSTICE, PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CHESTER, SC; RICHARD L. DELONIS, PRESIDENT, NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS, DETROIT, MI; G. ANDREW McKAY, CHAIR, NATIONAL LITIGATION COMMITTEE, AMERICAN CORPORATE COUNSEL ASSOCIATION, WASHINGTON, DC; AND GEOFFREY C. HAZARD, JR., TRUSTEE PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA, PHILADELPHIA, PA

STATEMENT OF JOHN SMIETANKA

Mr. SMIETANKA. Just briefly if I may, Mr. Chairman, the point that I would like to make very clearly is I was not only a U.S. attorney for 12 years, not only a prosecuting attorney in my county in Michigan for 11 years, but during the time that I have now been in private practice for the last 3 years, I have been also a member of the ethics committee of my bar association, and also serving as a hearing officer in the voluntary disciplinary program we have with our bar association—I should say mandatory disciplinary program. So I hear cases of alleged abuses of attorneys' authority by attorneys around the State.

Finally, from my perspective as a Principal Associate Deputy Attorney General in the Bush administration, I would like to just say that as I see this regulation of attorneys by someone, we have to look at a basic premise and that is that Federal authorities should regulate Federal attorneys enforcing Federal laws in Federal courts.

This not to denigrate the States. This is not to say that they don't do a wonderful job in their areas and have absolute and constitutional rights to do it, but they don't have the right—they shouldn't be dictating to the Federal Government how Federal investigations, approved by Federal courts and the Federal Congress, are handled.

I think that we got in to this mess—and we are in a mess—which has resulted in McDade, which I think is bad legislation and should not go into effect and should be repealed by something which is, I think, must wiser. And I think that Hatch bill which has been referred to by the Chair at the beginning of this hearing is a very wise starting point to work from because that is an integrated point of view from the Federal level, a response to a very difficult problem which Senator Biden talked about.

Senator Sessions, Senator DeWine, Senator Schumer and yourself talked today about the difficult of exercising power by Federal prosecutors, and we are paying a lot of attention to that that we did not in the past. We tried in the Bush administration to deal with this concept of disciplining and directing Federal prosecutors to act within the law by starting with the Thornburgh memorandum, which we believed at that time basically stated Federal law.

It was followed by Attorney General Bill Barr's attempt with his regulation dealing with contact with represented persons, and that frankly was picked up by Attorney General Reno with her regulation of contacts with represented witnesses. Frankly, within the

Department of Justice, there is an organization which is frankly far better equipped at dealing with the enforcement of rules than most, if not all, of the State bars.

In my State today, there are 32,573 lawyers. There are three counsel investigators in our bar grievance program. Three attorneys are supervising and handling the complaints against theoretically 32,000 people. Mr. Chairman, there are in the Department of Justice something in the neighborhood of 8 or 10,000 lawyers. There are 18 lawyers supervising the investigations or handling the investigations of the discipline. There is a better vehicle existing right now in the Department of Justice, with a better track record, than any of the bar associations than I have seen operating in this country, and I have seen several.

I would like to suggest that I do support the Hatch view because it acknowledges the principle of one United States. It acknowledges the principle that the Attorney General has the authority to run her Department. It directs her to address specific ethical problems. It reaffirms Congress' overall, ultimate responsibility to act in an oversight capacity of the discretion that it gives to the Attorney General. And, finally, it brings in the judiciary in an effective way to assist the Congress with their wisdom and their experience on any possible other areas that need to be regulated.

I thank the Chair for its courtesy.

[The prepared statement of Mr. Smietanka follows:]

PREPARED STATEMENT OF JOHN SMIETANKA

THE EFFECT OF STATE ETHICS RULES ON FEDERAL LAW ENFORCEMENT

Mr. Chairman and members of the Subcommittee, thank you for your invitation to testify today on the knotty problem of how to deal with alleged abuses of power by federal government attorneys.

I am pleased to be on a panel with people of such diverse backgrounds bringing different perspectives to the problem.

MY BACKGROUND

Practice:

- Admitted to practice before two state bars, Illinois and Michigan, and the federal bars of Northern Illinois, Western Michigan, the Sixth Circuit and the United States Supreme Court.
- After law school, private practice in my father's family law firm, first formed in Chicago in 1894.

County Prosecution:

- Trial and appellate Assistant Prosecuting Attorney, Berrien County, Michigan, 4 years.
- Nearly 8 years as Berrien County Prosecuting Attorney.
- President of the Prosecuting Attorneys Association of Michigan.

Federal Prosecution:

- Appointed and confirmed as United States Attorney for the Western District of Michigan in 1981, serving for over 12 years.
- In 1990, I was asked by Deputy Attorney General William Barr to come to Washington to be his Principal Associate. When he became Attorney General I moved with him to the Attorney, General's Office. In December 1992, I was appointed Special Counsel to the Attorney General and Special United States

Attorney for the Northern District of Illinois to supervise the prosecution of the roughly 60 cases called the "El Rukns."[1]

Post-federal Government Service:

- I left the federal government and entered private practice in west Michigan on December 31, 1993.
- Interspersed with my private practice were two unsuccessful campaigns to be Michigan Attorney General (1994 and 1998).

Special Bar Activities: Ethics

- As a member of the Michigan Bar, I have had special responsibilities. Judicial Ethics Subcommittee of the Ethics Committee of the State Bar. Our committee wrote opinions on ethical matters for the state bench and bar.
- I now sit on hearing panels for the Michigan Attorney Discipline Board, the "judicial" office of the attorney discipline process in our state.

- Almost Judicial:
- Nominated by President Bush to be Sixth Circuit Court of Appeals Judge in 1992. (The Senate Judiciary Committee did not hold a hearing for me among some 60 others, and my nomination died at the end of that Congress.)

Thus I have observed the legal scene in Michigan and across the United States from several perspectives: private practitioner, trial and appellate prosecutor, federal and state chief prosecutor, member of the Bush Administration's U.S. Department of Justice management team and volunteer in the Michigan State Bar's ethical process.

From my perspective, the conflict this Committee is dealing with is a recent bulge in the amoeba of the relationship between the three branches of the federal government, the state legal systems and the national and local media and the American public. To adequately examine the entire matrix is to risk becoming lost in immense complexity. Each aspect has been examined in scores of law review articles, cases, media reports, legislation, regulation and seemingly endless pre-meetings, meetings and post-meetings of members of all the interrelated disciplines. The only topic getting more consistent attention with equally less finality is the *de rigeur* "Fair Trial, Free Press" sessions which are part of so many seminars all over the country.

SUMMARY

Abuse is always a danger when we give power to a person. This is the lesson of history and one of the dominant themes of the American Revolution and founding of our current government. The real and perceived abuses of the colonists by the government of George III and his predecessors led to the Declaration of Independence and the Revolutionary War. The practical impossibility of the survival of the newly independent states under the Articles of Confederation, with virtually total decentralization of power to the States, drew us inexorably to the Constitutional Convention of 1787. There the delicate balances between liberty and coordination, between the people and the state and federal governments, between law making, law enforcing and law-application were debated and struck. But at the heart of the matter was the need for the *use of power for good* coupled with checking the *ills coming from its abuse.*

Our national constitutional history since then has been a playing out of the drama in a virtual infinity of situations.

Today you are deliberating on how to regulate power given to governmental lawyers.

We need to parse the question into its components. To deal with the future we must first understand the past and the present.

HISTORY

The exercise of the power and authority of federal prosecutors did not reach the point of causing national controversy until relatively recently.

The systematic pursuit of abuse of governmental power began to become a national question with a series of national events: Watergate, ABSCAM, the Mafia, the War on Drugs and the scandals of big business or big labor gone amok.

In Watergate, it was the Congress and the parallel work of the Special Counsels to the Attorney General, Cox and Jaworski, who broke through the screen of payoffs, obstruction of justice, perjury covering terminal abuse of presidential power.

[1] This was because the presidentially-appointed United States Attorney had had to recuse himself due to certain allegations against members of his office concerning what may generically be called "prosecutorial misconduct."

Many from those days are prominent today, instructing us on how to properly deal with the exercise of power.

Perhaps we can flippantly blame the movie "The Sting" for popularizing the tool of the undercover investigation, or Perry Mason's solving of crimes within the 30–60 minute windows of prime time. However the very graphic memories of television shots of drug dealers, burglars, and crooked politicians committing their crimes has a potent punch. The audience is, from the safety of its living room, brought into the arena to see crime in action. And juries often seem to expect, in this post-"Petrocelli" world, that prosecutors should be able to present videotaped replays of the crime at trial.

"ABSCAM," the most prominent of the early "stings" by federal government, introduced the sad images of congressmen taking cash for favors broadcast on the nightly news. Political corruption cases are always some of the most difficult to prove. The basic nature of the political process and the emotional trust we place in the often attractive people we elect to office are major factors. Even more so is the care the courts take with such cases to make sure there really were crimes, and not just one political faction commandeering the criminal justice process for personal or partisan advantage.

The Mafia, with its intensely secretive rules and often-brutal elimination of testifying defectors or retaliation against those who crossed it, made the captured lawyer and the corrupted legal system a household concept. There we saw lawyers, judges, police and the system itself seem co-opted by "the mob." Federal prosecutors, in the forefront or breaking its power, sat in silent rage at, to cite one example, defense lawyers passing from protectors of, the constitutional rights of their clients to facilitators of their crimes.

The "War on Drugs," brought on by what the public believed (and still does, for the most part) was the "Scourge of Drug Abuse." A public outcry moved the Congress, the courts and the White House to respond with tough laws, more enforcement resources and demands for results. Many prosecutors and I have had the difficult job of taking to task lawyers and judges (among many other types of people) for their criminal immersion in the drug trade, In the Western District of Michigan, one attorney took paper bags of money from drug clients and temporarily stored them in the ceiling above his office desk. Then he and his secretaries, during their lunch hour, went to 20 different banks, turning the money into cashier's checks for his drug clients. This case, and the hundreds of other like situations around the country, tended to smudge with suspicion other attorneys representing big-time dealers under investigation. Unfortunately, the immense pool of drug cash coupled with the tightening of the legitimate market for attorneys provided great temptation to struggling practitioners around the country.

Corporate and union investigations brought with them the difficult problem of the entity under investigation providing umbrella representation for all members of the body. Thus corporate counsel would routinely advise federal prosecutors that they now represented all employees, directors or in the case of, say, unions, all members, and contact with any without permission from the core counsel was prohibited. This found parallels later in all manner of investigations in the "joint defense agreements," whereby many putative "witnesses," "subjects" and "targets" would join together like musk oxen to show common horns to the government,

Several circumstances exacerbated the tension between prosecutors and defense counsel. In 1984, prosecutors began going after the proceeds of drug dealing wherever they could find them. This included two areas that particularly disturbed the private bar, honest and dishonest alike: tracing drug money to and through attorneys' bank accounts and seizing money paid to defense counsel for their services. In one case the federal prosecutors were nosing into facially private business transactions of suspected or charged drug dealers; in the other, the fees being used to pay for attorneys' services were being frozen and seized.

THE CONTROVERSY

One can track through the above historical references the main substantive areas of today's allegations of misconduct by the private bar against federal prosecutors.

1. "Federal prosecutors bypass the attorney-client relationship to have private contacts with the represented party."

A. Take the case of the member of an organized criminal venture who wants to cooperate with the government, but has an attorney not of his choosing publicly representing him. The *dilemma:* if he tells that attorney he wants to "cooperate" or plea bargain with the government, he risks injury to his family or himself.

B. Or there is the related question of a federal investigative agency (supervised or working closely with an Assistant United States Attorney) running "sting" operations where the undercover agent or informant talked to, or was in the presence of, a represented person.

C. Here, too, the issue of multiple, or "umbrella" representations provides tension, i.e., how can one attorney provide proper counsel for both the target corporation (or principal officers) and the potential witnesses against them at the same time.

2. "Federal prosecutors subpoena the attorney of a person to testify about the client."

A. A rather rarely used investigative strategy might be to seek from the attorney information not legally within the ambit of the privilege, e.g., the amount of fees charged by the attorney for a representation, perhaps the final step in tracing the proceeds of a drug distribution business.

B. Related to this issue is the above-noted sensitive area of forfeiture (under *United States* v. *Monsanto,* 491 U.S. 600 [1989]) of attorney fees traceable to drug proceeds.

3. "Under the Sentencing Guidelines, the prosecutors are really running the system through their charging power and their sentence recommendations."

A. The volume, if not the strength, of the argument of defense counsel is augmented by the general dissatisfaction with these guidelines, for different reasons by both the Circuit and District Courts.

i. The defense bar disliked the additional sword in the hand of their adversaries;

ii. the District Court judges were unhappy with the restriction of their freedom to impose what they felt was an appropriate sentence; and

iii. The Circuit Court judges disliked the volume of appeals on the rather uninteresting interpretational aspects of the guidelines.

B. Associated with these problems were the quasi-guerrilla warfare some of these judges were waging by not just publicly voicing opposition, but refusing to follow, and encouraging others not to follow, the guidelines in their courts.[2]

4. "The overwhelming authority against us in the courts, together with the vast new resources given to federal prosecutors and investigators, has tipped the level playing field against us."

A. When the defense bar saw the courts refusing to accept their arguments on traditional 4th, 5th, 6th, 8th ana 14th Amendment grounds, in the context of the increasing presence of federal prosecutorial power, they resorted to attacking the behavior of their opponents as unethical, first in the federal courts and, failing there for the most part, in the ethics boards of the local bars.

B. The bar ethical rules had, until the 1980's, not been the *forum conveniens* for this battle. But then with the federal legislature, courts and executive branch seen as ganging up on them, they became *the* places to go. Composed in great measure of private practitioners, and with criminal law not being the most socially favored part of the practice,[3] still there was a visceral resonance to the criminal defense bar's complaints against Administrations (Reagan and Bush) and their Justice Department that were seen as opposed to lawyers generally.

The attacks on the personal ethics of the individual prosecutor or his office were not limited to federal court. Anecdotally I can refer again to my own experience as a local prosecutor in the 70's. Towards the very end of the decade and into the 80's the personal attack formula had been adopted from the "gonzo lawyers" as they

[2] In the early 1990's, I personally participated in a training session for new federal judges, wherein several of the judges on the panel advised their audience to "wait until tomorrow's session and we'll tell you how to avoid applying them." When I challenged this, the defense attorney on the panel told the group to ignore what I was saying and the guidelines, and conduct "guerrilla warfare on the (guidelines)."

[3] From being at a way station to private practice when I began to practice in the 1970's to being a part of a professionally appropriate career path now, prosecutors still deal with some of the most distasteful aspects of human life. And for the defense bar, advocating for fair treatment of the perpetrators of murders, rapes, frauds and drug dealing, puts them in even closer proximity to the seamier side of life. Now that I am back in private practice (which is predominantly civil), I still hear the old refrain "How can you defend a guilty person?" Further my civil clients are a bit visibly put off by the notion that their attorney is representing a man serving time (I believe unjustly) for murder.

were called in Chicago by some of the more regular members of the criminal defense bar.

RESOLUTION ATTEMPTS

What we faced, thus, in the late 1980's was a trend that didn't bode 4 well for the future. The case of *United States* v. *Hammad*,[4] focused the attention of the Department of Justice. Attorney General Richard Thornburgh issued what is now known as the "Thornburgh Memo" in response, not only to Hammad, but to the entire trend of using ethics proceedings as one of the main arrows in the defense counsel's quiver. As is clear from the reading of the Memo itself, as well as Attorney General Thornburgh's rebuttal to the ensuing criticism,[5] this was not seen as creating something out of whole cloth, but rather as fitting in with a longer tradition of direction to the Department of Justice lawyers from their leader.

Taken in the context of a progressive deterioration of relationships between the federal (and state) prosecutors and their defense counterparts, the Memo's position was seen by one side as welcome leadership and the other as *ultra vires* arrogance. Rather than solve the problem, the Memo simply aggravated and gave to the criminal defense bar a torch to heat up members of the bar not till then engaged in the debate.

Meetings were demanded and held between various parts of the criminal defense bar and components of the Justice Department. In one in 1991, Deputy Attorney General Barr, Jack Curtin, President of the American Bar Association, the Presidents of the National District Attorneys Association and National Association of Attorneys General, as well as some of the associates of each, met at the Department of Justice. A discussion of a wide range of issues between the government lawyers (local, state and federal) and the ABA resulted in the creation of a "reconciliation committee" with members of each organization trying to resolve long-standing and often bitter differences among them, including some of the "ethics" issues. That committee submitted a report after over a year of meetings that may or may not have actually caused change for the better.[6] In addition, in 1991, meetings of a different kind were begun between the Department and the National Association of Criminal Defense Lawyers, to attempt to build bridges on an individual rather than institutional level between these two organizations.[7]

As a final attempt to resolve the ambiguity of the various issues discussed above and more, Attorney General Barr in 1992 promulgated for comment a proposed regulation. While that proposal was later withdrawn by Attorney General Reno, another was prepared and promulgated in its place, founded on the same assumed authority to regulate the behavior of her employees that Barr's was. With some modifications after months of extensive public commentary, the Reno Rule went into effect in late 1994.

For the next few years, the matter was played out in the law review articles, courts and media.

MCDADE AND THE FUTURE

In 1998, the so-called Citizens' Protections Act (till passage colloquially known as "the McDade Bill") was passed as a hider to an Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal 1999. It mandates that attorneys for the government "* * * shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent as other attorneys in that State."

While short and simple, the Act delivers far more punch. Effectively it expands the authority of the bars of the various states to regulate behavior not only in their own courts, but in federal courts as well. Simply put, had this law been in effect in 1961, the bar grievance authorities in the States of Mississippi, Alabama and Georgia would have had the power to punish under whatever "ethical" rules it had on the books by reprimand, suspension or revocation of the privilege of practicing law the federal attorneys who sought in federal court, either district or in the Fifth Circuit, to enforce the federal civil rights of the African-Americans in those states.

---

[4] 846 F2d 854 (2nd Cir. 1988), modified, 858 F2d 834 (2nd Cir. 1988), aff'd, 902 F2d 1062 (2nd Cir), cert. denied, 498 U.S. 871 (1990).

[5] See Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds,* 74 Judicature 290 (1991).

[7] I was also a participant in those discussions.

[6] I was a member of that committee, but left the Department some months before the final report was issued.

My view is that this statute should be immediately dealt with, either by repeal or amendment, to more properly reflect a true understanding of constitutional federalism. Both on the levels of proper balance between the state and federal governments and of the substance of the concerns about federal prosecutorial behavior, I would further suggest that some version of the Hatch Bill, S. 250, be adopted.

Enough law review articles, media discussion and court rulings and *dicta* have been disseminated to drown this issue in a maelstrom of words. I believe that stripped of its arcana, it may be simply stated:

> *Federal authorities should regulate the behavior of federal attorneys, enforcing federal criminal law in federal courts.*

This is, in other words, the Supremacy clause argument.

To say that the ultimate decision as to what norms are to be adopted in the federal executive and judicial branches, and who are to be the enforcers is one for the federal government is not arrogance, it is the constitutional framework. This is not to say there cannot be criticism or input by any other third parties, but rather the rules should be created and enforced by the constitutional or statutory officers in charge of either the legislative, executive or judicial institutions they work within.

That being said as a general rule, I personally favor the balance struck between the federal govermental branches by the S. 250. It recognizes both the oversight power of the Congress, the wisdom and experience of the federal judiciary and the primary supervisory role of the Attorney General. It identifies the questioned behavior most apparent today (S. 250, see. 2) and tasks the Attorney General to fashion rules to cover them. It leaves open to another day, after consultations with the entire justice system of the United States, federal, state and local, moderated by a federal judicial commission, the proposing of other standards.[8]

The alternatives are as I see them bleak.

Like it or not, the role of a prosecutor, federal, state or local, is different qualitatively from that of the non-prosecuting lawyer. This difference is based on both the powers vested in the prosecutor (a member of the Executive Branch charged with enforcing law), and the charge given (to do justice, regardless of the wishes of any "client" other than the constitution, laws and treaties of the United States). The private attorney, or probably even the federal civil attorney, is charged with representing the best interests of his client, regardless of what he may think the ultimate Platonic ideal of justice would require in the situation. Thus, when it comes to the enforcement of law, the prosecutor cannot be dealt with in a cookie cutter manner as just another attorney.

And the rules should not come from the fiat of associations that virtually are unrepresentative of prosecutors, such as the American Bar Association and most, if not all, the state bar associations. The percentage of prosecutors participating in the ABA at any significant level is minuscule. Time, money and, to some unfortunate extent, a cultural chasm keep them from meaningful participation.

Thus, the specific rules that deal with the most uniquely prosecutorial and federal issues are not best designed, in my view, by either the state or American Bar Associations.

And, while the tradition of delegating review of basic qualifications and enforcement of basic ethical rules to the states' courts may be long, it still is a delegation of federal authority not an inherent constitutional power. Query: Would the federal judiciary blithely accept a sitting district judge being suspended from practice by a state court for unethical behavior? Or would they demand a federal solution?

S. 250 provides the basis for a process, at once open and integrated, leading us out of the labyrinth within which we find ourselves. I support looking closely at it, but in any event, strongly urge the repeal of the current approach of the so-called Citizens' Protections Act.

Senator THURMOND. Before we go to questions, does anybody else have a brief statement to make?

STATEMENT OF JOHN R. JUSTICE

Mr. JUSTICE. I do, Mr. Chairman. Mr. Chairman, you have been so kind to introduce me, so I can cut out all the self-introduction.

---

[8] I have some trouble, from a constitutional separation of powers standpoint, with the Commission's power to review, and responsibility to report on, the work of the Justice Department's Office of Professional Responsibility. However, from a pragmatic point of view, I cannot at this time come up with a better entity as a substitute.

I would substitute for it this, that only a South Carolinian could say I am 55 years old, my wife is a couple of years younger, my oldest daughter is 27, my middle daughter is a junior at Carolina, and we all have one precious asset in common. We all have a letter from Senator Strom Thurmond congratulating us for finishing high school.

Senator THURMOND. Well, you have a fine family. [Laughter.]

Mr. JUSTICE. And in 3 more years, I fully expect my youngest child to have such a letter, Senator.

Senator THURMOND. Wonderful.

Mr. JUSTICE. On behalf of the country's prosecutors, as president of the NDAA, I appreciate this opportunity to appear in regard to this inappropriately titled Citizens Protection Act.

At the onset, let me make it clear that neither I nor any of my colleagues excuse improper or illegal acts by prosecutors at either the State or the Federal level. We condemn as much as any other citizen those who cannot properly employ the awesome responsibility. I am here to emphasize, however, that the Citizens Protection Act, passed through a previous Congress, is not the manner by which to enforce this exercise of power.

In 1996 testimony before the House Judiciary Committee on relationships between Federal and local law enforcement, I stated that the strength of the Federal system of criminal justice are those serious cases that necessitate investigations crossing State lines. Federal law enforcement can greatly expedite the closing of a case, bringing the guilty to justice. Congress has recognized this through a number of enactments, particularly the High-Intensity Drug Trafficking Area Act which brings partnerships between State and local government.

We have two basic concerns with the Citizens Protection Act, in that it, number one, we feel, will undermine the jurisdiction of State prosecutions. The proper role for Federal law enforcement is to investigate and prosecute those cases that are truly multi-State or international in nature. This is what the Constitution envisioned when separating State and Federal authority, and what the Congress has seen fit to do through its support of regional cooperative law enforcement efforts.

But the Citizens Protection Act in its simplest terms requires a Federal prosecutor to adhere to the ethical and procedural and substantive rules of both the States in which they are licensed and the State or States in which they practice. This presents an impossible ethical choice for the Federal prosecutor. They either follow the ethics of the State in which they work or the State in which they are licensed. And if these two States differ, they are in Hobson's choice and there is no way they can make a correct choice. No matter what they choose, the result is anything except a boon for criminals, and compounds the Federal investigation that involves several States at the same time. Then you are even in a more difficult place.

We view the Citizens Protection Act as undermining the very strength that the Federal system is made to advance—the ability to support local efforts by providing a multi-State capability. In turn, our concern goes to what new role the Federal system will assume to protect itself from an impossible ethical dilemma. And the

natural result there would be to adopt cases strictly within a State, cases that should be the State's responsibility, or, in other words, coming into my counties and taking my cases that should be in State court instead of Federal court. It is an unacceptable duplication of effort and a waste of assets. More importantly, it gives near impunity to criminals who work in multiple States. Our fight to reduce crime and to reduce the number of victims has come too far to be hobbled by an ill-considered effort that does nothing but prove solace to criminals.

Our second basis of opposition I will just briefly say was not in the final version of McDade last year, although I understand it is in the new legislation in the House this year. It would virtually end the practice or cross-designation of local prosecutors into the Federal system to have joint task force prosecutorial operations. Under McDade, in its original, pure form, that would be a matter of the past. I would suggest that more appropriate means of correcting ill-conceived actions by Federal prosecutors are found through the Department of Justice's Office of Professional Responsibility.

I thank you for the opportunity to be here.

Senator THURMOND. Thank you.

[The prepared statement of Mr. Justice follows:]

PREPARED STATEMENT OF JOHN R. JUSTICE

On behalf of this country's local prosecutors, I wish to thank you for this opportunity to voice our concerns about the inappropriately titled "Citizens Protection Act" and its adverse consequences for law enforcement.

I am John Justice, Circuit Solicitor (state prosecutor) of the Sixth Circuit of South Carolina. A jurisdiction of just over 100,000 people living in small towns and rural areas over a three county area. My circuit is located on the border with North Carolina and is between Charlotte, North Carolina, and Columbia, South Carolina.

I have been honored to serve in my current office for 21 years, having been elected to office 6 times. I still actively try cases as well as supervise a staff that includes five assistant solicitors. Annually, my office handles more than 3,000 felony cases.

I have been a member of the National District Attorneys Association for 20 years and am proud to be serving the prosecutors of America as president of that organization. I am here today, to present you with the views of that 7000 member organization.

At the onset, let me make it clear that neither I, or any of my colleagues, excuse improper or illegal acts by prosecutors at either the state or federal level. Our responsibilities to our citizens are perhaps best articulated by the Supreme Court in *Young* v. *U.S. ex rel. Vuitton* (107 S. CT. 2141) when it said:

> Between the private life of a citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. * * * For this reason, we must have assurance that those who will wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

We condemn, as much as any other citizen those who cannot properly employ this awesome responsibility. I am here to emphasize, however, that the "Citizens Protection Act," passed during the previous congress, is not the manner by which to enforce this exercise of power.

In 1996 I testified before the House Judiciary Committee on the relationships between federal and local law enforcement. At that time I stated that the strength of the federal system of criminal justice are those serious cases that necessitate investigations that cross state lines. Federal law enforcement can greatly expedite the closing of a case and bringing the guilty to justice.

The Congress has recognized this strength through the inception of the High Intensity Drug Trafficking Area (HIDTA) which unites federal, state and local law enforcement on a regional basis to stop drug trafficking. A similar scheme was estab-

lished for stopping money laundering and pending juvenile justice legislation looks at establishing a similar concept for youth gangs that operate on a regional basis.

In it's recently released report on "Federalization of Criminal Law" the ABA cautions against continuing the trend towards substituting the federal system of criminal justice for the traditional realm of local authority. It recognized that there is a role for federal law enforcement to play but as an extension rather then a replacement for state systems. The National District Attorneys Association participated in the ABA task force and has long opposed the unwarranted federalization of crime and the intrusion by federal law enforcement into traditionally local issues. Our position on unwarranted federalization has been premised upon the belief that there is more than enough crime for the combined efforts of federal, state and local law enforcement authorities to combat.

When the "Citizens Protection Act" was introduced in the House the consequences for local prosecutors would have been truly devastating.

Many hundreds of local prosecutors have been, and continue to be, cross designated as Special Assistant United States Attorneys. As such they work closely with joint task forces combating drug trafficking, domestic terrorism, money laundering, and other crimes that involve cross-jurisdictional efforts and interests. This designation as Special Assistant U.S. Attorney serves to foster a team approach to fighting crime, permits federal and local prosecutors to share information within their separate rules of criminal procedure and serves as a valuable source of experienced assistance to US Attorney Offices.

The "Citizens Protection Act," as originally envisioned would have cast a serious cloud on the continuation of this shared responsibility. The broad definition given to "attorney for the government" would have included a local prosecutor working under cross designation as a Special Assistant US Attorney. As such, he or she would then have been subject to disciplinary action by the "Misconduct Review Board" without benefit of any of the protections or financial support afforded employees of the federal government. While we recognized that many of the articulated penalties were not applicable, mounting a defense in Washington would be difficult at best. Yet the local prosecutor would not dare risk the consequences of not pursuing vindication because of the possible implications on their position within their own community.

Local prosecutors already face disciplinary proceedings by our state licensing authority, as city or county employees, under the inherent authority of the judges we appear before, and under the federal civil rights statutes that permit both civil and criminal sanctions against us as individuals. To add another disciplinary proceeding against local prosecutors would have removed any incentive to continue to cross designate and place ourselves in additional jeopardy.

The issue of access to state and local records by the "Misconduct Review Board" was an even more serious problem that would jeopardize joint work. The "Citizens Protection Act" would have overridden state privacy or privilege rules or legislation with the broad subpoena power given to the Board. Moreover, there was no requirement to wait until the criminal trials or investigations were completed.

The scenario could have developed where a local prosecutor, acting as a special assistant, becomes involved in a Misconduct Review Board investigation based on allegations by someone under investigation. Because of the extremely broad subpoena powers of the Board the subject of the criminal investigation could get any and all state records pertaining to any matter that was part of the joint effort or pertained to the background of the local prosecutor, including local grand jury records. Since their hearings would be open to the public, and could occur before the investigation, much less the trial was done, the state's ability to successfully investigate and prosecute the case would be placed at risk.

At a time when every effort is being made to maximize the efficiency and effectiveness of our efforts to fight crime it would have been extremely counterproductive for the Congress to have built this barrier to cooperative efforts between local and federal prosecutors. If the "Citizens Protection Act" had become law this Association was prepared, to protect local criminal cases, to recommend that local prosecutors and police agencies consider withdrawing from all task forces and criminal investigations that include federal agencies.

Many of you in the Congress saw the folly in this Act and were able to have removed those potions that would have opened our investigative and trial efforts through a federal process that was unrelated to fact or merit.

Our concern with the "Citizens Protection Act" is now based upon two premise's. First, that the proper role for federal law enforcement is to investigate and prosecute those cases that are truly multi-state or international in nature. This is what the Constitution envisioned when separating state and federal authority and what

the Congress has seen fitting through it's support for regional cooperative law enforcement efforts.

But the "Citizens Protection Act," in it's simplest terms, requires a federal prosecutor to adhere to the ethical and, as appropriate, procedural and substantive rules of both the state in which they are licensed *and* the state, or *states,* in which they practice. This presents an almost impossible ethical choice for the federal prosecutor.

If they follow the state rules and law of the jurisdiction in which they work an ethical complaint can be lodged in their licensing state if the rules there differ from the state of practice. Their licensing state can discipline the prosecutor and the defense that they were adhering to the rules of the state in which they practice will not serve as a defense.

Conversely, if the federal prosecutor follows the rules of their licensing state then the case in the jurisdiction in which they practice can be dismissed and sanctions taken against the federal prosecutor by the court before whom they are trying their case.

Neither result is anything except a boon for criminals and this Hobbesian choice is compounded if the federal investigation involves several states at the same time. Differing rules of practice and procedure will be impossible to untangle without running afoul of one set of rules or another.

Thus we view the "Citizens Protection Act" as undermining the very strength that the federal system is to advance—the ability to support local efforts by providing a multi-state capability.

In turn, our concern goes to what "new" role the federal system will assume to protect itself from an impossible ethical dilemma.

Faced by the daunting task of weaving a safe course between various state rules, at the risk of career ruining missteps, the safe course for the federal prosecutor is to retreat from multi- state cases and stick close to home. Essentially doing those types of cases that involve the laws of a single state—in short doing *my* cases—and ignoring the traditional role of federal law enforcement.

This is unacceptable as a duplication of effort and waste of assets. More importantly, it gives near impunity to criminals who work in multiple states. Our fight to reduce crime, to end reduce the numbers of people who become victims, has come too far to be hobbled by an ill considered effort that does nothing but provide solace to criminals.

Our second basis for opposing the so-called "Protection Act" is its very real potential to chill state and local participation in task force efforts. Now, our assistant prosecutors, cross-designated as special assistant U.S. Attorneys, work as full members of a joint investigations. If the "Protection Act" is implemented local prosecutors will need to examine the risks involved with continued participation. If a task force effort results in a federal trial in one of the participating venues what risk will there be for an local prosecutor from another state? Can they continue to be a team members of the laws of the second state are in conflict with those of their home jurisdiction. There is no federal protection thus do they limit participation and thereby limit liability or do they fully participate and exposure to personal and professional liability. Each case will have to be assessed not only on the merits of the situation but on the jeopardy that inures to the prosecutor.

I believe, in short, that far from being an ethics rule this is nothing less then an attempt to "divide and conquer." If the joint state-federal task forces are split up or rendered less effective then there is no protection for our citizens,

I would suggest that more appropriate means of correcting ill conceived actions by federal prosecutors are found through the Department of Justice's Office of Professional Responsibility.

On behalf of the prosecutors of this nation, both local and federal, I thank you, and this Subcommittee, for this opportunity to testify.

Senator THURMOND. Does anybody else have anything to say?

STATEMENT OF RICHARD L. DELONIS

Mr. DELONIS. I do, Mr. Chairman. First of all, I would like to thank the Chair and the subcommittee for inviting me to appear on behalf of the country's frontline Federal prosecutors. I serve, and I am honored to serve as the President of the National Association of Assistant United States Attorneys.

The first point I would like to make is that some of our critics have said that we Federal prosecutors feel that we are above the

law, and I want to just say forthrightly that that is not true, that we as a group feel that we are among the most dedicated servants of the law and we do not oppose regulation. In fact, we invite it. We ask to be regulated. We want to be ethical, but we do ask, do it, please, in a way that does not interfere with the way we discharge our responsibilities.

I would note that we as Federal prosecutors are already subject to a great deal of regulation from a great number of different perspectives—institutions, procedures, and the like that keep prosecutors on the straight and narrow. Indeed, one of my colleagues has done a chart which is here in the hearing room that pictorially displays all the various mechanisms and procedures and institutions that impact on a Federal prosecutor and assure ethical and proper conduct.

Now, beyond that, I would like to do something nobody else has alluded to here so far. I don't want to repeat what other panelists have said, but I thought I would put things in the context of a particular story, and the story I chose is something that happened in my own backyard, so to speak, in Detroit, and I talked to some colleagues in my office who handled the case.

Back in May 1992, it was a nice, warm summery day. There was a little girl named Loreal Roper, a toddler, age 3, a typical 3-year-old, active, at home standing in the doorway of the house looking out on the porch. There on the porch was her uncle and two male visitors, one being a guy named Alfred Austin.

As little Loreal stood there in the doorway looking out, a man approached the house. When he got to within 10 feet of the men, he pulled a gun and shot the three men dead, but he wasn't done. This man turned to Loreal, the 3-year-old toddler standing there in the doorway, pointed the gun at her and shot her in the face, killing her, and walked away.

That gunman was part of an organization that was known as Best Friends, a drug-dealing, murderous group of people operating in the city of Detroit and elsewhere that in their term of activity was responsible for upwards of 50, perhaps as many as 80 drug-related murders. The investigation of Best Friends was underway when one day a mother who had two sons who were defendants in criminal cases in the Federal court, as she was also a defendant—she was charged with laundering drug money—she came into the U.S. attorney's office without her lawyer and came to one of our prosecutors. And her message was this: I have a son who is one of the defendants. He wants to cooperate, but he is afraid of his lawyer; he doesn't trust him.

Now, the Michigan rules of discipline would not allow us, if we followed those and if those were controlling, to talk to her or to her son. But Federal policy and the rules of the Justice Department allowed us to do that, and one of my colleagues went to visit the son and talked to him and asked, is it true that you want to cooperate and that you don't trust your lawyer? He said that it was, and he was taken before the court and got an appointed counsel.

Then he offered the fact that his brother, who was also a defendant, had the same reservations about his lawyer. We talked to that brother, ascertained that was true, got him a lawyer. These two brothers cooperated, and in the end more than 50 murderous thugs

dealing drugs were indicted, prosecuted and convicted. And the man who murdered Loreal Roper sits today in a penitentiary, where he will sit for the rest of his life. I would say that that might not have happened had the Michigan rules of ethics been in force and controlled Federal law enforcement in that case.

Thank you.

Senator THURMOND. Thank you very much.

[The prepared statement of Mr. Delonis follows:]

PREPARED STATEMENT OF RICHARD L. DELONIS

Mr. Chairman, Honorable Members of the Subcommittee on Criminal Justice Oversight, Good Afternoon. My name is Richard Delonis, and I have been deeply honored by your invitation to testify at this hearing. I appear before you today in my capacity as President of the National Association of Assistant United States Attorneys, a professional association formed approximately six years ago for the purpose of representing the interests of this nation's federal prosecutors. My colleagues share in my appreciation of being afforded an opportunity to speak to you today regarding a topic that is of paramount interest to Assistant United States Attorneys.

We are the government's front-line litigators, those whose duty it is to investigate and vigorously prosecute the criminals who prey upon American society and the American people. I will endeavor to present to you the perspective of the dedicated men and women who daily walk into court, often confronting dangerous criminals "eyeball-to-eyeball" and, in their presence, asking juries to convict them and judges to sentence them.

I am employed by the Department of Justice, serving as an Assistant United States Attorney for the Eastern District of Michigan, at Detroit, Michigan. In November, I will have held that position for thirty years. I am the senior most attorney in my district. My current assignment entails the prosecution of the majority of my Office's criminal tax cases, as well as any special tasks that I may be delegated. I report directly to the Chief Assistant United States Attorney. Prior to my current assignment, I served in my Office's Organized Crime Strike Force for a period of six years.

I am here to address the issue of "The Effect of State Ethics Rules on Federal Law Enforcement" and, more particularly, speak to you in support of S. 250, The Federal Prosecutor Ethics Act. Let me begin by stating that, contrary to the "spin" being placed on this issue by some members of the bar, federal prosecutors are not opposed to being regulated. We take great pride in our integrity, and we are fervent in our dedication to ethical principles. We do not view ourselves as being above the law, rather, we view ourselves as being among its most dedicated servants. Indeed, we embrace the words of Mr. Justice Sutherland in *Berger* v. *United States,* 295 U.S. 88 (1935), where he wrote that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty * * * whose interest, therefore, in a criminal prosecution is * * * that justice shall be done. * * * It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The words of Justice Sutherland set forth the parameters of ethical conduct for Assistant United States Attorneys. My colleagues and I regard his depiction of our office as an ethical beacon for us to follow. I personally keep a framed copy of Justice Sutherland's remarks both in my office and in my study at home. I am attaching a copy of the full quotation to my written remarks.

Assistant United States Attorneys favor the imposition of ethical principles upon lawyers, including themselves. But we believe that this must be done in a manner which does not conflict with existent federal law and does not alter the established and accepted practices and procedures in the federal courts. Ethical proscriptions must be consistent with the performance of our sworn duty, and must not erect barriers to the effective discharge of our responsibilities.

Of the vast body of lawyers admitted to the bar in the fifty states, by far the greatest percentage of their number practice their profession largely in the state courts. Federal prosecutors practice almost exclusively in the federal courts. The state bar associations which promulgate ethical rules and regulations are, in essence, agents of the states in which they function. While they are rightly entitled to regulate the conduct of the attorneys admitted to practice in their respective states, including Assistant United States Attorneys, that regulation should be compatible with the manner in which federal prosecutors have traditionally performed their duties in the federal venue.

The assertion of ethical principles which contravene existent federal prosecutorial practice would handcuff federal prosecutors, thwart the efficient administration of justice, and usurp the authority of the constitutionally established body charged with regulating federal practice and procedure: the Congress of the United States. In short, federal prosecutors ought be subject to the ethical rules of the states in which they are admitted to practice, but those rules should not conflict with the discharge of their official duties. Federal prosecutors ought be subject to discipline by state authorities for breach of those rules, but not when the conduct to be disciplined is an appropriate performance of prosecutorial duty.

The question before us today is what legislation, if any, is necessary in order to assure ethical conduct by federal prosecutors. But, before giving detailed consideration to any legislative proposal relating to the establishment of ethical standards for federal prosecutors, it is both desirable and advantageous to examine the current situation in an effort to determine the extent to which any such legislation may be warranted. After the performance of such an inquiry, which we might call a needs assessment, we will be in a far better position to judge the value of any legislative proposals. Accordingly, I would like to now review with you the numerous existent practices, procedures and circumstances which serve to promote ethical conduct and act as prosecutorial restraints. The chart that we have placed before you contains a graphical representation of the numerous, current "barriers" to prosecutorial misconduct. A copy will be attached to my written remarks.

PROSECUTORIAL RESTRAINTS

Case agent training, experience and judgment

Typically, an Assistant United States Attorney's first contact with a given criminal case occurs when it is presented to him or her by the case agent, i.e., the investigator to whom the case has been assigned by the federal investigative agency. The case may be at an incipient stage, or the investigation may be substantially underway. In either event, the prosecutor will be working with a federal agent who has been well trained and has demonstrated good judgment to agency supervisors. Moreover, the agent will have been seasoned by some degree of experience in the field. The prosecutor's interaction with a skilled law enforcement professional will be a factor in the creation of an atmosphere of professional responsibility.

Agency investigative policy and guidelines

The investigative and prosecutive process is impacted by the internal rules, regulations, and policies of the investigative agency. The agent with whom the prosecutor works is subject to rules of conduct established by the agency for its employees. Agency policy and guidelines will thus influence the nature of the professional relationship between the investigative agent and the prosecutor.

Agency supervisor's training, experience and judgment

The case agent who works on a case with an Assistant United States Attorney works under the active supervision of his own agency. The agent reports to a supervisor on a regular basis, and the agent's activities and written reports are subjected to supervisory review. The training, experience and judgment of the supervisor act as a positive influence upon the case agent, and they provide a qualitative direction and control to the agent's job performance.

AUSA training, experience and judgment

Quite naturally, the Assistant United States Attorney's own training, experience and judgment will contribute to the ethical performance of prosecutorial duties. Also, it must be noted here that by Department of Justice policy, every Assistant United States Attorney is required to attend ethics training sessions on a regular basis.

AUSA's supervisor's training, experience and judgment

The federal prosecutor does not work in isolation. The Assistant United States Attorney works under the direction of a unit and/or division chief whose training, experience and judgment will also contribute to the formation of an ethical work environment.

Internal U.S. Attorney's Office investigative and prosecutive guidelines and policy

Most, if not all, United States Attorney's Offices have established their own internal policies and investigative/prosecutive guidelines. These internal rules and policies serve to further enhance an atmosphere where ethical conduct is expected and demanded.

U.S. attorney's manual guidelines and policy

In fulfilling their daily responsibilities, federal prosecutors have the assistance of a manual, promulgated by the Department of Justice, which gives them information and guidance on a vast array of issues.

Department of Justice investigative guidelines and policy

The work of an Assistant United States Attorney often involves complex issues, novel legal questions, high profile cases, and other sensitive questions. Over the years, the Department of Justice has established guidelines and departmental policies which are to be followed by prosecutors in the field.

Department of Justice approval process as to important issues and cases

Certain important issues and cases handled in the field by federal prosecutors require Department of Justice consultation and approval. For example, an Assistant United States Attorney who wishes to use a wiretap, compel testimony from a witness by a formal grant of immunity, issue a subpoena to an attorney, or bring a charge under the RICO statute, must first secure departmental approval. Certain types of prosecutions are routinely processed through the Justice Department in Washington. In tax cases, for example, the evidence gathered by the Internal Revenue Service is reviewed by the Tax Division which makes the decision whether or not to prosecute. If prosecution is warranted, the Tax Division sends the case to the United States Attorney's Office with the instruction to file criminal charges.

Department of Justice attorneys' training, experience and judgment

In those cases which involve Department of Justice consultation and approval, one or more attorneys and/or supervisors in the Department's appropriate litigating division will participate in the decision making process. Their individual and collective training, experience and judgment will influence the formulation of ethically appropriate decisions.

Judicial approval of search warrants

The search of a person's home or property constitutes one of the most significant intrusions that government can impose upon that person's freedom and right to privacy. In order to use such an intrusive investigative technique, the law requires the law enforcement officer to obtain the approval of a neutral and detached judicial officer. Common practice requires the federal agent to have the application for a search warrant reviewed and approved by an Assistant United States Attorney prior to its submission to the court. When unusual issues or circumstances are involved, oftentimes an Assistant United States Attorney will consult with colleagues or a supervisor to assure that a proper and legally justifiable search warrant is being sought from the court.

Judicial approval of complaints and arrest warrants

To initiate criminal charges by way of a criminal Complaint, or to secure a warrant for someone's arrest, the Assistant United States Attorney is required to submit to the court an affidavit setting forth the probable cause justifying the Complaint and the warrant. The affidavit itself is ordinarily sworn to by a federal agent who has knowledge of the case. A Complaint or a warrant will not issue without the approval of a judicial officer.

Preliminary hearings—judicial determination as to probable cause and release

Upon arrest, an accused is entitled to be brought before a judicial officer without any unreasonable delay. If the defendant has been charged in a criminal Complaint, the Assistant United States Attorney must establish the existence of probable cause to the satisfaction of a Magistrate Judge in order to obtain from the court an order in which the defendant will be "held to answer." To have the accused detained without bond, an Assistant United States Attorney must demonstrate to the Magistrate Judge that no condition or set of conditions will assure the accused's future appearance before the court or that, if released, he will not pose a danger to the community.

Grand jury indictment

To secure the return of formal criminal charges against anyone, the federal prosecutor must establish the existence of probable cause to the satisfaction of a majority of a federal grand jury. The grand jury will then return an indictment. The grand jury is a body of citizens drawn from the community to inquire into allegations of criminal conduct and to consider the filing of criminal charges. As an institution, the grand jury is several centuries old, having been originated in England as a means to check the power of the crown.

Motion to dismiss

In cases where criminal charges have been filed, an accused can seek the dismissal of charges, either pretrial or during the trial, upon a showing of some impropriety or defect in the charges.

Motion to suppress

Where an accused believes that evidence was illegally obtained, he may seek an order from the court suppressing such evidence, thereby foreclosing its use at trial.

Motion for judgment of acquittal

At trial, an accused can seek an order from the court entering a judgment of acquittal where the evidence is insufficient to support a conviction. Where a court determines the evidence to be legally insufficient, it even has the power to function as "the thirteenth juror" and vacate a jury's verdict of guilty.

Judicial sanctions—district court

Assistant United States Attorneys, like all lawyers, are subject to judicial sanction by the court where the court makes a finding of misconduct. The sanctions available to the court include reprimand and, censure, a finding of contempt, imposition of a fine, and an order barring the attorney from practicing in that court.

Judicial sanctions—appellate court

Lawyers, including Assistant United States Attorneys, are also subject to the disciplinary authority of the appellate courts. The available sanctions are similar to those which may be exercised by the lower court. One additional remedy exists at the appellate level, however. Under an appropriate circumstance, the favorable judgment obtained by the attorney in the lower court could be reversed.

Internal agency discipline

Where allegations of misconduct are raised against a federal agent, that agent's own agency will conduct its own internal investigation and, if circumstances warrant, impose sanctions upon the agent. Under some circumstances, disciplinary actions taken against an agent may have a deleterious impact upon an investigation or prosecution being conducted by a federal prosecutor.

Internal U.S. Attorney's Office discipline

Where misconduct allegations are raised against an Assistant United States Attorney, the United States Attorney's Office may take disciplinary action against its employee upon a finding that the attorney is in fact guilty of the charged misconduct. Internal discipline within the United States Attorney's Office is usually reserved to those cases where the misconduct is less serious in nature.

Office of Professional Responsibility

Where the charges of misconduct by a federal prosecutor are of a more serious nature, the matter is referred to the Department of Justice's Office of Professional Responsibility. That office is noted for conducting thorough investigations which can be protracted. The possible sanctions that could be imposed include reprimand, suspension, and discharge from office. Even when vindicated by an O.P.R. investigation, the experience can prove to be very difficult and demoralizing to the prosecutor who was been victimized by spurious charges. Last year, during the congressional consideration of the Citizen's Protection Act sponsored by Congressman Joseph McDade, an Assistant United States Attorney from Florida wrote to her congressman and her two senators stating her opposition to Representative McDade's bill and advising them of her own experiences. She wrote: "I have personally been subject to these processes, and I can tell you from first-hand knowledge that the system provides more than the average number of safeguards for unethical behavior without this bill. During my experience, I spent months defending myself against a spurious charge in three separate investigations. Though they all found no wrongdoing on my part, my ability to represent the people of the United States was, and has been, forever impacted by this horrible and humiliating experience. This bill would make those types of experiences commonplace for all of us." Michelle McCain Heldmyer, Assistant United States Attorney, Pensacola, Florida.

State bar associations

Assistant United States Attorneys are subject to the disciplinary rules of the state bar to which they belong. Indeed, the Department of Justice expects its lawyers to adhere to the state bar ethics rules. The Department's singular reservation has been to those instances where a state bar has chosen to promulgate a rule which conflicts with the official duties of its prosecutors.

Civil liability

Under some circumstances, federal prosecutors are subject to civil suit for conduct related to the performance of their official duties. The Congress has recognized the potential difficulties occasioned by this liability by recently enacting legislation that would allow the Department of Justice to pay one-half of the annual premiums on malpractice insurance policies obtained by its prosecutors. Unfortunately, to date the Department has not been able to extend this benefit to its attorneys.

Hyde amendment claims

Recently enacted legislation sponsored by the House Judiciary Committee Chairman, Representative Henry Hyde, allows defendants who have been acquitted to bring suit against the government for damages under certain circumstances.

Criminal prosecution

Finally, in the very worst of circumstances, federal prosecutors are themselves subject to criminal prosecution should they violate the law. Indefensible and condemnable acts such as subornation of perjury, obstruction of justice and willful and unlawful violation of the rules of grand jury secrecy constitute some of the potential grounds for criminal prosecution. Assistant United States Attorneys do not and would not condone such deplorable conduct by a colleague, and they earnestly hope and pray that they will never see the day that a colleague is charged with any such offense.

Three significant observations

The foregoing analysis leads us to three significant observations regarding the promulgation of ethical regulations for federal prosecutors. First, federal prosecutors are already subjected to many proscriptions and restraints. Indeed, it can be forcefully argued that, currently, federal prosecutors are more regulated than other members of the bar. The preceding analysis discloses that a prosecutor's conduct is subjected to continual and pervasive scrutiny. Moreover, there are very adequate disciplinary remedies already available for any instances of misconduct which would warrant the imposition of sanctions.

The second observation relates to the fact that issues of ethics and discipline are a very personal matter. These are not abstractions about procedural questions or constitutional interpretations of law, rather, they go directly to the very heart of a prosecutor's most valuable possessions: integrity and reputation. We are dealing with matters that deeply impact a person's livelihood and professional future. Allegations of misconduct, even if spuriously made, have profound impact upon morale which, in turn, will negatively impact the quality of work being performed by even the most conscientious of prosecutors.

The third observation relates to the interaction between prosecutors and agents. In recent years, federal prosecutors have become more active in the investigatory process and have assumed a greater role in the direction and supervision of investigations. The blanket application of state ethics rules to federal prosecutors will extend the ultimate impact of those rules to investigative agents simply because they are now working under a prosecutor's supervision. Ironically, such an extension of regulation to agent activity is likely to produce unintended, counter-productive results. Knowing that their closer relation to the prosecutor serves to circumscribe their investigative efforts, agents may well be motivated to separate themselves from prosecutorial oversight and act more independently. Having lost the benefit of prosecutorial supervision, the quality of law enforcement will diminish, a circumstance that will surely be decried by the organized bar that precipitated it.

THE CITIZEN'S PROTECTION ACT OF 1998

Having reviewed with you the various practices, procedures and mechanisms which serve to promote ethical conduct and act as prosecutorial restraints, I would like to take a moment or two to comment upon a bill passed by the Congress last October. The Citizens Protection Act of 1998 was sponsored by Representative Joseph McDade and was ultimately affixed to an omnibus appropriations bill which was hurriedly enacted in the closing moments of the last Congress. It was enacted without the benefit of a hearing in either congressional chamber. This Committee was thus deprived of an opportunity to exercise its normal and appropriate legislative prerogatives. Indeed, it would appear that the bill's primary supporters made every effort to avoid the scrutiny of this Committee and its counterpart in the House.

Consequently, we find ourselves confronted with legislation, which was both ill-advised and poorly crafted, slated to become effective in but a short time. The statute's key defect is that it subjects federal prosecutors, without any qualification, to

the "State laws and rules and local federal court rules" in any state where the prosecutor "engages in that attorney's duties."

The vagueness of the statutory language is patent. A cursory reading discloses that the words are so ambiguous in character that the federal prosecutor's duty of adherence is not specifically confined to ethical rules, but to "laws and rules" in general. The sheer breadth of this statutory language opens the door to much mischief. For example, many states have laws prohibiting the obtaining of evidence by wiretap. But, for more than thirty years, federal prosecutors have been authorized by law to gather evidence from the use of judicially sanctioned and supervised electronic surveillance. We can realistically anticipate many challenges to wiretap evidence obtained in states where state laws proscribe the use of electronic surveillance.

The blanket subjugation of federal prosecutors to state "laws and rules" creates another problem which seriously implicates the constitutional principles of federalism and the supremacy clause. As written, the statute now creates an opportunity for state bar associations, and perhaps state legislatures, to promulgate new "State laws and rules" governing federal law enforcement. So construed, this statute amounts to a congressional delegation or cession of its legislative authority to the states. The remaining question is how far will state authorities go in the exercise of such regulatory authority over federal law enforcement.

And, finally, it should be noted that the statute provides that government attorneys "shall be subject to State laws and rules * * * to the same extent as other attorneys in that State." The statute thus operates upon the faulty assumption that the federal prosecutor is just like all other lawyers. It ignores the fact that a federal prosecutor practices law almost exclusively in the federal court. It also fails to consider the fact that a prosecutor's work environment is far different from that of attorneys who are not prosecutors. As a public official, the federal prosecutor is subject to many more restraints and controls than attorneys who are not prosecutors. The chart which I presented to you earlier, as well as my earlier delineation of the many rules, procedures and mechanisms which exert influence and control over prosecutorial conduct, clearly demonstrate that there are far more ethical restraints upon the federal prosecutor than upon the prosecutor's law school classmates who have chosen to follow a different career in the law.

Most importantly, the statute fails to account for the fact that a federal prosecutor's authority and responsibilities are far different from those of an attorney engaged in the private practice of law. As a representative of the people, the duties of the federal prosecutor occupy a different, if not special, place in the operation of our legal system. The federal prosecutor represents not an individual client, but the people of the United States of America. It is the prosecutor's duty to enforce the law, not to seek a remedy or damages for a client. In proving a case, the prosecutor must prove it beyond a reasonable doubt, not to a preponderance of the evidence as the plaintiff's counsel in a civil case. The federal prosecutor may not prosecute a defendant he or she knows to be innocent, yet the defendant's attorney is duty bound to vigorously defend a client known to be guilty. Thus, it may make sense to promulgate an ethical rule forbidding a civil attorney from contacting a represented party without the notification/consent of that party's counsel. But in the context of the federal prosecutor's role in the administration of justice, the strict application of such an ethical rule may well be illogical and in conflict with the prosecutor's duty. Later, I will share with you a story that dramatically illustrates that point.

CASES IN POINT

Perhaps the best way to underscore the difficulties posed by the blanket subjugation of federal prosecutors to the ethical rules of state bar associations is to examine real cases and consider how they would have been impacted if state bar rules had controlled. Far from being speculative, these illustrations drive home the point that, as enacted, the Citizen's Protection Act of 1998 would not protect the citizenry as much as it would deprive them of the effective enforcement of the law to which they, as citizens, are entitled.

Operation senior sentinel

In an effort to stem the rising tide of telemarketing fraud, several years ago the Department of Justice launched an initiative, under the supervision of federal prosecutors, called "Operation Senior Sentinel." The undercover technique utilized in this investigation involved the secret recording of telephone calls from telemarketers to the telephone numbers of actual, former victims of telemarketing fraud. Many of the victims were senior citizens who had been defrauded out of substantial sums of money. With their cooperation and consent, their telephone numbers were taken

over by the F.B.I. and routed to lines which were answered by retired agents and volunteers from the American Association of Retired Persons (AARP). With the consent and cooperation of the answering party, the telephone calls from telemarketers were secretly recorded. The telemarketers believed that they were making a pitch to a would be victim when, in fact, their pitch was being recorded and preserved to be used as evidence against them at a later date. Eventually, more than 450 persons from various states were successfully prosecuted.

Some of the calls were recorded in jurisdictions where state laws prohibit the recording of telephonic conversations unless both parties to the conversation agree to the recordation. Had the state law in those jurisdictions controlled, federal prosecutors would have been ethically precluded from supervising the investigation, and the evidence gathered through this investigative technique would have been inadmissible in court. As a consequence, this law enforcement initiative to combat telemarketing fraud would have been substantially impeded if not entirely thwarted.

Little Loreal Roper

By all accounts, Loreal Roper was a typical, active three year old child. The toddler was destined, however, to find herself in the middle of an outburst of murderous violence. May 9, 1992 was one of those pleasant, warm, spring days in the city of Detroit. Harry Roper, Loreal's uncle, was sitting on the front porch talking with two male visitors while Loreal stood in the doorway looking on. One of the visitors was Alfred Austin, a young man who had recently had a brush with the law in the state of Ohio where he was now facing weapons charges.

As little Loreal stood in the doorway observing her uncle and the two men sitting with him on the front porch, a fourth man quietly approached the house. When he got to within ten feet of the three men on the porch, he produced a gun and shot all three of them to death. The cold blooded gunman then turned his attention to the innocent little girl standing in the doorway and, in a further act of savage, brutal violence, he shot little Loreal in the face, killing her. The gunman escaped from the scene, leaving behind the bodies of his four victims, including the three year old toddler.

At that time, federal and local authorities were in the midst of an intensive investigation of a notorious and extremely violent group of Detroit drug traffickers known as "Best Friends." The organization was believed to be responsible for at least 50, and perhaps as many as 80, drug related murders in Detroit and elsewhere.

Alfred Austin had been marked for death when a defense attorney advised members of the Best Friends organization that Austin was about to cooperate with the authorities and that he should be taken care of. Little Loreal Roper's life ended at the tender age of three when she became a victim as an innocent bystander to a Best Friends' execution.

During the Best Friends investigation, a female defendant charged with laundering drug money approached an Assistant United States Attorney without the presence or knowledge of her attorney. She advised the prosecutor that one of her sons, who was also a defendant represented by counsel, wanted to cooperate with the government. She further said that her son did not trust his attorney and, therefore, could not communicate through him. An Assistant United States Attorney then spoke to the son, with out the presence, consent or knowledge of his attorney. When the son confirmed what his mother had indicated about his desire to cooperate and his fear of his attorney, the prosecutor advised the court and another attorney was brought into the case to represent the son. The first son advised the government that his brother also wished to cooperate but he, too, did not trust his lawyer. The second son was also approached by the government, without the knowledge of his attorney, to confirm what his brother had said. When the second son confirmed those facts, the court was advised and a new attorney was appointed for the second son as well.

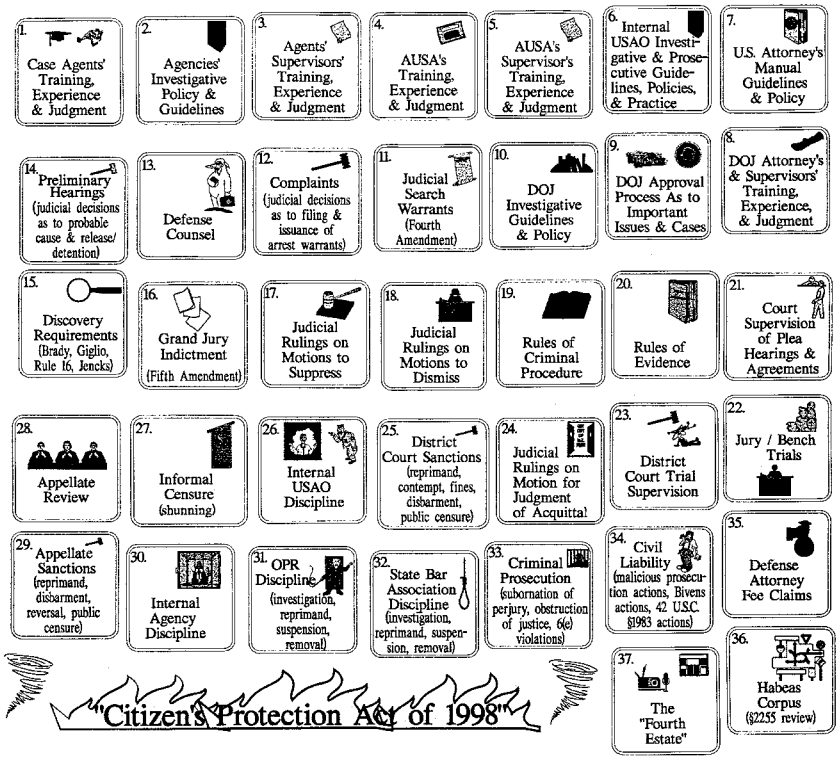
The cooperation of the two brothers was the major break in the case, and led to the dismantling of the Best Friends organization. In the end, approximately fifty people were charged and convicted of various crimes, including murder. As we sit here today, the murderer of little Loreal Roper is behind prison bars where he will spend the rest of his life.

Rule 4.2 of the Michigan Rules of Professional Conduct prohibits lawyers from contacting persons who are represented by counsel. Department of Justice policy, however, allows for such contacts under certain limited circumstances. If the Michigan rules had prevailed over Department of Justice policy in this case, the man who murdered little Loreal Roper and a number of his murderous colleagues might still be roaming the streets of Detroit today. And the Best Friends' drug trafficking and bloodbath would still be in progress.

CONCLUSION

It is quite apparent from the foregoing that 28 U.S.C. 530B, the Citizens Protection Act of 1998, is fundamentally flawed in numerous respects. Its provision for the blanket subjugation of federal prosecutors to "State laws and rules" will significantly impede the administration of justice at the federal level. If we are to truly protect the citizens of our Republic, we must afford them the quality federal law enforcement effort that they deserve. Section 530B must be repealed or amended. S. 250, the Federal Prosecutor Ethics Act, constitutes an appropriate remedy to the problem at hand. On behalf of the members of the National Association of Assistant United States Attorneys, and all of this nation's more than 4,500 federal prosecutors, I respectfully urge this Subcommittee and the entire United States Senate to rectify the situation created by the statute so hurriedly enacted last year. Thank you.

PROSECUTORIAL RESTRAINTS



SHELDON J. (SHELLY) SPERLING

First Assistant United States Attorney
Chief, Criminal Division
United States Attorney's Office
Eastern District of Oklahoma

Executive Director
Director, Region XV
National Association of Assistant
United States Attorneys

The United States Attorney

"The United States Attorney
is the representative not of an ordinary party to a controversy,
but of a sovereignty whose obligation to govern impartially is
as compelling as its obligation to govern at all;
and whose interest, therefore,
in a criminal prosecution is not that it shall win a case,
but that justice shall be done.
As such, he is in a peculiar and very definite sense the
servant of the law, the twofold aim of which
is that guilt shall not escape or innocence suffer.
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.
It is as much his duty
to refrain from improper methods calculated to produce
a wrongful conviction as it is
to use every legitimate means to bring about a just one."

QUOTED FROM STATEMENT OF MR. JUSTICE SUTHERLAND, BERGER V. UNITED STATES, 295 U. S. 88 (1935)

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. I have to preside at the Senate in 5 minutes, and I am very, very disappointed not to be able to be with you.

I got to know Mr. Justice. We are glad to have you here. And, Mr. Delonis, you represent the people with the greatest job in the whole world, assistant U.S. attorneys. I have been that, and U.S. attorney, and assistant is better. You don't have as many headaches. But it is a great job and it is composed of some of the finest people I have had the pleasure to know.

Mr. DELONIS. Thank you, Senator.

Senator SESSIONS. It is good to see Mr. Smietanka. John and I served as U.S. attorneys together for 12 years, I guess. There were just a handful that lasted that long.

Mr. SMIETANKA. That is right.

Senator SESSIONS. But John is a man of integrity and ability and courage and kindness and gentleness and strength and power, and all the good things that anybody could have as a human being, and it is an honor to see him again. And I respect you and the work you did as a principal deputy to the Attorney General and as U.S. attorney. It is good to see you again, John.

Mr. SMIETANKA. It is good to see you.

Senator SESSIONS. I am sorry I am not going to be able to stay for the rest of this panel. Thank you so much, Mr. Chairman.

Senator THURMOND. Thank you.

Before we go to questions, Mr. McKay and Mr. Hazard, do you all have anything you would like to say?

STATEMENT OF G. ANDREW McKAY

Mr. MCKAY. Mr. Chairman, with your permission, I would like to not repeat my statement, but supplement it with a few comments that I will keep certainly within the 5-minute rule, with your permission.

The issue is not, I believe, as the Department of Justice has testified before you today, whether the Ethical Standards for Federal Prosecutors Act creates new rules and restrictions for the Department of Justice. In fact, the eighth district decision last year governs the Department attorneys' conduct today. And whether McDade is in force or not, I believe the rules governing the conduct of the Department's attorneys would not change, and that would be the enforcement of the State laws.

The McDade provision simply codified the well-established understanding that all attorneys are subject to State bar professional rules of conduct. Since 1908, when the ABA first proposed the model rules, the chief judges in the highest courts in the States have adopted essentially the same standards for Federal and for local attorneys. And those of us who are in the corporate bar and other bars who also practice on a Federal level have to abide by all of those different rules.

The American Corporate Counsel Association, which is made of nearly 11,000 attorneys and 4,500 organizations across the United States and overseas, does not support the rescission of the McDade provisions or the adoption of S. 250. We believe that the current standards are appropriate. That has been supported by the Na-

tional Association of Manufacturers, the Chamber of Commerce, and others. And with the Chair's permission, I would be happy to submit additional comments for the record from those organizations rather than take time now to repeat those.

But I would like to point out to the Chair and the subcommittee a couple of other matters that I think are useful in your consideration. Senator Schumer mentioned that in the adoption of the legislation last year, this was a rather hasty and ill-conceived consideration. In fact, back in 1996, the Department and others were testifying before the House Committee on the Judiciary about ethical standards for Federal prosecutors. There was a report issued.

The Department had ample opportunity to discuss what was then H.R. 3386, and essentially the McDade provision codifies what was the result of those hearings. There has been some precedent and some discussion of these issues in the past, and the McDade bill is not a radical departure.

I would like to address one point that the Deputy Attorney General and his two colleagues made. With the Chair's permission, I would like to quote from a letter from the National Organization of Bar Counsel. This is a letter to Senator Hatch that is dated March 10, and I think it speaks pointedly to a couple of issues that are of legitimate concern to this committee and to others.

> The truly remarkable feature of the Department's campaign is the absence of any evidence to suggest a factual basis for the Department's concern that its line attorneys are at the mercy of State bar prosecutors, who are in turn supposedly working hand in hand with the criminal defense bar to complicate the lives of their prosecutorial adversaries. In the collective experience of the National Organization of Bar Counsel, nothing could be further from the truth. Informal surveys of the membership of the NOBC, which includes every attorney disciplinary authority in the country, repeatedly have failed to produce evidence of ethical prosecutions or even investigations directed at Federal prosecutors who engage in traditionally accepted law enforcement activities, such as string operations, undercover operations, wiretap surveillance, or the like."

Mr. Chairman, I think the record is clear that there are standards and they should be set very high for all of us who are members of the bar. As a former Federal prosecutor, now as a corporate attorney, we all individually should maintain and be held to that high standard. I do not think it is appropriate for the Department of Justice to be the final arbiter of its own rules of ethical conduct. I don't think this committee nor the Congress needs to be persuaded by the simple innuendo of the prosecutorial authority that they have been inhibited.

All of us who are former prosecutors—and I could cite from several, including members of the panel who spoke earlier and their predecessors who oppose this legislation—I think all of us have a different perspective on how high that bar should be set and the limitations that it should be met with by this committee and by the Congress.

I look forward to working with this committee. If the American Corporate Counsel Association or the other organizations I mentioned can be helpful to this committee in considering the legislation, we would be pleased to do so, Mr. Chairman. Thank you.

Senator THURMOND. Thank you.

[The prepared statement of Mr. McKay follows:]

PREPARED STATEMENT OF G. ANDREW MCKAY

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I appreciate your invitation to address this important subject before the Committee today. I come before you with perhaps a different perspective than my distinguished former colleagues from the Department of Justice who testified today. I am a representative of perhaps the most potentially adversely affected group by your decisions in this matter: corporate America.

I have been practicing as a corporate attorney, currently Executive Vice President, Chief Operating Officer and Deputy General Counsel of DSFX International, for the last thirteen years. I am a member of the American Corporate Counsel Association, Chair of its National Litigation Committee, Board Member of the ACCA Foundation, and past President and Board Member of the Washington Metropolitan Corporate Counsel Association. Before corporate practice, I was an Assistant US Attorney for the District of Columbia and served as counsel to a Congressional committee, among other positions I held on the Hill and at the Federal Election Commission.

The subject under consideration before you is perhaps rare, if not unique; it is a non-partisan, neither Republican nor Democratic, issue. Effective law enforcement is really not the central issue either, I suggest. No one would argue with the proposition that we want effective Federal (and local) law enforcement. Nor is this a debate about this particular Attorney General or anyone else in the current leadership of the Department of Justice. After all this debate began during the Carter Administration under Judge Bell when he was the Attorney General but received it most notable attention during the Bush Administration under Attorney General Tbornburgh.

This is a question of the appropriate ethical standards for federal prosecutors, which was well-established until 1989 when the Department began its unilateral efforts to exempt itself from the rules. State and federal courts have universally rejected, including most recently by the Eighth Circuit Court of Appeals in their January 6, 1998, opinion in the *United States* v. *McDonnell Douglas Corporation* (132 F.3d 1252), the Attorneys General arguments that the Department has the authority to promulgate rules regarding ex parte contact with individuals, specifically with represented corporate employees. The Conference of State (Supreme Court) Justices unanimously approved a resolution rejecting the Department's attempt to evade the fundamental rules governing ethical attorney conduct. State bar ethical bodies have uniformly applied Rule 4.2 to government attorneys and maintained that it would be a violation of a corporation's right to counsel in a governmental action if federal prosecutors were allowed to have ex parte contacts with represented corporate employees.

The Committee and Congress are examining the fundamental principle of the right of individuals, including organizations, to be represented. This widely accepted principal, too, has overwhelming bi-partisan support. It is a principle, I believe, that has been accepted by all states, the courts and, with the passage of Section 801 of the Omnibus Spending Bill last year, wisely reaffirmed by the Congress.

At the same time, as a former federal prosecutor I understand the Department's desire to increase its weapons to fight crime. However, I respectfully disagree with the leap-of-faith that the Department is asking the Committee to take. Having debated a senior Departmental representative on this subject twice last year, once before the ABA and again at ACCA's annual meeting, I still am unaware of any empirical or substantive evidence the Department has proffered to demonstrate the need for this exemption from the rules governing all other attorneys. It is not enough, I submit, to simply say that multi-jurisdictional prosecutions would be aided by freeing DOJ prosecutors from state ethical obligations. It probably would make such prosecutions easier if you abolished Miranda warnings in such cases, too, but I don't think the Committee or Congress would entertain such a suggestion. But where is the evidence to substantiate the Department's claim? What prosecutions have been hindered? What were the facts and circumstances in those cases? How many prosecutions really were affected? What disciplinary proceedings have re-

sulted from multi-state prosecutions that these changes would eliminate in the future? The Committee deserves such facts not just innuendo from the Department.

What the Department is asking the committee to do—without proper justification—is akin to authorizing what I've labeled as a "Representational Wiretap" whenever the Department sees fit. This is unnecessary and diametrically contrary to important fundamental principles. The right to counsel should not be lightly dismissed. And, no one individual or entity should be the final, self-governing arbitrator of these important rights. We don't allow it in traditional wiretaps, why should you be asked to change the standard here? Instead, why not authorize the Department to have judicial review and approval of such activity when it can demonstrate the specific need in a particular case to a judicial officer? Such a showing could include the authorization to use undercover agents and informants when the court finds it appropriate. Why create an entirely new mechanism to address the Department's concern when a procedure already exists that could accommodate legitimate law enforcement concerns and needs? And, it is a procedure that works well for everyone's benefit: protecting the rights of individuals, while at the same time aiding effective law enforcement in the appropriate cases.

The Department only says that it needs help in prosecuting drug trafficking, organized crime and telemarketing fraud. While I certainly agree that these are important crimes to combat, why should we subject the overwhelming majority, I suggest 99.99 percent, of corporations and organizations to such intrusive and potentially damaging contact? How is it intrusive or potentially damaging? The mere fact that—an organization could be held liable for what a heretofore represented individual might say is contrary to the long standing principles of fairness. See for example Comment 4 to the ABA's Model Rules. To follow the analogy I proposed above, why isn't an organization entitled to the same protections as individuals who are being targeted by federal prosecutors? Individuals receive Miranda or Civiletti warnings, but the Department doesn't even want the organization to be represented.

In today's marketplace the mere consequence of a corporation being investigated by the Department could have significant market and business consequences—regardless of the final outcome. Market price is affected each day by news about corporate performance in advance of actual disclosures by the company. How would the shares of a corporation be affected by an investigation started by a disgruntled, or worse miscreant, employee? How would such disclosure affect those doing business with corporation? Under such circumstances how is the corporation to protect itself if it cannot be properly represented? One proposal I previously made was that as a result of ex parte contact individuals could be held liable for their conduct, but that the organization could not. I was not surprised when my suggestion was not agreed upon by the Department. But why deny an organization the right to be adequately represented and then hold them accountable for any information that is collected?

The Department simply wants too much. The Department has apparently chafed under the current ethical structure when the Attorneys General have been unsuccessful at unilaterally establishing new governing ethical policies. The Department's twenty year effort to remove its prosecutors from the appropriate standard of ethics governing all other attorneys should be ended. The no-contact rule should not be diluted; the legitimate and reasonable constraints on such ex parte contact should remain. Nor should the Department become a self enforcing ethical body, exempt from discipline by state courts when it chooses. All attorneys should shoulder the same professional duties, obligations and privileges in the pursuit of justice.

Senator THURMOND. Mr. Hazard, would you care to make any statement?

STATEMENT OF GEOFFREY C. HAZARD, JR.

Mr. HAZARD. Yes, sir. I will be brief. I think Federal Government lawyers should be governed by rules of ethics because I think lawyers who are not, are not real lawyers. The States have regulated the bar since before the Constitution, and I think that authority ought to be recognized and maintained.

The Department of Justice does have some special problems. You have heard about them today. They center on one rule, 4.2. I believe that the power of investigation should be reasonably protected in the way that Mr. Holder and his colleagues suggested. I speak of that only generally, but that is the idea. That is possible under

rule 4.2 if there were authorization on some form of Federal regulation because that rule contemplates that there would be special authorization.

I happen to think that most of the activities are already authorized by law, but the Department understandably gets nervous and that nervousness tends to be accentuated when State bar committees issue some of these opinions that we have heard about. I think the baseline ought to be where it now is. I don't think the Department of Justice ought to make the rules, as would be permitted under the Hatch bill, because that amounts to Government lawyers making their own rules. Assuming that was valid, as I assume it would be, it just won't enjoy public support. There ought to be a broader base.

So the question is how do you get from here to there. I suggest an ad hoc commission made up of members of the Senate, House, the Department of Justice, the Conference of Chief Justices which is very interested in this, and the legal profession, or some such group. It happens that the Conference of Chief Justices and the Department of Justice, through very long negotiations which were referred to earlier, have gotten pretty close. I think that is a reasonable place to begin. I think it is possible to arrive at a set of rules that would provide some special protection for government attorneys. I think they are entitled to that, but I don't think we ought to displace the State rules wholesale in an effort to remedy that relatively narrow problem. I would be glad to be available to your staff or whoever, Mr. Senator, in whatever way I could be helpful.

Let me conclude by saying I appear here personally, not as a member of the Rules Committee of the Judicial Conference, not as a member of an ABA committee which I happen to be one, but only as an individual.

Thank you, sir.

Senator THURMOND. Thank you, Professor Hazard.

Now, we will begin questions. Mr. Smietanka, do you think the interests of Federal prosecutors are adequately represented before the ABA and State bars when ethical rules that impact Federal law enforcement are considered?

Mr. SMIETANKA. No; the reason is for several reasons. No. 1, there are 400,000 members of the American Bar Association. Of those 400,000, there are, I understand, roughly 4 to 5,000 prosecutorial-type folks who are active or members of that Association. When you get to the level of the rulemaking committees, I believe there is no one who is representing the prosecutorial point of view.

When I say "point of view," that is extremely important, Mr. Chairman, because there is a basic difference in outlook, mandated by the law and the power we give to prosecutors, than to lawyers who are in the private practice, and that is the responsibility of the prosecutor is not simply to represent a private client to get their best interest, but it is to exercise the power of the government and their discretion they are given to, in fact, do justice. That is a different perspective than is represented, understandably, by the American Bar, the other 392,000 lawyers.

Senator THURMOND. Thank you very much.

Mr. Justice, if the McDade amendment is not amended or repealed, do you believe it could complicate and impede Federal-State cooperation in law enforcement efforts?

Mr. JUSTICE. Certainly, Senator, I fully believe that it would. The cooperation that we have enjoyed the last number of years has been exceptional. There was a time when there was little cooperation between State and Federal prosecution, but that has changed. The McDade amendment would undo that, in that the Federal prosecutor would look more to within the State of his assignment to find his subject matter for prosecution, which would put him in direct conflict with State prosecution. As I mentioned before, if it passed in its pure form that has been reintroduced this year, it would absolutely dissolve the idea of cross-designation of State prosecutors as assistant U.S. attorneys.

Senator THURMOND. Incidentally, I want to commend you for your good work in South Carolina.

Mr. JUSTICE. Thank you, and yours too.

Senator THURMOND. Thank you.

Mr. Delonis, it appears to me that the McDade amendment will make prosecutors especially cautious not to do something that may even possibly violate a State's ethics rule because of the impact it would have on them personally. Please discuss the implications that disciplinary proceedings can have against the career and livelihood of an assistant U.S. attorney.

Mr. DELONIS. Mr. Chairman, I think that it is fair to say that the McDade amendment going into effect and being fully implemented would have a chilling effect on prosecutors in their work. I think they would be more reserved in the vigor with which they pursue their work because as a prosecutor, as a Federal attorney, you don't amass a fortune. At the end of your career, your greatest assets that you hold are your integrity and your reputation.

And when you get challenged and accused of misconduct by people on the other side—and I can say that I have seen something in 30 years that has happened; there has been a change in the judicial culture. The prosecutor now is the victim of personal attack as a defense tactic. That didn't happen when I was a new rookie in the Federal courts.

U.S. attorneys, we in the field, take these charges very seriously. We take them to heart, and what is especially burdensome is when somebody on the other side, as a tactic or maneuver of their own, calls our integrity into question when we know in our heart of hearts we have done nothing wrong, that we have been correct. And then we are put through a long, protracted process of defending ourselves and we come out of that being cleared because so many of these things are spurious allegations to begin with. And it leaves an indelible imprint on the morale of the person who has come under fire, when all they have done is performed their sworn duty in the best way that they knew how.

Senator THURMOND. Thank you very much.

Mr. McKay, assume that a low-level employee voluntarily approaches a Federal prosecutor to discuss corporate fraud and he says he is not and does not wish to be represented by the corporation. In your opinion, is it appropriate for the employee to speak

to the prosecutor, and if it is not, can this limitation impede whistleblowers?

Mr. MCKAY. I think it is appropriate for the individual to speak with the prosecutor, but I also think it is appropriate for the corporate counsel to be notified of such conversation. If the individual employee declines to be represented by corporate counsel, I think there is no prohibition for that employee to continue. I think corporate counsel is entitled to be notified, as I believe the model rules originally contemplated. I don't think that is an impediment today, nor should it be. But the individual has the right to decline the representation and that should be his right. The corporation, though, should be at least notified, Mr. Chairman.

Senator THURMOND. Thank you.

Professor Hazard, I understand that there is considerable debate within the legal community on whether the Judicial Conference should develop uniform Federal ethics rules. Do you think it is likely that in the near future the Judicial Conference will actually propose some form of uniform rules to the Congress under the Rules Enabling Act?

Mr. HAZARD. I think it is very unlikely, and I might say as a member of the committee I oppose it. I think we have got enough complications with the 50 State rules. I don't see that a uniform Federal rule would help. I think the problem before this house on 4.2 can be focused on and resolved without displacing State rules generally.

Senator THURMOND. I believe that is all the questions I have. Do any of you care to make any further statement?

[No response.]

Senator THURMOND. Well, I want to submit for the record a statement by Senator Hatch and a statement by Senator Leahy, members of this Judiciary Committee.

[The prepared statements of Senators Hatch and Leahy follow:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Mr. Chairman, thank you. I appreciate your leadership in holding this important hearing, today.

This hearing could not be more timely. Last year's omnibus appropriations bill included a provision originating in the house, relating to the application of state bar rules to federal prosecutors. The so-called McDade amendment proposed the addition of a new section, Section 530B, to title 28 of the United States Code, which would effect the ethical standards required of federal prosecutors.

Including this provision was so controversial that a bipartisan majority of the Judiciary Committee opposed its inclusion in the omnibus bill. In fact, our strong opposition resulted in a six month delay in the provision's effective date being included as well.

So there is no mistake, let me make it clear that questioning this provision should not be interpreted as advocating looser ethical standards for federal prosecutors, as some might suggest. Indeed, I have considerable sympathy for the values Section 530B seeks to protect. No one wants more than I to ensure that all federal prosecutors are held to the highest ethical standards. As Justice Sutherland put it in 1935, the prosecutor's job is not just to win a case, but to see "that justice shall be done. * * * It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

No one would suggest that unethical conduct be tolerated by any attorney—and especially not by an attorney representing the United States in federal court. The real question is whose rule to apply. I respectfully submit that, in general, the con-

duct of federal attorneys practicing before federal courts should be subject to federal rules, particularly when state rules conflict with established federal practice.

Although well-intentioned, section 530B is not the measured and well tailored law needed to address the legitimate concerns contemplated by Congress, and will have serious unintended consequences. Indeed, if allowed to take effect in its present form, section 530B could cripple the ability of the Department of Justice to enforce federal law.

The federal government has a legitimate and important role in the investigation and prosecution of complex multi-state terrorism, drug, fraud or organized crime conspiracies, in rooting out and punishing fraud against federally funded programs such as Medicare, Medicaid, and Social Security, in appropriate enforcement of the federal civil rights laws, in investigating and prosecuting complex corporate crime, and in punishing environmental crime.

As we will hear from some of our witnesses today, it is in these very cases that current Section 530B, if unchanged, will have its most serious adverse effects. Federal prosecutors in these cases, which frequently encompass several states, will be subject to the differing state and local rules of each of those states. Their decisions will be subject to review by the ethics review boards in each of these states at the whim of defense counsel, even if the federal prosecutor is not licensed in that state.

At a minimum, the law will discourage the close prosecutorial supervision of investigations that ensure that suspect's rights are not abridged. More likely, however, in its current form, section 530B will hinder the effective investigation and prosecution of violations of federal law.

Several important investigative and prosecutorial practices, perfectly legal and acceptable under federal law and in federal court, under current section 530B will be subject to state bar rules.

In short, current section 530B will likely affect adversely enforcement of our antitrust laws, our environmental laws prohibiting the dumping of hazardous waste, our labor laws, our civil rights laws, and the integrity of every federal benefits program.

I have given this matter substantial thought, and believe that the issue of ethical rules for federal prosecutors is only symptomatic of a larger issue to which greater consideration needs to be given. Presently, there are no uniform ethical rules that apply in all federal courts. Rather, applicable ethics rules have been left up to the discretion of local rules in each federal judicial district. Various districts have taken different approaches, including adopting state standards based on either the ABA Model Rules or the ABA Code, adopting one of the ABA models directly, and in some cases, adopting both an ABA model *and* the state rules.

This variety of rules has led to confusion, especially in multi-forum federal practice. As a 1997 report prepared for the Judicial Conference's Committee on Rules of Practice and Procedure put it, "Multi-forum federal practice, challenging under ideal conditions, has been made increasingly complex, wasteful, and problematic by the disarray among federal local rules and state ethical standards."

Indeed, the U.S. Judicial Conference's Rules Committee has been studying this matter, and is considering whether to issue ethics rules pursuant to its authority under the federal Rules Enabling Act.

I believe that this is an appropriate debate to have, and that it may be time for the federal bar to mature. The days are past when federal practice was a small side line of an attorney's practice. Practice in federal court is now ubiquitous to almost any attorney's practice of law. It is important, then, that there be consistent rules. Indeed, for that very reason, we have federal rules of evidence, criminal procedure, and civil procedure. Perhaps it is time to consider the development of federal rules of ethics, as well.

This is not to suggest, of course, a challenge to the traditional state regulation of the practice of law, or the proper control by state Supreme Courts of the conduct of attorneys in state court. The assertion of federal sovereignty over the conduct of attorneys in federal courts will neither impugn nor diminish the sovereign right of states to continue to do the same in state courts.

I want to work with all interested parties to address—and resolve—the critical issue. I believe that today's hearing is an important step in this process, and I commend Senator Thurmond for holding it. Thank you, Mr. Chairman, and I look forward to the testimony of our witnesses.

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

I commend Chairman Thurmond and Senator Schumer, the Ranking Member on this Oversight Subcommittee, for holding a hearing on the Citizen's Protection Act.

These provisions, which are known as the "McDade law," reflect an effort to clarify the ethical standards that apply to federal prosecutors and to identify who has the authority to set those standards. These are two questions that have cried out for answers for years, and created enormous tension between the Justice Department and virtually everyone else. We will hear today from a number of witnesses representing law enforcement organizations that are critical of the new law.

But we cannot lose sight of the fact that the McDade law has enormous support in other quarters, which is part of the reason the law passed in the first place. To name a few, the McDade law is supported by the Chamber of Commerce, the National Association of Manufacturers, the American Corporate Counsel Association, the National Organization of Bar Counsel, the ABA, the National Association of Criminal Defense Attorneys, General Motors Corporation and Monsanto.

The McDade law passed in October last year as part of the omnibus appropriations bill, yet this is the first congressional hearing in either the Senate or the House of Representatives on this law. Given the importance, complexity and controversy surrounding this issue, it is a matter that this Subcommittee and the Senate Judiciary Committee ought to examine carefully and responsibly.

The Justice Department aggressively opposed passage of the McDade law last year. It will come as no surprise today to hear that the Department continues to fight aggressively against this law. The Department has most recently been supportive of a change in the effectiveness date of the law to prevent its ever going into effect. Rather than a standstill that merely delays the effectiveness of a new law, such action in this setting would, in effect, repeal the McDade law for that period and the Department would during that period claim authority to prescribe regulations governing the conduct of federal prosecutors around the country, and rely on the controversial Justice Department regulations issued in 1994—regulations that allow contacts with represented persons and parties in certain circumstances, even if that contact is at odds with state or local ethics rules.

Independent Counsel. The debate over the ethical rules that apply to federal prosecutors comes at a time of heightened public concern over the high-profile investigations and prosecutions conducted by independent counsels. Special prosecutors Kenneth Starr and Donald Smaltz are the "poster boys" for unaccountable federal prosecutors. They even have their own Web sites to promote their work. By law, these special prosecutors are subject to the ethical guidelines and policies of the Department of Justice, and all of them claim to have conducted their investigations and prosecutions in conformity with Departmental policies.

I am not alone in my concerns about the tactics of these special prosecutors and, specifically, requiring a mother to testify about her daughter's intimate relationships, requiring a bookstore to disclose all the books a person may have purchased, and breaching the longstanding understanding of the relationship of trust between the Secret Service and those it protects. I was appalled to hear a federal prosecutor excuse a flimsy prosecution by announcing after the defendant's acquittal that just getting the indictment was a great deterrent. Trophy watches and television talk show puffery should not be the trappings of prosecutors.

One of the core complaints the Department has against the McDade law is that federal prosecutors would be subject to restrictive State ethics rules regarding contacts with represented persons. A letter to *The Washington Post* from the former Chairman of the ABA ethics committee pointed out:

> [Anti-contact rules are] designed to protect individuals like Monica Lewinsky, who have hired counsel and are entitled to have all contacts with law enforcement officials go through their counsel. As Ms. Lewinsky learned, dealing directly with law enforcement officials can be intimidating and scary, despite the fact that those inquisitors later claimed it was okay for her to leave at any time.

The McDade Law. This is not to say that the McDade law is the answer. This new law is not a model of clarity. It subjects federal prosecutors to the "State laws and rules" governing attorneys where the prosecutor engages in his or her duties. A broad reading of this provision would seem to turn the supremacy clause on its head. Does the reference to "State laws" mean that federal prosecutors have to comply with a state law requiring the consent of all parties before a conversation is recorded, or a state law restricting the use of wiretaps? Furthermore, by referencing only the rules of the state in which the prosecutor is practicing, does the new law remove the traditional authority of a licensing state to discipline a prosecutor in favor of the state in which the prosecutor is practicing? The new law subjects federal prosecutors not only to the laws and rules of the state in which the attorney is practicing, but also to "local Federal court rules." What is a federal prosecutor supposed to do if the state rules and local federal court rules conflict?

These are all significant questions and show that this law would have benefited from hearings, debate and more careful drafting before being inserted into an appropriations bill.

Hatch Bill, S. 250. At least one bill, the "Federal Prosecutor Ethics Act," S. 250, has been introduced to repeal the McDade law. This bill is a "cure" that could produce a whole new set of problems.

First, this bill would grant the Attorney General broad authority to issue regulations that would supersede any state ethics rules to the extent "that [it] is *inconsistent with* Federal law or *interferes with* the effectuation of Federal law or policy, including the investigation of violations of federal law." I am skeptical about granting such broad rulemaking authority to the Attorney General for carte blanche self-regulation.

Moreover, any regulation the Attorney General may issue would generate substantial litigation over whether it is actually "authorized". For example, is a state rule requiring prosecutors to disclose exculpatory information to the grand jury "inconsistent with" federal law, which permits but does not require prosecutors to make such disclosures? More generally, must there be an actual *conflict* between the state rule and federal law or policy? Can the Attorney General *create conflicts through declarations and clarifications of "Federal policy"? Does a state rule "interfere with" the "investigation of violations of Federal law" merely by restricting what federal prosecutors may say or do, or is more required?*

In addition to challenges concerning whether a Justice Department regulation was actually authorized, violations of the regulations would invite litigation over whether the remedy is dismissal of the indictment, exclusion of evidence or some other remedy.

Second, S. 250 provides nine categories of "prohibited conduct" by Justice Department employees, violations of which may be punished by penalties established by the Attorney General. These prohibitions were initially proposed last year as a substitute for McDade's ten commandments, which were extremely problematic and, in the end, not enacted. With that fight already won, there is no useful purpose to be served by singling out a handful of "prohibitions" for special treatment, and it may create confusion. For example, one of the commandments prohibits Department of Justice employees from "offer[ing] or provid[ing] sexual activities to any government witness or potential witness in exchange for or on account of his testimony." Does this mean that it is okay for government employees to provide sex for other reasons, say, in exchange for assistance on an investigation? Of course not, but that is the implication by including this unnecessary language.

Although the bill states that the nine "commandments" do not establish any substantive rights for defendants and may not be the basis for dismissing any charge or excluding evidence, they would invite defense referrals to the Department's Office of Professional Responsibility to punish discovery or other violations, no matter how minimal. In other words, these "prohibitions" and any regulations issued thereunder could provide a forum other than the court for a defendant to assert violations, particularly should defense arguments fail in court. This could be vexatious and harassing for federal prosecutors. The workload could also be overwhelming for OPF, since these sorts of issues arise in virtually every criminal case.

Two of the nine prohibitions are particularly problematic because they undermine the Tenth Circuit's recent en banc decision in *United States* v. *Singleton* that the federal bribery statute, 18 U.S.C. § 201(c), does not apply to a federal prosecutor functioning within, the official scope of his office. The court based its decision on the proposition that the word "whoever" in § 201(c) *["Whoever * * * gives, offers, or promises anything of value to any person, for or because of [his] testimony " shall be guilty of a crime]* does not include the government. But the bill would expressly prohibit Departmental employees from altering evidence or attempting corruptly to influence a witness's testimony "in violation of [18 U.S.C. §§ 1503 or 1512]"—the obstruction of justice and witness tampering statutes. These statutes use the same "Whoever * * *" formulation as § 201(c). By providing that government attorneys are subject to §§ 1503 and 1512, the bill casts doubt on the Tenth Circuit's reasoning and may lead other courts to conclude that § 201(c) does, indeed, apply to federal prosecutors, thereby reopening another can of worms.

Third, S. 250 establishes a Commission composed of seven judges appointed by the Chief Justice to study whether there are specific federal prosecutorial duties that are "incompatible" with state ethics rules and to report back in one year. The new Commission's report is not due until nine months after the Attorney General is required to issue regulations. Thus, to the extent that the Commission is intended to legitimize the Attorney General's regulations exempting federal prosecutors from certain state ethics rules (by providing the record and basis for the exemption), its purpose is defeated by the timing of its report. In addition, the Commission's report

must be submitted only to the Attorney General, who is under no obligation to adopt or even consider its recommendations in formulating her regulations.

For these reasons and others, S. 250 is not the answer to resolving the disputes over who sets the ethical rules for federal prosecutors and what those rules should be.

JUDICIAL CONFERENCE

The question of what ethics rules govern federal *prosecutors* is only a small part of the broader question of what ethics rules govern federal *practitioner*. The Justice Department has complained loudly about the difficulty in multi-district investigations of complying with the ethics rules of more than one state. Yet, private practitioners must do so all the time. Even the Justice Department acknowledges that its attorneys are subject to the ethics rules of both the states where an attorney is licensed and where the attorney practices. No area of local rulemaking has been more fragmented than the overlapping state, federal, and local court rules governing attorney conduct in federal courts. The Judicial Conference of the United States and the Administrative Office of the Courts have been studying this problem for some time. Their recommendations may come as early as this fall. I have sent a letter to the Chief Justice requesting information on when the Judicial Conference is likely to forward its final recommendations to Congress.

Any ethics, legislation dealing with the particular problem of federal prosecutors should be sensitive to the broader issues and not foreclose reasonable solutions to these issues on recommendation of the Judicial Conference.

The recommendations of the Judicial Conference on what ethics rules are applicable to federal prosecutors and what those rules should be would provide helpful guidance to Congress on this issue. While I respect this Attorney General and the government attorneys at the Department of Justice, I am not alone in my unease at granting the Department authority to regulate the conduct of federal prosecutors in any area the Attorney General may choose or whenever prosecutors confront federal court or state ethics rules with which they disagree.

The problems posed to federal law enforcement investigations and prosecutions by the McDade law may be real, but resolving those problems in a constructive and fair manner will require thoughtfulness on all sides.

Senator THURMOND. Now, before adjourning the hearing, I would like to place in the record a copy of three editorials from the Washington Post expressing concerns about the McDade legislation. As one of the editorials aptly states, McDade can be expected to hamper Federal law enforcement efforts greatly.

[The editorials follow:]

washington post 1/25/99

Repealing a Bad Law

THE CLOCK IS ticking on a dangerous attack on federal prosecutors that was passed into law by Congress as part of the budget deal last year. The provision—named for its sponsor in the House, former representative Joseph McDade (R-Pa.)—will go into effect this spring if it is not repealed, and it then can be expected to hamper federal law enforcement efforts greatly. While it passed the House overwhelmingly, it faced stiff opposition in the Senate and passed only because it had been tacked onto the bloated budget package. The Senate must take the lead quickly in repealing the McDade provision.

On its face, the McDade law seems innocent enough. It holds government lawyers to the standards of the state bars that give them their legal licenses. It was passed in response to the Justice Department's assertion that the attorney general unilaterally can exempt government lawyers from state bar rules. Lawyers generally are forbidden to contact directly parties they know to be represented by counsel—a rule that is at odds with some fairly standard practices in undercover investigations. The Justice Department claims that while its lawyers generally are obliged to follow state ethics rules, they are exempt from those rules forbidding such contacts.

The danger of the McDade provision is not only that it will interfere with federal undercover and multistate investigations but that it will invite changes to state ethics rules to the disadvantage of prosecutors.

Judiciary Committee Chairman Orrin Hatch (R-Utah) recently introduced a bill to reverse McDade, clarifying the authority of the attorney general to carve out exemptions where state rules interfere with federal policy. Mr. Hatch's bill is a good start, but it is actually a little more complicated than is necessary. It, in addition, would write into law a set of standards for federal prosecutors, and it also would create a national commission to study the general problem of state ethics rules and federal investigations.

These proposals may be worth considering, but given the time constraints involved, a simple bill is a far better approach. Mr. Hatch also has, so far, garnered only Republican senators as cosponsors (although the proposal has the support of the Justice Department). This is unfortunate. Last year, he and ranking member Patrick Leahy (D-Vt.) argued jointly against the McDade provision. A broad bipartisan approach to its repeal is the right approach now as well.

washington post 8/13/99

Quashing the Prosecutors

FOLDED INTO the Justice Department appropriations bill that passed the House of Representatives last week is a proposal to change dramatically the rules under which the ethics of federal prosecutors are judged. The measure was sponsored by Rep. Joseph McDade (R-Pa.), who was the subject of federal prosecution two years ago and was acquitted. The House supported it overwhelmingly as a reform, but in fact it is a bad idea. In the name of reining in prosecutorial misconduct, the so-called Citizens Protection Act would create a procedural web that is simply incompatible with effective federal law enforcement.

The legislation would require the attorney general to investigate allegations of misconduct according to certain tight timetables, no matter how frivolous the charges are. The deadlines would essentially eliminate the discretion of the department's ethics watchdogs to focus on the most serious and meritorious complaints they receive. The measure would thereby allow defense lawyers to tie up in time-consuming disciplinary proceedings the prosecutors who are after their clients.

Even those allegations that are ultimately dismissed could be revived, because the proposal also would create an independent review board to reexamine them. The board would present an administrative nightmare for the department. It would include voting members appointed by the president and nonvoting members appointed by congressional leaders, and it would have broad powers to investigate allegations and wide access to sensitive information. Its meetings, moreover, would be held in public. It would too easily become a roving, unaccountable body meddling in sensitive and continuing law enforcement matters.

The legislation also seeks to resolve a longstanding dispute between the department and parts of the legal profession over whether department attorneys are uniformly accountable to the ethical standards of the state bars that license them. Mr. McDade's provision is designed to nix a rather controversial claim by the department that it can exempt its lawyers from state rules—a claim that stands on somewhat tenuous legal footing. The department acknowledges the authority of state bars over its lawyers in most areas, but it unilaterally asserts a major exception. Lawyers are typically not allowed to contact directly a person whom they know to be represented by counsel. The department says, however, that this rule does not apply to prosecutors in the context of federal investigations. This notion is certainly problematic, but the McDade proposal goes way too far—eliminating any federal authority to protect the unique situation of federal prosecutors.

Prosecutorial misconduct is a serious problem to which the department cannot be too sensitive. The McDade legislation, however, is deeply flawed. Fortunately, the Senate version of the appropriations bill contains no such provision, so there is a good chance it will be stripped from the legislation in the conference committee. Failing that, President Clinton should consider vetoing the whole package.

washington post 10/18/99

Hampering Law Enforcement

ONE OF THE many nuggets of bad news in this year's mega-budget is an attack on federal prosecutors that, if finally passed, will do significant damage to the effectiveness of law enforcement. The provision is the handiwork of Rep. Joseph McDade (R-Pa.), who was himself once the subject of federal charges. It was enthusiastically embraced by the House in August and has apparently been stripped of some of its most objectionable provisions. Yet it remains a bad idea that should not become law.

What's left of the bill seems difficult to oppose. Its language merely holds federal prosecutors and other government lawyers to the standards of the state bars that give them their licenses to practice law. It is designed to trump a troubling Justice Department position that it has the authority unilaterally to exempt its lawyers from state rules of conduct.

This department view stands on shaky legal ground, but the McDade provision is not the simple good-government measure that it seems. The department's position responds to the fact that the duties of federal prosecutors—especially in the context of multi-state investigations and certain undercover work—sometimes conflict with state ethics rules. Lawyers normally are prohibited from contacting directly someone whom they know to be represented by counsel, but this rule sometimes makes no sense in the context of federal criminal investigations. The department, therefore, asserts that its lawyers, while generally obliged to follow state bar rules, can ignore them in this key arena.

One might expect that criminal justice legislation that is opposed by the president, the attorney general and the chairman and ranking member of the Senate Judiciary Committee would not be blithely slipped into the statute books. But prudence was long ago a casualty of this budget process.

Senator THURMOND. I would also like to submit for the record letters from individuals and groups that were written a few months ago in opposition to McDade—Attorney General Janet Reno and Deputy Attorney General Eric Holder; former Attorneys General Griffin Bell, Elliott Richardson, Benjamin Civiletti, Edwin Meese, III, Richard Thornburgh, and William Barr; FBI Director Louis Freeh and DEA Administrator Thomas A. Constantine; Director of the Office of National Drug Control Policy Barry McCaffrey; the National District Attorneys Association; the Fraternal Order of Police; the National Association of Assistant United States Attorneys; the Federal Bar Association; the Federal Criminal Investigators Association; the National Black Prosecutors Association; and the National Sheriffs' Association.

[The letters referred to are located in the appendix.]

Senator THURMOND. Additionally, I wish to place in the record a letter and attachments from the National Conference of Chief Justices, and a letter from the National Victims Center.

[The information referred to follows:]

THE SUPREME COURT OF SOUTH CAROLINA,
March 22, 1999.

The Hon. STROM THURMOND,
U.S. Senate, Russell House Office Building,
Washington, DC.

DEAR SENATOR THURMOND: I would like to thank you, again, for taking the time out of your busy schedule in January to listen to some of the concerns of the South Carolina court system and the Conference of Chief Justices (CCJ) with matters that may come before the United States Senate in the 106th Congress. This letter is a follow-up to that conversation and outlines our problems with S. 250, the Federal Prosecutor Ethics Act, which I am informed will be the subject of a hearing before the Subcommittee on Criminal Justice Oversight on March 24, 1999. S. 250, seeks to repeal the Ethical Standards for Federal Prosecutors Act (Sec. 801 of the Omnibus Appropriations Bill for Fiscal year 1999) that was signed into law on October 21, 1998, and will become effective on April 19, 1999. We believe the Ethical Standards for Federal Prosecutors Act merely codifies existing law (see *United States* v. *McDonnell Douglas Corporation,* 132 F. 3d 1252 (8th Cir. 1998)) and that in repealing it, S. 250 in its present form would, among other matters, allow self-regulation by the U.S. Department of Justice in critical legal ethics matters. We in South Carolina and the CCJ have a number of problems with this legislation and I have attached a brief Fact Sheet on this issue for your perusal.

As Chairman of this Subcommittee, I would like to thank you for your consideration of our concerns as you process this legislation. If you and your staff have any further questions on these matters, please feel free to call me or Edward O'Connell, Senior Counsel, at the National Center for State Courts in the Washington office at 703–841–0200.

Yours very truly,

ERNEST A. FINNEY, JR.,
Chief Justice.

FACT SHEET

28 U.S.C. § 530B—THE CITIZENS' PROTECTION ACT

The Conference of Chief Justices opposes efforts to repeal the Citizens' Protection Act, 28 U.S.C. § 530B (also known as "the McDade Bill"). Section 530B, which became law on October 21, 1998, requires attorneys for the federal government to comply with the rules of professional ethics adopted by the state supreme courts.

Background: For more than a century, it has been understood that all lawyers, including federal prosecutors, are required to abide by state rules governing professional ethics. However, in recent years, the U.S. Department of Justice has asserted that federal prosecutors are not required to comply with these ethics rules.

This position was first asserted in June 1989, by then-Attorney General Richard Thornburgh, in an internal memo to all DOJ litigators (the Thornburgh Memo"). He

argued that any disciplinary rule for the profession which placed a burden on Department of Justice attorneys was invalid under the Supremacy Clause of the Constitution, and that the rule against contacts with represented parties (Model Rule 4–2) was unenforceable against federal lawyers.

On August 4, 1994, the Department of Justice issued a final regulation providing circumstances under which Department attorneys are permitted to contact persons represented by counsel. The Conference of Chief Justices opposed this regulation because it substituted the Attorney General's regulation on lawyers for the independent control and supervision that has historically been the province of the state and federal judiciary.

Recently, the Eighth Circuit U.S. Court of Appeals struck down the Department's 1994 regulation, holding that it was promulgated without statutory authority. *United States* v. *McDonnell Douglas Corporation,* 132 F.3d 1252 (8th Cir. 1998). DOJ's position has also been rejected by a number of other courts.

The McDade provision codifies these holdings. It is intended to clarify that the DOJ cannot exempt itself from the ethical rules which govern all other attorneys.

Legislative Status: The McDade provision takes effect 190 days after enactment, or on April 19, 1999. Representatives of the Department have indicated that the Department will likely use the delay to seek to repeal the McDade provision.

SPECIFIC CONCERNS

- *Prosecutors should be required to behave ethically.* Prosecutors must be held to the highest standards of conduct because of their extraordinary powers and unique role in our justice system. Permitting the Justice Department to exempt its prosecutors from the ethics rules which govern all other attorneys creates a double standard. This sends precisely the wrong message to the profession and the public.
- *DOJ self-regulation cannot guarantee the objectivity that the current system delivers.* Currently, ethics allegations against federal prosecutors are subject to two levels of independent, outside review: state ethics boards investigate complaints and propose discipline if appropriate, state supreme courts then rule upon those proposals. This arrangement safeguards the integrity of the legal system in a way that self-regulation cannot.
- *Section 530B does no more than codify existing practices.* The McDade Bill originally contained two additional provisions: a citizens' review board and a list of specific rules for prosecutors. The Conference of Chief Justices took no position on these provisions. They did not become law. Section 530B simply recognizes the traditional authority of state supreme courts over ethics questions.
- *This historical system of state regulation of lawyers does not impose undue problems for prosecutors.* The courts have already interpreted the ethics rules to allow for law enforcement needs. For example, the courts have rejected the claim that Rule 4.2 prohibits taping by undercover agents of represented persons. In practice, there are only a tiny handful of cases in which federal prosecutors have been disciplined over the objections of DOJ.
- *State ethics rules do not form a hodgepodge of inconsistent standards.* Prosecutors can readily ascertain the rules which apply to multidistrict Investigation or litigation. Since 1908, standards of professional conduct recommended by ABA have been the national professional model, adopted by states almost universally. In practice, there are few conflicts between ethics rules. DOJ has ample resources to provide a "'hotline" for prosecutors with questions about the ethics rules.

NATIONAL VICTIM CENTER,
Arlington, VA, September 28, 1998.

TO WHOM IT MAY CONCERN: On behalf of the Board of Directors and Staff of the Nation Victim Center, we wish to express our opposition to the "Citizens Protection Act" (Formally H.R. 3396), a current amendment to the recently passed Commerce, Justice, State and the Judiciary appropriations measure (Title VII of H.R. 4276).

The National Victim Center, serving victims of all crimes, is the largest non-profit organization in the nation. The Center works with more than 10,000 victim-related organizations and agencies across the country.

We are greatly over the likely repercussions of this measure. Apart from the numerous negative consequences this measure holds for the federal criminal justice system in general, we are deeply concerned over its likely impact on victims of crime.

First and foremost, we strongly believe that the open-ended structure and criteria suggested by the measure creates an open invitation for procedural abuse by defendants at the expense of crime victims—and at the expense of justice. The terms used to define the conduct proscribed are so broad as to allow any defendant (or anyone for that matter) to file an endless stream of unsubstantiated complaints against U.S. Attorneys or other critical prosecutorial staff members. Federal prosecutors, in particular, will be forced to spend the majority of their time and resources responding to potentially frivolous complaints rather than pursuing prosecutions. As a result, criminal prosecutions may be delayed substantially, forcing crime victims to languish indefinitely as they await justice.

The emotional anguish and unrelenting turmoil inflicted on the lives of victims by the resulting delay will constitute nothing less than a re-victimization of those victims. The time honored tenant that "justice delayed is justice denied" should apply not only for the benefit of convicted murders, but for innocent victims as well.

We are equally concerned that the proposed measure will operate to seriously undermine the privacy and confidentiality of crime victims involved with criminal investigations and prosecutions. The Board, newly created by the bill, would have sweeping powers to obtain investigative files that include deeply personal and private information about crime victims. Since the Board is required to conduct its business in public, it is likely that this information will become public. In some cases, such disclosures would cause serious additional trauma and embarrassment to the victims. The prospect of such public disclosure might deter crime victims from cooperating with investigations and prosecutions, thus frustrating the ends of justice and the interests of public safety.[1]

Such divulgences might also violate the privacy rights of crime victims guaranteed them by federal law. For example, defendants (and the public for that matter) may be able to obtain information about the past sexual history of rape victims that would otherwise be denied to them under the federal rape shield law.[2] In a similar vein, offenders might be able to learn the whereabouts of victims and witnesses who are "in hiding" to escape the threat of further victimization of the accused or convicted perpetrator. Considering the circumstances surrounding many domestic violence and gang-related cases, disclosure of residence information to the perpetrator through the proposed review process would seriously jeopardize the safety and even the lives of the crime victims (and witnesses) in question.

For the reasons set out above, we oppose the "Citizens Protection Act" (Title VII of H.R. 4276), and urge the Members of the Senate, the House, and the Conferees appointed to consider the measure, to strike Title VII from the bill.

Thank you for your consideration of our position concerning this matter.

Sincerely,

DAVID BEATTY,
Director of Public Policy.

Senator THURMOND. Further, I would like to submit a statement by Senator Hatch upon his introduction of S. 250.

[The prepared statement of Senator Hatch follows:]

STATEMENT OF SENATOR ORRIN G. HATCH

INTRODUCTION OF THE FEDERAL PROSECUTOR ETHICS ACT

Mr. President, I am pleased today to introduce an important piece of corrective legislation—the Federal Prosecutor Ethics Act. This bill will address in a responsible manner the critical issue of ethical standards for federal prosecutors, while ensuring that these public servants are permitted to perform their important function of upholding federal law.

The bill I am introducing today is a careful solution to a troubling problem—the application of state ethics rules in federal court, and particularly to federal prosecutors. In short, my bill will subject federal prosecutors to the bar rules of each state in which they are licensed unless such rules are inconsistent with federal law or

[1] A study conducted by the National Victim Center by an independent research firm indicated that the number one concern of rape victims was that others, including the public, would learn that they had been raped. Sixty-six percent (66 percent) of the rape victims interviewed, said that they would be more likely to report their victimization to police if there was a law prohibiting public disclosure. (Emphasis added). National Victim Center, *Rape in America: A Report to the Nation, (1992).*

[2] See, Fed. R. Evid. 412, [Sexual Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior Sexual Predisposition].

the effectuation of federal policy or investigations. It also sets specific standards for federal prosecutorial conduct, to be enforced by the Attorney General. Finally, it establishes a commission of federal judges, appointed by the Chief Justice, to review and report on the interrelationship between the duties of federal prosecutors and regulation of their conduct by state bars and the disciplinary procedures utilized by the Attorney General.

No one condones prosecutorial excesses. There have been instances where law enforcement and even some federal prosecutors, have gone overboard. Unethical conduct by any attorney is a matter for concern. But when engaged in by a federal prosecutor, unethical conduct cannot be tolerated. For as Justice Sutherland noted in 1935, the prosecutor is not just to win a case, "but that justice shall be done. * * * It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We must however, ensure that the rules we adopt to ensure proper prosecutorial conduct are measured and well-tailored to that purpose. As my colleagues may recall, last year's omnibus appropriations act included a very controversial provision known to most of my colleagues simply as the "McDade provision," after its House sponsor, former Representative Joe McDade.

This well-intentioned but ill-advised provision was adopted to set ethical standards for federal prosecutors and other attorneys for the government. In my view, it was not the measured and well tailored law needed to address the legitimate concerns its sponsors sought to redress. Nor was I alone in this view. So great was the concern over its impact, in fact, that its effective date was delayed until six months after enactment. That deadline is approaching. In my view, if allowed to take effect in its present form, the McDade provision would cripple the ability of the Department of Justice to enforce federal law and cede authority to regulate the conduct of federal criminal investigations and prosecutions to more than fifty state bar associations.

As enacted last Fall, the McDade provision adds a new section 530B to title 28 of the U.S. Code. In its most relevant part, it states that an "attorney for the government shall be subject to State laws and rules * * * governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state."

There are important practical considerations which persuasively counsel against allowing 28 U.S.C. 530B to take effect unchanged. I have been a frequent critic of the trend towards the over-federalization of crime. Yet the federal government has a most legitimate role in the investigation and prosecution of complex multistate terrorism, drug, fraud or organized crime conspiracies, in rooting out and punishing fraud against federally funded programs such as Medicare, Medicaid, and Social Security, in vindicating the federal civil rights laws, in investigating and prosecuting complex corporate crime, and in punishing environmental crime.

It is in these very cases that Section 530B will have its most pernicious effect. Federal attorneys investigating and prosecuting these cases, which frequently encompass three, four, or five states, will be subject to the differing state and local rules of each of those states, plus the District of Columbia, if they are based here. Their decisions will be subject to review by the bar and ethics review boards in each of these states at the whim of defense counsel, even if the federal attorney is not licensed in that state.

Practices concerning contact with unrepresented persons or the conduct of matters before a grand jury, perfectly legal and acceptable in federal court, will be subject to state bar rules. For instance, in many states, federal attorneys will not be permitted to speak with represented witnesses, especially witnesses to corporate misconduct, and the use of undercover investigations will at a minimum be hindered. In other states, section 530B might require—contrary to long-established federal grand jury practice—that prosecutors present exculpatory evidence to the grand jury. Moreover, these rules won't have to be in effect in the district where the subject is being investigated, or where the grand jury is sitting to have these effects. No, these rules only have to be in effect somewhere the investigation leads, or the federal attorney works, to handcuff federal law enforcement.

In short, Section 530B will affect every attorney in every department and agency of the federal government. It will effect enforcement of our antitrust laws, our environmental laws prohibiting the dumping of hazardous waste, our labor laws, our civil rights laws, and as I said before, the integrity of every federal funding program.

Section 530B is also an open invitation to clever defense attorneys to stymie federal criminal or civil investigations by raising bogus defenses or bringing frivolous state bar claims. Indeed, this is happening even without Section 530B as the law

of the land. The most recent example is the use of a State rule against testimony buying to brand as "unethical" the long accepted, and essential, federal practice of moving for sentence reductions for co-conspirators who cooperate with prosecutors by testifying truthfully for the government. How much worse will it be when this provision declares it open season of federal lawyers?

What will the costs of this provision be? At a minimum, the inevitable result will be that violations of federal laws will not be punished, and justice will not be done. But there will be financial costs to the federal government as well, as a result of defending these frivolous challenges and from higher costs associated with investigating and prosecuting violations of federal law.

All of this, however, is not to say that nothing needs to be done on the issue of attorney ethics in federal court. Indeed, I have considerable sympathy for the objectives values Section 530B seeks to protect. All of us who at one time or another have been the subject of unfounded ethical or legal charges, as I have been as well, know the frustration of clearing one's name. And no one wants more than I to ensure that all federal prosecutors are held to the highest ethical standards. But Section 530B, as it was enacted last year, is not in my view the way to do it.

The bill I am introducing today addresses the narrow matter of federal prosecutorial conduct in a responsible way, and I might add, in a manner that is respectful of both federal and state sovereignty. As all of my colleagues know, each of our states has at least one federal judicial district. But the federal courts that sit in these districts are not courts of the state. They are, of course instrumentalities of federal sovereignty, created by Congress pursuant to its power under Article III of the Constitution, which vests the judicial power of the United States in "one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

As enacted, Section 530B is in my view a serious dereliction of our Constitutional duty to establish inferior federal courts. Should this provision take effect, Congress will have ceded the right to control conduct in the federal courts to more than fifty state bar associations, at a devastating cost to federal sovereignty and the independence of the federal judiciary. Simply put, the federal government, like each of our states, must retain for itself the authority to regulate the practice of law in its own courts and by its own lawyers. Indeed, the principle of federal sovereignty in its own sphere has been well established since Chief Justice Marshall's opinion in *McCulloch* v. *Maryland* [17 U.S. (4 Wheat.) 316, 1819].

However, the bill I offer today may only be a first step. For the problem of rules for the conduct of attorneys in federal court affects more than just prosecutors. It affects all litigants in each of our federal courts, who have a right to know what the rules are in the administration of justice. This is a problem that has been percolating in the federal bar for over a decade—the diversity of ethical rules governing attorney conduct in federal court.

Presently, there is no uniform rule that applies in all federal courts. Rather, applicable ethics rules have been left up to the discretion of local rules in each federal judicial district. Various districts have taken different approaches, including adopting state standards based on either the ABA Model Rules or the ABA Code, adopting one of the ABA models directly, and in some cases, adopting both an ABA model *and* the state rules.

This variety of rules has led to confusion, especially in multiforum federal practice. As a 1997 report prepared for the Judicial Conference's Committee on Rules of Practice and Procedure put it, "Multiforum federal practice, challenging under ideal conditions, has been made increasingly complex, wasteful, and problematic by the disarray among federal local rules and state ethical standards."

Moreover, the problem may well be made worse if Section 530B takes effect in its present form. First, as enacted, Section 530B contains an internal conflict that will add to the confusion. Section 530B provides that federal attorneys are governed by both the state laws and bar rules and the federal court's local rules. These, of course, are frequently different, setting up the obvious quandary—which take precedence? Finally, Section 530B might further add to the confusion, by raising the possibility of different standards in the same court for opposing litigants—private parties governed by the federal local rules and prosecutors governed by Section 530B.

The U.S. Judicial Conference's Rules Committee has been studying this matter, and is considering whether to issue ethics rules pursuant to its authority under the federal Rules Enabling Act. I believe that this is an appropriate debate to have, and that it may be time for the federal bar to mature. The days are past when federal practice was a small side line of an attorney's practice. Practice in federal court is now ubiquitous to any attorney's practice of law. It is important, then, that there be consistent rules. Indeed, for that very reason, we have federal rules of evidence,

criminal procedure, and civil procedure. Perhaps it is time to consider the development of federal rules of ethics, as well.

This is not to suggest, of course, a challenge to the traditional state regulation of the practice of law, or the proper control by state Supreme Courts of the conduct of attorneys in state court. The assertion of federal sovereignty over the conduct of attorneys in federal courts will neither impugn nor diminish the sovereign right of states to continue to do the same in state courts. However, the administration of justice in the federal courts requires the consideration of uniform rules to apply in federal court and thus, I will be evaluating proposals to set uniform rules governing the conduct of attorneys in federal court.

Mr. President, the legislation I am introducing today is of vital importance to the continued enforcement of federal law. Its importance is compounded by the deadline imposed by the effective date of Section 530B. I urge my colleagues to join me in this effort, and support the Federal Prosecutor Ethics Act.

Mr. President, I ask unanimous consent that the text of the bill be printed in the record following my remarks.

By Mr. HATCH (for himself, Mr. DEWINE, and Mr. NICKLES):

S. 250. A bill to establish ethical standards for Federal prosecutors, and for other purposes.

FEDERAL PROSECUTOR ETHICS ACT

Mr. HATCH. Mr. President, I am pleased today to introduce an important piece of corrective legislation—the Federal Prosecutor Ethics Act. This bill will address in a responsible manner the critical issue of ethical standards for federal prosecutors, while ensuring that the public servants are permitted to perform their important function of upholding federal law.

The bill I am introducing today is a careful solution to a troubling problem—the application of state ethics rules in federal court, and particularly to federal prosecutors. In short, my bill will subject federal prosecutors to the bar rules of each state in which they are licensed unless such rules are inconsistent with federal law or the effectuation of federal policy or investigations. It also sets specific standards for federal prosecutorial conduct, to be enforced by the Attorney General. Finally, it establishes a commission of federal judges, appointed by the Chief Justice, to review and report on the interrelationship between the duties of federal prosecutors and regulation of their conduct by state bars and the disciplinary procedures utilized by the Attorney General.

No one condones prosecutorial excesses. There have been instances where law enforcement, and even some federal prosecutors, have gone overboard. Unethical conduct by any attorney is a matter for concern. But when engaged in by a federal prosecutor, unethical conduct cannot be tolerated. For as Justice Sutherland noted in 1935, the prosecutor is not just to win a case, "but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We must, however, ensure that the rules we adopt to ensure proper prosecutorial conduct are measured and well-tailored to that purpose. As my colleagues may recall, last year's omnibus appropriations act included a very controversial provision known to most of my colleagues simply as the "McDade provision," after its House sponsor, former Representative Joe McDade.

This well-intentioned but ill-advised provision was adopted to set ethical standards for federal prosecutors and other attorneys for the government. In my view, it was not the measured and well-tailored law needed to address the legitimate concerns its sponsors sought to redress. Nor was I alone in this view. So great was the concern over its impact, in fact, that its effective date was delayed until six months after enactment. That deadline is approaching. In my view, if allowed to take effect in its present form, the McDade provision would cripple the ability of the Department of Justice to enforce federal law and cede authority to regulate the conduct of federal criminal investigations and prosecutions to more than 50 state bar associations.

As enacted last fall, the McDade provision adds a new section 530B to title 28 of the U.S. Code. In its most relevant part, it states that an "attorney for the government shall be subject to State laws and rules . . . governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state."

There are important practical considerations which persuasively counsel against allowing 28 U.S.C. 530B to take effect unchanged. I have been a frequent critic of the trend toward the over-federalization of crime. Yet the federal government has a most legitimate role in the investigation and prosecution of complex multistate terrorism, drug, fraud or organized crime conspiracies, in rooting out and punishing fraud against federally funded programs such as Medicare, Medicaid, and Social Security, in vindicating the federal civil rights laws, in investigating and prosecuting complex corporate crime, and in punishing environmental crime.

It is in these very cases that Section 530B will have its most pernicious effect. Federal attorneys investigating and prosecuting these cases, which frequently encompass three, four, or five states, will be subject to the differing state and local rules of each of those states, plus the District of Columbia, if they are based here. Their decisions will be subject to review by the bar and ethics review boards in each of each of these states at the whim of defense counsel, even if the federal attorney is not licensed in that state.

Practices concerning contact with unrepresented persons or the conduct of matters before a grant jury, perfectly legal and acceptable in federal court, will be subject to state bar rules. For instance, in many states, federal attorneys will not be permitted to speak with represented witnesses, especially witnesses to corporate misconduct, and the use of undercover investigations will at a minimum be hindered. In other states, section 530B might require—contrary to long-established federal grand jury practice—that prosecutors present exculpatory evidence to the grand jury. Moreover, these rules won't have to be in effect in the district where the subject is being investigated, or where the grand jury is sitting to have these effects. No, these rules only have to be in effect somewhere the investigation leads, or the federal attorney works, to handcuff federal law enforcement.

In short, Section 530B will affect every attorney in every department and agency of the federal government. It will effect enforcement of our antitrust laws, our environmental laws prohibiting the dumping of hazardous waste, our labor laws, our civil rights laws, and as I said before, the integrity of every federal funding program.

Section 530B is also an open invitation to clever defense attorneys to stymie federal criminal or civil investigations by raising bogus defenses or bringing frivolous state bar claims. Indeed, this is happening even without Section 530B as the law of the land. The most recent example is the use of a State rule against testimony buying to brand as "unethical" the long accepted, and essential, federal practice of moving for sentence reductions for co-conspirators who cooperate with prosecutors by testifying truthfully for the government. How much worse will it be when this provision declares it open season of federal lawyers?

What will the costs of this provision be? At a minimum, the inevitable result will be that violations of federal laws will not be punished, and justice will not be done. But there will be financial costs to the federal government as well, as a result of defending these frivolous challenges and from higher costs associated with investigating and prosecuting violations of federal law.

All of this, however, is not to say that nothing needs to be done on the issue of attorney ethics in federal court. Indeed, I have considerable sympathy for the objectives values Section 530B seeks to protect. All of us who at one time or another have been the subject of unfounded ethical or legal charges, as I have been as well, know the frustration of clearing one's name. All no one wants more than I to ensure that all federal prosecutors are held to the highest ethical standards. But Section 530B, as it was enacted last year, is not in my view the way to do it.

The bill I am introducing today addresses the narrow matter of federal prosecutorial conduct in a responsible way, and I might add, in a manner that is respectful of both federal and state sovereignty. As all of my colleagues know, each of our states has at least one federal judicial district. But the federal courts that sit in these districts are not courts of the state. They are, of course instrumentalities of federal sovereignty, created by Congress pursuant to its power under Article III of the Constitution, which vests the judicial power of the United States in "one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

As enacted, Section 530B is in my view a serious dereliction of our Constitutional duty to establish inferior federal courts. Should this provision take effect, Congress will have ceded the right to control conduct in the federal courts to more than fifty state bar associations, at a devastating cost to federal sovereignty and the independence of the federal judiciary. Simply

put, the federal government, like each of our states, must retain for itself the authority to regulate the practice of law in its own courts and by its own lawyers. Indeed, the principle of federal sovereignty in its own sphere has been well established since Chief Justice Marshall's opinion in *McCulloch* v. *Maryland* [17 U.S. (4 Wheat.) 316, 1819].

However, it may only be a first step. For the problem of rules for the conduct of attorneys in federal court affects more than just prosecutors. It affects all litigants in each of our federal courts, who have a right to know what the rules are in the administration of justice. This is a problem that has been percolating in the federal bar for over a decade—the diversity of ethical rules governing attorney conduct in federal court.

Presently, there is no uniform rule that applies in all federal courts. Rather, applicable ethics rules have been left up to the discretion of local rules in each federal judicial district. Various districts have taken different approaches, including adopting state standards based on either the ABA Model Rules or the ABA Code, adopting one of the ABA models directly, and in some cases, adopting both an ABA model and the state rules.

This variety of rules has led to confusion, especially in multiforum federal practice. As a 1997 report prepared for the Judicial Conference's Committee on Rules of Practice and Procedure put it, "Multiforum federal practice, challenging under ideal conditions, has been made increasingly complex, wasteful, and problematic by the disarray among federal local rules and state ethical standards."

Moreover, the problem may well be made worse if Section 530B takes effect in its present form. First, as enacted, Section 530B contains an internal conflict that will add to the confusion. Section 530B provides that federal attorneys are governed by both the state laws and bar rules and the federal court's local rules. These, of course, are frequently different, setting up the obvious quandary—which take precedence? Finally, Section 530B might further add to the confusion, by raising the possibility of different standards in the same court for opposing litigants—private parties governed by the federal local rules and prosecutors governed by Section 530B.

The U.S. Judicial Conference's Rules Committee has been studying this matter, and is considering whether to issue ethics rules pursuant to its authority under the federal Rules Enabling Act. I believe that this is an appropriate debate to have, and that it may be time for the federal bar to mature. The days are past when federal practice was a small side line of an attorney's practice. Practice in federal court is now ubiquitous to any attorney's practice of law. It is important, then, that there be consistent rules. Indeed, for that very reason, we have federal rules of evidence, criminal procedure, and civil procedure. Perhaps it is time to consider the development of federal rules of ethics, as well.

This is not to suggest, of course, a challenge to the traditional state regulation of the practice of law, or the proper control by state Supreme Courts of the conduct of attorneys in state court. The assertion of federal sovereignty over the conduct of attorneys in federal courts will neither impugn nor diminish the sovereign right of states to continue to do the same in state courts. However, the administration of justice in the federal courts requires the consideration of uniform rules to apply in federal courts and thus, I will be evaluating proposals to set uniform rules governing the conduct of attorneys in federal court.

Mr. President, the legislation I am introducing today is of vital importance to the continued enforcement of federal law. Its importance is compounded by the deadline imposed by the effective date of Section 530B. I urge my colleagues to join me in this effort, and support the Federal Prosecutor Ethics Act.

Senator THURMOND. Finally, I wish to place in the record a copy of a bipartisan letter from members of the Senate Judiciary Committee last year in opposition to McDade, and a letter from Senators a few weeks ago seeking an additional delay in the effective date of the legislation.

[The letters referred to follow:]

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 21, 1998.

The Hon. TED STEVENS,
Chairman, Committee on Appropriations, Washington, DC.

The Hon. ROBERT C. BYRD,
Chairman, Ranking Member Committee on Appropriations, Washington, DC.

The Hon. JUDD GREGG,
Chairman, Subcommittee on Commerce, Justice, State and Related Agencies, Washington, DC.

The Hon. ERNEST F. HOLLINGS,
Ranking Member, Subcommittee on Commerce, Justice, State and Related Agencies, Washington, DC.

DEAR CHAIRMAN STEVENS: As you may know, the House Appropriations Committee has approved the Commerce-Justice-State appropriations bill for fiscal year 1999 which includes an amendment that could seriously impair the effectiveness of federal prosecutors in their efforts to enforce federal criminal laws and protect our communities. Specifically, the amendment, which is very similar to H.R. 3396, the "Citizens Protection Act of 1998," would subject federal prosecutors to the state bar rules, and discipline, of any state in which they work, and to a Congressionally devised "Misconduct Review Board." These would be in addition to the already established Office of Professional Responsibility and Department of Justice ethical rules that federal prosecutors are required to follow.

By subjecting federal attorneys to State bar rules, Subtitle A of this amendment would have the effect of forbidding federal prosecutors in certain states from utilizing court approved and constitutional law enforcement techniques related to undercover investigations, contact with represented persons and cooperating witnesses, and the conduct of the grand jury. Indeed, federal court victories in each of these areas have been challenged as violating certain restrictive state rules of procedure, which are framed as "ethics" rules, to chill the enforcement of federal law. The most recent example is the use of a State rule against testimony buying to brand as "unethical" the long accepted, and essential, federal practice of moving for sentence reductions for co-conspirators who cooperate with prosecutors by testifying truthfully for the government. Use of these potentially devastating State rules against prosecutors has been resisted by every Attorney General for at least the last twenty years. The House amendment would in practice cede to fifty State bar associations control how federal prosecutions are to be conducted.

Subtitle B of the amendment would change the internal disciplinary procedures the Department uses, substituting vague and disruptive requirements for the Attorney General to follow. It also would impose unreasonably short time requirements on the Attorney General to hear and resolve complaints, and thus would likely unnecessarily interfere with the effectiveness of these prosecutors and result in rushed and incomplete investigations of the alleged wrongdoing. The amendment would provide, as an available penalty, loss of the employees' pension and retirement benefits—a severe sanction usually reserved only for criminal offenses involving disloyalty or treason. Lastly, this title would establish, as mentioned above, a Misconduct Review Board, which duplicates existing procedures, utilizes an unconstitutional structure, and provides virtually no due process rights to the accused employee.

The Department of Justice has weighed in strongly against the proposal, noting that it "constitutes an unwarranted and unnecessary interference with the lawful and effective functioning of federal attorneys and law enforcement agents."

Improving the disciplinary process for federal prosecutors, without hindering legitimate law enforcement investigative techniques and practices, is an important and complex issue that deserves our consideration. We stand ready to work with interested members of the House and others on this matter.

At this time, the amendment adopted by the House Appropriations Committee has not undergone the scrutiny that a proposal of this magnitude should be af-

forded. No Senate bill on this issue has been introduced, and the Judiciary Committee, the Committee of jurisdiction, has thus not formally considered the bill or held hearings on its merits. Therefore, we request your assistance in defeating any attempt to add this legislative language as an amendment to the Commerce-Justice-State appropriations bill, and in ensuring that this language is not included in any conference report.

Sincerely,

ORRIN G. HATCH,
Chairman.

JEFF SESSIONS,

STROM THURMOND,

MIKE DEWINE,

SPENCER ABRAHAM,

FRED THOMPSON,

JON KYL.

PATRICK LEAHY,
Ranking Member,

TED KENNEDY,

HERB KOHL,

DICK DURBIN,

RUSS FEINGOLD,

DIANNE FEINSTEIN.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, March 4, 1999.

The Hon. TED STEVENS,
Chairman, Committee on Appropriations, U.S. Senate, Washington, DC.

The Hon. ROBERT C. BYRD,
Ranking Member, Committee on Appropriations, U.S. Senate, Washington, DC.

DEAR SENATOR STEVENS AND SENATOR BYRD: As the Senate prepares to consider supplemental appropriations for fiscal year 1999, the undersigned members of the Judiciary Committee and other members of the Senate urge you to include a modest, technical corrective provision extending the delay in the effective date of certain legislation relating to the regulation of federal prosecutors, which was included in the fiscal year 1999 omnibus appropriations bill.

As you will recall, section 801 of the CJS appropriations provisions of the fiscal year 1999 omnibus appropriations bill added section 530B to title 28 of the United States Code, which was intended to set ethical standards for federal prosecutors, and which included a six-month delayed effective date. The intent of Congress in including this six-month grace period was to provide sufficient time for the resolution of concerns over the legislation, which had not been considered by the Senate in any meaningful way. However, due to arguably unanticipated events, the Congress has not been able to avail itself of the grace period provided in the legislation.

It is our desire to work with our colleagues in the House to resolve this important matter. However, we believe that it is in the best interests of the Congress, the Department of Justice, and our state and federal courts, to do so under the provisions of a grace period that maintains the status quo of current law, as Congress intended when the fiscal year 1999 omnibus appropriations bill was enacted. For this reason, we urge you to include in the Senate version of the supplemental appropriations bill the attached proposal, extending the delay in the effective date of section 530B six months, to October 21, 1999, and further urge you to request the House to accede to this provision in conference.

We have attached language for your review and consideration, and we thank you for your attention to this request. Should you have any questions, please let us know, or have your staff contact Judiciary Committee Chief Counsel Manus Cooney.

Sincerely,

TED KENNEDY,

JOE BIDEN,

JON KYL,

DIANNE FEINSTEIN,

HERB KOHL.

ORRIN HATCH,

MIKE DEWINE,

DON NICKLES,

JOHN WARNER,

STROM THURMOND,

JEFF SESSIONS,
SPENCER ABRAHAM.

AMENDMENT NO. Calendar No.

Purpose: To extend the period for compliance with certain ethical standards for Federal prosecutors.

IN THE SENATE OF THE UNITED STATES—106th Cong., 1st Sess.

(no.)

(title)

Referred to the Committee on and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. HATCH

Viz:

At the appropriate place, insert the following:

SEC. .COMPLIANCE WITH ETHICAL STANDARDS FOR FEDERAL PROSECUTORS.

Section 801 of title VIII of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999 (Public Law 105–277) is amended by striking subsection (c) and inserting the following:

"(c) EFFECTIVE DATE.-The amendments made by this section shall take effect 1 year after the date of enactment of this Act."

Senator THURMOND. We will leave the hearing record open for one week for additional materials to be placed in the record and for follow-up questions.

Now, I want to express my deep appreciation to you gentlemen for your presence here today and the great contribution that you have made to this hearing. It is very important. What you have had to say will be given every consideration and I thank you for coming.

We now stand adjourned.

[Whereupon, at 4:15 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF GEOFFREY C. HAZARD, JR., TO QUESTIONS FROM SENATOR LEAHY

Question 1. You have argued that ABA Rule 4.2 (the "no contact" rule) should apply to government attorneys, and that a corporation's right to counsel is violated when federal prosecutors have ex parte contacts with represented corporate employees. Your position raises two concerns: First, that corporations could immunize themselves from criminal investigation simply by employing in-house counsel, and second, that government attorneys would cease the salutary practice of supervising federal agents during the early stages of their investigations. In your opinion, are these concerns well founded?

Answer 1a. This is a complicated issue that protagonists on either side have oversimplified. Many government lawyers assert that corporations routinely attempt to do this and succeed. Many in-house counsel, including the lawyer sitting next to me at the hearing I attended, assert that corporations have a right to do so. The following response seeks to get closer to the truth of the matter.

First, a corporation can be a client and as such is entitled to the protection provided by Rule 4.2 against being interrogated by opposing counsel without the presence of its own lawyer. A corporation has no physical existence and hence acts only through its employees. A first issue is which employees "personify" the client for purposes of Rule 4.2.

It is generally agreed that top level management, including directors—the so-called "control group" do personify the corporation for this purpose. Decisional law establishes, at least to my satisfaction, that ground-level employees ordinarily do not personify the corporation, except, as establishes in *Upjohn Co.* v. *United States,* 449 U.S. 383 (1981), where they have actually consulted the company's lawyer (whether in-house or outside counsel) or where they have been given directions by that such a. Some corporation lawyers say that all employees always personify the corporation. Some lawyers in specific cases have written to Government lawyers stating that they represent all the employees and hence that the Government may not talk with any employees. In my opinion these "blanket immunity" claims are unsupported by law and are unprofessional pretenses to an immunity that corporations neither have nor should have.

Within the foregoing framework a difficult issue is the situation of mid-level employees such as plant or office managers or assistant managers or foremen. This issue often turns on specific facts. Employees at this level may or may not be considered to "personify" the corporation for purposes of Rule 4.2, depending on circumstances, on the particular interchange, on what the participants actually testify to concerning the interchange, and on the tendency of decisional law in the local jurisdiction. If personnel in this category are held to personify the corporation, then direct contact by an opposing counsel is not permitted; if they are held not to personify the corporation, the conversation are not improper.

These situations are necessarily uncertain and therefore fraught with risk for a lawyer making the contact. Not only may there be an ethical violation but, as a consequence of such a violation, evidence obtained through the interview may be irreparably "tainted" (and hence excluded) and the offending lawyer may be disqualified. These risks fall not only on Government lawyers but also private lawyers, for example, plaintiffs' lawyer seeking to investigate an accident. *See, e.g., Neisig* v. *Team I,* 78 N.Y. 2d 363 (1990).

In my opinion Rule 4.2 itself should be changed to reduce this risk. The Rule could provide, for example, that a lawyer does not violate the Rule if the person

with whom contact was made did not object, if it was not evident that the person was part of the control group, and if inquiry was avoided inquiry into attorney-client communications with the corporation's counsel. The American Bar Association Ethics2000 Commission, of which I am a member, is presently working on some such modification. However, many lawyers—especially lawyers for corporations—oppose any such change and it is uncertain at present what reformation, if any, will emerge, I repeat that the problem in this respect is as difficult for private lawyers as for Government lawyers. However, it might be appropriate for Congress to enact a specific rule applicable to Government lawyers.

Still within the foregoing framework, the ethics rules provide that if the person contacted has his or her *own* counsel, then consent from that lawyer prevails. Comment [4] to Rule 4.2 states: "If an agent or employee of the organization is represented in the matter by his own her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule." In my opinion Government lawyers have not taken advantage of this provisions as often as they might. Obviously an investigator cannot as a practical matter make this suggestion in routine inquiries to corporate employees. On the other hand, this provision could be useful when dealing with a witness who obviously has a lot of relevant information.

I suspect there is reluctance to use this approach not only because of the inconvenience but because of fear that the respondent's own lawyer would advise the respondent to refuse to talk unless immunity from prosecution is provided. This consequence makes the point that corporate employees, if they have proper legal advice, often would refuse to talk. That is, the Government investigators are often trading on legal ignorance. Corporate employees often are at risk because the statutory penalties in fields such as environmental law have been drawn so widely as to create real risks for middle level personnel.

Answer 1b. This issue is real and difficult and opens up a deep conflict in the law's attitude toward investigations. On one hand, in my opinion it is highly desirable that Government lawyers supervise investigations by federal agents. In general and usually, supervision by lawyers will result in more closely restrained investigations, less duplicity in dealing with suspects, and so forth. This is because—no matter what public opinion may be—lawyers generally adhere closer to the law governing such matters than do nonlawyer investigators, and they certainly know the rules better and the risks (to successful prosecution) of violating the rules. On the other hand, if a Government lawyer supervises an investigation, then the investigation is governed by the tight constraints in Rule 4.2. This is because activity done under a lawyer's supervision is generally governed by the same standards as activity of the lawyer personally.

If an investigation is conducted by a nonlawyer (such as an FBI agent) then the only constraints are those imposed by the general law, particularly Constitutional limitations formulated by the Supreme Court under the Due Process clause. Under that body of law, a witness or suspect can be questioned, including secret taping with a "wire," wire-tapped, and questioned by someone pretending to be a friend (such as someone in the same jail cell). None of this is permitted under the Rule 4.2 regime. Since FBI agents are not in lawyer employment classification, they are nonlawyers for purposes of these rules, even though they may have gone to law school.

Thus, there is strong practical incentive to avoid supervision of an investigation by Government lawyers, particularly Department of Justice lawyers and legal staff of local U.S. Attorneys. Perhaps needless to say, this gap in the rules governing investigations also creates serious "turf" conflict between the Department of Justice and the FBI. Top officials of both agencies are likely to deny any such conflict. At the same time, I am sure that the FBI agents are likely to deny any such conflict. At the same time, I am sure that the FBI agents in general like the idea of being free of DoJ supervision, whereas the DoJ lawyers in general prefer being in charge of investigation of matters which they eventually may have to prosecute.

I know of no good solution to the foregoing conflict in the law's attitude toward Government investigations. I am sure that folks concerned about law enforcement would strongly resist imposing Rule 4.2 on all Government investigations. I am sure that folks concerned with civil liberties would strongly resist eliminating the constraints that Rule 4.2 now imposes. Indeed, the latter group probably would wish to extend some such restraints to all Government investigations, whether lawyers supervised or not.

The most promising accommodation may be in the modifications of Rule 4.2 that the ABA Ethics2000 Commission is now considering. I should add that opinion within the Commission is probably divided on the issue. Hence, it is uncertain what recommendation the Ethics2000 Commission may make.

Question 2. Proponents of the McDade provision contend that it does nothing more than codify existing law with respect to rules governing attorney conduct. Do you agree? If not, why not?

Answer 2. Yes. In my opinion that is the effect of the McDade provision. However, codification of state ethics rules incorporates the conflicts described above. The McDade rule provides for "dynamic conformity" between the rules governing Government lawyers the rules prescribed by state law. That is, as state law rules are changed, the rules governing Government lawyers also change. In my opinion that is as it should be. The state ethics rules will change over time, to meet newly encountered problems and provide more definite solutions to old issues previously not resolved.

I think Government lawyers should be governed by ethics rules and that the governing ethics rules ought to remain those prescribed by the states. I also think that in some states, under prodding from some sectors of the bar, the courts have adopted provisions inappropriately protective of lawyers. However, as Nicholas Katzenbach observed years ago in another context, that is the price of federalism. In my opinion, which is shared my many ecademic observers and some members of the bar, Rule 4.2 is overly protective of lawyer interests and inadequately protective of the public interest in law enforcement. However, that is a seriously debatable question both within the legal profession and in the general public arena.

If the ABA Ethics2000 makes a suitable adjustment to Rule 4.2, the problem may be solved or least its intensity moderated. If no such adjustment is made, or if such an adjustment is not adopted by the states, Congress could address the problem anew. However, the problem will not become any simpler through passage of time.

Question 3. Under current law, can Federal courts authorize Federal prosecutors to do things that State ethics rules prohibit, or *exempt* Federal prosecutors from doing things that State ethics rules require? How, if at all, does the McDade law affect the authority of Federal courts to set their own rules of conduct that differ from State ethics rules?

Answer 3. In general, federal courts cannot do this. However, this problem too is complicated. For one thing, some federal courts have adopted ethics rules that are different from those operative in the state where the courts sits. This strikes me as foolish and potentially dangerous to lawyers, Government lawyers are well as those in private practice. Where such is the federal rule, a lawyer could be doing something in connection with federal litigation that is prohibited by the applicable state ethics rules, and vice versa. Surveys under auspices of the Federal Judicial Conference reveal these discrepancies. (A couple of federal courts adopt the 1908 ABA Canons of Ethics, which have been now twice superseded!) The Standing Committee on Rules of Practice and Procedure of the Judicial Conference (of which I am honored to be a member) is now considering a Rule, binding on the federal courts, that would require "dynamic conformity" to the local state rules. this seems to me a desirable proposal.

A subcategory of this problem is where the federal court allows—or refuses to condemn—conduct that arguably violates the state rules, and then the state disciplinary authority undertakes to reexamine the matter. Here the problem typically results not from a difference in the rules but a difference in their interpretation or in interpretation of the facts to which the rule is being applied. This sequence often results because the losing party before the federal judge takes the issue to the state disciplinary authority. (A similar issue can arise regarding conduct of private lawyers, and has in fact arisen in a particularly deplorable way in a case in which I have been consulted.) This situation is rare but generally very wrong in my opinion.

In my opinion an issue of professional conduct resolved in federal court should not be subject to reconsideration by the state authorities, whether state disciplinary authority or the local prosecutor—some of these cases implicate criminal law. An exception to this could be conduct relevant to a larger pattern of professional misconduct by the lawyer. It has been suggested to the Standing Committee (mentioned above) that it should consider such a provision.

Question 4. Does the McDade law affect in any way the authority of the U.S. Judicial Conference to prescribe uniform national rules for attorney conduct in Federal courts under the Rules Enabling Act? Does the McDade law affect in any way the authority of Federal district courts to prescribe local rules for attorney conduct?

Answer 4. In my opinion the McDade does limit the authority conferred under the Enabling Act. The Enabling Act confers authority concerning "rules of practice and procedure." The McDade provision covers "rules of professional ethics." There is some overlap because many state rules of professional ethics address conduct that is carried out through rules of practice and procedure. For example, the rules of professional conduct in most states impose obligations toward the courts. See particularly Rules 3.3 and 3.4. The Federal Rules of Civil Procedure and the Federal Rules

of Criminal Procedure have provisions on the same subjects. The risk of conflict is small, however, chiefly because the rules of professional conduct, particularly the ABA Model Rules, were drafted with an eye to the interaction between the rules of ethics and the rules of procedure.

Perhaps more important, many aspects of the rules of professional ethics concern lawyer conduct that, in my opinion, could not properly be characterized as involving "practice and procedure" in the federal courts. For example, in my opinion investigations prior to commencement of litigation are governed by the McDade provision, particularly because that provision incorporates rules like Rule 4.2, but would not properly be considered as "practice and procedure" in the federal courts. Accordingly, in my opinion the Enabling Act does not confer authority for the Judicial Conference to change some of the consequences mandated by the McDade Act. In my opinion that is true of regulation of lawyer conduct in the pre-litigation stage of federal investigations. That is, this stage involves Government lawyer conduct regulated by the McDade Act but does not involve "practice and procedure" within the scope of the Enabling Act.

Question 5. In practice, and as codified in an ABA rule, when a lawyer licensed in a State appears in the court of another jurisdiction, the ethics rules of the forum govern the lawyer's conduct, not the rules of the licensing State. This suggests that the ethics rules of the federal court in which a federal prosecutor is practicing ought to govern the conduct of federal prosecutors. Do you agree?

Answer 5. Yes, in my opinion. In general that approach applies to private lawyers as well. Thus, the conduct of a Maryland lawyer who is participating in a case in Virginia courts is governed by the Virginia rules, if the matter relates to the litigation as distinct from transactional aspects occurring outside of court and if there is conflict between the two rules.

RESPONSES OF ERIC HOLDER TO QUESTIONS FROM SENATOR LEAHY

Question1. A subcommittee of this Committee held a hearing on March 24th on the new McDade law. Deputy Attorney General Eric Holder and two United States Attorneys testified that the McDade law would cause "significant problems" for federal civil and criminal law enforcement. The McDade law went into effect on April 19th. Although I appreciate that it may be too soon to tell, are you aware of any significant problems: that have resulted in the last three weeks as a result of the new law?

Answer 1. *Impact of Section 530B:* The Department's assessment of the full impact of Section 530B is ongoing, and there are many issues about the scope and interpretation of Section 530B that are currently in litigation or are likely to be litigated in the near future. To date, however, the impact of Section 530B has been for the most part exactly what the Department predicted:

(1) *The Amendment has caused tremendous uncertainty* because most state bar rules have not been interpreted as applying to government attorneys and are vague, so attorneys simply do not know if their conduct is permissible or not; not surprisingly that creates a tremendous chilling effect and interferes with our ability to enforce the law.

The uncertainty is increased because we must frequently compare conflicting bar rules. Department attorneys, who are often licensed in multiple states, working in other states, and supervising investigations that span many states, must engage in a complex analysis to determine what rules should apply to particular conduct. The Department's regulation implementing the McDade Amendment provides guidance to attorneys, but the area of choice-of-law with respect to state ethics rules remains complex. Department attorneys often must seek guidance in determining what rules apply or must divert their scarce time to research on what rules may apply to particular conduct. The clear impact of this is to delay the investigation.

Moreover, the guidance that the Department provides is in a sense of less value to its attorneys than the guidance it can provide in other areas. In attempting to interpret § 530B, we can advise Department attorneys as to our best reading of the statute, but cannot protect them from the personal consequences if a court or disciplinary committee takes a different view. Under § 530B, unlike any other statute to which the Department might object on policy grounds, it is the individual government attorney, rather than the government who pays the price for misinterpreting the law. Accordingly, especially with respect to close questions arising under the statute, attorneys are chilled even from engaging in conduct that is in the best interests of a case and consistent with what we believe to be a correct interpretation of the law.

(2) *The Amendment creates a rift between agents and prosecutors,* because the Amendment, in practice, restricts prosecutors from supervising agents. This is not a helpful development in law enforcement because it is critically important that investigators and prosecutors work together, particularly on complex cases. We are already seeing evidence of this rift as investigators develop cases on their own, relying on well-established and perfectly legitimate federal law, without the input of prosecutors in order to avoid the restrictions prosecutors may be subject to under state ethics laws.

Moreover, because Section 530B limits the ability of prosecutors to speak with those who may have evidence of wrongdoing, particularly corporate employees, prosecutors have no choice but to use the grand jury subpoena to obtain the evidence, although a simple conversation might provide all that was needed. The Department believes that Section 530B is causing an increase in the use of grand jury subpoenas, but it does not yet have empirical evidence to support this claim.

(3) *The Amendment has prevented attorneys and agents from taking legitimate, traditionally accepted investigative steps, to the detriment of pending cases.* The most obvious effect on law enforcement has been in decisions by attorneys and investigators not to take particular investigative steps out of concern that such steps, such as obtaining evidence by consensual monitoring or speaking with corporate employees about potential corporate misconduct, may violate some state's bar rules.

There have been several examples of the impact already. In some states, Department attorneys are refraining from authorizing tape recordings by informants or law enforcement agents operating undercover. Federal law clearly permits this routine law enforcement activity, referred to as consensual monitoring. However, one state bar has issued a brief ethics opinion and has verbally advised Department attorneys that, if they participate in or authorize a consensual monitoring, they will violate the state bar rule prohibiting the use of fraud or deceit; this state's interpretation appears to be similar to the highly restrictive (and, we believe incorrect) view of the Oregon bar, which has interpreted its bar rules to prohibit attorney participation in sting operations (Oregon has recently issued a new opinion which addresses the issue of an attorney tape recording a conversation but does not resolve the issue of sting operations). In another state, Department attorneys have been reluctant to authorize consensual monitoring because of state criminal law or state ethics rules that could be interpreted to prohibit the conduct. Before proceeding with the action they contacted the local District Attorneys office and others to be sure they wouldn't be prosecuted for their actions.

As noted above, state rules regarding contacts with represented persons continue to be a problem for Department attorneys. In many cases, state rules are unclear or appear to prohibit traditionally accepted, constitutionally permissible investigative activities. In several cases, Department attorneys have refrained from, or been advised not to be involved in questioning targets and witnesses represented by counsel or defendants, even though law enforcement agents are permitted to engage in the same conduct. The most difficult situation arises in investigations of corporate misconduct because the law concerning which employees a government attorney may speak with is unclear.

The Amendment has also limited the Department's ability to investigate continuing criminal activities and such offenses as witness tampering and obstruction of justice. For instance, in one case, Department attorneys received information that an indicted defendant was seeking to intimidate or bribe a witness. The attorneys did not feel that they could, under the relevant interpretations of the state's ethics laws, use an informant to find out more about the defendant's plans.

Although state rules on communications with represented persons remain the most significant problem, defendants are also-using other bar rules offensively to claim that legitimate cases or evidence should be thrown out of court. In one case, defense counsel unsuccessfully sought dismissal of a drug indictment and other sanctions by claiming that, under the McDade Amendment, Department attorneys violated state ethics rules related to trial publicity because an arresting officer—a state trooper—talked to a reporter.

In another instance, on the eve of trial a defendant filed a motion to dismiss the indictment in a case for failure to present "material evidence" to the grand jury in violation of Rule 3.3(d) and 3.8(d). The defendant argued that the McDade amendment, by requiring compliance with state bar rules, altered existing Supreme Court law on what evidence must be presented to the grand

jury. We argued that we had complied with existing Supreme Court law and the court denied the motion.

(4) *Defendants are raising Section 530B in cases to interfere with prosecutions.* The Department believes that Section 530B should be interpreted not to conflict with other federal laws and not to elevate state substantive, procedural, and evidentiary rules over established federal law. The Department's regulations make clear that Section 530B mandates compliance with state bar ethical rules, not the host of other rules that govern each state's judicial system. Nonetheless, as the Department has predicted, it is being forced to litigate these claims by defendants. A number of defendants have argued that state bar rules prohibit the use of cooperating witness testimony. The Department has not lost on this issue to date. As we have noted in the past, the Department continues to litigate against the application of state bar rules that provide additional protections to attorneys (and not others) who are subpoenaed by federal prosecutors. These rules give procedural or other advantages to attorneys and are not part of established federal law.

The Department expects litigation concerning the McDade Amendment to be wide-ranging because defense counsel have every incentive to seek broad interpretations of the Amendment. In one case currently being litigated, a defendant is arguing that Section 530B requires compliance with state procedural rules that prohibit or limit the removal of cases from state court into federal court.

Question 2. I recently introduced a bill that addresses the Department's most pressing concerns respecting the McDade law. S. 855, The Professional Standards for Government Attorneys Act of 1999, would do two things. First, it would clarify the professional standards that apply to Government attorneys. Second,, it would ask the Supreme Court to prescribe a uniform national rule for Government attorneys with respect to contacts with represented persons. I know that the Department has been reviewing S. 855 for several weeks now. Do you support the basic approach of this legislation?

Answer 2. S. 855 is a good approach that addresses the two most significant problems caused by the McDade Amendment—confusion about what rule applies and the issue of contacts with represented parties. The Department looks forward to working with the Committee to solve these problems.

Question 3a. Under current practice and ABA model rules, the ethics rules of the court in which a lawyer is appearing govern the lawyer's conduct, not necessarily the rules of the licensing State. This suggests that the ethics rules of the federal court in which a federal prosecutor is practicing ought to govern the conduct of federal prosecutors. Do you agree?

Answer 3a. Yes.

Question 3b. More generally, do you agree that the choice-of-law provisions in S. 855 simply codify existing practice with respect to rules governing attorneys conduct?

Answer 3b. The Department strongly supports clear choice-of-law rules, so that all attorneys know what rules govern their conduct. The ABA Model Rules address most situations by making clear that the rule of the court before which an attorney is litigating should govern an attorney's conduct. Unfortunately, only a small minority of states have adopted that rule. Moreover, the ABA Model Rules do not directly address what is perhaps the most difficult choice-of-law issue—what rules apply to an investigation that is a collaboration of several attorneys who may be licensed in different states. The choice-of-law provisions of S. 855 do adopt the ABA's model rule approach.

Question 3c. Please let me know the respects in which the McDade law departs from existing law and practice with respect to rules governing attorney conduct?

Answer 3c. How far the McDade Amendment will stray from current law remains to be seen because the provision is so vague. Here are some of our concerns:

First, under pre-McDade law, it was relatively clear that Department attorneys need comply with the rules of the court before which they are litigating or the state where they are licensed; language of the McDade Amendment leaves that in doubt.

Second, pre-McDade, where a state bar rule went beyond the regulation of ethics and sought to alter substantive, evidentiary, or procedural rules in federal court, the Department has been able to challenge the rule in court, which it has done with varying success. Our ability to do this in the future remains to be seen.

Third, prior to the McDade Amendment, where a state bar rule purported to regulate ethics by unduly interfering with the enforcement of federal law, the Department has argued that the federal courts should (1) interpret the rule in the light of federal practice; (2) create an exception for law enforcement; and/or, (3) construe the rule narrowly in order to avoid running afoul of the Supremacy Clause. These

arguments are more difficult to make now, even when a federal judge believes a state ethics rule will interfere with the legitimate enforcement of federal law.

Fourth, with respect to the area of contacts with represented persons, the McDade Amendment supersedes the Department's ethics rule on communications with represented persons. The Department has proposed an interim final rule that would replace the Department's regulation on communications with represented persons. The new rule is intended to provide guidance to Department attorneys about what rule applies. It does not address communications with represented persons.

Question 4. In a letter that you and the Deputy Attorney General sent last year to Chairman Henry Hyde on the proposed McDade law, you discussed the ongoing consideration by the Judicial Conference of rules governing attorney conduct in federal court, and noted that "the Rules Enabling Act process is the one established by Congress to consider these kinds of issues. It would be premature at best to prejudge the outcome of that deliberative process."

a. Does the Department support the approach taken in S. 855, which is consistent with the Rules Enabling Act, or does it maintain that the authority to make and enforce ethical rules for federal prosecutors should rest with the Department?

b. As between the U.S. Judicial Conference and the Department of Justice, would you agree with me that the Judicial Conference is more disinterested with respect to the appropriate standards of conduct for federal prosecutors?

Answer 4 a and b. The Department has worked with the Conference of Chief Justices, the ABA, and others to come up with a rule on contacts with represented persons that is fair and effective. The Department believes that the Judicial Conference, under the Rules Enabling Act, is an appropriate forum to discuss and resolve the longstanding issues related to Rule 4.2 and we look forward to participating, as we have, in that process.

Question 5. Does the McDade law affect in any way the authority of the U.S. Judicial Conference to prescribe uniform national rules for attorney conduct in Federal Courts under the Rules Enabling Act? Does the McDade law affect in any way the authority of Federal district courts to prescribe local rules for attorney conduct?

Answer 5. The Department does not believe, that the McDade Amendment in any way affects the authority of the Judicial Conference or of local federal courts to develop rules of practice in federal courts.

Question 6. As you know, the Administrative Office of the Courts has spent many years reviewing the case law and studying the rules governing attorney conduct in the federal courts. It has found that most conflicts between state and local federal court rules fall into just a few core areas, including contacts with represented persons. In connection with which of these areas of conflict has the Department issued regulations and with which has it refrained from issuing regulations?

Answer 6. Of the 10 rules identified by the Judicial Conference, the Department has issued an ethics regulation in only one of these areas—the area of contacts with represented persons, where we have had serious problems.

Question 7. What new instructions or guidance, if any has the Department given to Assistant United States Attorneys with respect to their professional conduct under the McDade Amendment?

Answer 7. The Department has published regulations to implement the Amendment and to provide guidance to Department attorneys about what rule applies to particular conduct. We have also trained our Professional Responsibility Officers and are in the process, of training our attorneys, on compliance with the Amendment. In addition, we have created a new, centralized Professional Responsibility Advisory Office (PRAO) to provide consistent guidance and assistance to Department attorneys on issues of professional ethics.

Question 8. Senator Hatch has introduced a bill, S. 250, which would grant the Department broad authority to issue its own ethics rules where a state's rules were "inconsistent with Federal law" or "interfere[d] with the effectuation of Federal law or policy." Please identify those state ethics rules which the Department would "supersede' should this bill become law, and describe the regulations which the Department would likely issue.

Answer 8. S. 250 sets a standard—"inconsisten[cy] with federal law or "interferen[ce] with the effectuation of federal law or policy"—that the Department would have to meet in order to seek relief from state bar rules, whether via regulation or court order. If enacted, the Department would have to review that standard to determine what circumstances meet that test. As noted above, contacts with represented persons is the only area in which the Department has issued its own regulation, and the one area where the Department has had serious, longstanding problems.

ADDITIONAL SUBMISSIONS FOR THE RECORD

AMERICAN CORPORATE COUNSEL ASSOCIATION,
Washington, DC, March 31, 1999.

Re: Hearing on The Effect of State Ethics Rules on Federal Law Enforcement.

Hon. STROM THURMOND,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: Pursuant to the Chairman's request, submitted is additional evidence to be entered into the record for the hearing on "The Effect of State Ethics Rules on Federal Law Enforcement," conducted on March 24, 1999 by the Senate Subcommittee on Criminal Justice Oversight of the Judiciary Committee.

I thank the Chairman again for his gracious invitation to the American Corporate Counsel Association to testify on such an important issue for all the legal profession.

Very truly yours,

FREDERICK J. KREBS,
President.

AMERICAN BAR ASSOCIATION,
Chicago, IL, February 22, 1999.

DEAR SENATOR: One of the significant provisions in last year's omnibus appropriations bill, was The Ethical Standards for Prosecutors Act, P.L. 105–277, Sec. 801. This provision, popularly known as the "McDade-Murtha provision," makes it clear that federal prosecutors, like all other lawyers are subject to existing state laws and ethics rules governing attorney conduct. The effective date of the Act was delayed for 180 days to April 19, 1999. The American Bar Association, the Conference of Chief Justices and the American Corporate Counsel Association strongly support this provision. We urge you to oppose any proposals to weaken it or prevent it from taking effect.

Section 801, as passed, does not represent a change in the law. Since the founding of the Republic, the licensing and regulation of lawyers has always been the exclusive province of the states and the District of Columbia. The states and not the federal government license all lawyers, including federal prosecutors. It is states, under the authority of their highest courts, that adopt rules of professional responsibility to make sure all lawyers, regardless of their areas of practice, practice ethically. Federal prosecutors, like state prosecutors, have been disciplined under this system since the licensing of lawyers began. The independent review of state courts over the licensing of lawyers and the supervision of their conduct is an important check on misconduct and overreaching by attorneys for the federal government.

Section 801 is necessary because, in recent years, the U.S. Department of Justice has sought to exempt its lawyers from the state supreme courts' independent supervision. This would make these lawyers the *only* lawyers in America not subject to ethical regulation by a state court. In 1989, then-Attorney General Richard Thornburgh issued a memorandum to all U.S. Attorneys expressing the view that federal prosecutors from state ethics rules uniformly prohibiting unauthorized contact with represented persons.

Last year, a federal appeals court struck down the Reno regulation on the grounds that it was beyond the Attorney General's authority to issue the regulation. The Court of Appeals for the Eighth Circuit held that no law "expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States." Section 801 makes clear that the justice Department may not unilaterally exempt itself from ethical rules imposed upon all lawyers by the judiciary of each state and the local federal court.

Some who are opposed to Section 801 complain that it will unduly burden federal prosecutors. We reject any suggestion that acting ethically interferes with the prosecutorial function. Prosecutors are obligated above all to serve justice, and compliance with ethics rules advances that end while inspiring trust among the bench, the bar and the public.

Moreover, as a practical matter, the ethics rules rarely present problems for federal prosecutors. The courts have repeatedly interpreted these rules to allow prosecutors to do their jobs, and there are seldom conflicts among the various state rules which affect prosecutors. Since 1908, standards of professional conduct rec-

ommended by ABA have been the national professional model, adopted by states almost universally. As a result, there are only a tiny number of cases in which federal prosecutors have ever been disciplined over the objections of the Department of Justice.

All lawyers should continue to be held to the same standards of ethical conduct. Section 801 is not a radical departure in the law. Instead, it prevents the Department of Justice from substituting its regulation of its employees' conduct for the control and supervision that historically have been the province of the state and federal judiciary.

We urge you to oppose efforts to weaken or repeal Section 801.

Respectfully yours,

PHILIP S. ANDERSON.

CATERPILLAR INC.,
Peoria, IL, March 9, 1999.

Re: S. 250.

The Hon. PETER G. FITZGERALD,
U.S. Senator, Washington, DC.

DEAR SENATOR FITZGERALD: I am writing to urge your opposition to legislation recently introduced by Senator Orrin Hatch, S. 250, which repeal the Ethical Standards for Federal Prosecutors provisions that were included in last year's omnibus spending bill, P.L. 105–277.

The Ethical Standards provisions (also known as the "McDade provisions") make it clear that federal prosecutors are subject to existing state supreme court ethics rules governing attorney conduct. These provisions merely codify the longstanding principle that the regulation of the conduct of attorneys—including government attorneys—is the province of the states, which admit them to practice, adopt rules for their conduct and discipline them for violations of those rules.

S. 250 would effectively allow the Department of justice to unilaterally exempt its attorney from their longstanding professional obligation to honor these state ethics rules. Permitting the Department to exempt its prosecutors from the ethics rules that govern all other attorneys creates a double standard and sends the wrong message to the profession and the public. It would also lessen carefully crafted protections for people and entities under investigation. We at Caterpillar have long believed that the same ethical standards should apply to government attorneys, in-house counsel and outside counsel.

I urge you to oppose S. 250 or any similar effort to lower the ethical standards applicable to attorneys.

Sincerely,

R.R. ATTERBURY.

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Washington, DC, March 30, 1999.

The Hon. STROM THURMOND,
U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: On behalf of the U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses of every size, sector, and region, I am writing to express our concern about S. 250, the Federal Prosecutor Ethics Act, or similar legislation.

This legislation would allow government attorneys to engage in *ex parte* contacts with individuals known to be represented by counsel without their counsel's consent. Such a change would do more than simply reverse the Citizen's Protection Act, passed just last year in the Omnibus Appropriations bill. It would also send a signal that Congress is prepared to undo the long-standing ethical prohibition on *ex parte* communications with represented individuals that apply to all attorneys under state and local federal court rules.

We appreciate and support the interest in ensuring that federal government attorneys have all the tools they need to investigate and prosecute fully any illegal or improper corporate activity. This legislation, however, would seek to achieve this goal by creating a different standard for government attorneys and private sector attorneys with respect to *ex parte* communications.

As you are probably aware, the American Bar Association, the American Corporate Counsel Association and a number of other legal associations, individuals

and companies have come out strongly against enactment of S. 250 and further delay in implementing the McDade provision. It is our understanding that the Conference of State (Supreme Court) Justices has similarly enacted a unanimous resolution condemning the U.S. Department of Justice's refusal to abide by current state law principles of attorney-client ethics.

The different treatment of such a fundamental principle of the law requires substantial opportunity for Congress to understand fully the implications of this change, including the effect on due process for businesses and the strong potential for governmental abuse of power.

We do not believe the case has yet been made for such a change. Accordingly, the U.S. Chamber of Commerce continues to oppose S. 250 and any similar legislation that would undermine long-standing ethical prohibitions on *ex parte* communications.

Sincerely,

R. BRUCE JOSTEN.

GENERAL MOTORS CORPORATION,
Detroit, MI, February 5, 1999.

The Hon. CARL M. LEVIN,
U.S. Senate, Washington, DC.

DEAR SENATOR LEVIN: I am writing to you to express my support for the McDade provision signed into law in October of last year which clarifies that attorneys employed by the Federal Government, like all other attorneys, will be subject to the state ethics codes and court rules where they practice.

This provision had broad-based, bipartisan support in the last Congress, but is still being opposed by the Department of Justice. The DOJ position puts the desire for prosecutorial convictions ahead of the principle that the self-regulation of the bar and judiciary, as well as the public's respect for our legal system, depend upon *all* attorneys observing the ethics of the jurisdictions in which they practice.

The end does not justify the means. Convictions only obtainable by a disregard of accepted ethical codes of professional conduct are not worthy to pursue. Federal Government attorneys should set the example, not lower the standard.

State ethical codes are essentially uniform. Compliance with them is neither difficult nor complicated. They actually facilitate the administration of justice and are important to protecting the constitutional and personal rights of all citizens.

I very much hope you will oppose efforts by the DOJ, however well intended, to relax the obligation to observe the legal profession's ethics for its attorneys.

Sincerely,

THOMAS A. GOTTSCHALK.

MONSANTO COMPANY,
St. Louis, MO, February 11, 1999.

Senator JOHN ASHCROFT,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR ASHCROFT, I am writing to you to urge your opposition to legislation recently introduced by Senator Orrin Hatch, S. 250, which would repeal the Ethical Standards for Federal Prosecutors provisions that were included in last year's omnibus spending bill, P.L. 105–277.

The Ethical Standards provisions (also known as the "McDade provisions") make it clear that federal prosecutors are subject to existing state supreme court ethics rules governing attorney conduct. These provisions do no more that codify the longstanding principle that the regulation of the conduct of attorneys—including government attorneys—is the province of the states, which admit attorneys to practice, adopt rules for their conduct, and discipline them for violations of those rules.

S. 250 would effectively allow the Department of Justice to unilaterally exempt its attorneys from their longstanding professional obligation to honor these state ethics codes. Permitting the Department to exempt its prosecutors from the ethics rules that govern all others attorneys creates a double standard and sends the wrong message to the profession and the public. It could also lessen thoughtful protections that have been crafted for people and entities under investigation. We at Monsanto have long believed that the same ethical standards should apply to government attorneys, in-house counsel and outside counsel.

I urge you to oppose S. 250 or any similar effort to lower the ethical standards applicable to attorneys.

Sincerely,

BILL IDE.

NATIONAL ASSOCIATION OF MANUFACTURERS,
Washington, DC, March 16, 1999.

The Hon. DENNIS HASTERT,
Speaker of the House, U.S. House of Representatives,
Rayburn House Office Building, Washington, DC.

DEAR MR. SPEAKER: On behalf of the National Association of Manufacturers (NAM), the nation's largest broad-based industry trade group, I am writing to express our grave concerns regarding S. 250, the Federal Prosecutors Ethics Act.

This bill would allow government attorneys to engage in *ex parte* contacts with individuals represented by counsel without notifying or obtaining consent from such counsel. This result is in direct opposition to one of the most fundamental rules of established legal standards—the requirement that represented persons be contacted only through counsel.

Department of Justice lawyers have increasingly ignored this uniform rule observed by all 50 states. In fact, in 1989, Attorney General Richard Thornburgh expansively construed the Constitution's Supremacy Clause, declaring in a memo that "assistant U.S. attorneys could, under certain circumstances, contact and question people they knew to be represented by a lawyer without first alerting the contacted people's attorneys." The 8th Circuit Court of Appeals has ruled this practice unconstitutional, and the Citizens Protection Act (CPA) passed as part of the 1998 Omnibus Appropriations bill explicitly requires that all federal attorneys are "subject to State laws and rules, and local federal court rules, governing attorneys in each State" in which they practice—including *ex parte* contact prohibitions.

While the NAM appreciates and supports ensuring that the government has all the tools necessary to investigate and fully prosecute any illegal or improper activity, this bill would seek to achieve this laudable goal by severely undermining a nationally uniform and well-established code of conduct. Accordingly, we would urge substantive review and serious deliberation of this measure before undertaking such a drastic step. Please feel free to call me or Kimberly Pinter, the NAM's director for corporate finance and tax, at (202) 637–3071 if you would like to discuss this further.

Sincerely,

MICHAEL E. BAROODY.

NATIONAL ORGANIZATION OF BAR COUNSEL, INC.,
Boise, ID, March 10, 1999.

Re: Federal Prosecutor Ethics Act (S. 250)

The Hon. ORRIN HATCH,
Chair, Senate Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR HATCH: I write as president of the National Organization of Bar Counsel (the "NOBC"), an association composed of the Bar Counsel of all 50 states and the District of Columbia, who are charged by their respective high courts to investigate and, where appropriate, prosecute attorneys charged with professional misconduct. I write to express the NOBC's concern that pending proposed legislation introduced in the present session of Congress as the "Federal Prosecutor Ethics Act," S. 250, would undercut the traditional; authority of State Supreme Courts around the country to regulate the membership of their Bars, without conferring any measurable benefit upon the federal law-enforcement officials that the legislation is intended to protect.

The evident objective of S. 250 is to federalize the rules of professional conduct applicable to federal law-enforcement officials, creating a uniform set of disciplinary rules to be interpreted and implemented by the Justice Department rather than by the State Supreme Courts of the various jurisdictions before which the federal attorneys are admitted to practice. So far as federal law-enforcement personnel are concerned, the legislation, if enacted, would pre-empt the enforcement mechanisms established by the State Supreme Courts, as well as by the District of Columbia Court of Appeals, to oversee the professional conduct of attorneys admitted before the various high courts.

It merits observation that S. 250 would not only federalize the ethical rules governing federal law-enforcement attorneys but would oust the several federal district courts and courts of appeals from their traditional oversight of attorneys who practice before them. Rather than permit those courts to determine for themselves whether to follow the disciplinary rules of the States in which the courts sit, to adopt the ABA's Model Rules, or to prescribe their own standards, S. 250 would impose a uniform set of rules on the federal courts, whether the courts want one or not. The legislation also would deprive the federal courts of authority to enforce their own rules of conduct where government prosecutors are concerned.

It is beyond the scope of this letter to address the constitutionality of such an arrangement, although the Supreme Court's post-Civil War opinion in *Ex parte Garland* strongly suggests that such a law would not survive judicial review. Rather, we urge practical and prudential, rather than constitutional considerations. Before Congress embarks upon such a potentially confrontational course with the federal court system, we respectfully urge that the proponents of the legislation come forward with evidence that the present arrangement has compromised the ability of the Justice Department to perform its law-enforcement mission. the reasons for our scepticism are as follows:

For nearly a decade, the Justice Department has mounted a campaign to insulate its lawyers from the perceived threat of State disciplinary proceedings, first in the Thornburgh memorandum, then in the "contact" regulations, promulgated in 28 C.F.R. Part 77 (since declared invalid by the United States Court of Appeals for the Eighth Circuit in the *McDonnell-Douglas* litigation), and most recently in the Department's unsuccessful opposition in the McDade legislation enacted last year and codified at 28 U.S.C. § 530B. The truly remarkable feature of the Department's campaign is the absence of any evidence to suggest a factual basis for the Department's concern that its line attorneys are at the mercy of State bar prosecutors who are, in turn, supposedly working hand-in-hand with the criminal-defense bar to complicate the lives of their prosecutorial adversaries.

In the collective experience of the NOBC, nothing could be further from the truth. In formal surveys of the membership of the NOBC, which includes every attorney disciplinary authority in the country, repeatedly have failed to produce evidence of ethical prosecutions, or even investigations, directed at federal prosecutors who engage in traditional, accepted law-enforcement activities, such as "sting" operations, undercover operations, wiretap surveillance, or the like. As I am sure you are aware, the *only* remotely recent disciplinary proceeding challenging a federal prosecutor's unauthorized contact with a represented defendant was the *Howes* case in New Mexico. There the New Mexico Supreme Court imposed a public censure upon a federal prosecutor who repeatedly made contact with an incarcerated defendant who was under indictment and represented by a public defender at the time of the contacts.

Other well-known cases are readily distinguishable. The *Hammad* case arose not as a disciplinary matter, but as a defendant's challenge to the prosecutor's use of manufactured evidence in aid of an undercover operation; the court of appeals in New York ultimately overturned the trial court's dismissal of the indictment and took no further action against the prosecutor. Likewise, in *Ryan,* the court of appeals in California reversed the trail court's dismissal of an indictment predicated upon the prosecutor's unauthorized contact.

The District of Columbia Bar, with an estimated 18,000 lawyers who are government attorneys, probably has more federal prosecutors as members than any other bar in the country. The United States Attorney's Office for the District of Columbia is one of the largest in the country and handles criminal prosecutions in both the federal court and the District of Columbia Superior Court. Thousands more Department lawyers are based at Main Justice. If Justice Department lawyers were the subject of ethical complaints, investigations and prosecutions anywhere in the country, one would expect to find evidence of such activity in the District of Columbia. But the evidence is to the contrary. The District of Columbia Bar Counsel advises that, notwithstanding his receipt of nearly 1700 ethical complaints and his institution of over 100 formal disciplinary proceedings each year, he has had perhaps half a dozen complaints involving unauthorized contacts by federal attorneys (not merely Justice Department lawyers) in the seven years that he has held the position of Bar Counsel, and he has instituted *no* prosecutions on such grounds. (the *Howes* case, noted above, started as a referral to the District of Columbia Bar Counsel by a Superior Court Judge, because Mr. Howes was not a member of the District of Columbia Bar at the time, Bar Counsel referred the matter to his New Mexico counterpart.)

We ask: Why is the Justice Department so concerned about the regulation of the professional performance of its attorneys by the State Supreme Courts? Where is

the evidence that the Supreme Courts have overstepped their bounds or infringed upon legitimate federal law-enforcement efforts?

We understand that the McDade provision has inspired criticism to the effect that its provisions inadvertently subject federal law-enforcement attorneys to the potentially conflicting rules of multiple jurisdictions. The argument is based upon the provision of the law such attorneys "shall be subject to State laws and rules * * * governing attorneys *in each state where such attorney engages in that attorneys duties,* to the same extent and in the same manner as other attorneys in that state" (emphasis added). Apparently opponents of the McDade provision contend that the quoted provision subjects federal law-enforcement attorneys to the disciplinary rules in each jurisdiction to which the attorneys dispatch agents or investigators in aid of multistate investigations. By way of illustration, it is suggested that Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit, while serving as a principal in the office of the Deputy Attorney General in connection with the Oklahoma City bombing case, could have been made subject to investigation and prosecution in 20 or 30 different states because he dispatched FBI agents and investigators to those jurisdictions as part of the Justice Department's necessarily wide-ranging inquires. This argument is meritless, for at least the following reasons.

First, the McDade law plainly provides that *the attorney* is to be held accountable to the rules of the court before which he or she appears or in whose jurisdiction *the attorney* engages in law-enforcement efforts. Thus, under the McDade law, Mr. Garland would have been subject to the rules of the District of Columbia Bar (where he had been admitted to practice and where he maintained his office at Main Justice) while the Oklahoma City investigation was pending and then to the rules of the United States District Court, if and to the extent that his activities continued after the government commenced a formal criminal proceeding in that forum. I cannot imagine that any disciplinary authority in the country would have taken the position that, by virtue of the McDade law, Mr. Garland also had subjected himself to the rules of every jurisdiction to which the Justice Department dispatched agents or investigators in aid of its inquiry.

Second, the opponents of the McDade law who rely upon the Garland hypothetical or its like assume, incorrectly, that the ethical rules of the several States are variant and inconsistent. To the contrary, notwithstanding stylistic differences, the rules are remarkably similar from State to State. This is particularly the case with respect to the "anti-contact" rule embodied in the various state versions of the ABA's Model Rule 4.2(a) of the Rules of Professional Conduct and its counterpart Disciplinary Rule 7–104(A)(1) of the antecedent Code of Professional Responsibility. The remarkable absence of disciplinary proceedings brought against federal law-enforcement attorneys under *any* version of the "anti-contact" rule is the best evidence of uniformity in function, if not in precise wording.

Third, the criticism of the McDade law assumes, again incorrectly, that the NOBC's constituent bar counsel are anxious to bring disciplinary charges against federal prosecutors who engage in traditionally accepted law-enforcement procedures, notwithstanding that the federal courts repeatedly have upheld pre-indictment, noncustodial contacts with suspects known to be represented by counsel. Under the McDade law, The Bar Counsel of the several States remain the enforcement agents of the State Supreme Courts. Thus, it is significant that, as noted above, the NOBC regularly reports that its members have no pending prosecutions of federal attorneys based on violations of the "anti-contact" Rule.

Finally, the District of Columbia Bar Counsel notes that he has occasion to investigate Assistant United States Attorneys at the United States Attorney's Office who are charged with violations of the *Jencks* and *Brady* rules or with improper closing arguments in criminal trials. The District of Columbia Bar Counsel also notes that from time to time, the Justice Department's Office of Professional Responsibility refers matters involving attorneys at Main Justice who have been the subject of OPR's investigations and who are members of the District of Columbia Bar, Presumably, under S. 250, the District of Columbia Bar would lose jurisdiction over such matters, notwithstanding that Main Justice and the United States Attorney's Office never have objected on jurisdictional grounds to the Bar's investigations and prosecutions in such cases and have cooperated with Bar Counsel's inquiries.

In our view, the McDade provision has restores a measure of stability and certainty to a situation that has become progressively more muddled in recent years, as the Justice Department has asserted and reasserted a supposed authority to preempt the State Supreme Courts' regulation of the Department's attorneys and to substitute the Department as sole judge of its own conduct. For years, the ABA has struggled to deal with the problem presented by the Department's persistent derogation of the authority of the State Supreme Courts before which the Department's

attorneys are admitted to practice. More recently, the Conference of State Chief Justices has been drawn into the fray. Far from resolving this perennial conflict, we respectfully submit, the proposed S. 250 merely would renew the cycle of dispute and confrontation that has characterized the handling of this issue for the better part of a decade.

At the outset, for present purposes, we do not take issue with the power of Congress to enact such Legislation, even though the bill as drafted would make significant incursions upon the traditional authority of the State Supreme Courts to regulate the practice of law in their respective jurisdictions. Rather, we question the need for such legislation and the wisdom of delegating to one segment of the Bar—the federal prosecutors—the authority to act, in effect, as judges in their own cases, unlike any other lawyers admitted to practice in their country.

For the forgoing reasons, we respectfully urge you and your staff to reconsider the proposed S. 250 and to give the McDade law (which becomes effective in April 1999) a chance to work before the Senate condemns it out of hand.

We welcome an opportunity to meet with you to discuss in person our concerns about the pending legislation. We thank you for your careful attention to this important issue. I should note that copies of this letter will be made available to other members of Congress and their staffs.

Respectfully submitted,

MICHAEL J. OTHS,
PRESIDENT, NATIONAL ORGANIZATION OF BAR COUNSEL,
Bar Counsel, Idaho State Bar.

PROSKAUER ROSE LLP,
New York, NY, September 28, 1998.

Re: Title VIII in H.R. 4276 (DOJ Appropriations Bill)

Hon. Ted Stevens,
Chairman, U.S. Senate Appropriations
Committee, U.S. Capitol, Washington, DC.

DEAR CHAIRMAN STEVENS: I write to you with perspective of a former Deputy Attorney General of the United States, a vigorous advocate for victims' rights (I am privileged to serve as Chairman of the Board of the National Victim Center and Chairman of the Board of the International Center for Missing and Exploited Children), and as one who now represents companies and individual business persons under investigation by the federal government attorneys for criminal and quasi-criminal (or regulatory) federal violations. I respectfully urge you to ensure that the much-needed, indeed, long-overdue measure passed overwhelming (345–82) by the House of Representatives on August 5 as Title VIII of its version of the fiscal year 1999 appropriations bill for the Department of Justice (H.R. 4276), is retained as part of your unified bill and conference committee report.

I enclose for your information two articles I have recently written, on the need for Congress to curb prosecutorial excesses. The primary problem-solver advocated in these articles is for Congress to insist upon meaningful checks and balances against abuses of prosecutorial powers. The most important congressional action called for in the longer article I have written with two of my firm colleagues is the re-subjection of federal government lawyers to the ethical standards of conduct by which they abided for the history of the Republic, until 1989, and by which all other attorneys must abide.

I respectfully urge you to work toward a conference committee measure which embraces Title VIII of the House version of the bill, and thus re-establishes that federal government lawyers, just like all other attorneys, must indeed abide by the fundamental rules of ethical attorney conduct required by the State Supreme Courts granting those attorneys their very licenses to practice law, and the law, and the local rules of ethical practice required by the federal courts before whom these lawyers appear.

Contrary to the misunderstanding of some, this is nothing new. And it is certainly nothing radical. The measure simply sets the record straight, once and for all, and calls a halt to the Department's inappropriate claims, rejected by the courts, state and federal, that its lawyers alone are unbound by the basic rules of ethical attorney conduct applicable to all other lawyers, including state prosecutors and the federal prosecutors' adversaries, counsel for the investigated and the accused.

DOJ lawyers, like all other lawyers, are actually, and historically have been, subject to independent investigation and disciplines by the high court *of the state or states in which they are admitted to practice*—that is, the State Supreme Court that granted the lawyer his or her license to practice law. But, unfortunately, since 1989,

the Department of Justice has taken the position that its lawyers alone, paid for by congressionally-appropriated tax dollars, may ignore the fundamental ethical prohibition against interrogating represented persons outside the presence of the person's lawyer (*ex parte* contacts). The Department has abused this self-created, unethical power to interrogate and in some cases intimidate employees of corporations, small businesses, and individual citizens under criminal or civil (regulatory) investigation.

The Department's refusal to abide by the fundamental laws of ethical attorney conduct has been roundly condemned by state and federal courts, including a unanimous resolution of the Conference of State (Supreme Court) Justices. Most recently, the Eighth Circuit U.S. Court of Appeals rejected the DOJ's position, in a case concerning a government regulatory investigation of the McDonnell Douglas Corporation, *U.S.* v. *McDonnell Corporation,* 132 F.3d 1252 (8th Cir. 1997), in which the Department claimed the power for its attorneys alone to avoid not only the rules of the State Supreme Courts granting those lawyers their licenses, but even the local rules of practice of the federal court before which the government's lawyers were appearing.

Unless corrected, this self-exemption for government lawyers will likely expand and create the anomaly of prosecutors abiding by one set of (self made) rules while counsel for citizens in litigation with the Department of Justice are required to follow more restrictive rules.

The State Supreme Courts have always borne the exclusive responsibility for admitting attorneys to the bar and for their discipline. As the U.S. Supreme court has said: "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdiction. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers." *Leis* v. *Flynt,* 439 U.S. 438, 442 (1979).

Moreover, as a fundamental condition on its appropriations to the Department of Justice, Congress has routinely declared that each Department of Justice lawyer must be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." *See, e.g., Department of Justice Appropriation Authorization Act.* Fiscal Year 1980, Pub. L. No. 96–132, 93 Stat. 1040 (1979) (This provision has been reenacted in successive years). The courts have held that this statute requires prosecutors to comply with the ethics rules of their respective states of admission. *See, e.g., U.S.* v. *Ferrara,* 847 F. Supp. 964 (D.D.C. 1993), *aff'd,* 54 F.3d 825 (D.C. Cir. 1995). DOJ has simply been ignoring these rulings. This must stop. Congress—your Conference Committee—should act to stop it.

Title VIII of H.R. 4276 simply clarifies for the Department that it must cease its attempts to circumvent this requirement. The measure ensures that Justice employees will indeed abide by the rules of ethics required by the state supreme court authorities which have granted the lawyers their very licenses (as a condition of those licenses), and the local federal court rules of attorney conduct by which all attorneys appearing before those courts must abide.

No one, not even federal prosecutors, should consider themselves above the law. This appropriations measure would set the record straight, and put an end to the Department's policy of deciding which ethical rules it will obey or not obey.

Most recently, the Department has used its congressionally-appropriated tax dollars to bring federal suits against the states. DOJ has forced the states to spend their own tax dollars in these federal cases defending their right under the fundamental constitutional principle of Federalism (state prerogatives and responsibilities), to ensure that the lawyers to whom they grant a license to practice law (a core state function) actually abide by the states' standards of ethical attorney conduct. A case in point is the one recently brought by DOJ in federal court against Louisiana in December 1996. DOJ soaked up the scarce resources of the Louisiana Supreme Court, represented by the Louisiana Attorney General, for *over seven months* before the case was dismissed. *There was no actual or potential interference with any federal investigation even claimed along the lines of the hypothesized horrors DOJ has presented.*

The House was right to recognize that law enforcement concerns cannot justify the DOJ's self-creation of less demanding ethics rules for federal prosecutors and regulatory lawyers. This has nothing to do with the supremacy of federal laws that are duly enacted by Congress and enjoy protection of federal constitutional preemption.

The judiciary has consistently read the rule against contact with represented persons, and other ethics rules, to permit federal prosecutors reasonable leeways to perform their duties—e.g., in the "in-house mob lawyer" hypothetical DOJ so often cites. In exceptional cases like these. government lawyers would simply seek judicial

authorization for an exception to the rules, just like with warrant or wiretap requests. A judicial authorization, *by the neutral judicial authority,* would meet the well-recognized "authorized by law" exception to the legal rules against interrogating persons outside the presence of their lawyers. Neither DOJ nor any other law enforcement group has cited an actual ethics case placing an unreasonable restraint on law enforcement.

In short, it makes sense for Congress to condition its appropriation of citizen tax dollars to DOJ operations on the basic requirement that the federal lawyers employed through the public purse abide by the rule of law.

I hope these views and the enclosed materials are helpful to the Conference Committee. I look forward to answering any questions you may have and assisting you and the conference Committee in any way I can.

Sincerely,

ARNOLD I. BURNS.

SARA LEE CORPORATION,
Chicago, IL, March 23, 1999.

To: The Illinois Congresspersons, Included on the Attached Schedule.

DEAR SENATOR OR REPRESENTATIVE: I am writing to urge your opposition to S. 250, the Federal Prosecutor Ethics Act, which seeks to repeal the Ethical Standards for Federal Prosecutors Act, P.L. 105–277, Sec. 801 (popularly known as the McDade Provision). The McDade Provision is an important clarification of well-established law that compels *all* attorneys to conduct themselves in accordance with the ethical standards established by the states in which they practice. It is crucial that these standards of professional conduct be applied equally to federal prosecutors in order to support the integrity of the judicial process, to safeguard important protections of individual rights and to ensure public respect for our judicial system.

Federal prosecutors are entrusted with extensive powers in order to facilitate performance of their prosecutorial duties. While vigorous investigation and prosecution of improper conduct is essential to maintaining our social framework, the nation is not well served if prosecutorial activities infringe upon individual rights or undermine public confidence in the fairness of our judicial system. Exempting federal prosecutors from the ethical rules that bind all other lawyers would allow federal prosecutors to disregard long-standing practices which have been carefully and thoughtfully crafted to safeguard individual rights. Furthermore, such exemption is contrary to the public's expectation that prosecutors should adhere to the highest standards of the legal profession. Adherence to such standards is not an impediment to our federal prosecutors, but rather an essential part of their prosecutorial role.

While the Department of Justice had taken the position that it should be permitted to unilaterally declare federal prosecutors exempt from the ethics standards which apply to the rest of the legal profession, Congress wisely rejected this argument in the McDade Provision. We at Sara Lee believe that the same ethical standards should apply to both private sector and government attorneys. I urge you to continue to reject any efforts to diminish the ethical standards that apply to the conduct of government attorneys, including the legislation introduced by S. 250.

Sincerely,

JANET LANGFORD KELLY,
Senior Vice President, Secretary and General Counsel.

The Honorable Richard J, Durbin
United States Senate
Washington, D.C. 20510

The Honorable Peter Fitzgerald
United States Senate
Washington, D.C. 20510

The Honorable Bobby Rush
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jesse Jackson, Jr.
U.S. House of Representatives
Washington, D.C. 20515

The Honorable William Lipinski

The Honorable John Porter
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerry Weller
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerry Costello
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Judy Biggert
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Dennis Hastert

U.S. House of Representatives
Washington, D.C. 20515

The Honorable Luis Guitirez
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Rod Blagojevich
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Henry J. Hyde
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Danny Davis
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Philip M. Crane
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Janice Schakowsky
U.S. House of Representatives
Washington, D.C. 20515

U.S. House of Representatives
Washington, D.C. 20515

The Honorable Thomas Ewing
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Donald Manzullo
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lane Evans
U.S. House of Representatives
Washington, D.C. 20515

the Honorable Ray La Hood
U.S. House of Representatives
Washington, D.C. 20515

The Honorable David Phelps
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Shimkus
U.S. House of Representatives
Washington, D.C. 20515

○